Guidelines

Collaborations between competitors

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Contents

Guidelines regarding collaborations between competitors

The Dutch Competition Act (Mw) 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 ACM enforces is the Dutch Competition Act. One key element of this act is the prohibition of agreements that restrict competition between undertakings, also known as the cartel prohibition.

Some forms of collaboration between competitors promote competition. By working together, undertakings are able, for example, to become active in markets where that would not have been possible without collaboration. It is important for undertakings and trade organizations to know what arrangements are allowed, and what arrangements are not.

In these Guidelines, ACM explains how the Dutch Competition Act assesses a number of common forms of collaboration between competitors. These Guidelines primarily target undertakings, trade organizations, and their advisors, and they replace the document 'Guidelines regarding collaborations between undertakings'.[1] On www.acm.nl, ACM has also published educational material regarding the assessment of arrangements between suppliers and buyers, arrangements between health care providers[2], collective procurement of prescription drugs by hospitals and health insurers[3], and the room that the Dutch Competition Act offers for sustainability initiatives[4].

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). Undertakings that are involved in illegal arrangements with competitors may be eligible for a full or partial reduction of the fine. For more information, please contact ACM by calling +31 70 7222302 (anonymously).

[1] See https://wetten.overheid.nl/BWBR0033027/2013-04-01 (in Dutch).
[2] See https://www.acm.nl/nl/publicaties/publicatie/7083/Richtsnoeren-voor-de-zorgsector (in Dutch).
[3] See https://www.acm.nl/en/publications/publication/16341/Guidelines-on-collective-procurement-of-prescription-drugs.
[4] 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 educate undertakings and trade organizations on how to self-assess what arrangements between competitors are allowed, and what arrangements are not.

2. These Guidelines explain the general framework of the competition-law assessment of arrangements between competitors as stipulated in the cartel prohibition.[5] [6] By competitors, ACM means both actual and 'potential' competitors.[7] 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 help undertakings, trade organizations and their advisors (legal or otherwise) understand quickly what arrangements and forms of coordination between competitors are probably allowed, or are illegal. When enforcing competition rules, for example by imposing fines for violations, ACM has to apply Dutch and European case law. At a national level, ACM has, since it was founded in 1998, issued a large number of rulings and opinions that gave guidance to others. The District Court of Rotterdam and the Dutch Trade and Industry Appeals Tribunal (CBb) have issued similar rulings offering guidance, which undertakings are able to consult.[8] Furthermore, the European Commission has provided insight into the application of competition rules through its regulations, guidelines, and announcements.[9] The Guidelines on Horizontal Co-operation agreements (hereafter: Guidelines on Horizontal Co-operation) in particular contain a large amount of valuable information on this topic.[10]

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[5] The Dutch cartel prohibition of Section 6, paragraph 1 of the Dutch Competition Act, and the European cartel prohibition of Article 101, paragraph 1 of the Treaty on the Functioning of the European Union are virtually identical in terms of substance. The application of the Dutch cartel prohibition cannot be stricter or more flexible than the European cartel prohibition. The decisions of the European Commission and the European court rulings on competition also guide the interpretation of the Dutch cartel prohibition. The European cartel prohibition only applies when the collaboration between competitors can appreciably affect trade between European Union member states. More information can be found in the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004, C 101/7: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)&from=NL.

[6] In competition law, agreements about collaboration with competitors are also referred to as 'horizontal agreements'. A horizontal agreement is an arrangement between two or more undertakings that are active in the same levels of the distribution chain of goods or services, for example producers or distributors. Vertical agreements also fall under the Dutch Competition Act. ACM has published separate Guidelines for such agreements. Vertical agreements are arrangements between suppliers and buyers.

[7] Undertakings compete with each other if they offer products and services on the same product markets and geographical markets. Potential competitors are undertakings that are not yet active on certain product markets and geographical markets, but that could relatively easily enter those markets.

[8] See www.acm.nl for more information.

[9] See for European competition rules: http://ec.europa.eu/competition/antitrust/legislation/legislation.html

[10] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ. 2011, C 11/01: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=NL.

2. Assessment framework for collaboration between competitors

2.1 Why do competition rules exist?

4. 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.

5. Undertakings are not allowed to eliminate the usual uncertainty that competitors have about their own intended and actual market conduct by entering into agreements with each other or participating in concerted practices. Sharing each other's plans about, for example, prices, margins, number of products, and where or to whom the competitor will sell, are considered concerted practices that restrict competition. This kind of information usually reduces the uncertainty that an undertaking has about its competitor's conduct. It eliminates the incentive to innovate and to work as efficiently as possible. This harms buyers and consumers.

6. Undertakings are allowed to collaborate if collaboration enables them to work more efficiently, to innovate more and/or to be more competitive, and if buyers benefit from the collaboration. For small and medium-sized undertakings in particular, collaborations such as trade organizations can play a useful role, and they can perform activities that enable individual undertakings to be more competitive, for example by providing education, conducting benchmark studies, and acting as a contact point for the government.

2.2 In what cases does the cartel prohibition apply?

What types of conduct fall under the cartel prohibition?

7. Types of conduct exhibited by undertakings[11] that can be qualified as an *agreement*[12], *concerted practice*, or a *decision by an association of undertakings*, fall under the cartel prohibition.

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

9. The concept of 'concerted practices' comprises forms of coordination with which undertakings, without making any arrangements, have reduced the risks of competition, for example by exchanging information with each other.

10. The cartel prohibition also applies to 'decisions by associations of undertakings', where the organization seeks to influence the conduct of its members. A formal decision is not necessary.

[11] Every unit that offers goods or services on a certain market is an undertaking. The legal form of this unit and the manner in which it is financed do not matter. An undertaking can also be a natural person who offers goods or services.

[12] Dutch Trade and Industry Appeals Tribunal (CBb) 3 July 2008, ECLI:NLCBB:2008:BD6629, paragraph 7.9 (*AUV)*.

Informal recommendations or suggestions can also constitute 'decisions by an association of undertakings'. It does not matter whether the organization says that it is up to the members to decide what to do with its recommendations.[13]

11. The abovementioned categories of conducts that may fall under the cartel prohibition are hereafter also collectively referred to as 'agreement' or 'arrangement'.

What arrangements between competitors restrict competition?

12. Arrangements only fall under the cartel prohibition if they restrict competition. Experience has shown that certain arrangements between competitors always restrict competition. The object of these kinds of arrangements is to restrict competition, which is why they are also called 'restriction by object'.[14] [15] Well-known examples of restrictions by object are price-fixing agreements and market-sharing agreements, which are further explained below. These kinds of agreements are almost never allowed because they severely restrict competition.

13. Agreements about selling prices and purchasing prices between competitors always restrict competition.[16] An undertaking must set the price of a product or service by itself, without any coordination with competitors. An undertaking cannot make any arrangements with its competitors about the price they want to charge or pay. Arrangements about price increases, surcharges, discounts and minimum or maximum prices are illegal. Competitors are also not allowed to exchange any information about these aspects.

14. Market-sharing agreements between competitors, too, always restrict competition.[17] An undertaking has to determine by itself in what area it approaches customers or suppliers. An undertaking cannot make any arrangements with its competitors to share customers, suppliers, geographical areas or product markets.

15. In tender processes[18], competitors are not allowed to have any contact with each other about each other's prices or other award criteria and about who should win the tender process.[19] This is

[13] Decision by ACM of 26 April 2004 in case 3310/*Nederlands Tandtechnisch Genootschap*, paragraph 79 and decision by ACM of 26 April 2004 in case 3309/*NIP, LVE, NVP and NVVP*, paragraph 94; District Court of Rotterdam of 17 December 2015, ECLI:NL:RBROT:2015:9352, paragraph 5.5 – 5.12.

[14] 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, first paragraph 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/PDF/?uri=CELEX:52014XC0830(01)&from=NL.

[15] The cartel prohibition only covers restrictions to competition that are 'appreciable'. Whether a restriction to competition is appreciable depends on the position of the undertakings involved on the market. Restrictions by object are always appreciable.

[16] CBb 17 March 2011, ECLI:NL:CBB:2011:BP8077, paragraph 9.10.2 (*Shrimp Fishery*)

[17] CBb 30 October 2018, ECLI:NL:CBB:2018:527, paragraph 6.6 (*Ship-generated waste*); CBb 30 October 2018. ECLI:NL:CBB:2018:526, paragraph 4.3.7 (*Laundries*); decision by ACM of 27 August 1998 in case 379/*KNMvD*, paragraphs 71-73; decisions by ACM of 1 March 2000 in cases 1131, 1151, 1250 /*Establishment policy primary psychologists*, paragraphs 24-27; decision by ACM of 23 March 1999 in case 374/*Stichting Saneringsfonds Varkensslachterijen*, paragraph 61 and decision on objection of 24 March 2000, paragraph 113.

[18] When assessing whether a certain process constitutes a tender process, ACM does not look at the formal designation or the type of client. As soon as undertakings compete for an assignment, the cartel prohibition applies. This includes the situation that a private (non-governmental) client requests a price or an estimate from two different undertakings at the same time or after each other.

[19] CBb 11 November 2017, ECLI:NL:CBB:2017:1, paragraph 6.2.7 (*WMO Friesland*); CBb 12 October

because clients actually use tender processes to create a competitive procedure in order to receive the best possible bid from undertakings. If undertakings have contact about their bids beforehand, the competitive process in tender processes will thus be distorted. It is thus illegal to exchange information about the intended price or other criteria that are important to the client. This also applies to the situation in which an undertaking does not wish to be eligible for the job.[20] In these cases, undertakings cannot 'borrow each other's prices'[21] in order to get the client to contact them for future tender processes.

16. Other arrangements between competitors that always restrict competition are arrangements concerning collective refusals to supply or purchase (boycotts) or arrangements concerning restrictions of production, production capacity or purchasing.[22] Thus, competitors cannot make arrangements with each other to stop supplying products or services to certain buyers or to stop buying from certain suppliers or to reduce the production capacity.

17. Some arrangements do not have as their object the restriction of competition, but can nonetheless have anticompetitive effects. In order to determine their effects, an assessment must be carried out of what the actual consequences of the arrangements for competition are or can be.

2.3 In what cases does the cartel prohibition *not* apply?

18. Three types of exceptions to the cartel prohibition exist: the bagatelle exception, the exception for efficiency improvements, and a number of generic exemptions. This is explained below.

Bagatelle

19. The cartel prohibition does not apply to arrangements between a limited number of small undertakings.[23] 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 they primarily supply goods or if it does not exceed EUR 1,100,000 if they are engaged in other activities, such as services.

20. The cartel prohibition also does not apply to arrangements between undertakings with small market shares.[24] The idea is that if undertakings have a small combined market share, they are not capable of restricting competition effectively. Two requirements apply to this exception:

1) The combined market share of the undertakings involved that are actual or potential competitors does not exceed 10% on any of the relevant markets that the arrangements affect, and
2) the arrangements between the actual or potential competitors cannot negatively influence trade between member states in an appreciable manner.

2017, ECLI:NL:CBB:2017:325, paragraph 5.3.11 - 5.3.12 (*Demolition contractors*) and CBb 23 June 2016, ECLI:NL:RBROT:2016:4738, paragraph 7.1 (*Limburg construction case*).

[20] CBb 30 October 2018, ECLI:NL:CBB:2018:527, paragraph 4.12 (*Ship-generated waste*); CBb 12 October 2017, ECLI:NL:CBB:2017:325, paragraph 5
.3.11 – 5.3.12 (*Demolition contractors*).

[21] This is also called 'cover pricing'; CBb 12 October 2017, ECLI:NL:CBB:2017:325, paragraph 5.3.11 - 5.3.12 (*Demolition contractors*).

[22] CBb 17 March 2011, ECLI:NL:CBB:2011:BP8077, pt. 9.10.2 (*Shrimps*); CBb 24 March 2016, ECLI:NL:CBB:2016:56, paragraph 4.6.3 (*Pickled onions*); CBb 3 July 2008, ECLI:NL:CBB:2008:BD6629, paragraph 7.10 (*AUV*); CBb 3 July 2008, ECLI:NL:CBB:2008:BD6635, paragraph 7.5.1 (*Aesculaap*).

[23] See Section 7, first paragraph of the Dutch Competition Act.

[24] See Section 7, second paragraph of the Dutch Competition Act.

21. The first step for undertakings in determining whether their combined market share is less than 10% is defining the relevant market on which they are active. This may involve taking a look first at the way in which ACM and the European Commission previously defined markets in the many public decisions that can be found on the websites of ACM and the European Commission. If ACM or the European Commission has not yet assessed that market before, then the undertaking itself has to define the relevant market.

22. When defining the relevant market, the relevant product market and the geographical market have to be looked at.[25] The relevant product market comprises all products and/or services that the user considers substitutes of each other on the basis of their characteristics and prices. Among the 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 buyers and suppliers of other products react to price changes. The relevant geographical market is the area in which undertakings compete with each other. The relevant geographical market can be a part of the Netherlands, the whole of the Netherlands, or even a larger area. Roughly speaking, all undertakings that prevent the undertaking in question to be able to increase its prices by 5 to 10% belong to the same relevant market. When calculating the market share on that relevant market, the undertaking can use public sources, reports compiled by trade organizations or make an estimation in good faith.

Exception for efficiency improvements

23. Even if the collaboration between competitors is not a bagatelle, it can still be allowed if it also produces positive economic benefits (also called efficiency improvements). Section 6, third paragraph of the Dutch Competition Act offers a statutory exception to the cartel prohibition for efficiency improvements that offset the restriction to competition. The requirements to be eligible for this exception are:

1) There needs to be an improvement of production or distribution, or promotion of technical or economic progress (an 'efficiency improvement');
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. [26]

24. The requirement that users must be allowed a fair share of the efficiency improvement (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, than they would have without the restriction of competition. When testing against 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. The exemption automatically applies if all requirements have been met[27]: if

[25] For more information, see the commission notice on the definition of relevant market for the purposes of community competition law: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=NL.
[26] For more information, see the Communication from the Commission on Guidelines on the application of article 81, third paragraph of the Treaty, OJ 2004, C 101/8: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)&from=NL.
[27] CBb 17 March 2011, ECLI:NL:CBB: 2011:BP8077, paragraph 8.6.12 (*Shrimp*); District Court Rotterdam 20 October 2016, ECLI:NL:RBROT:2016:8059, paragraph 44 (*Ship-generated waste*), confirmed by CBb

that is the case, the arrangements are not illegal.

25. 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.[29]

Generic exemptions

26. The Dutch cartel prohibition does not apply to:

- Arrangements between competitors that fall under a European Block Exemption[30];
- Arrangements between competitors that fall under the Decision on the exemption for sector protection agreements[31] or the Decision on exemptions for collaboration agreements in retail[32],[33]
- Collective labor agreements[34] and certain arrangements about pensions.[35]

3. Assessment of specific forms of collaboration

27. ACM regularly receives questions about specific forms of collaboration. This chapter will look into assessments of several of these forms of collaboration:

- Recommendations from trade organizations
- Qualification schemes
- Terms and conditions
- Administrative collaborations
- Exchange of information between competitors
- Agreements within regard to purchasing, temporary staff, and labor
- Horizontal collaboration anticipating a concentration.

3.1 Recommendations from trade organizations

28. A trade organization is allowed to provide assistance to its members in many ways, for example by promoting their interests, providing education, or by acting as a contact point for the sector. It can also conduct research, and improve the quality of the range of goods and services, as long as this does not negatively influence competition, directly or indirectly.

29. As mentioned before[36], recommendations from trade organizations constitute 'decisions by

30 October 2018, ECLI:NL:CBB:2018:527, paragraph 6.3 (*Ship-generated waste*).
[28] See Section 6, fourth paragraph of the Dutch Competition Act and Article 2, third paragraph 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 L 1, 4 January 2003.
[29] District Court of Rotterdam, 20 October 2016, ECLI:NL:RBROT:2016:8059, paragraph 47.
[30] See Sections 12 and 13 of the Dutch Competition Act. European Block Exemptions exist for arrangements between competitors about research-and-development agreements and specialization.
[31] Decision of 25 November 1997, Dutch Government Gazette, 1997, 596.
[32] Decision of 12 December 1997, Dutch Government Gazette, 1997, 704.
[33] See Section 15 of the Dutch Competition Act.
[34] See also paragraph 76.
[35] See Section 16 of the Dutch Competition Act. With regard to arrangements pensions, the cartel prohibition does not apply to (i) arrangements between employers' organizations and employees' organizations exclusively regarding pensions and (ii) arrangements or decisions of an organization of professionals exclusively regarding participation in a professional pension plan.
[36] See paragraph 10.

associations of undertakings', which fall under the cartel prohibition if they can restrict competition. [37] Associations of undertakings thus cannot spread information, for example through recommendations, about prices, market-sharing, customers or any other competition-sensitive information.[38] If an association of undertakings sets recommended selling prices, it restricts competition between members. That is why it is a violation of the cartel prohibition to give such recommended tariffs.[39] This could also be the case with public statements about expected price trends, because those can be perceived as recommended prices.[40]

30. In addition, recommendations from an association of undertakings about components of prices, such as possible discounts and minimum margins, recommendations about maximum prices, and recommendations to increase prices, also constitute illegal price recommendations. In that context, it does not matter if the recommended prices are higher or lower than they would have been without those recommendations, or even equal to them. If an association of undertakings recommends a minimum price, too, it will restrict competition, because it distorts competition with lower prices. [41]

3.2 Drawing up calculation methods and cost projections

31. Calculation methods, drawn up by trade organizations, that only show what cost items are important for calculating prices do not restrict competition, and thus do not fall under the cartel prohibition. Such methods leave sufficient freedom to the undertaking to set its own commercial policy and prices, and do not eliminate the usual uncertainty about market conduct (intended or otherwise) by market participants.

32. If a trade organization gives cost projections or includes amounts or increases (in percentages), that, in principle, does not fall under the cartel prohibition. However, the trade organization must expressly limit itself to objective information that makes it easier for undertakings to calculate their own cost price structures, and thus independently set their resale prices.

33. If the trade organization combines a cost projection or a filled-out calculation method with, for example, the suggestion that it finds it desirable that members pass on cost increases (to a certain degree) in their prices or if it recommends members that they keep their margins or profit markups at a certain level, then this *does* fall under the cartel prohibition. This is also the case if, as a result of other circumstances, members get the impression that the identified cost items or cost increases are guiding factors for the pricing strategy of the undertaking.

34. Information about the average price of products within the sector directly influences the especially important competition factor of price, and thus is more likely to constitute a restriction of competition. After all, such information gives members a benchmark to which they can (uniformly) adjust their prices without taking their own cost price trend and cost structure as the starting point.[42] This is also

[37] District Court of Rotterdam of 17 December 2012, ECLI:NL:RBROT:2015:9352, paragraph 5.5-5.12; Supreme Court of the Netherlands, 14 July 2017, ECLI:NL:HR:2017, paragraph 3.3.4 (*Geborgde Dierenarts*).
[38] District Court of Rotterdam, 23 October 2001, ECLI:NL:RBROT:2001:AD7476 (*Simo*); CBb 3 July 2008, ECLI:NL:CBB:2008:BD6629 (*AUV*).
[39] Decision by ACM of 26 April 2004 in case 3310/*Nederlands Tandtechnisch Genootschap*, paragraph 79.
[40] Decision by ACM of 19 March 2003 in case 2021/*OSB*, paragraph 136; decision by ACM of 26 April 2004 in case 3309/*NIP, LVE, NVP and NVVP*, paragraph 127; District Court of Rotterdam 23 October 2001, ECLI:NL:RBROT:2001:AD7476 (*Simo*)
[41] Decision by ACM of 26 April 2004 in case 3310/*Nederlands Tandtechnisch Genootschap*, paragraph 89.
[42] Decision by ACM of 30 June 2017 in case 7615/*Traction batteries.*

the case if the trade organization communicates a range in which prices and tariffs of members fluctuate or will fluctuate, for example communicating that tariffs increase between 4% to 8%, which may create the risk that the lowest percentage will be seen as a recommended minimum tariff increase.

Example 1

An association of undertakings reports salary cost figures (from collective bargaining agreements or otherwise) and inflation figures to its members. *The Dutch Competition Act allows this, because it is not in combination with any recommendation or suggestion regarding passing on any costs, and the figures do not come from businesses in the same sector.*[43]

Example 2

An association of undertakings on the market for services by independent contractors gives its members a cost overview and recommendations regarding an hourly tariff that leads to a reasonable income. *These price recommendations restrict competition, and are thus not allowed.*

Example 3

An association of undertakings uses a so-called operating budget. This budget contains a number of cost items, each followed by a percentage of the undertaking's total costs. These percentages are designated as the association's guideline. Members are sent the operating budget, along with information on 'tariff calculation in 10 steps', which they can use to calculate their cost price per activity.
It is allowed to show cost items for which public and objective data are available, followed by a percentage. Cost items that are not objective cannot be presented in this way, followed by a percentage. An operating budget that leads to a tariff calculation is not allowed. A business is no longer, or in any case less stimulated to lower its costs (including profit margin) and thus also its tariffs, if the share of a certain component of its total costs is equal (or lower) to the share that its trade organization prescribes.[44]

Comparison models

35. It is allowed to create comparison models that undertakings can use to compare their own cost structures or performances with the average in the sector or with a best practice that can serve as a benchmark, if no far-reaching collaboration is involved, such as a specific recommendation.[45]

36. If, based on such comparison models, specific recommendations are made or conclusions are drawn, as a result of which one group of the undertakings involved is able to behave in a uniform manner, such recommendations and conclusions constitute an illegal constriction of competition. The provisions stipulated in marginals 31 et seq about recommendations and the factors as stated under calculation methods and cost projections, also apply to recommendations given based on comparison models.

[43] Decision by ACM of 21 December 2001 in case 2234/*ANKO*, paragraphs 39-40
[44] Decision by ACM of 21 December 2001 in case 2234/*ANKO*, paragraphs 27-33.
[45] Decision by ACM of 21 December 2001 in case 2234/*ANKO*, paragraph 41.

Example 4

An association of undertakings draws up a comparison model. For each cost item, the model contains last year's trends based on the collective bargaining agreements and data of the CPB Netherlands Bureau for Economic Policy Analysis. The items mentioned are energy, salary, housing, advertisement, and customer service. *An association of undertakings is allowed to present to its members trends of public and objective cost data. In such situations, it is up to the members to decide whether, and if so, to what extent they act upon these trends.*

Example 5

On a certain market, five undertakings are active. They manufacture consumer products, which they sell through independent wholesale traders. At the end of every month, the manufacturers hand in their sales figures with the trade organization. Two weeks later, the trade organization presents them with an overview that shows the total number of sales on the market and their own market share. They also gain insight into their market share per wholesaler and retail chain.
This form of information exchange, generally speaking, does not restrict competition, and is thus allowed. The participating undertakings only gain insight into their own positions on the market. They do not have access to individual information about other undertakings, which could take away the uncertainty about the market conduct of their most important competitors.

Example 6

A trade organization commissions a research firm to collect each month the sales figures of its members, and to make an overview of them. These overviews, which present the sales per market participant, are given to all members with a delay of 8 weeks. The market in question is a growth market on which many small providers are active. No single provider has a market share of more than 5%. Third parties are able to buy the overviews under similar conditions.
In principle, such data promotes competition in markets that are still evolving, and that have many small players. Furthermore, since the information is accessible to third parties, this kind of information exchange is generally allowed.

Example 7

On a certain market, 8 undertakings are active. The trade organization continuously collects real-time price data of its members by means of a webcrawler. The information is processed into a dataset that can be viewed in real-time with prices per undertaking per product. This enables members to keep a close watch on market trends and developments.
The exchange of detailed and traceable information about prices leads to the elimination of the usual uncertainty in the market. This kind of information exchange through a trade organization restricts competition, and is not allowed.

3.3 Qualification schemes

37. Qualification schemes are schemes by which activities of undertakings are tested against a number of quality criteria. An undertaking can call itself 'qualified' if its activities meet those criteria. Qualified undertakings often have the right to use a logo or other means to inform the public that they are qualified. Trade organizations often play an important part in the development and execution of qualification schemes. The admission requirements for membership of a trade organization can, in practice, also function as a qualification scheme.

38. The competition rules for qualification schemes also apply to other kinds of qualification schemes, such as certification schemes (where an independent authority certifies and checks the quality criteria), quality labels, quality registers or schemes that are, for example, part of statutes, membership criteria of a trade organization, or an integral chain management system such as in the agricultural sector.

39. Qualification schemes can contribute to the quality of the production, the service, the distribution and to the provision of information and options of the buyer. Qualification schemes do not restrict competition if the participating undertakings represent only a small part of the market. A small market share (combined or otherwise) of the participating undertakings is an indication that a *non*-participating undertaking can also enter the market or can operate on the market. In that case, non-participating undertakings can exert enough competitive pressure to offset any reduced competition between the qualified undertakings.

40. Qualification schemes can also violate the cartel prohibition.[46] This is the case, for example, if a qualification scheme leads to the exclusion of or is used for excluding undertakings from the market. If a qualification scheme has important economic benefits for the activities of the market participants that they cannot obtain themselves otherwise, it can be difficult for non-participating undertakings to operate on the market or to enter the market. This will be the case if the participating undertakings represent a large part of the market *and* consumers or business buyers consider the qualification an important criterion for buying goods or services.

41. If buyers (potential or otherwise) attach great importance to their supplier participating in the qualification scheme, the scheme is more likely to be considered an important competition parameter. If entrants (potential or otherwise) are excluded on unjustified grounds, this will constitute an anticompetitive effect, which is in violation of the cartel prohibition. Exclusion on unjustified grounds can be demonstrated, for example, by data that show that entrants (potential or otherwise) have been rejected on subjective grounds.[47]

42. In order to prevent unjustified exclusion, the qualification scheme must meet the following criteria:

- The nature of the scheme must be an open one,
- It must set requirements that are objective, non-discriminatory, and clear in advance,
- It must have a transparent qualification procedure (admission or otherwise), and
- It must have a qualification procedure (admission or otherwise) that provides for an independent decision about the admission on the first assessment or, after admission has been refused, on appeal.

43. Qualification schemes that meet these conditions do not restrict competition. The criteria are further explained below.[48]

[46] Supreme Court of the Netherlands 14 July 2017, ECLI:NL:HR:2017:1354 (*Stichting geborgde dierenarts vs. Agib*); District Court of Rotterdam, 25 March 2004, ECLI:NL:RBROT:2004:AO7022 (*UNETO-VNI*).
[47] District Court of Rotterdam, 25 March 2004, ECLI:NL:RBROT:2004:AO7022 (*UNETO-VNI*).
[48] District Court of Rotterdam, 7 April 2016, ECLI:NL:RBROT:2016:2494, paragraph 6.1. District Court of Rotterdam, 25 March 2004, ECLI:NL:RBROT:2004:AO7022 (*UNETO-VNI*); decision by ACM of 22 July 2004 in case 2157/*VNI*, paragraph 18.

44. A qualification scheme is considered to be open if it is accessible to anyone who meets the criteria. This means that anyone who meets the quality requirements has to be able to participate, not that it is mandatory to admit anyone just like that. A qualification scheme is also considered to be open if it accepts similar guarantees offered by other systems. For example, a qualification scheme also has to recognize diplomas or certificates of a similar level if these are relevant to the assessment of the properties on which the qualification is based.

45. A qualification scheme is objective if it sets objective criteria that contribute towards the objective of the scheme. These criteria are to be applied without discrimination. Membership of a trade organization is not an objective quality criterion that contributes to the scheme's objective. Non-members of a trade organization have to be able to participate as well, if they meet the quality criteria. If a trade organization has invested in the creation of a qualification scheme or if it carries out thereto-related key activities (accounting, for example), it can be justified to make a distinction between members and non-members in the participation fees. This distinction obviously needs to be reasonably proportional to the costs incurred. If the criteria are adjusted at any given moment, it must be assured, in the interest of objectivity, that the new criteria also apply to those already qualified. A qualification scheme can, for example, be discriminatory and non-objective, if it excludes foreign undertakings from participation beforehand.

46. A qualification scheme is clear if it is known in advance what requirements an entrant (potential or otherwise) must meet.

47. One of the situations in which an admission procedure is clear is if it is apparent from the scheme what procedure must be followed and what the criteria for admission and rejection are.

48. A qualification scheme is independent if the decision-making process about admission takes place in an independent manner. This can happen in the first assessment or, after qualification has been refused, on appeal. This also applies to cancellation or suspension of the membership. Independence has to be guaranteed as reflected in the composition of the assessment authority.

Example 8

In its statutes and regulations, a trade organization sets professional competence criteria for membership. Of all market participants, 90% is member of the trade organization. Buyers (potential and actual) are known to attach almost no importance to membership of the trade organization. However, members do use a logo to distinguish themselves. *If a trade organization sets professional competence criteria to membership, it may start to act as a qualification scheme. In that case, the statutes and regulations of the trade organizations function as a qualification scheme. However, the mere fact that 90% of market participants is affiliated with a qualification scheme is insufficient to conclude that participation in this qualification scheme is a factor of importance in the market, if buyers (potential and actual) attach almost no importance to membership of the trade organization. The use of a logo as quality label does not alter this fact. The qualification scheme does not restrict competition, and is thus allowed.*

Example 9

A group of suppliers in a certain market want to distinguish themselves as high-quality suppliers. To that end, they set up a qualification scheme that sets high demands to the professional skills and the service level of participants. Of all businesses active in the market, 7% of them participates. Together, they represent 8% of total market turnover.
Qualification schemes in which the participating undertakings have a combined market share of less than 20% and that have no provisions that have the objective to restrict competition have, in principle, no anticompetitive effects, and are therefore allowed.

3.4 General terms and conditions

49. General terms and conditions that are drafted by undertakings collectively or by an association of undertakings can make it easier for transactions to take place by providing clarity in advance for the contracting parties involved. Moreover, in consumer transactions, general terms and conditions can contribute towards consumer protection, for example, if they contain provisions about dispute settlement procedures and guarantee funds. The Dutch Competition Act thus does not stand in the way of using general terms and conditions.

50. Only if anticompetitive arrangements or concerted practices are created as a result of the establishment and mandatory application of general terms and conditions, it may constitute a violation of the cartel prohibition. This is particularly the case if general terms and conditions concern important competition parameters such as prices and tariffs, including discounts, surcharges, and payment periods.

51. Depending on the specific characteristics of a market, other important competition parameters than the ones previously mentioned, also exist. Undertakings and associations of undertakings know what competitive tools play an important role in the market on which they are active, for example, the warranty period or the period in which buyers have the right to free maintenance services. If the general terms and conditions that undertakings use, are established by undertakings collectively or by an association of undertakings, and relate to such parameters, they will restrict competition, and violate the cartel prohibition.

Example 10

A trade organization mandates its members to use the dispute settlement procedure that has been agreed upon in the sector. This dispute settlement procedure provides for a procedure that buyers can use if they are not content with any goods or services that have been supplied to them. Buyers are free to go to court if the arbitration board that implements the procedure does not rule in their favor. Non-members of the trade organization are also free to participate in the dispute settlement procedure.
Linking membership of the trade organization to the use of the dispute settlement procedure does not influence the way in which businesses compete in the sector, and, at the same time, leads to better protection of buyers. Mandatory participation in the dispute settlement procedure is allowed.

Example 11

A trade organization draws up general terms and conditions. The board makes them mandatory. They stipulate that members apply the price increase percentage, set annually by the trade organization, to the prices of services provided. This means that all members of the trade organization annually charge their buyers the prescribed price increase.
These general terms and conditions contain a price-fixing agreement. As the organization mandates the use of these general terms and conditions, this recommendation can be considered an anticompetitive decision by an association of undertakings. This would also have been the case if the trade organization had only advised its members to apply the general terms and conditions, instead of mandating them to do so. This provision in the general terms and conditions, along with the decision, is therefore not allowed.

3.5 Administrative collaborations

52. Collaborations between undertakings (through a trade organization or not) related to accounting, collective credit guarantee, collective debt collection or collective offices for business advice or tax-law advice are of no influence on the selection of products and services of the collaborating undertakings. After all, the collaborations limit themselves to the administrative processing of business activities, and do not influence the decisions about those activities themselves. Such forms of collaborations do not restrict competition, and thus do not fall under the cartel prohibition.

3.6 Exchange of information between competitors

53. The exchange of market information between undertakings (through an association of undertakings or an independent research firm, for example) can help undertakings keep track of general market trends, and capitalize on them. In addition, the exchange of information about, for example, new technologies or other developments can promote competition.

54. However, the exchange of information between undertakings can also lead to undertakings no longer determining their market conduct independently. Moreover, the exchange of information can make it easier to coordinate market conduct. Exchanging information is also a violation of the cartel prohibition if undertakings take advantage of the exchange to check the adherence to any existing price-fixing, production, or market-sharing agreements or other illegal anticompetitive arrangements. As mentioned before, competition is always restricted by any exchange of information that can eliminate the uncertainty among those involved about the moment, the extent to, and the way in which the undertakings involved adapt their market conduct.

55. Undertakings can exchange information directly with each other, or indirectly through, for example, suppliers, buyers, a trade organization or an independent research firm.[49] In that context, it is irrelevant whether the information is exchanged verbally, in writing, in an e-mail or through a website.

56. If an undertaking receives unwanted commercial information and wishes to prevent a violation, it

[49] If an undertaking individually concludes a contract with, for example, a market research firm for the collection of market information, through surveys for example, it will not be considered an agreement between competitors about the exchange of information. This is considered a service by third parties, instead of agreements that might fall under the cartel prohibition. See also the informal opinion of 18 December 2014, ACM/DM/2014/206814 (*Reaction to self-assessment pilot regarding accessibility of cash money*).

should publicly denounce this information. For example, an undertaking could state in writing that it denounces the information received, and state that it will not participate in any form of coordination.

57. Whether or not any exchange of information restricts competition depends on 1) the nature, frequency, and destination of the information exchanged, and 2) the market structure.[50] These factors should be assessed in relation to each other.

Nature, frequency, and destination of the information exchanged

58. Important strategic information is more likely to restrict competition than information that is of no strategic importance.[51] Information is more competition-sensitive:

a) if it concerns aspects that undertakings compete on with each other (competition parameters);
b) the more specific it is / the lower the level of aggregation is;
c) the more topical it is / the more frequently it is provided or the more it concerns future behavior;
d) if it is not available to everyone.

a) Competition parameters

59. It should be assessed whether it concerns information that eliminates uncertainties about the competitors' actions and strategy, as a result of which an undertaking no longer independently determines its market conduct. As the strategic value of data increases, the more likely it is that an illegal restriction of competition occurs. This is the case, for example, if the information relates to important competition parameters such as prices, production, sales, and customers.

b) Level of detail / aggregation

60. The exchange of information about individual undertakings can lead to elimination of the usual uncertainty in the market about the market conduct (intended or otherwise) of market participants, and thus harm competition. This is more likely to pose a problem to competition than an exchange of aggregated data.[52] It is not a problem if an undertaking, for example in a benchmark, only receives information about its own position and not any information about its competitors' positions.

c) Topicality and frequency

61. The more topical and frequent the information is, the more it will influence the undertaking's future behavior and the greater the strategic value is. But the exchange of historical data can also restrict competition. However, exchanging information older than twelve months generally does not reduce the usual uncertainty in the market. Any exchange of information about future market conduct will very likely eliminate the usual uncertainty in the market. Whether the information eliminates the uncertainty in the market also depends on the sector and the agreements (including the durations thereof) concluded within that sector. As for the topicality, even a one-off exchange of competition-sensitive information may constitute a violation.

[50] CBb 12 August 2010, ECLI:NL:CBB:2010:BN3895 (*T-Mobile*); CBb 4 October 2011, ECLI:NL:CBB:2011:BT6521 (*Bicycle manufacturers*).
[51] Guidelines on Horizontal Cooperation agreements, paragraph 87.
[52] Aggregated data is data from which it is very difficult to deduce information on the level of the individual undertaking.

d) Availability

62. If the information is available to other parties as well, such as non-involved competitors, suppliers, and buyers, the exchange of that information is less likely to restrict competition.[53] In marginal 67-68 of this Guideline, it is further explained to what extent the exchange of information conducted in public can also restrict competition.

Market structure

63. Market characteristics that are relevant for determining whether the exchange of information can restrict competition are the concentration ratio (number and size of undertakings active on the market), the nature of the product, and the degree of product differentiation, the presence of barriers to entry, the growth of market demand, and the cost structure.

64. Strategic information is more useful if:

- The market is more concentrated (fewer providers);
- The products are more homogenous;
- There are more or higher barriers to entry;
- The market is more transparent;
- Market demand is more stable; and/or
- The undertakings active on the market have similar cost structures.

65. The question whether the exchange of information restricts competition depends on the nature of the information and the characteristics of the market. For example, on a market with stable demand, the future behavior of competitors can be largely predicted by looking at historical behavior. In such a situation, the exchange of historical data can restrict competition.

66. The exchange of recent, competition-sensitive data of individual market participants in a saturated market[54] with a high concentration ratio enables the participating undertakings to take note of the market positions and the marketing strategies of their competitors, considerably reducing the residual competition between the market participants. In this way, this exchange replaces the normal risks of competition with practical collaboration, and increases the risk of a violation of the cartel prohibition.

Exchange of public information

67. Undertakings can also exchange information in public, for example through a website, by publishing brochures and catalogs, through a national newspaper, but also through specialized journals or an online platform. The publication of prices and product information is usually aimed at customers. In that case, price and quality have already been determined (unilaterally or otherwise) by the undertaking. Such transparency usually benefits buyers.

68. However, if undertakings publicly disclose information about intended price increases, discounts or changes in quality and service, or if they make statements about certain expectations regarding future price trends, such announcements may act as a signal to competitors,[55] over the heads of

[53] Guidelines on Horizontal Cooperation Agreements, paragraph 93-95.
[54] A saturated market is a market that no longer grows and in which no growth is expected.
[55] Undertakings are sometimes statutorily required to disclose tariffs publicly, and in that case, different rules apply to them.

customers and sometimes also those of shareholders. By doing so, they invite (implicitly or explicitly) competitors to follow suit. On markets with many competitors, the publication of information about prices and quality usually does not pose any problems for competition. However, on markets with few competitors with large market shares, and who are thus able to keep a close watch on each other, the exchange of public information can restrict competition at the expense of buyers.

69. The following circumstances are relevant when answering the question of whether the exchange of public information may restrict competition:[56]

- The content of the information: for example, it needs to be assessed whether the information is about relevant competition parameters (such as price and volumes/capacity[57]), whether it is about topical or future information, and how specific or concrete that information is.[58] It also needs to be assessed whether the information is primarily meant for buyers or actually for competitors. For example, this may become apparent by the medium that was chosen for the exchange[59] and by the fact of whether the information is useful to buyers when making purchasing decisions.
- The usefulness of the information: if the announced behavior has not yet been finalized by the undertaking, the undertaking is then able to decide *not* to implement the measure, without any drawbacks, if it notices that competitors do not follow suit ('trial balloon'). Moreover, buyers are not able to base their purchasing decisions on such statements.
- The timing of the information exchange: the more time there is between the announcement of the intended market behavior and the execution thereof, the more time competitors have to adjust their behavior accordingly.
- Market structure: if there are few providers, coordination that harms buyers is more likely to occur.
- The dynamics involved in the information exchange: if competitors react to each other's public statements, for example by publicly agreeing or holding out the prospect of their own market behavior, it is more likely that the information exchange enables the undertakings to coordinate their behavior with each other. Sometimes, however, a public reaction is not even needed, for example if one undertaking keeps taking the lead, and the other ones usually follow.

[56] Decision by ACM of 7 January 2014 in case 13.0612.53. (*Commitment decision of mobile operators*).
[57] Think of announcements about limiting (temporarily or otherwise) capacity because of maintenance, or a sharply reduced production because of circumstances (external or internal).
[58] For example, the exchange of individual data between competitors regarding intended future prices or volumes is always anticompetitive.
[59] Using a specialized medium such as a trade journal or online platform, which buyers generally do not use, may be an indication that the undertakings primarily intend to inform their competitors about intended market conduct.

Example 12

Four undertakings are active on a certain market. The managers of these undertakings frequently attend trade fairs, where they give presentations and interviews to trade journals. In their presentation, manager A says that their shareholders complain about the profitability of the business. Manager A claims their undertaking wants to raise prices by 10%, and wants to pay more attention to quality. The managers from the other undertakings subsequently indicate in interviews that they, too, believe the bottom has been reached, and that it is indeed time to offer buyers more quality, which will obviously cost a little bit more. *The managers' statements may lead to concerted practices between competitors about the price. Manager A floated a trial balloon about the desirability of a price increase, to which their competitors reacted approvingly. This way, manager A can easily raise their prices, knowing that the competitors in all likelihood will follow suit. Such exchanges of public information are thus able to restrict competition.*

3.7 Purchasing agreements

70. Many trade organizations help their members by negotiating, on their behalf, favorable conditions for the purchase of goods or services, for example, insurances or energy. In general, collectively buying such products and services (through a trade organization or not) does not restrict competition, and thus does not fall under the cartel prohibition.[60] That can change if the collective procurement leads to considerable purchasing power on the markets on which one buys, or to a considerable degree of collective costs[61], or if the trade organization members are forced or compelled to buy through the trade organization.

71. The collaboration as referred to in marginal 70 must be distinguished from arrangements in which competing undertakings collectively coordinate (secretly or otherwise) a maximum purchasing price, without actually having established collective procurement or having integrated their purchasing activities. These undertakings de facto form a 'buyer cartel', and their arrangements have the object of restricting competition.[62] [63] Buyer cartels harm suppliers, because they supply their goods and services against less favorable conditions, and are unable to profit from the benefits that they would have had in the case of collective procurement, such as the possibility of selling higher volumes or of saving on transaction costs. In addition, buyer cartels can lead to reduced pressure on buyers to control costs, improve quality and, innovate.[64]

[60] Informal opinion by ACM of 24 July 2014, ACM/DM/2014/204334 (*collective procurement of prescription drug TNFi*); Guidelines on collective procurement of prescription drugs, June 2016, ACM/TFZ/2016/401860.
[61] Guidelines on Horizontal Cooperation Agreements, paragraph 213-216.
[62] Guidelines on Horizontal Cooperation Agreements, paragraphs 205 and 206. See also Article 101, first paragraph, under a of the TFEU.
[63] Buyer cartels may also concern other kinds of arrangements, such as about limiting the number of goods or services to be bought or about the sharing of suppliers.
[64] For an example of a buyer cartel, see the decision of the European Commission of 8 February 2017 in case AT.40018 (*Car battery recycling)*. As a result of the buyer cartel for car batteries, fewer batteries were offered and collected, resulting in a frustration of the proper functioning of the recycling system.

Example 13

Four undertakings all buy product X from 6 suppliers. In order to push the price down, they agree that none of them will pay the suppliers more than EUR 25 a piece for product X. Going forward, they will negotiate individually with the suppliers about the price and supply conditions.
This agreement about the purchasing price for product X falls under the cartel prohibition, and is illegal. With this behavior, the four undertakings restrict mutual competition with regard to the purchasing of product X from these suppliers. An alternative to this buyer cartel could be these four undertakings collectively procuring product X from one or more suppliers. This could also benefit one or more of those suppliers, for example because of the possibility of selling higher volumes or of saving on transaction costs.

3.8 Labor and temporary staff

72. A special form of buying agreements are arrangements between undertakings about the procurement of labor from employees or hiring the services of independent contractors ('labor market agreements'). If labor market agreements are concluded about the procurement of labor from employees in the context of a collective labor agreement in order to improve employment and the employment conditions, the cartel prohibition does not apply.[65] Labor market agreements outside of this field may yet fall under the cartel prohibition.

73. From a competition-law perspective, undertakings that compete for labor (because they want to attract the same employees or wish to hire the same independent contractors) are each other's competitors on that labor market, regardless of whether they supply their clients products or services that compete with each other.

74. Competition for labor produces benefits for employees and independent contractors, such as higher wages and better employment conditions. Consumers, too, can benefit from competition between employers, because undertakings are able to produce more or better goods or services as a result of a more competitive utilization of their staff or hired independent contractors. The Dutch Competition Act does not allow arrangements that restrict competition for labor. This is also not allowed if the objective is to reduce labor costs or other costs. Such arrangements distort the proper functioning of the labor market, and may lead to reduced production, quality, and innovation. Undertakings need to make decisions independently from each other about aspects such as recruitment of personnel, and employment conditions (including fringe benefits or perquisites). Trade organizations, too, cannot give recommendations that will restrict competition for labor.

75. Examples of labor market agreements that may restrict competition are agreements not to recruit people from each other's personnel[66] or not to hire each other's personnel[67], or agreements to

[65] See also paragraph 26.
[66] These are also called 'non-poaching agreements'.
[67] In this context, Article 101, first paragraph, under c of the TFEU prohibits arrangements between undertakings that 'share markets or sources of supply'. In response to questions from the European Parliament about 'job cartels', the European Commission argues in this context that non-solicitation clauses often severely restrict competition. Such agreements fall under the cartel prohibition because the social sector and labor market are not exempt from application of the competition rules. According to the Commission, an agreement between undertakings not to recruit each other's employees can constitute a market-sharing agreement regarding the supply of labor. See no. E-1840/2007, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-1840&language=EN; District Court of 's Hertogenbosch, 4 May 2010, ECLI:NL:GHSE:2010:BM3360, paragraph 4.9.5 (*nurse anesthetist*). See also the conclusion by AG Lenz of 20 September 1995 in case C-415/93, paragraph 262

restrict wages and other employment conditions such as bonuses or allowances.[68] Such market-sharing or price-fixing agreements restrict the opportunities for undertakings to compete with each other by attracting labor on certain specific conditions. In addition, they can impede the realization of the European internal market because they create artificial barriers between the member states of the European Union. In addition, arrangements about not hiring independent contractors, or only on certain conditions, or arrangements about maximum tariffs for hiring independent contractors can also restrict competition. Such agreements limit independent contractors in their opportunities to offer their services, and to distinguish themselves from one another.

76. The above does not alter the fact that employers and employees are allowed to make arrangements in a collective labor agreement for the improvement of employment conditions such as wages and pensions. However, such arrangements may be anticompetitive because they harmonize employers' costs, and reduce the room for competition on employment conditions. Section 16 of the Dutch Competition Act contains an exception to the cartel prohibition, so that parties to the collective bargaining agreement will not be severely hindered in achieving their social objectives. This is the collective-bargaining-agreement exception.[69]

77. Finally, labor market agreements are allowed on certain conditions if they are necessary for a merger, acquisition or joint venture. It might be necessary, for example, to agree that the vendor cannot recruit from among the buyer's staff for a limited period of time, in order to protect the value of the undertaking to be acquired. Such arrangements are also called 'ancillary restrictions'. Examples are the aforementioned non-compete clauses and non-solicitation clauses.[70]

Example 14

Three undertakings are confronted with a strong increase in demand for their services and with a shortage on the labor market for specialized staff. In order to cope with the situation, they agree not to recruit each other's staff, and will not offer any perks such as awarding sign-on bonuses or similar allowances. To compensate the labor shortage, they temporarily hire independent contractors. As they fear that the independent contractors will play them off against each other in order to negotiate the highest possible salaries, the businesses agree to pay the contractors a maximum of EUR 50 an hour for their services. Finally, with help from an external company, they set up a collective initiative to attract suitable staff from abroad to the Netherlands.
The agreement not to recruit each other's staff restricts competition for labor between the undertakings, and is therefore not allowed. For the same reason, the agreement not to compete on employment conditions is also not allowed. Moreover, the agreement to pay independent contractors a maximum of EUR 50 an hour restricts competition for hiring independent contractors, and restricts the opportunities of independent contractors to offer their services, and is therefore also not allowed. The collective initiative to attract foreign staff to the Netherlands does not restrict

(*Bosman*).
[68] In this context, Article 101, first paragraph, under a of the TFEU prohibits agreements between undertakings that 'directly or indirectly fix purchase or selling prices or any other trading conditions'.
[69] ACM has published educational material about tariff agreements between independent contractors in collective bargaining agreements: https://www.acm.nl/sites/default/files/old_publication/publicaties/16978_leidraad-tariefafspraken-voor-zzp-ers-in-cao-s-2017-02-24.pdf (in Dutch).
[70] For more information about ancillary restrictions, see the Commission Notice on restrictions directly related and necessary for concentrations, OJ 2005, C 56/03: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=NL.

competition, and is allowed.

Example 15

An employers' organization advises its members not to increase the salaries of their employees by more than 2%, after failed negotiations for the collective bargaining agreement.
Employers' organizations are not allowed to advise their members about wage levels. Such recommendations restrict competition for labor between employers, and is therefore prohibited.

3.9 Horizontal collaboration in anticipation of a concentration

78. Undertakings that wish to join forces through means of a merger, acquisition, or joint venture, and that fall under the concentration rules of the Dutch Competition Act have to wait with the realization of their concentration until ACM has cleared this concentration.[71] The cartel prohibition applies to every concentration until it has been implemented, and thus also to concentrations that ACM does not have to be notified of. As soon as the concentration has been implemented, the cartel prohibition no longer applies. After implementation, the previously independent undertakings have become a single undertaking, or a collective undertaking has been created that fulfills all functions of an independent economic unit for the long term.

79. Undertakings that wish to concentrate have (or still have) to observe the cartel prohibition before ACM clears the concentration.[72] [73] That means that, during the negotiation phase, undertakings cannot make any arrangements about prices, markets and/or sharing of customers. Also, the undertakings cannot, in principle, exchange competition-sensitive information during the negotiation phase for the concentration.

80. And yet, undertakings will have to share information with each other, in order to value each other's undertaking within the context of the planned concentration. Whether the exchange of information is allowed, has to be determined on a case-by-case basis. Sharing information has to be absolutely necessary for realizing the planned concentration. If that is the case, a confidentiality agreement has to be signed, and carefully selected teams must be used that treat the information confidentially, and that are not directly or indirectly involved in the day-to-day operations of the undertakings.

[71] For the regulations regarding concentrations, see Sections 34 and 41 of the Dutch Competition Act or look at www.acm.nl. See also District Court of Rotterdam 14 March 2008, ECLI:NL:RBOT:2008:BC9420 (*Airfield Holding*).
[72] A concentration can also not be realized before clearance has been granted by the competent competition authority.
[73] If there is a concentration that has to be notified of, the acquiring undertaking cannot exert control over the target undertaking before ACM has granted clearance, because this would violate Section 34, first paragraph of the Dutch Competition Act.