The Private Competition Enforcement Review

Ninth Edition

Editor
Ilene Knable Gotts

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For further information please email
Nick.Barette@lbresearch.com

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Editor
Ilene Knable Gotts

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Gideon Roberton

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Nick Barette

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CONTENTS

EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia has been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent

(e.g., Nigeria) and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period, and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculation. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action or class-action legislation. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages

awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the

Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct. And in Israel a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that

discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney-client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
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Chapter 18

NETHERLANDS

Mattijs Bosch, Rick Cornelissen, Naomi Dempsey, Albert Knigge and Weyer VerLoren van Themaat[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Netherlands is increasingly a preferred forum for private competition law enforcement cases and connected damages claims. Since 2010, follow-on damages claims have been brought before the Dutch courts with regard to *Gas-Insulated Switchgear*,[2] *Bitumen*,[3] *Air Cargo*,[4] *Sodium Chlorate*,[5] *Candle Waxes*,[6] *Elevators and Escalators*,[7] *Paraffin Wax*[8] and *Prestressing Steel*.[9] Several judgments were published in 2015 in the *Gas-Insulated Switchgear*,[10] *Air Cargo*,[11] *Sodium Chlorate*[12] and *Prestressing Steel*[13] matters.

1 Mattijs Bosch and Naomi Dempsey are senior associates, Rick Cornelissen is counsel, and Albert Knigge and Weyer VerLoren van Themaat are partners at Houthoff Buruma.
2 Commission Decision, 24 January 2007, Case COMP/38899.
3 Commission Decision, 13 September 2006, Case COMP/38456.
4 Commission Decision, 9 November 2010, Case COMP/39258.
5 Commission Decision, 11 June 2008, Case COMP/38695.
6 Commission Decision, 1 October 2008, Case COMP/39181.
7 Commission Decision, 21 February 2007, Case COMP/38823.
8 Commission Decision, 1 October 2008, Case COMP/39181.
9 Commission Decision, 30 June 2010, Case COMP/38.344.
10 Gelderland District Court, 15 April 2015 ECLI:NL:RBGEL:2015:2621 and Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.
11 Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94, Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.
12 Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.
13 Limburg District Court, 25 February 2015, ECLI:NL:RBLIM:2015:1791.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for cartel damages claims is the Dutch law of obligations;[14] the specific competition legislation prescribed in the Competition Act (CA), the Treaty on the Functioning of the European Union (TFEU) and the Code of Civil Procedure (CCP). Most cartel damages claims are, however, based on an alleged unlawful act conducted by the alleged cartelist. In order to succeed, the claimant must establish that the defendant has committed an unlawful act that is attributable to him or her, and which caused the claimant to suffer damage. Whether a breach of national or European competition legislation in itself will amount to an unlawful act against the claimant depends on whether the breached rules are aimed to prevent the damage suffered by the claimant.[15]

Most likely some of the national substantive and procedural rules (in the CC respectively the CCP) will be amended by 26 December 2016, to comply with the Directive on antitrust damages actions adopted by the Council of the European Union on 26 November 2014 (the EU Damages Directive). On 8 October 2015, the government published a draft legislative proposal (the Draft Proposal) that would transpose the EU Damages Directive into Dutch law. A public consultation was held to collect opinions on the Draft Proposal from practitioners. Anticipating these law amendments, this chapter will – non-exhaustively – discuss some of the proposed articles. It should be borne in mind, however, that the Draft Proposal (and the final amendments of Dutch law) are still subject to change.

ii Limitation

Claims for damages become time-barred five years after the claimant has become aware of the infringement and the person liable for the damages, provided that no claims can be brought 20 years after the damage-causing event.[16] For the short limitation period to start running the claimant must be aware of the damage and liable person ('ought to have been aware' is insufficient). Depending on the circumstances of the case, it is therefore possible that the limitation period will have started (and run out) before the Netherlands Authority for Consumers and Markets (ACM) or the European Commission decides

14 Article 6:162 of the Civil Code (CC) embodies the obligation to repair damage in case of an unlawful act, which generally forms the legal basis for cartel damages claims. In addition to this it should be noted that in case of an infringement of competition law, victims can annul legal acts (based on Article 3:44 CC) or agreements (based on Article 6:228 CC) because of vitiated consent. This would provide a basis to claim damages because of unjust enrichment (Article 6:212 CC) or to claim that repayment shall take place of the amount that has been paid unduly (Article 6:203). Finally, according to Article 6:74 CC – in sum – every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him or her liable for the damages.

15 Article 6:163 of the CC. More on this can be found in Section IV, *infra*.

16 Article 3:310 of the CC.

there has been a breach of Article 6 of the CA or Article 101 of the TFEU. For example, in 2007 the Rotterdam District Court found that a claim for damages by CEF, a wholesale distributor of electrotechnical fittings, against the individual directors of FEG, a Dutch association in the electrotechnical fittings sector, was time-barred.[17] The court ruled as irrelevant that the European Commission had only given its decision that FEG had breached Article 101 of the TFEU in 1999:[18] CEF was held to have already been aware of the damage and the liable person in 1991 when it submitted a complaint to the European Commission regarding FEG's conduct. Because CEF first sent a letter claiming damages from the individual directors in 2000, and the limitation period had not been interrupted in time, the claim was dismissed. In contrast, a judgment relating to the *Gas-Insulated Switchgear* cartel, the Oost-Nederland District Court rejected the defendants' defence that the limitation period had started in May/June 2004 when the European Commission and the defendant – being the leniency applicant – issued a press release indicating that an investigation had been started into a possible *Gas-Insulated Switchgear* cartel in which the defendant may have participated.[19] The court ruled that the publication only stated that an investigation had started, which, in the circumstances, was insufficient to make the claimant aware of the fact it may have suffered damage. The court did not accept that the claimant should have started an investigation of its own in response to the May/June 2004 publication, citing that according to the European Commission, the cartel members had done their utmost to keep the cartel's activities secret. Furthermore, the Midden-Nederland District Court ruled that a claim to annul a maintenance contract for the service of elevators was time-barred as the three-year limitation period for such an annulment had expired; according to the claimant, the limitation period had started when the European Commission's cartel decision was published in 2007, while the claimant first brought its claim for annulment four years later, in 2011.[20]

The Draft Proposal[21] (consistent with the EU Damages Directive[22]) provides for a five-year limitation period, which will start to run the day following the day on which the infringement has ceased and the claimant knows, or can reasonably be expected to know of (1) the infringement, (2) the fact that the infringement caused harm to it and (3) the identity of the infringer.

17 Rotterdam District Court, 7 March 2007, ECLI:NL:RBROT:2007:BA0926.

18 Commission Decision, 26 October 1999, Case IV/33.884.

19 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403.

20 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403. In an interlocutory judgment of the Arnhem-Leeuwarden Court of Appeal this subject was not discussed further: Arnhem-Leeuwarden Court of Appeal, 10 September 2013, ECLI:NL:GHARL:2013:6653.

21 Proposed Article 6:193t CC of the Draft Proposal.

22 Article 10 of the EU Damages Directive.

III EXTRATERRITORIALITY

i Applicable law

The CA applies to all competition restricting decisions, agreements or conduct that aims to appreciably restrict or limit competition in (part of) the Dutch market or that has such an effect.[23] Foreign parties are not exempted and do not enjoy any immunity in that regard.

With regard to cartel damages claims arising before 11 January 2009 – when Council Regulation (EC) 864/2007 (Rome II) entered into force – in determining which national law or laws apply to a claim, Dutch courts apply the Unlawful Acts Act (UAA). According to Article 4(1) of the UAA, claims arising from wrongful acts as a result of illegal competition are governed by the laws of the country in whose territory the competitive act impacted the competition. In cases of cross-border competition distortion, the Dutch legislature has acknowledged that this rule of reference may lead to an unavoidable fragmentation as to the laws that will apply to parts of the claim. This implies that claims will have to be judged separately for each country where competition has been distorted. Unlike Article 6(3) Rome II, which applies to cartel damages that arose after 11 January 2009, the UAA does not contain a provision enabling the claimant to choose applicability of only the law of the court seized when the distortion of competition has also considerably affected competition in that country.

In 2014, the District Court of The Hague laid down judgment in the *Paraffin Wax* case,[24] finding that the place where the damage was suffered according to the UAA (in line with the above) was the production locations of the different undertakings involved, hence leading to the applicability of Italian, Swedish, Finnish, German and Norwegian law. In order to avoid such fragmentation the court enabled the parties to make the choice of law[25] (by filing a separate motion after this judgment).

ii Jurisdiction

Main rule: defendant's domicile

As the main rule, Dutch courts have jurisdiction to hear cartel damages claims that are submitted against (legal) persons domiciled in the Netherlands.[26] A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business in the Netherlands.[27]

23 Article 6 of the CA.

24 The Hague District Court, 17 December 2014, ECLI:NL:RBDHA:2014:15722.

25 Which is possible pursuant to Article 6 UAA. If the Rome II Regulation applies, such a choice of law is prohibited by Article 6(4) Rome II.

26 Article 4 of Council Regulation (EU) 1215/2012, which applies to proceedings instituted on or after 10 January 2015 (Brussels I bis), and Article 2 of Council Regulation (EC) 44/2001 (Brussels I (old)), which applies to proceedings instituted before 10 January 2015.

27 Article 63 Brussels I bis.

Alternative jurisdiction ground: anchor defendant rule

Since claimants in cartel damages proceedings often prefer to sue several (alleged) cartel participants domiciled in several countries in the same proceedings, they frequently invoke the alternative jurisdiction grounds under Article 8(1) Brussels I bis (anchor defendant rule). Under this rule – which is similar to Article 6(1) Brussels I (old) as well as almost similar to its Dutch equivalent Article 7(1) of the CCP[28] – a claim for cartel damages brought against a company which is not domiciled in the Netherlands may still be brought before the Dutch courts, but only if this claim is so closely connected with a claim against a cartelist that is domiciled in the Netherlands and if it is expedient to hear and determine both claims together.

On 21 May 2015, the European Court of Justice rendered a landmark decision[29] in the *Hydrogen Peroxide* (also: *CDC*) case on the interpretation of Article 6(1) Brussels I (old) in cartel damages proceedings where all defendants had been – as established by a decision of the European Commission – found to be participants in a single and continuous infringement. The European Court of Justice decided that in such a case – even when the undertakings have participated from different places and at different times – the prior case law criterion of a 'same situation of fact and law' is fulfilled and that Article 6(1) Brussels I (old) can apply if one defendant is domiciled in the Netherlands and other defendants are not. This decision actually confirmed prior Dutch case law decisions in which jurisdiction based on Article 6(1) Brussels I (old) was accepted in cartel damages cases. A few of these cases will be discussed below as well.

On 1 May 2013, the District Court of The Hague found the damages claims against the various defendants in the *Paraffin Wax* cartel to be sufficiently connected.[30] The anchor defendant – Shell Petroleum NV, the only defendant company domiciled in the Netherlands – had not participated directly in the cartel, but was held jointly and severally liable by the European Commission as the parent company of its 100 per cent subsidiary. The District Court held that this did not preclude assuming a sufficiently close connection with the damages claims against the other defendants (who had directly participated in the cartel) and that all the European Commission decision addressees could have reasonably foreseen that they might be summoned to appear before the court of one of the other cartel participants. Similarly, the Amsterdam District Court decided that it had jurisdiction to hear a claim against various defendants in the *Sodium Chlorate* cartel. The District Court found the damages claims closely connected, given the fact that the defendants were all involved in the same market forgery and all knew that the other cartel members were equally involved in these practices.[31] On 26 October 2011,

28 The Hague Court of Appeal decided that the case law of the European Court of Justice with regard to Article 6(1) Brussels I (old) is also relevant for the application of Article 7(1) CCP, which applies when the defendant is not domiciled in an EU or EEA country.

29 European Court of Justice 21 May 2015, C-352/13 (*Hydrogen Peroxide*; or: *CDC*).

30 The Hague District Court, 1 May 2013, ECLI:NL:RBDHA:2013:CA1870.

31 Amsterdam District Court, 4 June 2014, ECLI:NL:RBAMS:2014:3190. This judgment of the Amsterdam District Court was upheld by the Amsterdam Court of Appeal. See Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.

the Arnhem District Court decided that it had jurisdiction to hear a claim brought against a number of producers of gas-insulated switchgears, including the Alstom group, even though none of the defendants was domiciled in the Netherlands. The court decided that, with regard to one of the defendants, Cogelex, jurisdiction could be based on Article 5(3) of Council Regulation (EC) 44/2001 because both the wrongful act and the place where damages were suffered was in Arnhem (see more on this alternative ground below). The District Court then applied Article 6(1) of Council Regulation (EC) 44/2001 – even though this rule only applies if jurisdiction with regard to the anchor defendant is based on domicile[32] – to justify jurisdiction over the other defendants because the claim against all defendants would have to be decided on the same factual and legal grounds and otherwise there would be a risk of contradictory decisions.[33] On 17 July 2013, the Rotterdam District Court decided that it had jurisdiction to hear a claim brought against two Dutch subsidiary companies of two members of the *Escalator* cartel.[34] The court ruled at the same time that it had no jurisdiction to hear a claim brought against defendants who did not have their domicile in the Netherlands. The claims against the various defendants were not closely connected, given the substantial differences in fact and law and the fact that the European Commission had distinguished four national cartels which should each be assessed in accordance with the various national laws.[35] Contrary to the aforementioned case, the Midden-Nederland District Court found the damages claims against various other defendants based on the *Escalator* cartel to be sufficiently connected. According to the court, an equal factual basis in this case did exist, because the case pertained to the conduct of five escalator manufactures, and was based on Article 6:166 CC (group liability arising from a wrongful act).[36] On 25 February 2014, the Limburg District Court declared in a follow-on action on cartel damages that it had jurisdiction to hear the dispute on the basis of Article 6(1) of Council Regulation EC 44/2001 even though neither the claimants nor the majority of defendants were based in the Netherlands. [37] The court ruled that the defendants could have foreseen that a follow-on action would be launched in the Netherlands, given the fact that several meetings of the cartel were held in the Netherlands.

On 7 January 2015, the District Court of Amsterdam[38] even accepted jurisdiction when the same anchor defendant was summoned for the second time for the same claim. The claimant aimed to create jurisdiction with regard to claims against additional foreign defendants and therefore 'used' the same Dutch anchor defendant twice. The court rejected the defendants' abuse of law arguments.

32 See the wording of Article 6(1) Brussels I (old), in which 'domicile' is mentioned and also the Opinion of A-G Trstenjak, Nos. 87-90, to European Court of Justice 1 December 2011, C-145/10 (*Painer*).

33 Arnhem District Court, 26 October 2011, ECLI:NL:RBARN:2011:BU3546 and 3548.

34 Commission Decision, 21 February 2007, Case COMP/38823.

35 Rotterdam District Court, 17 July 2013, ECLI:NL:RBROT:2013:5504.

36 Midden-Nederland District Court, 27 November 2013, ECLI:NL:RBMNE:2013:5978.

37 Limburg District Court, 25 February 2015, ECLI:NL:RBLIM:2015:1791.

38 Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94.

Finally, the Amsterdam District Court ruled[39] recently that the sole fact that KLM determined the competent court, by requesting a negative declaratory decision that it was not liable to pay damages to Deutsche Bahn, did not constitute a ground for abuse of procedural law. The court seemed to take into consideration in this regard that KLM – at the time the writ of summons was sent – was confronted with (1) claims of shippers (claiming that surcharges were passed on to them) and (2) freight forwarders claiming they suffered damage (claiming that surcharges were not passed on by them). Thus, KLM would run the risk of being obliged to pay the same damages twice.

Alternative jurisdiction ground: place where the harmful event occurred

Claimants sometimes also invoke another alternative jurisdiction ground: according to Article 7(2) Brussels I (old) a tort claim can be brought before the courts of the place where the harmful event occurred.[40] In the same *Hydrogen Peroxide* [41]case as discussed above, the European Court of Justice decided that in cartel damages cases the harmful event occurred in relation to each alleged victim on an individual basis. Each victim can choose to bring an action before (1) the courts of the place in which the cartel was definitively concluded, (2) the place in which the particular agreement was concluded, which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or (3) before the courts of the place where its own registered office is located. Dutch courts applying Article 6(e) CCP to cases in which the defendant is not domiciled in the EU may be guided by this decision as well, although they are not obliged to follow the European Court of Justice case law when applying this Dutch national rule.[42]

Jurisdiction and arbitration clauses

The European Court of Justice decided in the *Hydrogen Peroxide* case that in cartel damages cases, account should be taken of jurisdiction clauses[43] contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules on international jurisdiction provided for in Article 5(3) and/or Article 6(1) Brussels I (old). However, such jurisdiction clauses only cover cartel damages claims if these refer to disputes concerning liability incurred as a result of an infringement of competition law. A clause that abstractly refers to all disputes arising from contractual relationships is therefore insufficiently specific to cover cartel damages claims. In the *Sodium Chlorate* decision, which was rendered shortly after the *Hydrogen Peroxide* decision on 21 July 2015,[44] the

39 Amsterdam District Court, 22 July 2015, ECLI:NL:RBAMS:2015:4408.

40 See also Article 6(e) of the CCP and Article 5(3) of Brussels I (old).

41 European Court of Justice 21 May 2015, C-352/13 (*Hydrogen Peroxide*; or: *CDC*).

42 See J A Pontier, *Onrechtmatige daad en andere niet-contractuele verbintenissen*, Maklu 2015, p. 151.

43 Article 23 Brussels I (old) and Article 25 Brussels I bis.

44 Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.

Amsterdam Court of Appeal applied this same rule and rejected the jurisdiction defence based on jurisdiction clauses that it found too abstract. For the same reasons, it also rejected the jurisdiction defence based on arbitration clauses.[45]

IV STANDING

To bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Associations and foundations which, according to their articles of association, promote and protect the interests of others affected by a cartel may start proceedings as well, but may not claim damages.[46] In practice, several (follow-on) cartel damages claims in the Netherlands have been initiated by vehicles (in the form of Dutch or foreign legal entities, such as limited companies or foundations). In general, this is possible under Dutch law if the actual victims have assigned their claims to such vehicles in a legally valid way or have mandated such a vehicle. In general it is inferred from the *Manfredi* and *Kone* decisions of the European Court of Justice that, indirect purchasers have standing to claim cartel damages.

V THE PROCESS OF DISCOVERY

There is no pretrial discovery system in Dutch law. Parties can, however, request for disclosure of information judicially and extrajudicially. In addition, it is possible for a party to assess its case upfront within the context of a preliminary examination of a witness or a preliminary expert opinion. As disclosure under Dutch law deals with the rights of parties when obtaining information, this topic shall be discussed hereafter.

The Dutch courts have general discretionary power to order disclosure from either or both of the parties,[47] including the disclosure of books and records.[48] This power covers both a demand for clarification of certain statements and the submission of specific documents. Parties may refuse to cooperate with such a demand, but the court may draw adverse inferences from such a refusal, unless parties can show they have sufficiently compelling reasons for their refusal. In principle, parties also have the possibility to request documents under Dutch administrative law (see subsection i, *infra*).

i Parties' options to obtain disclosure

While parties may request the court to apply its above-mentioned discretionary powers to order another party to disclose certain information or documents, the court is not

45 Even though the Brussels I Regulation does not apply to arbitration clauses (Article 1(2)(d) Brussels I). Pursuant to Articles 1074 (arbitration beyond the Netherlands) and Article 1022 (arbitration in the Netherlands) the Dutch court rejects jurisdiction if the dispute is covered by an arbitration clause. The national law applicable to the arbitration clause defines whether the dispute is covered by that clause.

46 More on this can be found in Section VII, *infra*.

47 Article 22 of the CCP.

48 Article 162 of the CCP.

obliged to grant such a request. Instead, Article 843a of the CCP provides parties a special right to obtain disclosure. By way of a claim under Article 843a of the CCP – as a motion in ongoing proceedings or in separate proceedings – parties can demand specific written or digital documents and information from any person who has these documents or data in its custody.

In order for a claim under Article 843a of the CCP to be successful, the claimant must first establish a legitimate interest in the disclosure. A legitimate interest may be found if the claimant is unable to obtain the documents or information in another way and without them would be at an unreasonable disadvantage in the proceedings. Second, the claimant must show that the requested documents and information pertain to a legal relationship – contractual or non-contractual – to which the claimant is a party. As a third requirement, the disclosure needs to relate to specific documents and information in order to enable both the court and the other party to be able to identify the requested information and to prevent 'fishing expeditions'.

A claim under Article 843a of the CCP should be denied if the information is subject to a legal privilege, or may be denied for compelling reasons (e.g., confidentiality or privacy) or if a fair and proper administration of justice is sufficiently secured without disclosure (e.g., if the information could reasonably be obtained another way, such as through witness testimony).[49] Following Article 5 of the EU Damages Directive, the Draft Proposal contains a specific subsection regarding the disclosure of information in the context of competition law infringements. Most likely one of most significant proposed changes will be that only sufficiently compelling reasons can prevent the granting of access to transcripts or extracts of documents.

In several proceedings regarding the *Air Cargo* cartel, both claimants and defendants requested the disclosure of documents, such as the unredacted Commission decision and documents relating to the functioning of the cartel including air waybills, invoices and assignment documentation. The Amsterdam District Court rejected all these requests in March 2015 as there was insufficient legitimate interest to order such disclosure at that stage of the proceedings.[50] The court carefully weighed the different interests and – with regard to some types of documents – indicated that disclosure in the future might still be possible.

In the field of the public antitrust enforcement, there are furthermore two noteworthy developments relating to the access to documents. First, it may be possible to obtain access to documents under Dutch administrative law as well. According to the Government Information (Public Access) Act (PAA) everyone can request an administrative body (also the ACM) to make certain documents publicly available. There are only certain grounds for refusal. The Rotterdam District Court has now held in a recent judgment that the Act establishing the ACM (of 28 February 2013) has priority over the working of the PAA.[51] This seems to imply that the ACM has additional grounds

49 For more on this aspect regarding privilege, see Section XI, *infra*.

50 Amsterdam District Court, 25 March 2015, ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.

51 Rotterdam District Court, 13 May 2015, ECLI:NL:RBROT:2015:3381.

to refuse access to documents. Second, the Trade and Industry Appeals Tribunal[52] held that the right to access to documents for defending parties, as enshrined in Article 6 ECHR may overrule the protection of leniency documents. The ACM requested that only the Tribunal (and not the parties accused of infringing the cartel prohibition) take notice of certain transcripts of the oral statement of leniency applicants. The Tribunal, however, weighed the interests, assessing the interest of a successful leniency programme and the interest that the parties should be able to defend themselves and decided that the limitation of access (for defendants) to transcripts of the oral statement of leniency applicants was not justified. It remains to be seen to what extent such judgments could enhance the position of claimants (in damages proceedings) in acquiring information.

ii Parties' right to witness testimony

Dutch procedural law gives parties the right to provide evidence through witness statements. The only group of persons exempt from having to testify in civil proceedings are close blood relatives and professionals required to observe confidentiality obligations.[53] (Opposing) parties can also be brought to the witness stand, but their testimony only has limited strength in proving their own statements. Witnesses will be examined by a judge and Dutch law does not contain a right to cross-examination. If a(n opposing) party called as a witness refuses to answer questions, the court may draw adverse inferences of such refusal.[54]

Finally, it is also possible to request a preliminary examination of a witness.[55] This could facilitate a party obtaining clarification on certain facts upfront, if this party is considering starting proceedings. In September 2014 such a request (in one of the *Air Cargo* cases) by claimant SCC for a preliminary examination of certain witnessess – among others, (former) KLM managers – was rejected by the Amsterdam District Court as SCC had not made it sufficiently clear why it had an interest in such an examination.[56]

VI USE OF EXPERTS

The Dutch civil law of evidence states that, unless otherwise provided by law, parties may use any and all means to prove their propositions statements and that the courts are free in their assessment of the evidence provided.[57] Expert evidence is one of the means through which parties may prove their statements, for example by way of submitting a report by a renowned economist on the quantum of damages in a claim for cartel damages. Parties may also request the court to appoint one or more independent experts to give evidence and their advice on certain issues, or the court may of its own accord

52 Trade and Industry Appeals Tribunal, 2 December 2015, ECLI:NL:CBB:2015:388.

53 Article 165 of the CCP.

54 Article 164 of the CCP.

55 Articles 186-193 of the CCP.

56 Amsterdam District Court, 25 September 2014, ECLI:NL:RBAMS:2014:6258.

57 Article 152 of the CCP.

appoint an independent expert. Courts are not obliged to appoint experts. It is at the court's discretion whether or not it deems such an appointment necessary for its decision on the case.[58]

It is also up to the court to decide the evidentiary value of a party, or a court-appointed expert's testimony or report. The courts may deviate from the conclusions of court-appointed experts. In such a case, however, the court must provide sufficient grounds for such a decision.[59]

VII CLASS ACTIONS

Since July 1994, an association (*Vereniging*) or foundation (*Stichting*) that, according to its articles of association, has the goal of promoting and protecting the common and similar interests of various (legal or natural) persons has standing to bring a collective redress claim seeking injunctive or declaratory relief, or even specific performance. They do not, however, have standing to claim damages.[60] The interests that the association or foundation aims to promote and protect must be sufficiently similar and thereby suitable to be represented and decided upon collectively. Therefore, the court is not able to order the defendant in a Dutch collective redress action to pay damages. Rather, only those individuals who have suffered a loss may start follow-on proceedings to obtain damages. Usually class actions are aimed at obtaining a declaration under law that the defendant has, through certain actions, acted wrongfully. Although such a decision, strictly speaking, has no legal effect with regard to potential individual claimants, the Supreme Court has ruled that in individual follow-on proceedings, the courts will take such a decision on, for example, the wrongfulness of certain actions, as their point of departure.[61] In addition, such a decision also can be a stepping stone for a collective settlement that can be declared binding internationally (see Section XII, *infra*).

Probably due to the inability under Dutch law to claim damages through class actions, the collective redress action claiming injunctive or declaratory relief or specific performance has not yet been used in antitrust cases. Instead, the most popular model thus far in the Netherlands entails the assignment of individual claims to a foundation acting as a 'claim vehicle'. Dutch courts generally accept standing of such *ad hoc* claim vehicles. Third-party funding generally is available and permitted in the Netherlands.

VIII CALCULATING DAMAGES

i Cognisable damages

Dutch civil law aims to compensate a claimant for the damages suffered due to another's wrongful act or default to perform. As a result, both actual loss and lost profit may be claimed, as well as the claimant's reasonable costs to prevent or reduce the damage

58 Supreme Court, 6 December 2002, NJ 2003, 63 (*Goedel/Mr Arts q.q.*).

59 Supreme Court, 5 December 2003, NJ 2004, 74 (*Vredenburgh/NHL*).

60 Article 3:305a of the CC.

61 Supreme Court, 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB c.s./World Online c.s.*).

suffered.[62] Exemplary or punitive damages, however, are not available. Furthermore, any profits realised by the claimant as a consequence of the same wrongful act will be deducted from any damages award, to the extent reasonable.

ii Method of calculating damages

Unless specifically provided for otherwise in legislation or by party agreement, it is up to the court to determine the most appropriate manner in which damages should be calculated in a given case. If the loss cannot be accurately determined, the judge may use his or her judgment to estimate its amount.[63] As damages are as a rule calculated by a comparison of the claimant's assets as a consequence of the wrongful act and the hypothetical situation of there having been no wrongful act, all possible relevant circumstances of the case are to be taken into account in this 'actual damage calculation'. Alternatively, the court may calculate damages abstractly, thereby not taking certain actual circumstances of the case into account. Whether the court will choose to undertake an actual damage calculation or an abstract calculation depends on the nature of the damages claimed and the liability. As yet, there have been no definitive court decisions on whether an actual or an abstract damage calculation should be used in calculating antitrust claims. In 2015, the Amsterdam District Court shed more light on this topic by indicating specifically that (as regards *Air Cargo* cartel related claims) in order to determine the (amount of) damage suffered, an analysis will be necessary of the actual price that was charged in the relevant period to the shippers in comparison to the hypothetical price they would have paid if the carriers had not acted wrongfully in the way claimants asserted. In doing so, the court referred to the Commission Staff Working Document Practical Guide of 11 June 2013 as a source for relevant insights.[64]

The court also has discretion to award damages based on the profit made by the defendant due to his or her wrongful act or failure to perform, provided the claimant requests the court to do so.[65] To date, this power has been used only sparingly, mainly in intellectual property disputes. Interestingly, however, the Gelderland District Court decided in a recent case that the objection, that a substantial price increase between an offer during the cartel and the agreement after the termination of the cartel could be attributed to a decrease of the cost price, was sufficiently rebutted by the claimant (TenneT in the case against Alstom).[66]

iii Legal interest

A claimant is entitled to compound legal interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered

62 Article 6:96 of the CC.

63 Article 6:97 of the CC.

64 Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.

65 Article 6:104 of the CC.

66 Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.

until the damages have been paid).[67] It is not relevant whether the claimant actually suffered any loss due to not immediately receiving monetary compensation for his or her loss, but a claimant cannot claim more than the specified interest rate for the delay in receiving monetary compensation.[68] The legal interest percentage is determined by the Dutch government. Since 2002 this interest has fluctuated between the current rate of 3 per cent and a 7 per cent rate in 2002.

iv Legal costs

Unlike in, for example, the United Kingdom, awards for legal costs in the Netherlands are limited. As a rule, the losing party will be ordered to pay the legal costs of the winning party, but the court may decide to apportion costs if both parties have been found to be wrong on certain aspects of the case.[69] Awards for legal costs will cover the full amount of court fees,[70] court-appointed experts and witnesses. However, for attorneys' fees only a limited and fixed amount is awarded, which generally does not begin to cover a party's actual attorneys' fees. Attorneys' fee awards are determined on the basis of points awarded for procedural actions (e.g., two points for an oral hearing) and set tariffs depending on the amount claimed.[71] Only in intellectual property law cases and exceptional circumstances (e.g., abuse of proceedings) do courts award actual compensation for attorneys' fees.

IX PASS-ON DEFENCES

In response to the European Commission's 2005 Green Paper on Damages Actions for breach of the European Commission antitrust rules[72] the Dutch government has indicated that the pass-on defence is available in the Netherlands. Nevertheless, there has been considerable debate in legal literature about whether the pass-on defence is, or should be, available in the Netherlands. Given the general principle of 'compensation for actual loss suffered' underlying the Dutch law of damages, defendants to an antitrust action should in principle be able to raise this defence. A judgment of the Arnhem-Leeuwarden Court of Appeal in 2014 (which will be discussed below) supports this approach. The implementation of Article 13 of the EU Damages Directive (possibly through Article 6:193q CC of the Draft Proposal) should (explicitly) end this debate in the near future.

Yet, in one of the Dutch Gas-Insulated Switchgear cartel damages cases, the Oost-Nederland District Court included some preliminary thoughts on the pass-on defence that had been raised, suggesting that it might not be reasonable to deduct the

67 Article 6:119 of the CC.

68 Supreme Court, 14 January 2005, NJ 2007, 481 (*Ahold c.s./the Netherlands*) and NJ 2007, 482 (*Van Rossum/Fortis*).

69 Article 237 of the CCP.

70 Currently, the highest court fee at first instance is €3,529.

71 Currently, the maximum fee is €3,211 per point with no maximum number of points for claims exceeding €1 million.

72 COM(2005) 672, 19 December 2005.

overcharge that was passed on to the claimant's buyers, based on the assumption that the 'extra' damages the claimant would receive would be passed on to its buyers in the future.[73] In an interlocutory judgment, the Arnhem-Leeuwarden Court of Appeal judged that the Oost-Nederland District Court had misapplied the principle of *audi alteram partem*, which resulted in the determination that the debate about the pass-on defence had not yet taken place. The execution of the judgment of the Oost-Nederland District Court in the follow-on proceeding for the determination of damages was suspended.[74] Finally, on appeal the Arnhem-Leeuwarden Court of Appeal principally accepted the pass-on defence as a legitimate defence under Dutch law.[75] The defendant complained that the Oost-Nederland District Court had rejected its pass-on defence with regard to damages claimed by the claimant. In sum, the Court of Appeal reasoned that it is not paramount to deprive the surplus gained by the cartel, but rather that the damage suffered be compensated. The Court of Appeal indicated that by applying the pass-on defence in this way, it would be prevented from compensating the claimant for damages which it has already reverse-charged. Also, by accepting the pass-on defence, the Court of Appeal explicitly indicated that – in doing so – the defendant having to pay multiple times for the same damage was avoided. The Court of Appeal did not deal with the exact amount of the damages and the burden of proof in this regard; this was left to a specialist court in different proceedings. Notwithstanding this judgment the Gelderland District Court took another approach in a more recent judgment (involving the same claimant as well), in which the defendant raised a pass-on defence.[76] The court held that the framework in Dutch damages law, which is the most suitable for assessing a pass-on defence, is Article 6:100 CC (the deduction of collateral benefits). Based on this article, the court indicated that possible benefits may only be deducted from damages, as far as this is reasonable and under the condition of a causal link between the benefits and the cartel. Eventually, the court indicated that it was not unreasonable to conclude that the claimant would be overcompensated to a certain extent, given that – according to the court – it was highly unlikely that customers of the claimant would ever start proceedings against the defendant and that it was likely that any damages would accrue to these customers to an important extent This judgment seems at odds with the EU Damages Directive (as Article 3(3)) stipulates that damages may not lead to overcompensation) and the 2014 Arnhem-Leeuwarden Court of Appeal's judgment. It remains to be seen, therefore, whether this judgment will be upheld.

X FOLLOW-ON LITIGATION

So far, most cartel damages claims in the Netherlands have been brought following a decision and a fine by the European Commission or the ACM. Pursuant to Article 16 of Council Regulation (EC) 1/2003, European Commission decisions on agreements,

73 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403.

74 Arnhem-Leeuwarden Court of Appeal, 10 September 2013, ECLI:NL:GHARL:2013:6653.

75 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766.

76 Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.

decisions or concerted practices under Article 101 of the TFEU that are no longer open for appeal bind the national courts, effectively meaning that in a claim for cartel damages following such a decision by the European Commission, the Dutch courts will have to accept and apply the breach of Article 101 of the TFEU found by the European Commission as a fact. For example, in the *Gas-Insulated Switchgear* case, the Oost-Nederland District Court held that it was bound by the European Commission's decision that the defendant – ABB Ltd – had participated in the cartel from 15 March 1988 until 2 March 2004, even though ABB Ltd had shown that it did not exist before 5 March 1999.[77] ABB Ltd stated that it must assume that the European Commission had identified it with one of the other ABB companies that did exist (and did participate in the cartel) in the period from 15 March 1988 to 5 March 1999. The court further held that it was up to the defendants to convincingly show that the project for which damages were claimed (and which had not been a subject of the European Commission's investigation) had not been influenced by the cartel, as all the prospective participants in the project had been found to have participated in the cartel, which covered the entire EU market. This conclusion was upheld by the Arnhem-Leeuwarden Court of Appeal.[78] A European Commission decision and fine for participation in a cartel is no guarantee, however, of a successful damages claim, as demonstrated by the Midden-Nederland District Court's decision in the *Elevator* cartel damages claim case. The court rejected the claim on the basis that the claimants (an owner–occupiers' association and local council) had failed to prove that the cartel arrangements found by the European Commission had also influenced the specific maintenance contract for which damages were now claimed.

In 2011, in a claim for damages in connection with the *Bitumen* cartel, the Rotterdam District Court decided – for the first time in the Netherlands – a request for a stay of the civil claim proceedings pending an appeal by the defendants against the European Commission's decision.[79] According to the court, the decision whether to grant an (immediate and full) stay hinges upon the demands of fair proceedings, whereby unnecessary and unreasonable delays should be avoided. The court took a nuanced view. Because one of the defendants had not appealed against the European Commission decision, the court decided that, as regards that defendant, at the very least questions involving the legitimacy of assignments and statute of limitations could be dealt with already and without delay. These issues would, according to the Rotterdam District Court, have to be decided according to Dutch law and their decision would not depend on the validity of the contested European Commission decision. Similarly, the District Court of The Hague rejected a request for stay of the proceedings pending an appeal by a number of the defendants against the European Commission's decision arguing that it could be assumed that a number of issues might be debated and decided

77 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403. In an interlocutory judgment of the Arnhem-Leeuwarden Court of Appeal, this subject was not discussed further: Arnhem-Leeuwarden Court of Appeal, 10 September 2013, ECLI:NL:GHARL:2013:6653.

78 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766.

79 Rotterdam District Court, 9 February 2011, ECLI:NL:RBROT:2011:BP7518.

independently of the contested European Commission decision, particularly given that not all the defendants had appealed the European Commission's decision. Furthermore, the court found that it would be contrary to due process – in particular the prevention of unnecessary and unreasonable delays – to stay the proceedings at this time until (likely many years later) all appeals had been finally decided.

In 2013, the Amsterdam Court of Appeal decided an appeal of a decision to stay the proceedings in one of the *Air Cargo* cartel claim cases pending the outcome of the European appeals of the airlines against the European Commission decision.[80] According to the Amsterdam Court of Appeal, the stay of a civil law claim proceeding is only prescribed if the national civil law proceeding contains questions regarding facts or law whose answers depend on the validity of the contested European Commission decision. Answers to these questions only depend on the validity of the decision of the Commission, if the validity of the European Commission's decision can reasonably be doubted. In other words, for the stay of a civil law claim proceeding reasonable doubt regarding the validity of the European Commission's decision is required. If one party, in support of its claims, invokes a European Commission decision, it is up to the other party who requested a stay for the proceeding to: (1) show that it has timely brought an action for annulment; (2) clarify that it reasonably opposes the European Commission decision; and (3) state the defence it would argue in the proceeding, so that the national court can decide whether and to what extent the assessment of these defences depend on the validity of the European Commission decision. In the case in question, the respondents in appeal did not meet requirements (2) and (3), as a result of which the judgment of the Amsterdam District Court (which decided to stay the proceeding) could not be upheld.[81] In line with this judgment, in 2015 the Amsterdam District Court decided to reject a request for a stay while the EU appeals were still ongoing (in another *Air Cargo* cartel related claim initiated by SCC). According to the court, at this stage in the proceedings it should be determined first which issues or which part of the issues could be debated and decided while the EU appeals were still ongoing. To that end, the defendants should submit a statement of defence.[82] As defendants already had submitted a statement of defence in the proceedings against claimant Equilib, the court ordered that Equilib had to provide specific information about what damages the shippers suffered in connection with what activities of the shippers and why these damages were caused by the carriers. Now the European Commission decision has been annulled by the General Court, it remains to be seen how the District Court will decide upon possible futher requests for a stay of proceedings.

As regards the status of ACM decisions in follow-on civil litigation, there is no provision similar to Article 16 of Council Regulation (EC) 1/2003. According to Part

80 Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013. The appealed case regarded: Amsterdam District Court, 7 March 2012, ECLI:NL:RBAMS:2012:BV8444.

81 Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013.

82 Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780.

B[83] of the Draft Proposal, however, an infringement of competition law established by a final decision of the ACM will be deemed irrefutable evidence of the established infringement in proceedings in which damages are claimed because of an infringement of competition law in the sense of the proposed Article 6:193k(a) CC.

Currently, Dutch competition and civil law impose no restrictions on the damages claims in civil proceedings on the basis that the defendant has already been subject to a competition law enforcement action and been fined, or towards defendants that have been granted leniency or immunity.

XI PRIVILEGES

Lawyers must refuse to testify as witnesses regarding what they know through their professional relationship with their client. Furthermore, a disclosure claim under Article 843a of the CCP against an attorney to obtain documents or information produced or obtained through such representation will be rejected.[84] Attorney–client communications, attorney work product and joint work product that are in the possession of persons other than the attorney (and clients), however, are not necessarily excluded from production. This also includes in-house counsel if they are, *inter alia*, registered in the Netherlands as an attorney (*advocaat*), except with regard to (possible) infringements of EU competition law investigated by the European Commission. The latter exception follows from the *Akzo* judgment of the European Court of Justice.[85] A 2013 judgment of the Dutch Supreme Court confirmed that the lack of legal privilege in the *Akzo* case does not mean that legal privilege of in-house counsel does not exist generally under Dutch law.[86]

Article 12g of the Act establishing the ACM acknowledges attorney–client legal privilege: the ACM may not examine or copy documents that have been exchanged between a company and its attorney. This legal privilege also covers in-house counsel if, *inter alia*, they are registered in the Netherlands as an attorney, except with regard to (possible) infringements of EU competition law investigated by the European Commission.

XII SETTLEMENT PROCEDURES

Except for the specific collective settlement mechanism described below, there are no particular means for a Dutch court to adopt or impose for settlements. Aside from some specific rules on settlement agreements, the general rules of contract law apply. Settlement negotiations between lawyers enjoy legal privilege, meaning that to disclose the contents of such negotiations in proceedings may result in a disciplinary complaint.

Only rarely are settlement agreements embodied in a court order. In certain circumstances parties to a settlement agreement, however, may choose to request the

83 Proposed Article 161a of the CCP.

84 See Section V.ii, *supra*.

85 Court of Justice, 14 September 2010, Case C-550/07 P.

86 Supreme Court, 15 March 2013, ECLI:NL:HR:2013:BY6101.

Amsterdam Court of Appeal to declare its terms binding under the Collective Settlement of Mass Claims Act. Under this Act, parties to a collective settlement can jointly request the court to declare a settlement binding on all members of a group on an opt-out basis. Basically it is required that one or more associations (*Verenigingen*) or foundations (*Stichtingen*) who, according to their articles of association, protect and promote the interests of persons who have suffered damage due to the acts of another party, who have reached a settlement agreement with one or more parties to compensate that damage can request, with the other parties to the settlement agreement, that the Amsterdam Court of Appeal declares the settlement agreement generally binding. The court must consider a number of aspects, such as whether (1) the compensation is reasonable and (2) the associations or foundations that agreed to the settlement can be deemed sufficiently representative for the interests of those on whose behalf the settlement was reached. Part of the settlement may be that any claims for damages under the agreement will be forfeited if they are not submitted within one year of a claimant becoming aware of his or her claim under the settlement.[87]

If the court grants the request for the settlement to be declared binding, then all individuals who fall within the scope of the class as determined in the settlement agreement are bound unless they timely 'opt out' within a specified period (of not less than three months). Opt outs must be filed on an individual basis and there is no procedure for filing an opt out on behalf of a group of persons or entities. An individual who opts out remains free to start his or her own proceedings against the tortfeasor and to claim more or another kind of compensation than he or she would have received under the generally binding settlement.[88] Those individuals, however, who do not opt out in time are bound by the terms of the settlement. The court decision must be sent to all known potential claimants under the settlement and published in one or more court-determined newspapers.[89]

According to two separate decisions of the Amsterdam Court of Appeal, the court's order declaring a settlement binding can be applied in international cases. In the *Shell* settlement, the court decided that Dutch interest associations can be deemed sufficiently representative for foreign claimants and that – as long as a number of the claimants are domiciled in the Netherlands – it also has jurisdiction regarding foreign claimants.[90] The court similarly ruled more than a year later in an interim judgment regarding the *Converium* settlement, in which only around 200 of the approximately 12,000 claimants were domiciled in the Netherlands.[91] Both settlements covered shareholder claims for damages; however, there are no legal grounds for not applying these principles to antitrust settlements, particularly given that a decision by the court to

87 Article 7:907 of the CC.

88 Article 7:908 of the CC.

89 Article 1017 of the CCP.

90 Amsterdam Court of Appeal, 29 May 2009, ECLI:NL:GHAMS:2009:BI5744.

91 Amsterdam Court of Appeal, 12 November 2010, ECLI:NL:GHAMS:2010:BO3908.

declare a settlement generally binding should in principle also have effect against foreign claimants, at least insofar as they are domiciled in the European Union and the European Free Trade Association.[92]

XIII ARBITRATION

In the Netherlands, antitrust claims may also be decided through arbitration, provided the parties agree to arbitration. The rules for arbitration are provided in Articles 1020 to 1077 of the CCP. Given that arbitration decisions are not published, the confidential nature of arbitration proceedings may make arbitration preferable, particularly for defendants in antitrust claims. Another advantage is that arbitration takes less time as compared to civil proceedings given the caseload of Dutch courts.

Pursuant to the European Court of Justice's judgment in *Eco Swiss v. Benetton*,[93] a decision by arbitrators that is contrary to Article 101 of the TFEU must be annulled if it is challenged before a national court. After all, one of the available grounds for annulment under Dutch arbitration law is failure to observe national rules of public policy; according to the European Court of Justice, Article 101 of the TFEU falls within that scope. The same rule applies to *exequatur* requests, as evidenced in a ruling by the Court of Appeal in The Hague in March 2005.[94] In that case, parties had submitted their dispute on the payment of royalties under a licence agreement to arbitration by the American Arbitration Association. Upon requesting an *exequatur* for the arbitration decisions in the Netherlands, the Court of Appeal in The Hague confirmed the first-instance court's decision to deny the *exequatur* on the grounds that the licence agreement was in part contrary to Article 101 of the TFEU and did not fall within the scope of any block exemption regulation. In light of the *Eco Swiss v. Benetton* judgment it is undisputed that arbitrators are obliged to apply provisions such as Article 101 of the TFEU to disputes before them even when the party with an interest therein has not relied on those rules. However, there is some debate within Dutch legal literature whether this obligation goes so far as to oblige arbitrators to raise, of their own motion, issues of European competition law where examination of that issue would oblige them to abandon the passive role assigned to them or the scope of their arbitration task. According to an earlier judgment by the European Court of Justice in the *Van Schijndel* case, this obligation does not exist for the national courts if – as is the case in the Netherlands – according to national rules of law they are bound by the ambit of the dispute as defined by the parties themselves and the facts and circumstances upon which parties have based their claims and defences.[95] Whether the *Eco Swiss v. Benetton* judgment implies a farther-reaching and more active obligation for arbitrators than the national courts has yet to be decided.

92 Article 33 of Council Regulation (EC) 44/2001 and EVEX Convention.

93 European Court of Justice, 1 June 1999, C-126/97.

94 The Hague Court of Appeal, 24 March 2005, NJF 2005, 239 (MDI/VR).

95 European Court of Justice, 14 December 1995, C-430/93 and C-431/93.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Dutch law, if one or more persons are liable for the same damages, the claimant may hold each jointly and severally liable for the full amount.[96] Article 6:193n paragraphs 2 and 4 of the Draft Proposal aim to stipulate exemptions to this principle, following Article 11 paragraphs 2 and 4 of the EU Damages Directive (facilitating certain exemptions for small or medium-sized enterprises respectively immunity recipients). Assuming that a joint and several liability of each cartel member for the entire damages of the cartel will be accepted by the courts, then a defendant to a cartel damages claim who pays more than 'its share' in the whole of the damages is entitled to seek contribution from the other cartel members. Contribution can only be sought for each co-cartelist's share in the damages.[97] Each party's 'share' in the damages is determined proportionately to their 'contribution' to the damages.[98] How exactly courts will determine the size of each party's 'contribution' in cartel damages claims cases (e.g., by reference to each party's market share or blameworthiness, or both) is something that will have to be clarified in future case law.

Contribution proceedings may be started separately or by way of a motion in the main proceedings that must be raised prior to or with the submission of the statement of defence.[99] The contribution and main proceedings may be dealt with and decided jointly by the court. This is an administrative measure and both proceedings remain separate cases with the decisions in each proceedings only have binding legal effect against the parties in those proceedings.[100] Defendants in contribution proceedings therefore do not automatically become parties to the main proceedings, although they may voluntarily join the main proceedings as a party[101] or can – in exceptional circumstances – be forced to join the main proceeding.[102]

The statute of limitations for a contribution claim is five years. The Supreme Court has ruled that the statute of limitations for such a claim commences on the date the claimant seeking contribution paid more than 'its share' in the damages. This means that the statute of limitations may begin (many) years after the fact and after the claimant was first sued for damages.[103]

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Netherlands is increasingly being chosen as forum for the private enforcement of European competition law. More than 10 follow-on cartel damages claims have recently

96 Article 6:102 of the CC.

97 Articles 6:10 and 6:12 of the CC.

98 Article 6:102 of the CC.

99 Article 210 of the CCP.

100 Article 220 of the CCP.

101 Article 214 of the CCP.

102 Article 118 of the CCP.

103 Supreme Court, 6 April 2012, ECLI:NL:HR:2012:BU3784.

been submitted to the Dutch courts and the Netherlands is increasingly competing with, notably, the United Kingdom and Germany, as the preferred forum for bringing this type of claim. Most likely this originates from the advantages of the Dutch system and practice, including (1) (relatively) low costs of the proceedings and external counsel; (2) the expert and pragmatic approach of the judiciary; (3) extensive legal possibilities for disclosure; (4) efficiency of the proceedings; and (5) the fact that claim vehicles (and its funding) as such are not regulated, and – hence – generally face few barriers in starting proceedings.

Appendix 1

ABOUT THE AUTHORS

MATTIJS BOSCH

Houthoff Buruma

Mattijs Bosch is a senior associate with Houthoff Buruma in the Amsterdam office. He specialises in EU and Dutch competition law, particularly focusing on multi-jurisdictional merger control proceedings, compliance, administrative proceedings and private (follow-on and stand-alone) litigation. He was seconded to Houthoff's office in Brussels in 2013. He studied law at the University of Maastricht (LLM, 2009), the University of Florence and at King's College, London (PG Diploma EU Competition Law, 2014). Mattijs is a member of the Dutch Association for Competition Law.

RICK CORNELISSEN

Houthoff Buruma

Rick Cornelissen is counsel with Houthoff Buruma. He specialises in the area of competition litigation with a particular focus on private enforcement (advising and representing clients regarding cartel damages claims, access to distribution networks claims and contract termination claims) and vertical restraints (structuring, negotiating and advising on distribution and agency contracts and e-commerce).

He studied law at the University of Utrecht and completed his postgraduate degree in EU competition law at the King's College of London. Rick is a member of the Dutch Association for Competition Law, the Dutch Association for European Law and the Dutch Association for Distribution, Franchise and Agency Law.

NAOMI DEMPSEY

Houthoff Buruma

Naomi Dempsey is a senior associate with Houthoff Buruma. She specialises in corporate litigation, with particular emphasis on private litigation of competition claims,

employment law and litigation before the Dutch Supreme Court. Naomi was admitted to The Hague Bar in 2005 after obtaining her law degree at Leiden University in 2003 and a *magister juris* degree at Oxford University in 2004.

ALBERT KNIGGE

Houthoff Buruma

Albert Knigge heads a team of experienced litigators at Houthoff Buruma. He joined the Amsterdam Bar in 1997 after obtaining his doctorate degree. He specialises in litigation and Supreme Court litigation and has extensive experience in complex, often multiparty and cross-border litigation, representing businesses and parties. Albert is a board member of the Dutch Association for Procedural Law, as well as an author and a member of the editorial staff of a loose-leaf handbook for Dutch civil litigators. He is continuously recommended in *The Legal 500*, *Chambers Europe* and *Chambers Global*. 'Albert Knigge is best known for his work in corporate and commercial litigation. He also has a strong reputation for financial litigation, including D&O liability and professional liability matters.' (*Chambers Europe and Global*, 2015, Dispute Resolution). Clients praise him as 'a very experienced, high-end lawyer that really is a sparring partner in business' (*The Legal 500*, 2014, Dispute Resolution).

WEYER VERLOREN VAN THEMAAT

Houthoff Buruma

Weyer VerLoren van Themaat has been assisting international clients for over 25 years in the most challenging and complex cases related to merger control and cartel defence litigation and leads Houthoff Buruma's competition practice group. He was resident partner at Houthoff Buruma's Brussels office from 1997 to 2005, after which he returned to Amsterdam. Weyer is chair of Lex Mundi's Antitrust Competition and Trade Group and non-governmental adviser to the Dutch Authority for Consumers and Markets, ACM. He publishes and speaks regularly on competition law related subjects. Weyer is recommended in, *inter alia*, *Chambers Europe* (2015 edition), *The Legal 500* (2015 edition), *Who's Who Legal* (2014 edition), and *Best Lawyers* (2014 edition). He is 'praised by his clients for his expertise in cartel cases and excellent litigation skills' (*Chambers Europe*, 2013 edition, EU & Competition). Sources describe Weyer as an enthusiastic and active lawyer: 'When I need a really good opinion I get him involved' (*Chambers Europe*, 2013 edition, EU & Competition).

HOUTHOFF BURUMA
Gustav Mahlerplein 50
1082 Amsterdam
Netherlands
Tel: +31 20 605 60 00
Fax: +31 20 605 67 00
a.knigge@houthoff.com
w.verloren@houthoff.com
n.dempsey@houthoff.com
m.bosch@houthoff.com
www.houthoff.com