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Commission I

National report of [The Netherlands](#)

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1. National competition law

1.1. Are there in your country general national anti-trust provisions with regard to the prohibition of cartels, the control of abuse of dominant positions and merger control?

The Dutch general national anti-trust provisions with regard to the prohibition of cartels are contained in the Dutch Competition Act (Mededingingswet). This act entered into force on 1 January 1998.

Does your country's Constitution contain provisions on privileges for agriculture under anti-trust law? If yes, what is the content of these provisions?

The Dutch constitution does not contain provisions on privileges for agriculture under anti-trust law.

1.2. Is there in your country a specific national anti-trust law for the agricultural sector? If yes, what is the content of these provisions and where are they laid down?

There is no specific national anti-trust law for the agricultural sector. In his initiative memorandum "*A fair sandwich, and the strengthening of the food chain*",¹ Kamerlid² Geurts called upon the Dutch government in 2014, inter alia, to ensure that producer organisations can make agreements using the agricultural exemption provided for by the CMO-Regulation³ without fear for possible intervention by the Netherlands Authority for Consumers and Markets (Autoriteit Consument en Markt - ACM) by including it in the Dutch Competition Act.⁴ In response to this initiative, the Minister for Economic Affairs made it clear that this was not necessary.⁵ After all, the exemption had direct effect. Instead he promised clarity. This clarity was provided for by the manual that was issued by the deputy Minister for Economic Affairs in 2015.⁶ The manual explains what opportunities for collaboration recognised producer organisations (PO's), recognised unions of producer organisations (UPOs) and recognised interbranch organisations in the agricultural sector have without violating the competition rules. Unfortunately the manual is rather superficial and contains no new insights.

In 2016 Kamerlid Van Gerven called upon the Dutch government to recognize purchasing power (monopsony) as market power.⁷ In his reaction, the Minister for Economic Affairs told the Dutch Lower House that it was not necessary to consider purchasing power as market power. According to the Minister this simply follows from the law.⁸

1.3. Is in your country the application of agricultural anti-trust law entrusted to specific authorities?

¹ Parliamentary paper 30004 nr. 2.

² Member of the Dutch House of Representatives (Tweede Kamer).

³ Article 219 Regulation 1308/2013.

⁴ When the Dutch Competition Act entered into force, the Netherlands Competition Authority (NMa) was entrusted with the enforcement of this act. On January 1, 2013 the NMa merged with the Independent Post and Telecom Authority (OPTA) and the Consumer Authority (Consumentenautoriteit) into the ACM. For the sake of readability, the NMa and its legal successor ACM are hereinafter collectively referred to as ACM.

⁵ Parliamentary Papers 34004 nr. 3.

⁶ Parliamentary Papers 28625 nr. 222. The manual is available via:

https://www.eerstekamer.nl/eu/overig/20150319/handleiding_mededingingsrecht_voor/document [Last checked on June 7, 2017].

⁷ Parliamentary Papers 28973 nr. 174.

⁸ Parliamentary Papers 28973 nr. 178.

As mentioned above, there is no specific national anti-trust law for the agricultural sector. The (general) anti-trust law applicable in the agricultural sector, both European and Dutch, is enforced by the ACM.⁹ The ACM is an autonomous administrative authority under Dutch law and is part of the Dutch central government. It is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws.¹⁰ The competition oversight of the ACM covers every economic sector in the Netherlands, including the agricultural sector. Appeals against ACM decisions can be lodged with the District court of Rotterdam only. Appeals against judgement of the latter court only can be lodged with the Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven - CBb).

1.4. Were there in your country in the last decade particularly important national administrative or judicial procedures underpinning agricultural anti-trust law (prohibition of cartels; control of misuse of dominant positions; merger control)? If yes, what was the content of these procedures and were the decisions taken on the basis of national or Union law?

Antitrust administrative and civil case law

(i) Bell pepper¹¹

The Bell pepper case is a long-term saga. It started with an application for leniency in 2009 and ended with a settlement in 2016.¹² The case concerns the collusion on daily and weekly prices, customer sharing and exchange of sensitive business information between three CMO-recognised producer organisations in the fruit and vegetable sector. The ACM concluded that the producer organisations violated both the Dutch and European prohibition of cartels. This conclusion was upheld before the District Court of Rotterdam.¹³

There are four elements that make this case noteworthy. First of all the three producer organisations used the services of an agricultural consultancy firm to organise their behaviour. This consultancy firm was considered to be part of the cartel in accordance with the Treuhand judgment of the European Court of First Instance.¹⁴ Secondly, two producer organisations argued that they had acted as if they were a union of producer organisations (UPO).¹⁵ Consequently their behaviour would be exempted from the prohibition of cartels. The ACM rejected this argument solely because no CMO-recognised UPO existed. Thirdly the ACM defined the relevant market as the Dutch market for bell peppers in the “*Holland season*”. Because of this rather narrow market definition the contested behaviour affected competition appreciably. Finally, when calculating the relevant turnover in the context of the basic amount of the fine, the ACM added the members' turnover to the turnover of the relevant producer organisations. In the course of the procedure, however, the ACM had to adjust the fines due to lack of ability to pay. Towards the end of the procedure every producer member had left the producer organisations that were fined. Consequently their financial resources were exhausted. Nevertheless the ACM argued that the producer organisations could demand a certain contribution from their former members. The lowered fines were ultimately accepted by the producer organisations by way of a settlement, thus ending the procedure.

⁹ See the ACM English website: <https://www.acm.nl/en/> [Last checked on June t, 2017].

¹⁰ For the legislation and regulations, as well as powers of the ACM, please check the website: <https://www.acm.nl/en/about-acm/mission-vision-strategy/legislation/> [Last checked on June 6, 2017].

¹¹ ACM Case 7036 – Paprika, decision May 15 2012.

¹² ACM Case 7036 – Paprika, settlement decision June 10 2016.

¹³ District Court of Rotterdam July 9 2015 case ROT 13/247, 13/248, 13/249, 13/250, 13/251, 13/252, 13/5771, 13/5772, 13/5774 (ECLI:NL:RBROT:2015:4885)

¹⁴ CFI July 8 2008 (Treuhand) case T-99/04 (ECLI:EU:T:2008:256).

¹⁵ See article 125c Regulation 1234/2007, now article 156 paragraph 1 Regulation 1308/2013.

(ii) Silverskin onions¹⁶

On the basis of an ex officio examination, the ACM concluded that 5 undertakings that produced, processed and sold silverskin onions violated both the Dutch and European prohibition of cartels by making agreements about the maximum sowing area for silverskin onions.¹⁷ The sown area agreements were initially concluded within the Cooperative Silverskin Growers (The Cooperative). After the Cooperative was dissolved in 2003, the sown area agreements were continued by the former members themselves. In support of the sown area agreements, the undertakings concerned purchased the assets of staggered silverskin onions processors. This would prevent new undertakings from entering the market, which could undermine the sown area agreement. In addition, the undertakings informed each other for several years of the prices they would charge for silverskin onions to their customers.

One of the undertakings took the view that the sown area agreements were exempted from the prohibition of cartels because of the “*agricultural exemption*”. This argument was rejected because the conditions for this exemption were not met. The sown area agreements were not necessary to achieve each of the objectives of the common agricultural policy (CAP). The sown area agreements just put one of these objectives at risk, namely the objective of ensuring reasonable prices for delivery to consumers. The undertakings also argued the Cooperative acted as a producer organisation under the CMO rules. Because the Cooperative was not CMO-recognised, this argument was also rejected.

(iii) Tree nurseries¹⁸

This case started with an investigation by the Dutch Fiscal Information and Investigation Service (FIOD). In the course of this investigation the FIOD found documents that indicated several tree nurseries violated the prohibition of cartels by - in varying formation – committing bid rigging in a tender for domestic award of contracts. Proof of this violation was handed over to the ACM which then started its own investigation. Eventually the ACM concluded that both the European and Dutch prohibition of cartels had been violated.¹⁹ Later in the procedure, the violation of the European prohibition of cartels was dropped. However based on Regulation 1/2003, the District Court of Rotterdam applied the European prohibition of cartels ex officio.²⁰ In the appeal brought by two undertakings, the CBb rejected this ex officio application because there was found to be an absence of trade between the EU member states. The ACM had concluded that the individual tenders constituted the relevant markets. This conclusion was rejected. In case of a long-term infringement, the entire market must be considered. Although the ACM had not defined this market, the CBb defined the relevant market itself based on the information contained in the file. Then it concluded that the market share of the undertakings concerned exceeded the national de minimis threshold.²¹ With respect to one undertaking, the contested judgment was confirmed although with an increased fine. In respect of the other undertaking, the contested judgement was annulled in so far as a fine was imposed.

¹⁶ CBb March 24 2016 Case 14/251 14/252 14/253 (ECLI:NL:CBB:2016:56). More or less comparable is the First year onion sets case: CBb October 6 2016 Case 15/157, 15/158, 15/160, 15/161 (ECLI:NL:CBB:2016:272).

¹⁷ ACM Case 6964 – Silverskin onions, decision May 25 2012.

¹⁸ CBb April 10 2014 Case AWB 10/828 AWB 10/829 (ECLI:NL:CBB:2014:118).

¹⁹ ACM case 5211 – Boomkwekerijen, decision November 13 2007.

²⁰ District Court of Rotterdam January 7 2010 case AWB 09/1868 MEDED-T1 AWB 09/1924 MEDED-T1 (ECLI:NL:RBROT:2010:BM9911).

²¹ Article 7 Dutch Competition act.

(iv) The Greenery / Oussoren²²

This civil case relates to a rather complicated subsidy structure. The Greenery, a subsidiary of a the largest CMO-recognised producer organisation in the fruit and vegetable sector Coforta, had requested CMO subsidy for an investment to be placed on the premises of Coforta member Oussoren. Even though tomato producer Oussoren paid part of the investment, The Greenery remained the full owner. After a number of years, Oussoren was given the opportunity to take over the investment. In return, Oussoren was obliged to continue to sell its entire tomato produce through The Greenery for a number of years to come. Before the end of this contractual period, Oussoren terminated its membership and refused to sell its produce through The Greenery any longer. In the following legal suit, the question arose as to whether the contractual obligation to sell the entire produce through The Greenery was in breach of the Dutch prohibition of cartels. On the basis of a very broad market definition (a European market for glass house vegetables), the Court of Appeal in The Hague concluded that competition was not appreciably affected by the aforementioned contractual obligation. Hence the Dutch prohibition of cartels was not violated.

Comments

The case law mentioned above shows that especially in the fruit and vegetable sector it can be difficult to define the relevant market. In the bell pepper case the ACM came to a very narrow market definition: a Dutch market for bell peppers in the so-called “*Holland season*”. It can be disputed whether this is a correct market definition given the fact that the vast majority of the Dutch fruit and vegetable production is being exported. Moreover, trade in fruit and vegetables is highly competitive and international.²³ This interpretation is supported by the judgment in The Greenery / Oussoren case. Further support can be found in a manual published by our Flemish neighbours’ Department of agriculture and fisheries on January 17 2017. In this manual it is assumed that there is a European fruit and vegetable market. For some products the market is even worldwide.²⁴ Food for thought!

Merger case law²⁵(i) Bloemenveiling Aalsmeer / FloraHolland²⁶

The merging parties were the two remaining flower auction houses in the Netherlands. Both auction houses offered producers and wholesalers a marketplace in which to trade ornamental horticultural products. The merger was approved in the second phase. The ACM conducted market research among around 1,500 producers and 500 buyers of ornamental plant products (wholesalers and florists).²⁷ On basis of this research, the ACM concluded that the relevant geographic market for the marketing of ornamental plant

²² Court of Appeal The Hague May 29 2012 Case 338554/HA ZA 09-1786. This judgment is also noteworthy because of the CMO aspect. These aspects are left out in this national report. (ECLI:NL:GHSGR:2012:BX8559)

²³ See: <http://www.agf.nl/artikel/135214/Nederlandse-groenten-en-fruithandel-boekt-import-en-exportrecords-in-2015>. [Last checked June 13 2017]

²⁴ Vlaams Departement Landbouw en Visserij in ‘Mededinging’ en de gemeenschappelijke marktordening (GMO) pag. 53. Available at: http://lv.vlaanderen.be/sites/default/files/attachments/gr_201609_publicatie_mededinging_digi.pdf. [Last checked on June 13 2017]

²⁵ The Friesland Foods / Campina merger, concerning the two largest dairy cooperatives in the Netherlands, was notified to and cleared by the European Commission: Case No COMP/M.5046.

²⁶ ACM Case 5901 – Bloemenveiling Aalsmeer – FloraHolland, Decision of August 21, 2007. More on this merger: P. Ingenbleek a.o. in “*The Flora Holland Flower Auctions - A Dutch Merger in the Face of Globalization*”, Wageningen University, August 22 2007. Available at: <http://docslide.net/documents/flora-holland-2007.html#>. [last checked June 12 2017]

²⁷ The results are available at: <https://www.acm.nl/nl/publicaties/publicatie/2006/Bloemenveiling-Aalsmeer-FloraHolland/>. [Last checked June 12 2017]

products included at least the European Union. In case of a structural price increase by the merged entity, customers would divert to alternative channels. As a result, the merged entity would be sufficiently constrained post-merger. The proposed merger was cleared under Dutch merger control.

(ii) Tradition – WestVeg – Unistar – Brassica-Group²⁸

This case concerned the merger between four CMO-recognised producer organisations in the fruit and vegetables sector. The idea was that Unistar and Brassica-Group would merge into the Unistar / Brassica-Group. This new entity would then merge with Tradition and WestVeg. The ACM only assessed the latter merger as this transaction exceeded the turnover thresholds for Dutch merger control. The ACM did not decide whether there was a separate Dutch market for glass house vegetables or that the market should be broken down into separate products. In all cases, the market share of the new entity would remain below 20% - 30%. Consequently the ACM cleared the merger.

(iii) Van Drie / Alpuro²⁹

The ACM approved the acquisition of Dutch veal producer Alpuro Holding by its Dutch rival producer Van Drie Holding. The ACM came to the conclusion that it was unlikely that Van Drie's acquisition of Alpuro would have adverse effects on retail veal prices. This conclusion was based on the assessment that Van Drie and Alpuro would have limited market shares on the European market. Furthermore foreign slaughterhouses depended on Dutch fattened new born calves to only a very small degree. The proposed merger was cleared under Dutch merger control, a decision which was eventually upheld in appeal before the District Court of Rotterdam.³⁰

Comments

Most of the mergers in the agricultural sector notified to the ACM in the last decade were cleared by the ACM with a shortened decision. The three decisions discussed above are the exception. In two of the substantive decisions, the ACM came to a very broad demarcation of the relevant geographic market. It is mainly thanks to this broad market definition that the concentrations were cleared. This is especially notable with regard to the Van Drie / Alpuro merger, a case in which there were several indications that the transaction may raise concerns. Ultimately, the Bundeskartellamt (the German Federal Cartel Office) cleared the merger subject to suspensive conditions.³¹

General informal opinions

(i) Kompany³²

This case concerned the intended establishment of the first UPO in the Netherlands by three CMO-recognised producer organisations in the fruit and vegetable sector. The ACM was asked whether Kompany's proposed modus operandi would be compatible with competition law. The producer organisations wished to know whether they could jointly sell the produce of their members within the scope of the UPO without violating the prohibition of cartels.³³

The ACM assessed that the European prohibition of cartels was applicable to agreements, decisions of associations of undertakings and concerted practices relating to the

²⁸ ACM Case 6797 – Tradition – WestVeg – Unistar – Brassica-Group decision November 19 2009.

²⁹ ACM Case 6895 – Van Drie / Alpura, decision May 4 2010.

³⁰ District Court of Rotterdam Cases AWB 10/2367 and AWB 10/2369 (ECLI:NL:RBROT:2012:BX1507), judgment July 19, 2012.

³¹ See the press release by the Bundeskartellamt of December 29 2010:

http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/29_12_2010_Kalbfleisch.html?nn=3591568. [Last checked June 12 2017]

³² ACM Case 6672 – Kompany, Informal opinion May 20, 2009.

³³ In fact, this is the question that the ECJ must answer in the French endive cartel (case C-671/15).

production of and trade in fruit and vegetables. Because the CMO Regulation contained an exception to the European prohibition of cartels,³⁴ the ACM checked the proposed modus operandi against this exception. It concluded that the conditions were not met. According to the ACM, the question whether the members' products could still be sold jointly without violating the prohibition of cartels should be answered by the European Commission. Consequently, the ACM refused to answer the submitted question.

In spite of this, Kompany was nevertheless established and recognised as an UPO.³⁵ In the meantime Kompany has been merged with two of its founders. This merger was notified to and cleared by the ACM under Dutch concentration control.³⁶ Following completion of this merger Kompany is most likely no longer a recognised UPO, but a recognised producer organisation.

- (ii) FresQ³⁷
81 members of Coforta, wanted to join FresQ with effect from January 1 2012. FresQ, at that time also a CMO-recognised producer organisation, asked the ACM whether this constituted a concentration within the meaning of Dutch merger control.³⁸

The ACM concluded that the accession of the 81 Coforta members did not constitute a concentration. According to the ACM, producers and the producer organisation of which they are members do not form a single economic entity. The producers were considered to be independent undertakings. The fact that they sold their produce or a significant part of it through their producer organisation did not alter this. The membership of a producer organisation was qualified by the ACM as a form of cooperation between independent undertakings. Such collaboration is not subject to Dutch concentration control. It is subject to review under the Dutch prohibition of cartels.

- (iii) Van Nature & Best of Four³⁹
Van Nature and Best of Four were two CMO-recognised producer organisations in the fruit and vegetable sector. They wished to confirm whether they had to notify their proposed merger with the ACM. The duty to notify would be triggered if the turnover of their members had to be added to their own turnover (in which case, the relevant turnover thresholds⁴⁰ would be exceeded).

According to the ACM, the characteristic of the producer organisations at hand was the bundling of their members' produce. This bundling through the producer organisations allowed the total produce of their members to appear on the sales market through one supplier. The bundled produce was thus the object of the commercial policy and the market behaviour of one single economic entity. The ACM's position was that the assessment of the turnover thresholds should be based on turnover data showing the actual economic size of an undertaking as far as possible. In the case at hand, it called for both producer organisations to take into account the total product sales. Consequently the turnover of their members had to be added to the turnover realised by the producer

³⁴ See article 176 Regulation 1234/2007, now article 209 Regulation 1308/2013.

³⁵ Productschap Tuinbouw Case 09/0346BAW/sec – Erkenning Kompany, Decision June 19, 2009 (not published).

³⁶ ACM case 13.0556.22 – Kompany – Komosa – Sunquality, Decision August 23, 2013.

³⁷ ACM case 7285 – FresQ, Informal opinion Oktober 31, 2011. The informal opinion was anonymized. However, based on reports in the agricultural press it can be deduced that the informal opinion relates to FresQ.

³⁸ See article 27 Dutch competition act.

³⁹ ACM case 7310 - Van Nature & Best of Four, informal opinion February 3, 2012. The informal opinion was anonymized. However, based on the case number it can be deduced that the informal opinion relates to proposed merger between Van Nature & Best of Four. See footnote 41.

⁴⁰ See: article 29 Dutch competition act.

organisations themselves. Eventually the proposed merger was notified to and cleared by the ACM.⁴¹

Comments

Of the four discussed informal opinions, three concerned the concept of the single economic entity. There are notable differences in approach in the FresQ case as compared with the Van Nature & Best of Four case. FresQ, Versdirect.nl, and Best Growers Benelux were each CMO-recognised producer organisations. The obvious question is why the ACM assessed the FresQ case differently from the Versdirect.nl and Best Growers Benelux case. Most probably this had to do with the fact that FresQ was not in control of sales of its members produce. The core activity of a CMO-recognised producer organisation in the fruit and vegetable sector is the planning of the production of its members, the bundling of supply and the sale of the products in accordance with the CMO rules.⁴² According to the judgement in France vs European Commission, a CMO-recognised producer organisation can only perform this core activity if “*une partie significative de la production des membres est vendue par l’intermédiaire de l’organisation de producteurs*”.⁴³ By “*sale*”, it is then meant that the producer organisation must sell the produce, select the sales channel and, unless the sale is executed through an auction, negotiate with customers on quantities and prices. This regulation is now codified in article 26, paragraph 1, Regulation 543/2011. According to the judgement in The Netherlands vs Commission,⁴⁴ FresQ was not to be regarded as being in control of sales. Its members were, in violation of the CMO rules, allowed to sell their own produce. Recently, the CBb confirmed this conclusion in its judgement of April 25 2017.⁴⁵ Accordingly, in the informal opinion of October 31, 2011, the ACM rightly held that the FresQ producer members were “*independent undertakings*”.⁴⁶ Van Nature & Best of Four on the other hand abided by the CMO rules. Consequently if the producer organisation is in control of sales, the producers together with the producer organisation of whom they are member form an single economic entity. The behaviour within this single economic entity is not subject to the prohibition of cartels.

Sustainability

- (i) Animal husbandry antibiotic resistance covenant⁴⁷
Stakeholders in the pigs, calves, broilers and cattle sectors (dairy cattle and meat cattle) had concluded the Animal husbandry antibiotic resistance Covenant on December 3 2008. Under this covenant it was agreed that farmers would enter into a bilateral contractual relationship with a recognised veterinarian. This aimed at counteracting antibiotic resistance. In the dairy sector, dairy processing companies adapted their quality systems to the covenant and imposed the agreements from the covenant on all their client cattle farmers. Two veterinarians lodged a complaint with the ACM.

The ACM had to assess whether there was a restriction of competition in two markets, (i) the veterinary services market by veterinarians to livestock farmers, and (ii) the market for product delivery by livestock farmers to the manufacturing industry. The ACM concluded that there was no violation of either the national or European cartel prohibitions. According to the ACM, competition was not appreciably affected.

⁴¹ ACM case 7310 - Van Nature & Best of Four, decision February 27, 2012.

⁴² See article 26 paragraph 1 Regulation 543/2011.

⁴³ ECJ September 30 2009 (France vs European Commission) case T-432/07, ECLI:EU:T:2009:373, decision ground 54.

⁴⁴ ECJ November 6 2014 (Netherlands vs European Commission) case C-610/13, ECLI: EU:C:2014:2349.

⁴⁵ CBb Case 15/7 7850 (ECLI:NL:CBB:2017:123), FresQ / Deputy Minister for Economic Affairs, judgment April 25 2017.

⁴⁶ Note that this interpretation is upheld by the Advocate General in the French endive cartel case (case C-671/15).

⁴⁷ ACM case 13.0256.53 – Veterinarians, Decision on objection December 18, 2014.

Meanwhile, the contractual bilateral relationship between the cattle keeper and the veterinarian is prescribed by law.⁴⁸

(ii) Anaesthetised castration of pigs⁴⁹

On November 29 2007 various branch organisations in the pigmeat sector, issued the so called “*Declaration of Noordwijk*”.⁵⁰ The aim was to end the non-anaesthetised castration of pigs by the end of 2015. For the transitional period, a system was created which would eventually bring about a situation whereby no fresh pork meat from non-anaesthetised castrated pigs could be purchased via supermarkets affiliated with the Centraal Bureau Levensmiddelenhandel (Central Grocery Bureau). The branch organisations asked the ACM to analyse the system they set up.

Two elements of the system were relevant from a competition law point of view. First, a fund managed by slaughterhouses would be set up from which participating pig farmers could receive a one-time contribution for the purchase of anaesthetic equipment. The fund would be filled with a surcharge of EUR 0.03 per kilogram of pork meat (about 1% of the purchasing price) paid by the supermarkets during the start-up period. Secondly, supermarkets would not buy pork meat from non-anaesthetised castrated pigs.

Because of the limited duration for which the compensation fund would be set up and the (very) low level of surcharge that supermarkets would have to pay per kilogram of fresh pork meat purchased, the ACM came to the conclusion that there was no indication that the system created by the branch organisations would manifestly lead to anti-competitive effects within the meaning of the Dutch prohibition of cartels. The ACM made one provision. The slaughterhouses would at all times have to retain freedom of choice to sell meat from both anaesthetised and non-anaesthetised castrated pigs.

(iii) Chicken of Tomorrow⁵¹

Under the Chicken of Tomorrow initiative, supermarkets, poultry farmers, and broiler meat processors would only sell chicken meat produced under enhanced animal welfare-friendly conditions. Furthermore Dutch supermarkets would remove regular chicken meat from their shelves.

The ACM analysed the Chicken of Tomorrow initiative under both the national and European cartels prohibition. It assessed that consumers are prepared to pay more for animal-welfare and environmental improvements. They are, however, not prepared to pay for the measures of the Chicken of Tomorrow initiative. This led the ACM to the conclusion that consumers would not benefit from these arrangements. Hence the arrangements would restrict competition. Chris Fonteijn, Chairman of the Board of the ACM, declared: “*I do not believe that it is necessary to make joint arrangements about removing regular chicken meat from supermarket shelves*”.

Comments

In recent years, the ACM has increasingly viewed sustainability initiatives from an economic angle. This has led to the ACM to reject some initiatives, with Chicken of Tomorrow being a prominent example. The ACM's recent approach to assessing sustainability initiatives caused

⁴⁸ State Newspaper 2013 nr. 23390.

⁴⁹ ACM case 6455 - Verdoofd castreren van varkens, informal opinion Oktober 27 2008.

⁵⁰ The declaration is available at: <http://www.lto.nl/media/default.aspx/emma/org/10819734/F1729599267%2fnoordwijk.pdf>. [last checked June 12, 2017]

⁵¹ ACM analysis of the sustainability arrangements concerning the ‘Chicken of Tomorrow’ January 26 2015, available at: <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition/>. [last checked on June 11 2017]

indignation in Dutch society. The ACM was seen as an obstacle to genuine sustainability initiatives. This reaction persuaded the Dutch government decide to announce the introduction of special legislation is going to be introduced.⁵² The aim is to create more room for sustainability initiatives without violating competition law. To this end, among others, a consultation was launched on May 15 2017.⁵³ However, the question is what room there is from a European competition law perspective to exempt national sustainability initiatives from the prohibition of cartels once the initiative affects the entire Dutch territory.⁵⁴

1.5. Are there in your country legal provisions or a non-binding code of conduct on unfair trading practices in the food chain (for example with regard to the pricing of agricultural products) Would you consider it reasonable to regulate such unfair practices and if yes, what should be the content of such regulation?

In the Netherlands there are no legal provisions on trading practices in the food chain, nor a non-binding code of conduct. There was however a pilot exercise with the so-called Code of conduct fair trade practices agrofood (Gedragscode eerlijke handelspraktijken agrofood).⁵⁵ According to the Minister for Economic Affairs this pilot exercise did not reveal serious problems. No formal complaints were submitted and there were no clear indications of current issues of unfair commercial practices.⁵⁶

2. EU anti-trust law

2.1. In your country how many producer organisations, associations of producer organisations and interbranch organisations have been recognised in accordance with Regulation (EU) No 1308/2013 (broken down by sectors, as appropriate)? Are there official statistics or a publicly accessible register on such recognised agricultural organisations?

There is no official Dutch register where the CMO-recognised producer organisations, UPOs and interbranch organisations are listed.⁵⁷ However on the website of the Netherlands Enterprise Agency (Rijksdienst voor Ondernemend Nederland – RVO) thirteen entities can be identified that were recognised as a producer organisation on August 9 2016. What is noticeable is that the Producers Organisation Pig farming (Producentenorganisatie Varkenshouderij – POV) is not listed, while it is recognised by the Minister for Economic Affairs as a producer organisation.⁵⁸ Thus, at the time of writing there are currently fourteen CMO-recognised producer organisations in the Netherlands: thirteen in the fruit and vegetable sector and one in the pig farming sector.

At the moment there is no recognised Dutch UPO. However, the Dutch recognised producer organisation Coöperatieve Royal Fruitmasters Group U.A. is member of the transnational UPO European Fruit Cooperation (EFC) recognised in Flanders.⁵⁹

⁵² Parliamentary Papers 30196 nr. 480.

⁵³ The consultation including the draft Act room for sustainability initiatives is available at: https://www.internetconsultatie.nl/ruimte_voor_duurzaamheidsinitiatieven. [last checked June 11 2017]

⁵⁴ See: Letter European Commission February 26 2016 to the Dutch Ministry of Economic Affairs regarding the proposed sustainability policy document. Available at: <https://zoek.officielebekendmakingen.nl/blg-775505> [last checked June 23 2017].

⁵⁵ The text of this code of conduct is available at: <http://www.lto.nl/media/default.aspx/emma/org/10835128/Handleiding+Gedragscode+Eerlijke+Handel+praktijken+Agrofood.pdf>. [last checked June 13 2017]

⁵⁶ Parliamentary Papers 28973 nr. 178.

⁵⁷ See: <http://www.rvo.nl/sites/default/files/2016/08/Overzicht-erkende-producentenorganisaties.pdf>. [last checked June 13 2017].

⁵⁸ Parliamentary Papers 33910 nr. 22 and 33910 nr. 22. The recognition decision is, as far as can be checked, not published.

⁵⁹ See: <http://www.efcfruit.com/nl> [last checked June 13 2017]. See also: J. Bijman en A. Saris in Support

The Vereniging ZuivelNL (dairy), the Stichting Organisatie Kalvesector (calves), the Stichting OVUNED (eggs) and the Stichting PLUIMNED (poultry) are recognised as interbranch organisation as of 1 January 2015.⁶⁰ The recognitions of the Vereniging Brancheorganisatie Granen (cereals), Vereniging Brancheorganisatie Suiker (sugar) and the Vereniging Brancheorganisatie Aardappelen (potatoes) were more problematic, albeit these interbranch organisations have also been recognised. Finally in 2016 also the Vereniging G&F Nederland (fruit and vegetables) and the Brancheorganisatie Sierteeltproducten (non-edible horticultural product) were also recognised.⁶¹ All in all, there are nine CMO-recognised interbranch organisations in the Netherlands, whilst as at February 22 2017 there were no requests for CMO-recognition of agricultural organisations pending.

2.2. Do you consider that agricultural organisations recognised in accordance with Regulation (EU) No 1308/2013 are only exempted from the prohibition of cartels under Article 101 TFEU or are they also exempted from any national prohibition of cartels? If they are not exempted from national prohibitions of cartels, does this pose a problem and if yes, how is this issue addressed by national law?

The Dutch Competition Act contains a special provision such that European exemptions from the prohibition of cartels also have direct effect in the national Dutch legal order.⁶² No special exemptions for recognised agricultural organisations exist. However these organisations can of course benefit from the national exemptions (provided the requisite conditions are met), the most notable exemption being the de minimis exemption.⁶³ There are in fact two alternative de minimis exemptions, of which the second can be especially relevant for the agricultural sector: the **Dutch** prohibition of cartels does not apply to agreements, decisions and concerted practices, if (i) the combined market share of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice is not greater than 10 per cent on any of the relevant markets affected by the agreement, decision or concerted practice and (ii) the agreement, the decision or the concerted practice does not appreciably affect trade between Member States.

2.3. Do you consider the quantitative ceilings in Articles 149, 169, 170 and 171 of Regulation (EU) No 1308/2013 to be reasonable? Are these provisions used in practice in the sense that the jointly managed volumes are actually reported as required in the said provisions?

A producer organisation which in accordance with its articles of association aims to bundle and sell its members' products as provided for by article 152 of Regulation 1308/2013, does not act in breach of the prohibition of cartels. In this case the CMO rules are considered to have precedence over the competition rules.⁶⁴ Moreover, it should not be forgotten that under Regulation 1308/2013 producer organisations and UPOs can also be recognised if they hold a dominant position. Under Regulation 1234/2007, this was only possible if necessary in pursuance of the objectives of Article 33 of the TFEU.⁶⁵ In this respect, the provisions made for by articles 149, 169, 170 and 171 Regulation 1308/2013 are considered to be a limitation and certainly no extension from the prohibition of cartels.

In the Netherlands these provisions are not used.⁶⁶

for Farmers' Cooperatives - Case Study Report European Fruit Co-operation (EFC), available at: <http://edepot.wur.nl/244999> [last checked June 13 2017].

⁶⁰ Parliamentary Papers 33910 nr. 22.

⁶¹ Parliamentary Papers 33910 nr. 26.

⁶² See: article 12 Dutch Competition act.

⁶³ See: article 7 Dutch Competition act.

⁶⁴ See: footnote 33.

⁶⁵ See: articles 125b paragraph 1 under g and 125c under b Regulation 1234/2007.

⁶⁶ Study on agricultural interbranch organisations in the EU pag. 90. The study is available at:

2.4. What is your assessment of the specific time-limited exemptions of cartels in the dairy sector as provided for by Regulation (EU) No 2016/558 and by Regulation (EU) No 2016/559? Do you consider such exemptions to be an appropriate instrument for dealing with market crises?

ZuivelNL confirmed that this time-limited exemption was not used. However, consideration was given to using the exemption in the context of the phosphate plan.⁶⁷ Eventually, an exemption was not required, because the intended phosphate reduction was to be achieved by national legislation.

It is also a question of whether it is an appropriate instrument. In general, production is planned quite far ahead. After this planning phase production cannot be stopped. Plants keep growing. We are not dealing with a factory where a production unit can be temporarily shut down.

2.5. Is there exercise in your country of the option to make decisions of recognised agricultural organisations extended to non-members and to provide for obligatory contributions of non-members to the financing of agricultural organisations (Articles 164 and 165 of Regulation (EU) No 1308/2013)? Do you consider this instrument to be reasonable and fit for application in practice?

The extension of rules of and the obligatory contributions of non-members to the financing of recognised agricultural organisations is governed by the Regulation on producer and interbranch organisations (Regeling producenten en brancheorganisaties). It should be noted, however, that the rules of producer organisations and UPOs in the fruit and vegetable sector are excluded. For this purpose, the Regulation implementing CMO fruit and vegetables (Regeling uitvoering GMO groenten en fruit) applies. However, the latter regulation does not provide for the extension of the rules of producer organisations and UPOs in the fruit and vegetables sector nor for obligatory contributions to these organisations.

In April 2016, the Minister for Economic Affairs accepted requests from the Cereals, Sugar and Potatoes interbranch organisations with regard to the extension of research activities in the context of the Joint Research and Innovation Program and the related obligation to pay financial contributions, as well as a registration obligation for non-affiliated producers.⁶⁸ In November 2016 the Dutch government wanted the dairy sector itself to take measures to reduce phosphate production.⁶⁹ This was necessary to maintain the so-called derogation.⁷⁰ One of the measures that should be taken in this context was the reduction of livestock. Interbranch organisations in the sector would draw up measures for this purpose. These measures would then be extended to non-affiliated farmers so they also could be forced to reduce their livestock. Eventually, this plan was abandoned, as the lead-time would be too long.⁷¹ This is not convincing argument; in light of the BIDS judgement,⁷² it cannot be ruled out that these measures would be contrary to the prohibition of cartels. If applicable the measures would not be extendable. At this moment one request for extension of rules of the Brancheorganisatie Sierteelproducten is pending. In addition, the Ministry of Economic Affairs is conducting consultations with the Stichting

https://ec.europa.eu/agriculture/external-studies/2016-interbranch-organisations_nl. [last checked June 14 2017]

⁶⁷ See: the answer to question 2.5.

⁶⁸ Communication from the Minister for Economic Affairs regarding decisions pursuant to Article 5:2 of the Regulation on producer and interbranch organisations of April 29 2016, State Newspaper 2016 Nr. 23394.

⁶⁹ Parliamentary Papers 34532 nr. B, pag. 2-3.

⁷⁰ OJ EU 2014, L 148.

⁷¹ Parliamentary Papers 34532 nr. 98.

⁷² ECJ November 20 2008 (BIDS) case C-209/07, ECLI:U:2008:643, decision ground 34.

PLUIMNED, Stichting OVONED and the Stichting Brancheorganisatie Kalveren about the binding of rules regarding studies on animal diseases / animal health and antibiotics.

It should be noted that the extension of the rules of and obligatory contributions of non-members to the financing of recognised agricultural organisations is a rather new phenomena in the Netherlands. Until 2014 we had product boards (productschappen). Product boards were public governing bodies fulfilling various tasks. Within the framework of these tasks, they could establish general rules and impose charges. These rules and charges were binding for every undertaking active in the relevant sector. With the dissolution of product boards there is a growing interest in the possibility to extend rules from and impose obligatory contributions of non-affiliated farmers to the financing of recognised agricultural organisations.

The extension of the rules of CMO-recognised agricultural organisations is in itself a good means of implementing sector-wide measures. However, the above-mentioned plan to reduce phosphate production shows that space is limited as soon as competition law is involved. In addition, it has proved difficult to collect obligatory financial contributions from non-affiliated farmers. The privacy rules prevent the government from exchanging personal data with agricultural organisations that have to collect the obligatory contribution.⁷³

2.6. Should, in addition to recognised agricultural organisations, agricultural cooperatives and other agricultural groupings also enjoy privileges under anti-trust law? If yes, do you consider the provisions in the second subparagraph of Article 209(1) of Regulation (EU) No 1308/2013 to be sufficient?

It should be noted that article 209 Regulation 1308/2013 already has a very broad scope. In addition to CMO-recognised producer organisations and UPOs, non-recognised “farmers’ associations, or associations of such associations” can also benefit from the second exemption. The problem is rather that it is quite difficult to meet the conditions for this exemption.

2.7. What is the understanding in your country of the meaning of the provision in relation to charge an identical price in the third subparagraph of 209(1) of Regulation (EU) No 1308/2013 and do you see a need for further clarification?

It should be observed that when the wording of article 209 paragraph 1 Regulation 1308/2013 is compared with the wording of article 176 paragraph 1 subparagraph 2 Regulation 1234/2007, one can see that the Dutch text differs. When subsequently different language versions are compared, the differences are even greater.

	Regulation 1234/2007	Regulation 1308/2013
Dutch	<i>zonder de verplichting in te houden een bepaalde prijs toe te passen</i>	<i>die de verplichting inhouden identieke prijzen toe te passen</i>
English	<i>under which there is no obligation to charge identical prices</i>	<i>which entail an obligation to charge an identical price</i>
French	<i>sans comporter l'obligation de pratiquer un prix déterminé</i>	<i>qui comportent une obligation de pratiquer un prix déterminé</i>
German	<i>soweit sie ohne Preisbindung</i>	<i>die zu einer Preisbindung verpflichten</i>

In Regulation 1308/2013 the Dutch version seems to be aligned to the English version. The question is whether this was intended. It is very well possible that it is merely a matter of translation. In Regulation 1234/2007 the concept of “*bepaalde prijs*” in the Dutch version looks to be the translation of “*prix déterminé*” in the French version.⁷⁴ The latter concept is upheld in

⁷³ Parliamentary Papers 33910 nr. 26.

⁷⁴ The concept of “*bepaalde prijs*” can be translated in English as a “*determent price*” but also as a “*particular price*”.

the French version of Regulation 1308/2013. Clarification of the concept itself would be helpful.

In the manual concerning the competition rules in the agricultural sector issued by deputy Minister for Economic Affairs in 2015,⁷⁵ it is not explained how the concept of “*identieke prijzen*” in Regulation 1308/2013 should be interpreted. Instead, reference is made to an unnamed ACM decision in which the ACM supposedly ruled that the tuning of daily and weekly prices by a non-recognised organisation constituted an obligation to apply a “*bepaalde prijs*”. One can see that the concept of “*bepaalde prijs*” is being used as a synonym for “*identieke prijs*”. To date there is no Dutch case law regarding the application of article 209 paragraph 1 Regulation 1308/2013, so we do not yet know whether the deputy Minister’s implicit interpretation is correct.

When looking at the case law regarding article 176 paragraph 1 subparagraph 2 Regulation 1234/2007, it can be observed that the obligation to apply a “*bepaalde prijs*” is assumed quite readily. An example of this is the interim judgement of the District Court of Rotterdam in the Bell Pepper case. The District Court ruled that in the Oude Luttikhuis judgment the European Court of Justice has given a broad indication of the obligation to apply a “*bepaalde prijs*”, by assessing whether the agreements and conduct in question “*do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products*”.⁷⁶ From this it follows that it is only important “*whether the agreements relate to the prices of bell peppers...*”⁷⁷

This rather broad interpretation is mirrored by the ACM decision in the Silverskin Onions case. In the context of the aforementioned decision ground from the Oude Luttikhuis judgement, the ACM considered that the exchange of information on prices to be charged can be regarded as an obligation to apply a “*bepaalde prijs*”.⁷⁸ Most probably this was the unnamed ACM decision the deputy Minister for Economic Affairs referred to in the manual mentioned above.

Assuming that the case law regarding article 176 Regulation paragraph 1 subparagraph 2 1234/2007 is also relevant for the application of article 209 of Regulation 1308/2013, it is considered that the very broad interpretation of the obligation to apply “*identieke prijzen*” makes it almost impossible to meet the conditions of the exemption in question. In view of this, it will be useful to get clarity as to what room there actually is.

2.8. What is the understanding in your country of the meaning of the provision in relation to the exclusion of competition in the third subparagraph of 209(1) of Regulation (EU) No 1308/2013 and do you see a need for further clarification?

As mentioned above, there is no Dutch case law regarding the application of article 209 paragraph 1 Regulation 1308/2013. With regard to the concept of “*exclusion of competition*” the case law regarding the application of article 176 paragraph 1 subparagraph 2 Regulation 1234/2007 is rather opaque. A striking exception is the ACM decision in the Silverskin Onions case. Here the ACM concluded that during the entire term of the agreement competition was “*seriously reduced*”. The fact that the undertakings concerned had a 70% market share in the European silverskin onions market was considered to be important by the ACM because it

⁷⁵ See: footnote 6.

⁷⁶ ECJ December 12 1995 (Oude Luttikhuis) C-399/93 (ECLI:NL:RBROT:2014:4689) decision ground 27.

⁷⁷ District Court of Rotterdam June 12 2014 Case 13/247, 13/248, 13/249, 13/250, 13/251, 13/252, 13/5771, 13/5772, 13/5774 (ECLI:NL:RBROT:2014:4689) decision ground 10.13. Because of the settlement, the CBb has not had an opportunity to comment on this interpretation.

⁷⁸ ACM case 6964 – Zilveruien, decision May 25 2012, paragraph 227. In appeal, the District Court of Rotterdam nor the CBb commented on this aspect.

showed that the “*exclusion of competition*” by the undertakings involved, major players in the European market, could have a “*proper effect*”.⁷⁹ This implies that a “*reduction of competition*” is considered synonymous with “*exclusion from competition*” provided that competition is “*seriously reduced*”. Again, this interpretation is very broad. For day-to-day practice, it would be rather helpful if the present concept could be more clearly defined.

Furthermore, it should be noted that Dutch case law shows that the third condition, not endangering the goals of the CAP, is also hard to meet. A good example is again the Silverskin Onions case. The CBb ruled that the sown area agreements in which silverskin producers engaged in endangered the objective to ensure that supplies reach consumers at reasonable prices.⁸⁰

2.9. Is the option to regulate contractual relations (Articles 148 and 168 of Regulation (EU) No 1308/2013) used in your country? If yes, which agricultural products are subject to such regulation? Do you consider this instrument to be useful?

To this date this option is not used in the Netherland.

For reports from non-EU countries: Should there be instruments or regulation in your country comparable to those mentioned in section 2 of this questionnaire? Please answer the questions mutatis mutandis.

3. General questions

3.1. Has in the last decade a public discussion taken place in your country regarding the question as to whether the legal position of agriculture in the marketing chain should be strengthened? If yes, what was or is the content of this discussion? Did it lead to reforms or reform proposals?

On May 24, 2016, the Dutch Lower House adopted a motion by Kamerlid Van Gerven.⁸¹ In this motion, the Dutch government was invited to consult with the ACM on how to detect and combat abuse of purchasing power (monopsony) by supermarkets. This did not however lead to reforms or reform proposals. The Dutch government assumed that there was no evidence of serious problems.⁸² The ACM for its part takes the stance that there is no need for intervention if the benefits of any such arrangements are passed on to consumers.⁸³

3.2. When you look at your national agricultural competition law or EU agricultural competition law as a whole, do you consider that there is a need for reform? If yes, which points should the reform concentrate on?

With the exception of the scope of the recognition of producer organisations, it is not so much the question of whether EU agricultural competition law should be reformed. There is, rather, a pressing need for clarity and up-front legal certainty.

Scope of recognition

Only in the fruit and vegetable sector can a producer organisation be recognised for one more specific products. In the other sectors the recognition covers the entire sector.⁸⁴ Some sectors

⁷⁹ Decision ACM Ma5 25 2012, paragraph 228. See: footnote 17. In appeal, the District Court of Rotterdam nor the CBb commented on this aspect.

⁸⁰ CBb March 24 2016 decision ground 4.5.4. See: footnote 16.

⁸¹ See: footnote 7.

⁸² See: footnote 8.

⁸³ ACM Vision Paper Purchasing Power (2004) and speech by Henk Don board member of the ACM October 6 2011.

⁸⁴ See: article 159 in combination with article 152 paragraph 1 subsection a Regulation 1308/2013.

include too many different products. This impedes the creation of producer organisations. Adaption of the rules for CMO-recognition is therefore desirable.

Clarity

- (i) Scope of article 152 Regulation 1308/2013
According to article 152 paragraph 1 Regulation 1308/2013 producer organisations can / have to pursue the following objectives: (i) planning of production, (ii) bundling of supply and (iii) placing on the market of the products produced by its members. These objectives are at loggerheads with the competition rules. As such it should be made clear that article 152 Regulation 1308/2013 takes precedence over the competition rules in case a producer organisation pursues the objectives for which it has been recognised,⁸⁵ provided of course, that the producer organisation does not go beyond what is strictly necessary in order to realise these objectives.
- (ii) Scope of the mandatory activities of producer organisations
The wording of Article 152 paragraph 1 Regulation 1308/2013 states that producer organisations should pursue a specific aim which may include at least one of the listed objectives. In the fruit and vegetable sector producer organisations, the first three of these objectives are mandatory.⁸⁶ This implies that, with the exception of the fruit and vegetable sector, producer organisations in every sector covered by Regulation 1308/2013 can choose to market only the produce of its members. It should be made clear that the pursuit of this objective alone does not violate competition law.
- (iii) Single economic entity
As explained in the answer to question 1.4 above, it is much-debated whether farmers can form a single economic entity with the producer organisation of which they are member. Therefore, the conditions should be set when farmers form an single economic entity with their producer organisation.
- (iv) Second exemption of article 209 paragraph 1 and article 210 paragraph 4 Regulation 1308/2013
As explained in the answers to questions 2.7 and 2.8 above it would be very helpful if it was explained in detail what the three negative criteria entail precisely. The same applies to article 210 paragraph 4 Regulation 1308/2013. All the more because the latter stipulation is also applicable with regard to the extension of rules.⁸⁷

Up-front legal security

EU agricultural competition law is not clear, transparent or understandable for farmers and their associations. This, along with the harsh interventions by the competition authorities, frightens farmers and their associations off. If farmers and their associations get up-front legal certainty that their plans are not violating EU competition law this could be remedied. One possibility is to introduce a procedure comparable to the one described in article 210 paragraph 2 Regulation 1308/2013. An informal opinion/comfort letter is another possibility.

⁸⁵ See: footnote 33.

⁸⁶ See: article 160 paragraph 1 Regulation 1308/2013.

⁸⁷ See: article 164 paragraph 4 Regulation 1308/2013.