THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Editor
Ilene Knable Gotts

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. 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 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 is undertaking a comprehensive review and is now considering the implementation of significant changes

to its private enforcement law. The most significant developments, however, 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 calculations. 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 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 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 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 (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. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly fora – 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., 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 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 a 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 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, 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; 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
Wachtell, Lipton, Rosen & Katz
New York
February 2018

Chapter 17

NETHERLANDS

Rick Cornelissen, Naomi Dempsey, 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, follow-on damages claims have been brought before the Dutch courts with regard to *Gas-Insulated Switchgear*,[2] *Bitumen*,[3] *Airfreight*,[4] *Sodium Chlorate*,[5] *Candle Waxes*,[6] *Elevators and Escalators*,[7] *Paraffin Wax*,[8] *Pre-stressing Steel*,[9] *CRT*[10] and *Trucks*.[11] In 2017, several (interim) judgments were published in the Gas Insulated *Switchgear*,[12] *Airfreight*,[13] *Sodium Chlorate*[14] and *CRT*[15] matters. Furthermore, several cartel damages cases regarding *Trucks* have been brought before different district courts. So far, no judgments have been rendered in these cases.

Apart from the above-mentioned pending cases, a considerable number of interest groups have announced their intention to initiate cartel damages proceedings in the Netherlands.

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1 Rick Cornelissen is counsel, Naomi Dempsey and Paul Sluijter are senior associates and Albert Knigge and Weyer VerLoren van Themaat are partners at Houthoff.

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 Commission Decision, 5 December 2014, Case COMP/39437.

11 Commission Decisions, 19 July 2016 and 27 September 2017, Case COMP/39824.

12 Gelderland District Court, 29 March 2017, ECLI:NL:RBGEL:2017:1724.

13 Amsterdam District Court, 12 April 2017, ECLI:NL:RBAMS:2017:2841, Amsterdam District Court, 2 August 2017, ECLI:NL:RBAMS:2017:5512, Amsterdam District Court 2 August 2017, Case No. C/13/562256 and C/13/604492 (unpublished), Amsterdam District Court, 13 September 2017, ECLI:NL:RBAMS:2017:6607.

14 Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166.

15 Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6331, Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6332, Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6333. Note that these judgments in the *CRT* proceedings have not been published.

II THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for cartel damages claims is the Dutch Civil Code (CC),[16] and the specific competition legislation prescribed in the Competition Act (CA), the Treaty on the Functioning of the European Union (TFEU) and the Dutch Code of Civil Procedure (CCP). Most cartel damages claims are based on an alleged unlawful act conducted by the alleged cartelist. To succeed, a claimant must establish that the defendant has committed an unlawful act that is attributable to it and that caused the claimant to suffer damage. 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 are aimed at preventing the damage suffered by the claimant.[17]

A relatively limited number of national substantive and procedural rules have been amended and added to the CC and CCP respectively by the Implementing Act Directive Private Enforcement of Competition Law (Implementing Act)[18] in order to implement the Directive on antitrust damages actions adopted by the Council of the European Union on 26 November 2014 (EU Damages Directive). The new statutory provisions are applicable to damages claims relating to infringements of EU competition law only, and not yet to damages claims relating to infringements solely of national competition law. A draft bill, pursuant to which the scope of the Implementing Act will be broadened, will probably be submitted shortly.[19] Moreover, pursuant to Article III of the Implementing Act, the added statutory provisions regarding the term and commencement date of the prescription period as well as on disclosure of evidence are not applicable to actions for damages of which the Dutch court was seized prior to 26 December 2014.

ii Limitation

The Implementing Act provides for a specific prescription period for competition law-related claims for damages (Article 6:193s CC). This provision stipulates:

a a five-year limitation period, which will start to run the day following the day on which the infringement has ceased and the claimant has become aware, or can reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to it and the identity of the infringer; and

b a 20-year limitation period, which will start to run the day following the day on which the infringement has ceased.

16 Article 6:162 of the CC embodies the obligation to repair damage in the 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 the case of an infringement of the 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 compliance with an obligation is a non-performance of the debtor and makes him or her liable for the damages.

17 Article 6:163 of the CC. More on this can be found in Section IV.

18 The Implementing Act came into force on 10 February 2017.

19 www.internetconsultatie.nl/wijzigingmarktenoverheid.

To illustrate: regular claims for damages become time-barred five years after the claimant has become aware of the damages and the person liable for the damages, provided that no claims can be brought 20 years after the damage-causing event (Article 3:310 CC). The Explanatory Memorandum to the Implementing Act (Explanatory Memorandum) seems to indicate that there is no reason to deviate from the standard relative and absolute limitation periods (five or 20 years, respectively) in Article 6:193s CC, as Article 10 Paragraph 3 of the EU Damages Directive holds that Member States will ensure that the limitation periods for bringing actions for damages are 'at least' five years. However, other noteworthy differences between Article 3:310 CC and the new Article 6:193s CC are that the latter requires that the infringement has ceased before a limitation period starts running and the fact that the claimant can reasonably be expected to have become aware of the infringement is sufficient to trigger a limitation period as well (instead of 'has become aware').

Hereinafter, relevant case law preceding the Implementing Act is discussed. This case law is still relevant for the interpretation of the concept of 'has become aware', which has remained applicable to actions for damages of which the Dutch court was seized prior to 26 December 2014. Pursuant to Article 3:310 CC, for the short limitation period to start running the claimant must be aware of the damage and the 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 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 electro technical fittings, against the individual directors of FEG, a Dutch association in the electro technical fittings sector, was time-barred.[20] The Court ruled as irrelevant the fact that the European Commission had only given its decision that FEG had breached Article 101 of the TFEU in 1999:[21] 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, in 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 had participated.[22] 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.

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

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

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

Although Spanish, Finnish, Swedish, Czech, Slovak and Austrian law is applicable to the claims, in one of the *Sodium Chlorate* cases,[23] the Amsterdam District Court ruled that it is up to claimants to explain what essential information was included in the summary of the non-confidential version of the European Commission's decision, but not in the press release, and why such information means that the required awareness did not exist when the press release was issued. Furthermore, the ability to formulate a claim during a period of one year may suffice for the determination that such claim is time-barred without violation of the relevant EU law principle of effectiveness.

Finally, the newly enacted Article 6:193t CC provides for two grounds for extension of the limitation period for future cartel damages claims. The first ground regards an extension between the parties involved during a consensual dispute resolution process (Paragraph 1 of Article 6:193t CC). In the case of mediation, such process ends when one of the parties or the mediator has notified in writing to the other party that mediation has ended or because pending the mediation no actions have been performed during a period of six months. The second ground for an extension relates to a competition authority performing an act within the context of an investigation or proceedings with regard to the infringement of competition law (Paragraph 2 of Article 6:193t CC). The extension commences on the day following the day that the limitation period has lapsed. The duration of the extension is equal to the period required for establishing the final infringement decision or alternatively terminating the investigation or proceedings with regard to the infringement of competition law, extended by one year.

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.[24] Foreign parties are not exempted and do not enjoy any immunity in that regard.

With regard to cartel damages claims arising from acts committed 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).[25] 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 in relation to acts committed after 11 January 2009, the UAA does not contain a provision enabling the claimant to choose the applicability of only the law of the court seized when the distortion of competition has also considerably affected competition in that country.

23 Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166.

24 Article 6 of the CA.

25 As confirmed by the Amsterdam District Court, 12 April 2017, ECLI:NL:RBAMS:2017:2841, *Airfreight*.

In 2014, the District Court of The Hague laid down an interim judgment in *Paraffin Wax*,[26] finding that the place where the damage was suffered according to the UAA (in line with the above) was the production location of the different undertakings involved, hence leading to the applicability of Italian, Swedish, Finnish, German and Norwegian law. The Court proposed that the parties would agree on a choice of law,[27] but it follows from a subsequent interim judgment that the parties did not do so.[28] In one of the *Airfreight* cases, the Amsterdam District Court ruled that the place where the airfreight service took place cannot be determined by the criterion 'the territory where the competitive act affected the competitive relationships' or by any 'production location' as in the *Paraffin Wax* case. The Court will likely refer prejudicial questions to the Supreme Court in early 2018 regarding the interpretation of Article 4(1) UAA for determining the applicable law when global services rather than products are involved.[29]

The law that pursuant to Article 4(1) UAA governs claims not only determines the grounds for and extent of the liability, but it also determines the rules on (suspension and tolling of) limitation periods. For example, the District Court of Limburg decided in *Pre-stressing Steel* that under the German law that was applicable to the claims, most claims had expired.[30] A similar decision followed in *Sodium Chlorate* in 2017: under a few of the eight law systems applicable, the claims had expired.[31]

ii Jurisdiction

Main rule: defendant's domicile

As a main rule, Dutch courts have jurisdiction to hear cartel damages claims that are submitted against (legal) persons domiciled in the Netherlands.[32] A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business in the Netherlands.[33]

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) and almost the same as its Dutch equivalent, Article 7(1) of the CCP[34] – a claim for cartel damages brought against a

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

27 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.

28 The Hague District Court, 21 September 2016, ECLI:NL:RBDHA:2016:11305.

29 Amsterdam District Court 2 August 2017, Case No. C/13/562256 and C/13/604492 (unpublished).

30 Limburg District Court, 16 November 2016, ECLI:NL:RBLIM:2016:9897.

31 Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166, also applying the laws of the countries of the production locations of the undertakings involved.

32 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.

33 Article 63 Brussels I bis.

34 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.

company that is not domiciled in the Netherlands may still be brought before the Dutch courts, but only if this claim is sufficiently 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 (CJEU) rendered a landmark decision[35] in the *Hydrogen Peroxide* (or *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 CJEU 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, such as the *Paraffin Wax*, the *Sodium Chlorate* and *Pre-stressing Steel* cases. [36]

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 *Elevators and Escalators* cartel.[37] 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 that should each be assessed in accordance with the various national laws.[38] Contrary to the aforementioned case, the Midden-Nederland District Court found the damages claims against various other defendants based on the *Elevators and Escalators* 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 manufacturers and was based on Article 6:166 CC (group liability arising from a wrongful act).[39]

On 7 January 2015, the District Court of Amsterdam[40] in the *Airfreight* cartel damages proceedings 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.

The Amsterdam District Court also ruled[41] 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

35 CJEU 21 May 2015, C-352/13 (*Hydrogen Peroxide* or *CDC*).

36 The Hague District Court, 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*Paraffin Wax*), 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.

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

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

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

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

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

summons was sent, was confronted with claims of shippers (claiming that surcharges were passed on to them) and claims of freight forwarders (claiming they suffered damage (meaning that surcharges were not passed on by them)). Thus, KLM would run the risk of being obliged to pay the same damages twice.

Finally, the Oost-Brabant District Court accepted jurisdiction regarding all except one of the defendants in the *CRT* cases, and thereby even further extended the criteria of the above-mentioned CJEU *Hydrogen Peroxide* case, as not all defendants were addressed in a prior European Commission decision as participants in a single and continuous infringement.[42] According to the Court, even though the CJEU attributed decisive meaning to those circumstances, this does not mean that the required connection by definition cannot exist in other circumstances. The Court considered that the defendants that were not addressed in the operative part of the European Commission decision were nevertheless mentioned as 'undertakings subject to proceedings' elsewhere in the decision. They had not provided indications that they determined their behaviour on the market independently from their parent companies and the claimant had sufficiently explained the business it conducted with each subsidiary. The Court rejected jurisdiction with regard to one defendant that was not mentioned as an 'undertaking subject to proceedings' in the European Commission decision.

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.[43] In the same *Hydrogen Peroxide*[44] 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 the place in which the cartel was definitively concluded; 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 before the courts of the place where its own registered office is located.[45] 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.[46]

Jurisdiction and arbitration clauses

The CJEU decided in *Hydrogen Peroxide* that in cartel damages cases, account should be taken of jurisdiction clauses[47] 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) or Article 6(1), or both, of Brussels I (old). However, such jurisdiction clauses only cover

42 Oost-Brabant District Court, 29 June 2016, ECLI:NL:RBOBR:2016:3484. Almost similar decisions were rendered in other *CRT* cases before the same court with different claimants but many similar defendants (decisions of 29 November 2017, not published).

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

44 CJEU 21 May 2015, C-352/13 (*Hydrogen Peroxide* or *CDC*).

45 The non-cartel related *Universal/Schilling* decision (CJEU 16 June 2016, Case C-12/15) is also relevant in this regard, in which it was decided that: 'In the context of the determination of jurisdiction […], the court seised must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant.'

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

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

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,[48] the 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.[49]

IV STANDING

To bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Dutch associations or foundations that, according to their articles of association, promote and protect the interests of others affected by a cartel may, subject to certain requirements, bring a claim in the interests of these others (a 'collective claim') as well, but may not yet claim damages on their behalf.[50] On 16 November 2016, a draft bill regarding collective damages claims was submitted to the Dutch parliament pursuant to which the latter limitation will be abolished.[51] If this draft bill is enacted, the road for collective cartel damages actions by Dutch associations or foundations will be opened. In practice, several (follow-on) cartel damages claims in the Netherlands have already been initiated by (special purpose) claim vehicles (in the form of Dutch or foreign legal entities, such as limited companies or foundations). This is possible under current Dutch law if the actual claimants have assigned their claims to such claim vehicles in a legally valid way or have mandated such a claim vehicle.

On 2 August 2017 and 13 September 2017, the Amsterdam District Court rendered two important judgments in the *Airfreight* follow-on proceedings brought by SCC[52] and Equilib, respectively.[53] The Court confirmed that the burden of proof for a valid assignment is on the claimant. However, it also decided that this in principle sufficiently proves the validity of the assignment if the submitted documentation contains the assignment agreement (title) and the assignment deed, and it is clear that the documentation was signed or provided by the assignor unless the defendants submit specific indications to the contrary. The Court held that in these particular cases (most) assignments were valid and were neither in breach of the prohibition on fiduciary transfers nor in breach of the assignment formalities.[54]

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

49 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.

50 More on this can be found in Section VII.

51 Draft bill of 15 November 2016 (No. 34.608).

52 Amsterdam District Court, 2 August 2017, ECLI:NL:RBAMS:2017:5512.

53 Amsterdam District Court, 13 September 2017, ECLI:NL:RBAMS:2017:6607.

54 A comparable decision was rendered in a *Sodium Chlorate case* before the same court (Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166). In the *Airfreight* cases, the defendants have lodged appeals against the District Court's judgments. The expectation is that these appeals will be expedited during the course of 2018.

In general it is inferred from the *Manfredi* and *Kone* decisions of the CJEU and an underlying principle of Dutch law on damages that indirect purchasers have standing to claim cartel damages, which has been confirmed in the Explanatory Memorandum.

Again in 2017, the Oost-Brabant District Court ruled in one of the *CRT* cases[55] that although it understands claimants' position as such that their claims are based on Brazilian tort law and not directly on Article 101 of the TFEU, it considers for the sake of completeness that the scope of the European Commission decision and EU law is limited. The CJEU case law in which it is stated that 'any individual' is able to claim damages was not meant to also include damage caused by transactions on non-EEA markets. The Court ruled that the Article 101(1) TFEU prohibition is limited to infringements insofar that these negatively influence trade between EEA Member States.

V THE PROCESS OF DISCOVERY

There is no pretrial discovery system in Dutch law. Parties can, however, request the disclosure of information judicially and extrajudicially. In addition, it is possible for a party to assess its case up front 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 is discussed hereafter.

The Dutch courts have general discretionary power to order disclosure from either or both of the parties,[56] including the disclosure of books and records.[57] This power covers both a demand for clarification of certain statements and the submission of specific documents. A party may refuse to cooperate with such a demand, but the court may draw adverse inferences from such a refusal unless the party can show he or she has sufficiently compelling reasons for his or her refusal. In principle, parties also have the possibility to request documents under Dutch administrative law (see below).

i Parties' options to obtain disclosure

While parties may request the court to apply its above-mentioned discretionary powers to order another (third) party to disclose certain information or documents, the court is not obliged to grant such a request. Instead, Article 843a CCP provides parties a special right to obtain disclosure. By way of a claim under Article 843a 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.

For a claim under Article 843a CCP to be successful, the claimant must first establish that it has 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 to enable both the court

55 Oost-Brabant District Court, 29 November 2017, ECLI:NL:RBOBR:2017:6331. Note that this judgment in the *CRT* proceedings has not been published.

56 Article 22 of the CCP.

57 Article 162 of the CCP.

and the other party to be able to identify the requested information and to prevent 'fishing expeditions'. Finally, 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 of evidence in civil proceedings. The newly enacted Article 844 up to and including Article 850 CPP provide for the required deviations from and additions to Article 843a CCP as a subsection regarding the disclosure of information in the context of cartel damages claims in order to transpose Chapter II of the EU Damages Directive into Dutch civil law. These newly enacted articles of the CCP are applicable to actions for damages of which the Dutch court was seized after 26 December 2014.

According to the Explanatory Memorandum, Article 843a CCP provides for more extensive access to evidence in cartel damages proceedings than required by Article 5 of the EU Damages Directive, except for one point: a claim under Article 843a 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).[58] Article 5 of the EU Damages Directive precludes the latter ground for refusal. Therefore, the newly enacted Article 845 CCP provides for a deviation of this ground for refusal and stipulates that disclosure of information can be refused in the event of compelling reasons. This means that with regard to cartel damages claims, disclosure cannot be refused on the basis that a fair and proper administration of justice can be sufficiently secured without disclosure.

In several proceedings regarding the *Airfreight* cartel, both claimants and defendants requested the disclosure of documents, such as the un-redacted 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.[59] 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 *Paraffin Wax* cartel, one of the defendants requested disclosure of the settlement agreement between the claimant and one of the (former) defendants in order to obtain information about the exact settlement amount. The Hague District Court rejected this request because the Court did not find this information essentially relevant at this stage of the proceedings. Moreover, the Court ruled that even if this information would ever become relevant, the Court could order the claimant to disclose the settlement amount without having to disclose the entire agreement.[60]

In the same case, the District Court of The Hague ruled on other (extensive) disclosure orders submitted by defendants in the light of a passing-on defence. Despite the fact that for a passing-on defence the burden of proof is on the defendant, the Court ruled that it should not be impossible or excessively difficult for defendants to set up a defence against the claims. According to the Court, from the equality of arms perspective the claimant had to disclose information required for the establishment and calculation of a possible passed-on

58 For more on this aspect regarding privilege, see Section XI.

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

60 The Hague District Court, 21 September 2016, ECLI:NL:RBDHA:2016:11305.

overcharge (e.g., invoices, supply contracts, sales data, etc.) to defendants as such information was primarily in the custody of the claimant and as it was foreseeable for the claimant that the defendants would invoke a passing-on defence.[61]

In the field of 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 Trade and Industry Appeals Tribunal, however, has held in a judgment that the Act establishing the ACM (of 28 February 2013) has priority over the working of the PAA.[62] This seems to imply that the ACM has additional grounds to refuse access to documents. However, the ACM does need to examine whether the information is obtained in the exercising of its functioning according to the Act establishing the ACM. If the information is obtained outside this authority, the PPA is applicable.

Secondly, the Trade and Industry Appeals Tribunal[63] held that the right of 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 provides for parties' 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.[64] (Opposing) parties can also be brought to the witness stand, but the strength of their testimony is limited when proving their own statements. Witnesses will be examined by a judge, and Dutch law does not contain a right to cross-examination. If a party or an opposing party called as a witness refuses to answer questions, the court may draw adverse inferences of such refusal.[65]

Finally, it is also possible to request a preliminary examination of a witness.[66] 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 *Airfreight* cases) by the

61 The Hague District Court, 21 September 2016, ECLI:NL:RBDHA:2016:11305.

62 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.

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

64 Article 165 of the CCP.

65 Article 164 of the CCP.

66 Articles 186–193 of the CCP.

claimant, SCC, for a preliminary examination of certain witnesses – 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.[67] This decision was upheld by the Amsterdam Court of Appeal by its decision of 22 September 2015.[68]

VI USE OF EXPERTS

Dutch procedural law 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.[69] 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 appoint an independent expert. Courts are not obliged to appoint experts: it is at the court's discretion whether it deems such an appointment necessary for its decision on the case.[70]

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.[71]

VII CLASS ACTIONS

Since July 1994, a Dutch association or foundation 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, a declaratory judgment or even specific performance. They do not, however, have standing to claim damages yet.[72] On 16 November 2016, a draft bill was submitted to the Dutch parliament introducing collective claims for damages in the Netherlands. If this draft bill is enacted, the road for collective cartel damages actions by Dutch associations or foundations will be opened.[73]

Pursuant to Article 3:305a CC, the interests that an association or foundation aims to promote and protect must be sufficiently similar (commonality requirement) and thereby suitable to be represented and decided upon collectively. Usually, collective actions are aimed at obtaining a declaration under law that the defendant has, through certain actions, acted unlawfully. 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

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

68 Not published.

69 Article 152 of the CCP.

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

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

72 Article 3:305a of the CC.

73 Explanatory Memorandum, legislative proposal collective damage claim, 16 November 2016, which can be found at www.rijksoverheid.nl/documenten/kamerstukken/2016/11/16/memorie-van-toelichting-afwikkeling-van-massaschade-in-een-collectieve-actie.

proceedings, the courts will take such a decision on, for example, the unlawfulness of certain actions as their point of departure.[74] In addition, such a decision in a collective action can also be a stepping stone for a collective settlement that can be declared binding for an entire group of claimants (see Section XII). Probably due to the inability under Dutch law to claim damages through class actions, the collective redress action claiming injunctive or declaratory relief, a declaratory judgment or specific performance has hardly been used in antitrust cases: however, it has been announced due to the legislative proposal allowing collective damages claims. Instead, the most popular model thus far in the Netherlands entails the assignment of individual claims to a legal entity acting as a 'claim vehicle'. Dutch courts generally accept the standing of such *ad hoc* claim vehicles. Third-party funding generally is available and permitted in the Netherlands, but is not (explicitly) regulated.

Case law demonstrates that a 'claim vehicle' that has been assigned individual claims still has a far-reaching obligation to substantiate each and every individual claim (e.g., by submitting the assignment agreements, the relevant deeds of assignment and additional relevant assignment documentation).[75]

VIII CALCULATING DAMAGES

i Cognisable damages

Generally, the newly enacted Article 6:193l holds that a cartel that forms an infringement of EU competition law is presumed to cause damage. 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 suffered.[76] 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. In other words, the basic principle of the Dutch law of damages is full compensation, but no more (in conformity with the EU Damages Directive).

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.[77] 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 in absence of the 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 in an abstract way, thereby not taking certain actual circumstances of a case into account. Whether the court will choose to undertake an actual damage calculation or an abstract calculation depends on

74 Supreme Court, 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB cs/World Online cs*).

75 The Hague District Court, 22 September 2016, ECLI:NL:RBDHA:2016:11305 and Midden-Nederland District Court, 20 July 2016, ECLI:NL:RBMNE:2016:4284, Amsterdam District Court, 2 August 2017, ECLI:NL:RBAMS:2017:5512 and Amsterdam District Court, 13 September 2017, ECLI:NL:RBAMS:2017:6607.

76 Article 6:96 of the CC.

77 Article 6:97 of the CC.

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 *Airfreight* cartel-related claims) 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.[78] Pursuant to the newly enacted Article 44a Paragraph 3 CCP, the national court is entitled to request guidance from the ACM in determining the extent of the damage.

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.[79] To date, this power has been used only sparingly, mainly in intellectual property disputes. Interestingly, however, the Gelderland District Court decided in 2015 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).[80] On 29 March 2017, the Gelderland District Court granted a damages award in one of the *Gas Insulated Switchgear* cases.[81] Based on an expert report estimating the prices that would have been paid if there had not been a competition law infringement, the claimant (TenneT) substantiated that the average overcharge amounted to €23.1 million. The defendant (ABB) contested this amount with reference to its profit margins. The Court ruled, however, that ABB's line of reasoning, focusing on its profits, was irrelevant for the assessment of the overcharge and, due to the absence of evidence in rebuttal, the Court granted TenneT the claimed €23.1 million in damages.

iii Statutory interest

A claimant is entitled to compound statutory interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered until the damages have been paid).[82] 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 statutory interest rate for a delay in receiving monetary compensation.[83] The statutory interest rate is determined by the government. Currently, the statutory interest rate for commercial transactions is 8 per cent and for non-commercial transactions 2 per cent.

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

79 Article 6:104 of the CC.

80 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).

81 Gelderland District Court, 29 March 2017, ECLI:NL:RBGEL:2017:1724.

82 Article 6:119 of the CC.

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

iv Legal costs

Unlike in, for example, the United Kingdom, the amount awarded for legal costs in the Netherlands is 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.[84] Awards for legal costs will cover the full amount of court fees,[85] 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.[86] 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

The Implementing Act provides for an explicit confirmation of a party's right to invoke a pass-on defence in Article 6:193p. Before the Implementing Act, only limited experience with the pass-on defence had been gained in the Netherlands. In response to the European Commission's 2005 Green Paper on Damages Actions for breach of the European Commission antitrust rules,[87] the government indicated that the pass-on defence was already available in the Netherlands. Nevertheless, there was considerable debate in legal literature about whether the pass-on defence was, or should have been, 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 were in principle able to raise this defence in any case. Most interesting is that the Supreme Court in its judgment of 8 July 2016[88] held that although the EU Damages Directive did not cover the case at hand in a temporal sense and the assessment framework was therefore formed by Dutch law, with due observance of the general principle of equality and the principle of effectiveness, it was desirable to interpret that law such that the outcomes are compatible with the Directive and the Dutch legislative (implementing) proposal. In addition, 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 an infringement of competition law is reduced in proportion to the amount of that loss the injured party has passed on to third parties.

Finally, the Supreme Court 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 provides for the prevention of overcompensation, such reasonableness test will presumably have a limited

84 Article 237 of the CCP.

85 Currently, the highest court fee at first instance is €3,894.

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

87 COM(2005) 672, 19 December 2005.

88 Supreme Court, 8 July, ECLI:NL:HR:2016:1483.

scope in future cartel damages cases. The Supreme Court upheld the judgment of the Court of Appeal to refer the claim for follow-up proceedings to determine the amount of damages before the Gelderland District Court.

On 29 March 2017, the Gelderland District Court ultimately rejected the defendant's pass-on defence. Although the Court found that the claimant had likely passed on the overcharge to its direct customers, who, in turn, passed on the overcharge to the general public (i.e., the end customers), it awarded the entire overcharge (€23.1 million) to the claimant taking into consideration that:

a it was very unlikely that the general public would initiate legal proceedings against the defendant;

b the damages awarded to the claimant were likely to benefit the general public, since the claimant is fully owned by the state and therefore damages paid to the claimant were assumed to ultimately benefit the general public as well; and

c surprisingly, the avoided fine resulting from the defendant's leniency application was much higher than the payable amount of damages.[89]

X 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. Pursuant to Article 16 of Council Regulation (EC) 1/2003, European Commission decisions on agreements, 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 given. For example, in *Gas-Insulated Switchgear*, 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.[90] 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) during 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.[91]

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 *Elevators and Escalators* cartel damages claim case. The Court rejected

89 Gelderland District Court, 29 March 2017, ECLI:NL:RBGEL:2017:1724.

90 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.

91 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766. The court of cassation is currently handling the appeal.

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.[92]

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

ii 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.[93] A cartel infringement established by a competition authority must therefore be transposed into national law on damages. This is particularly relevant with regard to (alleged) parental liability. This starting point has been recognised by the Dutch legislator as well as by the Dutch court.

In a judgment related to the *Elevators and Escalators* cartel, the Midden-Nederland District Court held that the parental liability concept or single economic unit doctrine under competition law cannot equally be applied under Dutch civil law (a case initiated by claim vehicle East West Debt).[94] With reference to *Manfredi*, the Court ruled – in short – that the CJEU's concept of a single economic unit cannot be applied to determine the joint and several liability of a parent company in a civil claim for cartel damages: Dutch law should be applied to assess the topic of possible parental liability. For the liability of an entity under the Dutch law on damages, it is required that such entity actually committed a wrongful act (for example, by being actually involved in the cartel infringement). It remains to be seen how this topic will further develop in European and national case law now that Article 6:193k CC has been enacted. This article – following Article 2 paragraph 2 of the EU Damages Directive – defines the infringer within the meaning of the CC subsection on cartel damages claims as an undertaking or association of undertakings that has committed an infringement of competition law. The Explanatory Memorandum indicates that the authentic interpretation of the concepts of undertaking and association of undertakings is preserved for the CJEU. However, the key question is whether the interpretation of these concepts from a tort law perspective is still reserved by the national court.

iii Stay of proceedings until a cartel infringement decision is irrevocable

In 2013, the Amsterdam Court of Appeal decided an appeal of a decision to stay the proceedings in one of the *Airfreight* cartel damages cases pending the outcome of the

92 Midden-Nederland District Court, 13 march 2013, ECLI:NL:RBMNE:2013:CA1922.

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

94 Midden-Nederland District Court, 20 July 2016, ECLI:NL:RBMNE:2016:4284. See also the Hague District Court, 22 September 2016, ECLI:NL:RBDHA:2016:11305.

European appeals of the airlines against the European Commission decision.[95] 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. This now seems to be the general assessment framework. 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.[96]

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 *Airfreight* cartel-related claim initiated by SCC). According to the Court, at that 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.[97] As the defendants had already submitted a statement of defence in the proceedings against claimant Equilib, the Court ordered that Equilib had to provide specific information about the alleged flights to establish the applicable law (and, if possible, regarding limitation and assignments).

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.[98] 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, 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 CJEU.[99]

95 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.

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

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

98 See Section V.ii.

99 CJEU, 14 September 2010, Case C-550/07 P.

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.[100]

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 attorneys, except with regard to (possible) infringements of EU competition law investigated by the European Commission.

XII SETTLEMENT PROCEDURES

In principle, general rules of contract law apply for adopting or imposing settlements. Settlement negotiations between lawyers enjoy legal privilege, meaning that to disclose 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 competition law-related cases, which is discussed below. Finally, a specific collective settlement mechanism is also described below.

Article 6:193o CC provides both the alleged infringer as well as the claimant with more guidance with regard to the influence of a settlement on civil proceedings than the general rules of Dutch contract law. Article 6:193o sub 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 infringement of competition law inflicted upon the injured party. This means that the injured party cannot take recourse against the 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). This is a deviation from the general provisions on settlements in the CC,[101] in which it is stated that even though as a general rule a payment from a settlement influences a claim in favour of the debtors, the remaining damages can still be recovered from the debtors who were not involved in the settlement unless the claimant performs an additional legal act, being that the claimant commits him or herself towards the co-debtors to reduce his or her claim on these co-debtors with the amount he or she could have claimed. The judgment of the District Court of The Hague, in one of the *Paraffin Wax* cases,[102] is an example of how the mechanism for proportionate share reduction after a settlement was applied before the new Article 6:193o CC came into force.

Accordingly, and also in deviation from the general provisions on settlements in the CC,[103] under Article 6:193o sub 2 CC, the co-debtors who are not involved in the settlement cannot have recourse against the settling infringer, in order to secure the settling infringer, 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 means there can be a larger incentive for infringers to settle. For the settling party one risk remains, being that he or she can be held liable for the damage caused by the co-debtors in cases where these co-debtors are not able to

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

101 Article 6:14 of the CC.

102 The Hague District Court, 21 September 2016, ECLI:NL:RBDHA:2016:11305.

103 Article 6:14 of the CC.

pay the remaining damages (for example, in cases of bankruptcy). To eliminate this final risk, Article 6:193o sub 4 CC provides for a possibility for the settling infringer to exclude this possibility in its settlement with the injured party.

Only rarely are settlement agreements embodied in a court order. In certain circumstances, however, parties to a settlement agreement may choose to request the Amsterdam Court of Appeal to declare its terms universally binding under the Collective Settlement of Mass Claims Act (WCAM). Under the WCAM, 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. Such a binding settlement aims to reach finality for all parties in dispute. Basically, one or more associations or foundations that, according to their articles of association, protect and promote the interests of persons who have suffered damage due to 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 declares the settlement agreement generally binding. 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.[104] 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.[105]

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.[106] Such an opted-out individual can, even if he or she has chosen not to be involved with the settlement, profit from interruption of the limitation periods reached by actions connected to the collective settlement, including the Court of Appeal proceeding.[107] 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.[108]

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 associations or foundations that promote and protect certain interests of individuals can be deemed sufficiently representative for foreign

104 The Amsterdam Court of Appeal recently rejected a settlement proposal on this basis. Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257. Parties proposing the settlement have recently submitted a new proposal. Developments in this case can be found at www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV.

105 Article 7:907 of the CC.

106 Article 7:908 of the CC.

107 Supreme Court 19 May 2017, ECLI:NL:HR:2017:936 (*Dexia*).

108 Article 1017 of the CCP.

claimants and that, as long as a number of the claimants are domiciled in the Netherlands, it also has jurisdiction regarding foreign claimants.[109] 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.[110] Both settlements covered shareholder claims for damages; however, there are no legal grounds for not applying these principles to antitrust settlements. In principle, a decision by the Court to declare a settlement generally binding should also have effect against foreign claimants, at least insofar as they are domiciled in the European Union and the European Free Trade Association,[111] although one cannot exclude the risk that a foreign court (outside or within the European Union and the European Free Trade Association) will consider the Dutch opt-out a breach under public policy rules (Brussels II bis).

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 1076 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 could take less time as compared to civil proceedings given the caseload of Dutch courts.

Pursuant to the CJEU's judgment in *Eco Swiss v. Benetton*,[112] 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 a failure to observe national rules of public policy; according to the CJEU, 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.[113] In that case, the 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 about 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 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

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

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

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

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

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

as defined by the parties themselves and the facts and circumstances upon which parties have based their claims and defences.[114] 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 has been 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.[115] Article 6: 193m Paragraphs 2 and 4 CC stipulate exemptions to this principle (facilitating certain exemptions for small or medium-sized enterprises and immunity recipients respectively). 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.[116] Each party's 'share' in the damages is determined proportionately to their 'contribution' to the damages.[117] 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.[118] 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.[119] 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[120] or can – in exceptional circumstances – be forced to join the main proceeding.[121]

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.[122]

114 CJEU, 14 December 1995, C-430/93 and C-431/93.
115 Article 6:102 of the CC.
116 Articles 6:10 and 6:12 of the CC.
117 Article 6:102 of the CC.
118 Article 210 of the CCP.
119 Article 215 of the CCP.
120 Article 214 of the CCP.
121 Article 118 of the CCP.
122 Supreme Court, 6 April 2012, ECLI:NL:HR:2012:BU3784.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Netherlands is a preferred venue to bring claims for private enforcement of European competition law. A considerable number of follow-on cartel damages claims have already been submitted to the Dutch courts, and many additional claims have been announced. The Netherlands is fiercely 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:

a the (relatively) low costs of the proceedings and external counsel;
b the expertise and pragmatic approach of the judiciary;
c rather well-developed possibilities to obtain disclosure compared to other civil law jurisdictions;
d efficiency of the proceedings; and
e the fact that claim vehicles (and their funding) as such are not regulated, and hence generally face few barriers in starting proceedings.

In addition, it can be expected that the number of (competition law-related) claims will increase after the entry into force of a legislative proposal abolishing limitations to collective damages actions.

Appendix 1

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