Guidelines on Cooperation between Undertakings

FOREWORD

The Netherlands Competition Authority (NMa) enforces the Dutch Competition Act [*Mededingingswet*]. Importantly, this Act comprises the prohibition of agreements restricting competition between undertakings, also referred to as the prohibition on cartels.

Undertakings should have a clear insight into which agreements are permissible and which are not. Many forms of cooperation between undertakings actually promote competition. For instance, cooperating with other undertakings enables small and medium-sized enterprises (the SMEs) to be active in markets where this would otherwise not be possible.

In general terms, these Guidelines indicate how the NMa assesses various forms of cooperation on the basis of the Competition Act. The document relates to SMEs in particular, as trade associations often play an important role in their business activities.

The NMa is confident that the Guidelines will prove useful to both the business community and the NMa itself. By providing clarity, the NMa aims to promote an effective and efficient enforcement of the Competition Act. If deemed necessary, these Guidelines will be amended and/or expanded in future.

The Guidelines were drawn up after consultation with, inter alia, the employer's organisation VNO-NCW and the trade association MKB-Nederland, the latter representing SMEs in the Netherlands.

A reader's guide to the Guidelines is provided in the form of a short checklist summarising the contents of the document.

The Guidelines were published in the Netherlands Government Gazette [*Staatscourant*] on 7 April 2005 (no. 67, pages 20 to 24) came into force on 8 April 2005 and they were complemented on 21 April 2008 (no. 77, page 14) and came into force on 22 April 2008.

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GUIDELINES ON COOPERATION BETWEEN UNDERTAKINGS

1 Introduction

1. The Netherlands Competition Authority (NMa) looks favourably on any cooperation between undertakings which enables work to be undertaken more efficiently, enhances innovation and promotes competition. Cooperation arrangements such as trade associations may in various instances of cooperation, particularly amongst small and medium-sized enterprises (SMEs), play a useful role and enable activities to be undertaken which could not be undertaken by individual undertakings. In addition to promoting interests, providing information and acting as a point of contact for a particular trade sector, this also relates to, for example, the collective undertaking of research into factors and circumstances which can, in a general sense, affect undertakings in that sector and improve the quality of the supply of goods and services.

2. The business community will profit from an effective and clear application of the Competition Act. In particular this applies to the SMEs, which do not, in general, exert much market power. In the vast majority of cases, cooperation between these undertakings does not contravene competition law. Moreover, it is precisely SMEs that benefit from steps being taken against illegal cartels and the abuse of a dominant position, as well as from measures to prevent the creation or strengthening of a dominant position

3. On 8 June 2001, the NMa published guidelines for the assessment of forms of cooperation between companies both within and outside trade associations. Taking account of, inter alia, developments in case law, as well as signals and requests from, and the requirements of, trade associations, their members and their umbrella organisations, the NMa drew up new guidelines.[1] Moreover, on 1 May 2004 European competition policy was modernised requiring all member states of the European Union to enforce the European cartel prohibition and the European prohibition on practices amounting to an abuse of a dominant . Since that date, it has, in addition, no longer been possible to submit an exemption request to the European Commission for restrictive competition agreements with cross-border effects.[2] In these revised guidelines, more attention has been paid to the subject of (price) recommendations from trade associations and more examples given of practices which do not infringe the Competition Act. These guidelines are to be published in the Netherlands Government Gazette [*Staatscourant*] and will come into force the day following their publication.

4. The aim of these guidelines for the assessment of forms of cooperation between undertakings (hereinafter: Guidelines) is to offer advance insight into the criteria which must be observed in order to abide by the cartel prohibition laid down in

[1] Prior to the implementation of these Guidelines, an earlier version was submitted to the employer's organisations VNO-NCW, MKB-Nederland, LTO Nederland, and Het Branche Bureau, as well as to the Ministry of Economic Affairs and the Consumer Association.
[2] See the brochure 'Modernisering Europese mededingingsregels' (Modernisation of the European Competition Rules) at www.nmanet.nl

Section 6, subsection one, of the Competition Act (hereinafter: cartel prohibition). By publishing these Guidelines and the accompanying reader's guide, the NMa assists undertakings and trade associations in making their own assessment of forms of cooperation and practices in the light of the Competition Act.[3] Undertakings and trade associations themselves bear responsibility for compliance with the Competition Act.

5. The Guidelines set out the most important elements making up an assessment in terms of competition law, but do not contain an exhaustive description of all the existing legal provisions and case law. Moreover, agreements not covered by these Guidelines may contravene the Competition Act, whilst agreements not expressly deemed permissible could be compatible with the Competition Act.

6. The examples included in these Guidelines should only be used as an illustration of the manner in which an analysis in terms of competition law should be tackled in specific cases. It is inherent in the Competition Act that the assessment of each specific case depends on individual circumstances. Consequently, in addition to existing legislation and regulations – which, for example, give general indications for market shares – it is not always possible to give valid solutions for every case.

7. These Guidelines are not in anticipation of a judicial judgement, of which the NMa should, of course, take account. Moreover, these Guidelines do not deal with the application of the prohibition laid down in Section 24 of the Competition Act, respectively Article 82 EC, prohibiting the abuse of a position of economic dominance.

8. At a later stage supplementary or revised guidelines may also be published. The Guidelines replace the guidelines of the NMa regarding the assessment of forms of cooperation between undertakings both within and outside trade associations, published on 8 June 2001.

9. The structure of the Guidelines is as follows. Firstly, chapter 2 sketches the legal framework within which the Guidelines have to be placed. Chapter 3 explains the general applicability and assessment framework. Subsequently, chapter 4 deals with the assessment of a number of specific forms of cooperation; whilst chapter 5 indicates where additional information can be obtained. Finally, chapter 6 gives the date on which these Guidelines come into force.

2 Legal Framework

2.1 Section 6 Competition Act

10. The NMa is authorised to test cooperation agreements between undertakings against the cartel prohibition of Section 6 of the Competition Act. This cartel prohibition bans agreements between undertakings, decisions by trade associations, and concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Dutch market, or any part thereof.

[3] The Guidelines and reader's guide can be downloaded from the website www.nmanet.nl.

11. According to chapter 1 of the explanatory memorandum to the Competition Act the interpretation of Section 6 of the Competition Act should be sought in European case law and decisions taken in practice. An explicit choice has been made by the legislature to link national rules on competition closely to those of European legislation. In the explanatory memorandum to the Competition Act, it is clearly stated that the Competition Act shall be neither stricter nor more flexible than the European rules governing competition.[4]

Undertaking

12. The term 'undertaking' refers to every entity which undertakes an economic activity, irrespective of the legal form of the entity and its manner of financing, and also includes natural persons who undertake economic activities.[5] The supply of goods and services in return for a certain form of payment is an economic activity, with a few exceptions.[6]

Agreement

13. There is said to be an 'agreement' in the sense of the cartel prohibition when the undertakings involved have made known their collective will to act in a certain way in the market. The existence of an agreement can be demonstrated explicitly or implicitly by the practices of the undertakings. There are no specific format requirements. Nor is the existence, or not, of contractual sanctions or enforcement measures a determining factor when considering the question as to whether or not there is an agreement in the sense of Section 6 of the Competition Act.[7]

Concerted practices

14. In addition to 'agreement' the cartel prohibition also covers 'concerted practices'. Therefore, the prohibition of this Section also includes forms of coordination between undertakings which, without resulting in agreements, do in fact consciously replace the risk of mutual competition by actual collaboration or synchronisation.[8]

Decisions by trade associations

15. In respect of the term 'decisions by trade associations', jurisprudence has observed a functional approach. The way in which a certain agreement is legally characterised is not of determinate importance.[9] According to existing jurisprudence, the term 'decisions by trade associations' includes legally binding decisions as well as decisions which, although not legally binding, are observed by those concerned, and also non-binding decisions which form a fair expression of the will of the associations to coordinate the practices of its members in the market concerned.[10]

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[4] House of Representatives of the Dutch Parliament, session year 1995-1996, 24707, no. 3, p. 10 et seq.
[5] European Court of Justice of 23 April 1991, *Höfner and Elser*, C-41/90, ECR. 1991, I-1979, para. 21 and the decision of the European Commission of 30 January 1995, *Coapi*, OJ 1995, L 122/37, para. 32-33.
[6] European Court of Justice of 16 June 1987, *Commission v Italië*, C-118/85, ECR. 1987, 2599, para. 7.
[7] Decision of the European Commission of 23 April 1986, *Polypropyleen*, OJOJ 1986, L 230/1, para. 81 and decision of the European Commission of 21 October 1998, *Voorgeïsoleerde buizen*, OJOJ 1999, L 24/1, para. 129.
[8] European Court of Justice of 14 July 1972, *Imperial Chemical Industries v Commission*, 48/69, ECR. 1972, p. 619, para. 64.
[9] Case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 79 and case 3309/*NIP, LVE, NVP and NVVP*, decision of the D-G NMa of 26 April 2004, para. 94.
[10] European Court of Justice of 29 October 1980, *van Landeyck e.a.*, 209 to 215 and 218/78, ECR. 1980, p. 3125, para. 88; European Court of Justice of 8 November 1983, *Navewa*, consolidated cases 96-102, 104, 105, 108 and 110/82, ECR. 1983, p. 3369, para. 20; European Court of Justice of 27 January 1987, *Verband der*

16. There can also be said to be a 'decision by an association of undertakings' even when a decision is merely presented as a recommendation without obligation.[11] To fall within the term 'decision by an association of undertakings', it is not essential for there to be a formal decision. It is only of relevance that certain entities, the trade associations or the affiliated undertakings, undertake actions which ultimately result in the consequences referred to in the cartel prohibition.[12]

17. In each case, the will of the associations to coordinate the practices of its members in the markets concerned should be derived from the concrete circumstances. In each case it is a requirement that the advice is communicated to the members, or the advice has at least been made known to the members or they are already familiar with the advice. When considering the circumstances which demonstrate the will to coordinate, the joint interest that the members of the association had when the recommendations were drawn up and distributed could be taken into account, as well as the nature and the phrasing of the recommendation, the breadth and regularity of the dissemination of advice, the manner in which the recommendations are drawn up and also the making available of model contracts in which the rates are included.[13] In this context, the determining factor is not the extent to which the members actually comply with the advice. Nor is it essential that the members were controlled, or in any way coerced, by means of sanctions, to comply with the advice.[14] Similarly, there is no requirement that the association of undertakings be authorised, by virtue of its articles of association, to take such a decision.[15] Should there be any question of compliance, control or coercion, or the authority by virtue of the articles of association to take such decisions, this will, however, form an exceptionally clear indication of the existence of a will to coordinate.

Bagatelle agreements and significance

18. The cartel prohibition does not apply to agreements between a limited number of undertakings with a low turnover and market share. Section 7(1) of the Competition Act (the so-called bagatelle provision) lays down that the cartel prohibition does not apply to agreements which do not involve more than eight undertakings provided the joint turnover of these undertakings does not exceed:
    - EUR 5,500,000 if the core activities of these undertakings relate to the supply of goods; and

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Sachversicherer, 45/85, ECR. 1987, p. 405, para. 32; decision of the European Commission of 5 June 1996, *FENEX*, OJOJ 1996, L 181/28, para. 41-42; case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 79 and case 3309/*NIP, LVE, NVP and NVVP*, decision of the D-G NMa of 26 April 2004, para. 94.

[11] European Court of Justice of 27 January 1987, *Verband der Sachversicherer*, 45/85, ECR. 1987, p. 405, para. 26-32 and case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 79.

[12] European Court of Justice of 15 May 1975, *Frubo v Commission*, 71/74, ECR. 1975, p. 563, para. 30; European Court of Justice of 29 October 1980, *van Landeyck et al.* 209 to 215 and 218/78, ECR. 1980, p. 3125, para. 88 and European Court of Justice of 8 November 1983, *Navewa*, consolidated cases 96-102, 104, 105, 108 and 110/82, ECR. 1983, p. 3369, para. 20.

[13] Decision of the European Commission of 5 June 1996, *FENEX*, OJOJ 1996, L 181/28, para. 34 and 35; decision of the European Commission of 24 June 2004, *Ereloonregeling Belgische Architecten*, OJ 2005 L 4/10-11, para. 72 and 73 and European Court of Justice of 27 January 1987, *Verband der Sachversicherer*, 45/85, ECR. 1987, p. 405, para. 29-32.

[14] Decision of the European Commission of 24 June 2004, *Ereloonregeling Belgische Architecten*, OJ 2005 L 4/10-11, para. 70 and European Court of Justice of 27 January 1987, *Verband der Sachversicherer*, 45/85, ECR. 1987, p. 405, para. 30.

[15] European Court of Justice of 27 January 1987, *Verband der Sachversicherer*, 45/85, ECR. 1987, p. 405, para. 31.

- EUR 1,100,000 in all other cases, for example the supply of services.

Neither does the cartel prohibition apply when the two criteria set out in section 7(2) are fulfilled. The first criterion prescribes that the joint market share of the undertakings that are party to the agreement in none of the relevant markets affected by the agreement, shall exceed 5%. The second criterion prescribes that the joint turnover in the previous calendar year of the undertakings that are party to the agreement, as calculated for the goods and services subject to the agreement, shall not exceed EUR 40,000,000. If both criteria are fulfilled, the cartel prohibition shall not apply.

19. In some cases a competition restriction exceeding the bagatelle limit of Section 7 of the Competition Act may not result in a 'perceptible' restriction of competition and, consequently, this restriction will fall outside the scope of the cartel prohibition of Section 6 of the Competition Act.

20. When assessing whether an agreement significantly restricts competition, two factors are of particular importance: firstly the *position* of the parties concerned in the market and, secondly, the *nature of the agreement*.[16]

Position of the parties

21. The position in the market of the undertakings concerned is of importance, as it is mostly when parties exert 'market power' that agreements prove detrimental to competitors,.[17] Market power entails that a supplier has the ability to raise the price above the level determined by competitors and, at least in the short term, is able to make a profit which is above normal.[18]

22. In competition law, an important first indicator for market power relates to the market share of the relevant undertakings. Other factors are, for example, the position of the competitors, barriers to market entry [19], bargaining powers of purchasers, technological advantages, capacity, access to raw materials, brand recognition and financial resources.

Nature of the agreement

23. The nature of the agreement relates to the area and objective of the cooperation (for example an agreement concerning prices or concerning joint research), the degree of competition between the parties (for example competitors, or purchaser and supplier), and the extent to which they combine their activities (for example involving either the joint purchase of only a certain raw material or the purchase of all raw materials required).[20]

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[16] Guidelines from the European Commission regarding the applicability of Section 81 of the EC Treaty on horizontal cooperation agreements, OJOJ 2001, C 3 of 6 January 2001, p. 2, subsection 1.3.1. See also: www.nmanet.nl

[17] Also see the document on procurement power (Inkoopmacht) from the NMa on www.nmanet.nl. Procurement power is market power on the procurement side of the market.

[18] Guidelines from the European Commission regarding vertical restrictions, OJ 2000, C 291 of 13 October 2000, p. 1, para. 119. See also: www.nmanet.nl

[19] Barriers to entry are obstructions which undertakings encounter when they wish to enter a particular market.

[20] Guidelines from the European Commission regarding the applicability of Section 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2, para. 21-23.

24. The nature of the agreement is important because matters which have a direct effect on exceptionally important competition factors– in particular price and quantity – can, in a short time, significantly restrict competition.

25. Moreover, there is a reciprocity between these two factors. If a large part of a sector is involved in an agreement, then an agreement initially appearing to relate to less important competition factors shall, nevertheless, quickly have a significantly restrictive effect on the level of competition. At least as far as these factors are concerned, there will no longer be any difference between all these competitors. This explains why the NMa looks very critically at the practices of trade or professional associations which generally have considerable authority amongst their members. On the other hand, agreements concerning exceptionally important competition factors, such as price agreements between undertakings which have a relatively weak market position, will still, in general, significantly restrict competition.

Statutory exception to the cartel prohibition

26. Section 6, subsection three, of the Competition Act constitutes a statutory exception to the cartel prohibition. If all the criteria are fulfilled, the agreements will not be prohibited. The criteria necessary to fulfil the exception are:
1. the agreement must contribute to an improvement in the production or distribution, or result in a technological/economic advance;
2. a fair share of the benefits resulting from the agreements must be passed on to the users;
3. the competition must not be restricted any more than is absolutely necessary;
4. there must still be sufficient competition in the market.[21]

27. Undertakings shall themselves determine whether any agreements restricting competition made by them fulfil the criteria laid down for legal exceptions. Section 6(4) of the Competition Act stipulates that it is up to an undertaking wishing to refer to legal exceptions to prove compliance with these criteria. In this context, undertakings can make use of the large volume of European case law available on the application of competition rules in several sectors. In addition, by means of regulations, guidelines and publications, the European Commission has provided undertakings with insight into the application of the competition rules. On a national level, the NMa has, since its establishment in 1998, adopted a large number of decisions. Finally, the Court of Rotterdam and the Trade and Industry Appeals Court have also issued rulings providing direction to undertakings.[22]

Generic exemptions

28. For a number of types of agreements, particularly ones concerning the SMEs, there are generic exemptions on the basis of Section 15 of the Competition Act. This relates to the Decision in Relation to the Exemption of Agreements executed as a Combination (Besluit vrijstelling combinatieovereenkomsten)[23], the Decision in Relation to the Exemption of Agreements to Protect Branches of Industry (Besluit vrijstelling branchebeschermingsovereenkomsten)[24] and the Decision in Relation to

[21] For more information see the Guidelines of the European Commission concerning the application of Article 81, paragraph 3, of the EC Treaty, OJ 2004, C 101 of 27 April 2004, p. 8. Guidelines of the European Commission regarding the application of Article 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2, para. 1.3.1.
[22] See www.nmanet.nl for a more detailed explanation.
[23] Decision of 25 November 1997, Bulletin of Acts and Decrees 1997, 592.
[24] Decision of 25 November 1997, Bulletin of Acts and Decrees 1997, 596.

the Exemption of Cooperation Agreements in the Retail Trade (Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel)[25]. Furthermore, pursuant to section 16 of the Competition Act, the cartel prohibition does not apply to collective labour agreements, agreements between employers' organisations and employee organisations with regard to pensions exclusively, nor does it apply to agreements or decisions adopted by an organisation representing the liberal professions pertaining only to the participation in a professional pension scheme.[26]

2.2 Article 81 EC Treaty

29. The NMa has the authority to apply the European cartel prohibition, as laid down in Article 81, paragraph one, of the EC Treaty (hereinafter: EC). The substantive testing of Article 81, paragraph one, EC is the same as the substantive testing of Section 6, subsection one, of the Competition Act. There is, however, one difference: the European cartel prohibition has one additional requirement. This relates to the possibility of adversely affecting the trade between member states. This so-called 'cross-border effect' is present whenever the trade between member states is being or could be affected. This is, for example, the case with cross-border commerce. More information about the concept of ' cross-border effect' can be found in the European Commission's Guidelines on the notion of 'affecting trade' in Articles 81 and 82 EC.[27]

30. In addition to the European Commission, the national competition authorities of member countries are also authorised to apply Article 81 EC in full. The NMa is obliged to enforce the European cartel prohibition. When the NMa makes any judgement in respect of the application of Article 81 EC, the standpoint of the European Commission concerning the application of Article 81 EC remains effective.

31. Article 81, paragraph three, of the EC constitutes a legal exception to the European cartel prohibition. Undertakings are responsible for assessing whether or not their agreements fulfil all four of the criteria laid down for the legal exemption to be applicable. If all the criteria are fulfilled the agreements will not be prohibited. The exception criteria are the same as the criteria in Section 6, subsection three, of the Competition Act, those being:
    1. the agreement must contribute to an improvement in the production or distribution, or result in a technological/economic advance;
    2. a fair share of the benefits resulting from the agreements must be passed on to the users;

[25] Decision of 12 December 1997, Bulletin of Acts and Decrees 1997, 704.
[26] If the deliberation on conditions of employment results in a collective labour agreement, competition law doesn't apply to the content of the collective labour agreement as long as it doesn't contain any subjects which lay outside the social objectives. The latter is the case when the collective labour agreement contains clauses on tariffs for the self-employed, as is discussed in the White Paper "Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet" (Clauses on tariffs for collective labour agreements for the self-employed and the Competition Act" of december 2007, published on www.nmanet.nl. The cartel prohibition can also apply in a situation when a collective labour agreement had been envisaged, but hasn't been reached and the employers' organisation, subsequently, advises, on its own initiative, its members on its policy on conditions of employment. The NMa will, however, not easily conclude that this situation constitutes an infringement of competition law (see Court of Rotterdam of 17 October 2007, *CNV Dienstenbond t. NMa*, MEDED 06/4638 STRN).
[27] See for more information the Guidelines of the European Commission on the concept 'influencing trade' in Articles 81 and 82 of the EC Treaty, OJ 2004, C 101 of 27 April 2004, p. 7. With the exception of 'no perceptible effect on trade', see the Publication of the European Commission regarding agreements which are not sufficiently significant to restrict competition perceptibly in the sense of Article 81, para. 1, of the EC Treaty ('de minimis'), OJ. 2001, C368 of 22 December 2001, p.7.

3. the competition must not be restricted any more than is absolutely necessary;
4. there must still be sufficient competition in the market. [28]

32. The European Commission has issued a vast number of publications in which it explains in more detail certain aspects associated with the revised competition policy[29]. There are, inter alia, publications about 'the cross-border effect' and about the exception criteria of Article 81, paragraph three, EC.

33. The European Commission has formulated a specific policy in respect of vertical and horizontal agreements. Vertical agreements are agreements between undertakings which work on different levels within the same industry, for example between a supplier and a customer. Horizontal agreements are agreements between undertakings which work on the same level or the same levels of the market, for example between producers themselves or between distributors themselves. In contrast to vertical agreements, horizontal agreements often involve cooperation between competitors. The European Commission's policy in respect of both horizontal and vertical agreements concerns a more economic and less legalistic approach than previously. In the context of which, greater importance is now given to the (potential) consequences of an agreement in the market in general, and the degree of competition in the market in particular, than to the exact (legal) form on which the agreement is founded. In addition, it is generally assumed that the majority of vertical agreements [30] are, in principle, less harmful to competition than horizontal agreements[31].

34. On 13 October 2000, the European Commission published 'Guidelines in respect of Vertical Restrictions'.[32] In these EC guidelines, the European Commission set out the principles for the testing of vertical agreements in the light of Article 81, paragraph one, EC. Amongst other things, the EC guidelines explain which agreements will, in general, fall outside the area of application of Article 81, paragraph one, EC, how block exemptions for vertical agreements[33] are applied and how the European Commission will treat individual cases which fall outside the scope of application of the block exemption.

35. On 6 January 2001, the European Commission published 'Guidelines in respect of the application of Article 81 of the EC to horizontal cooperation agreements' .[34] In these EC guidelines, the European Commission set out the principles for the testing of horizontal agreements in the light of Article 81, paragraph one, EC. Amongst other things, the EC guidelines explain which agreements will, in general, fall outside the area of application of Article 81, paragraph one, EC, how block exemptions for

[28] For more information see the Guidelines of the European Commission concerning the application of Article 81, para. 3, of the EC Treaty, OJ 2004, C 101 of 27 April 2004, p. 8.
[29] Also referred to as 'Modernising'. For the meaning see margin number 3 of these Guidelines.
[30] Vertical agreements are arrangements between undertakings working on different levels of the same industry, for example a supplier and a customer.
[31] Horizontal agreements are arrangements between undertakings working on the same level, or levels, of the market, for example between producers themselves or between distributors themselves. In contrast to vertical agreements, horizontal agreements often relate to cooperation between competitors.
[32] European Commission Guidelines in respect of vertical restrictions, OJ. 2000, C 291 of 13 October 2000, p. 1.
[33] European Commission Regulation (EC) no. 2790/1999 of 22 December 1999 concerning the application of Article 81, para. three, of the Treaty on group vertical agreements and concerted practices, OJ. L 336 of 29 December 1999, p. 21.
[34] OJ C 3 of 6 January 2001, p. 2.

horizontal agreements[35] are applied and how the European Commission will treat individual cases which fall outside the scope of application of the block exemption.[36]

2.3 The relationship between the Dutch and European competition law

36. On the grounds of Section 12 of the Competition Act, the European block exemptions have been incorporated in Dutch competition law. If a particular agreement is exempt from the application of the European cartel prohibition, because it falls under a European block exemption, then this agreement will also be exempt from the application of the Dutch cartel prohibition. Likewise, this applies to agreements which do not affect cross-border trade and to which the European cartel prohibition does not, therefore, apply and, moreover, to agreements which although influencing cross-border trade, are still covered by a European block exemption (Section 13 Competition Act). On the grounds of Section 14 of the Competition Act, the individual exemptions granted in the past by the European Commission remained valid under the Dutch Competition Act. If Sections 12, 13 or 14 of the Competition Act are applicable to an agreement, then the cartel prohibition can no longer be applicable to this agreement.

37. By virtue of Sections 12 and 13 of the Competition Act, European Commission block exemptions are automatically incorporated into the Dutch competition Act, so that the relevant agreements are exempt from the cartel prohibition. There is, however, no automatic incorporation of any publications and guidelines from the European Commission; but, given that the Competition Act is neither stricter nor more flexible than the European competition rules, the NMa will apply Section 6 of the Competition Act in conformity with any publications and guidelines drawn up by the European Commission.

3 General Areas of Application and the Assessment Framework for Forms of Cooperation

38. These Guidelines on Cooperation between Undertakings relate to a number of specific, horizontal forms of cooperation which are not governed by European block exemptions, publications or guidelines. The reason being that in such cases the European Commission is not authorised to judge as the trade between member states is not affected. It is also possible that the European Commission does not have to deal with these forms of cooperation very often and, for that reason, feels less need to issue guidelines itself. In a number of other forms of cooperation there is no question of competition being restricted and, therefore, there can, in principle, be no question of a national or European block exemption. Nevertheless, it is possible that a need will arise for more clarity about the manner in which the Competition Act is applicable to certain cases or, under which circumstances the Competition Act is not applicable to certain cases due to there being no question of competition being

[35] Under simultaneous retraction of the Publication from the European Commission regarding agreements, decisions and concerted practices relating to cooperation between undertakings, OJ 1968, C 75 of 29 July 1968, p. 3 and of the Publication from the European Commission concerning the assessment of common undertakings having the character of a cooperation arrangement on the grounds of Article 85 of the EEC, OJ, 1993, C 43 of 16 February 1993, p.2.

[36] European Commission Regulation (EC) no. 2658/2000 of 29 November 2000 concerning the application of Article 81, paragraph three, of the Treaty on block specialisation agreements, OJ L 304 of 5 December 2000, p. 3 and European Commission Regulation (EC) no. 2659/2000 of 29 November 2000 concerning the application of Article 81, paragraph three, of the Treaty on block research and development agreements, OJ L 304 of 5 December 2000, p. 7.

restricted.

39. Whether or not agreements restrict competition and are, therefore, in contravention of the cartel prohibition depends, inter alia, on the nature and size of the undertakings concluding the agreements and on the content of the agreements associated with the cooperation.

Forms of cooperation which are, in general, permissible

40. A number of forms of cooperation do not fall under the cartel prohibition. These forms of cooperation are consequently permissible. This relates to forms of cooperation:
    - which fulfil the criteria of the bagatelle provision of Section 7 of the Competition Act;[37]
    - to which the statutory criteria for exceptions by virtue of Section 6, subsection three, of the Competition Act apply ;[38]
    - which fall within the scope of application of a (European) block exemption.[39]

Forms of cooperation which are, in general, prohibited

41. Once it has been determined that an agreement, or a concerted practice, is aimed at restricting competition, the cartel prohibition may be applied without it being necessary to examine in any more detail the specific consequences of the agreement or the actual concerted practice. This means that there will not have to be a detailed enquiry into the relevant market (or its structure) and the nature of the services to which the decision relates .[40] Such agreements fall under the cartel prohibition and almost never fulfil the statutory criteria for exceptions. When determining the degree of competition restriction, the subjective view or intention of the parties shall not be decisive.[41]

42. Irrespective of the types of products and services or the form of agreement, price agreements between competitors intend to restrict the level of competition.[42] Jurisprudence illustrates that agreements between undertakings, decisions (including recommendations) of trade associations and the concerted practices of undertakings relating to prices and tariffs, including discounts and surcharges, fall under the cartel prohibition and almost never fulfil the statutory criteria for exceptions.

43. Irrespective of the types of products and services or the form of agreement, market sharing agreements between competitors intend to restrict the level of competition.[43] Jurisprudence illustrates that agreements between undertakings, decisions (including

[37] For the criteria for the bagatelle provision see para. 18 of these Guidelines.
[38] For the statutory criteria for exceptions see para. 26 and 27 of these Guidelines.
[39] For the scope of application of the European block exemption see para. 34-37 and other block exemptions para. 28 of these Guidelines.
[40] The European Court of First Instance of 15 September 1998, *European Night Services et al. v Commission*, T-374/94, T-375/94, T-384/94 and T-388/94, ECR. 1998, II-3141, para. 136.
[41] Case 450/*Van Ditmar Boekenimport*, decision of the D-G NMa of 16 December 1998, margin number 23.
[42] Case 379/*KNMvD*, decision of the D-G NMa of 27 August 1998, para. 64; case 613/*NVZP en LTO 1,* decision of the D-G NMa of 29 July 1999, para. 33; case 642/*NVZP en LTO 2,* decision of the D-G NMa of 9 July 1999 para. 46 and case 234/*Centrale Organisatie voor de Vleesgroothandel*, decision of the D-G NMa of 30 July 1999, para. 25.
[43] Case 379/*KNMvD*, decision of the D-G NMa of 27 August 1998, para. 71-73; cases 1131, 1151, 1250/*Vestigingsbeleid eerstelijns psychologen*, decision of the D-G NMa of 1 March 2000, margin numbers 24-27; case 374/*Stichting Saneringsfonds Varkensslachterijen*, decision of the D-G NMa of 23 March 1999, para. 61 and decision on an objection of 24 March 2000, para. 113.

recommendations) of trade associations and the concerted practices of undertakings relating to the sharing of markets, agreements on production quotas, prohibited bid-rigging, agreements on business locations, the geographical sharing of markets and the division of customers, all fall under the cartel prohibition and almost never fulfil the statutory criteria for exceptions.

44. Agreements made with the intention of collectively refusing to supply goods (a boycott) also intend to restrict the level of competition. Jurisprudence illustrates that agreements between undertakings, decisions (including recommendations) and the concerted practices of undertakings relating to the collective, concerted, refusal to supply fall under the cartel prohibition and almost never fulfil the statutory criteria for exceptions.[44]

4 Specific forms of cooperation

45. Any agreements not belonging to one of the categories detailed under margin numbers 40 to 44 of these Guidelines must be examined to assess whether or not they fall under the cartel prohibition. If that is the case, consideration must be given as to whether they belong to one of the above-mentioned categories of Section 6, subsection three, of the Competition Act. For the cartel prohibition to be applicable, the actual consequences of an agreement, or concerted practices, should be assessed in detail. In this assessment, particular attention should also be paid to the economic context of the agreements. This should be taken to refer, amongst other things, to the market position of the parties involved in the agreement, the degree of concentration in the market (the number and size of active undertakings in the market) and the nature of the products.[45] When there is, for example, a question of a market with just a few undertakings, any statement from a trade associations with ten members of equal size is more likely to have the effect of restricting competition than a situation where there are numerous undertakings active in the market and the trade associations involved is one with thousands of members of varying size all undertaking different activities.

4.1 Recommendations from trade associations

46. A decision may be categorised as a 'decision of a trade association' in the sense of the cartel prohibition even though it is presented as an informal recommendation only.[46] For the cartel prohibition to be applicable to a recommendation from a trade association, it makes no difference whether or not the association says it is up to their members to decide how to react to the recommendation.[47] To fall under the term 'decision of an association of undertakings' no formal decision is, therefore, necessary. All that matters is that the trade associations, or the affiliated

[44] Case 2422/*klager v AUV en Aesculaap*, decision of the D-G NMa of 29 August 2002, para. 85 and the Court of Rotterdam of 16 May 2001, *KNMvD*, MEDED 99/2584-SIMO.
[45] Guidelines on the applicability of Article 81 EC Treaty on horizontal cooperation agreements, OJ. 2001, C 3 of 6 January 2001, p. 2, para. 26-37.
[46] European Court of Justice of 27 January 1987, *Verband der Sachversicherer v Commission*, 45/85, ECR. 1987, para. 26-32 and case 3310/*Nederlands Tandtechnisch Genootschap*, decision from the D-G NMa of 26 April 2004, para. 79.
[47] Case 2973/*BOVAG and NCBRM*, decision of the D-G NMa of 13 November 2003, para. 86-90, confirmed by the Advisory Committee on administrative appeals under the Competition Act by 2973/ *BOVAG and NCBRM,* decision on appeal of 28 September 2004, para. 36-41.

undertakings, undertake activities which intend to bring about the consequences referred to in the cartel prohibition, those being a restriction and/or distortion of competition.[48] Consequently, Section 6 of the Competition Act is also applicable to an association of undertakings, to the extent the association's own activities cause the consequences referred to in the provision to be brought about.[49]

47. A decision from a trade association should form the true expression of the will of the association to coordinate the practices of its members in the markets concerned. In respect of the factors which could play a role here, reference is made to margin number 17 of these Guidelines.

48. An association of undertakings may support its members in numerous ways, for example, by promoting the members' interests, by providing information, by acting as a point of contact for the sector. Undertaking research and promoting the quality of the supply of goods and services is also permissible, provided competition is not adversely affected, either directly or indirectly.

49. Advice and recommendations from trade associations which relate to prices and tariffs (or parts of these), including discounts and surcharges, do by their nature restrict competition and, consequently, fall under the prohibition of Article 81, paragraph one, EC and/or Section 6, subsection one, Competition Act.[50] Advice in relation to prices must be considered price agreements.

50. Entrepreneurs should all determine their own commercial policies and prices themselves, without bringing their intended market practices into line with those of their competitors. Entrepreneurs will be more inclined to raise their prices if they know, with a reasonable degree of certainty, that their competitors are going to do the same. Consequently, by issuing advice in respect of prices, an association of undertakings will be restricting competition between the affiliated undertakings. This could cause undertakings to lose some of the incentive required to work as efficiently

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[48] European Court of Justice of 15 May 1975, *Frubo v Commission*, 71/74, ECR. 1975, p. 563, para. 30; European Court of Justice of 29 October 1980, *Van Landewyck*, 209-215 and 218/78, ECR. 1980, p. 3125, para. 88 and European Court of Justice of 8 November 1983, *Navewa*, consolidated cases 96-102, 104, 105, 108 and 110/82, ECR. 1983, p. 3369, para. 20. Also see para. 15 of these Guidelines.

[49] European Court of Justice of 15 May 1975, *Frubo v Commission*, 71/74, ECR. 1975, p. 563, para. 30 and 31; European Court of Justice of 29 October 1980, *Van Landewyck et al. v Commission*, 209-215 and 218/78, ECR. 1980, p. 3125, para. 10 and 88; European Court of Justice of 8 November 1983, *Navewa*, consolidated cases 96-102, 104, 105, 108 and 110/82, ECR. 1983, p. 3369, para. 3 and 20.

[50] See inter alia the Court of Rotterdam dated 23 October 2001, *Centrale Organisatie voor de Vleesgroothandel v D-G NMa*, MEDED 00/910-SIMO; case 3309/*NIP, LVE, NVP and NVVP*, decision of the D-G NMa of 26 April 2004, para. 122; case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 89; case 2973/*BOVAG en NCBRM*, decision of the D-G NMa of 13 November 2003, para. 115 and 118, confirmed by the Advisory Committee on administrative appeals under the Competition Act for 2973/ *BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 42 and 46; case 2819/*Rotterdamse Taxi Centrale*, decision of the D-G NMa of 8 January 2003, para. 58; case 2021/*OSB*, decision of the D-G NMa of 19 March 2003, para. 138; case 2422/*klager v AUV en Aesculaap*, decision of the D-G NMa of 29 August 2002, para. 76; European Court of Justice of 17 October 1972, *Vereniging van Cementhandelaren*, 8/72, ECR. 1972, p. 977, para. 19-21; decision of the European Commission of 20 July 1978, *Fedetab*, OJ1978, L 224/29, para. 95 and 98; decision of the European Commission of 5 June 1996, *FENEX*, OJ 1996, L 181/26, para. 46 and decision of the European Commission of 30 October 1996, *Veerdienstmaatschappijen*, OJ 1996, L 26/23, para. 59.

as possible, which would be detrimental to their customers and limit their freedom of choice.[51] Ultimately this would reduce the degree of price competition in the market.[52]

51. If, for example, an association of undertakings distributes recommendations about its members' pricing policies, this automatically implies that the association of undertakings is capable of coordinating the practices of its members and, consequently, influencing the pricing policy throughout the whole market. The aim of the price recommendation is to form a sort of benchmark and, therefore, bring a degree of coordination to the setting of prices.[53]

52. By laying down recommended prices, trade associations adversely affect the level of competition. This can also occur when statements are made about anticipated developments. Even if the recommendations are barely complied with or not observed by all the members of the association of undertakings and only form a basis for calculation, [54] recommending horizontal tariffs still contravenes the cartel prohibition.[55] Even if there was no question of an enforceable obligation to follow a recommended tariff, recommending tariffs would still be in contravention of the cartel prohibition.[56] Moreover, it is of no importance whether the freedom of the members to determine their own tariffs is not, or barely, affected, nor whether the competition is primarily played out in respect of other competition parameters. It can be assumed that price recommendations have a perceptible influence on competition in the market,[57] as the aim of these recommendations is to form a benchmark and, therefore, bring about a certain degree of coordination in the pricing policy.

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[51] Case 2021/*OSB*, decision of the D-G NMa of 19 March 2003, para. 136; case 2234/*ANKO*, decision of the D-G NMa of 21 December 2001, para. 39; decision of the European Commission of 5 June 1996, *FENEX*, OJ 1996, L 181/26, para. 61; decision of the European Commission of 24 June 2004, *Ereloonregeling Belgische Architecten*, OJ 2005 L 4/10-11, para. 88.

[52] See inter alia XXV th Competition report 1995 from the European Commission, p. 128; case 2973/*BOVAG en NCBRM*, decision of the D-G NMa of 13 November 2003, para. 122, confirmed by the Advisory Committee on administrative appeals under the Competition Act for 2973/ *BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 56; case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 89; case 3309/*NIP, LVE, NVP and NVVP*, decision of the D-G NMa of 26 April 2004, para. 122 and 127; Court of Rotterdam of 23 October 2001, *Centrale Organisatie voor de Vleesgroothandel t. D-G NMa*, MEDED 00/910-SIMO.

[53] Case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 83; European Court of Justice of 17 October 1972, *Vereniging van Cementhandelaren*, 8/72, ECR. 1972, para. 18-21; European Court of First Instance of 22 October 1997, *SCK/FNK*, T-213/95 and T-18/96, ECR. 1997, II-1739, para. 164; decision of the European Commission of 5 June 1996, *FENEX*, OJ 1996, L 181/26, para. 40 and 49.

[54] Case 3309/*NIP, LVE, NVP en NVVP*, decision of the D-G NMa of 26 April 2004, para. 127.

[55] Case 2021/*OSB*, decision of the D-G NMa of 19 March 2003, para. 136; case 3309/*NIP, LVE, NVP en NVVP*, decision of the D-G NMa of 26 April 2004, para. 127; Court of Rotterdam of 23 October 2001, *Centrale Organisatie voor de Vleesgroothandel v D-G NMa*, MEDED 00/910-SIMO; European Court of Justice of 17 October 1972, *Vereniging van Cementhandelaren*, 8/72, ECR. 1972, para. 18-21; European Court of Justice of 11 July 1989, *Belasco et al. v Commission*, ECR. 1989, p. 2117, para. 15; decision of the European Commission, *Lloyd's Underwriters' Association, OJ* 1993, L 04/26, para. 32; decision of the European Commission of 5 June 1996, *FENEX*, OJ 1996, L 181/26, para. 46 and 60; decision of the European Commission of 24 June 2004, *Ereloonregeling Belgische Architecten*, OJ 2005 L 4/10-11, para. 78 and 79.

[56] Court of Rotterdam of 23 October 2001, *Centrale Organisatie voor de Vleesgroothandel t. D-G NMa*, MEDED 00/910-SIMO; Court of Rotterdam of 17 August 2004, *NTC en Modint v D-G NMa,* MEDED 02/1438 RIP and MEDED 02/1438 RIP; decision of the European Commission of 2 April 2003, *Frans Rundvlees*, OJ 2003, L 209/12, para. 118; case 3309/*NIP, LVE, NVP en NVVP*, decision of the D-G NMa of 26 April 2004, para. 122; case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 89; case 2021/*OSB*, decision of the D-G NMa of 19 March 2003, para. 136; case 2422/*klager t. AUV en Aesculaap*, decision of the D-G NMa of 29 August 2002, para. 77.

[57] The Advisory Committee on administrative appeals under the Competition Act for 2973/ *BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 58.

53. Recommendations from an association of undertakings about areas of pricing, such as the granting, or not, of discounts and the minimum margins necessary [58] and recommendations related to increasing prices also form forbidden forms of (horizontal) pricing policy advice. In this context it makes no difference whether such recommendations relate to higher or lower prices than would arise under conditions of free competition or even result in the same level of pricing.[59] Even the recommendation of a minimum price by an association of undertakings has the object of restricting competition, as it rules out competing on the basis of lower prices.[60]

Calculation models and cost estimates

54. Calculation models, drawn up by a number of undertakings or a trade association, which only show which items are of importance when the prices are being calculated do not restrict competition and do not fall under the cartel prohibition.[61] Such models leave sufficient freedom for entrepreneurs to determine their own commercial policies and prices and do not eliminate the normal uncertainties in the market regarding the (intended) market practices of other players in the market.

55. If a trade association gives a cost estimate or, in a calculation model, includes sums or increase percentages for specific items, this will not of itself fall under the cartel prohibition. A condition is that the trade association explicitly restricts itself to the provision of objective information which makes it simpler for the undertakings to calculate their own costs structures and, therefore, to determine their own selling price independently.[62]

56. If the trade association allows a cost estimate or the filling in of a calculation model to be accompanied by, for example, the suggestion that the association deems it desirable that its members pass on (to a certain degree) any cost increases in their prices, or advises its members to maintain their margins or their profit mark-ups at a certain level, this would fall under the cartel prohibition. The same applies if any other circumstances arise which lead to the members gaining the impression that the cost items or the cost increases highlighted serve as an indication of the direction in which the undertaking's pricing policy should be going .[63]

57. Regarding the nature of the information, the general rule is that competition is less likely to be restricted the more objective the information is, the more aggregated it is,

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[58] European Court of Justice of 29 October 1980, *Van Landewyck et al v Commission*, 209-215 and 218/78, ECR. 1980, p. 3125, para. 92-164; European Court of Justice of 11 July 1989, *Belasco et al v Commission*, ECR. 1989, p. 2117, para. 12. Also see European Court of First Instance of 19 March 2003, *CMA CGM e.a. t. Commission*, T-213/00, para. 171-185; case 2973/*BOVAG and NCBRM*, decision of the D-G NMa of 13 November 2003, para. 118, confirmed by the Advisory Committee on administrative appeals under the Competition Act for 2973/*BOVAG and NCBRM, decision on appeal of* 28 September 2004, para. 46.

[59] Case 2973/*BOVAG en NCBRM*, decision of the D-G NMa of 13 November 2003, para. 122.

[60] Case 3310/*Nederlands Tandtechnisch Genootschap*, decision of the D-G NMa of 26 April 2004, para. 89.

[61] Decision of the European Commission of 8 February 1980, *Bundesverband Deutscher Stahlhandel, OJ* 1980, L 62/28, para. 23.

[62] Decision of the European Commission of 5 June 1996, *FENEX*, OJ 1996, L 181/26, para. 62-63. In the opinion of the Nma, the term 'independently determined' should also be taken to mean 'determined in individual negotiations with the suppliers' own customers '.

[63] Decision of the European Commission of 8 February 1980, *Bundesverband Deutscher Stahlhandel, OJ* 1980, L 62/28, para. 22-29. The Advisory Committee on administrative appeals under the Competition Act for 2973/*BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 58.

the more generally available it is and the more it relates to facts from the past, such as details from Statistics Netherlands (CBS), or the Bureau for Economic Policy Analysis (CPB), or information on the basis of collective labour agreements. The more the information takes on a subjective tint – such as is, by definition, the case with profit mark-ups or standard incomes [64] – or contains specific interpretations and 'translations' of general information for a particular sector– such as shown in example 3 below – or is highly detailed and can be traced back to individual situations or individual undertakings, or contains extrapolations to the future in respect of unpredictable developments, then the more likely it is that there is a question of prohibited restricted competition. In these cases, the advice from the trade associations once again acquires a prescriptive character, which may incite the members to adjust their prices (uniformly), irrespective of their own cost developments .[65]

58. In some cases extrapolations are permissible, for example in references to short-term prognoses from the CPB. Similarly permissible are references to costs, for example to previously announced government measures which will either increase or decrease costs, provided there is no suggestion of passing these costs on. These prognoses and measures are, after all, objective details. Information within trade sectors concerning the average salaries to be paid to employees, as well as the bandwidth, is permissible in the context of competition legislation provided it is based on objective information as laid down in collective labour agreements.[66] Information about the average price of products within the trade is a subject which directly influences an exceptionally important competition factor and can, consequently, perceptibly restrict competition very quickly. In such cases, members are being offered a benchmark against which they can adjust their prices (uniformly) without using their own cost price development and cost structure as their point of departure. The same applies to making known a bandwidth within which the prices and tariffs of the members fluctuate, for example that the tariff increase is to be between 4% and 8%, whereby the lowest percentage will be taken to be the minimum tariff increase being recommended by the trade association.

Example 1

An association of undertakings announces (collective labour agreement) salary cost figures and inflation figures to its members. This announcement is, in principle, permissible as the figures are based on details which are objectively available. [67]

Example 2

[64] Case 2973/*BOVAG and NCBRM*, decision of the D-G NMa of 13 November 2003, para. 124 and 125, confirmed by the Advisory Committee on administrative appeals under the Competition Act for 2973/ *BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 58.
[65] Decision of the European Commission of 8 February 1980, *Bundesverband Deutscher Stahlhandel, OJ* 1980, L 62/28, para. 22-29.
[66] The Advisory Committee on administrative appeals under the Competition Act for 2973/ *BOVAG en NCBRM, decision on appeal of* 28 September 2004, para. 53.
[67] Case 2234/*ANKO*, decision of the D-G NMa of 21 December 2001, para. 39.

An association of undertakings is active in the market for the provision of services. The association of undertakings has drawn up an arithmetic example. The arithmetic example contains a number of actual standard sums for the revenue and the annual number of services undertaken by an 'ideal' service provider in the market, resulting in a 'standard tariff'. This is in fact a price recommendation which will restrict competition and is, therefore, not permissible.[68]

Example 3

An association of undertakings furnishes its members with the following details: the general price index is 2% and the salary increase agreed in the collective labour agreement is 3%. The first figure comes from the CPB and is a determinant for the overhead costs, the second figure is information on the basis of the collective labour agreements and is determinant for the salary costs. These details are of an objective nature and generally available and for this reason competition is not restricted when the association of undertakings passes this information on to its members. This is, therefore, permissible. Suppose that the association of undertakings expands on this by telling its members they should include one quarter of the first sum in the average costs and three quarters of the second sum and that the exact cost increase for the specific trade sector is, accordingly, 2.75%. In this way, the association of undertakings is 'translating' general information into information specific to the trade sector and, moreover, adding its own interpretation of the situation. In so doing, the information acquires a subjective character. Processing objective figures to an average consequently restricts competition and is, therefore, not permissible. The members will tend to use this average as a benchmark against which they will adjust their own costs (uniformly) without having to use their own cost price developments and cost structure as a point of departure.

Example 4

An association of undertakings makes use of a so-called operating budget. This budget contains a number of cost items, with a percentage behind each item. These percentages are presented as guidelines from the association of undertakings and form a part of the total costs of the association. Together with the operating budget a 'tariff calculation in 10 steps' is sent, on the basis of which entrepreneurs can calculate their cost price per activity.
It is permissible to present the cost items for which objective information is available as percentages, but cost items which are not objective may not be presented as percentages in this way. Nor are operating budgets which lead to tariff calculations permissible as entrepreneurs will no longer, or at least to a lesser extent, have the incentive to bring their costs (including profit share) down, and thus lower their tariffs, if the share of a particular item in their total costs is equal to (or lower than) the share proposed by the association.[69]

Comparative models

59. The drawing up of comparative models on the basis of which undertakings can compare their own cost structure or performance with the average in the sector or

[68] Case 3309/*NIP, LVE, NVP and NVVP*, decision of the D-G NMa of 26 April 2004, para. 129.
[69] Case 2234/*ANKO*, decision of the D-G NMa of 21 December 2001, para. 27 - 33.

with a *best practice* which serves as a *benchmark is permissible, provided there is no question of far-reaching cooperation*.[70]

60. However, if, on the basis of such comparative models, definite recommendations are made or conclusions drawn as a result of which some of the undertakings involved are able to start practising in a uniform way in the market, then these recommendations and conclusions will be deemed to imply a prohibited restriction to competition. The provisions of margin number 46 et seq., and in particular margin numbers 55 and 56, of these Guidelines about recommendation and the factors detailed under calculation models and costs estimates are also applicable to recommendations and advice issued on the basis of comparative models.

Example 5

An association of undertakings draws up a comparative model. For each cost item the model contains the developments in the previous year on the basis of the collective labour agreements and information from the CPB. The items detailed are those for energy, salary costs, accommodation, advertising and customer service. Trade associations may present the costs of objective information to their members. It is then up to the entrepreneurs themselves to decide whether or not, and to what extent, they will comply with these developments.

4.2 Exchange of Information

General introduction

The exchange of information can promote competition

61. The exchange of information between undertakings, whether or not via trade associations or independent research agencies, can help undertakings to follow general market trends and, therefore, take advantage of them. Even the exchange of information in respect of, for example, new technology or other developments can have the effect of promoting competition.

The exchange of information can restrict competition

62. The exchange of information can, however, also have the effect of removing the normal uncertainties in the market regarding the (intended) market practices of the players in the market and, thus, affect the level of competition. Uncertainty about the commercial and strategic policy of competitors is an important incentive for undertakings to innovate and to organise their management more efficiently. The exchange of information can result in undertakings no longer determining their own market practises individually and independently. Moreover, the exchange of information can make the coordination of market practices easier and consequently serve agreements which restrict competition.[71] In particular, the exchange of information is in contravention of the cartel prohibition if its purpose is to monitor

[70] Case 2234/*ANKO*, decision of the D-G NMa of 21 December 2001, para. 41.
[71] European Court of First Instance of 27 October 1994, *Fiatagri and New Holland Ford*, T-34/92, ECR. 1994, II-905, para. 91, confirmed by the European Court of Justice of 28 May 1998, C-8/95P, ECR. 1998, I-3175; European Court of First Instance of 27 October 1994, *John Deere*, T-35/92, ECR. 1994, II-957, para. 52 and 81, confirmed by the European Court of Justice of 28 May 1998, C-7/95P, ECR. 1998, I-3111.

the fulfilment of any existing price, production or market sharing agreements or any other prohibited agreements restricting competition.[72]

63. To act in contravention of the cartel prohibition, there must be a question of an agreement between undertakings, concerted practices or a decision from an association of undertakings. If an undertaking individually concludes a contract with, for example, a market research agency to collect market information, for instance using questionnaires, there is no question of an agreement between competitors about the exchange of information. The cartel prohibition is, therefore, not being contravened. This relates to a service from third parties and not to agreements which actually fall under the cartel prohibition.[73]

64. In the event of *joint* purchasing of market information by competitors the situation is different. This will require a more detailed assessment of such a purchase agreement.[74] Should competitors jointly discuss, process and use the information they have purchased, they may find they are contravening the cartel prohibition.

65. The exchange of information may be undertaken directly between undertakings themselves or indirectly via trade association or independent research agencies. As far as competition legislation is concerned there is no difference. As indicated above, in every situation there must be a question of an agreement between undertakings, concerted practices or a decision from an association of undertakings.

66. Whether the exchange of information is verbal, in writing, via e-mail or via a website is irrelevant in respect of an assessment in the light of competition legislation. If there is a question of an agreement between undertakings, concerted practices or a decision from an association of undertakings, it is possible that this exchange of information contravenes the cartel prohibition.

When does the exchange of information have a perceptible effect on competition?

67. Whether or not *the exchange of information has a perceptible effect on competition depends on the circumstances of each case*: on the one hand, it depends on the nature, the frequency and the purpose of the information being exchanged and, on the other, it depends on the market structure.

The nature, frequency and purpose of the information exchanged

68. The more the exchanged information relates to factors affecting competition (i.e. the more 'competition sensitive' it is), the earlier there can be a question of an illegal restriction of competition. Information becomes more competition sensitive the more it:
    a. relates to parameters of competition such as prices, production, sales and customers;
    b. is detailed/ has a lower level of aggregation;
    c. is up to date and frequently disseminated;
    d. is not available to everyone.

[72] Decision of the European Commission of 2 December 1986, *Vetzuren*, OJ 1987, L 3/17, para. 45; 24th Competition Report 1994 from the European Commission, p. 642.
[73] Decision of the European Commission of 26 November 1997, *Wirtschaftsvereinigung Stahl*, OJ. 1998, L 1/10, consideration 58, confirmed by European Court of First Instance of 5 April 2001, T-16/98, ECR. 2001, II-1217, para. 38; case 1615/*Fietsfabrikanten*, decision of the D-G NMa of 21 April 2004, para. 133-134.
[74] Case 1615/*Fietsfabrikanten*, decision of the D-G NMa of 21 April 2004, para. 140 et seq.

Re a.

69. Consideration should be given to whether this relates to information which eliminates uncertainties about the actions and strategies of competitors, as a result of which an undertaking will no longer determine its market practices individually and independently. The more the information contains details which could be deemed operationally confidential, the earlier there is a question of an illegal restriction of competition.

Re b.

70. The exchange of information about individual undertakings is more likely to encounter problems with competition legislation than the exchange of aggregated information. The exchange of information about *individual* undertakings can lead to the elimination of the normal uncertainties in the market regarding the (intended) market practices of the players in the market and in so doing can affect competition. In respect of competition legislation, there are unlikely to be problems if an undertaking is only given information about its own position, without it being given information about the situation of its competitors. [75]

Re c.

71. The more up-to-date and frequent the information is, the more influence it will have on the future market practices of undertakings. [76] Although this does not detract from the fact that the exchange of historical information may also restrict competition. In general, however, any exchange of information which is older than twelve months will not cause the normal uncertainties in the market to be reduced. [77]

Re d.

72. The greater the accessibility of information (for example, it is also accessible to disinterested competitors, suppliers and customers), the less there is a question of a restriction of competition. Everyone can benefit from public information, whilst only those party to an exchange of confidential information are in a position to benefit.

Market structure

73. Important characteristics of market structure are the degree of concentration (the number and size of undertakings active in the market), the nature of the product and the degree of product differentiation, the existence, or not, of barriers to entry, the growth of demand in the market and the cost structure.

74. The greater the degree of concentration in a market (few suppliers), the more homogeneous the products, the more/higher barriers to entry, the more stable the market demand and the more symmetric the cost structure, the more likely there is to be a question of an illegal restriction of competition.

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[75] Decision of the European Commission of 17 February 1992, *UK Agricultural Tractor Registration Exchange*, OJ 1992, L 68/19, para. 61.

[76] Decision of the European Commission of 17 February 1992 *UK Agricultural Tractor Registration Exchange*, OJ 1992, L 68/19, consideration 50; Decision of the European Commission of 26 November 1997, *Wirtschaftsvereinigung Stahl*, OJ 1998, L 1/10, para. 52, confirmed by the European Court of First Instance of 5 April 2001, T-16/98, ECR. 2001, II-1217, para. 38.

[77] For more information see inter alia the press release of the European Commission of 20 September 1999, IP/99/690 and the decision of the European Commission of 17 February 1992, *UK Agricultural Tractor Registration Exchange*, OJ 1992, L 68/19, para. 61.

Assessing a specific case

75. As stated above, the circumstances of each case determine whether the exchange of information has a perceptible effect on the level of competition.

76. The question is at what moment is the information dated and the exchange of such not a problem as far as competition legislation is concerned. This depends on the nature of the information and the characteristics of the market. In a market with a stable demand, the future practices of competitors can largely be predicted on the basis of historical practices.[78] In such cases, exchanging historical details could restrict competition.

77. The exchange of competition sensitive, recent information about individual players in a saturated and highly concentrated market enables the participating undertakings to acquire knowledge of the market position and market strategy of their competitors, as a result of which the remaining competition between the players in the market is appreciably reduced. The exchange of such information means that practical cooperation is actually replacing the risks normally inherent between competitors and is, therefore, in contravention of the cartel prohibition.[79]

Joint purchase of market information

78. Should in a specific case, there be no question of an information exchange alone forming a restriction to competition, the cartel prohibition could still be said to be contravened if there is a question of joint purchasing of market information by competitors. Such cases will, as previously stated, require a detailed assessment of any such purchase agreement. If there is, for example, a question of exclusivity – the market research agency concerned may only supply the market information to the undertakings involved, whereby these undertakings take decisions about new participants – consideration should, in particular, be given to whether this has an undesirable exclusionary effect in the market.[80]

Example 6

Five undertakings are active in a market. They produce consumer products which are sold to the retail trade through independent wholesalers. At the end of each month, the undertakings supply their sales figures to their trade association. Two weeks later, they receive a statement from the trade association showing total sales in the market and showing the market share of their own undertaking. The entrepreneurs are also provided with insight into their own market share per wholesaler and retail chain. This type of exchange of information does not, in general, restrict competition and is, therefore, permissible. The participating undertakings only acquire insight into their own position in the market. They do not have access to individual information about

[78] Decision of the European Commission of 26 November 1997, *Wirtschaftsvereinigung Stahl*, OJ 1998, L 1/10, para. 52, confirmed by the European Court of First Instance of 5 April 2001, T-16/98, ECR. 2001, II-1217, para. 38 and the decision of the European Commission of 17 February 1992, *UK Agricultural Tractor Registration Exchange*, OJ 1992, L 68/19, para. 50.

[79] See, inter alia, the European Court of First Instance of 11 Marc 1999, *Thyssen Stahl v Commission* T-141/94, ECR. 1999, II-347, para. 12, confirmed by the European Court of Justice of 2 October 2003, C-194/99, ECR. 2003, I-10821, para. 84-90, and the European Court of Justice of 28 May 1998, *John Deere*, C-7/95P, ECR. 1998, I-3111, para.s 88-90.

[80] Case 1615/*Fietsfabrikanten*, decision of the D-G NMa of 21 April 2004, para. 140 et seq.

other undertakings which would eliminate the uncertainty about the market practices of the undertaking's most important competitors.

Example 7

A trade association gives a market research agency instructions to collect its members' monthly sales figures and to compile a statement of these. These statements, showing the sales per market player, are provided to all the members after an eight week period. This relates to a growth market in which numerous small suppliers are active. No single supplier has a market share above 5%. Third parties may purchase the statements under the same conditions.
In a market which is at the height of development and has numerous small players, such information will, in principle, have the effect of promoting competition. Moreover, as the information is, in this situation, accessible to third parties, such an exchange of information will, in general, be permissible.

4.3 Recognition schemes

79. Recognition schemes are schemes whereby the activities of undertakings are tested against a number of qualitative criteria (quality schemes). If the activities of an undertaking fulfil the criteria, the undertaking may say that it is 'recognised'. Recognised undertakings often acquire the right to publicise the fact they are recognised by means of, for instance, a logo. Trade associations often play an important role in the realisation and implementation of recognition schemes.

80. The competition rules for recognition schemes are also applicable to other sorts of quality schemes, such as certification schemes (whereby the certification and the monitoring of the quality requirements are carried out by an independent body), seals of approval schemes, quality registers or quality schemes which, for example, form part of the articles of association or the membership criteria of a trade association or form part of an integral chain management system, such as those in the agricultural sector.

81. Recognition schemes can contribute to the quality of the production, service and distribution, and to the information provision and choice of options open to customers. In principle, therefore, the NMa assesses such schemes positively.

82. Recognition schemes can, however, also limit competition in the sense of the cartel prohibition. The following points describe when such situations could arise.

83. Recognition schemes should never intend nor result in competition being prevented, restricted or distorted in the sense of Section 6, subsection one, of the Competition Act.[81] Given that the usual intention or objective of recognition schemes is to improve the quality of the supply of goods or services, the aim will rarely be to restrict competition. This would, of course, differ if the recognition scheme were used, either wholly or partially, as a vehicle for making agreements which restrict competition.

84. Although it may not have been the aim of a recognition scheme to restrict competition, it is possible that this could be the result. To assess whether a recognition scheme results in competition being restricted, a test of the scheme

[81] Court of Rotterdam of 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK.

should take account of the specific situation in which it has an effect. In particular, account should be taken of the economic and legal context in which the undertakings concerned operate, the nature of the services to which the agreement relates, the structure of the relevant market and statutory circumstances under which it functions, unless it is a question of a recognition scheme incorporating factors which clearly restrict competition (such as price and market sharing agreements). The previous sentence implies that the actual effects of the scheme on the level of competition must be assessed.[82]

85. Recognition schemes will not restrict competition if the undertakings participating in the recognition schemes only represent a small part of the market. A low (joint) market share of the undertakings participating in the recognition scheme indicates that an undertaking *not* participating in the scheme can, even without participating in the scheme, operate in, or enter, the market. Those undertakings not participating in the recognitions scheme will, in such situations, be able to exercise sufficient competitive pressure to compensate for any reduction in competition between the recognised undertakings. Given the reference framework of the European Commission's guidelines on horizontal agreements, [83] the point of departure could, in principle, be that a recognition scheme will not have a restrictive effect on competition when the participating undertakings have a joint market share of less than 20%, provided the scheme does not contain any provisions which specifically aim to restrict competition.

86. Recognition schemes which do not have the aim of restricting competition may, however, still have the effect of restricting competition if the joint market share of the undertakings affiliated to the recognition scheme is greater than 20%. There is a question of a restrictive competition effect if, inter alia, the recognition scheme has an exclusionary effect (or a potentially exclusionary effect). If, in respect of activities in the market, the recognition scheme offers its participants important economic advantages which they would not otherwise enjoy, then a situation could arise which makes it difficult for the undertakings not participating in the recognition scheme to operate in, or enter, the market, without first participating in the scheme. This will be the case if the participating undertakings represent a large share of the market and consumers or businesses consider the particular recognition scheme an important condition when deciding from whom to procure goods and services.

87. The conclusion that can be drawn from the above is that when customers (or potential customers) attach no, or little, importance to the participation of their supplier in a recognition scheme, it is improbable that participation in the recognition scheme will be deemed an important factor. If participation in a recognition scheme can be deemed an important factor, there is a question of restrictive competition in contravention of the cartel prohibition whenever new entrants (or potential new entrants) are excluded on unfair grounds . Excluding new entrants (or potential new entrants) unfairly can, for example, be demonstrated on the basis of information which illustrates that entrants (or potential new entrants) are being excluded on subjective grounds.[84]

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[82] Court of Rotterdam of 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK.
[83] Guidelines on the applicability of Article 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2.
[84] Court of Rotterdam of 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK.

88. To prevent unfair exclusion and to guarantee that anyone who fulfils the requirements for participation in a recognition scheme can participate in that scheme, the recognition scheme must satisfy the following conditions:
- the recognition scheme should have an open character;
- the requirements laid down for participation in the recognition scheme must be objective, non-discriminatory and made clear in advance;
- the (admission) procedure for recognition must be transparent; and
- the (admission) procedure for recognition must provide for an independent decision about the admission on first assessment, or should recognition be rejected, on appeal.

If a recognition scheme fulfils these conditions, then the scheme will not normally pose any restriction to competition in the sense of the cartel prohibition.[85]

89. In the following margin numbers the conditions formulated above will be explained in more detail.

90. **Open:** A recognition scheme has an open character when the scheme is accessible to everyone who fulfils the conditions. What is essential is that all those who fulfil the quality requirements may participate in the scheme. There is, therefore, no compulsion to allow everyone to participate in the recognition scheme. A recognition scheme accepting equivalent guarantees offered by other systems will also be deemed open.[86] Consequently, a recognition scheme must, for example, recognise diplomas or certificates of a comparable level, if these are relevant for the determination of the characteristics on which recognition is based.

91. **Objective and non-discriminatory:** A recognition scheme is objective when the scheme sets objective requirements which contribute to the aim of the scheme. These requirements must be applied without any discrimination. Membership of a trade association is not an objective quality requirement contributing to the aim of the scheme. Even those who are not members of a trade association must be able to participate if they fulfil the quality requirements. If a trade association invested in the setting up of the recognition scheme, or undertakes important work for the scheme (for example administration), it would be justifiable for a differential to be made in the costs charged to members and non-members for participation in the scheme. This differential must of course bear a reasonable relationship to the costs incurred. Should the requirements be amended at any time, then, in the interests of objectivity, it is important to ensure that the new requirements are valid for and applied to those who already enjoy recognition. A recognition scheme is, for example, not objective and is discriminatory when foreign undertakings are excluded from participation in advance.

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[85] Court of Rotterdam of 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK and case 2157/*VNI*, revised decision on appeal of the D-G NMa of 22 July 2004, para. 18; decision of the European Commission of 29 November 1995, *SCK/FNK*, OJ 1995, L 312/79, para. 23-30, confirmed by the European Court of First Instance of 22 October 1997, *SCK/FNK*, T-213/95 and T-18/96, ECR. 1997, II-1739, para. 145-149; decision of the European Commission of 10 July 1985, *EATE*, OJ 1985, L 219/35, para. 47-51, confirmed by the European Court of Justice of 20 May 1987, *ANTIB t. Commission*, ECR. 1987, p. 2201, para. 16-24; decision of the European Commission of 7 April 1999, *EPI-gedragscode*, OJ 1999, L 106/14, para. 30 and 38.

[86] Decision of the European Commission of 29 November 1995, *SCK/FNK*, OJ 1995, L 312/79, para. 23-30, confirmed by the European Court of First Instance of 22 October 1997, *SCK/FNK*, T-213/95 and T-18/96, ECR. 1997, II-1739, para. 145-149; decision of the European Commission of 10 July 1985, *EATE*, OJ 1985, L 219/35, para. 47-51, confirmed by the European Court of Justice of 20 May 1987, *ANTIB v Commission*, ECR. 1987, 2201, para. 16-24; decision of the European Commission of 7 April 1999, *EPI-gedragscode*, OJ 1999, L 106, p. 14, para. 38.

92. **Advance clarity:** A recognition scheme displays clarity when advance notice is given of the requirements new entrants (or potential new entrants) have to fulfil.

93. **Transparency:** An admission procedure is transparent when the scheme contains, inter alia, an explanation of the procedure to be followed for admission and the criteria for rejection.

94. **Independence:** A recognition scheme can be deemed independent when the decision making regarding admission to the scheme is carried out in an independent manner. This could be on first assessment or, if an application has been rejected, on appeal. The same applies to termination or suspension of membership. The independence must be guaranteed in the composition of the body undertaking the assessment.

Example 8

In order to admit a body to membership of a trade association, the trade association has laid down requirements in respect of craftsmanship in its articles of association and regulations. Of those participating in the market, 90% are members of the trade association. It is well-known that customers (and potential customers) attach no, or almost no, importance to membership of the trade association. Members do, however, use a logo to differentiate themselves from those who are not members. If becoming a member of a trade association is dependent on fulfilling requirements of craftsmanship, membership can take on the role of a recognition scheme. The articles of association and regulations of the trade association should, therefore, be deemed a recognition scheme. The simple fact that 90% of the participants in the market are affiliated to the recognition scheme is, however, insufficient for the conclusion to be drawn that participation in this recognition scheme is a factor of importance in the market, as it is well-known that customers (and potential customers) attach no or little importance to membership of the trade association. Nor does the use of a logo as a mark of quality alter this. The recognition scheme does not restrict competition and is, consequently, permissible.

Example 9

A group of suppliers in a market wish to distinguish themselves as high-quality suppliers. Collectively, therefore, they draw up a recognition scheme which places extremely high demands on the craftsmanship and level of service of the participants. Of the participants active in the market 7% participate and together they represent 8% of the turnover in the market.
Recognition schemes comprising participating undertakings with a joint market share of less than 20% and containing no provisions which have as their aim the restriction of competition will, in principle, not cause competition to be restricted. Such recognitions schemes will, therefore, be permissible.

4.4 Membership criteria of trade associations

95. As indicated in margin number 81 of these guidelines, quality schemes do not need to be stand-alone schemes. They can, for instance, also form a part of the articles of association or other regulations of a trade association.

96. If quality requirements are attached to membership of a trade association and the membership of the association automatically offers participation in a recognition scheme, then it is possible that membership of the trade association, in the same

way as participation in a recognition scheme, could be important or even essential for an undertaking to compete within that particular trade sector. In such a situation, the membership requirements of the trade association will be assessed in the same way as a recognition scheme.[87]

97. The assessing of the membership criteria of trade associations will in no way affect the right of undertakings to organise themselves. However, statutory competition rules will, without prejudice, be applicable to the exercising of the right of trade associations to take decisions or undertakings to conclude agreements, to the extent these decisions or agreements influence the market practices of the undertakings and, accordingly, the competition between these undertakings.

Example 10

A trade association wishes to improve the quality in its trade sector; therefore, in its articles of association, it lays down that a condition of membership for (new) members will be to follow a craftsmanship course run by an educational institution affiliated to the trade sector. The members of the trade association represent 95% of the turnover in the trade sector, advertising is carried out in the name of the association and its logo is generally recognised by customers. The customers attach considerable importance to the scheme.
It is probable that membership of the trade association is an important condition affecting the ability to compete in this sector's market. The membership criteria will, therefore, be assessed in the same way as a recognition scheme. The trade association may lay down the requirement that a craftsmanship course be followed, or a craftsmanship test undertaken. The trade association may not, however, insist that the training be given, or the course followed, at an institution affiliated to it if a comparable course is being offered elsewhere.

4.5 General terms and conditions

98. General terms and conditions drawn up by undertakings jointly or by trade associations can make the realisation of transactions easier as, in advance, they offer clarity to the contracting parties. Furthermore, in transactions with consumers, general terms and conditions can contribute to consumer protection by, for example, including provisions in respect of arbitration rules and guarantee funds. Consequently, the Competition Act does not, in any way, preclude the observation of general terms and conditions.[88]

99. However, should the drawing up and the compulsory application of general terms and conditions result in agreements or concerted practices which restrict competition, there could be a question of the cartel prohibition being contravened. This is, in particular, the case when general terms and conditions relate to important parameters of competition, such as prices and tariffs, including discounts, surcharges and payment terms.

100. In addition to the previously-mentioned parameters of competition, it is, depending on the specific characteristics of the market, possible to distinguish other important parameters of competition. Undertakings and trade associations know which

[87] Court of in Rotterdam of 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK and case 2157/*VNI*, revised decision on appeal of the D-G NMa of 22 July 2004, para. 18.
[88] Case 2333/*Modint,* decision of the D-G NMa of 18 March 2002, confirmed by the Court of Rotterdam of 18 August 2004, MEDED 02/1087 RIP and 02/1438 RIP.

competition factors play an important role as far as competition in the market in which they are active is concerned. In a certain market, an important parameter of competition could, for example, be the guarantee period or the period in which customers are entitled to free services. If the terms and conditions which must be observed by undertakings are drawn up by the undertakings jointly or by an association of undertaking and relate to such parameters, they will, in principle, restrict competition and, therefore, contravene the cartel prohibition.

Example 11

A trade association compels its members to make use of the arbitration scheme agreed in the trade sector. This arbitration scheme contains a procedure which customers may use if they are not satisfied with the goods and services supplied. Moreover, it offers customers the freedom to go to court should the arbitration committee responsible for the implementation of the scheme rule against them. It also allows for undertakings which are not members of the trade association to affiliate themselves to the arbitration scheme.
Linking membership of the trade association to the use of the arbitration scheme has no influence on the manner of competition within the sector and, at the same time, offers the customers better protection. Compelling participation in the arbitration scheme is, therefore, permissible.

Example 12

The general terms and conditions drawn up by a trade association, and which the board of the trade association have made compulsory, include a provision stating that the annual price increase percentage determined by the trade association is to be applied to the prices for the delivery of services. This means that all the members of the trade association will pass on the prescribed price increase to their customers each year.
These general terms and conditions do, therefore, include a horizontal price agreement. Those members of the trade association applying the general terms and conditions will be passing on the same price increase each year. Given that members of the trade association are compelled to make use of the general terms and conditions, this recommendation can be considered a decision from an association of undertakings restricting competition. This provision of the general terms and conditions, in combination with the decision, is not, therefore, permissible.

4.6 Cooperation in the area of administration

101. Cooperation between undertakings in the areas of bookkeeping, joint credit guarantees, joint debt collection and shared offices for organisational or tax advice has no influence on the supply of products and services of the cooperating undertakings. Such cooperation is, after all, restricted to the administrative processing of the undertakings' activities and does not, therefore, have any influence on decisions in respect of the activities themselves. Such forms of cooperation do not restrict competition and do not, therefore, fall under the cartel prohibition.

4.7 Code of conduct

102. Codes of conduct or rules of conduct can be drawn up on the initiative of undertakings or of trade associations. In practice, it would appear that codes of conduct are also drawn up on the insistence of social welfare organisations. Codes of conduct can form a part of the initiatives taken by a trade sector to remain self-regulatory and, therefore, avoid having rules imposed by the government. In addition,

a code of conduct may form a part of a covenant concluded with social welfare groups.

103. If a code of conduct is agreed between undertakings, there is a question of an agreement between undertakings. A code of conduct, or code of honour, drawn up within a trade associations and laid down by an administrative authority of the trade associations should be viewed as a decision by an association of undertakings.

104. Dependent on the economic and judicial context within which a profession is practised, certain codes of conduct may be necessary in order to maintain, for example, standards of decency, professional dignity and qualifications or qualities necessary for the proper practising of an occupation, in other words criteria stipulated with regard to ethical behaviour. If the rules of conduct relate to ethical matters and are applied in a way which is objective, transparent and non-discriminatory, they will not fall under the cartel prohibition.[89]

105. Codes of conduct which have provisions curbing the use of parameters of competition and/or laying down restrictions on the way undertakings trade will, in general, fall under the cartel prohibition. Agreements between competitors which forbid the parties from approaching each other's customers or offering products or services below a certain price level fall under the cartel prohibition. Such agreements will, after all, have as their object to restrict competition and form a very serious infringement of the cartel prohibition.[90]

Example 13

A trade association keeps a list of doubtful debts. Once a month this list is distributed to the undertakings affiliated to the trade association. In addition, the trade association has drawn up a code of conduct. One of the provisions of the code of conduct forbids members of the trade association to deliver to any of the customers mentioned on the list of doubtful debts.
Drawing up and distributing a list of doubtful debts to members of a trade association does not, in principle, restrict competition. However, the provision in the code of conduct *combined with the list of doubtful debts results in a coordinated refusal to deliver (a boycott)* and, therefore, falls under the cartel prohibition.[91] But, on the other hand, if the members of the trade association can decide themselves whether or not to deliver to the customers on this doubtful debts' list, it would be permissible.

4.8 Joint purchasing

106. Many trade associations support their members by negotiating favourable conditions in respect of the purchasing of goods or services. Amongst other things, this can refer to insurance, parcel delivery services, energy etc. Normally speaking, joint

[89] Decision of European Commission of 7 April 1999, *EPI-gedragscode*, OJ1999, L 106, p. 14, para. 38 and the European Court of First Instance of 28 March 2001, *EPI v Commission,* T-144/99, ECR. 2001, II-1087, para. 64 - 65. In addition see Court of Rotterdam of 16 May 2001, *KNMvD*, MEDED 99/2584-SIMO; case 502/*Stichting Reclame Code*, decision of the D-G NMa of 12 July 2001, para. 36-46; case 2902/*Van Broekhuijze*, decision on appeal of the D-G NMa of 19 May 2004, para. 13 and 23; European Court of Justice of 19 February 2002, *Wouters et al. v NOvA*, C-309/99, ECR. 2002, I-1577, para. 97 as well as European Court of First Instance of 26 January 2005, *Piau*, T-193/02, ECR 2005 II-209, para. 100-106.
[90] Case 2422/*klager v AUV en Aesculaap*, decision of the D-G NMa of 29 August 2002, para. 71-75 and Court of Rotterdam of 16 May 2001, *KNMvD*, MEDED 99/2584-SIMO.
[91] Case 486/*Stichting Kredietbeheer Betonindustrie*, decision of the D-G NMa of 24 May 2002, para. 17.

purchasing, whether or not via a trade association, will not have the effect of restricting competition and will not, therefore, fall under the cartel prohibition.[92] However, there could be a question of this if the joint purchasing resulted in significant purchasing power on the markets in which goods or services are purchased, or the joint purchasing resulted in a considerable level of shared costs, [93] or the members of the trade association were compelled or required to purchase the goods or services through the trade association.

4.9 Joint advertising

107. The intention of joint advertising is to focus, in a general way, the attention of customers (and potential customers) on a specific supply of products or services, or on a particular joint brand name. As such, joint advertising does not restrict competition and, therefore, does not fall under the cartel prohibition. If, however, participating undertakings are compelled to accept additional obligations which could, for example, prevent members from doing their own advertising, either fully or partially, then there could be said to be a restriction of competition.

Example 14

The suppliers of a particular consumer product notice that the sales of that product are showing a downward trend. In order to turn this trend round, a joint campaign is organised. The suppliers retain complete freedom to determine their prices and to advertise individually. As there is no question of a restriction of competition, this is permissible.

5 Further Information

108. Undertakings which have questions about the Competition Act or wish to receive information may contact the NMa's Information Line. The Information Line has been set up specifically for trade associations, SMEs and consumers. The NMa Information Line can be contacted on the free-phone number: 0800-0231885, and by e-mail at: info@nmanet.nl. More information can also be found on the NMa's website: www.nmanet.nl. Moreover, undertakings with specific question of a substantive nature may contact the Information Line, from where they will be redirected to the entrepreneurs' desk.

109. Undertakings which wish to end their involvement with a cartel and notify the NMa about the cartel may, under certain conditions, be considered for a fine reduction or fine immunity. More information in this respect can be found under the 'Leniency Guidelines' on the NMa's website at: www.nmanet.nl. The Leniency Office can be contacted on telephone number: 070-330 1710, fax number 070-330 1700 or via e-mail at: NMa_clementie@nmanet.nl.

[92] European Commission's Guidelines regarding the applicability of Article 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2, para. 115-138. Also see the Nma's document on procurement power at www.nmanet.nl. Procurement power is market power on the procurement side of the market.

[93] European Commission's Guidelines regarding the applicability of Article 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2, para. 128.

6 Date of Entry into Force

110. These Guidelines shall come into force on the day following their publication in the Netherlands Government Gazette.[94]

The Hague, 7 April 2005

[94] These guidelines were published in the Netherlands Government Gazette of 7 April 2005 (no. 67, pages 20 to 24) and became effective on 8 April 2005.