THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. 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 terms of 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 had 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: it 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 past 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. In addition, 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 has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas 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 continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the 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 the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also 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 has 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 countries such as 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 taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. 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 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. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

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, e.g., Sweden). Some jurisdictions 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 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 spillover 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, 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 a case (e.g., in Brazil, as well as 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 were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 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, 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 toward 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; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; 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 by 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 and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
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Chapter 15

NETHERLANDS

Rick Cornelissen, Elselique Hoogervorst, Albert Knigge, Paul Sluijter and Weyer VerLoren van Themaat[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Netherlands is a preferred forum for private competition law enforcement cases and connected damages claims. Since 2010, there have been a number of damages claims brought before the Dutch courts, mainly following various Commission decisions.[2] In 2019, several judgments were published in the *Airfreight*,[3] *Trucks*,[4] *Gas-Insulated Switchgear*[5] and *Elevators and Escalators* cases.[6]

II THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for antitrust damages claims is the Dutch Civil Code (CC) and the Dutch Code of Civil Procedure (CCP), and the specific competition legislation in the Dutch Competition Act (CA)[7] and the TFEU. The CA applies to all agreements between

1 Rick Cornelissen, Albert Knigge and Weyer VerLoren van Themaat are partners, Paul Sluijter is counsel and Elselique Hoogervorst is a professional support lawyer at Houthoff.

2 Commission decision, 24 January 2007, case COMP/38899 (*Gas-Insulated Switchgear*) Commission decision, 13 September 2006, case COMP/38456 (*Bitumen*), Commission decision, 9 November 2010 and 17 March 2017, case COMP/39258 (*Airfreight*), Commission decision, 11 June 2008, case COMP/38695. (*Sodium Chlorate*), Commission decision, 1 October 2008, case COMP/39181 (*Candle Waxes*), Commission decision, 21 February 2007, case COMP/38823 (*Elevators and Escalators*), Commission decision, 1 October 2008, case COMP/39181 (*Paraffin Wax*), Commission decision, 30 June 2010, case COMP/38.344 (*Pre-stressing Steel*), Commission decision, 2 April 2014, case COMP/39610 (*Power Cables*), Commission decision, 5 December 2014, case COMP/39437 (*CRT*), Commission decisions, 19 July 2016 and 27 September 2017, case COMP/39824 (*Trucks*), Commission decision, 4 December 2013, case COMP/39914 (Euro), Commission decision, 21 October 2014, case COMP 39924 (Swiss Franc), Commission decision, 4 February 2015, case COMP/39861 (Yen) (*Interest rate derivatives*), Amsterdam District Court, 9 May 2018, ECLI:NL:RBAMS:2018:3203 (*Beer*).

3 Amsterdam District Court, 1 May 2019, ECLI:NL:RBAMS:2019:3392, 3393 and 3394, Amsterdam District Court, 11 September 2019, ECLI:NL:RBAMS:2019:9965.

4 Amsterdam District Court, 15 May 2019, ECLI:NL:RBAMS:2019:3574.

5 Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:3990, Arnhem-Leeuwarden Court of Appeal, 26 November 2019, ECLI:NL:GHARL:2019:10165.

6 Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060, Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441, Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230.

7 Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Mededingingswet).

undertakings, decisions by associations of undertakings and concerted practices that aim to prevent, restrict or distort competition within all or a part of the Dutch market, or that have this effect.

Most cartel damages claims are based on an alleged unlawful act by the defendant. To succeed, a claimant must establish that the defendant has committed an attributable unlawful act which damaged the claimant. Whether a breach of national or European competition law in itself will amount to an unlawful act against the claimant depends on whether the breached rules aimed to prevent the damage allegedly suffered by the claimant.

Some national substantive and procedural rules were amended and added to the CC and CCP when the EU Damages Directive was implemented on 10 February 2017.[8] The added provisions on the stay of proceedings and the disclosure of evidence do not apply to damages actions which the Dutch court was seized of before 26 December 2014.[9] All added provisions apply to damages claims for EU competition law infringements only, and not to damages claims for solely national competition law infringements.[10] The Dutch Supreme Court found it desirable that, if the EU Damages Directive does not apply in a temporal sense, the applicable Dutch law is interpreted so that the outcomes are compatible with the Directive and the Implementing Act.[11]

ii Class actions, assignment of claims and mandate

Mass claims can be bundled in collective actions through assignment or mandate. The most popular models for claiming cartel damages in the Netherlands are the assignment of individual claims to a legal entity acting as a claim vehicle and representation by mandate.

Furthermore, a Dutch foundation or association with full legal capacity 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 can bring a collective redress claim seeking injunctive or declaratory relief, a declaratory judgment or even specific performance.[12] Since 1 January 2020, damages can also be claimed in a collective action (the Act on Damages Claims in a Collective Action (WAMCA)).[13] This Act has stricter safeguards to prevent abuse of the Dutch collective action system especially in light of the increasing commercial use of collective actions. Third-party funding is available in the Netherlands, but is not explicitly regulated. Therefore, the WAMCA adds stricter requirements for the

8 Directive 2014/104/EU of the European Parliament and of the council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, PbEU 2014, L 349/1 (EU Damages Directive). This directive has been implemented by the Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, Staatsblad 2017, 28 (Implementing Act).

9 Article III of the Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, Staatsblad 2017, 28, jo. Article XVIII of the Verzamelwet Justitie en Veiligheid 2018, Staatsblad 2018, 228.

10 A draft bill, which will broaden the scope of the Implementing Act, was published in 2017 to allow interested parties to react to the proposed legislative text: www.internetconsultatie.nl/wijzigingmarktenoverheid. The draft bill has not yet been submitted to the Parliament.

11 Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (*Gas-Insulated Switchgear*).

12 Article 3:305a of the CC.

13 Wet van 20 maart 2019 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie), Staatsblad 2019, 130. The date of entry into force was published in Staatsblad 2019, 447.

standing of a claim vehicle. Finally, the WAMCA introduced procedural changes intended to enhance the efficiency and effectiveness of these proceedings, including appointing an exclusive representative, consolidating collective actions if these actions are based on the same events, and the obligation for the parties to try to negotiate a settlement agreement after an exclusive representative has been appointed.[14] Those who do not want to be represented in this collective action can opt out after the appointment of the exclusive representative. Foreign persons can be represented if they opt in. If a settlement is reached and declared binding, there is another opportunity to opt out. The WAMCA applies to collective actions brought on or after 1 January 2020 for events that took place on or after 15 November 2016.

The EU is preparing a directive on representative actions for the protection of the collective interests of consumers (COM(2018)184). It is not clear yet if and to what extent the proposed EU law on representative actions will change Dutch legislation.

iii Statute of limitations

The Implementing Act has a specific prescription period for competition law-related claims for damages (Article 6:193s CC):

a a five-year limitation period, beginning on the day after the infringement ended and the claimant became aware, or can reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to them and the infringer's identity; and

b a 20-year limitation period, beginning on the day following the day on which the infringement ended.

Regular damages claims become time-barred five years after the claimant becomes aware of the damage and the person liable ('ought to have been aware' is insufficient), or 20 years after the damage-causing event (Article 3:310 CC). Since Article 6:193s CC has no retroactive effect, Article 3:310 CC is still important.

There has been case law[15] on Article 3:310 CC about how publicity around a potential cartel affects a limitation period. These cases have found that if the sole publicity about investigations into a possible cartel is issued in European Commission press releases or in media reports, without information that would show potential claimants the nature of the damage they may have suffered or the identity of those responsible, this will be insufficient to start the limitation period. For example, in the *Elevators and Escalators* case, the Rotterdam District Court found that newspaper articles in 2004, which mentioned that authorities carried out raids and that following these raids Kone conducted an internal investigation that revealed competition-restricting activities in Belgium, Luxembourg and Germany were not concrete enough for the claimants to suspect the existence of a cartel in the Dutch market. Therefore, the newspaper articles did not start the limitation period for the claimants in this case. The limitation period started with the publication of the Commission decision.[16]

14 Articles 1018b-1018m of the CCP.

15 Rotterdam District Court, 26 September 2018, ECLI:NL:RBROT:2018:8001 (*Bitumen*), Arnhem-Leeuwarden Court of Appeal, 28 August 2018, ECLI:NL:GHARL:2018:7753 (*Gas-Insulated Switchgear*), Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 and Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (*Elevators and Escalators*).

16 Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 (*Elevators and Escalators*).

Article 6:193t CC gives two grounds for extending the limitation period. The first ground is an extension between the parties involved during a consensual dispute resolution process. In mediation, this ends when a party or the mediator notifies the other party in writing that mediation has ended or if no actions have been performed for six months pending the mediation. The second ground relates to a competition authority performing an act within the context of an investigation or proceedings with regard to the infringement of competition law. The extension starts on the day following the day that the limitation period has lapsed. The extension equals the period required for establishing the final infringement decision or alternatively terminating the investigation or proceedings about the competition law infringement, extended by one year.

III EXTRATERRITORIALITY

i Applicable law

Regulation (EC) 864/2007 (Rome II) applies when determining which laws apply to antitrust damages claims arising from acts committed on or after 11 January 2009. For acts committed before 11 January 2009, the Unlawful Acts Act (UAA) applies.[17] Under Article 4(1) 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 competition. In cross-border cases, this rule of reference may lead to an unavoidable fragmentation of the laws that will apply to parts of the claim. Unlike Article 6(3) Rome II, the UAA has no provision enabling the claimant to choose that only the law of the court seized will apply when the competition distortion has also considerably affected competition in that country. Therefore, in a number of cases, Dutch courts applied several different foreign law systems to parts of the bundled claims. [18] In two recent airfreight cases, the Amsterdam District Court decided differently due to the difficulties in locating the place of the affected territory in cases of international airfreight services: it found that the effectiveness principle and due process required a practical solution and it decided that Dutch law applied to all claims.[19]

ii Jurisdiction

Main rule: defendant's domicile

Dutch courts generally have jurisdiction to hear antitrust damages claims against parties domiciled in the Netherlands.[20] A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business there.[21]

17 For acts committed before 1 June 2001, the UAA is applied by analogy, see Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (*Elevators and Escalators*), Amsterdam District Court, 1 May 2019, ECLI:NL:RBAMS:2019:3392 and 3393 (*Airfreight*).

18 Inter alia in Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166 (*Sodium Chlorate*): the applicable law also determines the rules on limitation periods; under a few of the eight law systems applicable, the claims had expired. See also Limburg District Court, 16 November 2016, ECLI:NL:RBLIM:2016:9897 (*Pre-stressing Steel*).

19 Amsterdam District Court, 1 May 2019, ECLI:NL:RBAMS:2019:3392 and 3393 (Airfreight).

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

21 Article 63 Brussels I recast.

Alternative jurisdiction grounds: anchor defendant rule or place where the harmful event occurred

Claimants frequently invoke the alternative jurisdiction ground under Article 8(1) Brussels I recast (anchor defendant rule). Under this rule, a cartel damages claim against a company that is not domiciled in the Netherlands may still be brought before the Dutch courts, if it is sufficiently closely connected with a claim against a cartelist that is domiciled in the Netherlands and if it is expedient to do so.[22]

On 21 May 2015, the European Court of Justice (CJEU) issued a landmark decision[23] in *Hydrogen Peroxide*. The CJEU decided that even when the undertakings have participated in different places and times, the prior case law criterion of the same situation of fact and law is fulfilled, and that Article 6(1) Brussels I (old) can apply if only one defendant is domiciled in the Netherlands. This decision confirmed prior Dutch judgments in which jurisdiction based on Article 6(1) Brussels I (old) was accepted in cartel damages cases.[24] In many cases, Dutch courts have assumed jurisdiction based on the anchor defendant rule,[25] even when the same anchor defendant was summoned for the second time for the same claim.[26] There have been exceptions to this, such as the *Beer* case in which the Amsterdam District Court did not allow MTC to use Heineken as an anchor defendant for claims, based on the infringement of Article 102 TFEU, against Greek brewery AB. The Greek competition authority had found no evidence of Heineken's involvement in AB's competition law infringement and MTC had not substantiated their arguments in a way that made the court accept that Heineken had been involved in the competitive act. Therefore, the claims were not sufficiently closely connected.[27]

Claimants also sometimes invoke another alternative jurisdiction ground: according to Article 7(2) Brussels I recast (Article 5(3) Brussels I (old)), a tort claim can be brought before the courts of the place where the harmful event occurred. This covers both the place where the damage occurred and the place of the event giving rise to it.

In the *Hydrogen Peroxide*[28] case discussed above, the CJEU 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 the courts of (1) the place of the

22 It was confirmed in the CRT case, Oost-Brabant District Court, 29 June 2016, ECLI:NL:RBOBR:2016:3484, that the case law of the CJEU with regard to Article 6(1) Brussels I (old) is also relevant for the application of Article 7(1) CCP, which applies when a defendant is not domiciled in an EU or EEA country.

23 CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*Hydrogen Peroxide*).

24 The Hague District Court, 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*Paraffin Wax*), Rotterdam District Court 17 July 2013, ECLI:NL:RBROT:2013:5504 (*Elevators and Escalators*), Limburg District Court, 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Pre-stressing Steel*) and Amsterdam District Court, 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*Sodium Chlorate*). The judgment of the Amsterdam District Court was upheld by the Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.

25 Midden-Nederland District Court, 27 November 2013, ECLI:NL:RBMNE:2013:5978 (*Elevators and Escalators*).

26 Amsterdam District Court, 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Airfreight*).

27 Amsterdam District Court, 9 May 2018, ECLI:NL:RBAMS:2018:3203 (*Beer*).

28 CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*Hydrogen Peroxide*). See for the interpretation of Article 7(2) Brussels I recast in the context of Article 102 TFEU: CJEU, 5 July 2018, C-27/17, ECLI:EU:C:2018:533 (FlyLAL). The non-cartel related *Universal/Schilling* decision (CJEU 16 June 2016, case C-12/15) is also relevant in this regard: 'In the context of the determination of jurisdiction . . ., the court seized must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant.'

causal event, which can be the place in which the cartel was definitively concluded, or 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 (2) the place where the damage occurred, which can be the place where its own registered office is located.[29]

Recently, the CJEU gave a further explanation of 'the place where the damage occurred'. In *Tibor-Trans*, a Hungarian case concerning the *Trucks* cartel, the CJEU decided that in the case of an Article 101 TFEU infringement consisting of collusive arrangements on pricing and gross price increases for trucks, 'the place where the harmful event occurred' covers the place where the affected market is located. That is the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel with whom that victim had not established contractual relations.[30]

Jurisdiction and arbitration clauses

The CJEU decided in *Hydrogen Peroxide*[31] that in cartel damages cases, account should be taken of jurisdiction clauses[32] contained in contracts for the supply of goods, even if this derogates from the international jurisdictional rules provided in Article 5(3) or Article 6(1), or both, of Brussels I (old). However, jurisdictional clauses only cover cartel damages claims if these refer to disputes concerning liability incurred due to a competition law infringement. A clause that abstractly refers to all disputes arising from contractual relationships is therefore insufficiently specific to cover cartel damages claims. This is different in an action for damages based on Article 102 TFEU. In that case, the jurisdiction clause does not have to refer expressly to disputes relating to liability incurred as a result of an infringement of competition law.[33]

In the *Elevators and Escalators* case, the Amsterdam District Court found that the CJEU's *Hydrogen Peroxide* decision should also apply to arbitration clauses.[34] In this case, the arbitration clause only referred abstractly to disputes relating to contractual relationships. Therefore, the court rejected the jurisdiction defence.[35]

IV STANDING

A claimant bringing cartel damages claims must be a natural or legal person. In general, indirect purchasers have standing to claim cartel damages.

Dutch courts generally accept the standing of claim vehicles (Dutch or foreign legal entities such as limited companies or foundations) that act based on assignment of claims or

29 This decision is also relevant for the interpretation of Article 6(e) CCP, which applies when a defendant is not domiciled in an EU or EEA country.

30 CJEU, 29 July 2019, C-451/18, ECLI:EU:C:2019:635 (*Tibor-Trans*).

31 CJEU, 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*Hydrogen Peroxide*).

32 Article 23 Brussels I (old) and Article 25 Brussels I recast.

33 CJEU, 24 October 2018, C-595/17 (*Apple/eBizcuss*).

34 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 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.

35 Amsterdam District Court, 23 October 2019, ECLI:RBROT:2019:8230 (*Elevators and Escalators*). See along the same lines the Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006 (*Sodium Chlorate*).

representation by mandate, if they find that the assignments and mandates are legally valid. The burden of proof for a valid assignment is on the claimant.[36] The sole fact that a claim vehicle is funded by litigation funders and works on a 'no win, no fee' basis, which is not allowed for Dutch lawyers, does not make the assignment agreement null and void.[37]

Standing requirements in class actions (Article 3:305a CC) are stricter. An entity bringing a class action must be a Dutch foundation or association with full legal capacity that is sufficiently representative. When assessing representativeness, emphasis is given to several factors, including the articles of association. These must cover the interests of the group that the entity is promoting. A court will also assess whether the entity is capable of properly safeguarding the interests it represents. A representative entity will also not have standing if it did not try to engage with the defendant before bringing its action. In addition, the interests of the persons that are represented in the action must be sufficiently similar. The WAMCA, which came into force on 1 January 2020 (see Section II.ii), has added stricter requirements for a representative entity's standing. The entity must meet certain governance requirements, have sufficient resources to conduct the proceedings, have sufficient control of the legal action and have a generally accessible webpage with information about its governance and the collective action including the financial contributions requested. The legal claim must also have a sufficiently close relationship with the Netherlands. In addition, the claim will only be heard if the claim vehicle has sufficiently shown that bringing a collective action is more efficient and effective than bringing individual claims.

V OBLIGATION TO FURNISH FACTS

According to Dutch procedural law, the writ must contain the claim and the grounds for the claim.[38] Furthermore, claimants must furnish in the writ all the factual elements necessary to grant the relief they request.[39] These factual elements must be sufficiently substantiated in the writ, and can be substantiated in more detail during the proceedings. In *CRT*, the Oost-Brabant District Court found that the claimants had sufficiently substantiated their claims in the writ as far as they were based on the alleged infringement of Brazilian competition law, but had not done so for their claims based on the alleged Article 101 TFEU infringement. Since the claimants asserted that they had suffered damage due to an EU competition law infringement, they should have asserted that the alleged infringement related to their purchases and that it had impacted trade in the EEA.[40]

Claim vehicles that act based on the assignment of individual claims must substantiate the claims of every assignor, because assignment of claims is just a way of bundling individual claims to which no exceptional rules apply.[41] In *Trucks*, the Amsterdam District Court ruled that claim vehicles cannot limit their obligation to substantiate their claims by giving just a number of examples, not even if the assumption is made that the ultimate scope of the

36 Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 (*Elevators and Escalators*).

37 Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (*Elevators and Escalators*).

38 Article 111(2d) of the CCP.

39 Article 149 and 150 of the CCP.

40 Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6932 (*CRT*).

41 Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (*Elevators and Escalators*), Amsterdam District Court, 15 May 2019, ECLI:NL:RBAMS:2019:3574 (*Trucks*), Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (*Elevators and Escalators*).

harm will be established in follow-up damages proceedings. The claimants, and the litigation vehicles for each assignor, must assert and substantiate (whether or not with documentation) more regarding when and from whom which trucks (of which makes) were acquired. In any case, sufficient facts must be asserted to be able to assess, for each owner, renter, lessee or user of the truck(s), whether these parties incurred harm as a result of the cartel during the alleged infringement period or the post-infringement period to establish the plausibility of the possibility of harm.[42]

In *Elevators and Escalators*, the Arnhem-Leeuwarden Court of Appeal confirmed the ruling of the court in first instance that claim vehicle EWD had not fulfilled its obligation to furnish enough factual elements for each assignor to establish the causal link or the existence of damage. EWD had not explained which contracts were at stake and under which circumstances they were concluded.[43] In another *Elevators and Escalators* case, the Rotterdam District Court found that the claim vehicle did not sufficiently substantiate the plausibility of the possibility of damage suffered by each assignor. However, the Court allowed the claim vehicle to further substantiate its assertions.[44]

VI THE PROCESS OF DISCOVERY

There is no formal pretrial discovery system in Dutch law. Parties can, however, request disclosure judicially and extra-judicially. A party can assess its case up front through preliminary examination of a witness or a preliminary expert opinion.

The Dutch courts have general discretion to order disclosure from either or both parties,[45] including disclosure of books and records.[46] This power covers both a demand for clarification of certain statements and the submission of specific documents. A party can refuse to cooperate with this demand, but the court may draw adverse inferences from this unless the party can show sufficiently compelling reasons for the refusal. In principle, parties can also request documents under Dutch administrative law (see below).

i Parties' disclosure options

Article 843a CCP provides a special right to disclosure in addition to the discretionary right of the courts, by way of 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.

For a claim under Article 843a CCP to be successful, the claimant must (1) establish that it has a legitimate interest in the disclosure. This may be found if the claimant cannot obtain the documents or information in another way, and would be at an unreasonable disadvantage

42 Amsterdam District Court, 15 May 2019, ECLI:NL:RBAMS:2019:3574 (*Trucks*). See also Amsterdam District Court , 11 September 2019, ECLI:NL:RBAMS:2019:9965, where the Court has also ordered the litigation vehicles to further substantiate the assertion that the freight forwarders, who directly purchased the air freight services, passed on their overcharges to the shippers, who allegedly assigned their claims to the litigation vehicles (upstream pass on). The air cargo carriers will have to substantiate their assertion that the shippers passed on the overcharge to their customers (downstream pass on).

43 Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (*Elevators and Escalators*).

44 Rotterdam District Court, 23 October 2019, ECLI:NL:RBROT:2019:8230 (*Elevators and Escalators*).

45 Article 22 of the CCP.

46 Article 162 of the CCP.

in the proceedings without them. The claimant must (2) show that the requested documents and information relate to a legal relationship – contractual or non-contractual – to which the claimant is a party. Disclosure must (3) relate to specific documents and information so that the court and the other party can identify the requested information and to prevent fishing expeditions. Finally, (4) disclosure can only be sought for documents that are in the custody of the party against whom the order is requested.

Article 843a CCP constitutes the standard legal basis for disclosure in civil proceedings. The newly enacted Articles 844–850 CCP deviate from and add to Article 843a CCP through a subsection regarding the disclosure of information in cartel damages claims transposing Chapter II of the EU Damages Directive into Dutch civil law, including the black-listed and grey-listed exceptions to the right of disclosure. These Articles apply to actions for damages of which the Dutch court was seized on or after 26 December 2014.[47] Article 845 CCP stipulates that disclosure can only be refused for compelling reasons, whereas the grounds for refusal of Article 843a CCP are broader. This means that for cartel damages claims, disclosure cannot be refused because fair and proper administration of justice can be sufficiently secured without disclosure.

The Dutch courts have refused disclosure requests where (1) there was insufficient legitimate interest[48] or (2) where they did not find the information relevant.[49] In both cases, the court indicated that future disclosure could be possible at a later stage in the proceedings if required.

In the field of public antitrust enforcement, there are two noteworthy cases on access to documents.

First, it may be possible to access documents under Dutch administrative law. According to the Government Information (Public Access) Act (PAA), anyone can request an administrative body (including the Dutch Competition Authority (ACM)) to make certain documents publicly available. There are only certain grounds for refusal. The Trade and Industry Appeals Tribunal, however, has held that the Act establishing the ACM (of 28 February 2013) has priority over the PAA.[50] This implies that the ACM has additional grounds to refuse access to documents. If the information is obtained outside its functions under its establishing act, the PAA applies.

Second, the Trade and Industry Appeals Tribunal[51] held that the right of access to documents for defending parties in cartel investigation procedures, 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,

47 Article III of the Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, Staatsblad 2017, 28, jo. Article XVIII of the Verzamelwet Justitie en Veiligheid 2018, Staatsblad 2018, 228.

48 Amsterdam District Court, 25 March 2015, ECLI:NL:RBAMS:2015:1780 and Amsterdam District Court, 25 March 2015, ECLI:NL:RBAMS:2015:1778 (*Airfreight*).

49 The Hague District Court, 21 September 2016, ECLI:NL:RBDHA:2016:11305 (*Paraffin Wax*).

50 Trade and Industry Appeals Tribunal, 17 June 2016, ECLI:NL:CBB:2016:169 in which the judgment in first instance (Rotterdam District Court, 13 May 2015, ECLI:NL:RBROT:2015:3381) was overturned because the ACM failed to examine whether the requested information was acquired under the authority of the Act establishing the ACM.

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

weighed the interests, assessing the interests of a successful leniency programme with the parties' right to defend themselves, and decided that the limitation of access (for defendants) to transcripts of the oral statement of leniency applicants was not justified.

ii Parties' right to witness testimony

Parties have a right to present evidence through witness statements. The only persons exempt from testifying in civil proceedings are close blood relatives and professionals required to observe confidentiality obligations.[52] Opposing parties can also be witnesses, but their testimony's strength is limited when proving their own statements. Witnesses are examined by a judge. There is no right to cross-examination. If a witness refuses to answer questions, the court may draw adverse inferences.[53]

Finally, parties can request preliminary examination of a witness.[54] This could facilitate a party clarifying certain facts up front if this party is considering starting proceedings. This request can be refused if the claimant does not make it clear why it has an interest in the examination.[55]

VII PRIVILEGES

Lawyers must refuse to testify about what they know through their professional relationship with their clients. This includes any request through a disclosure claim under Article 843a of the CCP. Lawyer–client communications, lawyer work product and joint work product that is in the possession of persons other than the lawyer (and clients), however, are not necessarily excluded from production. This professional legal privilege also applies to in-house counsel if they are, inter alia, registered in the Netherlands as a lawyer, except for EU competition law infringements investigated by the European Commission. The latter exception follows from the *Akzo* judgment of the CJEU.[56] A 2013 judgment of the Dutch Supreme Court confirmed that the lack of legal privilege in *Akzo* does not mean that legal privilege of in-house counsel does not exist generally under Dutch law.[57]

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

VIII USE OF EXPERTS

Dutch procedural law allows parties to use any means to prove their case. The courts are free in their assessment of the evidence provided.[58] Parties can use expert evidence to prove their statements. Parties may also ask the court to appoint one or more independent experts to

52 Article 165 of the CCP.
53 Article 164 of the CCP.
54 Articles 186–193 of the CCP.
55 Amsterdam District Court, 25 September 2014, ECLI:NL:RBAMS:2014:6258 (*Airfreight*).
56 CJEU, 14 September 2010, case C-550/07 P.
57 Supreme Court, 15 March 2013, ECLI:NL:HR:2013:BY6101.
58 Article 152 of the CCP.

give evidence and advice on certain issues, or the court may itself appoint an independent expert, for example for deciding damages.[59] Courts are not obliged to appoint experts: it is discretionary.[60]

The court can decide the evidentiary value of a party, or a court-appointed expert's testimony or report. The court may deviate from the conclusions of court-appointed experts but it must provide sufficient grounds for this decision.[61]

IX CALCULATING DAMAGES

i Cognisable damages

Generally, under the newly enacted Article 6:193l CC, a cartel within the meaning of the EU Damages Directive and the Implementing Act is presumed to cause damage. Dutch civil law aims to compensate a claimant for the damage suffered as a result of another's wrongful act or failure to perform. Both actual loss and lost profit may be claimed, as well as the claimant's reasonable costs to prevent or reduce the damage suffered and statutory interest.[62] Exemplary or punitive damages are not available. Furthermore, any profits realised by the claimant as a result of the wrongful act will be deducted from any damages award to the extent reasonable. In other words, the basic principle is full compensation but no more (in conformity with the EU Damages Directive).

Damages cannot only be claimed by those who dealt directly or indirectly with the alleged cartelists, but under certain circumstances also by those who purchased products or services in the market allegedly affected by the cartel from non-cartelists (umbrella damages).[63] Recently, the CJEU decided that persons who are not active in the market affected by the cartel, but who provided subsidies in the form of promotional loans to buyers of the products offered in that market, may also seek compensation from the cartelists for their losses. These losses may consist of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably.[64]

ii Method of calculating damages

The court generally determines the most appropriate manner for calculating damages. If the loss cannot be accurately determined, the judge may estimate it.[65] In principle, all possible relevant circumstances of the case are taken into account (actual damages calculation). In some cases, the court calculates damages in an abstract way, not taking certain actual circumstances of a case into account. The method chosen depends on the nature of the damages claimed and the liability. Under Article 44a(3) CCP, the court may request the ACM's guidance in determining the extent of the damage.

59 Arnhem-Leeuwarden Court of Appeal, 29 May 2018, ECLI:NL:GHARL:2018:4876 appointed three experts to report on questions of overcharge and pass-on defence. See also Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:3990.

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

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

62 Article 6:96 of the CC.

63 CJEU, 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone*).

64 CJEU, 12 December 2019, C-435/18, ECLI:EU:C:2019:1069 (*Otis*).

65 Article 6:97 of the CC.

The WAMCA (see Section II.ii) gives the court the possibility to award damages depending on whether a claimant qualifies as part of a certain category of claimants (damages scheduling). Whether this will lead to calculating damages in an abstract way remains to be seen.

As yet, there have been no definitive court decisions on whether an actual or an abstract damages 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 *Airfreight* cartel-related claims) to determine the damage suffered, the actual price that was charged in the relevant period to the shippers will be analysed and compared to the hypothetical price they would have paid if the carriers had not acted wrongfully in the way that the claimants asserted.[66]

In a recent judgment in *Gas-Insulated Switchgear*, the Arnhem-Leeuwarden Court of Appeal found that the existence of an overcharge had been sufficiently disputed, so it had to assess the question of whether an overcharge was being paid for the GIS Installation and, if so, the extent of the overcharge, by comparing the actual price paid and the hypothetical price that would have been paid without the infringement of competition law.[67]

The court may also award damages based on the profit made by the defendant due to his or her wrongful act or failure to perform at the claimant's request.[68] This power has been used sparingly, mainly in intellectual property disputes. Interestingly, however, in 2015, the Gelderland District Court rejected the objection that a substantial price increase between an offer during a cartel and the agreement after the termination of the cartel could be attributed to a decrease in the cost price.[69]

iii Statutory interest

A claimant may seek compound statutory interest annually on damages claimed (calculated from the day the loss is suffered until the damages have been paid).[70] It is irrelevant whether the claimant actually suffered any loss because it did not immediately received monetary compensation, but a claimant cannot claim more than the statutory interest rate for a delay in receiving monetary compensation.[71] The government determines the statutory interest rate. It is currently 8 per cent for commercial transactions and 2 per cent for non-commercial transactions.

66 Amsterdam District Court, 25 March 2015 ECLI:NL:RBAMS:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:RBAMS:2015:1778 (*Airfreight*).

67 Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:3990. See also Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (*Gas-Insulated Switchgear*), Arnhem-Leeuwarden Court of Appeal 28 August 2018, ECLI:NL:GHARL:2018:7753 (*Gas-Insulated Switchgear*).

68 Article 6:104 of the CC.

69 Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713. The enforcement of this judgment is suspended in appeal (Arnhem-Leeuwarden Court of Appeal, 23 August 2016, ECLI:NL:GHARL:2016:6736, Arnhem-Leeuwarden Court of Appeal, 28 August 2018, ECLI:NL:GHARL:2018:7753).

70 Article 6:119 of the CC.

71 Supreme Court, 14 January 2005, ECLI:NL:HR:2005:AR0220, NJ 2007, 481 (*Ahold and others/The Netherlands*) and ECLI:NL:HR:2005:AR2760, NJ 2007, 482 (*Van Rossum/Fortis*).

iv Legal costs

Legal costs awards 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.[72] Awards for legal costs will cover the full amount of court fees,[73] court-appointed experts and witnesses. However, only a limited and fixed amount is awarded for lawyers' fees, which generally does not begin to cover a party's actual lawyers' fees. Lawyers' fee awards are determined based on points awarded for procedural actions (e.g., two points for an oral hearing) and set tariffs depending on the amount claimed.[74]

In class actions under the WAMCA (see Section II.ii), the court can award a much higher amount of costs to the winning party in some circumstances. If the court finds that the defectiveness of the claim was summarily apparent, it can order the claimant to pay a higher amount to the defendant, up to five times the fixed amount, unless fairness dictates otherwise. If the court grants damages to the claimant, it can also order, if so requested, that the defendant pay reasonable and proportionate court costs and other costs that the claimant has incurred, unless fairness dictates otherwise.

The courts only award actual compensation for lawyers' fees in intellectual property cases and exceptional circumstances (e.g., abuse of proceedings).

X PASS-ON DEFENCES

The Implementing Act confirms a party's right to invoke a pass-on defence in Article 6:193p CC. Given the general principle of compensation for actual loss suffered underlying the Dutch law of damages, defendants in a cartel damages action were in principle already able to raise this defence.

In its judgment of 8 July 2016, the Supreme Court held that generally speaking, a pass-on defence comes down to the assumption that the scope of an injured party's right to compensation resulting from a competition law infringement is reduced proportionate to the amount of that loss the injured party has passed on to third parties. The Supreme Court also decided that what is ultimately relevant, is that in comparing the actual situation with the situation that presumably would have existed had the standards not been violated, an assessment must be made of which losses and which benefits are related to the event for which the debtor is liable in such a way that they can reasonably be attributed to the debtor as a result of this event. As the EU Damages Directive prevents overcompensation, this reasonableness test will presumably have a limited scope in future cartel damages cases.[75]

In the *Gas-Insulated Switchgear* cases, the pass-on defences were rejected in the first instance.[76] In the following appeal proceedings, which are still pending, the

72 Article 237 of the CCP.

73 Currently, the highest court fee at first instance is €4,131 (court fees 2020).

74 Currently, the maximum fee is €3,856 per point with no maximum number of points for claims exceeding €1 million.

75 Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (*Gas-Insulated Switchgear*).

76 Gelderland District Court, 29 March 2017, ECLI:NL:RBGEL:2017:1724 (*TenneT/ABB*) and Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713 (*TenneT/Alstom*).

Arnhem-Leeuwarden Court of Appeal appointed three experts to report on questions regarding the pass-on defence, for which, the Court of Appeal pointed out, the defendant has to assert and prove the relevant facts.[77]

XI FOLLOW-ON LITIGATION

i Evidence of a cartel infringement

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. Under Article 16 of Council Regulation (EC) 1/2003, European Commission decisions on agreements, decisions or concerted practices under Article 101 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, the Dutch courts must accept and apply the breach of Article 101 TFEU found by the European Commission. However, a European Commission decision and fine for participation in a cartel does not guarantee a successful damages claim. For example, in *Elevators and Escalators*, the claim was rejected because the claim vehicle did not fulfil its obligation to furnish sufficient facts.[78]

For the status of ACM decisions in follow-on civil litigation, the Implementing Act has provided for a new Article 161a CCP. This establishes that a competition law infringement established by an irrevocable decision of the ACM provides irrefutable evidence of the established infringement in proceedings in which damages are claimed because of a competition law infringement law in the sense of Article 6:193k(a) CC.

iii European versus national law – parental liability

It follows from CJEU case law as well as from the EU Damages Directive that in the absence of Community rules governing compensation for damage caused by cartel infringements, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of causal relationship, provided that the principles of equivalence and effectiveness are observed.[79] A cartel infringement established by a competition authority must therefore be transposed into national law on damages.

However, in the *Skanska* case,[80] the CJEU clarified the concept of economic continuity. It ruled that the buyer of an entity that infringed EU competition law can be held liable for the damage caused if the infringing entity has ceased to exist. The CJEU pointed out that the decision on who is liable in EU competition law damages actions is directly governed by EU law and not by national law. The CJEU found that the entities that must compensate for the damage caused by conduct prohibited by Article 101 TFEU are the 'undertakings', within the

77 Arnhem-Leeuwarden Court of Appeal, 29 May 2018, ECLI:NL:GHARL:2018:4876 (*TenneT/ABB*). See also Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:4876 (*TenneT/Alstom*) that will use the expert reports submitted in *TenneT/ABB*.

78 Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060 (*Elevators and Escalators*).

79 CJEU, 13 July 2006, C-295/04 (*Manfredi*), ECLI:EU:C:2006:461, CJEU, 21 May 2015, C-352/13 (*Hydrogen Peroxide*) and Recital 11 of the EU Damages Directive.

80 CJEU, 14 March 2019, C-724/17, ECLI:EU:C:2019:204 (*Skanska*).

meaning of that provision, that participated in that conduct. The concept of 'undertaking' has the same meaning in the context of fines imposed by the European Commission as in the context of civil actions for damages, according to the CJEU.

In *Gas-Insulated Switchgear*, the Arnhem-Leeuwarden Court of Appeal applied the findings in *Skanska* when assessing the question of whether Cogelex, an entity that had not been held liable by the Commission and had not been fined, could be held liable for the damage caused by Alstom Holdings, a cartel member. According to the Court, Cogelex's liability cannot be assessed by national Dutch law,[81] contrary to national case law preceding the *Skanska* ruling.[82] The court ruled that Cogelex and Alstom Holdings (a minority shareholder in Cogelex) form one undertaking in the sense of Article 101 TFEU, because Alstom Holdings exercised a decisive influence on Cogelex's strategy and market behaviour. The court therefore found that Cogelex could be held liable for the damage caused by Alstom Holdings. However, in contrast to *Skanska*, the concept of economic continuity did not apply in this case. Moreover, the Court held Cogelex, a subsidiary that did not actually participate in the infringement, liable for the actions of its parent company, whereas the Commission so far only held a parent company liable for the infringement of competition law by its subsidiary. The Court did so without any further actual substantiation.

iv Stay of proceedings until a cartel infringement decision is irrevocable

Dutch courts have allowed a stay of proceedings in cartel damages cases pending the outcome of an appeal of a European Commission decision.[83] This requires reasonable doubt regarding the validity of the European Commission's decision. If one party invokes a European Commission decision in support of its claims, it is up to the other party who requested a stay for the proceeding to (1) show that it has brought a timely action to annul the European Commission decision; (2) clarify that it reasonably opposes the European Commission decision; and (3) state the defence it would argue in the proceedings, 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.[84]

81 Arnhem-Leeuwarden Court of Appeal, 26 November 2019, ECLI:NL:GHARL:2019:10165 (*Alstom and others/TenneT and Saranne*), after the Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:3990 had given the parties the possibility to respond to the *Skanska* ruling.

82 Midden-Nederland District Court, 20 July 2016, ECLI:NL:RBMNE:2016:4284 (*Elevators and Escalators*). See also The Hague District Court, 22 September 2016, ECLI:NL:RBDHA:2016:11305, The Hague District Court, 17 December 2014, ECLI:NL:RBDHA:2014:15722 and 21 September 2016, ECLI:NL:RBDHA:2016:11305 (*Paraffin Wax*), Amsterdam District Court 9 May 2018, ECLI:NL:RBAMS:2018:3203 (*Beer*).

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

84 Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013 and Amsterdam District Court, 25 March 2015, ECLI:NL:RBAMS:2015:1780.

XII SETTLEMENT PROCEDURES

In principle, the general rules of contract law apply to adopting or imposing settlements. Settlement negotiations between lawyers enjoy legal privilege, so disclosing the contents of such negotiations in proceedings may result in a disciplinary complaint. In addition, the newly enacted Article 6:193o CC contains specific legislation for settlements in private competition law-related cases.

Article 6:193o(1) CC stipulates that the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the competition law infringement inflicted on the injured party. This means that the injured party has no recourse against infringers that were not involved in the settlement for the part of the share of the settling infringer that has not been paid out under the settlement (e.g., if the infringer's share was X, and he or she settles for X minus 20, the injured party cannot take recourse on the other infringers for the remaining 20).

Accordingly, under Article 6:193o(2) CC, the co-debtors who are not involved in the settlement cannot have recourse against the settling infringer. This protects the settling infringer so that as a result of the settlement he or she can no longer be successfully sued by either the injured party or the co-debtors. This generally incentivises infringers to settle. For the settling party one risk remains, which is that he or she can be held liable for the damage caused by the co-debtors in cases where the co-debtors are unable to pay the remaining damages (for example, in cases of bankruptcy). To eliminate this final risk, Article 6:193o(4) CC provides for a possibility for the settling infringer to exclude this possibility in its settlement with the injured party.

Settlement agreements are rarely embodied in a court order. However, one or more associations or foundations that, according to their articles of association, protect and promote the interests of persons who have suffered damage as a result of the acts of another party, and that 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 declare the settlement agreement generally binding on an opt-out basis (the Collective Settlement of Mass Claims Act (WCAM)). The court must consider a number of aspects, such as whether the compensation is reasonable, and whether 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. For this test, it is relevant whether the position of the non-active claimants (claimants who did not take part in the collective redress actions leading to the settlement) is sufficiently safeguarded.[85]

The court's order declaring a settlement generally binding can be applied in international cases.[86] In principle, a decision by the court to declare a settlement generally binding should also have effect against foreign claimants, at least in so far as they are domiciled in a Member

85 The Amsterdam Court of Appeal rejected a settlement proposal on this basis. After adjustments were made, the Court approved the second amended and restated settlement agreement and declared it binding on all investors that would fall within the scope of the settlement class: Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Fortis/Ageas*). More information and the English translation of the ruling can be found at www.forsettlement.com.

86 Amsterdam Court of Appeal, 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (*Shell*) and Amsterdam Court of Appeal, 12 November 2010, ECLI:NL:GHAMS:2010:BO3908 (*Converium*).

State of the EU or the European Free Trade Association,[87] although one cannot exclude the risk that a foreign court (outside or within the EU and the European Free Trade Association) will consider the Dutch opt out a breach under public policy rules (Brussels I recast).

The WAMCA (see Section II.ii) also provides for the possibility to have a settlement declared generally binding when it is reached during the collective proceedings. In that case, foreign claimants have to opt in to be represented in the proceedings, and they have the opportunity to opt out after the settlement is declared generally binding.

XIII ARBITRATION

Antitrust claims may be arbitrated if the parties agree. The rules for arbitration are provided in Articles 1020 to 1076 of the CCP. The confidential nature of arbitration proceedings may make arbitration preferable, particularly for defendants in antitrust claims. Another advantage is that arbitration can take less time compared to civil proceedings given the caseload of Dutch courts.

Under the CJEU's judgment in *Eco Swiss v. Benetton*,[88] a decision by arbitrators that is contrary to Article 101 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 a failure to observe national rules of public policy; according to the CJEU, Article 101 TFEU falls within that scope. It is therefore undisputed that arbitrators must apply provisions such as Article 101 TFEU to disputes before them even when the interested party has not relied on those rules. However, there is some debate within Dutch legal literature about whether this obliges arbitrators to raise, on their own motion, issues of European competition law where examining that issue would oblige them to abandon the passive role assigned to them or the scope of their arbitration task. According to the CJEU in *Van Schijndel*, 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.[89] 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.

The validity of arbitration clauses is discussed in Section III.

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.[90] Article 6:193m(2 and 4) CC contain exemptions to this principle for small or medium-sized enterprises and immunity recipients respectively. Assuming that a joint and several liability of each cartel member for the entire damage 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 may seek contributions from the other cartel members. Contributions can only be sought for each co-cartelist's share

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

88 CJEU, 1 June 1999, C-126/97.

89 CJEU, 14 December 1995, C-430/93 and C-431/93.

90 Article 6:102 of the CC.

in the damages.[91] Each party's share in the damages is determined proportionately to their contribution to the damages.[92] The courts have not yet clarified how they will determine the size of each party's contribution in cartel damages claims cases.

Contribution proceedings may be started separately or through a motion in the main proceedings that must be raised before or with the submission of the statement of defence.[93] 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 having binding legal effect against the parties in those proceedings.[94] 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[95] or can – in exceptional circumstances – be forced to join the main proceedings.[96]

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 begins on the date the claimant seeking contribution paid more than its share of the damages. This means that the limitation period may begin many years after the fact and after the claimant was first sued for damages.[97]

XV FUTURE DEVELOPMENTS AND OUTLOOK

After the implementation of the EU Damages Directive, the Netherlands is still a preferred venue for claims for private enforcement of European competition law. Many follow-on cartel damages claims have already been submitted to the Dutch courts, and more claims are likely to follow. The Netherlands is fiercely competing with England and Wales and Germany as the preferred forum for bringing this type of claim. This likely originates from the advantages of the Dutch system and practice, including:

a the relatively low costs of the proceedings and low adverse cost orders, which are not based on the actual costs incurred, but on a court-approved scale of costs;

b the broad expertise and pragmatic approach of the Dutch judiciary;

c well-developed possibilities to obtain disclosure;

d the fact that claim vehicles (and their funding) as such are not regulated, and hence generally face few barriers in starting proceedings based on assignment of claims or representation by mandate; and

e in addition, the number of private competition law-related claims is likely to increase as a result of the recently introduced WAMCA.

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

92 Article 6:102 of the CC.

93 Article 210 of the CCP.

94 Article 215 of the CCP.

95 Article 214 of the CCP.

96 Article 118 of the CCP.

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

Appendix 1

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Rick Cornelissen is a partner at Houthoff. He specialises in competition litigation and commercial litigation, with a particular focus on cartel damages claims, claims for access to distribution networks and disputes regarding contract terminations. Rick also has extensive experience in advising, negotiating and litigating on a wide variety of other matters regarding distribution, agency and e-commerce (with a focus on automotive and other high-end consumer goods). He is a lecturer on several courses and the author of several publications on the subject of competition litigation. Rick is a member of the Dutch Associations for Competition Law, European Law and Distribution Franchise and Agency Law.

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Weyer VerLoren van Themaat has been assisting international clients for over 25 years in complex cases relating to merger control and cartel defence litigation, and leads Houthoff's competition practice group. He was resident partner at Houthoff's Brussels office from 1997 to 2005, after which he returned to Amsterdam. Weyer was chair of Lex Mundi's antitrust competition and trade group from 2014 to 2016, and is a non-governmental adviser to the ICN on behalf of the Dutch Authority for Consumers and Markets (ACM). He publishes and speaks regularly on competition law-related subjects. Weyer is highly recommended in, inter alia, *Chambers Europe*, *The Legal 500*, *Who's Who Legal* and *Best Lawyers*. He is 'praised by his clients for his expertise in cartel cases and excellent litigation skills'.

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