

Kluwer Competition Law Blog

ACM announces stricter enforcement of vertical and horizontal restraints and publishes guidelines

Mariska van de Sanden (Bird & Bird, The Netherlands) · Wednesday, March 6th, 2019

On 26 February 2019, the Dutch Authority for Consumers & Markets (“ACM”) [published](#) renewed guidelines on both vertical and horizontal restraints. These documents are likely published to reflect the new strategy of the ACM: the stricter enforcement of vertical and horizontal restraints with a focus on vertical price fixing, online sales restraints, purchasing cartels and agreements on employment conditions. In January 2019, the new chairman of the board of the ACM already [announced](#) that the ACM will impose more fines than it did before. In my opinion, clear warnings for undertakings doing business in the Netherlands.

Although these are in general interesting developments, this is especially true for the stricter enforcement of vertical restraints. The ACM’s position up until now basically was that those restrictions generally do not harm consumer welfare and thus did not have its priority.

In this post, both guidelines are briefly discussed as well as its impact on the enforcement of the competition rules in the Netherlands.

Guidelines on vertical restraints

In itself, the [guidelines on vertical restraints](#) do at first sight not seem to contain any surprising developments. The guidelines basically reiterate the Vertical Block Exemption Regulation (“VBER”) and [guidelines](#) of the European Commission (“Commission”) and add some of the latest developments.

The guidelines do include some interesting statements, however. For example, according to the ACM an absolute ban to use a price comparison website is a hardcore restriction if this ban is not based on objective qualitative criteria. Thereby, the ACM seems to follow the German Federal Court of Justice in its [ASICS judgment](#) of 12 December 2017 [1] and the Commission in its [e-commerce sector inquiry report](#). [2] As regards dual pricing the ACM clarifies that price differentiation between purely online and offline distributors is not a hardcore restriction. Moreover, an online market place ban, for example to protect the luxury image of the product, is not a hardcore restriction according to the ACM in line with the judgment of the CJEU in [the Coty-case](#).

Furthermore, the guidelines mention non-compete obligations and ‘other’ restraints, such as

selective and exclusive distribution and exclusive supply. These ‘other’ restraints are unfortunately not discussed in more detail. Interestingly, the guidelines do also not discuss MFN/APPA clauses while the previous policy did.

The guidelines replace the ACM [strategy and priority policy on vertical agreements](#) from 2015. Back then the ACM took the view that vertical agreements, in the absence of market power, benefit consumer welfare more often than not. Unless there would be a clear theory of harm, the ACM would not give priority to vertical restraints. As a result, the ACM did not actively intervene with respect to vertical restraints in the previous years. This has now clearly changed. The ACM explicitly warns for stricter enforcement on vertical restraints, especially price fixing and online sales restraints. The ACM has already put this new approach in practice. In December 2018, the ACM [conducted](#) several dawn raids at manufacturers and (online) distributors of consumer goods for alleged minimum price arrangements. The reason for this radical change in position of the ACM is not clarified in the guidelines.

The timing of the renewed approach of the ACM is also interesting, especially in the wake of the ongoing [revision](#) of the VBER and its guidelines. It might mean that the ACM needs to amend its guidelines again in the upcoming year(s).

Guidelines on horizontal restraints

The ACM also published national [guidelines on horizontal restraints](#). These replace [the previous guidelines \(2013\)](#). The guidelines first describe the basics of the cartel prohibition and then discuss some specific forms of cooperation between competitors and advices from associations. The guidelines are largely based on the [Guidelines on horizontal agreements](#) from the Commission and – again – reflect the more recent (European) developments.

New chapters compared to the previous ACM guidelines relate to purchasing cartels and restrictive agreements on employment conditions, like no-poaching agreements and agreements on the maximum wages for self-employed persons (freelancers). This is in line with the ACM’s new focus areas (see above) and is not surprising given the ACM’s involvement lately in these areas. For example, the ACM currently investigates whether it can assist vulnerable freelancers (e.g. parcel deliverers, cleaners and taxi drivers) by allowing collective (minimum) tariff agreements.

Also new are the parts on gun-jumping and public information exchanges. The inclusion of the latter topic seems to follow from the [mobile operators commitment decisions \(2014\)](#). In that case several mobile operators made announcements in the public domain about intended market behavior which had not been finally decided on within the companies. This triggered an investigation by the ACM and ended in commitment decisions. The commitments ended in 2016 but the ACM clearly still sees public information exchanges as potentially competition restrictive.

Final remarks

Although the content of the guidelines is perhaps not the most exciting development, the renewed approach of the ACM definitely is. The ACM’s warning that it will stricter enforce certain competition rules is a clear message. Undertakings doing business in the Netherlands might want to review their agreements and practices in order to avoid any enforcement action. The ACM can impose fines up to a maximum of € 900.000 or, if higher, 10% of the

turnover of the company concerned. In the Netherlands, fines for cartels can even increase up to 40% of the turnover depending on the duration of the cartel.

The vertical and horizontal guidelines are each accompanied by a presentation. See: [verticals](#) and [horizontal](#)s (in Dutch).

[1] The FCJ ruled that ASICS had infringed competition law by prohibiting its retailers from participating in price comparison websites, e.g. irrespective of the quality of the price comparison website.

[2] The Commission stated in its report that: *‘[M]arketplaces and price comparison tools differ in a number of respects’ and that in a selective distribution system ‘absolute price comparison tool bans which are not linked to quality criteria, potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction’.*

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