The Private Competition Enforcement Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

The Private Competition Enforcement Review

The Private Competition Enforcement Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The Private Competition Enforcement Review - Edition 7
(published in August 2014 – editor Ilene Knable Gotts).

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

The Private Competition Enforcement Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Rawson

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-18-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADDLESHAW GODDARD LLP

ARAQUEREYNA

ASHURST LLP

CHIOMENTI STUDIO LEGALE

CONSUMERS EMPOWERMENT ORGANISATION OF NIGERIA (CEON)

DANAILOV, DRENSKI, NEDELCHEV AND CO/LEX LOCUS LAW OFFICES

DLA PIPER UK LLP

ENSAFRICA

EPSTEIN, KNOLLER, CHOMSKY, OSNAT, GILAT, TENENBOIM & CO LAW OFFICES

GLOVER & TEMPLE (LEGAL & HUMAN DEVELOPMENT CONSULTANTS)

HANSBERRY COMPETITION

HAUSFELD & CO LLP

HOUTHOFF BURUMA

IWATA GODO LAW OFFICES

JUN HE LAW OFFICES

KASTELL ADVOKATBYRÅ AB

MAGALHÃES E DIAS ADVOCACIA

MARTÍNEZ LAGE, ALLENDESALAZAR & BROKELMANN

MOTIEKA & AUDZEVIČIUS

NORTON ROSE FULBRIGHT LLP

POPOVICI NIȚU & ASOCIAȚII

PRAGER DREIFUSS AG

SCWP SCHINDHELM

SRS ADVOGADOS

STIKEMAN ELLIOTT LLP

TRILEGAL

TURUNÇ

WACHTELL, LIPTON, ROSEN & KATZ

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

EDITOR'S PREFACE

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

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. Last year in Korea, for example, 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 the past few years, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea). Moreover, we appear to be at a critical turning point in the EU: on 17 April 2014, the European Parliament voted to adopt the proposed directive on rules governing private actions for damages for infringements of competition law. Once approved by the European Council – possibly as early as the summer or autumn of 2014 – EU Member States will be required to implement the directive into national law within two years of its promulgation. As mentioned above, even prior to the entry of the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, are emerging as major venues for private enforcement actions. 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 are currently also contemplating collective action or class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions such as Hungary seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

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

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged is gross negligence or wilful conduct. Only Australia seems to be 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. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

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

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so

strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across 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
August 2014

Chapter 17

NETHERLANDS

Naomi Dempsey, Albert Knigge and Weyer VerLoren van Themaat[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Recent years have shown a significant rise in Dutch 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 the *Gas-Insulated Switchgears*,[2] *Bitumen*,[3] *Air Cargo*,[4] *Sodium Chlorate*,[5] *Candle Waxes*[6] and *Elevator and Escalator*[7] cartels. Since 2013, there have been six judgments published in relation to *Gas-Insulated Switchgears*,[8] *Air Cargo*,[9] *Escalator*,[10] and *Sodium Chlorate* cartels.[11]

1 Naomi Dempsey is a senior associate, and Albert Knigge and Weyer VerLoren van Themaat are partners at Houthoff Buruma.

2 Commission Decision 24 January 2007, Case COMP/38899.

3 Commission Decision 13 September 2006, Case COMP/38456.

4 Commission Decision 9 November 2010, Case COMP/39258.

5 Commission Decision 11 June 2008, Case COMP/38695.

6 Commission Decision 1 October 2008, Case COMP/39181.

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

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

9 Amsterdam Court of Appeal 24 September 2013, ECLI: NL:GHAMS:2013:3013; Amsterdam Court of Appeal 7 January 2014, ECLI:NL:GHAMS:2014:27.

10 Rotterdam District Court 17 July 2013, ECLI:NL:RBROT:2013:5504; Midden-Nederland District Court 27 November 2013, ECLI:NL:RBMNR:2013:5978.

11 Amsterdam District Court 4 June 2014, ECLI:RBAMS:2014:3190.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for cartel damages claims is formed by the general rules regarding liability for wrongful conduct;[12] the specific competition legislation prescribed in the Competition Act (CA) and the Treaty on the Functioning of the European Union (TFEU); and the Code of Civil Procedure (CCP). For a cartel damages claim to succeed, the claimant must establish that the defendant has acted in a wrongful manner that can be attributed to him or her, and that the claimant has suffered damage as a result of the defendant's wrongful conduct. Whether a breach of national or European competition legislation in itself will amount to wrongful conduct depends on whether the breached rules are aimed at preventing the damage suffered by the defendant.[13]

ii Limitation

Claims for damages become time-barred five years after the claimant has become aware of the infringment and the person liable for the damages, provided that no claims can be brought 20 years after the damage-causing event.[14] For the shorter limitation period to commence running the claimant must be subjectively aware of the damage and liable person ('ought to have been aware' is insufficient). Depending on the circumstances of the case, it is therefore possible that the limitation period will have started (and run out) before the Netherlands Authority for Consumers and Markets (ACM) or the European Commission decides there has been a breach of Article 6 of the CA or Article 101 of the TFEU. For example, in 2007 the Rotterdam District Court found that a claim for damages by CEF, a wholesale distributor of electrotechnical fittings, against the individual directors of FEG, a Dutch association in the electrotechnical fittings sector, was time-barred.[15] The court ruled as irrelevant that the European Commission had only given its decision that FEG had breached Article 101 of the TFEU in 1999:[16] CEF was held to have already been aware of the damage and the liable person in 1991 when it submitted a complaint to the European Commission regarding FEG's conduct. Because CEF first sent a letter claiming damages from the individual directors in 2000, and the limitation period had not been interrupted in time, the claim was dismissed. In contrast, a recent judgment relating to the *Gas-Insulated Switchgears* 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 issued a press release indicating that an investigation had been started into a possible *Gas-Insulated Switchgears* cartel in which the defendant may have participated.[17] The court ruled that the publication only stated that an investigation had started, which, in the circumstances,

12 Article 6:162 of the Civil Code (CC).

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

14 Article 3:310 of the CC.

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

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

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

was insufficient to make the claimant aware of the fact he 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. On the other hand, the Midden-Nederland District Court ruled that a claim to annul a maintenance contract for the service of elevators was time-barred as the three-year period of limitation for such an annulment had run; according to the claimant, the period of limitation had started when the European Commission's cartel decision was published in 2007, while the claimant first brought its claim for annulment four years later, in 2011.[18]

III EXTRATERRITORIALITY

i Applicable law

The CA applies to all competition restricting decisions, agreements or conduct that aims to restrict or limit competition in (part of) the Dutch market or that has such an effect.[19] Foreign parties are not exempted and do not enjoy any immunity in that regard.

With regard to cartel damages claims arising before the enactment of Council Regulation (EC) 864/2007 (Rome II), when determining which national law or laws will apply to a claim, Dutch courts apply the Unlawful Acts Act (UAA). According to Article 4(1) of the UAA, claims arising from wrongful acts as a result of illegal competition are governed by the laws of the country in which territory the competitive act impacted the competition. In cases of cross-border competition distortion, the Dutch legislature has acknowledged that this rule of reference leads 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, the UAA does not contain a provision enabling the claimant to choose applicability of only the law of the sought-out court when the distortion of competition has also and considerably affected competition in that country.

ii Jurisdiction

Dutch courts have jurisdiction to hear cartel damages claims that are instigated against (legal) persons having their domicile in the Netherlands[20] or when the basis of the claim is a wrongful act and the harmful event occurred in the Netherlands.[21] Under Article 7(1) of the CCP – the Dutch equivalent of Article 6(1) of Council Regulation (EC) 44/2001 – a claim for cartel damages against persons who do not have their domicile in the Netherlands and whereby the cartel had no influence in the Netherlands may still be

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

19 Article 6 of the CA.

20 Article 2 of the CCP and Article 2 of Council Regulation (EC) 44/2001.

21 Article 6 of the CCP and Article 5(3) of Council Regulation (EC) 44/2001.

brought before the Dutch courts, but only if this is done together with a claim against a cartelist that is domiciled in the Netherlands and both claims are so closely connected that it is expedient to hear and determine them together. On 1 May 2013, the District Court of The Hague found the damages claims against the various defendants based on the *Candle Waxes* cartel to be sufficiently connected.[22] The court held the fact that the anchor defendant – Shell Petroleum NV, the only defendant company with its domicile in the Netherlands – had not itself directly participated in the cartel, but had been found guilty by the European Commission of cartel infringement because of its influence as (sole) shareholder of its subsidiary that had directly participated in the cartel, did not preclude assuming a sufficiently close connection with the damages claims against the other defendants (who had directly participated in the cartel) and that all the European Commission decision addressees could have reasonably foreseen that they might be summoned to appear before the court of one of the other cartel participants. The court also rejected one of the defendant's appeals to forum choice clauses in the sale contracts; the defendant was not a party to the contracts (instead, its subsidiary was) and was unable to show that the forum choice clauses had also been entered into on her behalf. On 26 October 2011, the Arnhem District Court decided that it had jurisdiction to hear a claim brought against a number of producers of gas-insulated switchgears, including the Alstom group, even though none of the defendants was domiciled in the Netherlands. The court decided that as regards one of the defendants, Cogelex, jurisdiction could be based on Article 5(3) of Council Regulation (EC) 44/2001 because both the wrongful act and the place where damages were suffered was in Arnhem. The district court then invoked Article 6(1) of Council Regulation EC) 44/2001 – even though this rule only applies if jurisdiction is first based on domicile – to justify jurisdiction as regards the other defendants because the claim against all defendants would have to be decided on the same factual and legal grounds and otherwise there would be a risk of contradictory decisions.[23] On 17 July 2013, the Rotterdam District Court decided that it had jurisdiction to hear a claim brought against two Dutch subsidiary companies of two members of the *Escalator* cartel.[24] The Rotterdam District 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 factual basis and legal base and the fact that the European Commission had distinguished four national cartels which should each be assessed in accordance with the various national laws.[25] Contrary to the aforementioned case, the Midden-Nederland District Court found the damages claims against various other defendants based on the *Escalator* cartel to be sufficiently connected. According to the court, an equal factual base in this case did exist, because the case regarded the assessment of the acting of five escalator manufactures, covered

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

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

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

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

by the Dutch resolution on group liability arising from a wrongful act.[26] Similarly, the Amsterdam District Court decided that it had jurisdiction to hear a claim against various defendants in the *Sodium Chlorate* cartel. The court found the damages claims closely connected, given the fact that the defendants were all involved in the same market forgery and all knew that the other cartel members were equally involved in these practices.[27]

IV STANDING

To bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Associations that, according to their articles of association, promote and protect the interests of others affected by a cartel may start proceedings as well, but may not claim damages.[28]

Whether indirect purchasers of goods or services may claim damages from the cartel members has yet to be decided. In order for such a claim to succeed, the competition rules that have been breached must serve to protect the claimant suffering the damage.[29] There does seem to be – within Dutch legal literature – a *communis opinio* that competition rules also serve to protect the interests of at least consumers, and possibly also middlemen. However, even if it is held that the competition rules of the CA and the TFEU do not aim to protect consumers or middlemen from suffering damage due to cartels, the courts could still hold that the defendant has acted wrongfully by having breached a rule of unwritten law pertaining to proper social conduct.

V THE PROCESS OF DISCOVERY

i Discretionary powers of the court to order disclosure

The Dutch courts have a general discretionary power to demand information from either or both of the parties.[30] This power covers both a demand for clarification of certain statements and the submission of specific documents. Parties may refuse to cooperate with such a demand, but do so at their own risk. Unless parties can show they have sufficiently compelling reasons, the court may at its discretion draw the conclusions it wants from such a refusal. This usually leads to the point of contention being decided in the other party's favour. The court may also order a party to submit documents that it, as a legal person, is legally required to have (e.g., bookkeeping documents or annual accounts).[31] Again, refusing to do so is done at the risk of the court drawing its own conclusions from that refusal.

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

27 Amsterdam District Court 4 June 2014, ECLI:NL:RBAMS:2014:3190.

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

29 Article 6:163 of the CC.

30 Article 22 of the CCP.

31 Article 162 of the CCP.

ii Parties' options to obtain disclosure

While parties may request the court to use its above-mentioned discretionary powers to order another party to disclose certain information or documents, the court is not obliged to grant such a request. Instead, Article 843a of the CCP provides parties a special discovery action. By way of a claim under Article 843a of the CCP – as a motion in ongoing proceedings or in separate proceedings – parties can demand specific written or digital documents and information from any person who has those documents or that information in their possession.

In order for a claim under Article 843a of the CCP to be successful, the claimant must first show a legitimate interest in obtaining the requested documents and information. 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 to which the claimant is a party. Legal relationships based on wrongful acts are included. As a third requirement, the claimant must be able to specify the documents and information they want to receive. This requirement aims to prevent 'fishing expeditions'. The claimant must be able to show that it is sufficiently likely that the information and documents are at hand and describe them in such an exact way that it is clear which documents and information are meant. This requirement does not go so far that the claimant must be able to specify the contents of such documents and information, but a request to obtain 'all correspondence' or 'all financial documentation' is insufficiently specific and will lead to a refusal by the court.

A claim under Article 843a of the CCP may be denied if the defendant does not have the documents or information, the documents or information are not necessary for a fair trial and decision of the case (e.g., if the information could reasonably be obtained another way, such as through witness testimony), or if the defendant can show sufficiently compelling reasons for refusal. Compelling reasons may be that the documents and information are confidential or that disclosure may harm another's privacy. Finally, if the request pertains to documents or information that has been obtained (or produced) by professionals who by way of their job or position are entitled or obliged to observe confidentiality – such as lawyers, notaries, trustees in bankruptcy and medical professionals – and the request is aimed at such a professional, it will be refused.[32]

iii Parties' right to witness testimony

Dutch procedural law gives parties the right to prove their arguments decisively through witness hearings. The only group of persons exempt from having to testify in civil proceedings are close blood relatives and professionals who by way of their job or position are obliged to observe confidentiality.[33] (Opposing) parties can also be heard as witnesses, but their testimony only has limited strength in proving their own propositions.

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

33 Article 165 of the CCP.

If a(n opposing) party called as a witness refuses to answer questions, the court may draw the conclusions it deems appropriate from that refusal.[34]

VI USE OF EXPERTS

The Dutch civil law of evidence states that, unless otherwise provided by law, parties may use any and all means to prove their propositions and that the courts are free in their assessment of the evidence provided.[35] Expert evidence is one of the means through which parties may prove their propositions, for example by way of submitting a report by a renowned economist on the quantum of damages in a cartel claim for 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 at its own initiative appoint an independent expert. Courts are not obliged to appoint experts. It is at the court's discretion whether or not it deems such an appointment necessary for its decision of the case.[36]

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.[37]

VII CLASS ACTIONS

Since July 1994, associations that, according to their articles of association, promote and protect the common and similar interests of various (legal or natural) persons may start a class action to obtain any type of court order, with one noteworthy exception – namely, an order to pay damages.[38] For a claim to be admissible in court the association must have first attempted to obtain their claim out of court in consultation with the defendants.[39] Finally, the interests that the association aims to promote and protect must be sufficiently similar and thereby suitable to be represented and decided upon collectively. As stated, the possibility of the court ordering the defendant in a Dutch class action to pay damages has been excluded by the legislature. It is up to individuals who have suffered a loss to start follow-up proceedings to obtain damages. Usually class actions are therefore aimed at obtaining a declaration under law that the defendant has by certain actions acted wrongfully. Although such a decision, strictly speaking, has no legal effect with regard to potential individual claimants, the Supreme Court has ruled that it is logical that in

34 Article 164 of the CCP.

35 Article 152 of the CCP.

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

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

38 Article 3:305a of the CC.

39 A term of two weeks to respond to a request for consultation is – according to Section 2 of Article 3:305a of the CC – sufficient to meet this requirement.

individual follow-on proceedings, the courts will take such a decision on, for example, the wrongfulness of certain actions as their point of departure.[40]

Probably because of the inability under Dutch law to claim damages through class, this mechanism has not yet been used in antitrust cases. Instead, individual actions are usually combined into one court case. This is done either by a number of claimants acting together in their own name, or by so-called claim vehicles buying up claims and, after assignment, asserting these claims in court in their own name.

VIII CALCULATING DAMAGES

i Cognisable damages

Dutch civil law aims to compensate a claimant for the damages he or she has suffered due to another's wrongful act or default to perform. This means on the one hand that both actual loss and lost profit may be claimed, as well as the claimant's reasonable costs to prevent or reduce damages suffered, to determine their amount and another's liability or to obtain compensation out of court.[41] On the other hand, exemplary or punitive damages are not available. Furthermore, a profit the claimant has enjoyed as a consequence of the same wrongful act will be deducted from any damages to be awarded, but only insofar as this is reasonable.

ii Method of calculating damages

Unless specifically provided 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.[42] As a rule, damages are calculated by a comparison of the claimant's assets as a consequence of the wrongful act and the hypothetical situation had there been no wrongful act. All possible relevant circumstances of the case are taken into account in this 'actual damage calculation'. By way of alternative, the court may calculate damages abstractly, thereby not taking certain actual circumstances of the case into account. Whether the court will choose actual damage calculation or an abstract calculation depends on the nature of the damages claimed and the liability. As yet, there have been no definitive court decisions on whether an actual or an abstract damage calculation should be used in calculating antitrust claims.

The court also has a discretionary power to award damages based on the profit made by the defendant thanks to his or her wrongful act or failure to perform, provided the claimant asks the court to do so.[43] To date, this power is used only sparingly, mainly in intellectual property disputes.

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

41 Article 6:96 of the CC.

42 Article 6:97 of the CC.

43 Article 6:104 of the CC.

iii Legal interest

A claimant is entitled to compound legal interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered until the damages have been paid).[44] It is irrelevant whether the claimant actually suffered any loss due to not immediately receiving monetary compensation for his or her loss, while at the same time a claimant cannot claim more than the legal interest for the delay in receiving monetary compensation.[45] The legal interest percentage is determined by the Dutch government. Since 2002 this interest has fluctuated: from 7 per cent in 2002, it decreased to 4 per cent in 2004, increased to 6 per cent in 2007 and then decreased again from mid-2009 onward to the current rate of 3 per cent.

iv Legal costs

Unlike in, for example, the United Kingdom, awards for legal costs in the Netherlands are limited. As a rule, the losing party will be ordered to pay the legal costs of the winning party, but the court may decide to apportion costs if both parties have been found to be wrong on certain aspects of the case.[46] Awards for legal costs will cover the full amount of court fees,[47] court-appointed experts and witnesses. However, for attorneys' fees only a limited and fixed amount is awarded, which generally speaking 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.[48] 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

To date, there is no decisive case law on whether defendants to cartel damages claims can successfully argue that the claimant has in full or part 'passed on' their damage to other parties. In its judgment in the *Gas-Insulated Switchgear* cartel case, the Oost-Nederland District Court included some preliminary thoughts on the passing-on defence that had been raised, suggesting that it might not be reasonable to deduct the costs that were passed on to the claimant's buyers, based on the assumption that the damages the claimant would receive would be passed on to its buyers in the future.[49] On appeal, the Arnhem-Leeuwarden Court of Appeal judged that the Oost-Nederland District Court has misapplied the principle of *audi alteram partem,* which has as a result that a

44 Article 6:119 of the CC.

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

46 Article 237 of the CCP.

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

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

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

crystallised debate about the passing-on defence has not yet taken place. The execution of the judgment of the Oost-Nederland District Court regarding the follow-up proceeding for the determination of damages has, therefore, been suspended.[50] Moreover, given the claimant's very specific circumstances (an electricity network provider whose tariffs are regulated by the ACM), it is unclear whether the aforementioned preliminary thoughts can or will be applied in other cartel damages cases.

The Dutch government has stated – in response to the European Commission's 2005 Green Paper on Damages Actions for breach of the European Commission antitrust rules[51] – that the pass-on defence is available in the Netherlands. Although there has been, and still is, considerable debate in legal literature about whether the pass-on defence is or should be available in the Netherlands, given the general principle of 'compensation for actual loss suffered' underlying the Dutch law of damages, defendants to an antitrust action should in principle be able to raise this defence.

X FOLLOW-ON LITIGATION

So far, most cartel damages claims in the Netherlands have arisen 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 practices under Article 101 of the TFEU that are no longer open for appeal bind the national courts, effectively meaning that in a claim for cartel damages following such a decision by the European Commission, the Dutch courts will have to accept and apply the breach of Article 101 of the TFEU found by the European Commission as a fact. For example, in the *Gas-Insulated Switchgear* case, the Oost-Nederland District Court held that it was bound by the European Commission's decision that the defendant – ABB Ltd – had participated in the cartel from 15 March 1988 until 2 March 2004, even though ABB Ltd had shown that it did not exist before 5 March 1999.[52] ABB Ltd stated that it must assume that the European Commission had identified it with one of the other ABB companies that did exist (and did participate in the cartel) in the period from 15 March 1988 to 5 March 1999. The court further held that it was up to the defendants to convincingly show that the project for which damages were claimed (and which had not been a subject of the European Commission's investigation) had not been influenced by the cartel, as all the prospective participants in the project had been found to have participated in the cartel, which covered the entire EU market. A European Commission decision and fine for participation in a cartel is no guarantee, however, for a successful damages claim, as demonstrated by the Midden-Nederland District Court's decision in the *Elevator* cartel damages claim case. The court rejected the claim on the basis that the claimants (an owner–occupiers' association and local council) had failed to prove that the

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

51 COM(2005) 672, 19 December 2005.

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

cartel arrangements found by the European Commission had also influenced the specific maintenance contract for which damages were now claimed.

In 2011, in a claim for damages in connection with the *Bitumen* cartel, the Rotterdam District Court decided – for the first time in the Netherlands – a request for a stay of the civil claim proceedings pending an appeal by the defendants against the European Commission's decision.[53] According to the court, the decision whether to grant an (immediate and full) stay hinges upon the demands of fair proceedings, whereby unnecessary and unreasonable delays should be avoided. The court took a nuanced view. Because one of the defendants had not appealed against the European Commission decision, the court decided that, as regards that defendant, at the very least questions involving the legitimacy of assignments and statute of limitations could be dealt with already and without delay. These issues would, according to the Rotterdam District Court, have to be decided according to Dutch law and their decision would not depend on the validity of the contested European Commission decision. Similarly, the District Court of The Hague rejected a request for stay of the proceedings pending an appeal by a number of the defendants against the European Commission's decision arguing that it could be assumed that a number of issues might be debated and decided independently of the contested European Commission decision, particularly given that not all the defendants had appealed the European Commission's decision. Furthermore, the court found that it would be contrary to due process – in particular the prevention of unnecessary and unreasonable delays – to stay the proceedings at this time until (likely many years later) all appeals had been finally decided.

In 2012, the Amsterdam Court of Appeal decided on an appeal regarding a decision to stay the proceedings in one of the air cargo cartel claim cases pending the outcome of the EU appeals of the airlines against the European Commission decision.[54] According to the Amsterdam Court of Appeal, the stay of a civil law claim proceedings is only prescribed if the national civil law proceedings contain questions regarding facts or law which answers depend on the validity of the contested European Commission decision. The 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 proceedings 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 proceedings to: (1) show that it has timely brought an action for annulment; (2) clarify that it reasonably opposes the European Commission decision; and (3) address the defence it would argue in the proceedings, so that the national court can decide whether and to what extent the assessment of these defences depend on the validity of the European Commission decision. 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 could not be upheld.[55]

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

54 Amsterdam District Court 7 March 2012, ECLI:NL:RBAMS:2012:BV8444.

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

As regards the status of ACM decisions in follow-on civil litigation, there is no provision similar to Article 16 of Council Regulation (EC) 1/2003. The Dutch courts are free regarding the amount of weight they attach to such a decision. Possibly the Dutch courts may be bound to accept the outcome or decision of the ACM to which no further appeal is open as correct on the basis of the rule that administrative decisions that have not been successfully contested through administrative proceedings have legal force.[56] This is, however, a matter of debate in Dutch legal literature and has not yet been decided in case law. In any case, according to the doctrine of administrative legal force, the finding of facts by the ACM is not binding upon the Dutch civil courts.[57] Therefore, should the defendant to a claim for cartel damages and an addressee of an ACM decision contest the facts as found by the ACM in a sufficiently convincing manner, he or she should at least be allowed the opportunity to disprove the presumption that the facts found by the ACM are correct.

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

XI PRIVILEGES

Lawyers must refuse to testify as witnesses regarding what they know through their professional relationship with their client. Furthermore, a disclosure claim under Article 843a of the CCP against an attorney to obtain documents or information produced or obtained through such representation will be rejected.[58] 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.

The CA acknowledges attorney–client legal privilege: according to Article 51 of the CA the ACM may not examine or copy documents that have been exchanged between a company and a lawyer that has been admitted to the Dutch Bar. This legal privilege also covers attorneys who are employed by the company, but not other legal advisers (in-house lawyers).

Similarly to Article 28(1) of Council Regulation (EC) 1/2003, documents and information that the ACM has obtained through its investigations may only be used by the ACM in its application of the CA.[59] This obligation, however, does not by definition preclude the working of the Administration Disclosure Act (the ADC). Under the ADC, any person may request a government agency to grant access to information in documents regarding governmental actions and issues (including investigations and decisions by the ACM).[60] Unless the governmental agency addressed can argue that one of the exceptions

56 Supreme Court 22 December 2007, NJ 2007, 218 (*Van Rattingen Grondverzet/Loenen*).

57 Supreme Court 2 June 1995, NJ 1997, 164 (*Aharachi/Bedrijfsvereniging*).

58 See Section V.ii, *supra*.

59 Article 90 of the CA.

60 Article 3 of the ADC.

under the ADC applies, it is obliged to disclose the documents requested. One of the (absolute) exceptions is company information that has been given to the governmental agency on a confidential basis, but not all information provided by companies in a leniency application qualify as company confidential information. The governmental agency can also refuse disclosure if this would lead to disproportionate harm to the parties involved. It is on these grounds that the ACM refused to disclose information related to a leniency application, citing that the ACM's effective ability as a competition supervisor would be greatly harmed if such information were to be disclosed.[61]

Should a claimant attempt to obtain access to the ACM's files by way of a claim under Article 843a of the CCP, be they with the ACM or in the possession of addressees, the court will have to decide whether the confidentiality obligation of Article 90 of the CA or the ACM's interest in not deterring leniency applications (or both) is sufficiently compelling to deny the disclosure request.

XII SETTLEMENT PROCEDURES

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

Only rarely are settlement agreements embodied in a court order. In certain limited circumstances parties to a settlement agreement can request that the court declare its terms binding under the Collective Settlement of Mass Claims Act. Under this Act one or more associations who, according to their articles of association, protect and promote the interests of persons who have suffered damage due to the acts of another party, who have reached a settlement agreement with one or more parties to compensate that damage can request, with the other parties to the settlement agreement, that the Amsterdam Court of Appeal have that settlement agreement declared generally binding. The court must consider a number of points, such as whether: (1) the compensation is reasonable; and (2) the associations that agreed to the settlement can be deemed sufficiently representative for the interests of those on whose behalf the settlement was reached. Part of the settlement may be that any claims for damages under the agreement will be forfeited if they are not submitted within one year of a claimant becoming aware of his or her claim under the settlement.[62]

If the court grants the request for the settlement to be declared generally binding, then individuals who fall within the scope of the settlement have the right to 'opt out' within a specified period of not less than three months. An individual who opts out remains free to start his or her own proceedings against the tortfeasor and claim more than he or she would have received under the generally binding settlement.[63] Those

61 ACM 25 June 2007, Case 6112.

62 Article 7:907 of the CC.

63 Article 7:908 of the CC.

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.[64]

According to two separate decisions of the Amsterdam Court of Appeal, the court's order declaring a settlement generally binding can apply to foreign claimants. In the *Shell* settlement, the Court decided that Dutch interest associations can be deemed sufficiently representative for foreign claimants and that – as long as a number of the claimants are domiciled in the Netherlands – it also has jurisdiction regarding foreign claimants.[65] 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.[66] Both settlements covered shareholder claims for damages; however, there are no legal grounds for not at some point applying these principles to antitrust settlements, particularly given that a decision by the court to declare a settlement generally binding should in principle also have effect against foreign claimants, at least insofar as they are domiciled in the European Union and the European Free Trade Association.[67]

XIII ARBITRATION

In the Netherlands, antitrust claims may also be decided by way of arbitration provided parties agree to arbitration. The rules for arbitration are laid down in Articles 1020 to 1077 of the CCP. Given that arbitration decisions are not published, the confidential nature of arbitration proceedings may make arbitration preferable, particularly for defendants against antitrust claims. Another advantage may be that arbitration takes less time in comparison to civil proceedings given the overload of cases the Dutch courts have to deal with.

Pursuant to the European Court of Justice's (ECJ) decision in *Eco Swiss/ Benetton*,[68] a decision by arbitrators that is contrary to Article 101 of the TFEU must be annulled if it is challenged before a national court. After all, one of the available grounds for annulment under Dutch arbitration law is failure to observe national rules of public policy; according to the ECJ, 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.[69] In that case, parties had submitted their dispute on the payment of royalties under a licence agreement to arbitration by the American Arbitration Association. Upon requesting an *exequatur* for the arbitration decisions in the Netherlands, the Court of Appeal in The Hague confirmed the first-instance court's decision to deny the *exequatur* on the grounds that the licence agreement was in part

64 Article 1017 of the CCP.

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

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

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

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

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

contrary to Article 101 of the TFEU and did not fall within the scope of any group exemption. In light of the *Eco Swiss/Benetton* decision it is undisputed that arbitrators are obliged to apply provisions such as Article 101 of the TFEU to disputes before them even when the party with an interest therein has not relied on those rules. However, there is some debate within Dutch legal literature whether this obligation goes so far as to oblige arbitrators to raise, of their own motion, issues of European competition law where examination of that issue would oblige them to abandon the passive role assigned to them or the scope of their arbitration task. According to an earlier decision by the ECJ in the *Van Schijndel* case, this obligation does not exist for the national courts if – as is the case in the Netherlands – according to national rules of law they are bound by the ambit of the dispute as defined by the parties themselves and the facts and circumstances upon which parties have based their claims and defences.[70] Whether the *Eco Swiss/Benetton* decision implies a farther-reaching and more active obligation for arbitrators than the national courts is yet to be decided.

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.[71] Assuming that such 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.[72] Each party's 'share' in the damages is determined proportionately to their 'contribution' to the damages.[73] 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.[74] The contribution and main proceedings may be dealt with and decided jointly by the court. This is an administrative measure and both proceedings remain separate cases with the decisions in each proceedings only have binding legal effect against the parties in those proceedings.[75] 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.[76]

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

71 Article 6:102 of the CC.

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

73 Article 6:102 of the CC.

74 Article 210 of the CCP.

75 Article 220 of the CCP.

76 Article 214 of the CCP.

The statute of limitation for a contribution claim is five years. The Supreme Court has ruled that the statute of limitation for such a claim will start to run from the date the claimant seeking contribution paid more than 'its share' in the damages. This means that the statute of limitation may start running (many) years after the fact and after the claimant was first sued for damages.[77]

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Netherlands is increasingly being chosen as forum for the private enforcement of European competition law. Numerous cartel damages claims have recently been submitted to the Dutch courts and it is to be expected that in the near future the Netherlands will compete with, notably, the United Kingdom and Germany as the preferred forum for bringing this type of claim.

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

Appendix 1

ABOUT THE AUTHORS

NAOMI DEMPSEY

Houthoff Buruma

Naomi Dempsey is a senior associate with Houthoff Buruma. She specialises in corporate litigation, with particular emphasis on private litigation of competition claims, employment law and litigation before the Dutch Supreme Court. Ms Dempsey was admitted to The Hague Bar in 2005 after obtaining her law degree at Leiden University in 2003 and a *magister juris* degree at Oxford University in 2004.

ALBERT KNIGGE

Houthoff Buruma

Albert Knigge heads a team of experienced litigators at Houthoff Buruma. He joined the Amsterdam Bar in 1997 after obtaining his doctorate degree. He specialises in litigation and Supreme Court litigation and has extensive experience in complex, often multiparty and cross-border litigation, representing businesses and parties. Mr Knigge is a board member of the Dutch Association for Procedural Law, as well as an author and a member of the editorial staff of a loose-leaf handbook for Dutch civil litigators. He is recommended in the *Legal 500* (2010 edition) and *Chambers Europe* (2010 edition). Clients praise him as 'a very experienced, high-end lawyers that really is a sparring partner in business' (*Legal 500*, 2013 edition, Dispute Resolution). Financial litigation specialist Albert Knigge is 'absolutely top of the bill' (*Legal 500*, 2013 edition, Dispute Resolution).

WEYER VERLOREN VAN THEMAAT

Houthoff Buruma

Weyer VerLoren van Themaat has been assisting international clients for over 24 years in the most challenging and complex cases related to merger control and cartel defence litigation and leads Houthoff Buruma's competition practice group. He was

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

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