

The Netherlands Post-Damages Directive: Will the Popularity as a Preferred Forum for Actions for Damages for Competition Law Infringements Increase?

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1. Introduction

On 10 February 2017, the Dutch Government implemented the EU Damages Directive (the “Directive”)¹ into national law with the entry into force of the Implementation Act regarding the Private Enforcement of Competition Law Directive (the “Act”).² The Act amends several provisions of the Dutch Civil Code and of the Dutch Code of Civil Procedure and—in line with the Directive—essentially aims to ensure that anyone who was suffered harm caused by an infringement of competition law can effectively exercise their right to full compensation. As an increasing number of damages actions are being brought for infringements of competition law before courts in the Netherlands, the future will tell whether the implementation will further increase the attractiveness of the Netherlands as a preferred forum for antitrust actions for damages or whether other jurisdictions will also (or further) attract popularity.³

2. What’s new?

2.1 Introduction of the term *undertaking* in civil law

The Directive uses the term “undertaking” to describe the entity that has infringed competition law. Under competition law, the concept of an undertaking is an economic one, as it may encompass separate legal entities within a corporate group. In essence, separate legal entities may be viewed as a single undertaking, thus holding the group of legal entities liable for the anti-competitive conduct carried out by one of them. For instance, the European Commission (the “Commission”) can hold a parent company liable for the conduct of its subsidiary, even if that parent company has not itself participated in the infringement. This is the case when the parent company has the ability to exercise decisive influence over the conduct of its subsidiary and if it actually exercised decisive influence during the period of infringement. In case the subsidiary is wholly-owned, or almost wholly-owned by its parent, there is a rebuttable presumption that the parent company does in fact exercise decisive influence. In such case, the Commission will be able to hold the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company rebuts that presumption by proving that its subsidiary acted independently on the market.⁴ This presumption has proven extremely difficult to rebut in practice and is therefore an important tool for the Commission to hold the economic undertaking (including the parent company and the subsidiary) liable from a competition law perspective. However, the Directive deals with liability from a civil law perspective.

The question has now arisen as to whether the Directive aims to introduce the broader economic concept of an undertaking under competition law into civil law. The answer to that question is not entirely clear, but should most likely be answered negatively. On the one hand, the use of the term *undertaking* seems to imply that the Commission wants the civil liability to be in line with competition liability on this point. On the other hand, this would result in a big change on how the various Member States deal with civil parent company liability, as multiple EU jurisdictions, including the Netherlands, require a separate unlawful act of the parent company (for example through means of active involvement in the infringement). If the Directive would indeed require a change in the rules on civil parent company liability, it would have been logic if such far reaching consequence would have been

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¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349, p.1.

² Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), Government Gazette, 9.2.2017, Nr.28, available at <https://zoek.officielebekendmakingen.nl/dossier/34490/stb-2017-28?resultIndex=0&sorttype=1&sortorder=4> [Accessed 25 May 2017]. On 7 June 2016, the legi34490) was submitted to the second chamber of Parliament, see <https://zoek.officielebekendmakingen.nl/kst-34490-1.html> [Accessed 25 May 2017].

³ In addition to the Netherlands, popular jurisdictions for antitrust damages claims are the UK and Germany.

⁴ *Akzo Nobel NV v Commission of the European Communities* (C-97/08 P) EU:C:2009:536; [2009] 5 C.M.L.R. 23 at [61].

explicitly dealt with in the (recitals of the) Directive. This is not the case. Furthermore, the Court of Justice of the European Union (CJEU) held rather recently that a

“decision [of the Commission] does not determine the requirements for holding the defendants liable in tort, jointly and severally as the case may be, since this is to be determined by the national law of each Member State”.⁵

Moreover, the Directive itself also seems to leave room for national preferences on this point.⁶

In the Act the notion of “infringer” is also a key element. It is the infringer that acted unlawfully and it is the infringer that can invoke the passing-on defence. The Dutch legislator has not indicated that, with the introduction of the term infringer and the corresponding definition of undertaking, it aimed to change the current status of the rules on parent company liability. Under Dutch civil law, a parent company can be held liable for actions of its subsidiary on the basis of attribution, but only in exceptional circumstances. However, the Explanatory Memorandum to the Act is not entirely clear on this issue, especially because the legislator indicated that the authentic interpretation of the term undertaking is reserved to the CJEU.⁷

2.2 Presumption of damage

In line with the Directive, the Act introduces a rebuttable presumption that cartel infringements cause harm. The presumption of harm is new under Dutch law. The presumption can be rebutted by evidence to the contrary, to be provided by the infringer. It is important to note that the rebuttable presumption does not change the fact that a claimant still needs to quantify the damages he is claiming. In addition, it should be mentioned that no similar presumption exists for other types of infringements of competition law that are not cartels. The definition of what infringement constitutes a cartel and what infringement does not is thus crucial for any damages claimant wishing to rely on the presumption of damage.⁸

2.3 Disclosure of documents: the black and grey lists

With relation to the disclosure of documents, the Act introduces the so-called black list and grey list. The disclosure of documents falling under the black list cannot be ordered by the national court under any circumstances.

These documents do not constitute proof in actions for damages and shall be deemed inadmissible. The black list includes:

- leniency statements; and
- settlements submissions.

The national court may, however, order the disclosure of documents falling under the grey list, though only after the competition authority, by adopting a decision or otherwise, has closed its proceedings. If those documents are used prior to that date they will be declared inadmissible. The grey list includes:

- information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, such as a reply to the Statement of Objections or a reply to a Request for Information;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings, such as a Statement of Objections; and
- settlement submissions that have been withdrawn.

The new rules on disclosure constitute a significant improvement with regard to the previous situation where the disclosure of leniency statements was subject to a weighing exercise by national courts on a case-by-case basis taking into account all the relevant factors.⁹ The introduction of the absolute ban on the disclosure of leniency statements reflects the need to safeguard the effectiveness of leniency programmes. The effectiveness of such programmes would indeed be undermined if potential leniency applicants would be faced with the possibility of disclosure in actions for damages.

2.4 The right to full compensation and the passing-on defence

Since *Courage and Crehan*, it has been settled case law that individuals should be entitled to claim damages for loss caused by infringements of competition law.¹⁰ Actions for damages brought before national courts of EU Member States are therefore meant to strengthen the public enforcement of the competition rules as undertaken by the Commission and the national competition authorities. This was confirmed by the Directive, which states that any natural or legal person who was suffered

⁵ *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* (C-352/13) EU:C:2015:335; [2015] Q.B. 906; [2015] 5 C.M.L.R. 4 at [21].

⁶ Recital 11 of the Directive states that “[w]here Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive”.

⁷ Explanatory Memorandum, TK II, 2015-2016, 34490, nr.3, p.12.

⁸ The Directive incorporated for the first time, in Article 2(14), a definition of the term “cartel”, which the Act identically takes over. A cartel means “an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors”.

⁹ *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2011] All E.R. (EC) 979 at [31]; *Bundeswettbewerbshörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [34].

¹⁰ *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26]–[27]; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) EU:C:2006:461; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60].

harm caused by an infringement of competition law can claim full compensation for that harm. Full compensation shall bring that person in the position in which it would have been had the infringement of competition law not been committed, and shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. Importantly, the Directive also states that full compensation shall not lead to overcompensation.

A tool to avoid overcompensation is the passing-on defence, which is explicitly allowed by the Directive and taken over in the Act. The passing-on defence means that defendants can invoke the fact that the injured party passed on (part of) the overcharge resulting from the defendant's infringement of competition law to another customer further downstream. If the injured party paid a higher price resulting from a competition law infringement, the defendant can argue that the injured party suffered no or reduced harm because it passed on the whole or part of the higher price to its downstream customer(s). The burden of proving that the overcharge was passed on is on the defendant.

Prior to the implementation of the Directive, the Dutch Supreme Court already confirmed that the passing-on defence is a valid defence under Dutch law.¹¹ The Dutch Supreme Court also gave an opinion on how the passing-on defence should be qualified under Dutch law and thereby settled the discussion in legal literature about this topic. Most legal writers took the position that the passing-on defence is a defence against the amount of damages (in short: the overcharge minus the part of the overcharge that was passed on). On the other hand, some other authors argued that the passing-on defence should be qualified as a means for the infringer to invoke the concept of deduction of collateral benefits (*voordeelstoerekening*).¹²

Perhaps surprisingly, the Dutch Supreme Court held that both approaches can be applied when it comes to the passing-on defence. According to the Supreme Court, both approaches will lead to the same result: it should be assessed which advantages and disadvantages are connected to the infringement in such a way that they can reasonably be attributed to the defendant. A court assessing the passing-on defence can therefore choose which approach it will take, thereby taking into account the procedural debate.

Although being a valid defence, the passing-on defence remains controversial because it requires a complex and extensive economic analysis. To provide guidance on the subject the Commission published a Communication on quantifying harm in actions for damages,¹³ which is accompanied by a more comprehensive and detailed

Practical Guide.¹⁴ More recently, on 25 October 2016, the Commission also published a "Study on the Passing-on of Overcharges",¹⁵ which includes a 39-step manual for national judges on how to calculate damages. The importance that Dutch courts will attach to these documents remains to be seen.

2.5 Limitation periods

The Act provides a limitation period of five years. This period starts running on the day following the day on which the competition law infringement ceased and the claimant became aware or could reasonably be expected to be aware of the infringement, the fact that it caused harm and the identity of the infringer. In any event, an action for damages is time barred upon expiry of 20 years following the day after the end of the infringement.

Furthermore, the Act states that the limitation period will be extended if a competition authority takes action for the purpose of the investigation or its proceedings in respect of the infringement to which the action for damages relates. The duration of the extension is one year after the infringement decision has become final or after the proceedings are otherwise terminated. A final infringement decision is a decision that cannot or can no longer be appealed. Thus, if an infringement decision is being appealed the limitation period will be suspended for the duration of the appeal. The Act also provides for an extension of the limitation period in case of out-of-court settlement discussions. The limitation period regime has retroactive effect and applies to cases initiated after 26 December 2014. As a result of the limitation periods and their possible extensions, infringers may not know the full extent of the damage claims they face until several years after the infringement decision.

In the consultation round on the draft Act, there was a lot of criticism on the limitation topic because the initial limitation scheme in the draft went one step further than was required by the Directive. Interestingly, limitation periods was the only topic on which practitioners mostly representing claimants and those mostly representing defendants seemed to agree. It is in the interest of both claimants and defendants (as well as in the public interest) that limitation periods are clear and not too long. After all, extending limitation periods will generally limit any willingness for defendants to come to a settlement because those defendants can be confronted with new claims during such extensions.

¹¹ *TenneT v ABB* NL:PHR:2016:70.

¹² The concept of deduction of collateral benefits can be described as follows: where one and the same event has resulted in both loss for the person who suffered it (i.e. paying the overcharge) and benefited from it (i.e. passing-on the overcharge), the benefit must, to the extent that this is reasonable, be taken into account in assessing the reparation of the damage to be made.

¹³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C167, p.19.

¹⁴ Practical Guide—Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205.

¹⁵ Available at <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf> [Accessed 25 May 2017].

2.6 Limitation of liability for small and medium enterprises and immunity recipients

The Act provides that undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the harm caused. Each of those undertakings is bound to compensate the harm in full and the injured party has the right to require full compensation from any of them.

However, the Act provides an exception for small and medium enterprises (“SMEs”) and immunity recipients. SMEs can only be held liable to their direct and indirect purchasers if their market share in the relevant market was below five per cent at any time during the infringement period and if the application of the normal rules would irretrievably jeopardise their economic viability and cause their assets to lose all their value. Immunity recipients on the other hand can only be held liable to their direct and indirect purchasers, unless full compensation cannot be obtained from the other infringers. Furthermore, the Act also provides a windfall for immunity recipients with respect to contribution claims from other infringers. The Act introduces the rule that the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm and shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

2.7 Proportionate share reduction in consensual settlements

The Act introduces the rule whereby an injured party, following a consensual settlement, will see its claim reduced by the settling co-infringer’s share of the harm that the infringement inflicted upon the injured party. Any remaining claim of the settling injured party can only be exercised against non-settling co-infringers. The claimant will then have to reduce its claims against the remaining co-infringers with the proportionate share of the settling co-infringer. This principle was already recognised by the District Court of The Hague with relation to damage claims deriving from the *Candle Waxes* cartel.¹⁶

3. Practical significance

Over the last years the Netherlands has seen a significant increase in actions for damages deriving from competition law infringements.¹⁷ This is mainly related to the advantages of the Dutch judicial system. For instance, Dutch courts have a reputation of being professional and efficient, judgments are rendered expeditiously and the costs of litigation are modest.¹⁸ Furthermore, actions for damages in the Netherlands can be brought by claim vehicles that can bring actions under their own name and there are no limitations on funding by third parties. The Act is thus expected to make the Netherlands an even more appealing forum for actions for damages. Considering the current Brexit-related uncertainties, it remains to be seen whether follow-on damage claims will shift to Continental Europe, in particular the Netherlands.

¹⁶ *CDC v Shell* NL:RBDHA:2016:11305.

¹⁷ Notable cartel damage actions that have been brought in the Netherlands include *Airfreight* (AT.39258), *Bitumen Netherlands* (AT.38456), *Candle Waxes* (COMP/39181), *Elevators and Escalators* (COMP/E-1/38823), *Gas Insulated Switchgear* (Case COMP/F/38899), *Prestressing Steel* (COMP/39344) and *TV and Computer Monitor Tubes* (AT.39437).

¹⁸ Dutch law does not have the “loser pays it all” principle.