

# Vertical Agreements

The regulation of distribution practices  
in 37 jurisdictions worldwide

# 2012

Contributing editor: Stephen Kinsella OBE



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# Netherlands

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## Antitrust law

- 1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main sources of law applicable to vertical restraints in the Netherlands are:

- the Dutch Competition Act of 22 May 1997 (DCA); and
- the Decree of 12 December 1997 providing exemptions for cooperation agreements in the Retail Trade sector (the Decree for the retail trade sector).

The EU legislation regarding vertical restraints is directly applicable in the Netherlands and can also be considered a legal source.

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## Types of vertical restraint

- 2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The DCA does not give a definition of vertical restraints nor does it prohibit specific vertical restraints. The courts and the Dutch Competition Authority (NMa) assess vertical restraints on the basis of the jurisprudence of the Court of Justice of the European Union. The vertical restraints subject to antitrust law in the Dutch jurisdiction are therefore identical to the types of vertical restraints subject to EU competition law. The principal types of vertical restraints subject to antitrust law are exclusive and selective distribution, exclusive purchasing, franchising, agency, resale price maintenance, non-compete clauses and licence agreements.

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## Legal objective

- 3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The object of the DCA is mainly economic and aims at the protection of competition and the benefits of the consumer and fair trade. The text of article 6(3) DCA, providing individual exemptions (by self-assessment), is similar to the text of article 101(3) of the Treaty on the Functioning of the European Union (TFEU). Under the Decree for the retail trade sector, the interests of small and medium-sized companies are also taken into account.

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## Responsible authorities

- 4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The prohibition of anti-competitive vertical restraints is enforced by courts and the NMa. The NMa is charged with the supervision of compliance with the DCA and may impose penalties and execute research, but the minister of economic affairs is responsible for competition policy.

Cases are allocated to three different chambers of the NMa, namely the Competition Department, the Legal Department and the Office of Energy and Transport Regulation. The NMa takes care of general competition enforcement as well as industry-specific regulation.

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## Jurisdiction

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The territorial scope of the DCA is limited to the Dutch market. The decisive factor for the applicability of the DCA is the place where a competition infringement has or may have its effect. This 'effect doctrine' can be seen as a broad interpretation of the principle of territoriality.

Competition agreements which are exclusively effective on foreign markets do not fall within the scope of the DCA. The DCA is applicable, however, to competition agreements concluded by foreign undertakings with effect on the Dutch market.

According to the NMa, the DCA is applicable in a pure internet context (*Sectorscan internet verkoop*, June 2009). To our knowledge the NMa has not applied the DCA extraterritorially in cases regarding a pure internet context, nor are there any civil cases in that respect.

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## Agreements concluded by public entities

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The DCA is applicable to vertical restraints in agreements concluded by public entities, if public entities act as undertakings by carrying out economic activities.

If and in so far as a public entity acts in the context of a public prerogative or carries out a typical public task, it is not considered as an undertaking.

**Sector-specific rules**

- 7** Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

There is only one decree that applies to the assessment of vertical restraints in specific sectors of industry, namely the Decree for the retail trade sector. This Decree applies to the retail trade sector and allows retail companies to advertise together, etc. However, the Decree is somewhat outdated as the European Vertical Block Exemption Regulation No. 330/2010 (VBER 330/2010) allows more forms of cooperation than the Decree does.

**General exceptions**

- 8** Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Based on article 7 DCA (de minimis provision), article 6 DCA (cartel prohibition) does not apply to restrictions (generally assumed to include hard-core restrictions) on competition of minor importance.

The de minimis provision is applicable if no more than eight undertakings are involved in the agreement, decision or concerted practice and their combined turnover of the foregoing calendar year is no more than €5.5 million regarding products and no more than €1.1 million regarding services.

Article 6 DCA also does not apply to agreements, decisions or concerted practices if the combined market share of the undertakings or associations of undertakings concerned on none of the relevant markets exceeds 10 per cent and the agreements, decisions or concerted practices do not appreciably affect trade between the EU member states. Furthermore, by governmental decree categories of agreements, decisions or concerted practices that in general are clearly of minor importance can be excluded from the scope of article 6 DCA.

Pursuant to article 9 DCA, the NMa may apply article 6 DCA on competition agreements that fall within the scope of the de minimis exemption if the agreement, decision or concerted practice, given the situation on the relevant market, nevertheless affects competition to a significant degree. For this reason individual assessment will always be necessary.

**Agreements**

- 9** Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

There is no definition of 'agreement' in the DCA. The courts and the NMa apply the same definition of 'agreement' as developed in EU case law.

- 10** In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for the relevant rules for there to be a formal written agreement. In line with article 101 TFEU and the decision of the Court of Justice dated 11 January 1990 (C-277/87, *Sandoz*) an agreement exists when undertakings involved express their joint intention or will to act in a certain way on the market or even silently coordinate their market behaviour. Oral agreements or gentleman's agreements can therefore also be caught by the relevant rules on vertical restraints.

**Parent and related-company agreements**

- 11** In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

If a parent company forms an economic entity with a related company within which the related company does not have actual autonomy to determine its behaviour on the market, the parent and the related company are considered as one undertaking. In this case the prohibition on competition infringing agreements does not apply.

**Agent–principal agreements**

- 12** In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

The DCA does not contain an explicit provision for agents. Article 7:443 of the Dutch Civil Code, however, includes legislation regarding the legality of non-competition clauses restricting agents. According to this provision, a non-competition clause effective after the termination of the agency agreement is only legitimate when certain conditions are met and when it is maximised to a term of two years after the termination of the agency agreement.

Furthermore, article 6 DCA applies to improper agency agreements that cause the agent to bear financial or commercial risks. According to the European Commission, these types of agent should be considered as independent undertakings who have to determine their own market strategies independently.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

Articles 7:428 up to and including 7:445 of the Dutch Civil Code contain provisions for agents. The definition of an agent–principal relationship is given in article 7:428(1). There is relatively little published case law regarding agent–principal relationships and there are no recent authority decisions in this regard.

**Intellectual property rights**

- 14** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

There is no explicit provision in the DCA for the granting of IPRs. Thus antitrust law will not be applied differently.

**Analytical framework for assessment**

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The analytical framework used by the authority does not differ much from the EU framework taking into account that the assessment is limited to the Dutch market. However, if hard-core restrictions are present in an agreement, the agreement should be assessed by taking article 7 DCA into account.

**16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

The authority will check whether agreements fit within the safe harbour of VBER 330/2010 that refers to the market shares of the supplier as well as of the buyer. Furthermore, the NMa and courts will consider market shares, structures and economic factors when assessing whether a certain agreement containing vertical restraints fits within the de minimis provision. In general, the authority will analyse the market position and conduct of other suppliers and buyers when assessing the effects of certain restraints on the market as well as whether agreements are widely used.

**17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

According to the new VBER 330/2010, both the buyer's and the supplier's market shares are relevant. The NMa, however, stated in its guidelines on buyer power that – in general – it considers buyer power positive as it might lead to consumer benefits. In its decision regarding a concentration in the veal-producing industry, the NMa explicitly cleared a merger with reference to consumer benefits as a (possible) result of the buyer power that would be created (NMa, 4 May 2010).

#### Block exemption and safe harbour

**18** Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Dutch antitrust law does not include block exemptions or safe harbours except for the Decree for the retail trade sector. The Decree does not add much more exemptions to those already included in VBER 330/2010. Consequently, there is little jurisprudence regarding the application of the Decree specifically.

#### Types of restraint

**19** How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Resale price maintenance is in general prohibited and considered a hard-core restriction of competition. The Dutch de minimis exception is, however, of a different nature than the EU de minimis exception: as long as no effect on cross-border trade is present and only a small number of parties with relatively small annual turnover are involved, resale price maintenance (including the use of minimum resale prices and restricting the buyers' ability to give rebates or discounts) will probably be allowed under article 7 DCA.

The use of maximum prices is in general allowed, as this would be favourable to the consumers' interest. As long as suggested prices are not de facto fixed or minimum prices, they will be allowed. Strong market positions of suppliers may nevertheless result in application of the cartel prohibition (same as in VBER 330/2010).

**20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

A well-known civil case in which the use of 'loss leaders' was assessed is the *Albert Heijn/Peijnenburg* case (Court of Den Bosch, 10 February 2005). In this case the Court of Den Bosch decided in injunction proceedings that Peijnenburg (a producer of cereal products) was allowed to terminate its distributorship agreement with supermarket chain Albert Heijn, as Albert Heijn sold its products at such low prices that Peijnenburg's image (brand) would be ruined.

As far as we are aware no other recent Dutch cases assess specific restrictions applying to the introduction or promotion of new products or brands. Such specific restrictions would probably be assessed in conformity with EU law and regulations.

**21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Yes, in a civil court decision of the Court of The Hague dated 19 February 2007 (*Make It Easy Gelderland VOF ao/Make It Easy BV ao*) such a link seems to be made. In this case addressing the illegality of fixed resale prices imposed on franchisees, the non-competition clauses also incorporated in the franchise agreements were considered illegal because of the per se illegality of the fixed resale prices. The illegality of the non-competition clauses seemed to derive from the illegality of the fixed resale prices.

**22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Yes, the DCA addressed this issue in respect of the discussions on the fixed resale prices that (through a dispensation by the minister of justice laid down in a special law on fixed book-pricing) are allowed for books in the Dutch language sold in the Netherlands. A few parties selling foreign books requested to be allowed a similar dispensation of the cartel prohibition arguing why in their case advantages of resale price maintenance would exceed disadvantages (often referring to a broader offer of titles and a better distribution network). So far these requests have not been honoured.

**23** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

In general, restricting a buyer from reselling its products in certain territories will not be allowed unless the restriction fits within the framework of VBER 330/2010 or can be considered, according to national competition law, to be of a de minimis nature or can otherwise benefit from article 6(3) DCA. Such restrictions can be allowed under article 7 DCA, when their scope is limited and national. If the restriction is not of a de minimis nature, the Dutch competition law will be applied in line with VBER 330/2010 so that such restrictions should be carefully assessed.

**24** Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

There is no specific Dutch legislation on this issue. In general such a restriction will have to be assessed according to article 6 DCA and article 24 DCA (abuse of a dominant position). Such restrictions

will not be allowed unless they fit within the framework of VBER 330/2010 or can be considered, according to national competition law, to be of a de minimis nature or can otherwise benefit from article 6(3) DCA.

**25** How is restricting the uses to which a buyer puts the contract products assessed?

Please see questions 23 and 24.

**26** How is restricting the buyer's ability to generate or effect sales via the internet assessed?

There is no specific national competition law or guidance regarding this issue. In the guidelines to VBER 330/2010 this issue is tackled and, as Dutch law is in general applied in line with EU law, it can be concluded that buyers' ability to generate sales through the internet cannot in general be restricted.

**27** Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

No, for as far as we know there is no specific case law or guidance regarding this issue.

**28** Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Please see questions 23 and 24. Recent developments in case law confirm that selective distribution systems have to be assessed in line with EU law.

The Dutch Supreme Court has ruled that it can be unlawful to compete with a selective distribution system if such competition can only be reached through breaches of one of the parties involved in the selective distribution system in relation to the seller (Supreme Court, 8 January 2010, *Alfa Romeo Nederland*).

The Dutch Supreme Court ruled that when objective criteria are met new parties willing to join the network should in general be allowed to become part of the selective distribution system. Failing such access the seller should explain why it will not allow the new party as a distributor. Without a proper reason the refusal to contract will in general be considered a violation of competition law (Supreme Court, 16 September 2011, *Batavus*).

**29** Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

As there is no specific national law regarding selective distribution systems, this matter is assessed in accordance with EU competition law. Selective distribution systems are most likely to be lawful where they relate to products with a strong brand or image. Recent Dutch case law refers to, inter alia, bicycles, perfumes and cars (Supreme Court, *Alfa Romeo Nederland*; Court of Amsterdam, 3 December 2009, *Kia*; Supreme Court, 22 September 2006, *Lancôme/Kruitvat*; Supreme Court, *Batavus*).

**30** In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There is no specific law regarding internet sales in the Netherlands.

The guidelines to VBER 330/2010 indicate that in general internet sales is considered 'passive' and may not be restricted. We expect that these new criteria will lead to new case law, but all current Dutch case law regarding internet sales still refers to VBER

2790/1999 (Court of Zutphen, 30 December 2005; Court of Appeal of Arnhem, 18 December 2007, *MF Design/Eastborn Slaapsystemen*; 6 October 2009, Supreme Court, *Batavus*).

**31** Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

We are not aware of any such action by the NMa.

**32** Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

We are not aware of case law or decisions from the NMa explicitly dealing with the cumulative restrictive effects of multiple selective distribution systems operating in the same market. However, as the NMa applies article 6 DCA in line with EU law, cumulative effects can be taken into account.

**33** Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

No, we are not aware of such a decision of the NMa.

**34** Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

No, we are not aware of such a decision of the NMa.

**35** How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

There are no specific statutory provisions in the Netherlands regarding restricting a buyer's ability to obtain the supplier's products from others than the supplier, so these matters are assessed in accordance with EU competition rules. Under these rules direct or indirect exclusive purchase obligations pursuant to which a buyer is obliged to buy 80 per cent or more of its purchases from its supplier or another undertaking designated by the supplier for more than five years, are not covered by the exemption on vertical restraints, and fall under the scope of the relevant cartel prohibition provisions. Agreements that contain such obligations are therefore considered to be void if their object or effect is to appreciably restrict competition within (a part of) the Dutch market. The nullity of such a contractual provision might even lead to nullity of the agreement as a whole, which will in principle be the case if the null and void provision is inextricably connected to the remainder of the agreement.

**36** How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Dutch law does not provide specific rules with regard to restricting the buyer's ability to sell non-competing products that the supplier considers 'inappropriate'. Therefore, these matters are assessed in accordance with EU competition rules. In some selective distribution systems it is possible for the supplier to set specific demands with regard to method of distribution of its products or services, when the nature of the product or service requires a specialised way of distribution (eg, specialised high-standard shops in which only luxury products are sold).

- 37** Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Dutch law does not provide specific rules with regard to restricting a buyer's ability to stock or sell (or both) products competing with the supplier's products. This matter is assessed according to EU competition rules. Therefore, any direct or indirect obligation of the buyer causing the buyer not to manufacture, purchase, sell or resell goods or services that compete with supplier's goods is excluded from the exemption on vertical restraints and falls under the scope of the relevant cartel prohibition provisions. Agreements that contain such obligations are deemed to be void if their object or effect is to appreciably restrict competition within (a part of) the Dutch market. The nullity of such a contractual provision may even lead to nullity of the agreement as a whole, which will in principle be the case if the null and void provision is inextricably connected to the remainder of the agreement.

- 38** How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

There are no specific statutory provisions in the Netherlands regarding restricting a buyer's ability to obtain the supplier's products from others than the supplier, so these matters are assessed according to the applicable EU competition rules.

- 39** Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

There are no specific statutory provisions in the Netherlands regarding restricting a supplier's ability to supply other distributors or consumers directly, so this matter is assessed in accordance with the EU competition rules. There are in general no objections against a distribution system in which a supplier agrees to not sell certain products to other distributors than to one exclusive distributor or to consumers in a specific territory of the Dutch market as long as market position of the purchaser is not too strong.

- 40** To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

There are no specific statutory provisions in the Netherlands in this respect. This matter is assessed in accordance with EU competition rules.

- 41** Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed.

There are no specific statutory provisions in the Netherlands in this respect. This matter is assessed in accordance with EU competition rules.

- 42** Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

There are no specific statutory provisions in the Netherlands in this respect. This matter is assessed in accordance with EU competition rules.

## Notifying agreements

- 43** Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no procedure for notifying agreements containing vertical restraints to the NMa.

## Authority guidance

- 44** If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

In cases in which new or unsolved questions arise regarding restrictions of competition, it is possible to request advice (so called 'informal opinion') from the NMa about the relevant (individual) matter.

## Complaints procedure for private parties

- 45** Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Violations of competition rules can be reported to the NMa in several ways. First of all the NMa provides the possibility to file complaints of violations of competition rules, including vertical restraints. According to the NMa, it annually receives approximately 4,000 complaints of possible antitrust infringements. Another way of reporting possible antitrust infringements is to file an official decision request to the NMa to which the NMa is legally required to issue a formal decision. The third way to bring an antitrust violation to the attention of the authorities is to apply for leniency. Undertakings and natural persons that are or were engaged in cartel practices may be granted fine immunity or fine reduction if they confess their participation in a cartel and fully cooperate with the NMa during the investigation.

## Enforcement

- 46** How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

It is hard to establish how frequently antitrust law has been applied to vertical restraints by the authorities responsible for antitrust enforcement. According to the provisional annual report regarding 2011 of the NMa, the NMa carried out 18 formal investigations of possible violations of the DCA.

- 47** What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The inclusion of vertical hard-core restraints (such as price maintenance, territorial and customer restrictions) excludes the entire agreement from the vertical block exemption. Contrary to what applies to hard-core restrictions, the failure to meet the conditions provided for non-compete clauses results only in non-applicability of the block exemption to the non-compete clause itself. Non-applicability of the block exemption makes the provision or the agreement, whatever may be the case, to fall under the scope of the cartel prohibition including articles 6(3) and 7 DCA. Nullity of a contractual provision might cause nullity of the entire agreement,

which will in principle be the case if the null and void provision is inextricably connected to the remainder of the agreement.

- 48** May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

In case of a violation the NMa can impose a fine, an order for incremental penalty payments or a binding order to comply with the antitrust regulation provisions without imposing a penalty. Fines imposed on undertakings may be up to €450,000 or up to 10 per cent of the total net annual turnover of the undertaking, whichever is higher. The NMa may also impose fines on natural persons. Such fines may be up to €450,000. A natural person will only be fined if he or she directed the anti-competitive behaviour or omitted to take measures to prevent the behaviour, although he or she was empowered and reasonably bound to do so. The binding order entails a milder form of enforcement. However, when the binding instructions contained in the order are violated, the NMa is empowered to impose a fine or an order for incremental penalty payments. Another instrument is a 'commitment decision', in which the NMa declares a commitment made by the infringer binding in order to prevent or ensure the discontinuation of a violation of competition rules. Recently the minister of economic affairs has introduced a new fine policy offering the NMa the possibility to impose higher fines (eg, in case of repetition of an offence).

According to the provisional 2011 annual report of the NMa, the total amount of fines imposed in 2011 has varied substantially (from €4.5 million in 2009 to €137.1 million in 2010 and €39.7 in 2011). Furthermore, the NMa imposed eight fines on natural persons (most of them de facto directors).

#### Investigative powers of the authority

- 49** What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The NMa has extensive investigative powers to trace and intervene in cartels and other antitrust violating practices. For example, it may search premises and computers in order to find proof of illegal activities and take far-ranging measures to prevent violation of competition such as searching private homes without the permission of the occupant. Persons and entities that are subject to the investigation of the NMa are in principle obliged to cooperate and provide information in the context of the investigation, failing which

#### Update and trends

As per 1 January 2012 the NMa will merge with the Netherlands Consumer Authority and the Opta (the authority that focuses on the post and telecommunications sectors). The new authority will be called the Autoriteit Consument en Markt (Authority for the Consumer and Market (ACM)). This could imply that administrative procedures for vertical restraints dealt with by the ACM will change, but the impact of the merger on administrative procedures is not yet clear.

may result in fines up to €450,000 or up to 1 per cent of the total net annual turnover of the undertaking if the infringer is an undertaking, whichever is higher.

#### Private enforcement

- 50** To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

According to Dutch law, an entity or a natural person who suffers losses due to infringements of competition law can initiate civil proceedings to recover the losses. This type of claim should be submitted to civil courts and can be based on a wrongful act, unjustifiable enrichment and undue payment. In theory, it is also possible to recover 'scattered losses' (many individual small losses caused by a single cartel) through civil actions, but Dutch law does not provide a practical solution as there is no possibility for class actions. The chances of recovering all of the legal costs are limited. In general, only a (relatively small) part of the actually spent legal costs are awarded by the courts to the winning party. The duration of the proceedings will depend on the circumstances of the case and is hard to predict.

#### Other issues

- 51** Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

There is no unique point relating to the assessment of vertical restraints in our jurisdiction that is not covered above.

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