

Guidelines on Cooperation between Undertakings

FOREWORD

The Netherlands Competition Authority (NMa) enforces the Competition Act. An important part of this Act is the prohibition of agreements which restrict competition between undertakings, also referred to as the prohibition on cartels.

It is important that undertakings are clear about what agreements are or are not allowed. Many forms of cooperation between undertakings promote competition. For instance, cooperating with other undertakings enables the small and medium-sized enterprises (the SME's) to be active on markets on which this would not be possible without cooperation.

These Guidelines provide an indication in general terms of how NMa assesses a number of types of cooperation on the basis of the Competition Act, in particular with regard to the SME's in which trade organisations often play an important role.

NMa assumes that the Guidelines will prove to be useful for undertakings and for NMa itself. Providing clarity also contributes to the effective and efficient enforcement of the Competition Act. These Guidelines will be amended and/or expanded as necessary.

The Guidelines were drawn up on the basis of consultation with, amongst others, the employer's organisations VNO-NCW and MKB-Nederland.

A reader's guide has been included before the Guidelines on Cooperation between Undertakings, in which the contents of the Guidelines are set out in the form of a short test.

The Guidelines were published in the *Netherlands Government Gazette (Staatscourant)* on 7 April 2005 (No. 67, pp. 20-24) and came into force on 8 April 2005.

READER'S GUIDE TO THE GUIDELINES ON COOPERATION BETWEEN UNDERTAKINGS: WHAT IS ALLOWED AND WHAT IS NOT?

Making markets work. This is the aim of the Competition Act. The Act does not prohibit undertakings from entering into agreements with each other, but does prohibit them from entering into agreements which restrict competition. 'Agreements' includes contracts, concerted practices or decisions taken by associations of undertakings (hereinafter "agreements"). This prohibition applies to written contracts, but also to concerted practices which are not set out in a written agreement.

This reader's guide helps you assess which agreements you, as an entrepreneur, can or cannot enter into with other undertakings. As an entrepreneur, you have to assess whether the conducts or agreements comply with the Competition Act. This is referred to as 'self-assessment'. The reader's guide provides you with a basis for this self-assessment.

The reader's guide is part of the Guidelines on Cooperation between Undertakings. In these Guidelines, the Netherlands Competition Authority (NMa) explains how it deals with agreements between undertakings. Its rulings are based on current legislation, case law and the decision-making practice of the European Commission.

Before applying this reader's guide to your own situation, please start with reading the legal framework first (from page 3 onwards) in the Guidelines on Cooperation between Undertakings.

This reader's guide takes you through six steps:

1. Is an undertaking involved in terms of the Competition Act?
2. Is an agreement involved, in terms of the Competition Act?
3. Is the agreement exempted?
4. What is the purpose of the agreement?
5. How should the specific agreements be assessed?
6. Is the agreement allowed?

Applying the Guidelines on Cooperation between Undertakings gives you an indication, but not a full legal and economic assessment. The assessment in the Guidelines is necessarily limited to the main elements. No rights may therefore be derived from the reader's guide. More information can be obtained by downloading the Guidelines on Cooperation between Undertakings and/or ordering a copy through NMa's website (www.nmanet.nl) or from NMa's Information Line (e-mail: info@nmanet.nl or tel. 0800-0231 885). Undertakings with specific substantive questions may also be referred to the company desk by the Information Line.

Each step of this reader's guide contains a reference to the relevant information in the following sources:

- the Competition Act;
- specific sections in the Guidelines on Cooperation between Undertakings
- NMa's website, www.nmanet.nl.

STEP:	If:	Then:	Further information	
1	STEP 1: IS AN UNDERTAKING INVOLVED IN TERMS OF THE COMPETITION ACT?			
	Is an undertaking involved which carries out an economic activity?	<i>No</i> ►	<i>Competition Act not applicable</i>	<i>Section 12</i>
	<i>Yes</i> ▼			
2	STEP 2: IS AN AGREEMENT INVOLVED IN TERMS OF THE COMPETITION ACT?			
	Is an agreement involved between the undertakings?	<i>No</i> ►	<i>Competition Act not applicable</i>	<i>Sections 13 - 17</i>
	<i>Yes</i> ▼			
3	STEP 3: IS THE AGREEMENT EXEMPTED?			
31	Are more than eight undertakings involved?	<i>Yes</i>	<i>Go to 3.2</i>	<i>Section 7 Competition Act Sections 18 - 25</i>
	<i>No</i> ▼			
	Do the activities of the undertakings focus mainly on selling goods?			
	If so (the activities focus mainly on selling goods), does their joint turnover exceed EUR 4,540,000? <i>Yes: Go to 3.2</i>	<i>No</i>	<i>Agreement is allowed</i>	
	If not (the activities do not focus mainly on selling goods), does their joint turnover exceed EUR 908,000?	<i>No</i>	<i>Agreement is allowed</i>	
	<i>Yes</i> ▼			
32	Is the agreement governed by the Decision in Relation to the Exemption of Agreements Executed as a Combination [<i>Besluit vrijstelling combinatieovereenkomsten</i>]?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>15 Competition Act Sections 28 Website</i>
	<i>No</i> ▼			
	Is the agreement governed by the Decision in Relation to the Exemption of Agreements to Protect Branches of Industry [<i>Besluit vrijstelling branchebeschermingsovereenkomsten</i>]?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>15 Competition Act Section 28 Website</i>
	<i>No</i> ▼			
	Is the agreement governed by the Decision in Relation to the Exemption of Cooperation Agreements in the Retail Trade [<i>Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel</i>]?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>15 Competition Act Section 28 Website</i>
	<i>No</i> ▼			
	Is the agreement governed by a European block exemption?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>12/13 Competition Act Sections 36 - 37</i>
	<i>No</i>			

4 STEP 4: WHAT IS THE PURPOSE OF THE AGREEMENT?				<i>Sections 41-44</i>
	Is it a price agreement?	<i>Yes</i>	<i>Go to step 6</i>	<i>Section 42</i>
	<i>No</i>			
	Is it a market sharing agreement?	<i>Yes</i>	<i>Go to step 6</i>	<i>Section 43</i>
	<i>No</i>			
	Is the purpose of the agreement production limitations or prohibited bidrigging?	<i>Yes</i>	<i>Go to step 6</i>	<i>Section 43</i>
	<i>No</i>			
	Is the purpose of the agreement a refusal to supply goods and/or services (a boycott)?	<i>Yes</i>	<i>Go to step 6</i>	<i>Section 44</i>
	<i>No</i>			
5 STEP 5: HOW SHOULD THE SPECIFIC AGREEMENTS BE ASSESSED?				
5.1	Are recommendations made by a trade organisation to its members?	<i>No</i>	<i>Go to 5.2</i>	<i>Sections 46 - 60</i>
	<i>Yes</i>			
	Does this only involve the promotion of its members' interests, the provision of information, its role as a point of contact and/or conducting research into or promoting quality?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>Section 48</i>
	<i>No</i>			
	Does this involve recommended prices and tariffs, including discounts, minimum margins or minimum prices?	<i>Yes</i>	<i>Go to step 6</i>	<i>Sections 49-53</i>
	<i>No</i>			
	Does this only involve calculation models and cost estimates? This depends on how objective the information is, whether passing on costs is recommended, what the nature of the information is and the corresponding market structure.	<i>Yes</i>	<i>Agreement is allowed</i>	<i>Sections 54-58</i>
	<i>No</i>			
	Does this only involve comparative models or joint research?	<i>Yes</i>	<i>Agreement is allowed</i> <i>Go to step 6</i>	<i>Sections 59-60</i>
	<i>No</i>			
5.2	Does the agreement relate to the exchange of information between competitors?	<i>No</i>	<i>Go to 5.3</i>	<i>Sections 61 - 78</i>
	<i>Yes</i>			
	Is the exchange of information used to verify compliance with prohibited anti-competitive agreements?	<i>Yes</i>	<i>Go to step 6</i>	<i>Section 62</i>
	<i>No</i>			
	Does the undertaking enter into its own contract with, for instance, a research bureau?	<i>Yes</i>	<i>Agreement is allowed</i>	<i>Sections 63, 65</i>
	<i>No</i>			
	Do the competitors purchase the information jointly?	<i>Yes</i>	<i>Go to step 5.2.1</i>	<i>Section 64</i>
	<i>No</i>			

	Do the competitors discuss or process the information purchased jointly?	Yes	<i>Go to step 6</i>	Sections 64, 78
	<i>No</i> ▼			
5.21	Nature, frequency and use of the information exchanged			Sections 67 - 72
	Does the information relate to prices, production, sales or customers?	Yes	<i>Go to step 6</i>	Sections 68, 69
	<i>No</i> ▼			
	Can the information which is exchanged be traced to individual market parties?	No	<i>Agreement is allowed</i>	Section 70
	<i>Yes</i> ▼			
	Is the information older than 12 months?	Yes	<i>Agreement is allowed</i>	Section 71
	<i>No</i> ▼			
	Is this information publicly accessible?	Yes	<i>Agreement is allowed</i>	Section 72
	<i>No</i> ▼			
5.22	Market structure			Sections 73, 74
	Are there few players on the market, is the product homogenous and are the barriers to entry high?	No	<i>Agreement is allowed</i>	Sections 73-77
	<i>Yes</i>		<i>Go to step 6</i>	
5.3	Does this involve the criteria of membership of a trade organisation?	No	<i>Go to 5.4</i>	Sections 95-97
	<i>Yes</i> ▼			
	Do quality criteria apply which make the agreement a <i>de facto</i> recognition scheme?	No	<i>Agreement is allowed</i>	Section 96
	<i>Yes</i> (assess the agreement as a recognition scheme) ▼			
5.4	Is the agreement a recognition scheme?	No	<i>Go to 5.5</i>	Sections 79-94
	<i>Yes</i> ▼			
	Do the undertakings only represent a small part of the market (a market share of less than 20%) and are there no provisions whose purpose it is to restrict competition?	Yes	<i>Agreement is allowed</i>	Section 85
	<i>No</i> ▼			
	Is it important for market parties to participate in a recognition scheme?	No	<i>Agreement is allowed</i>	Sections 81,87
	<i>Yes</i> ▼			
	Are there effects which restrict competition, for instance (potentially) exclusionary effects?	No	<i>Agreement is allowed</i>	Sections 81,84,86
	<i>Yes</i> ▼			
	Does the recognition scheme meet the following cumulative conditions: - open character; - objective, non-discriminatory criteria known beforehand; - transparent (admission) procedure; - an (admission) procedure with independent decision-making in relation to admission on the basis of an initial assessment or, after refusal, on	Yes	<i>Agreement is allowed</i>	Sections 88-94

	the basis of an appeal?			
	<i>No</i>		<i>Go to step 6</i>	
55	Does this relate to general terms and conditions?	<i>No</i>	<i>Go to 5.6</i>	Sections 98-100
	<i>Yes</i>			
	▼			
	Do these involve important parameters of competition, such as prices and tariffs, including discounts and surcharges, and payment terms?	<i>No</i>	<i>Agreement is allowed</i>	Sections 99-100
	<i>Yes</i>		<i>Go to step 6</i>	
56	Does this relate to cooperation in the area of administration?	<i>Yes</i>	<i>Agreement is allowed</i>	Section 101
	<i>No</i>			
	▼			
57	Do the agreements include a code of conduct?	<i>No</i>	<i>Go to 5.8</i>	Sections 102-105
	<i>Yes</i>			
	▼			
	Does the code of conduct restrict the use of prices, production, sales or customers and/or does it restrict the actions of the undertakings?	<i>Yes</i>	<i>Go to step 6</i>	Section 105
	<i>No</i>			
	▼			
	Is the code of conduct necessary for standards of decency, professional dignity, or are the qualifications or qualities necessary for the proper practising of an occupation, in other words criteria stipulated with regard to ethical behaviour?	<i>No</i>	<i>Go to 5.8</i>	Section 104
	<i>Yes</i>			
	▼			
	Is the code of conduct in relation to this applied in an objective, transparent and non-discriminatory way?	<i>Yes</i>	<i>Agreement is allowed</i>	
	<i>No</i>		<i>Go to step 6</i>	
58	Do the agreements relate to joint purchasing?	<i>No</i>	<i>Go to 5.9</i>	Section 106
	<i>Yes</i>			
	▼			
	Does the joint purchasing result in purchasing power on the markets on which goods are purchased?	<i>No</i>	<i>Agreement is allowed</i>	Section 106
	<i>Yes</i>			
	▼			
	Does the joint purchasing result in a considerable level of shared costs?	<i>No</i>	<i>Agreement is allowed</i>	Section 106
	<i>Yes</i>			
	▼			
	Are the members of the trade organisation compelled or required to purchase the goods and/or services through the trade organisation?	<i>No</i>	<i>Agreement is allowed</i>	Section 106
	<i>Yes: Go to step 6</i>			
59	Do the agreements relate to joint advertising?	<i>No</i>	<i>Go to 5.10</i>	Section 107
	<i>Yes</i>			
	▼			
	Are additional obligations imposed which, for instance, fully or partially prevent members from doing their own advertising?	<i>No</i>	<i>Agreement is allowed</i>	Section 107
	<i>Yes: Go to step 6</i>			
510	Does the agreement have other effects which restrict competition?	<i>No</i>	<i>Agreement is</i>	

	<i>Yes</i> ▼		<i>allowed</i>		
6	STEP 6: IS THE AGREEMENT ALLOWED?				
	<p>If the agreement is a price agreement or an agreement on tariffs, market sharing, production quotas, location, the geographical division of markets, the division of customers or an agreement to jointly refuse to supply (boycott), the restriction of competition is almost always appreciable and the exception contained in section 6(3) of the Competition Act (see below) almost never applies. Such agreements are therefore seldom allowed.</p> <p>If the agreement relates to other topics, go to 6.1.</p>			<i>Sections 41-44</i>	
61	<p>Is the restriction of competition appreciable?</p> <p>Determine this on the basis of the following factors:</p> <ul style="list-style-type: none"> - The position of the parties (market share, position of competitors, barriers to entry, bargaining power of buyers, technological advantage, capacity, access to raw materials, brand recognition and financial resources). The agreements are particularly damaging to competitors if the parties have "market power". - The nature of the agreement (area and purpose of the cooperation, the competitive relationship between the undertakings, and the degree of bundling of activities). Agreements, in particular on price and volume, may restrict competition appreciably. 	<i>No</i>	<i>Agreement is allowed</i>	<i>Sections 20-25.</i>	
62	<i>Yes</i> ▼	Do the agreements contribute to improving the production or distribution of goods or to promoting technical or economic progress?	<i>No</i>	<i>Not allowed</i>	<i>6.3 Competition Act Sections 26-27</i>
63	<i>Yes</i> ▼	Are consumers allowed a fair share of the resulting benefits?	<i>No</i>	<i>Not allowed</i>	<i>Sections 26-27</i>
64	<i>Yes</i> ▼	Are restrictions imposed on the undertakings involved which are not indispensable to the attainment of these objectives?	<i>Yes</i>	<i>Not allowed</i>	<i>Sections 26-27</i>
65	<i>No</i> ▼	Are the undertakings involved afforded the possibility of eliminating competition in respect of a substantial part of the products concerned?	<i>Yes</i>	<i>Not allowed</i>	<i>Sections 26-27</i>
	<i>No</i> ►			<i>Agreement is allowed</i>	