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The International Comparative Legal Guide to:

Competition Litigation 2019

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A practical cross-border insight into competition litigation work

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Netherlands

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Any individual may bring claims for compensation for loss caused to them by a breach of national or EU competition law before the civil courts.

In certain circumstances, class actions or mass settlements are possible:

- The Class Action Financial Settlement Act ("**WCAM**") allows non-profit organisations and companies that cause large-scale damage to conclude collective settlement agreements, which can be made binding by the Amsterdam Court of Appeal on all injured parties that do not opt out.
- Collective rights organisations have standing to start a collective action to seek "*protection of other persons' interests that are similar to the ones represented by the collective rights organization*" (Article 3:305a of the Dutch Civil Code; "**DCC**"). While it is possible to claim declaratory or coercive relief in collective actions, collective rights organisations are not (yet) allowed to claim monetary compensation on behalf of a class. However, a declaratory judgment can be a starting point for negotiations about a (individual or collective) settlement agreement.
- In practice, most mass claims are pursued by private parties, who have purchased and bundled individual claims. These claims are subsequently assigned to a "claim vehicle", who subsequently attempts to recover these claims in its own name and on its own account.

1.2 What is the legal basis for bringing an action for breach of competition law?

Cartel damages claims are generally tortious liability claims (Article 6:162 DCC). Participation in a cartel is furthermore considered to be a group act, making participants jointly and severally liable for the damages caused by that act (Article 6:166 DCC).

Since the implementation of the Directive on Antitrust Damages Actions, the Dutch Civil Code also contains a special legal basis for antitrust damages actions (Article 6:193m DCC). According to this provision, undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by that infringement.

In some civil cases, claimants have argued that their claims are governed by Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") alone (*cf.* the judgment of the Court of Justice of the European Union in *Otis*). In theory, liability may also be based on unjust enrichment or breach of contractual obligations.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law is derived from both national and EU law. The majority view is that Article 101 TFEU directly grants victims a right to full compensation, but that national law determines the requirements for the (tortious) liability of cartel participants.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialised courts hearing civil antitrust cases. However, there are a number of judges who specialise in competition law cases, and who rotate among courts.

Recently, the Dutch legislator enacted a law to establish the Netherlands Commercial Court ("**NCC**"). Parties in large commercial disputes, including antitrust cases, can agree to litigate before the NCC. The NCC will be a new international commercial division of the Amsterdam District Court and the Amsterdam Court of Appeal. A national pool of judges, who have the necessary knowledge of and experience with international commercial disputes, will be created to handle the proceedings as efficiently as possible. An added benefit is that parties may opt to conduct the proceedings in English.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

An action for antitrust damages may be brought by any individual who has incurred a loss as a result of that infringement.

The most commonly used manner to bring class actions is the "assignment model". This concept denotes to the practice whereby a "claim vehicle" purchases and bundles individual claims in order to recover these in its own name.

As mentioned in our answer to question 1.1, collective rights organisations have standing to commence collective actions and to

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issue a request to declare collective settlement agreements binding. An opt-out regime applies in both cases.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

As a main rule, the Dutch courts have international jurisdiction when the defendant is domiciled in the Netherlands (*forum rei*).

There are two special jurisdictional rules which are often invoked in antitrust damages cases:

- The Dutch courts have jurisdiction if "the harmful event" occurred in the Netherlands (*forum loci delicti*).
- The Dutch courts also have jurisdiction to hear claims against foreign defendants when there is a Dutch "anchor defendant", provided there is a close connection between the claims against them.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Netherlands is known to be a claimant-friendly jurisdiction. As a result, an increasing number of (follow-on) cartel damages proceedings are pending in the Netherlands. Pending cases include: *Trucks*; *Air Cargo*; *Gas Insulated Switchgear*; *Cathode Ray Tubes*; *Sodium Chlorate*; *Pre-stressing Steel*; *Paraffin Wax*; and *Elevators and Escalators*.

For the following reasons, the Netherlands is considered to be a favourable forum to bring an antitrust claim:

- The Dutch judiciary has the reputation of being professional and efficient. Because of the large number of cases already pending, Dutch courts have ample experience with antitrust damages claims. The NCC is furthermore expected to attract (international) claimants and defendants alike.
- The financial risks of bringing a claim are limited, as adverse cost orders are low.
- It is comparatively easy to bring a class action, as Dutch law allows for the assignment and bundling of tort claims and third-party litigation funding.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

An interim relief judge may issue any order that is provisional in nature. This includes injunctions, payment of an amount of money, or seizure of evidence. It is not possible to obtain a declaratory judgment in interim relief proceedings.

Normal rules of evidence do not apply in interim relief proceedings. The interim relief judge can grant an interim measure if they consider it likely that the claim will be granted in proceedings on the merits, and that the claimant cannot await the outcome of these proceedings. When deciding on a request for interim relief, the interim relief judge must furthermore balance the interests of the claimant and the defendant.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

As the Netherlands is a civil law system, there is no predefined set of available remedies. Claimants may seek declaratory relief, compensatory damages, or coercive relief, as they see fit. In order to obtain such relief, the claimant must furnish sufficient facts and, if these are disputed by the defendant, prove that the criteria for tortious liability and/or group liability are met.

In case a collective rights organisation starts a collective action, it cannot claim monetary damages (yet).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under Dutch law, damages are compensatory; punitive damages are considered to be contrary to the public order and are therefore not available.

In principle, damages are calculated on the basis of actual loss. However, if an accurate calculation is very difficult or impossible, a judge has the discretion to estimate damages in the abstract.

The most important precedent, in which monetary damages have been awarded thus far, is *TenneT/ABB*. In that case, the District Court Gelderland accepted TenneT's argument that the Gas Insulated Switchgear Cartel had caused TenneT to pay an overcharge of 58% for a GIS system it purchased from ABB. The court therefore ordered ABB to pay TenneT an amount of damages in excess of €68 million.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Because a victim has a right to full compensation, fines imposed by national competition authorities are not taken into account. Redress schemes already offered are only taken into account when such a scheme also provided compensation to that particular claimant.

4 Evidence

4.1 What is the standard of proof?

In its writ of summons, the claimant should state their claim and the factual basis of that claim. If the claimant does not furnish sufficient facts to substantiate their claim, the court should reject it. In its judgment in *IATA*, the Supreme Court ruled on the scope of the

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obligation to furnish facts in (stand-alone) competition law cases. According to the Supreme Court, the claimant should diligently provide insight into the definition, structure, characteristics and functioning of the relevant market, as well as the effects of the alleged infringements on those markets.

If the claimant furnished sufficient facts to substantiate their claim, they only need to prove those factual allegations that are (sufficiently) disputed by the defendant. In that case, a factual allegation is proven if the court considers it "sufficiently plausible".

4.2 Who bears the evidential burden of proof?

As a general rule, each party has the burden of proving the submissions and allegations on which they rely (Article 150 of the Dutch Code of Civil Proceedings; "**DCCP**"). In competition law cases, this means that the claimant has to prove: (i) the existence of the infringement; (ii) that they incurred a loss; (iii) a causal link between the loss and infringement; and (iv) that the damage can be reasonably attributed to the defendant. If the defendant offers an affirmative defence, the defendant carries the burden of proof of those facts.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Since the implementation of the Directive on Antitrust Damages Actions, the Dutch Civil Code contains the rebuttable presumptions (i) that cartel infringements caused harm, and (ii) that overcharges were at least partially passed on to indirect purchasers.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence may be supplied in any appropriate form, including digital files, except where the law provides otherwise or the court decides otherwise. The court is free in its assessment of the evidence provided.

It is common practice for parties in competition law cases to submit expert evidence, in particular economic reports on the quantification of damages. The court may also appoint an independent expert. However, we are not familiar with any (follow-on) antitrust damages cases where this has happened.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

While the Netherlands does not know a common law style discovery, it is possible to obtain disclosure of documents in possession by the other or even a third party. In order for a disclosure request to be granted, three cumulative criteria must be met:

(i) The documents must be specified in order to prevent "fishing expeditions".

(ii) The applicant must have a legitimate interest in obtaining disclosure of those documents.

(iii) The documents must relate to a legal relationship, to which the applicant is a party.

In antitrust damages cases, a court may reject a disclosure request if there are compelling reasons to do so. Disclosure requests must furthermore be denied if it concerns leniency statements or settlement submissions. Finally, information prepared specifically for infringement proceedings (either by a party or a competition authority), as well as settlement submissions that have been withdrawn, can only be disclosed after those proceedings have closed.

A disclosure request can be made before commencement of proceedings or while proceedings are already pending. However, Dutch courts tend to reject disclosure requests that are made before defendants have submitted their statement of defence. The reason for this is that courts find they will need to know which defences are raised by the defendants in order to assess whether there is a legitimate interest in disclosure.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

If called upon to testify, any person is obliged to appear as a witness. Testimonial privilege can be invoked by close family members of one of the parties, and professionals who are bound by a duty of confidentiality, such as lawyers and doctors.

A witness hearing is led by an examining judge, who questions the witness first. After that, both parties are allowed to ask questions to the witness.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A decision of the European Commission or the Netherlands Authority for Consumers & Markets ("**ACM**") establishing a violation of EU competition law is irrefutable proof of the existence of the infringement.

Decisions in which the ACM finds an infringement of Dutch competition law alone and decisions of other national competition authorities have probative value. However, in such a case, courts are allowed to take into consideration evidence to the contrary.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general starting point, parties have the obligation to fully and truthfully inform the court. The right to be heard (*audi alteram partem*) also implies that both sides should be able to comment on all available evidence. Moreover, when a party refuses to submit certain documents or disclose certain information, the court may draw adverse inferences as it considers appropriate. There is therefore little room for (commercial) confidentiality claims. This does not mean that they are never granted. Courts may, depending on the facts of the case, reject a disclosure request when the requested documents contain commercially sensitive information or business secrets.

In order to preserve confidentiality, the parties may request the court to issue a "gag order" or order that proceedings are held behind closed doors. While there is little experience with "confidentiality rings", the court may order that only certain individuals (e.g. the parties' attorneys) may examine documents containing confidential information.

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4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules. The European Commission and the ACM have the power to intervene as *amicus curiae* in proceedings involving questions relating to EU competition rules. The court may also request the ACM to provide assistance in the quantification of damages. As far as we are aware, there are no cases in the public domain in which either of these possibilities have been used.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

These are available, but have never been raised in competition cases up until now.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Indirect purchasers have standing to sue and the passing-on defence is indeed available (Article 6:193p DCC).

In the *Gas Insulated Switchgear* case, the Supreme Court clarified the legal test to be used to assess the passing-on defence. The case concerns a civil claim by TenneT against ABB. When assessing the passing-on defence, lower courts will have to take into account the benefit that is conferred onto the claimant in connection with the infringement, provided that it is reasonable to do so. The Supreme Court then referred the case back to the District Court Gelderland.

It is particularly interesting how the district court subsequently applied the Supreme Court's ruling when assessing ABB's passing-on defence. ABB had pointed out that TenneT's rates were regulated, which also meant that it could pass on all the costs of the GIS station in question to its customers. The court nevertheless rejected ABB's passing-on defence. The court considered it unlikely that electricity users themselves would be able to file a (successful) action for damages against ABB. It therefore considered it unreasonable to deduct the amount passed on from the damages claimed by TenneT. The court furthermore found that the damages paid by ABB would ultimately benefit those users anyway, since TenneT is a wholly-owned state enterprise.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

The Dutch Code of Civil Proceedings allows cartel members to join the proceedings on a voluntary basis (Article 217 DCCP). While Dutch law also allows for non-voluntary third party intervention, up until now courts have consistently rejected requests from defendants to summon other cartel members to appear as co-defendants in pending proceedings on the merits.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Following the implementation of the Actions for Antitrust Damages Directive, the Dutch Civil Code contains a special statute of limitations for actions for antitrust damages (Article 6:193s DCC). The subjective limitation period is five years and starts to run the day after the infringement ended, and the victim became aware of: (i) the infringement; (ii) the fact that the infringement caused harm to them; and (iii) the identity of the undertaking that committed the infringement. The absolute statute of limitations is 20 years and starts to run the day after the infringement ended. Both statutes of limitations are suspended when a competition authority starts investigating an alleged infringement until any decision by that competition authority has become final. Mediation is also a cause for suspension.

For tortious liability claims, Dutch law both has an objective and a subjective statute of limitations. These apply to cases started before 26 December 2014. The subjective statute of limitations is five years and starts to run on the date after the day that the victim obtains knowledge of (i) the fact that he incurred a loss, and (ii) the identity of the tortfeasor. This statute of limitation can be interrupted by sending a simple notice letter. The objective statute of limitations is 20 years and starts running on the day the damage was inflicted.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The duration of the proceedings largely depends on the complexity of the case, the workload of the court and the course of action the parties adopt during the proceedings. Very simple cases can take only a year to litigate (e.g. *VvE Het Schip en VvE De Wal/Otis*), while the longest running cases (*Air Cargo*) have already been pending for more than five years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, they do not.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned in our answer to question 1.1, collective rights organisations can start collective actions with an aim of seeking "*protection of other persons' interests that are similar to the ones represented by the collective rights organization*". It is not (yet) allowed to claim monetary compensation in such a collective action. The WCAM furthermore allows non-profit organisations and companies that caused large-scale damage to jointly request the Amsterdam Court of Appeal to make a collective settlement agreement, binding on all injured parties that do not opt out.

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8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In the Netherlands, adverse costs are calculated by multiplying the number of procedural steps in a case, such as court submissions and oral hearings, by a (very low) fictitious tariff. As a result, adverse cost orders only award a fraction of the costs actually incurred. E.g., in 2016, the District Court of the Middle-Netherlands only awarded a total amount of €82,320 to the nine defendants after rejecting the claims in the *Elevators and Escalators* case.

8.2 Are lawyers permitted to act on a contingency fee basis?

While lawyers are not permitted to act on a "no win-no fee" basis, they are allowed to agree on a success fee.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is permitted and has been used in most follow-on damages actions up to date.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes. Courts of appeal conduct a full review of questions of fact and law of district court judgments. After appeal, it is possible to bring an appeal in cassation before the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The ACM runs a leniency programme that is largely similar to that of the European Commission.

Leniency applicants (be they successful or unsuccessful) are not given immunity from civil claims. However, in principle, successful immunity recipients are only (jointly and severally) liable for damages incurred by their own (direct or indirect) purchasers. Only when claimants cannot obtain full compensation from the other cartel members can they claim damages from an immunity recipient.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Dutch courts are barred from ordering the disclosure of leniency statements.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Act implementing the Directive on Antitrust Damages Actions entered into force on 28 January 2017. The most important changes concern the rules on disclosure, the statute of limitation and the rule that decisions of the Netherlands Consumer & Markets Authority are formally binding.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive is implemented in Articles 6:193a–6:193t DCC and Articles 161a and 845–850 DCCP.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

In principle, the amendments introduced by the Implementing Act have immediate effect. Article III of the Implementing Act states that the new statutes of limitation for antitrust damages actions, and the new rules on disclosure, only apply in proceedings that commenced after 26 December 2014.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

In the summer of 2017, the legislator submitted a bill to repeal the prohibition for collective rights organisation to claim monetary compensation in a collective action.

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Martijn van de Hel (partner at Maverick Advocaten) is recognised as one of the leading individuals in the Dutch competition law market. Martijn has unique experience with and knowledge of cartel investigations and he is also adept in follow-on damage claims matters. He is currently involved in cartel damages litigation regarding the air cargo cartel and he is assisting in a potential multi-billion claim in the foreign exchange market. He is described as "*very knowledgeable, fast and responsive*" (*Chambers*, 2018). Clients praise his "*in-depth knowledge and very good communication skills*", *not just* "*towards us as a client, but to regulators and other parties as well*" (*Chambers*, 2017).

Maverick Advocaten N.V. is a leading Dutch boutique competition law firm with a strong focus on both stand-alone and follow-on competition and regulatory litigation. Founded by three partners who gained substantial experience at the top of the Dutch legal profession, Maverick Advocaten now has one of the largest competition law practices in the Netherlands. Currently, the firm has 11 fee-earners exclusively focusing on (EU) competition law.

As one of the Netherlands' foremost competition practices, Maverick is regularly involved in complex civil and administrative litigation, both at the Dutch and EU courts. This has provided us with the knowledge and experience to successfully manage and complete projects of the highest complexity.

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