

Netherlands new English-language court seen attracting few, non-cartel competition disputes – lawyers

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[The sixth paragraph has been amended to clarify Paul Sluijter's position at Houthoff. The seventh paragraph has been amended to clarify that the NCC handles disputes]

- Court would work like arbitration court, subject to parties agreeing to jurisdiction
- Other developments could prove more impactful on Netherlands as antitrust forum
- July entry into force date becoming unlikely, senate approval pending

The upcoming English-language Netherlands Commercial Court (NCC) may attract cases involving competition law but only in actions where parties agree to use the new tribunal, lawyers have told PaRR.

In March the Dutch parliament approved a bill allowing for cases to be heard in English in the NCC - a planned court specialising in international business disputes that will be housed in a special chamber within the Amsterdam District Court and Amsterdam Court of Appeal. The court is intended as an arbitration court and would have jurisdiction if parties agree.

Houthoff partner Albert Knigge welcomed the creation of a commercial court with specialised judges, but said that it is hard to estimate what will happen with cartel cases, Knigge said.

Maverick partner Martijn van de Hel said: “In the competition law sphere the NCC will be relevant for agreements with a non-compete clause or a supply clause, but for the real cartel cases that is not the question.”

Although it will be possible to arrange the handling of disputes in cartel cases before the NCC, “you have to agree with each other and normally you don’t see a willingness to handle such cases quickly”, he said.

This was backed by Houthoff lawyer Paul Sluijter, who said: “We have to see what the market is. In a cartel damages case you will normally have one claimant against a number of defendants, who would then all have to agree that the matter will be brought before the NCC.”

He said that the least complicated cases will relate to contracts containing a forum clause appointing the NCC as the competent court to handle disputes.

“Having multiple parties agreeing after the fact to go to the NCC could however be a challenge, but in case of a dispute between large commercial companies it could be possible,” according to

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Sluijter. “It is possible that parties come to an agreement after the fact,” he said, adding that since such parties would already be at loggerheads by that stage, reaching such agreement might be more difficult.

Freshfields partner Onno Brouwer pointed out that it is “of course possible” that competition law arguments will be raised in future cases before the NCC, but he added: “Given the broad spectrum of commercial cases that can be brought before the NCC, it is not obvious that this will occur frequently.”

The Netherlands is one of several jurisdictions trying to attract commercial cases post-Brexit, Sluijter noted, with Germany, France and others including Switzerland already possessing or working on introducing English-language courts.

It remains to be seen what effect the UK’s departure from the EU will have on the need for such European commercial courts, according to Houthoff partner Albert Knigge.

“In many commercial contracts, parties have chosen to apply English law to the contract and in that case parties will of course prefer the Commercial Court in London to have jurisdiction. Furthermore, it will be highly unlikely that the UK will no longer be a member to any recognition and enforcement treaty with the EU, so the need to go to an EU jurisdiction will be less urgent,” he said.

Knigge added that the main reason for parties to prefer the NCC would be that proceedings at the NCC will be much more cost effective than pursuing proceedings in the UK.

According to van de Hel, the NCC fits into a wider role of the Netherlands as an international legal forum, which has relatively claimant-friendly judges of good quality, as well as relatively cheap lawyers. Besides being a jurisdiction for international commercial disputes, the Netherlands houses the International Criminal Court.

“There is currently some kind of competition ongoing between jurisdiction when it comes to taking on commercial disputes and in that sense the NCC will bring more competition,” van de Hel noted.

Van de Hel pointed to another aspect of the Dutch jurisdiction that is more interesting for cartel damages cases: existing legislation for collective redress of mass damages (Wet collectieve afwikkeling massaschade – Wecam), which allows non-profit entities to start opt-out claims that can be made binding by a judge.

“There are more and more ideas to handle cartel damages cases this way,” he said, adding it is just a matter of waiting for the first court to apply the Wecam in a follow-on case.

Sluijter said that any change to the Netherlands’ status as an attractive tax location for multinationals would likely have a greater impact on the country as a forum for disputes. “A large number of multinational companies are headquartered in or structured through the Netherlands, which often provides a basis for jurisdiction of a Dutch court. If in such a case the dispute relates to an international matter, it could often be attractive to

have the NCC handle the matter instead of a random district court,” he concluded.

Following approval by the country’s parliament in March, the senate is currently mulling the NCC proposal and has sent questions to the government after holding a debate on the plan last month.

A senate official told PaRR that the law-making body is currently awaiting the justice ministry’s answers to its questions before proceeding with voting on the law.

“I do understand there was an intention to hurry up the process because the aim was for entry into force on 1 July, but this date is becoming less likely,” the official said.

by Luuk de Klein in Brussels

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