

Guidelines

Arrangements between suppliers and buyers

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Guidelines regarding arrangements between suppliers and buyers

The Dutch Competition Act ensures effective and fair competition. The basic principle for effective and fair competition is that undertakings determine their market conduct independently from each other. Independent market conduct ensures rivalry between undertakings to gain the buyers' favor. This works as an incentive for undertakings to be cheaper, better and more innovative, which, in turn, benefits buyers and consumers.

The Netherlands Authority for Consumers and Markets (ACM) is an independent regulator. One of the laws that ACM enforces is the Dutch Competition Act. A key element of this act is the prohibition on agreements that restrict competition between undertakings, also known as the cartel prohibition. This prohibition can also apply to arrangements between suppliers and buyers.

Many arrangements between suppliers and buyers promote competition. By making arrangements, they can distribute goods and service more efficiently, for example. It is important for undertakings to know in advance what arrangements are legal, and what are not.

In these Guidelines, ACM explains how the Dutch Competition Act assesses a number of common arrangements between suppliers and buyers. These Guidelines primarily target undertakings, trade organizations, and their advisors, and they replace the document 'ACM's strategy and enforcement priorities with regard to vertical agreements'. On www.acm.nl, ACM has also published separate guidance on the assessment of arrangements between competitors, arrangements between health care providers¹, collective procurement of prescription drugs by hospitals and health insurers² and the room that the Dutch Competition Act offers for sustainability initiatives³.

Any undertakings, trade organizations, employees, and consumers who suspect any violations of the cartel prohibition have the opportunity to report such violations to ACM in confidence by calling +31 70 7222 000 or +31 70 7222 500 (anonymously).

¹ See <https://www.acm.nl/nl/publicaties/publicatie/7083/Richtsnoeren-voor-de-zorgsector> (in Dutch).

² See <https://www.acm.nl/en/publications/publication/16341/Guidelines-on-collective-procurement-of-prescription-drugs>.

³ See <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability>.

1. Introduction

1. It is the responsibility of undertakings themselves to comply with the Dutch Competition Act. With these Guidelines, the Netherlands Authority for Consumers and Markets (hereafter: ACM) wishes to inform undertakings on how to self-assess what arrangements between suppliers and buyers are allowed, and what arrangements are not. As suppliers and buyers are active at different levels in the distribution chain, such arrangements are also called 'vertical agreements'.

2. These Guidelines explain the general framework of the competition-law assessment of arrangements between suppliers and buyers. In addition, these Guidelines describe several common arrangements between suppliers and buyers. These Guidelines will clarify as much as possible whether or not certain arrangements are allowed under the cartel prohibition. However, any final assessment will always depend on the actual circumstances of each individual situation. These Guidelines do not represent an exhaustive description of the legal provisions and case law, nor do these Guidelines prejudge court rulings, which ACM will obviously take into account. The examples in these Guidelines illustrate how undertakings should approach specific situations. Arrangements that are not included in these Guidelines, too, may violate the cartel prohibition. Conversely, arrangements about which it is not explicitly mentioned in this document that they are allowed, may yet be compatible with antitrust rules.

3. These Guidelines are based on the Vertical agreements block exemption regulation⁴ (hereafter: 'Block Exemption') and the European guidelines concerning vertical restraints⁵ (hereafter: 'Commission Guidelines'). The Block Exemption and the Commission Guidelines are very important in practice for testing arrangements between suppliers and buyers against the competition rules. In addition to these Guidelines, undertakings can use Dutch and European case law with regard to the application of competition rules in various sectors when assessing their arrangements. Furthermore, through regulations, guidelines, and notices, the European Commission has provided undertakings insight into the application of competition rules⁶.

2. Assessment framework for arrangements between suppliers and buyers

2.1 In what cases does the cartel prohibition apply?

What types of conduct fall under the cartel prohibition?

4. Types of conduct exhibited by undertakings⁷ that can be qualified as an *agreement* or as

⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ. 2010, L 102/1: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010R0330&qid=1555334284582&from=EN>.

⁵ Guidelines on vertical restraints, 2010/C 130/01: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010XC0519\(04\)&qid=1555334822679&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010XC0519(04)&qid=1555334822679&from=EN)

⁶ For more European competition rules: <http://ec.europa.eu/competition/antitrust/legislation/html>

⁷ Every unit that offers goods or services on a certain market is an undertaking. The legal form of this unit

concerted practices fall under the cartel prohibition.

5. The concept of 'agreement' comprises both written arrangements as well as oral arrangements. The important element is that undertakings have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that intention is expressed is irrelevant.⁸

6. The concept of 'concerted practices' comprises forms of coordination with which undertakings, without making any arrangements, no longer determine their market conduct independently from each other, for example, a supplier threatening to stop supplying if the buyer refuses to charge a certain resale price, and the supplier changes their sale price in response. ACM uses the term 'agreement' in this document for both agreements and concerted practices.

What arrangements between suppliers and buyers are anticompetitive?

7. Vertical agreements fall under the cartel prohibition if they restrict competition. In this document, ACM uses the term 'vertical restraints' for provisions in vertical agreements that restrict competition.

8. ACM distinguishes between different types of vertical restraints: hard-core restrictions⁹, non-compete obligations¹⁰ and other restrictions. These types of restrictions are further explained below. In section 3, ACM will discuss in greater detail the competition-law assessment of these restrictions.

Hard-core restrictions

9. Hard-core restrictions are severe anticompetitive restrictions.¹¹ The most important hard-core restrictions that have the object to restrict competition:¹²

a. *Resale price maintenance*. This means that the supplier restricts the buyer's ability to set its own resale price. Using a suggested resale price or imposing a *maximum* resale price does not constitute a hard-core restriction.

b. *Market-sharing*. This means that the supplier prohibits the buyer to sell in a specific area, or to specific customers or specific customer groups. Think of a supplier who only allows a buyer to sell to customers in The Hague, but not to customers in Amsterdam:

- If the supplier prohibits the buyer to approach customers in Amsterdam of their own accord, in order to sell products, that is a restriction of 'active sales'.¹³ A restriction of active sales is

and the manner in which it is financed do not matter. An undertaking can also be a natural person who offers goods or services.

⁸ See marginal 25 of the Commission Guidelines.

⁹ See Article 4 of the Block Exemption.

¹⁰ See Article 5 of the Block Exemption.

¹¹ See for example: Guidance on restrictions of competition "by object" for the purpose of defining which agreement may benefit from the De Minimis Notice, SWD(2014) 198 of 25 June 2014: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf. See also the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ. 2014, C 291/1: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0830\(01\)&from=NL](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0830(01)&from=NL).

¹² This is a non-exhaustive list of hard-core restrictions. ACM refers to the Block Exemption and the Commission Guidelines (marginals 47-64) for a more detailed description.

¹³ Active sales occurs when the seller deliberately approaches the customer or customers, for example by

usually a hard-core restriction and only allowed in certain circumstances. For example, a supplier can prohibit the buyer to sell actively in a geographical area that they have assigned exclusively to themselves or to another buyer.¹⁴

- The supplier may never prohibit the buyer to sell products to customers in Amsterdam that come to them of their own accord. This restriction of ‘passive sales’ constitutes a hard-core restriction. Passive sales means that the seller does not deliberately seek out customers, but that individual customers ‘spontaneously’ ask the seller for a product or service. Reaching out to customers through general advertisements or promotion, for example on the Internet¹⁵, also constitutes passive sales.

c. *Restriction of online sales.* This means that the supplier limits the buyer’s ability to sell products over the Internet. Below is a clarification of what situations constitute a hard-core restriction and what situations do not.

- Charging a buyer a higher price (or giving a smaller discount) for products that the same buyer resells online than for products they sell offline (dual pricing) is an indirect form of resale price maintenance, and thus constitutes a hard-core restriction. However, charging different types of buyers different prices, for example buyers who only sell products online and buyers who only sell products offline, does not constitute a hard-core restriction.
- The distinction mentioned under b) between passive sales and active sales is also relevant to restrictions of online sales. Restricting passive sales over the Internet always constitutes a hard-core restriction. Restricting active sales over the Internet is usually a hard-core restriction, and is only allowed in certain situations.
 - A complete prohibition of selling products online is a hard-core restriction.
 - Imposing a fixed ratio between online and offline sales is a hard-core restriction.
 - A complete prohibition of using price-comparison websites on the buyer’s part can be a hard-core restriction if this restriction is not based on objective quality standards.
 - Prohibiting the buyer from selling products through an online forum, for example in order to preserve the luxury image of the product, is not a hard-core restriction.

Example 1: Resale price maintenance

A supplier forces an online store to sell their products for EUR 100. If the online store charges a lower price, the supplier will no longer supply the online store. Therefore, the online store charges the resale price imposed by the supplier.

This conduct is a hard-core restriction because the supplier forces the online store to set its resale price at EUR 100. In this way, the supplier limits the buyer’s freedom to set their own resale prices.

writing to them directly, sending an email or visiting.

¹⁴ See Article 4 under b of the Block Exemption to learn about the other situations in which the supplier can prohibit active sales by a buyer.

¹⁵ Advertisements on the Internet that specifically target certain customers constitute active sales to those customers. Banners on websites of third parties that only appear for customers in a certain geographical area are an example of active sales in that area.

Example 2: Market-sharing

A supplier grants buyer A the exclusive right to sell their products in The Hague. Buyer A cannot sell the products to customers outside of The Hague. Buyer B can sell the supplier's products exclusively in Amsterdam and not in The Hague. Buyer A cannot send any emails to customers from Amsterdam. If customers from Amsterdam approach buyer A of their own accord, buyer A has to redirect these customers to buyer B.

As a result of this conduct, the market is divided between buyer A and buyer B. The supplier can prohibit buyer A from sending emails directly to customers in buyer B's exclusive area.

Restricting the active sales is allowed in this situation.

The supplier cannot prohibit buyer A from selling products to customers from Amsterdam that approach the supplier of their own accord, for example because the supplier's service is outstanding. This restriction of passive sales is a hard-core restriction.

Example 3: Restricting online sales by charging different wholesale prices

A supplier supplies a buyer who runs both a brick-and-mortar store and an online store. The supplier applies a recalculation based on the share of goods sold online. If the share of online exceeds 25%, the supplier will charge the buyer a purchase price that is 10% higher for the products that the buyer has sold through the online store. With this arrangement, the supplier wants to stimulate the buyer to invest in the showroom of the brick-and-mortar store.

This conduct is a hard-core restriction because the purchase price for the same buyer is higher for online sales than for offline sales (dual pricing). A supplier who wishes to stimulate investments in a showroom is allowed to pay a fixed fee to the buyer.

Example 4: Restricting online advertising

A supplier restricts its distributors in their opportunities to advertise on online search engines. The distributors cannot bid on advertising space that is presented with search queries in which searchers use the supplier's brand name. This limits the distributors' ability to advertise in search queries of the following kind: 'buy [brand name supplier]'.

This conduct constitutes a hard-core restriction because it restricts competition on the purchase market for advertising space, on which the supplier and the distributors compete with each other, and because the distributors are limited in their ability to create visibility on a search engine through advertising.

It depends on the circumstances of the situation whether this kind of 'advertising restrictions' limit passive or active sales over the Internet. For example, if the buyer cannot bid for the aforementioned search queries in the entire European Union, then that would probably constitute a restriction of passive sales. However, if the supplier cannot bid for the aforementioned search queries only in specific cases or specific areas, then it can be a restriction of active sales that is allowed in certain situations¹⁶. However, this example does not appear to be such a situation, which means that a restriction of active sales would also constitute a hard-core restriction.

¹⁶ An example of such a situation is the supplier prohibiting the buyer to bid for search queries in a geographical area that he has assigned to himself or to another buyer. See Section 4 under b of the Block Exemption for the other situations in which the supplier can prohibit a buyer from actively selling.

Non-compete obligations

10. Non-compete obligations are a special category of vertical restraints.¹⁷ Non-compete obligations are only allowed if they meet certain requirements.¹⁸ The following arrangements between supplier and buyer constitute non-compete obligations:

- a. The buyer cannot manufacture, buy, sell or resell goods or services that compete with the goods or services it buys from the supplier.
- b. The buyer has to buy at least 80% of its total demand of the product in question from the supplier.
- c. The buyer cannot manufacture, buy, sell or resell certain goods or services after the end of the agreement with the supplier.

Other restrictions

11. The category 'other restrictions' comprises all other vertical restraints that may restrict competition, depending on the circumstances of the case. The object of these other restrictions is not to restrict competition, but they may have as their effect a restriction of competition in specific cases. That is why such restrictions are also called 'restrictions by effect.' Examples are restrictions related to:

- a. Selective distribution¹⁹;
- b. Exclusive distribution²⁰;
- c. Exclusive sale²¹.

2.2 In what cases does the cartel prohibition not apply?

12. Three types of exceptions to the cartel prohibition exist: the bagatelle exception, the exception for efficiency improvements, and the Block Exemption. In addition, the cartel prohibition does not apply in the case of agency. This is explained below.

Bagatelle exception

13. The cartel prohibition does not apply to arrangements between a limited number of small undertakings.²² This exception applies if no more than eight undertakings are involved in the arrangement, and if the combined turnover of these undertakings does not exceed EUR 5,500,000 if

¹⁷ These non-compete obligations are also known as 'excluded restrictions'. See Article 1d in conjunction with Article 5 of the Block Exemption. The non-compete obligations (or 'excluded restrictions') are further explained in marginals 65-69 of the Commission Guidelines.

¹⁸ These conditions specifically concern the goods or services to which the non-compete obligation applies, the duration of the non-compete obligation, and the place from which the goods or services are sold. See also marginal 24.

¹⁹ Selective distribution is a situation in which the supplier selects a group of licensed buyers/suppliers that can distribute its product. An example is a supplier who sets out a condition for selling its products that the buyer must have a showroom.

²⁰ Exclusive distribution means that the supplier grants individual buyers/distributors the exclusive right to serve a specific area or customer group. One example is a supplier who appoints in a specific city one buyer who can resell its products in this city.

²¹ Exclusive sale or supply means that the agreement contains elements that restrict the buyer/distributor from buying from other suppliers. One example is a supplier who prohibits its buyers from selling products of competing suppliers.

²² See Section 7, first paragraph of the Dutch Competition Act.

they primarily supply goods or if it does not exceed EUR 1,100,000 if they are engaged in other activities, such as services.

Example 5: Bagatelle

A supplier forces its three buyers to resell its products for EUR 100. If the buyers charge a lower price, the supplier will no longer supply them. That is why the buyers charge the mandatory resale price. The supplier has a total turnover of EUR 3,000,000, and the three buyers each have a turnover of EUR 500,000.

In this case, the cartel prohibition does not apply, because the requirements for the bagatelle exception have been met: fewer than eight undertakings are involved in the arrangement, and their combined turnover is less than EUR 5,500,000. Even though a hard-core restriction (resale price maintenance) exists, the cartel prohibition does not apply, and this agreement is allowed.

Exception for efficiency improvements

14. Restrictions to competition, including hard-core restrictions, can still be allowed if they produce economic benefits (also called efficiency improvements) that offset the negative anticompetitive effects. Section 6, third paragraph of the Dutch Competition Act lists the requirements for this exception²³:

- 1) There needs to be an improvement of production or distribution, or promotion of technical or economic progress (an 'efficiency improvement'²⁴);
- 2) Users are allowed a fair share of the efficiency improvement;
- 3) The restriction to competition has to be indispensable to the attainment of the efficiency improvement;
- 4) Sufficient competition must remain in the market.

15. Vertical restraints may yield various efficiency improvements (first requirement), such as: (a) the prevention or reduction of the 'free-rider problem': free riding on a service provided by a competing buyer, as a result of which buyers do not have any incentive to invest in service themselves, (b) the incentive to open up new markets, (c) the prevention of the 'hold-up problem'²⁵ as a result of which undertakings are not prepared to make major investments, (d) the protection of the product's image by means of quality standards, and (e) the realization of economies of scale in the distribution.²⁶

²³ The way arrangements are tested against these requirements is explained in more detail in marginals 122-127 of the Commission Guidelines. For more information, see the European Commission Guidelines on the application of Article 81, third paragraph of the Treaty, 2004, C 101/8: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(07\)&from=NL](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)&from=NL).

²⁴ See marginal **Fout! Verwijzingsbron niet gevonden.** for examples of possible efficiency improvements.

²⁵ A 'hold-up problem' is the inefficient situation in which a collaboration between undertakings is not realized, because one party should make a specific investment that would lead to the other party obtaining more bargaining power. One such example is when a producer invests in a machine that manufactures a specific product that is of value to one specific buyer. After the investment, the buyer has a strong negotiating position vis-à-vis the manufacturer because the manufacturer cannot use the machine for anything else. If the manufacturer foresees this situation, it may refrain from investing whereas it would have been valuable.

²⁶ See marginals 106-109 of the Commission Guidelines.

16. The condition that users must be allowed a fair share of the benefits (second requirement) implies that the users of the product in question must be compensated for the negative consequences of the restriction of competition, for example, by enabling them to benefit from a lower price, better quality, a more sustainable product²⁷, a larger selection, better service, faster delivery or more innovation than they would have without the restriction of competition.

17. When applying the criterion of indispensability (third requirement), it should be checked in particular whether the restriction of competition enables an efficiency improvement that could not have been realized without this restriction.

18. Finally, sufficient competition will remain if the undertakings continue to experience competitive pressure to such an extent that they will continue seeking efficiency improvements, and passing these on to users. If the agreement, for example, leads to the creation, preservation or strengthening of a dominant position, insufficient competition will remain, and this requirement will not have been met.

19. If undertakings make anticompetitive arrangements, it is up to them to prove that these arrangements are still allowed because they meet the requirements for the exception for efficiency improvements.²⁸ In that context, they must substantiate the benefits of their arrangements with objective and verifiable data. Think of substantiated studies (including market studies), reports, or analyses about the efficiency improvement and its magnitude, the necessity of the restriction of competition in order to achieve the efficiency improvement, and the competitive landscape. The exception automatically applies if all criteria have been met. In that case, the agreement is not illegal.

The 'safe zone' of the Block Exemption

20. Agreements containing vertical restraints that do not constitute hard-core restrictions, and where the undertakings involved do not have a strong market position, are often positive for competition and for end-users. That is why the exception for efficiency improvements automatically applies to such agreements if they fall in the 'safe zone' of the Block Exemption.²⁹ Vertical agreements fall in the safe zone of the Block Exemption if the market shares of supplier *and* buyer are 30% or less³⁰, and they do not include any hard-core restrictions³¹. In that case, the cartel prohibition does not apply.

²⁷ ACM has published specific information about the assessment of sustainability initiatives. See: <https://www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements>.

²⁸ See Section 6, fourth paragraph of the Dutch Competition Act and Article 2 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ. 2003, L 1/1: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=NL>.

²⁹ Based on Section 12 of the Dutch Competition Act, the Block Exemption applies directly to agreements that fall under the Dutch cartel prohibition. Except for a number of exceptions, the Block Exemption does not apply to vertical agreements between competitors. See Block Exemption, Article 2, fourth paragraph, and marginals 27-28 of the Commission Guidelines.

³⁰ See Article 3 of the Block Exemption.

³¹ See marginal 9 for an explanation of the hard-core restrictions.

Agency

21. A special situation is where the buyer is an agent of the supplier's, who, in that case, is called 'principal'. A buyer is an agent if the buyer acts as a representative of the principal. In that context, it is not relevant what the supplier and buyer call their relationship, but what the true nature of that relationship is. In order to qualify as an agent, it is necessary that the buyer runs no or minimal financial or commercial risk with regard to the activities that it has been charged with by the principal.³² The principal carries these risks. If this requirement has been met, the principal and the agent will be considered a single undertaking. That is why, in that case, an agreement between principal and agent is not an agreement between two undertakings. That means that the cartel prohibition does not apply in such cases.

Example 6: Agency

Supplier A sells its products through buyer B. Buyer B works on a commission basis, and sells the products for the price that supplier A sets. Buyer B does not obtain ownership of the products, and is able to return inventory if stock is left. Buyer B makes a number of specific investments in its store, in a special website, and in a training program in order to be able to sell supplier A's products. Supplier A does not pay for these costs.

In this example, there is no agency within the meaning of Dutch competition law. Buyer B makes market-specific investments in its store, its website and courses in order to be able to sell supplier A's product. As a result, he runs more than minimal commercial and financial risks when selling the product. The fact that buyer B works on a commission basis, does not become owner of the products, and does not run any inventory risk, is, in this case, insufficient to qualify buyer B as an agent.

As there is no agency, the cartel prohibition applies as normal. This means that the fact that supplier A sets the price for the products that buyer B sells constitutes resale price management, and is therefore a hard-core restriction.

3. Assessment of vertical agreements in practice

3.1 Block Exemption applies: vertical restraint allowed

22. A practical way of assessing whether or not a vertical agreement conflicts with competition rules is to see first whether there is a restriction of competition. Does the agreement restrict competition by impeding the freedom of an undertaking to determine its commercial practices independently?³³ The second step is to see whether that restriction qualifies as a hard-core restriction.³⁴ If the agreement does not contain any hard-core restrictions, then, thirdly, it is sensible to see whether the entire

³² Marginals 12-21 of the Commission Guidelines contain an extensive description of the risks and costs that are relevant for the assessment of agency relationship.

³³ The possible negative anticompetitive effects of vertical restraints are described in further detail in marginals 96-105 of the Commission Guidelines.

³⁴ The hard-core restrictions are described in marginal 9.

agreement falls under the safe zone of the Block Exemption. In that context, it needs to be assessed whether each of the individual market shares of supplier and buyer is less than 30%.³⁵ If this is the case, the entire agreement is allowed.

23. If the supplier's or buyer's market share exceeds 30%, or if the agreement contains hard-core restrictions, the Block Exemption will not apply to the agreement. In that case, the agreement cannot benefit from the Block Exemption, and all vertical restraints are prohibited unless one of the exceptions applies, especially the exception for efficiency improvement.

Example 7: calculation of market shares for the purpose of the Block Exemption

The first step in calculating whether the market share threshold of 30% is exceeded is defining the relevant market on which the supplier sells the goods and the buyer buys these products. For this purpose, the many public decisions that can be found on the websites of ACM and the European Commission in which ACM and the European Commission previously defined markets can be consulted. If ACM or the European Commission has not yet looked into that market previously, then the undertaking itself needs to define the relevant market.

The product dimension and the market's geographical dimension must be looked into when defining a relevant market.

The relevant product market comprises the goods and/or services that the user sees as alternatives for each other based on product characteristics, price, and intended use. Decisive factors for the definition of the relevant product market are the physical and technical characteristics of the goods or the nature of the services, price ratios, and the way buyers³⁶ and suppliers of other products³⁷ react to price changes.

The relevant geographical market is the area in which the undertakings involved are active, and in which the conditions for competition are sufficiently equal and clearly differ from the conditions for competition in adjacent areas. The relevant geographical market can be a part of the Netherlands, the whole of the Netherlands, or a larger area. Decisive factors for defining the market include: distribution of market shares of the suppliers in various areas, price differences, purchase behavior of the buyers and trade flows.³⁸

Once the relevant market has been defined, the market share of the supplier and buyer has to be determined.³⁹ The supplier's market share is determined by determining its share in the total sum of sales on the relevant market. The buyer's market share is determined by determining its share in the total sum of purchases on the relevant market.

Imagine supplier A and supplier B competing with each other on the relevant market for product X in the Netherlands. Supplier A sells for a total sum of €1,000 to buyer C. Buyer C also buys for a total

³⁵ The market share threshold of 30% is included in Article 3 of the Block Exemption.

³⁶ This is also called demand substitution.

³⁷ This is also called supply substitution.

³⁸ See marginals 86-95 of the Commission guidelines and the Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ. 1997, C 372/3: [https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=NL](https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=NL).

³⁹ When calculating the market share on that relevant market, the undertakings can use public sources, reports made by trade organizations or make an estimation in good faith.

sum of €2,000 from supplier B. Buyer C resells the products for a total turnover of €6,000. Buyer C is the only buyer on this market.

For the calculation of the market shares in the context of the Block Exemption, the market for product X in the Netherlands needs to be looked into. On this market, supplier A sells for an amount of €1,000, which means it has a share of 33% of total sales by suppliers on this market, which amount to €3,000.⁴⁰ Supplier B sells on this market for €2,000, which means it has a share of 66% of total sales by suppliers on this market. Buyer C buys for €3,000, which means it has a market share of 100% on the purchase market.

24. The non-compete obligations that have been described in marginal 10 can only benefit from the Block Exemption under certain conditions. These conditions particularly relate to the goods or services that fall under the non-compete obligation, to the duration of the non-compete obligation (not longer than 5 years), and to the place from which goods or services are sold. Article 5 of the Block Exemption describes the exact requirements that a non-compete obligation must meet in order to benefit from the Block Exemption.⁴¹ Non-compete obligations that do not meet these requirements cannot benefit from the Block Exemption, and must be tested directly against the cartel prohibition and the exception for efficiency improvements.⁴²

2. Testing against the exception for efficiency improvements

25. Even if a vertical agreement does not fall under the Block Exemption, it can still be allowed if it meets all of the requirements of the exception for efficiency improvements.

26. Hard-core restrictions like resale price maintenance and completely restricting online sales by a buyer restrict competition and seldom meet the requirements of the exception for efficiency improvements. However, suppliers and buyers can still invoke this exception, even in the case of hard-core restrictions.⁴³ For example, it is conceivable that restrictions like resale price maintenance, dual pricing, and imposing a fixed relationship between online and offline sales⁴⁴ also have efficiency benefits that are necessary for maintaining an online and offline sales channel.

Example 8: stimulating service in the case of strong interbrand competition

A supplier of electric tools gives its dealers price recommendations. Dealers that do not stick to the price recommendations get less favorable supply conditions and their supply contracts are suspended. In this way, the supplier wants to protect the margins of dealers to stimulate service. A number of positive qualities of tools, like minimal vibrations, cannot be easily verified by consumers.

⁴⁰ Calculation as follows: $\text{€1,000} / (\text{€1,000} + \text{€2,000}) \times 100\% = 33\%$

⁴¹ See also marginals 65-69 of the Commission Guidelines for a more detailed explanation of these requirements.

⁴² If the market share threshold of 30% is not exceeded, the Block Exemption continues to apply to the remaining part of the agreement if the non-compete obligation can be contractually separated from the rest of the agreement.

⁴³ In this context, the Commission Guidelines describe a number of possible efficiency improvements that resale or sale restrictions (marginals 61-64) and resale price maintenance (marginals 223-229) might have.

⁴⁴ See marginal **Fout! Verwijzingsbron niet gevonden..**

Retailers are able to convince consumers of these positive qualities if employees take product-specific courses, by giving demonstrations, and by making the tools available so that consumers are able to try before they buy. The supplier has a small market share, and experiences strong competition from other suppliers.

Assessment: as this conduct constitutes resale price maintenance, which is a hard-core restriction, the Block Exemption does not apply to the vertical agreement. That is why the conduct has to be tested directly against the cartel prohibition. The application of resale price maintenance by the supplier restricts price competition between the dealers, because they are not free to set their own prices. Therefore, they are unable to offer consumers discounts, for example. In this way, the resale price maintenance has the object of restricting competition within the meaning of the cartel prohibition.

Although resale price maintenance constitutes a hard-core restriction, the supplier can put forward an efficiency defense. In order to do so, the supplier has to make a plausible case that the requirements for application of the exception for efficiency improvements have been met.

Stimulating service in order to convince consumers of certain positive qualities of the tools can be an efficiency improvement that could benefit the users. Intervention by the supplier might be necessary, because otherwise a free-riding problem would arise: many consumers could enjoy this service from a retailer, but then buy the product for less money from a different retailer that did not have these expenses, and is thus able to charge a lower price. Since the supplier experiences strong competition from other suppliers (strong 'interbrand' competition), it is also plausible that sufficient competition will remain in the market.

Finally, it is up to the supplier to make a plausible case that resale price maintenance is indispensable in this situation in order to make sure that the service is provided and that this is not possible with real alternatives that are not, or less, anticompetitive. As an alternative for resale price maintenance, the supplier in this case could, for example, use a selective distribution system with specific criteria or requirements for its buyers in order to provide a certain level of service or to have a showroom in exchange for a fixed fee. If the supplier can make a plausible case that these are not real alternatives for resale price maintenance, then the resale price management is indispensable. In this special case, all requirements for application of the exception for efficiency improvement have been met, so that resale price maintenance is allowed.

4. What if ACM launches an investigation into a vertical restraint?

27. ACM can launch enforcement investigations into vertical restraints on the basis of notification or it can do so ex officio. In that process, ACM must prioritize. ACM does that on the basis of its prioritization policy.⁴⁵

28. If ACM launches an investigation into a possible violation of the cartel prohibition, the burden of proof to demonstrate that a vertical agreement falls under the cartel prohibition lies with ACM. If there

⁴⁵ Prioritization policy of enforcement investigations by the Netherlands Authority for Consumers and Markets, <https://www.acm.nl/en/publications/publication/16182/Prioritization-of-enforcement-investigations-by-ACM>.

are hard-core restrictions, ACM can determine more easily whether there is a violation, because the standard of proof is not as high as it is for restrictions by effect.⁴⁶

29. The burden of proof for making a plausible case that the Block Exemption or the exception for efficiency improvement applies lies with the undertakings that invoke these exceptions. They have to make a plausible case that all requirements for these exceptions have been met. ACM encourages market participants in an actual investigation to bring as soon as possible any evidence that their vertical agreement meets the exceptions. If ACM is convinced that the requirements have been met, it will stop the investigation. If a violation of the cartel prohibition is established and none of the exceptions apply, ACM is then able to impose a fine on the undertakings involved and on the *de facto* executives.

⁴⁶ ACM does not have to establish the effects of hard-core restrictions on competition. Also, ACM does not have to demonstrate that hard-core restrictions appreciably restrict competition, because hard-core restrictions have the object of restricting competition. In such cases, there is no need for the so-called appreciability requirement.