OECD

POLICY ROUNDTABLES

Trade Associations

2007

Introduction

The OECD Competition Committee debated trade associations in October 2007. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Antonio Capobianco for the OECD, written submissions from Canada, Chinese Taipei, the Czech Republic, the European Commission, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Japan, Korea, Lithuania, Mexico, the Netherlands, Norway, Poland, Romania, Slovenia, South Africa, Switzerland, Turkey, the United Kingdom, the United States and BIAC as well as an aide-memoire of the discussion.

Overview

Trade associations play valuable, fundamental roles as forums for the discussion and exchange of views on issues of common interest for the industry sector which they represent. Many trade association activities are supported and encouraged, because they promote the efficient functioning of the market. For this reason, many trade association activities benefit from statutory and non-statutory exemptions or immunities from the application of competition rules.

Participation in trade associations' activities, however, may provide ample opportunities for competitors to meet regularly and to discuss business matters of common interest. Such meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination. Casual discussions of prices, quantities and future business strategies can lead to agreements or informal understandings in clear violation of antitrust rules. It is for this reason that trade associations and their activities are subject to close scrutiny by competition authorities around the world.

Related Topics

Prosecuting Cartels without Direct Evidence of Agreement (2006)
Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation (2005)
Hard Core Cartels: Recent Progress and Challenges Ahead (2003)
Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002)
Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)

NETHERLANDS

1. Introduction

The Netherlands would like to submit a written contribution to the roundtable discussion of 16 October 2007 on potential pro-competitive and anticompetitive aspects of trade/business associations. The Netherlands thus hopes to be able to contribute to a fruitful discussion.

The structure of the submission is as follows. Firstly, a short overview will be given of the legal framework with a focus on legislation and on the Guidelines on cooperation of undertakings. Secondly, the recent practice in case law of the Netherlands Competition authority (hereinafter: NMa) will be illustrated by analysing the pro- and anticompetitive aspects of business associations. Thirdly, the enforcement methods of competition employed by the NMa will be outlined. Finally, an outlook is presented.

2. Legal framework

2.1 Hard law: legislation

The cartel prohibition is laid down in Article 6, paragraph one of the Dutch Competition Act and paragraph three contains the legal exception. Article 6 of the Dutch Competition Act is the same as Article 81 of the EC Treaty (hereinafter: EC), except for the additional requirement of interstate effect which is laid down in Article 81 EC only. This cartel prohibition bans agreements between undertakings, decisions by associations of undertakings, 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.

The cartel prohibition does not apply to agreements between a limited number of undertakings with a low turnover. Article 7 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 collective turnover of these undertakings does not exceed:

- EUR 4,540,000 if the core activities of these undertakings relate to the supply of goods;[1] and
- EUR 908,000 in all other cases, for example the supply of services.[2]

On the grounds of Article 12 of the Competition Act, the European block exemptions have been incorporated in Netherlands competition legislation. If a particular agreement is exempted from the application of the European cartel prohibition, because it falls under a European block exemption, then this agreement will also be exempted from the application of the Netherlands cartel prohibition. Likewise, this applies to agreements which do not influence interstate trade and to which the European cartel prohibition

1 From 1 October 2007, this provision is changed by law into an amount of € 5,500,000.

2 From 1 October 2007, this provision is changed by law into an amount of € 1,100,000. Moreover, the cartel prohibition does not apply to agreements when the market share does not exceed 5% and the turnover does not exceed € 40,000,000.

does not, therefore, apply and, moreover, to agreements which although influencing interstate trade, are still covered by a European block exemption (Article 13 of the Competition Act).

For a number of types of agreements, particularly those concerning the Small and Medium Sized Enterprises (hereinafter: SMEs), generic exemptions on the basis of Article 15 of the Competition Act are available. These relate to the Decision in Relation to the Exemption of Agreements executed as a Combination, the Decision in Relation to the Exemption of Agreements to Protect Sectors of Industry and the Decision in Relation to the Exemption of Cooperation Agreements in the Retail Trade.

2.2 Soft law: Guidelines on Cooperation of Undertakings

The NMa looks favourably on any cooperation between undertakings which enhances efficiency, innovation and promotes competition. Cooperation arrangements such as business associations can result in various forms of cooperation, particularly amongst SMEs, which 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 business sector, this also relates to, for example, the collective undertaking of research into factors and circumstances which can, in a general sense, influence undertakings in that sector and improve the quality of the supply of goods and services.

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, have much power in the market. In the vast majority of cases, cooperation between these undertakings does not contravene the rules of competition. Moreover, it is precisely the SMEs that benefit from the steps being taken against the prohibited cartels, the combating of abuse facilitated by economic dominance and the prevention of the creation or strengthening of positions of power.

On 8 June 2001, the NMa published guidelines for the assessment of forms of cooperation between companies both within and outside business associations. Taking account of, inter alia, developments in case law, as well as signals and requests from, and the requirements of, business associations, their members and their umbrella associations, the NMa drew up new guidelines. In 2005, the NMa published an updated version of the Guidelines on Cooperation between Undertakings, at the request for more concrete examples of amongst others the Dutch Association of SMEs. As certain agreements between competing undertakings are in principle considered to be unlawful, particularly those involving parameters of considerable importance to competition such as price and volume, it is highly relevant to undertakings to know for sure which kinds of agreements on cooperation are indeed permitted. Especially for SMEs, cooperation between undertakings is often preconditional to operating on particular markets. In the updated version of the Guidelines, the NMa indicates in what way collaborative structures will generally be assessed within the framework of the Competition Act. This concerns SMEs in particular, because of the important position of business associations. The Guidelines were developed after careful consultation with the employers' association VNO-NCW and MKB Nederland (the Dutch Association of SMEs). The information presented in these guidelines will stimulate compliance with the Competition Act.[3]

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 competent to judge on these forms of cooperation as trade between member states is not influenced. It is also possible that the European

[3] Guidelines for the healthcare sector are also in the making. They will mainly deal with subjects such as collective negotiating by business organisations. The Guidelines for the healthcare sector will be published this year.

Commission does not 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 (i.e. general terms and conditions, cooperation in the area of administration, joint purchasing and joint advertising) and, therefore, in principle, the issue of a national or European block exemption does not arise.

The forms of cooperation contained in the Guidelines are strictly formulated. These strict criteria are specified by case law where all the specific circumstances of the case will be taken into account. The Guidelines contain a strict formulation for reasons of clarity, since it is not possible to take the context of the case into account and in order to prevent business associations being active in an area where competition is likely to be restricted.

Issues dealt with in the Guidelines on Cooperation between Undertakings are: the legal framework, recommendations from trade organisations, general areas of application and the assessment framework for forms of cooperation and specific forms of cooperation. The specific forms of cooperation dealt with are: recommendations from trade organisations, exchange of information, recognition schemes, membership criteria of trade organisations, general terms and conditions, cooperation in the area of administration, code of conduct, joint purchasing and joint advertising.

If you would like to obtain a copy of the Guidelines in English, the OECD organisation has printed some for you to take with you or they can be downloaded from our website at www.nmanet.nl.

3. Case law

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.

In practice, the majority of the complaints and requests which are dealt with by the NMa, concern price recommendations of business associations, calculation models, information exchange and to some extent also recognition schemes.

In this paragraph, the contents of the agreement are illustrated by some recent cases the NMa has dealt with. Firstly, recent case law concerning recommendations from business associations related to tariffs is set out. Secondly, recognition schemes and thirdly, costs estimates are discussed.

3.1 Recommendations from business associations

3.1.1 Recommendations related to tariffs: the need to investigate the context and appreciability

Following European case law, there is a clearly discernible trend in national case law towards a greater emphasis by the courts on the economic effects of prohibited practices. In the absence of any concrete (proven) facts, the court does not readily accept that certain practices or agreements are anti-competitive by object. This sets requirements to evidence presented by NMa. The Trade and Industry Appeals Tribunal [CBb] stated in the Secon[4] and Modint[5] cases at the end of 2005, that an examination was necessary of the factual and economic context in which these practices occur ('context examination').

4 The Trade and Industry Appeals Tribunal of 7 December 2005, Secon en G-Star / NMa, LJN: AU8309.

5 The Trade and Industry Appeals Tribunal of 28 October 2005, *Vereniging Modint en Modint Credit & Finance BV vs de Raad derdebelanghebbende Vereniging Retail Partners Nederland*, AWB 04/794 en 04/829 9500.

This is necessary to prove the case for practices or agreements of anti-competitive object. Furthermore, NMa must render plausible that parties involved do not have a negligibly small position on the market ('appreciability examination'). Both of these investigations are separate from the investigation into the concrete effects of the practices under consideration ('examination of the effects'). The latter investigation must take place in case of practices that are anti-competitive by effect, not by object.[6] Within this assessment framework, the Court of Rotterdam issued a number of rulings in 2006.

Bicycles[7]

Facts

The department Two Wheels companies of the BOVAG (the Union of Garage Owners) and NCBRM (the Dutch Christian Union of Bicycle and Motor Dealers) recommended the following to their members:

- not accepting any offers from the Centre of Coordination of Transport in the province Brabant and National Cycling projects to participate in company bicycle promotions, because of the low profit margins and payment risks;

- tariffs for service and control maintenance by means of service and control maintenance booklets issued by BOVAG;

- the percentages for costs of interest and profit margins incorporated into the tariffs of the maintenance shops by means of a Guidance Booklet issued by NCBRM.

Analysis

The Court ruled that a distinction must be made between evident and non-evident intention to restrict competition. Obstructing entry to the market by (potential) competitors or attempting to force (potential) competitors out of the market, according to the Court, is an example of an evident intention to restrict competition, for which a limited examination of the context is sufficient.

However, the booklets are not evidently recommendations which restrict competition. Further examination of the context is necessary, such as the economic context in which the recommendations are applied, notably the objectives of BOVAG and NCBRM and the real circumstances of the relevant market, such as the way in which the bicycle dealers concerned apply the booklets. According to the Court, the NMa has conducted insufficient examination related to the question whether the recommendations of providing the booklets leads to a restriction of competition, since any insight into the actual functioning of the decision within the relevant market is lacking.[8]

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6 The examination of the effects consists of an economic investigation into the concrete consequences of the alleged infringement on the relevant market, whereas the context examination consists of an investigation into the functions and objectives envisaged by the alleged infringement.

7 The Court of Rotterdam of 28 February 2006 *BOVAG/NCBRM t. NMa*, MEDED 04/3141 WILD, and new decision of the NMa taking into account the objections of the parties of 19 October 2006.

8 The NMa has decided not to appeal the decision.

Psychologists[9]

Facts

Three associations of undertakings recommended to their members the tariffs to be applied for their psychotherapist care.

Analysis

The Court ruled that the NMa had not adequately made likely that the recommended tariffs were generally known to the members of two of the associations of psychotherapists. The Court only considers a recommendation a *real* recommendation when it is also generally known to the members of the association.[10]

In this case, according to the Court, the NMa had not adequately examined the role of the referring general practitioner (on which aspects does he choose a specialist?) and the health insurer in referrals to psychologists and psychotherapists. In the changing context of healthcare, that is the introduction of market elements, without a further examination of the context, the NMa could not conclude that the prices recommended by the professional associations of psychotherapists in themselves had the effect of restricting competition. The NMa had to examine to what extent the price is taken into account when choosing a psychotherapist and in what manner competition would have evolved in the market of psychotherapist care if the associations concerned had not recommended the tariffs.[11]

3.1.2 Calculation models and cost estimates

In paragraph 57 of the Guidelines on Cooperation of Undertakings, the NMa has included the case law up until mid 2005 and summarized the aspects thereof which are taken into account when assessing whether calculation models and cost estimates are in conformity with competition rules. This paragraph states that 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, 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 character – such as is, by definition, the case with profit mark-ups or standard incomes – or contains specific interpretations and 'translations' of general information for a particular sector 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 business associations once again acquires a prescriptive character, which may incite the members to adjust their prices (uniformly), irrespective of their own cost developments.

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9 The Court of Rotterdam of 17 July 2006, *NIP, LVE en NVVP t. NMa*, MEDED 05/2213-WILD, MEDED 05/2214-WILD, MEDED 05/2215-WILD and appeal at the Trade and Industry Appeals Tribunal is still pendant.

10 The NMa has not appealed this issue.

11 The NMa has appealed this part of the decision and emphasises the economic and legal context of the recommendations and that the recommended tariffs have the object of restriction competition in accordance with recent European case law (GlaxoSmithKline Services Unlimited and Belgian Architects). The difference between examination into the context and into the effects is disappearing. According to the NMa, the examination should not concern how the recommended tariffs would have evolved, but how competition should have (better) evolved without the recommended tariffs. In other words, what the negative influence of the recommendations would have been.

Case TLN, AZ en VZV[12]

Facts

Three business associations, Transport and Logistics Netherlands (TLN), Alliance Transporters of Containers over Sea (AZ) and Association of Transporters of Containers over Sea (VZV), were suspected of recommending prices to their members. The alleged price recommendations related to the passing on of the annual general development in costs (by issuing annual letters containing the results published by a research bureau on the expected cost developments), fluctuations in fuel prices and the cost of the proposed German road toll.

Analysis

The business associations infringed competition law by recommending that their members pass on fluctuations in the fuel price and the German road toll to their customers. The NMa has not imposed a fine for this infringement because the Dutch government repeatedly and clearly expressed the desirability of passing on the increase in fuel prices and the road toll in full. The government left the realisation of this to the undertakings themselves. The associations involved then recommended in all openness that their members do so and made model clauses and tables available to their members for this. After it appeared that the NMa had objections to this, the associations immediately ceased issuing these recommendations. Due to the specific circumstances of this case, the NMa has decided not to impose fines for these infringements.

The NMa concluded that competition rules were not infringed with regard to the issuing of annual information on the development of costs. Giving such information to members is a legitimate task of a business association. However, business associations must draw their members' attention to the fact that they must determine their commercial behaviour, including their prices, independently of each other and, by doing so, must take their individual cost structure as the point of departure. The information provided related to objective and generally available data which did not contain interpretations made by the business associations themselves. For this reason, the NMa did not regard this information as a prohibited price recommendation which restricts competition.

3.2 Recognition schemes

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

Although it may not have been the aim of a recognition scheme to restrict competition, it is possible that this could be the effect. To assess whether a recognition scheme has the effect of restricting competition, a test of the scheme 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

12 Case 3371/*TLN, AZ en VZV*, decision of the NMa of 25 March 2005.

previous sentence implies that the actual effects of the scheme on the level of competition must be assessed.[13]

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 recognition 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,[14] 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.

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 competitive 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.

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.

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

14 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.

3.2.1 Installation sector[15]

Facts

In order to admit an undertaking to membership of the trade association in the installation sector, 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 organisation. It is well-known that customers (and potential customers) attach no, or almost no, importance to membership of the trade organisation. Members do, however, use a logo to differentiate themselves from those who are not members.

Analysis

If becoming a member of the trade association is dependent on fulfilling requirements of craftsmanship, membership can take on the role of a recognition scheme according to the Court of Rotterdam. 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 organisation. Nor does the use of a logo as a mark of quality alter this. The recognition scheme does not restrict competition and is, consequently, allowed. According to the Court, the existence of a theoretical possibility that an exclusionary effect can occur, constitutes insufficient proof that concrete anti-competitive effects occur in the market. The NMa should have examined the concrete effects of the membership schemes on competition.[16]

4. Enforcement of competition

The classic enforcement method at hand for the NMa is the imposing of fines or periodic penalty payments under administrative law through a sanction decision. Nowadays, it has become more and more common to close an investigation or a complaint by means of an alternative instrument. In this paragraph, the NMa's policy towards alternative enforcement is set out, followed by illustrative examples of an intervention, an informal opinion, compliance programmes and self-regulation.

4.1 Alternative enforcement policy

Specific situations may warrant the choice for an alternative mode of enforcement. In so doing, the NMa refrains from imposing fines and works towards a settlement with the undertakings or association of undertakings involved. With a view to fostering precision and transparency as to its enforcement policy, the NMa developed a range of policy criteria which have to be met in order to refrain from sanctions:

- the infringement is terminated immediately or has already been terminated;
- the offence is not likely to be repeated;
- the consumer will expectedly benefit more from alternative modes of enforcement as opposed to sanctions procedures;

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

16 The NMa has not appealed this decision.

- alternative modes of enforcement generate sufficient prevention effects;
- alternative modes of enforcement do not meet with principal objections from third parties concerned;
- the offence does not concern a so-called 'hardcore' infringement; these include price rigging practices and agreements on market splitting and production volume.

The NMa emphasises the importance of maintaining contacts with the sector. In this respect, the NMa wishes to exert an advisory role. The NMa realises this by delivering speeches and presentations, and by issuing advice to for instance business associations. Furthermore, the NMa issues guidelines and brochures which elucidate the way in which legislation is to be interpreted and helps clarify NMa's policy with regard to the use of information and the implementation of its statutory powers. The alternative enforcement method is of considerable importance to the NMa's effectiveness. Following an investigation, the NMa may decide on using an alternative instrument. A healthy balance between these preventive measures and repressive intervention will contribute to the success of our mission to make markets work.

Informal opinions are also employed as prevention instruments. They are helpful in providing insight into the specific market position of parties. In 2006, the NMa issued 22 informal opinions. In deciding to honour a request for an informal opinion, the NMa applies a 'yes, provided that'-policy to which the following requirements apply cumulatively:

- the matter must raise a new legal issue;
- a considerable social and/or economic interest must be at issue; and
- it must be possible to form an opinion on the basis of information provided by the applicant, in other words, without the need for the NMa to carry out further substantive research.

The NMa will not issue an opinion if a similar case is being dealt with by the NMa, the European Commission or any other competition authority, or if a relevant case is before the courts.

4.2 Alternative enforcement in practice

In this paragraph, a number of examples illustrate the NMa's alternative enforcement in practice.

4.2.1 Intervention concerning Orthobanda

Orthobanda is the business association for orthopaedic instrument makers, who offer both tailor-made and standard orthopaedic products and protheses. A large number of orthopaedic instrument makers calculated their prices on the basis of a collective system for calculating prices developed by Orthobanda. After studying the practical effects of this system, the NMa concluded that it obstructed competition in the sector. Orthopaedic instrument makers ought to determine their prices independently of each other through negotiations with healthcare insurers. This message was also communicated to all healthcare insurers in the Netherlands.

After intervention by NMa, the business association Orthobanda appealed to its members at the end of 2004 to cease applying the collective system for calculating prices. If this had not been done, the NMa could have started an investigation.

4.2.2 Informal opinion on shrimp fishery industry

At the request of the Producer Organisation (PO) Dutch Fishery Union, the NMa gave its opinion on regulations to be implemented in the shrimp sector by the newly founded Transnational Association of Producer Organisations (TVPO). All TVPO's – several TVPO's may be set up in the shrimp fishery industry – are subject to the stipulation that they may not take up a dominant position in the relevant market, unless such a dominant position is in exceptional cases held to be necessary in order to comply with the objectives of the Common Agricultural Policy as set out in article 33 of the EC Treaty. In this way, PO's and/or TVPO's will remain in competition with one another, but can also deploy sufficient countervailing powers to offset wholesalers in the shrimp sector. Ultimately, the consumer will benefit from effective and actual competition between the various links constituting the shrimp production chain. Whether or not the TVPO that is envisaged by the PO Dutch Fishery Union, actually disposes of a dominant position, is left undecided in the informal opinion. A TVPO may only implement measures with an effect on prices and the amount of shrimps brought to land, if these measures remain within the strict normative framework of legislation on Common Agricultural Policy. In this regard, the informal opinion refers back to a previous NMa assessment of practices among producer organisations (and others), relating to agreements on fishing quotas, for example.[17] The informal opinion of the NMa stressed that a situation of structural overcapacity in the shrimp fishery industry may lead to company failures, surpluses and a very high fishing intensity, bearing ecological consequences of various kinds. In order to remove the structural overcapacity of the market at present, a clearance operation might prove worthwhile.

In its informal opinion, the NMa pointed out that – in exceptional circumstances – it is possible to set up a crisis cartel in order to revitalise the sector and restore economic soundness.

The NMa underlined that it attaches great importance to compliance-programmes set up by undertakings and PO's in the shrimp sector. These may increase awareness and stimulate compliance with current competition legislation. Various important players in the shrimp sector had developed a compliance programme by the end of 2005 or were in the process of doing so.

4.2.3 Compliance programme for business association of pharmacology

On the basis of market signals, the NMa started an investigation into possible anti-competitive behaviour of the Royal Dutch Society for the Advancement of Pharmacology (KNMP) and its members. In mid 2006, the investigation was dropped after KNMP had promised to instigate a compliance programme. The compliance programme, in short, comprised a set of measures and procedures necessary to safeguarding compliance

with the Competition Act. The KNMP appointed a compliance officer, who is responsible for investigating, terminating and preventing anti-competitive practices.

4.2.4 Self-regulation in the liberal professions sector

The liberal professions are in a state of development, ever more so in the last few years. This calls for regular critical evaluations of regulation in the liberal professions, as provided by law and set out in rules drawn up by professional associations themselves. In 2004, the NMa embarked on an analysis of professional self-regulation and codes of practice among architects, auditors, the legal profession and the notary profession. In these analyses, the central question was whether professional self-regulation and codes of conduct are necessary and proportional to the sound exercise of these professions. Restrictions to

[17] This is expounded in the sanctions decision of 14 January 2003 and the decision on objection of 28 December 2004 relating to case 2269.

competition among the abovementioned professional groups may be necessary to guarantee specific public interests with regard to services provided. However, it is important that professional associations should always bear in mind the competitive impact of rules and regulation, since the liberal professions have an important economic role, that is essential to other sectors of the economy as well. Improving competition within these professional groups may have a positive effect on economic performance in other sectors.

Architects

Within the framework of its 2006 analysis, the NMa conducted meetings with the professional associations concerned: the Royal Institute of Dutch Architects (BNA) and the Dutch Professional Organisation of Urban Designers and Planners (BNSP). These meetings resulted in a number of changes to self-regulation. Codes of conduct should not hinder or stop clients from switching to another architect. The NMa expects these alterations to promote the level of competition among architects and provide a wider range of choice to clients when selecting an architect. This may improve the quality of architectural services provided. NMa analysis of self-regulation among architects has now come to an end.

Notary profession

The NMa conducted a series of meetings with the professional association concerned: the Royal Society for the Notary Profession (KNB). By subsequently issuing a consultation document on 30 March 2006, the NMa invited the opinion of a wide range of parties involved in the market for notary services, including private and business users. They were queried on the issue whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the notary profession. These included the prohibition on awarding provision and specific limitations regarding the use of intermediaries and the outsourcing of services. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Evaluation of the Notary Act. The consultation round was officially closed by means of a round table meeting on 4 December 2006, in which various respondees and a number of interested parties participated. A final report of the NMa is expected in 2007.

Legal profession

Likewise, the NMa conducted a series of meetings with the professional association the Netherlands Bar Association (NOvA). Following this, the NMa invited the opinion of a wide range of interested parties, including private and business users of legal services, who were asked to give their opinion by responding to a consultation document. The question under consideration was whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the legal profession and the protection of customers. More specifically, rules prohibiting particular collaborative associations and the direct approach of potential clients were the subject of consultation. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Legal Profession. After taking note of the reactions to the consultation document, the NMa will in the second half of 2007 convene a round table meeting inviting respondees and interested parties. Subsequently, the NMa will draw up its final report on self-regulation among legal professionals.

Auditors

In 2006 the NMa conducted a series of meetings with the professional associations the Royal Dutch Institute for Registered Auditors (NIVRA) and the Dutch Association for Auditors and Administrative Advisors (NOvAA). Almost simultaneously, various legislative processes were completed. Recently, the Directive 2006/43/EC, the Act on the Enforcement of Auditors Organisations (Wta) and the Decision on the Enforcement of Auditors Organisations (Bta). On the basis of this regulation, NIVRA and NOvAA

have drawn up many new directives and supplementary regulation, while removing regulation that had now become obsolete. The NMa commented on these directives and supplementary regulation from the perspective of competition. At the end of 2006, some new directives and supplementary regulation had not yet been implemented. The process will be completed in the second half of 2007.

5. Assessment

Prior to the entry into force of the Dutch Competition Act, the Netherlands used to be a so-called cartel paradise. Historically, guilds were commonly present in every sector. Cartels used to be allowed and common practice. In 1996, the European Court of Justice ruled that the Dutch trade association of the building sector infringed European competition law.[18] In 1998, the Dutch competition law entered into force and the NMa started investigating cartels.

At the beginning of its existence, the infringements regularly involved business associations. The NMa strengthened its advisory role through issuing advice to business associations. The NMa continued to receive quite a lot of complaints and requests concerning business associations. Especially, the request for more (concrete) examples from the Dutch Association of SMEs, made the NMa publish a better and improved version of the Guidelines on Cooperation between Undertakings, which clearly stated which practices were and were not allowed in competition law.

The guidelines proved to be useful for business associations as well as the NMa, since the amount of complaints, signals and requests concerning business associations seemed to have decreased since then.

This is a positive development, since, after all, self-assessment by undertakings is crucial. Alternative enforcement methods through compliance programmes and self-regulation have increased. Moreover, following case law, it has become harder and harder for the NMa to prove an infringement of competition law, since context examination is required.

6. Conclusions

The legal framework consists of hard law as well as soft law. Hard law concerns legislation and soft law the Guidelines on Cooperation of Undertakings. The cartel prohibition, the bagatelle provision, the European block exemptions and the generic exemptions are set out.

The Dutch Association of SMEs requested more concrete examples of what is allowed and what is prohibited under competition law. This request mainly concerned price recommendations of business associations, calculation models, information exchange and also recognition schemes. Therefore, the NMa published an updated version of the Guidelines on Cooperation between Undertakings in 2005 in which case law is laid down and illustrative examples are given.

The forms of cooperation contained in the Guidelines are strictly formulated. These strict criteria are specified by case law where all the specific circumstances of the case will be taken into account. The Guidelines contain a strict formulation for reasons of clarity, since it is not possible to take the context of the case into account and in order to prevent business associations being active in an area where competition is likely to be restricted.

Following European case law, there is a clearly discernible trend in national case law towards a greater emphasis by the courts on the economic effects of prohibited practices. In the absence of any

[18] Decision of the European Court of Justice of 25 March 1996, *SPO vs Commission*, C-137/95-P, Jur. 1996, I-1611.

concrete (proven) facts, the court does not readily accept that certain practices or agreements are anti-competitive by object.

The classic enforcement method at hand for the NMa is the imposing of fines or a periodic penalty payments under administrative law through a sanction decision. Nowadays, it has become more and more common to close an investigation or a complaint by means of an alternative instrument. In this paragraph, the NMa's policy towards alternative enforcement is set out, followed by illustrative examples of informal opinions, compliance programmes and self-regulation.