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Commission II – Kommission II

THE EFFECT OF EUROPEAN AND NATIONAL COMPETITION LAW ON THE AGRICULTURAL SECTOR

L'ECONOMIE AGRICOLE FACE AU DROIT DE LA CONCURRENCE EUROPEEN ET NATIONAL

DIE AGRARWIRTSCHAFT IM LICHTE DES EUROPÄISCHEN UND NATIONALEN WETTBEWERBSRECHTS

National Report – Rapport national – Landesbericht

The Netherlands – les Pays Bas – die Niederlande

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Dutch report – Rapport hollandais – Holländischer Bericht

Dutch competition law and its significance in the agro-food sector

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Introduction

As from 1998 competition law in the Netherlands closely resembles European competition law. However, unlike Article 36 of the EC Treaty and the provisions based on it, there are no specific provisions for the agro-food sector. Dutch competition law is enforced exclusively under administrative law.[1] Supervision of compliance with the Dutch Competition Act is the responsibility of the Netherlands Competition Authority (NMa).[2] NMa provides an informative website.[3] The most important documents on the website, like the Competition Act and the annual reports, are available in the English language. These documents provided most of the material and examples that have been used in this account.

1. National Competition Law

1.1) Legal foundation of Competition Law in the Netherlands

1.1.1) Which legal basis has Dutch legislation for competition law?

The Competition Act

On 1 January 1998 a new Dutch Competition Act entered into force and simultaneously the Netherlands Competition Authority started its operations.

This Competition Act was adopted by the Dutch Parliament in 1997[4] and provided a completely new legislative basis for competition policy. The Dutch Competition Act is based on and closely linked to European law. The Act is based on a prohibition system similar to that of Articles 81 and 82 of the EC Treaty. The Dutch Competition Act also includes a system of preventive concentration control, which is similar to the EC Merger Regulation.

There are a number of fundamental differences between the new Dutch Competition Act and its predecessor, the Dutch Act on Economic Competition. One of these is that the new legislation includes a prohibition system, banning all competition-restricting arrangements and practices unless the organisation in question has been granted an exemption or dispensation. The monitoring of concentrations also constitutes a new element in Dutch legislation.

The Dutch Competition Act has introduced bans on:

- cartel arrangements;
- abuse of a dominant position;

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1 For an English translation of the Dutch General Administrative Law Act: http://www.justitie.nl/Images/11_11380.doc

2 In Dutch: Nederlandse mededingingsautoriteit.

3 See: www.nmanet.nl

4 Published on 22 May 1997; Stb. 1997, 242. Translation: http://www.nmanet.nl/en/Images/14_5843.pdf

- concentrations (mergers, acquisitions and specific types of joint venture) without prior notification.

The former Act on Economic Competition was based on the abuse system and therefore condoned cartels unless they were explicitly prohibited, in addition to which general bans applied to 'hard-core' cartel constructions. The new Competition Act has turned things around in that all cartels are now banned unless explicit permission has been given in the form of an exemption.

The Competition Act provides general parameters for assessment of the prohibition of cartels and the option to be granted exemption from this prohibition (Articles 6 and 17 of the Dutch Competition Act), the prohibition of abuse of a dominant position (Article 24 of the Competition Act) and the control of concentration (Chapter 5 of the Competition Act). These parameters have been formulated through "open standards". The key element of such general parameters for assessment is that the specific market situation and competitive relations should be assessed for each case individually. The advantage of a set of general assessment parameters is that the instruments provided by the Competition Act can be applied with a certain degree of flexibility, while the Competition Authority is in a position continually to make allowance for changing market conditions.

European Competition Law

European Competition Law has a considerable influence on Dutch competition law. Firstly the NMa is, according to Article 88 of the Netherlands Competition Act, competent to apply Article 81(1) and Article 82 of the EC Treaty. The director general of the Competition Authority shall exercise the power, as afforded pursuant to the Regulations based on Article 87 of the EC Treaty, to apply Article 81(1) and Article 82 of the Treaty, as well as the existing power, pursuant to Article 84 of the Treaty, to determine the admissibility of competition agreements and the abuse of a dominant position in the common market. Furthermore the criteria established in the Dutch Competition Act are similar to the ones established in European Competition Law. This makes for instance the case law of the European Court of Justice very important for the application and interpretation of Dutch competition law.

The Competition Authority

The Netherlands Competition Authority is an agency of the Ministry of Economic Affairs, but it operates at a distance from the Ministry, while making its decisions independently. The independence of the Netherlands Competition Authority is qualified, because the Minister of Economic Affairs has the power to issue instructions to the director general of the Netherlands Competition Authority. This construction is meant to preserve the Minister's responsibility and accountability to Dutch Parliament. However, the Minister does not intend to use the power to issue instructions in individual cases and has announced that the Netherlands Competition Authority will be given maximum independent status, meaning that the Minister would formally lose this power. On 15 September 2000 the Dutch Council of Ministers has accepted a proposal of the Minister of Economic Affairs to change the status of the Netherlands Competition Authority into a so-called autonomous administrative organisation ('*zelfstandig bestuursorgaan*'). This proposal is still under debate in Parliament. As a result of this new Bill, the director general would be replaced by a Board of Directors, consisting of three members.

On 1 January 1998 the Netherlands Competition Authority started off with a 70-strong workforce, whose number have now increased to some 300. The first Director-General was A.W. Kist. He held his office for exactly five years. So far no successor has been appointed.

The NMa has issued the following mission statement:

- On the basis of the applicable legislation, NMa regulates the proper functioning of all markets for goods and services. NMa promotes competitive relationships which are ultimately to the advantage of customers and – partly for this purpose – of companies which, for example, are confronted with restraints on competition on entering the market.

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Legal protection

If an interested party does not agree with a ruling issued by the NMa, that party may seek legal protection.

As the director general of NMa is an administrative authority, the rulings (and their preparation) are subject to the General Administrative Law Act of the Netherlands.

This implies, among other things, that prior to lodging an appeal with the courts, an administrative appeal has to be filed with the director general of NMa against a ruling.

Rulings in response to notification of a concentration and to application for a licence have been excluded from this under the Competition Act.

The administrative appeal must be filed within six weeks of publication of the decision against which it is aimed. Except where special circumstances apply, failure to comply with this requirement renders the administrative appeal inadmissible.

The file is made available for inspection by the relevant interested parties for the duration of the appeals procedure, with interested parties being invited to respond orally. Because they are under no obligation to do so, a hearing is not always organised.

A so-called Advisory Committee on Administrative Appeals advises on appeals aimed against decisions pursuant to which a sanction is imposed and which involve infringement of the ban on cartels or the ban on abuse of a dominant position. Prior to issuing an 'advice' (*Advies)*, the Advisory Committee invites the interested parties to be heard. In principle the decision on the administrative appeal follows within six weeks of receipt of the appeal. A ten-week term applies in the event that the Advisory Committee is required to issue its advice. However, this term is suspended if the appeal turns out to be incomplete. The General Administrative Law Act furthermore offers the option of granting a one-off extension by four weeks. However, some cases are sufficiently complex as to take more time to be dealt with because they require meticulous preparation. In the event that the interested parties disagree with such extension of the term, they have the option of lodging an appeal with the Rotterdam Court.

The Netherlands Competition Authority assesses cases on appeal on the basis of the evidence and rules in effect at the time of the appeal.. This means that the parties can submit both new evidence and new argument.

Example of a case where new evidence is taken into account

- Case 2491/Bols-De Kuyper
- *Contested decision:* In this case, Bols, UTO and De Kuyper filed a partial administrative appeal against an extensive decision in relation to an application for exemption in accordance with section 17 of the Competition Act regarding a joint operating agreement. This focused on the production, storage and distribution of 9 alcoholic beverages. Despite repeated requests for information from NMa during the initial stage, De Kuyper provided no information which showed that combining the production of these beverages would result in a cost saving for the beverage Advocaat. In relation to the beverage Advocaat, the application for exemption was therefore dismissed, since the joint operating agreement would not result in cost savings.
- *Consideration:* In the administrative appeals stage, however, De Kuyper did show that cost savings would result. After De Kuyper had confirmed this by means of a statement by an accountant of PriceWaterhouseCoopers, the director general of NMa, on the basis of the new factual material that was provided, was of the opinion that Bols' standpoint had been substantiated, namely that co-operation would result in efficiency improvements in relation to the production of Advocaat.
- In the decision on the administrative appeal, on the basis of the above, the partial administrative appeal was declared to be well founded and the exemption with regard to the combined activities in relation to Advocaat were granted retrospectively for ten years from

the date of the initial decision (29 March 2001). This is in line with the granting of the exemption for other beverages in the initial decision.

In the event that the undertakings concerned disagree with the decision on the administrative appeal, they have the option of lodging a judicial appeal with the Rotterdam District Court. Higher appeals can be filed with the Trade and Industry Appeals Tribunal (CBB[5]). The Dutch Competition Act may also be raised in proceedings between market parties. These cases are heard by the civil courts, often in summary proceedings.

1.1.2) Which instruments exist in Dutch legislation for the control of restrictions on competition?

According to Article 6 of the Dutch Competition Act, agreements, decisions and concerted practices are prohibited if they have as their objective or effect the prevention, restriction or distortion of competition.

Inspections

NMa monitors compliance with the Dutch Competition Act. To this end NMa officers have been given general powers (under the General Administrative Law Act) as well as specific powers (under the Competition Act). For example, NMa is at liberty to request information in writing as well as orally, enter business premises[6] and demand access to business documents. It carries out investigations in response to complaints received or at its own initiative.

Whenever it is established that the Competition Act has been violated, a report is drawn up while a penalty can ultimately follow against the offending party, for example by imposing a fine and/or an administrative order subject to penalty (or not, as the case may be).

Complaints

An interested party may submit a complaint. This is considered to constitute an 'application' (as defined by the General Administrative Law Act of the Netherlands) to NMa to use its discretionary powers to launch an investigation. NMa is under the obligation to respond to applications by interested parties.

The notion of 'having an interest' is therefore relevant in determining whether a the NMa may legally consider the complaint by way of an application. Pursuant to Section 2(1) of Book 1 of the General Administrative Law Act, an interested party is defined as one whose interests are directly involved in a decision.

Legal precedent stipulates that a person qualifies as an interested party provided he or it meets the following cumulative conditions: the interest must concern the party's 'own interest', which is 'objective'; moreover it must concern an 'actual' as well as 'personal' interest, which in addition should have a 'direct link' to the requested ruling.

If a complaint is filed by someone who does not qualify as an interested party, NMa is under no obligation to respond, but it may still launch an investigation on its own accord.

The notion of 'having an interest' is also pivotal in preparing specific decisions because the file of the case is available for inspection by those having such interest and only they are entitled to state their views or be heard. The upshot of all this is that the consumer does not always qualify as a party having an interest in terms of the General Administrative Law Act. Competitors usually do.

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[5] College van Beroep voor het bedrijfsleven. Sometimes translated as Industrial Appeals Tribunal, see e.g. European Court of Human Rights 19/04/1994 Van de Hurk vs. The Netherlands (http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/463.txt).

[6] Currently the question is under debate whether NMa should be given the power to enter and search people's homes against their will. So far – with very few exceptions – such power does not exist in Dutch administrative law.

Example of a decision taken pursuant to a complaint

- Case 1546/Weyl Beef Products
- Weyl Beef Products submitted a complaint against Stichting Saneringsfonds Runderslachterijen in relation to the Restructuring Scheme for Beef Abattoirs of 1995 *[Saneringsregeling runderslachterijen 1995]*. At an earlier stage, Stichting Saneringsfonds Runderslachterijen had applied for an exemption from the prohibition contained in section 6 of the Competition Act for the Restructuring Scheme.
- *Parties and markets:* This case involved two parties, namely Weyl Beef Products and Stichting Saneringsfonds Runderslachterijen.
- *Considerations:* The complaint of Weyl Beef Products was dismissed because the EU Court of First Instance ruled in relation to the same restructuring scheme that the restructuring was inseparably linked to the levy directive of the Product Board for Livestock and Meat *[Productschap voor Vee en Vlees].* This levy directive had already been approved in line with European rules for state support. There was no reason to deviate from the European line as formulated by the Court of First Instance.

Prioritisation

With its current capacity, NMa will not be able to take on all the cases that arise. Establishing which cases have priority is essential in this situation. NMa will therefore have to make a selection that optimises its impact. Effective law enforcement policy contributes as far as possible to the emergence and maintenance of actual competition. The following aspects may play a role in deciding on the priority given to cases:

- economic importance;
- importance for consumers;
- likelihood of establishing that a violation has occurred;
- effectiveness;
- seriousness of the supposed breach.

Settlement

In handling complaints, NMa has been applying a range of methods aimed at promoting compliance with the Competition Act. In addition to investigating complaints and issuing a ruling, NMa has in some cases - with the approval of the plaintiff - communicated such objections as it had established to the target company without issuing a formal ruling.

In some cases this has prompted the latter to alter its conduct, thus eliminating the incompatibility with the Competition Act.

1.1.3) Enforcement and sanctions

Introduction

The Dutch Competition Act is enforced under administrative law; there is no role for penal law.

Sanctions

As part of the enforcement of the Competition Act, the NMa can impose fines, which makes Dutch competition law consistent with European competition law. Fines are imposed to penalise those who actually violate the law and to deter potential offenders from doing so (general deterrent). In addition to the imposition of administrative fines, NMa is authorised to impose administrative orders subject to penalties (*'last onder dwangsom'*). These administrative orders can to a certain extent be compared to injunctions. For every day that, or for every instance in which, the company does not follow the order it has to pay a fixed amount of money. These measures are designed to terminate a violation and consequently serve a different purpose from a fine. As administrative orders and fines serve different ends, both can be imposed for the same offence.

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Fines

Fines can be imposed in the event of an infringement of the prohibition of cartels or the abuse of a dominant position. These are the material core provisions of the Dutch Competition Act. Fines may not exceed the higher of Euro 450 000 or 10% of the undertaking's annual turnover in these cases. The maximum fine is therefore related to turnover and can vary from one undertaking to another. With this choice, too, the legislators comply with the system that applies for the European Commission. The fine provisions of the Dutch Competition Act mean that the Netherlands Competition Authority must consider the level of the fine in each specific case, with the aim of effective application of the Act. The Act does provide instructions in this respect: the Netherlands Competition Authority must in any event take account of both the gravity and duration of the infringement when determining the level of the fine. Other circumstances of the case may also play a role, such as recidivism and the benefits gained through the infringement. In principle, the relevant undertaking's financial position or profitability does not play a role.

In addition to making the material core provisions of the Dutch Competition Act subject to fines, some other forms of conduct also face the penalty of administrative fines. For example, NMa can impose fines of up to Euro 4,500 for non-compliance with the commitment to co-operate in an NMa inspection. NMa can also impose fines for infringements as part of the supervision of concentrations. A maximum fine of Euro 4,500 can be imposed for non-compliance with regulations or failure to comply with the information requirements in relation to a request for a concentration licence. The Netherlands Competition Authority is authorised to impose fines of up to Euro 22,500 for the provision of inaccurate or incomplete information, non-compliance with the regulations for a concentration license, and a number of other infringements in relation to supervision of concentrations.

Guidelines for the Setting of Fines

Multiplying the fine basis by a certain factor. This factor increases To give the parties insight into the way the level of the fine is determined, NMa approved and published policy rules in December 2001; *The Guidelines for the Setting of Fines [Richtsnoeren Boetetoemeting]*.

In the case of fines imposed for failing to give (proper) notification of a merger or acquisition or failure to comply with the obligation to co-operate, the statutory maximum is not a percentage of the annual turnover of the undertaking in question, but a fixed amount. NMa adheres to the policy that the maximum fine of EUR 22,500 or EUR 4,500 respectively will be imposed, except if there are special mitigating circumstances.

The *Guidelines for the Setting of Fines* are based on the principle that the level of fines should be high enough that they restrain offenders from offending again (specific prevention), as well as deter potential offenders (general prevention). In determining the fine, NMa –as stated before- is required to take into account the seriousness and duration of the infringement, in accordance with Article 57 of the Competition Act. The seriousness of the infringement, according to the guidelines, depends first on the type of infringement.

The guidelines refer to three types of infringements: very grave, grave and less grave. Far-reaching horizontal restraints, such as price agreements, market distribution agreements and quota schemes are very grave infringements. Abuse of a dominant position of the type aimed at excluding or driving a company from a market fall into this category. The second category – grave infringements – includes, for instance, horizontal restraints which cannot be regarded as very grave infringements, individual vertical price maintenance, vertical prohibitions on sales to third parties and forms of abuse of a dominant position, such as discrimination and tied sales. The category of less grave infringements relates to schemes that only distort competition to a limited degree. These include, in particular, prohibited vertical schemes and branch schemes that restrain competition but which do not relate to prices and sales opportunities. The seriousness of the infringement is then determined on the basis of the type of infringement *and* the economic context in which the infringement occurred. In this regard, the nature of the products and services involved, the size of the market, the size of the company or companies

involved and its or their (joint) market share, the structure of the market and applicable regulations play a role.

In principle, the fine is based on a fine base of 10 percent of the 'turnover involved' of the undertaking in question.

The 'turnover involved' must be distinguished form the total annual turnover of the company. The 'turnover involved' is equal to the value of all the transactions realised by the undertaking for the entire duration of the infringement (not just one year) through the sale of goods and/or services to which the infringement relates (which need not be all the transactions made by the company).[7] If the information provided by the undertaking is inadequate, NMa may estimate the turnover involved. In certain cases, the turnover involved is difficult to determine because, for instance, it involves practices aimed at protecting a (dominant) position, which consists of not carrying out certain transactions or action aimed at excluding or eliminating a competitor. In the last case, the turnover involved is equal to the turnover of the undertaking during the period of the infringement on the market that was to be protected, subject to a minimum of one year.

The level of the fine is determined by in proportion to the severity of the infringement, taking into account the economic context. With regard to less grave infringements and depending on the seriousness of the offence, this factor is set at a maximum of 1. In the case of grave infringements, the maximum factor is 2. In the case of very grave infringements, the factor is set at a value ranging from 1.5 to 3. The importance of the undertaking involved to the Dutch economy, expressed in terms of its total annual turnover on the Dutch market may subsequently result in a situation where the resulting factor obtained has to be amended to have a deterrent effect. The fine may also be higher if aggravating circumstances give cause for an increase in the fine, such as previous infringements of competition rules. On the other hand, the amount of the fine may be lower in the event of mitigating circumstances, such as far-reaching co-operation.

It is only possible to deviate from the guidelines if the application of the guidelines would produce inequitable results. This will be the case, for instance, if the application results in the bankruptcy of the company in question. In addition, it is possible to deviate from the guidelines in special cases by imposing a symbolic fine.

By means of the *Guidelines for the Setting of Fines*, NMa has aimed to achieve a transparent policy that results in fines that have a deterrent effect. In doing so, NMa aims to achieve a situation where undertakings refrain from committing offences. Due to the threat of a fine, undertakings will be more inclined to terminate their prohibited practices in exchange for fine immunity or a reduction in the fine and to provide NMa with information on the cartel agreements in which they are involved.

Leniency

To increase the likelihood of detecting cartels, NMa has set up a Leniency Office. NMa also published Leniency Guidelines[8] *[Richtsnoeren clementietoezegging]*. In this way, NMa has taken an important step towards the quick and effective detection of secret and damaging cartels, which have direct consequences for customers and consumers.

The Leniency Guidelines state that NMa is willing to reduce the fine, relative to that of other offenders, in the case of an undertaking which, of its own accord, informs NMa of the infringement of the prohibition on cartels, in which it is involved, provides NMa with evidence of this cartel and fulfils certain conditions, for instance that it will give its full co-operation to NMa 's investigation. A policy such as this, also referred to as a leniency policy, is regarded by other competition authorities as an important law-enforcement instrument. With the aid of this

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7 The notion of 'turnover involved' is similar to the notion of 'affected commerce' that is used in US cartel policy.

8 Translation: http://www.nmanet.nl/en/Images/14_8180.pdf

leniency policy, it is possible to detect, terminate and penalise infringements of the prohibition on cartels more efficiently.[9]

Orders Subject to a Penalty

If a breach of the Competition Act is committed and the offence continues, NMa may impose an order subject to a penalty. The purpose of imposing an order subject to a penalty is to ensure that the offence ceases, or to prevent it repetition.

The order stipulates the action that must be taken or the action that must cease. Compliance with the order is enforced by means of a penalty, which the perpetrator is required to pay if he does not comply with the order. The decision establishes the time period within which the offender must carry out the order; after that deadline, the penalty is due.

It is possible to file an administrative appeal and subsequently a judicial appeal against the order subject to a penalty, in accordance with the provisions of Article 63(1) of the Competition Act. Filing an appeal has the effect of suspending the decision. The periods stipulated in the decision will not commence and the order subject to a penalty will not take effect while the administrative appeal or judicial appeal is being processed. The Competition Act, however, does provide for exceptional situations. In accordance with Article 63(2) of the Competition Act, NMa is granted the authority to determine expressly in a decision that the automatic suspension under this provision of an administrative or judicial appeal, has been waived, so that the period of grace commences one day after notice of the decision is served. NMa may exercise this authority if exceptional and important circumstances are present. NMa therefore has to weigh or balance the interests involved. Opinions differ with regard to the nature of this balancing of interests.

Case Law

- Case 1 Telegraaf/NOS-HMG
- The Presiding Judge of the District Court of Rotterdam made a ruling in this respect in the case of De Telegraaf/NOS-HMG, filed by NOS and HMG, following the decision taken by NMa on 16 February 2000.
- The order subject to a penalty required NOS and HMG to supply De Telegraaf with the weekly programme listings, subject to reasonable conditions. For every week that NOS and HMG did not supply the listings, they would forfeit a penalty of NLG 50,000. The Presiding Judge of the Court, however, was of the opinion that this was not proportionate to the financial loss incurred by De Telegraaf. In addition, the risk that NOS and HMG would suffer irreversible consequences was greater than the risk incurred by De Telegraaf.
- In granting NMa this authority, the legislature recognised that suspending the enforcement of the order may be especially damaging to the party on whose behalf the order is imposed. Partly on these grounds, the Presiding Judge of the District Court of Rotterdam interpreted Article 63(2) of the Competition Act to mean that NMa may (only) resort to waiving the automatic suspension in case of an appeal if there is a reasonable expectation that the disadvantage to the party in whose interests the order subject to a penalty is imposed will not only be serious, but also undoubtedly substantially greater than the disadvantage to the party on whom the order subject to a penalty is imposed.
- It is apparent from this that the Court is not satisfied with a simple balancing of interests, in which the interests of the opposing parties are balanced against each other.
- In addition to the above framework for the balancing of interests, the Court stated that the assessment depends largely on the circumstances of the case and that it is important to consider whether the suspension in case of an appeal will have irreversible consequences.

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[9] For a detailed account of the Dutch policy on fining and leniency in cartel cases, see: Monique van Oers and Bernd van der Meulen, *The Netherlands Competition Authority and its Policy on Fines and Leniency*, World Competition 26(1): 25-52, 2003.

If this is the case, there is every reason for the immediate enforcement of the order subject to a penalty. It is also important to consider whether the financial disadvantage is proportionate to the financial disadvantage to the party on whom the order subject to a penalty is imposed.

Provisional measures

Inspired by the European Camera Care case,[10] the Competition Act offers the opportunity to impose a provisional measure subject to penalty.[11] This has been done in view of the fact that the nature of infringements of the Competition Act can make it unacceptable for the alleged victim to have to await the NMa's penalty ruling or its imposition of an administrative order on the guilty party. In a case of refusal to supply or selective price-dumping, for example, the victim in question could easily have been pushed off the market by the time the penalty ruling takes effect.

Stringent requirements apply to the granting of a request for imposition of a provisional measure subject to penalty. These can be summarised as follows:

- it has to be a matter of a *prima facie* violation;
- it has to be a matter of pressing urgency in that the measure must be necessary to prevent irreparable damage or loss which cannot be redressed in the form compensation for damages or through another suitable means.

So far only one request for imposition of a provisional measure was granted.

Procedure

If NMa has reason to believe that a company has committed an offence and that an administrative order or fine should be imposed, a report is drawn up. The report and the file on which it is based are handed over by the directorate in question to the Legal Department. The report, which forms the basis of the sanctions proceedings instituted by the Legal Department, includes, for instance, the facts and circumstances that serve as the basis for determining that an infringement was committed. In addition, the name of the company involved and the name of the person or legal entity to whom NMa may attribute the infringement are stated. The Legal Department then invites interested parties to submit their opinions on the report in writing or verbally. It is possible to respond both in writing and (afterwards) verbally. After the parties involved have made their opinions known, the Legal Department prepares a well-argued decision.

NMa gives high priority to proceedings in relation to sanctions. The Competition Act stipulates that NMa is required is to take a decision within 13 weeks after the report is drawn up, in the case of proceedings in relation to sanctions as a result of the failure to give (proper) notification of a concentration or a breach of the obligation to co-operate. Such a term does not apply to other cases involving sanctions. Although NMa aims to take decisions quickly in these cases also, in practice it has proved impossible to adhere to the same term.

The cases are often very complex and the interests involved often conflict. Taking into account the requirement that it exercise due care, NMa tries to operate with the necessary speed without losing sight of the importance of due process and the need to substantiate its decisions.

Interested parties may submit an administrative appeal against a decision imposing a sanction. In cases involving infringements, for which the statutory fine amounts to Euro 22,000 or more, NMa requests the advice of an external advisory committee before taking a decision on the administrative appeal. NMa makes this advice known at the same time as it announces its

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[10] Camera Care vs. Commission (Case 792/79R) [1980] ECR 119; [1980] 1 CMLR 334.

[11] This instrument does not exist elsewhere in Dutch administrative law. It could be compared to a temporary injunction.

decision. Interested parties may lodge a judicial appeal with the Court of Rotterdam against a decision in relation to an administrative appeal. Finally it is possible to appeal against the decision in the judicial appeal to the Trade and Industry Appeals Tribunal.

In cases in which no administrative or judicial appeal is filed, fines have to be paid within a period of 13 weeks (Article 67 of the Competition Act). After that period statutory interest is due. Fines are paid to the Treasury.

1.1.4) Does Dutch legislation differentiate between horizontal and vertical restraints of competition?

The Dutch Competition Act does not differentiate between horizontal and vertical restraints. Nonetheless the distinction between these two types of restraints has relevance under Dutch competition law. On the one hand European law and policy in this regard has its effect because the Dutch Competition Act is meant to be interpreted in conformity with European law. On the other hand –as stated above- in its fining policy NMa usually considers vertical restraints to be less grave than horizontal restraints.

1.1.5) Are there any exceptions or exemptions to the illegality of horizontal and vertical restraints of competition?

As in European law, the Dutch Competition Act provides for exemptions from the ban on cartels. The *de minimis* provision of Article 7 of the Dutch Competition Act exempts competition agreements, which are of minor significance.

Furthermore the EC's block exemptions and the EC's individual exemptions based on Article 81(3) of the EC Treaty, are incorporated in the Dutch Competition Act (Articles 12, 13 and 14). Under Article 15 of the Dutch Competition Act, Dutch block exemptions may be granted by general administrative orders. Four such orders were adopted and concern the following exemptions:

- combination agreements (Stb. 1997, 592);
- agreements protection of branches (Stb. 1997, 596);
- co-operation agreements retail trade (Stb. 1997, 704);
- temporary decision exemption price binding newspapers (expires 1 January 2003, Stb. 1997, 705).

Individual exemptions may also be granted (Article 17 of the Competition Act). The criteria for exemption are similar to the ones of Article 81(3) of the EC Treaty (as interpreted under the old Regulation 17).

The director general may grant dispensation from the prohibition of Article 6(1) of the Competition Act for agreements, decisions or concerted practices, within the meaning of that Article, which contribute to improving the production or distribution or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

- a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or
- b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.

Example of a decision on an application for an individual exemption

- Case 1237/Stichting Keten Kwaliteit Melk [Foundation for Quality in the Milk Production Chain]
- *Application:* Stichting Keten Kwaliteit Melk (KKM) applied for exemption f their Regulations of Affiliation [*Reglement Aangeslotenen*] and the Regulations for the Recognition of

Livestock Companies [*Erkenningsreglement veehouderijbedrijven*], which contained KKM's quality assurance system for farm milk. In accordance with this system, at the request of a dairy farmer, KKM issued the farmer with a 'Recognition Certificate', if this dairy farmer met the criteria set by KKM. These criteria, which extended beyond the existing statutory requirements, related to the method of production and not to the quality of the milk. Eleven milk-processing companies were affiliated to KKM, with a joint market share of more than 98%. Articles 9 to 12 of KKM 's Regulations of Affiliation stipulated that as of 1 January 2000 milk-processing companies affiliated to KKM could no longer purchase milk from dairy farmers who were not recognised by KKM.

- *Findings:* The regulations applicable to obtaining recognition by KKM, as included in the Recognition Regulations, could be regarded as objective, transparent and non-discriminatory. A dairy farmer could appeal to an independent foundation against any decision taken by KKM in relation to an application for recognition. Membership of KKM was also open to foreign dairy farmers and the system provided for the recognition of equivalent (foreign) systems. These aspects of KKM 's system did not limit competition and were therefore not in violation of the prohibition contained in Article 6 of the Competition Act.
- Articles 9 to 12 of the regulations of affiliation, however, did limit competition because the milk-processing companies affiliated to KKM were limited in their freedom to decide from which dairy farmers they wished to purchase their milk. In addition, it was made impossible for dairy farmers who meet all the statutory requirements, but were not recognised by KKM, to sell their milk. The market share of milk-processing companies that were not affiliated to KKM was too small (less than 2%) to offer realistic opportunities for selling their milk. During the processing of the application for exemption, however, the applicant withdrew these provisions. Consequently it was decided that exemption was not required. As a warning, the decision indicated that if one or more milk-processing companies were to continue their market behaviour, originally based on Articles 9 to 12 of the Regulations of Affiliation, after these had ceased to apply, they would violate the Competition Act.

1.1.6) Are there any rules concerning (price) recommendations?

There are no specific rules concerning recommendations in the Competition Act. Nevertheless they play a role in NMa policy.

An assessment in accordance with competition law is based on the principle that vertical price maintenance and horizontal price agreements are prohibited under Article 6.

The question of price recommendations came up in a case relating to price recommendations made by the Dutch Hairdressers' Federation. NMa considered these recommendations to be in breach of Article 6.

Example of a case concerning price recommendations

- Case 2234/ANKO
- *Case:* Koninklijke Algemene Nederlandse Kappersorganisatie (ANKO) [Royal Dutch Hairdressers' Federation] is a branch association to which approximately 6200 hairdressing salons are affiliated. In November 2000, in a letter to its members, the association indicated that its members should reassess their price lists and that prices had increased on average by 5 percent in the year 2001.
- ANKO issued a press release so that "newspapers and other media could communicate the increase in the price of its services to consumers," according to ANKO.
- *Assessment:* ANKO acted in conflict with the prohibition on cartels. It appears from the facts of the case that ANKO's intention was to have its members increase their prices by 5 percent. For instance, in an internal memorandum, the Executive Board of ANKO advised

its members to increase their tariffs by “5 percent on average”. ANKO also indicated how increases in costs amounting to 5 percent could be passed on in the prices.

- *Fine:* The Director-General of NMa decided against imposing a fine. The following factors played a role in this decision. Shortly after the procedure commenced, ANKO indicated that is wished to consult NMa to obtain clarity on how to communicate information to its members in the future in such a way that it complied with the Competition Act. NMa conceded to this wish on the strict condition that ANKO would provide full openness with regard to the way in which it communicates with its members in relation to cost increases and related matters. Partly as a result of this openness, it appeared that ANKO’s practices, apart from the communication in relation to price increases, contained other elements that NMa also deemed to be in conflict with the Competition Act. It appeared, for instance, that ANKO had encouraged its members through a variety of communication channels to apply certain profit margins. This is an infringement of the prohibition on cartels, because this practice is aimed at directing the pricing behaviour of hairdressers and results in hairdressers charging the same prices. In addition, ANKO encourages its members to pass on cost increases in full in their tariffs. This is also a practice that contravenes the Competition Act, because as a result hairdressers are not given an incentive to reduce their costs, resulting in lower prices. Finally, it appeared that ANKO had sent its members a calculation model in an attempt to direct the pricing behaviour of its members with the result that competition was reduced.
- ANKO entered into a written agreement with NMa to cease these practices immediately and to refrain from these practices in future. In addition, NMa entered into agreements with ANKO with regard to the way it issues information to its members to ensure that this complies with the Competition Act. Most of these changes in behaviour go beyond the boundaries of the report that was drawn up. Partly for this reason, NMa decided against imposing a fine.
- ANKO did not file an administrative appeal against this decision.

1.1.7) Abuse of dominance; discrimination/obstruction

Any undertaking that is sufficiently powerful not to have to worry unduly about other market players (competitors, suppliers, customers or end users) represents a potential threat to the open and free market when it abuses its economic dominance, for example by charging inordinately high prices, applying unreasonable supply conditions, refusing to supply specific customers, charging varying prices for identical products or services, pushing competitors off the market or making it impossible for new businesses to enter the market through a policy of price-dumping. Having a dominant position as such is not a problem and is therefore not banned; it is only when a business abuses its position that it is in contravention of the Competition Act.

Article 24 of the Dutch Competition Act prohibits the abuse of a dominant position. Although the Act itself does not provide examples of abuse, the accompanying Explanatory Memorandum does name a few, such as exploitation using extreme highly prices or a strategy of price-dumping aimed at pushing competitors off the market, unreasonable delivery conditions, the exclusion of customers from delivery, practising price discrimination, and tie-in selling.

When an undertaking which enjoys a dominant position in one market abuses this position of dominance to limit or prevent competition in another (derived or adjacent) market, this can also qualify as abuse of a dominant position, all the more so insofar as the undertaking itself also canvasses the derived or adjacent market in question.

Abuse of dominance cases are relatively rare.[12] So far none has occurred in the agro-food sector.

1.1.8) Discriminatory measures and obstructive competition practices

As stated above, the Dutch Competition Act does not specify different types of abuse of dominance. However discrimination between customers and obstruction of competitors are considered to be examples of such abuse.

1.1.9) Mergers

Concentrations of undertakings (like mergers and takeovers) can lead to powerful enterprises which are sufficiently dominant to exert a significant impact of competition in a specific market, to the point of cutting out competition altogether. To prevent this from happening, a system of preventive control of concentrations of undertakings beyond specific turnover thresholds has been provided for in the Competition Act. What this boils down to is that proposed mergers and acquisitions are required to be notified to NMa and may not be completed unless NMa has performed an assessment of the competitive consequences of the concentration proposals. The Dutch Competition Act applies only to undertakings whose operations are aimed at the Dutch market or whose activities include the Dutch market. However, business operations in the Dutch market may also be subject to EU concentration control.

Initially NMa had to be notified of concentrations if the joint global turnover of the companies involved amounted to more than NLG 250 million and if at least two of them had an annual turnover in the Netherlands of the least NLG 30 million. As of 17 October 2001, the last-mentioned turnover threshold was increased from NLG 30 million to EUR 30 million. The condition that the undertakings should have a joint annual turnover in excess of NLG 250 million (EUR 113.45 million) has not changed.

The increase in the turnover thresholds was partly intended to bring about a reduction in the administrative burden for small and medium-sized enterprises. After the increase took effect, a clearly noticeable reduction in the number of notifications occurred. At the moment that the increase in the turnover thresholds took place, it appeared that eight concentrations which were being processed at that moment were no longer obliged to give notice.

Of all major commercial transactions, mergers and takeovers are particularly sensitive to even quite short delays. For this reason the procedure – as in EC law – has been divided into two stages. In a first stage of four weeks, the NMa has to give notice as to whether a licence is required (Article 37). The NMa may determine that a licence is required if it has reason to assume that the concentration will lead to dominant positions that restrain competition. If this is not the case, the concentration may proceed. Otherwise the companies have to enter the second stage by filing an application for a licence. NMa has thirteen weeks to decide on such an application.

The deadlines are strict. If NMa does not meet them, the companies are at liberty to proceed with their concentration.

At the beginning of 2001, NMa announced a far-reaching investigation into the consequences of the proposed merger between the supermarket organisations, Schuitema and Sperwer. Ahold, the parent company of Albert Heijn, is a majority shareholder of Schuitema. In the analysis, Ahold and Schuitema were regarded as a single entity. After an initial investigation, it appeared that a dominant position might arise as a result of the merger. After the announcement that NMa would start the so-called second-stage investigation, the companies decided against applying for a licence and the merger was abandoned.

However in the previous year some important concentrations in the retail sector had taken place

[12] The Tegraaf/NOS-HMG-case has been mentioned above.

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Examples of concentration cases in the food retail sector

- Case 1628/Laurus–Groenwoudt
- *Parties and market(s):* The director general of NMa had earlier determined that a licence was required for the takeover of the supermarket division of Groenwoudt Groep by Laurus N.V. After an initial investigation, it was concluded that for the time being there was reason to assume that, as a result of the planned takeover, a dominant position could arise or be strengthened at a particular location and/or on regional markets for the retail trade in daily consumer products through supermarkets.
- As a result de facto competition on these markets could be significantly obstructed. It was decided that further research should be carried out to establish whether the takeover would indeed result in a dominant position.
- Laurus operates under the supermarket formulas[13] Konmar, Super de Boer, Edah, Spar and Basismarkt. Groenwoudt operates under the formulas Groenwoudt, Nieuwe Weme and Lekker & Laag.
- In the first phase of the investigation locations were identified where Laurus and Groenwoudt would jointly acquire a strong position on the local market. In addition it was stated that a national market could be deemed to exist if there was a chain effect and a uniform commercial policy. In order to assess at which geographical level the consequences of the takeover ought to be analysed, NMa analysed local areas in which it was concluded in the first phase that the parties would acquire a strong position and carried out research into the way supermarkets respond to their competitors. In addition, NMa commissioned external research bodies to carry out research into price and service differences between supermarkets within a single formula, into the relationship between the local competitive positions of supermarkets and their price and service levels, and into the distribution of supermarkets throughout the Netherlands.
- *Finding(s):* On the basis of the research that was carried out, the director general of NMa concluded that, in assessing the consequences of this takeover, it had to be assumed that there was a national market for the sale of daily consumer products through supermarkets.
- Research showed that the density of supermarkets in the Netherlands was very high. Almost every consumer in the Netherlands could reach a supermarket within five minutes. In the vicinity of a supermarket that belongs to one of Groenwoudt's or Laurus's formulas there was almost always at least one other supermarket and usually more than one. It was established that a knock-on effect occurred in the Netherlands. Since the areas from which supermarkets drew their customers overlapped, they ultimately competed with each other at the national level.
- In addition, supermarket organisations that operated nationally, including the parties in this case, followed a uniform commercial policy (for instance, with regard to prices, assortment and service) for the entire formula in the Netherlands. Consequently the undertakings competed at a national level with other supermarket chains. Laurus and Groenwoudt would acquire a combined market share in the Netherlands of approximately 26 percent. The largest competitor was Ahold, which, including Schuitema, had a market share of approximately 39 percent. Due to the above, a dominant position would not arise or be strengthened as a result of the takeover. The director general of NMa therefore granted a licence for the realisation of the takeover.
- Case 1710/Schuitema–A&P

[13] By 'formula' are meant all the characteristics that make the stores recognisable, e.g. range of products, way of presenting the products, use of colours, etc.

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- *Parties and market(s):* Schuitema N.V. gave notice of its intention to take over A&P Holding B.V. Following an initial investigation, the director general of NMa decided that a licence was required for this concentration.
- Schuitema is a wholesale organisation that supplies 464 independent supermarket companies with products and services through subsidiaries. These companies mainly operate the C1000 stores, a formula developed by Schuitema, and the smaller Kopak A&P formula, a super-market organisation that operates 125 supermarkets through its own branches under the A&P supermarket formula. A&P also operates 6 hypermarkets under this formula (formerly 'Maxis'). *Finding(s):* Ahold owned 73% of Schuitema's shares. In the opinion of NMa, Ahold had control of Schuitema due to this interest. For the purposes of assessing the concentration in question, Ahold and Schuitema were therefore considered is to be a single entity. Assuming that the market was a national market, Ahold (including Schuitema) and A&P would acquire a combined market share in the Netherlands of approximately 42 percent.
- This ensured that the parties would have a very strong position on the market for the sale of daily consumer products through supermarkets. This was strengthened by the strong position that the parties had on the procurement market for daily consumer products (procurement organisations T.S.N. and Albert Heijn). A number of mitigating factors had to be offset against this. The second largest player on the market (Laurus), with a market share of approximately 26 percent, was a player of stature. The parties would also have to take into account the competitive pressure of regional supermarket chains, which were often strong. In addition, supermarkets experience a certain degree of competitive pressure from other distribution channels, such as specialist stores. The director general of NMa concluded that, as a result of the intended concentration, a dominant position would not arise or be strengthened. A licence was therefore granted.

1.1.10) Are Competition Law-based decisions of government agencies or courts solely focused on aspects of competition, or do they equally take into account aspects of economic and social policy?

The application of competition law focuses on economic aspects. Non-economic interests, however, may play a role at various levels in assessments.

The first question is deciding whether the practice is subject to the Competition Act. For instance, the agreements between organisations representing employers and employees with regard to employment and the conditions of employment, set out in collective labour agreements, are not considered to be subject to the prohibition on cartels.

If the Competition Act does apply to the behaviour of companies, the second question is whether the behaviour restrains competition. There is no room for *de facto* competition on some relevant markets because the legislator has considered specific legislation and regulations to be necessary in the sectors. In such cases, competition is not restrained, for instance by agreements or concentrations. In the concentration cases in relation to the merging of hospitals, the assessment to date has been that a dominant position has not been strengthened or maintained, since *de facto* competition in this sector has been excluded by the government through legislation and regulations. The situation may be different if new rules in this area allow more operation of market forces or if the actual situation changes.

In the event of an appreciable restraint on competition as a result of agreements that have been made, an investigation may be carried out at the request of the parties to establish whether an exemption from the prohibition on cartels is possible. Non-economic interests often appear to be linked to or coincide with economic interests. Advantages, for instance, in relation to the environment may also result in efficiency advantages, contribute to an improvement in production or distribution and may result in the promotion of economic and technological progress. The interest of the environment may therefore also be regarded as an economic interest and will therefore also play a role in the assessment in accordance with competition

law. In all cases, however, it is necessary to comply with the criteria for exemption stipulated in section 17 of the Competition Act. This means that an exemption will not be granted if only non-economic interests are involved and there are no advantages resulting in improvements in production or distribution, or economic and technological progress. In addition, agreements are prohibited which impose greater restraints on competition than are strictly necessary to achieve the aim of efficiency improvements or technological progress.

1.2) Special provision for agriculture in Competition Law

1.2.1) Extension of farmers' possibilities due to Competition Law

Does Dutch legislation contain special provisions for farmers or general provisions which farmers can invoke?

Neither the Dutch Competition Act nor Dutch competition policy contains special provisions for agriculture. However farmers like other entrepreneurs may apply for the general exemptions if they want to engage in practices that restrain competition or they can ask for enforcement ('complain') if they are confronted with malpractices by others.

Are there exceptions for horizontal or vertical (1.6) restraints of competition in the agro-food sector?

Under Dutch competition law there are no specific exceptions for the agro-food sector. Therefore the general rules apply.

A total of 1,040 requests for exemption were submitted in 1998 in the context of the transitional regime. The arrangements with respect to which exemption was applied for had already been in existence on the effective date of the Dutch Competition Act. Prior law, the Dutch Act on Economic Competition, did not prohibit these arrangements.

Most requests for exemption were received from the following industrial sectors:

- ***retail and wholesale;***
- ***construction;***
- ***the care sector;***
- ***agriculture;***
- ***transport;***
- ***commercial services;***
- ***culture, media and sport;***
- ***the power sector.***

The most requests for exemption, by far, were received from the care, construction and retail sectors. The requests in agriculture were concerned with schemes and arrangements involving the cultivation of flowers and crops.

Schemes that guarantee quality in the production chain occur more and more frequently, particularly in relation to food production. In principle, NMa will view these schemes positively.

The aim of these (recognition) schemes is to guarantee the quality of production throughout the entire chain. In general, these schemes provide an incentive to maintain quality, while offering consumers increased freedom of choice. An exemption from the prohibition on cartels is likely to be granted, provided the restraints on competition -- if and insofar as these schemes include such restraints -- do not extend further than is necessary to achieve the intended advantages.

Does Dutch legislation feature special provisions for co-operative organisations?

Dutch competition law does not feature any special provisions for co-operative producer organisations in the agro-food sector. The same holds true for co-operations in the forest sector (1.5).

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Does Dutch legislation accept organisations for special branches of trade?

The Competition Act does not provide specific measures for branch organisations. Nonetheless they play an significant role in competition policy.

Small and Medium-sized Enterprises (SMEs) and Branch Organisations

When the Competition Act took effect in 1998, a considerable number of branch organisations submitted applications for exemptions. Formal decisions were taken in 2000 in relation to a number of these applications.

These decisions received the necessary attention by the press and from employers' associations and interest in the topic has grown. As a result of this, NMa has co-operated in the information activities of VNO-NCW, the main employers' associations, targeted, for instance, at branch organisations. In addition, in 2001 guidelines were published for small and medium-sized companies, in which further information was given on the relationship between co-operation in the SME sector and the Competition Act. Special attention was given to the role of branch organisations. With regard to the application of the Competition Act in specific cases within the SME sector, NMa paid attention, for instance, to systems of approval implemented by branch organisations.

Systems of Approval and Requirements for Membership of Branch Organisations

In part due to activities in relation to deregulation, there seems to be a growing need among undertakings for self-regulation. Partly as a result of the liberalisation of legislation governing the establishment of companies, companies have looked for support to so-called recognition and certification schemes. Such schemes may affect the market in a variety of ways. These systems of approval must be assessed in accordance with the Competition Act. This assessment may be summarised as follows. The aim of systems of approval is normally to increase the quality of production or service provision in a certain branch and therefore, in principle, they do not limit competition. A system of approval, however, may result in effects that restrain competition.

First, in the case of systems of approval to which a large part of the branch is affiliated, the system of approval may limit competition between recognised and non-recognised undertakings, due to the fact that the latter are excluded. Associations may aim to build an image of quality and may therefore require their members to adhere to a certain level of quality. Striving for quality, however, may not be used as a means of withholding the advantages of membership from competitors. For this reason, systems of approval must satisfy the criteria of openness, objectivity, transparency and independence and the scheme must accept systems that offer equivalent guarantees ('dispensations'). It is also important that the systems of approval comply with the criteria not only on paper, but also in the way in which the scheme is applied. This means that every potential candidate who satisfies the criteria of membership must be able to join the scheme, that the requirements must be objective and known beforehand and that the procedure to be followed in joining the scheme must be clear beforehand. In addition, the system of approval must provide for independent assessment of candidates on the basis of the recognition criteria. This criterion has been imposed to avoid a situation where direct competitors may decide on the recognition of new entrants. Finally, how the criteria are met is not important. All that is important is whether the criteria have been met. Prescribing a specific course will therefore generally not be accepted. The systems of approval must accept courses that result in the same level of quality.

Second, a system of approval may result in restraints on competition between recognised undertakings. This is the case if the scheme provides for agreements with regard to the parameters of competition. For instance, if a system of approval includes agreements on prices or the division of markets, the scheme will fall within the scope of the Competition Act. If it is of considerable importance to be able to be a member of a branch organisation in order to operate in the market, the requirements for membership of the branch organisation may function more or less as a system of approval. In such cases, NMa will assess the

requirements for membership of a branch organisation on the basis of the same criteria applied in assessing a system of approval.

Special provisions concerning leasing agreements in the area of plant breeding and seed
Dutch competition law does not include special provisions concerning leasing agreements for contracts in the area of plant breeding and seed.

Possibility of declaring horizontal or vertical restraints general binding
Under Dutch law up to 1998, it was possible to declare that restraints of competition by private organisations and associations were generally binding. The new Dutch Competition Act, which entered into force in 1998, abolished this possibility.

Are there any restrictions on exemptions for the agro-food sector by a supervisory body combating the abuse of exemptions?
NMa is empowered to withhold those (block) exceptions that apply automatically. So far this power has not been used in the agro-food sector or elsewhere.

Could the agro-food sector use more horizontal and vertical co-operations and mechanisms facilitating co-operation, provided by Dutch Competition Law?
The Ministry of Agriculture stimulates chain integration in the agro-food sector. Guidelines and assistance are provided. It does not seem that this kind of initiative is unduly hampered by competition law. In other words, there seem to be ample opportunities and they seem to be well used. However some authors believe that parties do not always realise that their initiatives fall within the scope of competition law and for that reason fail to apply for the necessary exemptions.

1.2.2) Protection of farmers by Competition Law

Dutch competition law does not include any special provisions protecting farmers from discriminatory or obstructive practices. However, like everybody else farmers may lodge a complaint with the NMa if, as mentioned above, they can show an interest as defined in the General Administrative Law Act.

Example in the agro-food sector of the handling of a complaint

- Case number unknown
- In April 2001, NMa took action against the so-called 'milk dime *[melkdubbeltje]*. Supermarkets wished to co-ordinate the milk price by increasing it by 10 cents. NMa initiated an investigation into the milk levy, partly as a result of external reports, including a complaint from *Consumentenbond*, the Dutch Consumers' Association.
- NMa notified Albert Heijn, Laurus, Schuitema, Dirk van den Broek and Nettorama that it would consider imposing an order subject to a penalty if they maintained their price increase. The supermarket chains subsequently announced that they would not continue with the price increase, which they had jointly introduced. The aim of this agreed increase in the milk price was to support dairy farmers who were suffering a loss of income due to the crisis caused by foot-and-mouth disease.
- NMa did not intervene because the Competition Act prohibits passing on a higher procurement price in the retail price, nor because NMa was opposed to any form of support for the farmers affected by the foot-and-mouth crisis. NMa opposed this campaign because it was not permissible to organise the campaign in a way that contravened the Competition Act. After all, competitors are prohibited from agreeing on price increases and agreeing to pass these on to consumers without incurring risk.

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2. National Law and EC Law

2.1) Which conflicts arose until now between EC Law and national law because of the supremacy of EC Law?

As the Dutch Competition Act was only recently brought into line with European competition law, so far no conflicts have arisen.

2.2) Has national law been modified due to EC Law or will modifications become necessary in the future?

As stated before, current Dutch competition law is virtually a clone of European competition law. Recent developments in European competition law, however, will necessitate new adaptations. For instance the Dutch legislator will have to consider whether the introduction by Regulation 2003/1 of the 'exception legale' under Article 81(3) of the EC Treaty will have to be followed in the Competition Act.

3. Assessment of the effective Competition Law concerning agriculture

3.1) Are the operational possibilities under Competition Law of food- and agricultural companies sufficient to establish agricultural co-operation and to realise vertical integration into agriculture under special provisions for agriculture?

Generally speaking the food- and agriculture sector suffers from a heavy burden of administrative obligations. In this respect the sector is hampered by competition law as well. Apart from this, competition law does not seem to cause specific problems. Vertical agreements that do not unduly restrict competition can obtain an exemption from the ban on cartels.

3.2) Is agriculture adequately protected by Competition Law or should these provisions be enlarged?

To a large extent, the agro-food sector in the Netherlands seems to be retail driven. The distribution of revenues that result from market mechanisms do not always seem to favour the primary sector. However there are no indications that this state of affairs is due to cartels or abuse of dominance on the side of the retail sector. Therefore insofar as protection is deemed appropriate, it cannot be expected from competition law. In the current international situation market regulation does not seem to be an option either.

Conclusion

From the point of view of Dutch competition law, the agro-food sector is a sector like any other sector. No specific rules or exceptions apply. The application of competition law by the Netherlands Competition Authority seems to take sufficiently account of the characteristics of the agro-food sector. Competition law in the Netherlands may not be a great help for the specific problems of the agro-food sector, it doesn't create great problems either. On the other hand the agro-food sector shares in the benefits of the free market that is guarded by competition law.