Private Antitrust Litigation

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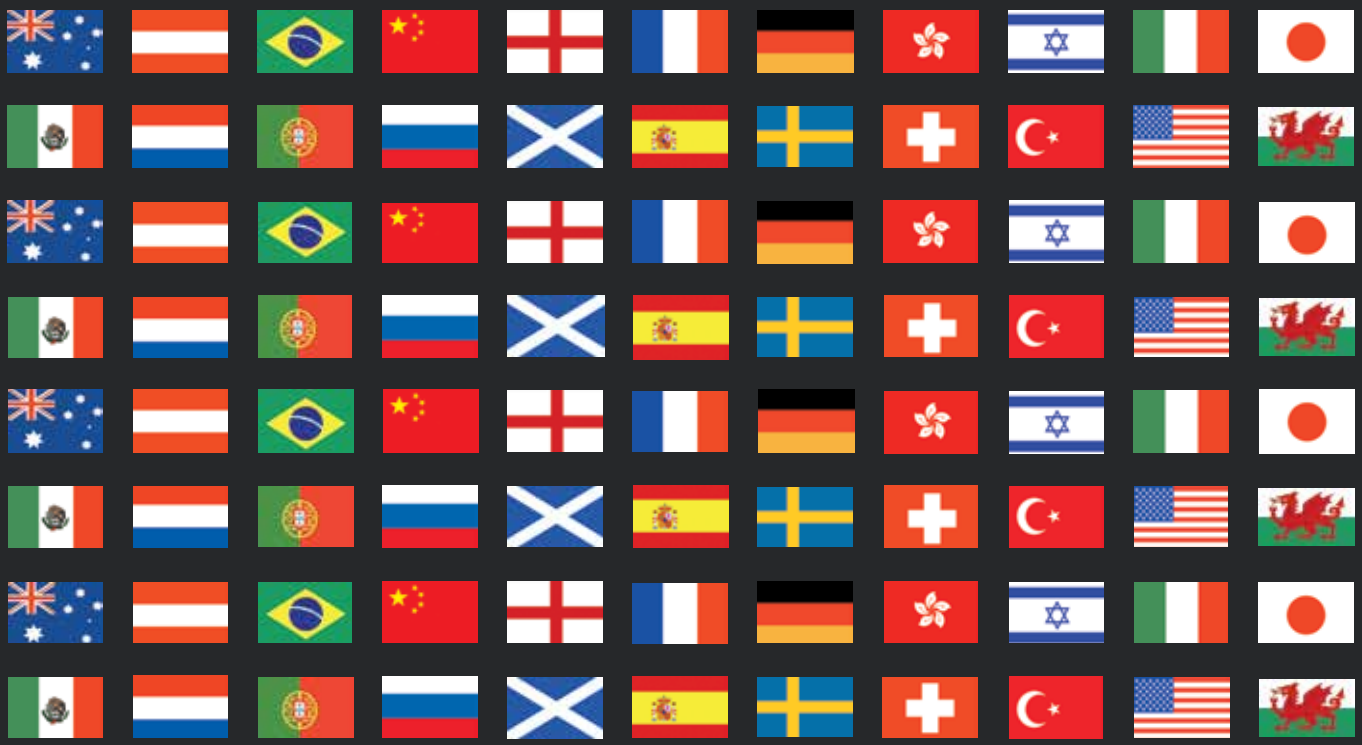

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GETTING THE DEAL THROUGH

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Private Antitrust Litigation 2018

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Netherlands

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Stek

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The Netherlands is widely regarded as a favoured forum for follow-on cartel damages litigation in the European Union. It is in the area of follow-on actions concerning a decision by the European Commission, that the most notable developments are found. The number of follow-on cartel damages that are brought before the Dutch courts, mostly through claim vehicles, is steadily increasing.

Private enforcement of competition law also plays an increasingly important role in the development of private antitrust litigation in the Netherlands. A substantive body of case law has already been developed, primarily through contract disputes.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

On 10 February 2017, Directive 2014/104/EU on antitrust damages actions (the Damages Directive) was implemented into separate, newly created sections of the Dutch Civil Code (BW) and the Dutch Code of Civil Procedure (RV), which provide additional, specific rules for private competition damages actions (collectively, the Damages Directive Implementation Act).

New sections of the BW and the RV created by the Damages Directive Implementation Act apply exclusively to damages actions following cross-border infringements of competition law and infringements of national competition laws insofar as they affect the trade between EU member states. However, the Netherlands state will adopt a separate measure pursuant to which the Damages Directive Implementation Act will also be applicable to damages actions following purely domestic infringements of competition law.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

In addition to the new sections implementing the Damages Directive, there are several civil law actions through which private competition actions are possible. Section 6:162 BW sets out the criteria for tort and provides the conditions for establishing liability and the right to compensation for damages. In addition to section 6:162, BW damages may also be claimed on the basis of section 6:166 BW, which provides the rules for group liability for damages caused by a tortious act (see question 33). Furthermore, damages may be claimed on the basis of unjust enrichment, as set out in section 6:212 BW. Undue payment (section 6:203 BW) may create a ground for restitution of the amount unduly paid (see question 27). Finally, individual claims may follow from collective settlement agreements, as set out in sections 7:907-7:910 BW and sections 1013-1018 RV (see question 19).

After the establishment of liability by the court, damages are usually calculated in a separate procedure, in accordance with sections 612–615b RV.

All district courts in the Netherlands are competent to hear civil law claims (see question 5). Judgments at first instance may be appealed before the courts of appeal. Judgments from a court of appeal may be appealed before the Supreme Court of the Netherlands (see question 18). We note that procedures at first instance with respect to collective settlement agreements must be submitted to the Amsterdam Court of Appeal (section 1013(2) RV).

Interim relief measures are sought from the president of the district court that has jurisdiction over the main course of action.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available for all types of competition matters. Both contractual disputes and cartel and abuse-of-dominance cases may be brought before a court. A decision by a competition authority establishing an infringement is not required. However, with regard to cartel or abuse-of-dominance cases, such a decision will in most instances be the starting point for follow-on damages litigation.

As regards the effect of a finding of infringement by competition authorities in national courts, see question 15 on the applicable standard of proof.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The rules regarding jurisdiction are set out in the RV and in EU Regulation 1215/2012. Pursuant to section 2 RV, a Dutch court has jurisdiction when one of the defendants is domiciled in the Netherlands or has its statutory seat in the Netherlands. For defendants that have their domicile or statutory seat outside of the European Union, section 6 RV provides several grounds on the basis of which jurisdiction in the Netherlands can be established; for instance, when the underlying cause of damages suffered as a result of a tortious act took place in the Netherlands. Jurisdiction over defendants having their statutory seat or domicile within the European Union, but outside of the Netherlands, will be determined on the basis of EU Regulation 1215/2012.

Claimants in cartel damages procedures can influence the jurisdiction in which their claim will be heard by using an 'anchor defendant'. EU Regulation 1215/2012 stipulates that in the case of multiple defendants that are domiciled in a member state, each defendant can be sued before the courts of the place where any one of the defendants is domiciled, provided that there is a close connection between the claims of the claimant on the defendants. Therefore, a claimant can choose between the various member states in which the defendants are domiciled and then bring a claim against all defendants in its member state of choice. Pursuant to section 7 RV, which contains the same 'close connection' criterion as EU Regulation 1215/2012, claimants that have brought a claim against a Dutch 'anchor defendant' can also bring claims before a Dutch court against defendants that have their domicile or statutory seat outside of the European Union.

Potential defendants can also influence the jurisdiction in which a damage claim will be heard by using a 'torpedo'. The defendant will bring a case in its member state of choice, seeking a declaration of non-liability. Pursuant to article 29 of EU Regulation 1215/2012, which contains a lis pendens rule, any court other than the court first seized by the defendant has to stay proceedings until the court first seized by the defendant has established whether it has jurisdiction. Moreover,

should the court that first seized accept jurisdiction, other courts must decline jurisdiction with regard to the dispute. In a follow-on case relating to the *Airfreight* cartel, KLM, Martinair and Air France successfully launched a 'Dutch torpedo' by bringing a case before the District Court of Amsterdam, seeking a declaration that they were not liable to pay any damages to Deutsche Bahn in relation to any infringement of competition law. In its judgment of 22 July 2015, the district court accepted jurisdiction, thereby dismissing a claim by Deutsche Bahn that KLM's action constituted abuse of procedural law and was therefore inadmissible.

Forum-selection and arbitration clauses between claimants and defendants do not necessarily affect the jurisdiction of the Dutch courts. In a follow-on case relating to the *Elevator* cartel, the District Court of Rotterdam dismissed a motion by the defendants (elevator manufacturers) contesting the district court's jurisdiction. The defendants argued that the district court lacked jurisdiction to hear the claim, due to arbitration clauses in the general terms and conditions that apply to the agreements between the defendants and the housing associations that have assigned their claims to the claimant. The district court referred to relevant case law of the European Court of Justice and held that the arbitration clauses only cover disputes that arise directly from the legal relationship in the context of which they had been agreed on (ie, the purchase agreements between the elevator manufacturers and the housing associations). Since the housing associations could not foresee the competition law infringements on the part of the elevator manufacturers when they agreed on the arbitration clauses, the arbitration clauses do not cover claims following such infringements. Therefore, the district court held that the arbitration clauses do not affect its jurisdiction and dismissed the motion by the defendants (District Court of Rotterdam, 25 May 2016).

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, private actions against both corporations and individuals can be brought before the Dutch courts. Actions against corporations and individuals from other jurisdictions can be brought before a Dutch court if the applicable rules on jurisdiction provide sufficient ground to do so (for instance, section 6 RV or articles 7 or 8 of EU Regulation 1215/2012; see question 5).

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Yes, third parties are allowed to fund litigation. In practice, most follow-on damages litigation is initiated by third parties, ie, claim vehicles.

A five-year pilot scheme regarding contingency fees has been initiated by the Dutch Bar Association. The pilot scheme is, however, limited to cases regarding bodily injuries or death and was initiated on 1 January 2014. With the exception of the scheme, no contingency fee arrangements are available in the Netherlands.

8 Are jury trials available?

Jury trials are not available in the Dutch legal system.

9 What pretrial discovery procedures are available?

Dutch legislation provides for the following three pretrial discovery procedures: provisional examination of a witness, provisional expert opinion and request for documents.

The preliminary hearing of witnesses (sections 186-193 RV) or experts (sections 202-207 RV) share the same two objectives. The first objective is the preservation of evidence. The second objective is to provide the claimant with the opportunity to clarify certain facts, especially with respect to the defendant's identity. The procedures aim at clarifying the facts and circumstances. The party can, on the basis of these facts and circumstances, assess whether or not to start proceedings. Claimants must be able to identify the scope and nature of their request for a preliminary hearing. Moreover, they must have a legitimate interest. However, the courts do not tend to apply very high thresholds.

If a claimant has knowledge of a certain document that is not in his or her possession, section 843a RV allows for a request for that document. Section 843a does not, however, allow for discovery of all documents relating to a certain case. The claimant must demonstrate a legitimate interest in specific documents. The judgment of 16 May 2012 of the District Court of Arnhem in a follow-on case relating to the *Gas Insulated Switchgear* cartel confirms the restrictive approach taken by Dutch courts with respect to section 843a RV.

The Damages Directive Implementation Act contains more detailed rules on requests for documents pursuant to section 843a RV in competition damages actions. For instance, pursuant to the newly created section 845 RV a person that has in his or her possession documents relating to a follow-on damages claim may refuse disclosure of such documents (only) if he or she can demonstrate compelling reason to do so.

10 What evidence is admissible?

Section 152 (1) RV states that there are no limitations regarding the form of evidence that can be brought before the court. Section 152 (2) RV does, however, state that the determination of the value of the presented evidence is left to the discretion of the court.

11 What evidence is protected by legal privilege?

Correspondence between a lawyer and a client and legal advice are covered by the legal privilege enjoyed by lawyers, as members of the Dutch bar. It is important to note that the European Court of Justice and the Supreme Court of the Netherlands have ruled differently about extending legal privilege to in-house lawyers. According to the European Court of Justice, correspondence between in-house lawyers and their employers is not covered by legal privilege (*AkzoNobel*, 14 September 2010). The Supreme Court of the Netherlands, on the other hand, has acknowledged the existence of legal privilege for in-house lawyers that are admitted to the bar. In-house lawyers who are not admitted to the bar therefore do not possess legal privilege (Supreme Court of the Netherlands, 15 March 2013).

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

We note that the enforcement of competition law in the Netherlands is based on administrative law and procedure. In its judgment in the Window Cleaners cartel the Hague Court of Appeal ruled that infringements of the Dutch Competition Act are exclusively sanctioned through administrative law. The Dutch Competition Act is therefore a lex specialis to the Penal Code (The Hague Court of Appeal, 21 May 2008). A criminal conviction in competition law cases is, while theoretically possible, therefore very unlikely to happen in practice.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Since infringements of the Dutch Competition Act are exclusively sanctioned through administrative law, criminal proceedings in competition law matters are only a theoretical possibility (see question 12).

Leniency applicants under the Leniency Rule enjoy a certain degree of protection because their leniency files will not be disclosed by the Netherlands Authority for Consumers and Markets (ACM). The applicant is therefore protected from disclosure. The applicant is not, however, shielded from follow-on litigation. On 2 December 2015, the Trade and Industry Appeals Tribunal (CBb) issued a judgment in which it decided that the ACM had to grant access to oral leniency submissions to the defendants in the *Dutch Flour* cartel appeal proceedings. The CBb held that, in this particular case, the protection of the ACM's leniency programme was not as important as safeguarding the defendants' right of defence. The CBb considered it relevant that the defendants already had knowledge of the contents of the oral statements. Therefore, the interest in withholding the transcripts of these statements from the defendants was limited. It has been argued that this judgment is at odds with the protection that the leniency files of competition authorities are afforded by the Damages Directive and the Damages Directive Implementation Act, which states that Dutch courts may never grant access to a competition authority's leniency files for the purpose of actions for damages (section 846(1)(a) Rv).

In principle, the ACM does not disclose documents obtained in its investigations. The files of the ACM fall within the scope of the Government Information Act, on the basis of which disclosure of

information in the files of the authorities can be requested by any member of the public. However, sections 10 and 11 of the Government Information Act provide several grounds, inter alia business secrets, on which the ACM can deny requests for the disclosure of information.

On 13 May 2015, the District Court of Rotterdam issued a ruling on the applicability of the Government Information Act to the files of the ACM. The district court ruled that section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets, pursuant to which the ACM may not disclose any information gathered while exercising its statutory task except under certain circumstances, prevails over the Government Information Act. In its judgment on appeal, the CBb confirmed that section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets prevails over the government Information Act. However, the CBb furthermore considered that the requested documents may contain information which does not fall within the scope of section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets. Therefore, the ACM has to determine for each requested document which information contained therein is covered by section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets and which information is not (CBb, 17 June 2016).

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

If proceedings regarding the same course of action have already been brought before a court in another EU member state or a state whose court judgments are recognised and enforceable in the Netherlands, a stay of proceedings may be requested. Furthermore, reasons of procedural efficiency may also lead to a stay of proceedings.

Dutch courts are pragmatic in their approach towards requests for a stay of proceedings in follow-on cartel damages cases on the basis of the *Masterfoods* rule of the European Court of Justice. Rather than granting such requests, they have generally opted to continue the proceedings with regard to the matters that are unrelated to the European Commission's decision and procedural matters. By doing so, the courts have managed to await the outcome of the decision of the European Commission while avoiding a formal stay of proceedings.

The hesitancy of the Dutch courts to stay proceedings is well illustrated by the decision of the Amsterdam Court of Appeal of 24 September 2013 in follow-on litigation with respect to the *Airfreight* decision of the European Commission. The Court of Appeal determined that the party demanding a stay of proceeding needs to fulfil three criteria, as follows:

- it has filed a timely appeal at the European Court of Justice;
- it is opposing the decision of the European Commission on reasonable grounds; and
- it wishes to file in the proceedings, so that the national court can decide on that basis whether and, if so, to what extent the assessment of those defences depends on the outcome of the appeals at the European Court of Justice.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The burden of proof in national or Community proceedings concerning infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) rests on the party or authority alleging the infringement. An undertaking invoking the exemption of article 101(3) TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The applicable standard of proof for claimants is not explicitly defined in Dutch legislation. Section 150 RV in principle places the burden of proof on a party that relies on any specific rights or facts. The burden of proof with regard to passing-on defences has only recently been clarified. In a case relating to the *Gas Insulated Switchgear* cartel the Arnhem-Leeuwarden Court of Appeal did not decide on the division of the burden of proof with respect to the defendant's passing-on defence (Arnhem-Leeuwarden Court of Appeal, 2 September 2014). However, in a judgment of 8 July 2016 concerning the same case, the Supreme Court of the Netherlands ruled that the burden of proving pass-through lies with the defendant.

Despite the absence of a predefined standard of proof, it should be noted that, based on a 21 December 2012 judgment of the Supreme Court of the Netherlands, claimants cannot rely on identifying the defendant's conduct as being in breach of competition law to meet their burden of pleading. Rather, they must submit a detailed description of the relevant market and how the defendant's conduct affected competition on that market. The district courts in the Netherlands have consistently applied this judgment in cases concerning contractual disputes.

However, pursuant to the previously mentioned decision of the European Court of Justice in the *Masterfoods* case, the illegality of the defendant's conduct is presumed if the European Commission has already taken a decision to that effect.

Under the Damages Directive Implementation Act, a final decision by the ACM regarding an infringement of competition law will have a binding effect for Dutch courts (section 161a RV). This binding effect is limited to the infringement of competition law and does not cover the existence or amount of harm. However, the Damages Directive Implementation Act also contains a rebuttable presumption that cartels cause harm (section 6:193l BW).

Moreover, the Damages Directive Implementation Act has introduced an ease of the burden of proof of indirect purchaser claimants. The new section 6:193q BW establishes a rebuttable presumption that an indirect purchaser claimant suffered overcharge harm if this claimant manages to demonstrate that:

- the defendant has infringed competition law;
- this infringement has led to increased prices for the direct purchasers of the defendant; and
- the indirect purchaser claimant has purchased goods or services that were affected by the competition law infringement.

We note that, under the Damages Directive Implementation Act, article 9(2) of the Damages Directive has not been transposed into national law. Pursuant to this article, findings of infringement by competition authorities from EU member states should at least count as prima facie evidence before the national courts of other EU member states. The explanatory memorandum of the Damages Directive Implementation Act states that, under Dutch law as it currently stands, decisions by national competition authorities from other nations can already be taken into account as prima facie evidence by Dutch courts. In practice, Dutch courts will indeed take into account findings by foreign national competition authorities.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The duration of civil proceedings will vary according to the facts of each individual case. The courts do aim for the following timetables:

- judgment in first instance within one year; and
- judgment from a court of appeal within two years.

However, in practice, it has proven difficult to reach decisions within the intended timetable.

As stated in question 3, a follow-on proceeding for the determination of damages according to sections 612–615b RV will be initiated, which will prolong the duration of the timetable. Practice shows that proceedings concerning competition law take longer than average to resolve because of their complex nature. An example can be found in the follow-on damages proceedings relating to the *Airfreight* cartel, which started in April 2011 and are still ongoing.

For contractual disputes, interlocutory proceedings may be used to accelerate proceedings. However, interlocutory proceedings are less suitable for resolving more complex antitrust cases such as cartel cases.

17 What are the relevant limitation periods?

Pursuant to section 3:310(1) BW, the limitation period for damage claims is five years as from the day that the injured party becomes aware of both the damages and the identity of the liable party. In most cases the publication of a final decision by the relevant authority will trigger the limitation period. However, if an injured party is aware of the damages and the identity of the liable party, he or she should not wait until a final decision has been published, since the limitation period may be deemed to have commenced (and expired) prior to publication of the final decision (see, for instance, the judgment of the District Court of Rotterdam, 7 March 2007). Section 3:310(1) BW furthermore provides that the limitation period cannot be suspended beyond a period of 20 years after the event that has caused the damage in the first place.

Limitation periods can, however, be interrupted, pursuant to sections 3:316 and 3:317 BW. Section 3:316 BW states that limitation periods will be interrupted as soon as proceedings are commenced. Section 3:317 BW states that a written warning will also interrupt a limitation period.

Under the Damages Directive Implementation Act, the abovementioned limitation periods of five and 20 years continue to apply (section 6:193s BW). Moreover, these periods are interrupted by the starting of out-of-court dispute settlement procedures and an act of investigation or a procedural act by a competition authority relating to the competition law infringement on which the damages claim is based (section 6:193t BW).

18 What appeals are available? Is appeal available on the facts or on the law?

The Dutch judicial system comprises eleven districts. Each one of the 11 districts falls within the jurisdiction of one of the four courts of appeal. According to section 60 of the Judiciary Organisation Act, these courts of appeal are competent to hear appeals that are brought against judgments of the district courts. The courts of appeal consider and reconsider the facts of a case.

The Supreme Court of the Netherlands is competent to hear appeals in cassation. The Supreme Court of the Netherlands considers only questions of law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

In theory, Dutch legislation provides two options for collective proceedings with regard to antitrust claims. They have, however, rarely been used.

Pursuant to section 3:305a(1) BW, a foundation or association (with full legal personality) may bring a representative action to safeguard interests of a similar nature of other persons, provided that its articles of association specifically focus on such interests. Section 3:305a(3) BW does, however, stipulate that damage claims are not admissible under this section. The foundation or association can seek publication of the judgment, after which individual parties may pursue damage claims in separate proceedings. A legislative proposal is pending pursuant to which, inter alia, this restriction with respect to damage claims will be deleted from section 3:305a BW. The aim of this proposal is to facilitate effective and efficient processing of mass damages claims. Should this proposal be adopted, we may see a substantial increase in collective proceedings based on section 3:305a BW.

The Collective Settlement of Mass Claims Act, as incorporated in sections 7:907–7:910 BW and sections 1013–1018 RV, allows for an agreement with regard to the payment of compensation for mass damages, which can be reached between a foundation or association, representing the claimants, and the defendants. The agreement may be declared binding on all actual and potential claimants by the Amsterdam Court of Appeal. Opt-outs are possible (see question 23).

On 17 January 2012, the Amsterdam Court of Appeal declared an international collective settlement between non-US shareholders and two Swiss issuers binding for all non-US shareholders of a Swiss company. This ruling, based on the Collective Settlement of Mass Claims Act, is particularly interesting, since the majority of the non-US shareholders and the potentially liable parties were not domiciled in the Netherlands. In a provisional ruling of 15 November 2010, the Court of Appeal assumed international jurisdiction, the basis for which was twofold:

- at least some of the shareholders (200 out of 12,000) were based in the Netherlands; and
- the non-US shareholders were represented by Dutch interest groups and the settlement agreement would be executed in the Netherlands.

The last element would suggest that even without any interested party residing in the Netherlands, the Amsterdam Court of Appeal may have jurisdiction to declare the settlement binding.

20 Are collective proceedings mandated by legislation?

Collective proceedings are mandated by legislation. Representation of claimants by a legal entity is set-out in section 3:305a BW to section 3:305c BW. The Collective Settlement of Mass Claims Act is included in sections 7:907–7:910 BW and sections 1013–1018 RV.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Under Dutch legislation, there is no certification process for collective proceedings.

Section 3:305a(1) BW and section 7:907(1) BW do however state that the articles of association should focus on the representation of the interests of the claimants (see question 19). Collective settlement agreements will be examined by the Amsterdam Court of Appeal (see question 24).

22 Have courts certified collective proceedings in antitrust matters?

Collective proceedings in private enforcement of competition law have not yet been certified by courts.

23 Can plaintiffs opt out or opt in?

Section 3:305a(5) BW provides individual parties with the possibility to opt out. Individual claimants can furthermore object to certain grounds for action that concern them.

Section 7:907(2) BW states that the collective settlement agreement is legally binding for all actual and potential parties, after the Amsterdam Court of Appeal has approved the agreement. However, pursuant to section 7:908(2) BW, parties that do not wish to be bound can opt out by written notification for a period of at least three months (see question 24).

24 Do collective settlements require judicial authorisation?

Collective settlements based on the Collective Settlement of Mass Claims Act require judicial authorisation from the Amsterdam Court of Appeal. Section 7:907(2) BW set outs the minimum requirements for a settlement agreement. The conditions for a request to declare a collective settlement agreement binding are laid down in section 7:907(3) BW.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

There are 11 district courts in the Netherlands. Sections 99–110 RV lay down the rules on territorial jurisdiction of the district courts, which determine which district court should hear the claim. The rules on territorial jurisdiction apply to all of the 11 district courts.

Section 1013(3) RV states that the Amsterdam Court of Appeal has exclusive competence over collective settlement agreements.

26 Has a plaintiffs' collective-proceeding bar developed?

The Dutch Bar Association has not developed a plaintiffs' collective-proceeding bar. It is not envisaged that this will happen any time soon.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Several forms of compensation are available. Compensation for damage consists of financial loss and other disadvantages pursuant to section 6:95 BW. Financial loss includes the loss of profit (section 6:96 BW). Section 6:97 BW states that the court will determine the damages through means that are in accordance with the nature of the damage. The court may rely on estimates, if it is not possible to accurately determine the damage.

Damage may be compensated through proceedings based on section 6:162 BW. Section 3:305(a) BW does not allow for requests for compensation in representative actions. However, as indicated in question 19, individual parties can bring claims for damages in separate proceedings on the basis of section 6:162 BW.

A collective settlement reached between a foundation or association with full legal competence and one or more other parties based on the Collective Settlement of Mass Claims Act must provide for compensation of damages.

Update and trends

The Netherlands remains a popular jurisdiction for follow-on cartel damages litigation and the number of civil damages actions brought before the Dutch courts is ever-growing. The most notable recent development in the Netherlands is the entry into force of the Damages Directive Implementation Act, which provides claimants with a more detailed set of rules for antitrust damages actions. Another notable event is the €23 million in damages that was awarded to TenneT by the District Court of Gelderland in a follow-on case relating to the *Gas Insulated Switchgear* cartel (District Court of Gelderland, 29 March 2017).

Section 6:203 BW allows the claimant to demand restitution for the amount unduly paid.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

A claimant can stop unlawful conduct by means of an injunction on the basis of section 3:296 BW. A claimant may also request a declaratory judgment, on the basis of section 6(2) of the Dutch Competition Act or section 3:40(2) BW, to declare an agreement null and void.

Preliminary injunctions against unlawful actions may be requested through interlocutory proceedings. The claimant must display a certain sense of urgency for an application for interim relief measures.

29 Are punitive or exemplary damages available?

Neither punitive nor exemplary damages are available in the Netherlands.

30 Is there provision for interest on damages awards and from when does it accrue?

Pursuant to section 6:83(b) in conjunction with 6:119 BW, interest is added to the awarded damages. Interest accrues from the date the damages were incurred and is compound.

The applicable interest rates are laid down in section 6:120 BW. The interest rate in case of tort is determined by governmental decree.

31 Are the fines imposed by competition authorities taken into account when setting damages?

The main principle for determining the amount of damages is that the actual damage suffered by the claimants should be compensated. Fines imposed by the competition authority are thus unlikely to be taken into account when setting the damages for infringement of competition law, although there are no rules that prevent this.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The legal costs are generally borne by the losing party. Legal costs, including court and lawyer fees, can be recovered. It should, however, be noted that the recoverable costs are maximised by a court-approved scale of costs, stemming from sections 237–241 RV. Consequently, the legal costs that can be recovered are usually just a fraction of the actual legal costs of the proceedings.

33 Is liability imposed on a joint and several basis?

Liability is imposed on a joint and several basis on each person that bears an obligation to compensate the same damage (section 6:102 BW).

Joint and several liability is also the starting principle under the Damages Directive Implementation Act (section 6:193m(1) BW). However, the Damages Directive Implementation Act contains an exception to this principle for small and medium-sized companies. Pursuant to section 6:193m(2) BW, a small or medium-sized company (within the meaning of Commission Recommendation 2003/361/EC) is only liable for damage towards its direct and indirect purchasers if its market share on the relevant market during the infringement was at all times less than 5 per cent and application of the starting principle of joint and several liability would irreparably jeopardise its economic viability and would render its assets valueless. We note that this exception does not apply if the small or medium-sized company concerned has played a leading role in the infringement or has incited other companies to take part in the infringement, or has been found guilty of a competition law infringement on a previous occasion (section 6:193m(3) BW).

Section 6:193m(4) BW contains a second exception to the starting principle of joint and several liability under the Damages Directive Implementation Act. Pursuant to this new article, companies that have been granted immunity from fines by the competent competition authority are only liable for damages towards their direct and indirect purchasers and suppliers, unless claimants cannot obtain sufficient compensation from the other cartel members.

With regard to parental liability we note that under Dutch civil law the European law concept of a single economic entity cannot be applied to establish parental liability in civil competition damage claims. Rather, the joint and several liability of a parent company should be determined under Dutch law, which stipulates that for a parent company to be liable for damages, it is required that such parent company was actually involved in the competition law infringement. This was confirmed by the District Court of Midden-Nederland in a judgment of 20 July 2016 in a follow-on case relating to the *Elevator* cartel.

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

According to section 6:166(1) BW, each individual member of a group is both jointly and severally liable towards the other group members for an equal share of the awarded damages. Section 6:166(2) BW does, however, state that certain circumstances may require a different allocation of the damages.

Claims for contribution or indemnity may be asserted in the same proceedings as the principal claim (ie, as an accessory proceeding that is connected to the principal claim). Moreover, such claims may be asserted after a judgment or settlement in the principal claim, provided that the relevant limitation period has not yet expired (see question 17).

Under the Damages Directive Implementation Act, a company that has been granted immunity from fines by the competent competition authority is only liable towards the other cartel members for the damages awarded to its direct and indirect purchasers, in proportion to the extent to which its actions have contributed to these damages (section 193n BW). We note that this exception applies only to damages awarded to direct and indirect purchasers and suppliers of the cartel members. Consequently, the normal regime for contribution among the cartel member applies to damages awarded to other claimants, such as claimants seeking damages for umbrella pricing.

35 Is the 'passing on' defence allowed?

Since the entry into force of the Damages Directive Implementation Act, passing on defences are explicitly allowed under Dutch law (section 6:193p BW). Prior to the entry into force of the Damages Directive Implementation Act, the possibility of invoking this defence had already been acknowledged by the Arnhem-Leeuwarden Court of Appeal in a follow-on case relating to the *Gas Insulated Switchgear* cartel (Arnhem-Leeuwarden Court of Appeal, 2 September 2014).

In the above judgment, the Court of Appeal assessed how the passing-on defence should be applied. The Court of Appeal considered that damages are about compensating the claimant for losses suffered as a result of wrongful acts by the cartelists and not to take away everything the cartelists may have gained as a result of the cartel. Consequently, loss of income and interest aside, the amount of the damages that can be claimed is determined by the overcharge caused by the cartel minus the part of the damages that were passed on by the claimant. The Court of Appeal accepted the defendant's passing-on defence. However, it did not decide on the division of the burden of proof with respect to this defence. In its judgment of 10 June 2015, the District Court of Gelderland stated that it will follow the ruling of the Court of Appeal, for as long as the Supreme Court of the Netherlands or the European Court of Justice have not issued a contrary judgment. On 8 July 2016, the Supreme Court of the Netherlands issued a judgment in which it upheld the judgment by the Court of Appeal.

An important ruling with regard to passing-on defences was issued on 21 September 2016 by the District Court of the Hague in a follow-on case relating to the *Paraffin Wax* cartel. The defendants, namely, the paraffin wax manufacturers, requested access to documents in order to be able to substantiate their passing-on defence. The claimant challenged this request by arguing that its customers had failed to preserve certain documents. The court found that, while a passing-on defence

must be raised by the defendants, the claimant is responsible for making sure that relevant documents are preserved and accessible for the defendants. The court ruled that it may 'draw the inferences it deems advisable' from the claimant's failure to preserve the documents.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The following defences can be invoked by defendants to reduce the amount of compensation for damage.

Section 6:100 BW states that in a case in which the injured party has suffered damage as well as benefited from the action at hand, the compensation of damages should be adjusted accordingly, to the extent that this is reasonable.

If any of the underlying circumstances can be attributed to the claimant, the amount of compensation can be reduced in accordance with section 6:101 BW. The amount may be reduced to the degree to which the damage can be attributed to the injured party.

Unjust enrichment may also be a reason to limit the amount of compensation. Section 6:212 BW determines that a party that has been unjustly enriched at the expense of others must repair the damage up to the amount of enrichment. Repair of the damage must, however, be reasonable.

37 Is alternative dispute resolution available?

Alternative dispute resolution under Dutch civil law includes arbitration, binding advice, mediation and settlements.

The Dutch arbitration rules are laid down in sections 1020–1077 RV. In addition, the Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Parties may choose to document the outcome of binding advice or mediation in a settlement agreement (sections 7:900–7:910 BW).

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