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THE AGRICULTURAL COOPERATIVE AND ITS MEMBERS AS A SINGLE ECONOMIC ENTITY FROM A DUTCH PERSPECTIVE

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On 19 June 2017, the Netherlands Authority for Consumers and Markets (ACM) published a press release on its site stating that «guidance» has been given to the Coöperatieve Nederlandse Bloembollencentrale (CNB). The aforementioned «guidance» is contained in a letter of the same date addressed to CNB1. In this letter, the ACM writes: «In short, the request included a description of the so called Current Trading Method by CNB members working in the flower bulb sector. According to the request, there may be competition risks associated with the Current Trading Method, whereby CNB’s proposal is to discontinue the Current Trading Method and organise the cooperation between growers of flower bulbs in a different way». On the basis of the information provided by CNB and the information known to the ACM about the competitive process in the flower bulb sector, the letter then confirms

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«that the current practice indeed entails risks of competition law». These risks are, however, greatly reduced by the discontinuation of the «Current Trading Method» and the implementation of the «Proposed Trading Method» by CNB. The letter of the ACM is intriguingly vague. What are we talking about? From an interview with two directors of CNB in the «Bloembollenvisie», it can be concluded that the «Current Trading Method» relates to the «current activities within producer organisations». According to the interview, this refers to agreements made by flower bulb growers within producer organisations «about price and area under cultivation», as well as sales of flower bulbs by growers together with other growers. The competition law risks that may be associated with these activities are removed «by establishing a single economic entity in which affiliated growers partially transfer their power of controls»2. According to the website of CNB, this single economic entity is formed by a «sales company». Acting upon instructions from the affiliated growers, the sales company organises the production with regard to a certain flower bulb cultivar, bundles the supply and sells the flower bulbs produced by the affiliated growers3. The «guidance» given by the ACM to CNB is a reason to examine the conditions under which producers of primary agricultural products can form a single economic entity together with the agricultural cooperative of which they are members. This is relevant from a competition law point of view. After all, agreements concluded within a single economic entity are not subject to the cartel prohibition. Firstly, the competition rules in agriculture are briefly discussed. In this context, consideration is also given as to whether agricultural cooperatives receive preferential treatment. Subsequently, a general description is given as to when a single economic entity exists. After that, the present practice in Dutch agriculture will be examined. Subsequently, it is explained how a single economic entity in the agriculture sector can be shaped. The article ends with a conclusion.


3 Website CNB «Kwekersverenigingen» [Producer organisations] can be consulted via: https://www.cnb.nl/kwekersverenigingen (last consulted on 3 December 2017).

vo per esaminare le condizioni alle quali i produttori di prodotti agricoli primari possono costituire un’entità economica individuale unitamente alla cooperativa agricola di cui fanno parte. Si tratta di un aspetto rilevante dal punto di vista del diritto della concorrenza. Dopotutto, gli accordi conclusi nell’ambito di un’entità economica individuale non sono soggetti al divieto di costituire cartelli. In primo luogo, si esaminano brevemente le regole di concorrenza in agricoltura. In tale contesto, si valuta altresì se le cooperative agricole beneficino di un trattamento preferenziale. Successivamente, viene fornita una descrizione generale dell’eventuale esistenza di un’entità economica individuale. In seguito verrà esaminata l’attuale prassi dell’agricoltura olandese. Inoltre, si illustra come si possa formare un’entità economica individuale nel settore agricolo. L’articolo termina con una conclusione.

Keywords: competition law - CMO (Common Market Organisation) - agriculture - producer - single economic entity - undertaking - association of undertakings - cooperative - producer organisation - cartel - European
1. Agricultural cooperatives and competition law.

1.1 - Competition law in the agricultural sector.

J.L.R.A. Huydecoper, Advocate-General at the Dutch Supreme Court, once sighed that few jurisdictions qualify as «scholarly-science» to such an extent as does competition law. The Advocate-General was faced with the question of whether a non-competition clause in an everyday lease agreement was in violation of the cartel prohibition. If such a straightforward competition law question raises the qualification «scholarly-science», how is competition law in the agriculture sector perceived? After all, in this sector sector-specific competition rules apply.

On the basis of Art. 42 TFEU, competition rules apply only to the agricultural sector if and in so far as it is determined by the European Parliament and the Council. The European Parliament and the Council have made use of this power by means of Art. 206 Reg. 1308/2013 by determining that the competition rules also apply in the agricultural sector, with the exception of the «derogations» contained in this Regulation with regard to the cartel prohibition. With regard to the prohibition to abuse an economic dominant

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2 Treaty on the Functioning of the European Union.
3 The competition rules for the fishing industry are contained in Regulation 1379/2013, OJ EC 2013 L 354/1.
4 For an elaborate description of the competition rules in the agriculture sector, see: H.C.E. P.J.
position and merger control, the competition rules therefore apply in full to the agricultural sector.
In a memorandum published in June 2016, DG Competition\(^5\) schematically outlined the applicability of the cartel prohibition in the agriculture sector and then briefly went into separate sectors\(^6\). By way of introduction, DG Competition states that producers of primary agricultural products may engage in joint activities such as collective purchasing, production planning, storage and distribution, in order to gain a larger market share. However, DG Competition points out that the exclusive joint sale or negotiation without actually developing joint activities that improve competitiveness and efficiency are generally prohibited. In any event, it will always be necessary to first assess whether an agreement, concerted practice or decision restricts competition at all. Where appropriate, this restriction should also be appreciable.
In addition, it is important to note that in Art. 152 paragraph 1 sub c Reg. 1308/2013\(^7\) various objectives are mentioned which recognised producer organisations or associations of producer organisations can pursue\(^8\). The most noticeable objectives from a competition law perspective are (i) ensuring that production is planned and adjusted to demand, (ii) concentration the supply and (iii) selling the products of the agricultural cooperative and its members. In the view of DG Competition, these activities are generally prohibited. However, the Court of Justice has ruled in the French chicory case that activities that are necessary for producer organisations or associations of producer organisations to achieve the aforementioned objectives fall outside the cartel prohibition. Otherwise, the effectiveness of the Common Market Organisation (CMO) would be undermined\(^9\).
Therefore, under certain strict circumstances competition law must give way to the Common Agricultural Policy (CAP).
Taking into account both elements discussed above, the competition law framework to be used in the agriculture sector looks schematically as follows:

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\(^5\) The Directorate General Competition (DG Competition) is the department of the European Commission that is responsible for the European competition policy and for enforcing the European competition rules. DG Competition works closely with the national competition authorities.

\(^6\) The memorandum An overview of European competition rules applying in the agricultural sector can be consulted via: http://ec.europa.eu/competition/sectors/agriculture/overview_european_competition_rules_agricultural_sector.pdf (last consulted on 29 November 2017).


\(^8\) Producer organisations are in Dutch also referred to as "teilersverenigingen" [growers’ associations].

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9 ECJ 14 November 2017 (French chicory) case C-671/15, ECLI:EU:C:2017:860, par. 44.

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On the basis of the amended scheme, the cooperation between producers of primary agricultural products can thus be verified against the cartel prohibition:

1. Are we dealing with an agreement or concerted practice between independent undertakings or a decision by an association of undertakings which appreciably restricts competition on the relevant market?\(^{10}\) The applicability of the European cartel prohibition also requires that trade between Member States be «distorted»\(^{11}\).

2. Should the cartel prohibition give way to the CAP?\(^{12}\)

3. Can the general exclusions provided for in Articles 209 and 210 be relied upon?\(^{13}\) One of these derogations is the so-called «genossenschaftsprivilég», under which agreements between producers of primary agricultural products and their cooperatives are excluded from the cartel prohibition provided that these agreements: (i) do not jeopardise the objectives of the CAP, (ii) do not impose the obligation to charge an identical price, or (iii) exclude competition\(^{14}\).

4. Is it possible to benefit from a crisis derogation?\(^{15}\)

5. Is it possible to benefit from a sector-specific exclusion?\(^{16}\)

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\(^{10}\) ECJ 12 December 1995 (Dijkstra) joined cases C-319/93, C-40/94 and C-224/94, ECLI:EU:C:1995:433, par. 22. For the competition law assessment of various partnership forms between competitors, see: *Guidelines on horizontal cooperation agreements*, OJ EU 2011 C 11/1. Also see in this respect: A.M. van den Bossche, in *Samencwerking tussen concurrenten, dat komt als eb en vloed. Wijisheid is maat* [Cooperation between competitors, that is like high and low tide. Wisdom is discretion], SEW, 2012, 130.

\(^{11}\) See: *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ EC 2004 C 101/81.

\(^{12}\) In accordance with the judgment in the French chicory case, this is the case when the conduct of a producer organisation or association of producer organisations is essential for realising one or more of the objectives mentioned in Art. 152 paragraph 1 sub e Reg. 1308/2014.

\(^{13}\) In § 2.1. of the memorandum, DG Competition noted that in practice, these general exemptions are not applied often, so that the scope of these exemptions is unclear.

\(^{14}\) Art. 209 paragraph 1 2nd and 3rd paragraph Reg. 1308/2013. This exemption is designated by the European Commission as *Genossenschaftsprivilég* [the German word for cooperative privilege] in the decision of 26 July 1988 in the case IV/31.379 - Bloemenvieilingen Aalsmeer, OJ EC 1998 L 262/27, 42. At the request of the German delegation, this derogation has been included in Reg. 26/62, the ultimate predecessor of the current derogation and is derived from German law. In this sense: I. Menna - Mestmäcker, in *Wettbewerbsrecht [Competition law]*, Beck, 2012, Book 1, part 2, section VIII, marginal 40 and Wiedemann, in *Handbuch des Kartellrechts [Manual on competition law]*, Beck, 2008, chapter 8, § 32, marginal 18.

\(^{15}\) To date, the European Commission has once made use of the authority offered by Art. 222 Reg. 1308/2013. See: Reg. 2016/359, whereby permission is granted for agreements and decisions regarding production planning in the milk and milk products sector, OJ EC 2016 L 96/20.

\(^{16}\) The articles 149 (dairy products), 169 (olive oil), 170 (beef) and 171 (certain arable crops) seem to be intended as an exemption to the cartel prohibition. Moreover, Reg. 1308/2013 contains special
6. Can a block exemption be invoked?\textsuperscript{17}
7. Is it possible to benefit from the (individual) statutory exemption?\textsuperscript{18}

The single economic entity is dealt with in question 1. As will be further elaborated below, agreements concluded within a single economic entity do not fall under the cartel prohibition. The applicability of the «Genossenschaftsprivileg» is addressed in question 3 in the context of the external component of the single economic entity.

1.2. - Preferential treatment for agricultural cooperatives?

In general, agricultural cooperatives, in which producers of primary agricultural products are united, are sympathetically treated from a competition law perspective. In this context, writers\textsuperscript{19} usually refer to the Oude Luttikhuys judgment. In this judgment, the Court of Justice points out that «the organisation of an undertaking in the special legal form of a cooperative is not in itself to be regarded as an anti-competitive conduct». The Court of Justice adds that this legal form «is favoured both by national legislators and by the Community authorities because it encourages modernisation and rationalisation in the agricultural sector and improves efficiency»\textsuperscript{20}. The economic usefulness of agricultural cooperatives has been underlined by the Court of Justice in the Florimex judgment. By concentrating the supply, an agricultural cooperative contributes to the improvement of sales structures by enabling a large number of small producers to participate in the economic process on a more than regional scale and thus meets certain objectives of the CAP\textsuperscript{21}. This certainly does not mean that the

\textsuperscript{17} For the assessment, see: *Guidelines on horizontal cooperation agreements*, footnote 16.
\textsuperscript{18} In the Memorandum, DG Competition refers exclusively to the Block Exemption specialisation agreements. However, there are more block exemptions that might possibly be relevant. See also: A.M. van den Bossche, footnote 16.
\textsuperscript{19} The Greenery B.V. versus various producers, case T-183/08, ECLI:EU:T:2010:241, par. 22.
\textsuperscript{20} ECJ 12 December 1995 (Oude Luttikhuys) case C-399/93, ECLI:EU:C:1995:434, par. 12.
\textsuperscript{21} Court 14 May 1997 (Florimex) joined cases T-70/92 and T-71/92, ECLI:EU:T:1997:69, par. 161.
cooperation between producers of primary agricultural products within an agricultural cooperative has been withdrawn from the cartel prohibition\textsuperscript{22}. In order to escape this prohibition, cooperation «must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers»\textsuperscript{23}. Further restrictions, «such as those requiring exclusive supply and payment of excessive fees on withdrawal, tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors, could have the effect of restricting competition»\textsuperscript{24}.

In this context, VerLoren van Themaat indicated this to be a «rule of reason consideration» of the Court of Justice\textsuperscript{25}. Under the current CMO rules, this could be the application of the «Genossenschaftsprivileg». This approach was, for example, applied by the European Commission in the Campina case\textsuperscript{26}. When assessing cooperation between producers of primary agricultural products, «account should be taken of the economic context in which the undertakings operate, the products or services covered by the agreements, the structure of the market concerned and the actual conditions in which it functions»\textsuperscript{27}. For example, the position of the cooperative concerned on the market will be relevant\textsuperscript{28}. Cooperation within a small local or regional agricultural cooperative will encounter less competition law objections than cooperation within a large agricultural cooperative. A small agricultural cooperative may, for example, benefit from the \textit{De Minimis} arrangement\textsuperscript{29}. Caution is however required. As mentioned above, DG Competition is critical of joint sales or negotiation without actually developing joint activities that improve

\textsuperscript{22} ECJ 12 December 1995 (Oude Luttikhuis) case C-399/93, ECLI:EU:C:1995:434, par 13.
\textsuperscript{24} ECJ 12 December 1995 (Oude Luttikhuis) case C-399/93, ECLI:EU:C:1995:434, par. 15.
\textsuperscript{25} J.W. VerLoren van Themaat in his annotation of the Oude Luttikhuis judgment in TvAR, 1996, 60. Ottevanger and Van der Voorde, are of the opinion that this «rule of reason» should also be applied in Dutch law. T.R. Ottevanger - S.J. van der Voorde, in \textit{De Coöperatieve onderneming [The Cooperative undertaking]}, WEJ Tjeenk Willink, 1999, 175.
\textsuperscript{26} XX1st\textsuperscript{a} report on competition policy 1991, 76-77. The report can be consulted via: https://publications.europa.eu/en/publication-detail/-/publication/b5113ee7-343c-47b4-8b99b771ff3/language-en (last consulted on 4 December 2017).
\textsuperscript{27} ECJ 12 December 1995 (Oude Luttikhuis) case C-399/93, ECLI:EU:C:1995:434, par. 10.
\textsuperscript{28} Opinion A-G Tesauro 12 September 1995 (Dijkstra) case C-319/93, ECLI:EU:C:1995:277, marginal 32.
\textsuperscript{29} See e.g. Art. 7, Dutch Competition Act.
competitiveness and efficiency. The same applies, where appropriate, to production planning and bundling of supply. It should also be noted that in competition law, a distinction is made between agreements aimed at restricting competition and agreements that only have that effect. The first category of agreements are deemed to restrict competition to an appreciable extent, without the need for any research. Examples of this from *agricultural jurisprudence* are price agreements and production agreements.

2. - Norm addressees of the cartel prohibition.

2.1. - The undertaking.

The European and Dutch competition rules only apply to undertakings. Art. 1 sub j Dutch Competition Act does not contain a definition of the concept of undertaking, but simply refers to Art. 101 paragraph 1 TFEU. This article does not contain a definition either. The same applies to Art. 102 TFEU. That is why the European Court of Justice was called upon to define the concept of undertaking. In the Höfner and Elser judgment, the Court of Justice has held that an undertaking «includes any entity engaged in economic activity, regardless of its legal form and the way in which it is financed».

It follows from the judgment in Commis-

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sion/Italy that an economic activity is defined as «any activity consisting in offering goods and services on a given market». The foregoing means that the concept of undertaking is very broad. The legal form is therefore irrelevant. Hence we are not exclusively talking about legal entities. Natural persons and even government bodies can also qualify as an undertaking. Nor is the intention to make a profit required. Non-profit institutions can thus also be an undertaking under the competition rules. The only relevant criterion is that an entity performs an economic activity. When assessing whether an activity is of an economic nature, it is important whether it can, at least in principle, be exercised by a private entity. If it is excluded that a private entity performs a particular activity, it makes no sense to apply the competition rules to that activity.

In the FNCBV judgment, the Court of Justice ruled that the activities of producers of primary agricultural products are certainly economic in nature. «They produce goods which they offer for sale for remuneration». Consequently, the producers in question can be regarded as undertakings within the meaning of the competition rules.

2.2. - Association of undertakings.

In addition to undertakings, associations of undertakings are also subject to the competition rules. The Dutch Competition Act does not de-

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37 In the Siemens judgment, the Court of Justice considered that the European legislator had «opted to use the term undertaking as a designation for the perpetrator of an infringement of the competition law, which can be punished on grounds of articles 81 EC and 82 EC, and no other terms, such as in particular the terms “company” or “legal entity” as used in article 48 EC». ECJ 10 April 2014 (Siemens) joined cases C-231/11 - C-233/11, ECLI:EU:C:2014:256, par. 42.


define this concept. Art. 1 sub g of the Dutch Competition Act, again simply refers to Art. 101 paragraph 1 TFEU. The latter article, as well as Art. 102 TFEU, does not contain a definition either. In the Frubo judgment, the Court of Justice ruled that Art. 101 (1) TFEU applies to «associations in so far as their own activities of those of the undertakings belonging to them are calculated to produce the results to which it refers» 40. It is therefore an «institutionalised form of coordination» 41. In the BNIC judgment, the Court of Justice added that the legal framework in which decisions of associations of undertakings are adopted, as well as the legal classification given to that framework in the various national legal systems, do not affect the applicability of the European competition rules 42. This means that an association of undertakings can be regarded as an organisation that unites a number of undertakings 43. Such an organisation does not need to have the legal form of an association. It is not even necessary for the organisation to be a legal entity 44. In view of this broad definition, public bodies, such as the Bar Association, can also qualify as an association of undertakings. This depends, of course, on the activities that such an organisation develop 45. An association of undertakings does not have to carry out economic activities itself. As soon as an association of undertakings does so, such an organisation can also qualify as an undertaking in its own right 46.

If European jurisprudence is considered, it is striking that agricultural cooperatives are usually qualified as undertakings. Whether these cooperatives can also be regarded as an association of undertakings is not commented upon. In the VBA/Florimex judgment, the General Court identified Verenigde Bloemenveilingen Aalsmeer (VBA) as an undertaking. VBA, a

40 ECJ 15 May 1975 (Frubo) case 71/74 ECLI:EU:C:1975:61, par. 30.
41 Court 24 May 2012 (MasterCard) case T-111/08, ECLI:EU:T:2012:260, par. 244.
44 Parliamentary Document 24704 no. 3 p. 11, 58 and 87.
45 Decision NMa 21 February 2002, case 560/87 (Engelgeel), marginal 40 and the decision of the European Commission of 7 April 1999 in case IV/36.147 EPI code of conduct, OJ EC 1999 L 106/14, marginal 24.
cooperative association in which 3,000 growers of flowers and ornamental plants were affiliated, was engaged in the auction of floricultural products. The Court of Justice is even more vague in the Oude Luttikhuis judgment. It is noted that Coberco, a cooperative association of dairy farmers, makes its business «from processing milk into milk and dairy products and selling those products». Coberco is then indirectly referred to as «an undertaking in the specific legal form of a cooperative association». On the other hand, the General Court’s DPF judgment is quite clear. The cooperative association Dansk Pelsdyravlerforening (DPF) is regarded by the General Court as an association of undertakings. After all, DPF had more than 5,000 fur breeders as members. According to the General Court, those fur breeders were undertakings within the meaning of the competition rules. Furthermore, DPF was engaged in the sale of the fur skins produced or processed by its members. As a result, DPF also qualified itself as an undertaking. It follows from the foregoing that a cooperative association in which producers of primary agricultural products have united themselves qualifies as an association of undertakings. As soon as this cooperative association carries out economic activities itself, it will also qualify as an undertaking.

2.3. - The single economic entity.

2.3.1. - Introduction.

The basic idea of the European competition rules is «that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells». This «freedom of decision», an important feature of full competition, presupposes that two or more entities operate inde-

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47 Court 14 May 1997 (VBA/Florimex) joined cases T-70/92 and T-71/92, ECLI:EU:T:1997:69, par. 3-4 and ECJ 30 March 2000 (VBA/Florimex) case C-265/97, ECLI:EU:C:2000:170, par. 2.
48 ECJ 12 December 1995 (Oude Luttikhuis) case C-399/93, ECLI:EU:C:1995:434, par. 2 and 12.
50 In this sense: Wiedemann, in Handbuch des Kartellrechts [Cartel Law manual], Beck, 2016, chapter 8, § 32, marginal 22.
51 ECJ 16 December 1975 (Suiker Unie) joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, ECLI:EU:C:1975:174, par. 173 and ECJ 4 June 2009 (T-mobile) case C-8/08, ECLI:EU:C:2009:343, par. 32.
ependently on the market. For this reason, the cartel prohibition in article 101 TFEU is aimed at «unitary organisation[s] of personal, tangible and intangible elements which pursue [...] a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision»\(^{53}\). In this way, the EU judicature clarified the concept of «undertaking» by considering that the concept refers to «an economic entity for the purpose of the subject-matter of the agreement in question even if in law that economic entity consists of several persons, natural or legal»\(^{54}\). Several natural and legal persons can therefore, from a competition law perspective, be regarded as a single economic entity in the course of trade. The characteristic element of a single economic entity is that competition is excluded between the various entities that are part of a single economic entity\(^{55}\). Competition between different entities that together form a single economic entity can be excluded on various grounds. The most obvious is of course ownership. But that is not the only ground. Contractual and economic relationships may also mean that certain entities do not compete with each other.

\[\text{2.3.2. - Ownership.}\]

In the Parker Pen Viho case, the Court of Justice clearly explained why entities that belong to the same group of undertakings cannot compete with each other. Parker Pen sold its products in Germany, France, Belgium and the Netherlands, among other things through subsidiaries. These subsidiaries were only allowed to sell the Parker Pen products in their own allocated area. Delivery requests from local customers were forwarded to the local subsidiary. Viho was of the opinion that this restriction on passive sales\(^{56}\)


\(^{56}\) See currently: Art. 4 sub b under (i) Regulation 330/2010 concerning the application of Art. 101, paragraph 3 TFEU on groups of vertical agreements and concerted practices,
was in conflict with the cartel prohibition and lodged a complaint with the European Commission. The General Court and the Court of Justice agreed with the European Commission that Parker Pen had not violated the cartel prohibition. The General Court ruled that the cartel prohibition refers «to relations between economic entities which are capable of competing with one another and does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit»\textsuperscript{57}. This ruling was maintained on appeal. In the words of the Court of Justice, Parker Pen and its subsidiaries formed a «single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling».\textsuperscript{58} So a subsidiary that is unable to define its own market conduct independently, forms a single economic entity together with the parent company. This means that it is important to verify why this independence is lacking with the subsidiary. Reference can be made in this context to the Hydroterm judgment. In this judgment, the Court of Justice established that there could be a single economic entity «if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement. For in those circumstances competition between the persons participating together, as a single party, in the agreement in question is impossible».\textsuperscript{59} So the Court of Justice mentions two important elements for the lack of independence: (i) decisive influence and (ii) identical interests. The first element, the decisive influence that a 100\% parent company can exercise, is described very well by Advocate-General Kokott in her opinion in the Akzo Nobel case. According to the Advocate-General, a parent company is «in any event undoubtedly in a position to exert decisive influence over its subsidiary if [...] it controls it wholly, whether by means of a direct shareholding or indirectly through its shareholdings in other companies». The decisive influence is that the parent company has the sole right «to appoint the members of the subsidiary’s management bodies, and it is not unusual for there to be personal interconnections between the two companies. Moreover, it follows from the 100\% shareholding that the interests of other shareholders cannot play any part either}

\textsuperscript{57} Court 12 January 1995 (Parker Pen / Viho) case T-102/92, ECLI:EU:T:1995:3, par. 47.
\textsuperscript{58} ECJ 24 October 1996 (Parker Pen / Viho) case G-73/95, ECLI:EU:C:1996:405, par. 16.
\textsuperscript{59} ECJ case 12 July 1984 (Hydroterm) case 170/83, ECLI:EU:C:1984:271, par. 11.
in strategic decisions or in the day-to-day business of the subsidiary»\(^60\). As soon as more shareholders are involved, the situation can become different. This is apparent from for instance the IJsselcentrale decision of the European Commission. In this decision, the European Commission concluded that the four Dutch electricity producers, who had jointly set up the N.V. Samenwerkende Elektriciteitsproductiebedrijven (SEP) (cooperating electricity generating companies), did not belong to the same group of undertakings. According to the European Commission, the four electricity producers were separately organised legal entities that were not controlled by one and the same natural person or legal entity. Each electricity producer defined its own business policy independently\(^61\).

Regarding the second element, the identical interests, Odudu and Bailey point out that a parent company is able to appropriate all profit made by the subsidiary\(^62\). In this respect, there is «thus complete coincidence of interests between the parent company and its wholly-owned subsidiary»\(^63\). In this situation, it is irrelevant to which entity the profit eventually goes. As soon as this becomes relevant, competition becomes possible. In that case, there is no longer a single economic entity\(^64\). Consequently, a subsidiary forms a single economic entity together with the parent organisation if (i) the subsidiary cannot define its own market conduct independently, (ii) the parent organisation has decisive influence over the subsidiary and (iii) the parent organisation and the subsidiary have identical interests.

2.3.3. - Agents and other intermediaries.

In the Guidelines on Vertical Agreements, an agent is defined as «a legal or physical person vested with the power to negotiate and/or conclude contracts on..."
behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the:
- purchase of goods or services by the principal, or
- sale of goods or services supplied by the principal»°. This is not a full definition. The agent is namely an «independent intermediary». For the benefit of his client, the principal, the agent intermediates with the establishing of agreements°. So the agent is not in paid employment with his principal. Notwithstanding this legal autonomy, in the VAG Leasing judgment, the Court of Justice ruled that from a competition law perspective, «intermediaries» lose «their character of as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal’s undertaking»°. The capacity for bearing financial risks is precisely the essential condition for being an economic actor°. Incidentally, in this respect account must sooner be taken of the economic reality than the legal qualification of the contractual relationship with national law°. An agent who does not bear financial risks, consequently forms a single economic entity with his principal if he has to safeguard the interests of his principal and follow his instructions. In this situation, the agent is actually an «auxiliary organ included» in an undertaking of his principal, just as the employee discussed below°°.

° Guidelines on vertical restraints, OJ EU 2010 C 130/1, marginal 12. See also: Art. 1 paragraph 2 Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ EC 1986 L 382/17. The directive is restricted to negotiating «the sale or the purchase of goods». In the Netherlands, Directive 86/653 was implemented in Book 7, Title 7, section 4 of the Dutch Civil Code and applies to negotiations with establishing contracts in general.
° Art. 1 paragraph 2 Directive 86/653 (see: footnote 71).
° ECJ 24 October 1995 (VAG Leasing) case C-266/93, ECLI:EU:C:1995:345, par. 19. The European Commission has further elaborated on this in the Guidelines on vertical restraints, marginals 13-17 (see: footnote 71). Also see in this respect: ECJ 14 December 2006 (CEPSA) case C-217/05, ECLI:EU:C:2006:784, par. 50-57 mentioning circumstances which can be used to assess whether a service station operator qualifies as an autonomous undertaking in the sense of the competition rules.
°°° ECJ 14 December 2006 (CEPSA) case C-217/05, ECLI:EU:C:2006:784, par. 46.
°° ECJ 16 December 1975 (Suikerunie) joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174, par. 358-359 and Court 15 September 2005 (DaimlerChrysler) case T-325/01, ECLI:EU:T:2005:322, par. 88. Directive 86/653 stipulates in Art. 3 paragraph 1 sub a
From the foregoing, it follows that there are three elements that bring about that an agent forms a single economic entity together with his principal: (i) the agent does not define his own market conduct, (ii) he follows the instructions given him by his principal and (iii) he has to safeguard the interests of his principal.

However, it is important to note that a distinction should be made between «on the one hand, the market on which the agent offers his agency services to potential principals, and on the other the market on which he offers his principal’s goods or services to potential customers»71. It is possible that for the first market mentioned, the agent is an independent market participant for his principal72. In this case, the single economic entity is restricted to the market in which the agent offers the goods or services of his principal.

2.3.4. - Employed persons.

The main characteristic of a labour relation is that someone delivers a performance for someone else for a particular period and under his responsibility, and receives compensation in return73. Activity as an employed person is by nature the opposite of the independent execution of an economic or commercial activity.

Normally, employees do not bear the direct commercial risk of a transaction. They have to carry out their employer’s assignments. They do not offer their services to different customers, but they work for one single employer. For this reason, there is a fundamental difference between an employee and an undertaking that performs services74. Compared with agents, employed persons are «auxiliary organs of the undertaking» of their employer75. For the duration of the labour relationship, they are

and c that the agent is obliged to safeguard the interests of his principal and to follow up his instructive (see: footnote 71).

72 ECJ 14 December 2006 (CEPSA) case C-217/05, ECLI:EU:C:2006:784, par. 62.
integrated in this undertaking and so form a single economic entity. Consequently employees are not themselves undertakings in the sense of competition law. As soon as the employment contract ends, the single economic entity of employer and employee also ends. This may have consequences for the agreements that the employer and his former employee have made. Consider in this respect e.g. a non-competition or relationship clause. Such an interest can conflict with the cartel prohibition if the former employee has, or wants to, become independently active on the market and thus qualifies as an undertaking in the sense of the competition rules.

2.3.5. - Consequences of the single economic entity.

Odudu and Bailey point out that the single economic entity concept has three consequences: (i) entities that together form a part of a single economic entity cannot violate the cartel prohibition, (ii) each entity within a single economic entity can be held liable for an infringement of the competition rules and (iii) competition authorities can take enforcement activities regarding entities that are indeed established outside their own jurisdiction, but that form a part of a single economic entity which has other entities that are established within the jurisdiction of the competition authority. This article examines the extent to which producers of primary agricultural products can cooperate within an agricultural cooperative without acting in violation of the cartel prohibition. The first consequence is therefore exclusively discussed. As early as the Consten & Grundig judgment, the Court of Justice considered that with the cartel prohibition, the European legislator decided «to leave untouched the internal organization of an undertaking and to render it liable to be called in question, by means of Article 86, only in cases where it reaches...»

76 ECJ 16 September 1999 (Becu) case C-22/98, ECLI:EU:C:1999:419, par. 26.
78 O. Odudu - D. Bailey, in The single economic entity doctrine in EU competition law, CMLR, 2014, 1721-1722.
such a degree of seriousness as to amount to an abuse of a dominant position»79. This starting point is also defended in the literature80.

In the ICI judgment, the Court of Justice ruled that when a subsidiary «does not enjoy real autonomy in determining its course of action in the market», the cartel prohibition does not apply «in the relationship between it and the parent company with which it forms one economic unit»81. In the Parker Pen/Viho judgment, the Court of Justice added to this that the cartel prohibition does not apply «to conduct which is in reality performed by an economic unit»82. In the DaimlerChrysler judgment, the Court ruled that the cartel prohibition does not relate to agents who cannot define their own market conduct independently and that have to follow the instructions of their principal83. The same applies to employees, considering agents are equated to them84. Regarding vertical agreements, in the CEPSA judgment, the Court of Justice took a similar point of view by considering that agreements between service station operators and an oil company are only subject to the cartel prohibition «where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings»85. The foregoing is however restricted to the internal situation of the single economic entity. There may also be an external component. As soon as an intermediary (an agent) or employee wants to terminate the contractual relationship, competition can emerge between him and his client (the principal), or the employer respectively. This can be deduced from the Oude Luttikhuis as well as the Becu judgments. So the external component must simply be verified against the cartel prohibition. Of course, the proper operation of the single economic entity plays a role with this verification.

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79 ECJ 13 July 1966 (Consten - Grundig) joined cases 56-64 and 58-64, ECLI:EU:C:1966:41, 340.
81 ECJ 14 July 1972 (ICI) case 48/69, ECLI:EU:C:1972:70, par. 134.
82 ECJ 24 October 1996 (Parker - Viho) case C-73/95, ECLI:EU:C:1996:405, par. 54.
83 Court 15 September 2005 (DaimlerChrysler) case T-325/01, par. 88.
84 ECJ 16 December 1975 (Suiker Unie) joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, ECLI:EU:C:1975:174, par. 539-540.
85 ECJ 14 December 2006 (CEPSA) case C-217/05, ECLI:EU:C:2006:784, par. 38.
3. - The single economic entity in the agriculture sector.

3.1. - Point of view of the Dutch government.

In his initiative note «Een eerlijke boterham, over het versterken van de voedselketen» [An honest income, on strengthening the food chain], in 2014, Member of Parliament Geurts called on the Dutch government to among other things arrange that producer organisations (POs) can make agreements using the exception to the cartel prohibition as regulated in Reg. 1308/2013 without having to fear possible intervention by the ACM. The Dutch Minister of Economic Affairs reacted with the information that the exception in question has immediate effect. «It is therefore unnecessary to include the provisions in the Dutch Competition Act and their addition would not create any new possibilities». Nevertheless, in the same letter the minister announced that the guidance promised on 7 November 2013 «which should offer more transparency about the competition rules that are relevant for the establishment and activities of POs» would be sent to the House of Representatives before the end of the year. The intended guidance was finally sent by the Dutch State Secretary of Economic Affairs to the House of Representatives on 19 March 2015. In this guidance, among other things, the question is raised as to whether producers of primary agricultural products can form a single economic entity together with the agricultural cooperative of which they are a member. According to the State Secretary, this question can be answered in the negative: «POs, UPOs (Associations of Producer Organisations) and BOs (Branch Organisations) concern partnerships that are focused on strengthening the market position of their members, e.g. through joint negotiations, but whereby the undertakings concerned can further operate independently, so that there is no decisive control. For this reason, in general POs, UPOs and BOs will not constitute an economic entity».

86 Parliamentary Document 34 004, no. 2, 13.
87 Letter of the Dutch Minister of Economic Affairs 28 October 2014, Parliamentary Document 34004 no. 3, 4-5.
89 In this context, the Dutch State Secretary refers to producer organisations (POs), associations of producer organisations (UPOs) and branch organisations (BOs).
90 Competition law guidance for producer organisations and branch organisations in the agricultural sector, appendix to Parliamentary Document 28625 no. 222, 7. The Instruction can be consulted via: https://www.eerste-kamer.nl/en/woerg/20150319/handleiding_mededingingsre-
In her guidance, the State Secretary exclusively refers to an unspecified informal opinion of the Dutch Competition Authority\(^91\) dated 31 October 2011. As will be explained below, this concerns the informal opinion in the FresQ case. However, it is striking that the informal opinion in the Versdirect.nl and Best Growers Benelux case, which will also be discussed below, is not mentioned.

Incidentally, in this context it can also be pointed out that the Flemish Department of Agriculture and Fisheries seems to share the opinion of the Dutch State Secretary of Economic affairs. In a manual regarding competition law aspects in the agricultural sector published on 17 January 2017, it is remarked that the producers of primary agricultural products do not usually form a single economic entity with the agricultural cooperative of which they are a member:

«An economic entity can be seen as an umbrella organisation that defines the economic activities of its components. The economic entity must operate as a single organisation. The defining factor here is that the umbrella organisation must have decisive control over the components and there must be no freedom to define market conduct independently. This will sooner be applicable to subsidiaries of POs. The growers who are members of the PO are usually still considered to be independent undertakings\(^92\).»

The Flemish Department of Agriculture and Fisheries does not substantiate its position. It is plausible to assume that the position was derived from the guidance from the Dutch State Secretary of Economic Affairs, mentioned above. After all, this guidance is explicitly mentioned in the literature section of the Flemish manual.

It will be argued below that the opinion regarding the single economic entity in the agriculture sector in both the Dutch guidance and the Flemish manual are too simplistic.

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\(^91\) On 1 April 2013, the NMa merged with the Consumer Authority and the OPTA [Independent Mail and Telecommunication Authority] to form the Netherlands Authority for Consumers and Markets (ACM).

\(^92\) Manual on competition law in the agricultural sector, 23. The Instruction can be consulted via: http://lv.vlaanderen.be/sites/default/files/attachments/gr_201609_publicatie_mededinging_digi.pdf (last consulted on 4 December 2017).
3.2. - Opinion of the NMa/ACM.

3.2.1. - Introduction.

The NMa and successor in title ACM have had a number of opportunities to assess how, in the light of competition law, to qualify the relationship between producers of primary agricultural products and the agricultural cooperative of which they are a member. This usually concerned concentrations between undertakings.\(^93\)

3.2.2. - Decision of 07 July 1999 (FCDF - De Kievit).

Friesland Coberco Dairy Foods B.V. (FCDF), which at the time was part of the cooperative association Zuivelcoöperatie De Zeven Provinciën U.A., intended to take over the dairy plant Zuivelfabriek De Kievit B.V. The NMa required a permit for this takeover. This permit was eventually granted with the decision of 7 July 1999. In this decision, the NMa points out that the cartel prohibition is not applicable to agreements between a parent company and a subsidiary that belong to the same group of undertakings, if the undertakings form a single economic entity in which the subsidiary cannot really define its operations in the market independently. However, the NMa remarks that in the present case, both the dairy farmers and the dairy cooperative are independent undertakings. «Dairy farmers are free to cancel their membership of the cooperative. The cooperative may also take farm milk from non-members (see point 97). An individual dairy farmer cannot exert any meaningful influence on the policy of the dairy cooperative of which he is a member and co-owner». Thus the NMa concludes that «the individual members and the cooperative are not economic entities. The dairy farmer’s farm milk is exclusively “bound” on the grounds of freely made agreements between a dairy cooperative and its dairy farmer members».

The NMa based the above conclusion on a decision by the European Commission in the Campina case. From this decision, the NMa derived

\[^{93}\text{With a concentration, a merger, takeover or the establishment of a joint venture is meant. For a definition of a concentration, see: Art. 3 Reg. 139/2004 regarding the merger control of undertakings, OJ EC 2004 L 24/1 and Art. 27, Competition Act.}\]
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Thus the NMa concludes that «individual members and the cooperative are not economic entities. The dairy farmer’s farm milk is exclusively “bound” on the grounds of freely made agreements between a dairy cooperative and its dairy farmer members».

The NMa based the above conclusion on a decision by the European Commission in the Campina case. From this decision, the NMa derived that «no parallels may be drawn between intra-concern relationships and the relation of dairy farmers to their cooperatives»94. The Commission decision referred to by the NMAs is discussed in the Report on Competition 1991 and relates to the exit arrangement used by Campina95.

3.2.3. - Decisions of 16 September 1999 and 16 April 2003 (The Greenery - Fruitmasters).

Two large producer organisations in the field of fruit, The Greenery and Fruitmasters, tried in 1999 and again in 2003 to establish a joint subsidiary. In both cases, the intended establishment of such a joint subsidiary was notified to the NMa. However, the joint subsidiary did not materialise. The NMa was afraid that the intended concentration would among other things «possibly lead to the creation of a dominant position vis-à-vis the suppliers of fresh fruit, especially in the market for auction and intermediation services to fruit growers». According to the NMa, this concern was based on «the fact that a significant percentage of the volume of fruit produced in the Netherlands is marketed through the auction and intermediation services of The Greenery and Fruitmasters»96. The NMa therefore demanded in both instances a permit for the concentration. This permit was not requested by The Greenery and Fruitmasters97. Both decisions seem to imply that the NMa has designated the members of The Greenery and Fruitmasters to be autonomous and independent undertakings. After all, the NMa is afraid that the new joint venture will obtain a position of dominance in relation to the members of its parents.

3.2.4. - Decision of 19 November 2009 (Tradition, WestVeg, Unistar and Brassica-Group).

Tradition, WestVeg, Unistar and Brassica Group were all four CMO-recognised producer organisations. An intended merger of these organis-
tions in the sense of Art. 27 paragraph 1 sub a of the Dutch Competition Act was notified to the NMa. The decision of 19 November 2009 mentions, without any explanation being given, that the turnover data supplied with the notification show that the reported concentration falls within the scope of the merger control regulated in chapter 5 of the Dutch Competition Act. This means that the turnover thresholds mentioned in Art. 29 paragraph 1 of the Dutch Competition Act were exceeded. Unfortunately, the turnover data of the four producer organisations were not published. Considering the relatively small number of members per producer organisation, it goes without saying that the ACM has added the members’ turnover to the own turnover of the producer organisations.

### 3.2.5. - Informal opinion 31 October 2011 (FresQ).

In 2011, the NMa had to judge as to whether the admission of a number of growers to a producer organisation could be considered to be a concentration in the sense of Art. 27 of the Dutch Competition Act. To this end, the NMa had to verify whether the growers and the producer organisation together would form a single economic entity. In an informal opinion of 31 October 2011, the NMa concluded that there was no economic entity:

«The growers are autonomous and independent undertakings, and the fact that they direct their sales, or a significant part thereof, through the cooperative does not in my opinion change anything in principle. So that I believe that for the application of the Dutch Competition Act, they cannot in principle be designated as a part of one single economic entity under the leadership of the cooperative.»

In the aforementioned informal opinion, the producer organisation concerned was not named. Nevertheless, identification is possible, be-

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98 NMa Decision 19 November 2009 in case 6797/Tradition - WestVeg - Unistar - Brassica Group, marginal 10.

99 Tradition, WestVeg, Unistar and Brassica Group merged into Best of Four. It is noted hereafter in § 3.2.8 that, based on the own turnover, the proposed merger between Van Nature and Best of Four would not have had a reporting obligation. It is therefore natural to assume that the same applied to the merger between Tradition, WestVeg, Unistar and Brassica Group.

100 Informal opinion NMa 31 October 2011 in case 7285 [...], 2.
cause in the informal opinion it is noted that the producer organisation in question «had received [...] requests from [...] individual growers of greenhouse vegetables to be admitted to the cooperative with effect from 1 January 2012». At the end of 2011, the agricultural press reported the transfer of 81 Coforta growers to FresQ\(^{101}\). Based on this report, it should be assumed that the informal opinion of 31 October 2011 concerns FresQ.

3.2.6. - Informal opinion 3 February 2012 (Versdirect.nl and BGB).

A few months after the informal opinion in the FresQ case, the NMa came up with another conclusion. Again, we are dealing with a proposed concentration. From the informal opinion of 3 February 2012 in the Versdirect.nl and Best Growers Benelux (BGB) case, it is apparent that producers of primary agricultural products can certainly form a single economic entity with the producer organisations of which they are a member:

«A characteristic of the present cooperatives is combining members’ supply. Combining through the cooperative results in the total supply of the members appearing on the sales market through just one supplier. Thus the collective supply is the subject of the commercial policy and the market conduct of one single unit. That – in the case of [Party 1] – the cooperative itself is involved in the form of intermediation, does not in this case result in the “principals” (the separate [...]) conducting their own commercial policy when putting their products on the market individually in this mediation»\(^{102}\).

Versdirect.nl and BGB notified the NMa of the intended merger. In its decision of 27 February 2012, the NMa informed the parties that no permit is required to establish the concentration that is the subject of the notification. In the short-form decision, it is merely mentioned that «the


\(^{102}\) Informal opinion 3 February 2012 in case 7319 [...], 2. The names of the parties can be found via the case number. Versdirect.nl and Best Growers Benelux have notified their proposed concentration. In the concentration decision with the same case number as the informal opinion, Versdirect.nl and Best Growers Benelux are mentioned by name. The ACM website refers to the informal opinion intended here.
notified operation falls within the scope of the merger control regulated in chapter 5 of the Dutch Competition Acts. In view of the informal opinion, it should be assumed that Versdirect.nl and BGB have added the members’ turnover to their own turnover.

3.2.7. - Decision of 15 May 2012 (Bell peppers).

In this decision, the NMa established that in the period 30 May 2006 to 13 February 2009, the CMO-recognised producer organisations Coöperatieve Veiling Zuidoost-Nederland U.A. (ZON), Coöperatie United West Growers U.A. (UWG) and Coöperatieve Rainbow Paprika Telers U.A. (RPT) had made agreements about the price of bell peppers. This is a complicated matter, in particular regarding the concept of undertaking. The case is made even more complicated by the fact that the District Court of Rotterdam issued an interlocutory judgement twice which each time had consequences for the approach taken by the NMa.

In the decision of 15 May 2012, the NMa designated ZON, UWG and RPT as the «undertakings concerned», because they carry out economic activities. The producer organisations are not designated as an association of undertakings. Neither can it be deduced from the decision that the NMa is of the opinion that the members form a single economic entity with the cooperative of which they are members.

In the court proceedings, a discussion started about exactly which legal entities were involved with the infringement established by the ACM. After the ACM had substantiated, to the satisfaction of the court, which legal entities were concerned, the affected turnover was dealt with. The ACM was of the opinion that it could be deduced from the Finnboard judgment that in the calculation of the affected turnover, the turnover achieved by the members of the producer organisations could also be included. This argument was accepted by the court:

103 Decision NMa 27 February 2012 in case 7310/Versdirect.nl - Best Growers Benelux.
104 Decision NMa 15 May 2012 in case 7036/Peppers, marginals 158-163.
105 In this sense: P.V.F. Bos - M.J. Plomp, in Een gemengde sla van ondernemingsbegrip, toerekenbaarheid, beboeting en landbouwbeleid [A mixed salad of the concept of undertaking, accountability, fines and agricultural policy], M&M, 2013, 162.
106 Decision NMa 15 May 2012 in case 7036/Bell Peppers, marginals 13-31 and 204.
«The court agrees with ACM that the considerations in the Finnboard judgment of the General Court make clear that the lack of a formal qualification as association of undertakings does not interfere with the use of the achieved turnover for the setting of fines by the sales companies for the benefit of the members affiliated with the cooperatives. The conditions for doing so are almost the same as in the Finnboard case:
- the sales companies [organisation L] and [organisation B] operate as a joint sales office for the members of [organisation L] and [organisation B] respectively. The growers who were affiliated with the mentioned cooperatives, had deliberately outsourced the sales and were obliged to market their bell peppers through the sales companies. To this end, they also had to join [organisation F] (100% parent of the sales companies referred to). These circumstances alone show that they were bound to the rules of [organisation L] and [organisation B] respectively;
- just as did Finnboard, these sales companies acted as contract party, but were not the owner of the products being traded, in this case bell peppers;
- [organisation L] and [organisation B] exclusively represented the interests of their members (also in terms of sales, see article 2 articles of association) and were involved with agreement aimed at achieving a better (higher) bell peppers price for their members. The agreements were therefore made exclusively for the benefit of the member-growers;
- the own income from the cooperatives is out of proportion to the sales value, as struck by the cartel;
- moreover, the articles of association of both cooperatives show that they were able to bind their members. All members are obliged to adhere strictly to the cooperative’s articles of association, the regulations and decisions, under penalty of sanctions and/or disqualification from memberships».

On account of the aforementioned interlocutory judgment, the ACM reduced the imposed fines by the decision of 10 June 2016. The fines were further reduced due to the poor financial situation of the fined producer organisations. Although the assets were nil to very limited, the ACM considered there was still room for a fine. In the opinion of ACM, «financial soundness in a broad sense» could after all be assumed. In view of this, the ACM deemed it to be reasonable that the producer organ-

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isations would demand a «significant contribution» from their still active members. The producer organisations have in the meantime accepted this decision\(^\text{108}\).

3.2.8. - Decision of 22 December 2015 (Van Nature and Best of Four).

In the decision of 22 December 2015, the ACM concluded that the CMO-recognised producer organisations Van Nature and Best of Four could merge. In the short-form decision, the ACM reports that after an investigation, it was established that the notified operation falls within the scope of the merger control regulated in chapter 5 of the Dutch Competition Act. This means that the turnover thresholds mentioned in Art. 29 paragraph 1 of the Dutch Competition Act were exceeded. Unfortunately, the decision does not report the turnover data of the producer organisations concerned. Enquiries have indicated that in their merger notifications, both producer organisations had added the turnover of their members to their own turnover. If only the own turnover had been taken into consideration, the proposed concentration would have had no notification obligation. So the fact that the ACM concludes that there is a concentration with a notification obligation, implies that together with Van Nature and Best of Four respectively, the members form a single economic entity. This is therefore comparable with the situation in the informal opinion in the Versdirect.nl and BGB case. This approach is also obvious. After all, Van Nature is the successor in title of Versdirect.nl and BGB.

3.2.9. - ACM «Guidance» 17 June 2017 (CNB).

The letter from the ACM in the flower bulb case is very brief and does not contain any substantial information. It can only be deduced from the communications from CNB referred to in the introduction to this article that it is the intention that the «sales company» and the associat-

\(^{108}\) Decision ACM 10 June 2016 (Bell Peppers) case 7036, marginals 33-39.
ed growers will form a single economic entity. In this light, the «guidance» will have to be understood to mean that the ACM takes a positive stance on this.

3.2.10. - Conclusion regarding the single economic entity.

When considering the decisions and informal opinions of the NMa/ACM, then in the first instance, there does not appear to be an unambiguous answer as to whether producers of primary agricultural products may form a single economic entity with their producer organisations. The guidance from the Dutch State Secretary of Economic Affairs reflects this ambiguity. Yet the conclusion must be that the answer to the aforementioned question should be in the affirmative.

In the FCDF - De Kievit case, the NMa has clearly made an incorrect analysis. First of all, the termination option. The fact that a producer of primary agricultural products can terminate the membership of his agricultural cooperative is irrelevant. After all, agents can also terminate the granted assignment and employees can hand in their notice. Yet during the term of their assignment or employment contract, they can form a single economic entity with their client or employer. In this context, it should be noted that a producer should have a reasonable exit option. After all, that external aspect does not form a part of the single economic entity, but should be verified against the cartel prohibition. The «Genossenschaftsprivilég» is relevant in this respect. Secondly, the power of control. The fact that an individual dairy farmer cannot exert an influence on the policy of the dairy cooperative, clearly indicates that it is not the individual dairy farmer, but the dairy cooperative that defines the market policy. In the same way as a parent company defines the market policy of the entire group its head of.

In the two decisions in the The Greenery - Fruitmasters case, mention is indeed made of (statutory) obligations resting with the members of a recognised producer organisation, but the scope of these obligations is not discussed. In the decisions, the NMa appears to take the position that the members can operate independently with
respect to the recognised producer organisation of which they are a member, among other things because they can choose their own distribution channel\textsuperscript{109}. This may be motivated by the fact that The Greenery and Fruitmasters have themselves informed the NMa «that all suppliers of fruit can switch in the short-term from the cooperative distribution channel to an alternative distribution method»\textsuperscript{110}. Just as in the FCDF - De Kievit case, for which the decision was undoubtedly still fresh in the memory of the NMa, in the The Greenery and Fruitmasters case the emphasis is also laid on the existing exit option for the growers. As mentioned above, this aspect is irrelevant for the question as to whether a producer forms a single economic entity with his agricultural cooperative during the term of his membership.

In the bell peppers case, the emphasis was on agreements that the producer organisations had made with each other. The NMa did not need to qualify the relationship between the producer organisations and their members. The decision of 15 May 2012 solely reports that the CMO rules allow «growers of bell peppers to combine their production in recognised producer organisations (POs) and associations of producer organisations (APOs)»\textsuperscript{111}. The members only entered the picture during the court proceedings. The ACM wanted to include the members’ turnover in the calculation of the basic amount of the fine. To this end, the ACM relied on the Finnboard judgment and not on the existence of a single economic entity between the bell pepper growers and their agricultural cooperative. This is quite remarkable. The circumstances pleaded within the framework of the Finnboard judgment point to the existence of such a single economic entity.

Then the two informal opinions of the NMa. In both cases, we are dealing with CMO-recognised producer organisations. Why then two totally different opinions? Neither of the opinions contain any information on this point. It should be considered that an informal opinion of the NMa/ACM is largely based on the information submitted by the applicant. It cannot be excluded that FresQ itself took the position that its members were independent undertakings. This is an understandable point of view in the light of the decisions of the NMa in the cases FCDF - De Kievit and The Greenery.

\footnotesize{\textsuperscript{109} Decision NMa 16 September 1999 in case 1427/The Greenery - Fruitmasters, marginals 19, 45 and decision NMa 16 April 2003 in case 3230/The Greenery - Fruitmasters 2, marginals 40-43 and footnote 100.
\textsuperscript{110} Decision NMa 16 April 2003 in case 3230/The Greenery - Fruitmasters 2, marginal 67.
\textsuperscript{111} Decision NMa 15 May 2012 in case 7036 / Peppers, marginals 57 and 167.}
- Fruitmasters. Moreover, FresQ was also involved in the bell peppers case when it requested an opinion from the NMa. Apparently, in that case FresQ had taken the position that it did not have tight control over the sales of the products that were being produced by its members, so that some members «conducted themselves autonomously on the market»112. What FresQ meant by this can be deduced from the Netherlands/Commission judgment. According to this judgment, FresQ had allowed some of its large growers to second sales staff to FresQ subsidiaries. A seconded sales employee took exclusive care of the sales of the products of the grower who had seconded him and he followed his instructions exclusively113. This may explain why in the informal opinion of 31 October 2011, the NMa concluded that the FresQ growers were «autonomous and independent undertakings».

On the other hand, Versdirect.nl and Best Growers Benelux will undoubtedly have explained, using the CMO rules, that they were in control of the sales of the products that were being produced by their members. Based on this, the NMa concluded that Versdirect.nl and Best Growers Benelux formed a single economic entity together with their members. This approach is followed in the decisions in the case Tradition, WestVeg, Unistar and Brassica-Group and the case Van Nature and Best of Four, as well as in the «guidance» to CNB.

Thus the central theme is that in case the CMO rules, in particular in the fruit and vegetables sector, are strictly observed, the producers of primary agricultural products and their agricultural cooperative form a single economic entity. This interpretation is supported by the opinion of Advocate-General Wahl in the French chicory case:

«Practices adopted within a PO or APO which is in fact in charge of managing the production and marketing of its members’ products are comparable to those adopted within a company or group presenting itself on the market in question and given the particular features of the agricultural market, as a single economic entity. Such “internal” practices are not subject to the application of competition law. In such a configuration, the farmers represented no longer have any control, for the purpose of selling their products, over negotiations on products or prices [...].»114.

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112 District Court of Rotterdam 9 July 2015 (Bell Peppers) case ROT 13/247, 13/248, 13/249, 13/250, 13/251, 13/252, 13/5771, 13/5772, 13/5774, ECLI:NL:RBROT:2015:4885, par. 3.2.
113 ECJ 6 November 2014 (Netherlands / Commission) case C-610/13, ECLI:EU:C:2014:2349, par. 68.
4. - The single economic entity in the agriculture sector.

4.1. - Introduction.

It was observed above that the CMO rules in the fruit and vegetables sector ensure that producers of primary agricultural products form a single economic entity together with their agricultural cooperative. That means that it needs to be verified which circumstances cause a single economic entity to be established between producers and a producer organisation in the fruit and vegetables sector.

4.2. - Recognised producer organisations in the fruit and vegetables sector.

The core activity of a recognised producer organisation in the fruit and vegetables sector consist according to Art. 11 paragraph 1 Reg. 2017/891 of «the concentration of supply and the placing on the market of the products of its members for which it is recognised»115. Moreover, a recognised producer organisation on grounds of Art. 160 Reg. 1308/2013 is also obliged to plan the production of its members.

From the France/Commission judgment, it follows that a recognised producer organisation can only carry out the core activity referred to if «une partie significative de la production des membres est vendue par l’intermédiaire de l’organisation de producteurs» [a significant part of the members’ production is sold through the producer organisation]116. In other words, the members of a recognised producer organisation are therefore obliged to sell a «significant proportion» of their production through the intermediation of their producer organisation. Producer organisations can only allow members to

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116 Court 30 September 2009 (France - Commission) case T-432/07, ECLI:EU:T:2009:373, par. 54 and Court 16 September 2013 (Netherlands/Commission) in case T-343/11, ECLI:EU:T:2013:468, par. 151. The latter ruling was upheld on appeal. In this context, see also Art. 160 2nd paragraph Reg. 1308/2013.
sell products outside the producer organisation under strict conditions\textsuperscript{117}. According to the Court, the term «placing on the market» means that the producer organisation must sell the products, select the sales channel and, unless the sales are done through an auction, to negotiate with buyers about quantities and prices. This rule has now been codified in Art. 11 paragraph 1 Reg. 2017/891. The members may not get involved with these sales. Such involvement would detract from the control that recognised producer organisations should have over the sales. In the Netherlands, this has been further elaborated on in the Implementing Regulation CMO fruit and vegetables 2017\textsuperscript{118}.

The CMO rules say nothing about the distribution of the sales proceeds as such. However, it should be considered that recognised producer organisations in the fruit and vegetables sector should aim to «stabilise producer prices»\textsuperscript{119}. This objective will not be realised, or at least only to a lesser extent, if members are treated differently in equivalent cases. Reference can be made in this context to the Batavia judgment. In this case, the Productschap Tuinbouw [Horticultural Marketing Board] had withdrawn Batavia’s recognition as a producer organisation. One of the reasons for this was that one of the members of Batavia, who was also a board member, defined different sales prices and conditions for his own products than for the products of other members who also grew greenhouse vegetables\textsuperscript{120}. This aspect was also considered in the FresQ case. According to the College van Beroep voor het bedrijfsleven [Trade and Industry Appeals Tribunal], the CMO rules mean that «affiliated growers reaching a mutual agreement about the price is incompatible with (only) one of them subsequently benefiting from the sales price that the producer organisation is able to obtain for the products»\textsuperscript{121}.

\begin{flushleft}
\textsuperscript{117} See: Art. 12 Reg. 2017/891.
\textsuperscript{118} Regulation of the State Secretary of Economic Affairs of 5 July 2017, no. WJZ/17108187, regulating the execution of the common organisation of markets for fruit and vegetables, Stcr. 2017 39552.
\textsuperscript{119} Art. 160 1° paragraph in conjunction with Art. 152 paragraph 1 sub a under iii Reg. 1308/2013.
\textsuperscript{120} Letter from the Horticultural Marketing Board of 25 May 2010. This letter has not been published, but is manifest from the judgment of the interim injunction judge of the Trade and Industry Appeals Tribunal of 22 June 2010 (Batavia) case AWB 10/298, ECLI:NL:CBB:2010:BN0348. In the court proceedings, the withdrawal of the recognition of Batavia was upheld. Judgment of Trade and Industry Appeals Tribunal of 6 September 2013 (Batavia) case AWB 11/1086, 12/529, 12/592 to 12/595, ECLI:NL:CBB:2013:103.
\textsuperscript{121} Trade and Industry Appeals Tribunal 25 July 2017 (FresQ) case 15/7, ECLI:NL:CBB:2017:
\end{flushleft}
It is very important for the producer organisations that they have tight control over the sales. If this control is lacking, producer organisations are at risk of losing their recognition. This can subsequently have consequences for any CMO subsidies that they have received. Partly in view of this, it is clearly the intention of the European legislator that producer organisations check whether their members fulfil their CMO obligations. According to Art. 153 Reg. 1308/2013, these obligations should be included in the articles of association of the producer organisations. Moreover, the articles of association must provide for sanctions that can be imposed on members if they violate their statutory obligations. For this reason, the members need to be checked on by the producer organisation, which is prescribed by Articles 13 and 14 of the Dutch Implementing Regulation CMO fruit and vegetables 2017.

Finally, there are also specific exit rules. On the basis of Art. 6 Regulation 2017/891, members can terminate their membership of a producer organisation with a period of notice of no more than six months. There is a condition however that the membership must have lasted at least one year. This regulation is further detailed in Art. 7 of the Dutch Implementing Regulation CMO fruit and vegetables 2017. In the Netherlands, termination can only be done with effect from 1 January. The duration of the period of notice, which producer organisations must define in their own articles of association, is a minimum of three months and a maximum of six months.

4.3. - Non-recognised agricultural cooperatives and their members as a single economic entity.

Producer organisations in the fruit and vegetables sector do not form a single economic entity with their members «because of» the recognition. The recognition solely ensures that the competition rules, if applicable, are set aside by the CMO rules, as recently ruled by the Court of Justice in the French chicory case. This means that the articles of association of an agricultural cooperative are not the only basis to establish a single

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122 See on the importance of control over sales: H.C.E.P.J. Janssen, in Producenorganisaties in de groenten en fruitsector en het belang van regie over de afzet [Producer organisations in the fruit and vegetables sector and the importance of control over sales], SEW, 2015, 76.
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When shaping a single economic entity, the external component should first be considered. This means (I) that producers of primary agricultural products may only be bound to the single economic entity as long as necessary for the proper operation of the single economic entity. Subsequently, for the internal component it is important that (II) the market conduct of the participating entities is the market conduct of a single entity, (III) that there is one entity that checks other entities, and (IV) that the participating entities have identical interests.

If the aforementioned four elements are set against the CMO rules, we arrive at the following diagram:

<table>
<thead>
<tr>
<th>Measure</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>I 1</td>
<td>Art. 6 Reg. 2017/891</td>
</tr>
<tr>
<td>2</td>
<td>Art. 153 Reg. 1308/2013</td>
</tr>
<tr>
<td>3</td>
<td>Art. 6 Reg. 2017/891 Art. 7 Reg. CMO G&amp;F</td>
</tr>
<tr>
<td>II 4</td>
<td>Art. 152 Reg. 1308/2013 Art. 160 Reg. 1308/2013 Art. 11 Reg. 2013/891</td>
</tr>
<tr>
<td>5</td>
<td>Art. 160 Reg. 1308/013</td>
</tr>
<tr>
<td></td>
<td>SEE is an autonomous market party</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>8</td>
<td>SEE decides on the sales conditions</td>
</tr>
<tr>
<td>9</td>
<td>SEE sells the products in its own name</td>
</tr>
<tr>
<td>10</td>
<td>The producer cannot buy his products back</td>
</tr>
<tr>
<td>III</td>
<td>The producer presents himself as part of the SEE</td>
</tr>
<tr>
<td>11</td>
<td>The producer must provide the SEE with information</td>
</tr>
<tr>
<td>12</td>
<td>The SEE can check on the producers</td>
</tr>
<tr>
<td>13</td>
<td>The SEE can impose sanctions</td>
</tr>
<tr>
<td>IV</td>
<td>The producers participate in the sales proceeds on an equal footing</td>
</tr>
</tbody>
</table>

SEE: Single economic entity  
Reg. CMO G&F: Dutch Implementing Regulation CMO fruit and vegetables
The measures mentioned in the diagram may be included in the articles of association or in a contract. It is a well-known fact that paper alone is cheap. A legal structure can be perfectly «competition-proof» on paper. If it is different in practice, producers of primary agricultural products and their agricultural cooperatives still run the risk of violating the cartel prohibition. It is therefore of vital importance that a real check be made that the members do not jeopardise the single economic entity. Any violations must be seriously punished.

5. - Conclusion.

Competition law in the agricultural sector is a particular «scholarly-sci-ence». In daily practice, it often proves to be difficult to apply the competition rules in accordance with the CAP. Certainly if the rules contradict each other. Governments and competition authorities repeatedly attempt to create transparency. This does not usually clarify the subject matter. The guidance that the Dutch State Secretary of Economic Affairs sent to the House of Representatives in 2015 is – unfortunately – a clear example of this. The confusion thus created has enormous consequences. For instance, producers of primary agricultural products distrust working together. The idea is that any cooperation is in conflict with the competition rules. This delays essential innovation.

This article has explained that producers of primary agricultural products within a single economic entity are quite capable of working together without acting in conflict with the cartel prohibition. After all, the cartel prohibition is not applicable to internal situations. When shaping a single economic entity, they can use the rules that are applicable to recognised producer organisations in the fruit and vegetables sector. In this sector cooperation among producers has taken place for more than 100 years, since 1966 under the flag of a CMO. The introduction of the competition rules has not changed anything in this respect. So, as is common knowledge, it is best to follow a good example!