GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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COMPARISON ACROSS JURISDICTIONS

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Netherlands Q&A

Klaas Bisschop and Sanne Bouwers[1]

Effect of public proceedings

1 What is your country's primary competition authority?

The Authority for Consumers and Markets (ACM).

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The ACM has both supervisory and investigative powers. Supervisory power entails the general monitoring of compliance with the Dutch Competition Act (DCA), whereas investigative power is used to determine whether an infringement has or has not occurred. This investigative power is exercised where there is a suspicion of an infringement.

Based on their supervisory duties, ACM officials have the following powers:

- to enter and search locations, if necessary with police assistance, with the exception of private homes if permission has not been granted by the resident;
- to demand information, including from staff members who have knowledge of possible infringements;
- to demand access to business data and documents and to make (digital) copies of such data and documents; and
- to examine vehicles and other means of transport.

Based on their investigative duties, ACM officials have, in addition to the powers set out above, the following investigative powers:

- to enter and search private homes, if necessary without permission from the resident, after having obtained authorisation from the examining magistrate responsible for handling criminal cases at the Rotterdam District Court;

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- to seal business premises, spaces and objects; and
- to exercise their powers, if necessary with police assistance.

ACM officials cannot initiate criminal proceedings upon (the suspicion of) an infringement of the DCA. The DCA is not enforced as a criminal matter.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Private enforcement proceedings can be initiated parallel to any investigation conducted by and any sanctions imposed by ACM officials. The DCA is not enforced as a criminal matter, for which reasons no criminal proceedings can be started on the basis of the DCA

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

Pursuant to Article 16(1) EU Regulation No. 1/2003, a Dutch court cannot take decisions that would conflict with a decision rendered by the European Commission. To that effect, a Dutch court should assess whether it is necessary to stay the respective private enforcement proceedings awaiting the outcome of the European Commission's decision and the outcome of any appeals from decisions following investigations, which in practice entails the adjournment or suspension of the private enforcement proceedings.

The Amsterdam Court of Appeal has held that staying national proceedings is only prescribed insofar as in the national proceedings questions of fact or of law are at issue of which the answers are subject to the validity of the decision of the European Commission, provided that there is reasonable doubt as to the validity of that decision.

There is no specific provision in Dutch law that provides for a mechanism for staying a private enforcement proceeding while an investigation is pending by the ACM. However, Dutch courts may decide to stay such proceedings based on principles of due process.

Further, with the implementation of the EU Directive 2014/104/EU on 10 February 2017 (the Damages Directive), the limitation period of a stand-alone private claim to 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 (Article 6:193t(2) (new) Dutch Civil Code (DCC)). The duration of the extension is one year after the infringement decision has become final or after the proceedings are otherwise terminated.

A more general note on the Damages Directive: with the implementation of this Directive, Article 6:193k up and until Article 6:193t (new) were added to the DCC and Article 44a(3), Article 161a, Article 844 up and until Article 850 (new) were added to the Dutch Code of Civil Procedure (DCCP). These newly implemented articles only apply to, in short, cross-border infringements of competition law and not to pure national infringements. In the explanatory memorandum to the implementation act, the legislator indicated that it intends to also declare these new articles to apply to pure national infringements through means of a future legislative proposal.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

The operative part of a decision of the ACM is binding in private enforcement proceedings, provided that the decision has formal legal force (meaning that the decision is no longer subject to ordinary forms of review). With the implementation of the Damages Directive, the evidentiary value of a final and conclusive cartel infringement finding by the Dutch competition authority was explicitly laid down in Article 161a (new) DCCP.

European Commission decisions are binding on the addressee of those decisions in private enforcement proceedings. There is a debate in the Netherlands as to whether this applies to the entire decision or only the operative part.

Dutch rules of evidence are characterised by the doctrine that evidence can be provided by all legal means available, including a decision of a foreign competition authority or a sector-specific regulator. Courts are free to assess evidence and are therefore also free to assess a foreign decision or a decision of a sector-specific regulator as prima facie evidence.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

After the implementation of the Damages Directive (and therefore in relation to claims where the infringement of EU competition law started on or after 10 February 2017) immunity recipients can only be held liable to their direct and indirect purchasers, unless full compensation cannot be obtained from the other infringers (Article 6:193m (4) (new) DCC). Furthermore, Article 6:193n (new) DCC also provides a windfall for immunity recipients with respect to contribution claims from other infringers. 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.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

With the implementation of the Damages Directive (and therefore in proceedings brought on or after 26 December 2014) a so-called black list (Article 846 (new) DCCP) and grey list (Article 847 (new) DCCP) was introduced. The disclosure of documents from a competition authority's file 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.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

With the implementation of the Damages Directive (and therefore in proceedings brought on or after 26 December 2014), lenience statements are shielded from subsequent disclosure as they fall under the black list of Article 846 (new) DCCP (see further question 7).

9 Is information submitted in a cartel settlement protected from disclosure?

With the implementation of the Damages Directive (and therefore in proceedings brought on or after 26 December 2014), settlement submissions are shielded from subsequent disclosure as they fall under the black list of Article 846 (new) DCCP, provided that they will not be withdrawn (see further answer to question 7).

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

To protect commercially sensitive information, a Dutch court can impose an obligation of confidentiality upon the recipient of such information. Also, the court can order that certain documents are to be deposited at the court where they can be studied in person, but not photocopied.

Furthermore, the parties can request the court to order that the proceedings will be conducted behind closed doors (Article 27 DCCP). If that request is allowed, the parties to the proceedings cannot make statements to third parties about what was discussed during the hearing (Article 29 DCCP). In addition, a judgment can be redacted before it is published (Article 28 DCCP).

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

An action for compensation can be brought on any of the following grounds. First and foremost Article 6:162 DCC contains the possibility to claim damages on the basis of a wrongful act. Second, a claimant may also base its claim upon:

Article 6:74 DCC, which provides a claim for damages in the event of breach of contract, Article 6:212 DCC, which provides a claim for damages in the event of unjust enrichment or Article 6:203 DCC, which provides a claim for damages in the event of undue payment.

The implementation of the Damages Directive introduced a rebuttable presumption that cartel infringements cause harm (Article 6:193l (new) DCC), to be increased by statutory (compound) interest.

12 What forms of monetary relief may private claimants seek?

The principal monetary relief sought is compensatory damages. Monetary relief comprises both losses and foregone profits (Article 6:96(1) DCC).

Exemplary or punitive damages cannot be awarded under Dutch law.

13 What forms of non-monetary relief may private claimants seek?

In principle, compensation of damage is made by means of monetary relief. Pursuant to Article 6:103 DCC, however, upon the demand of the person suffering loss, a Dutch court may award compensation of damage in 'a form other than payment of a sum of money'. Other forms of compensation may be payment in kind, specific performance or a court order or prohibition for certain behaviour in the future.

14 Who has standing to bring claims?

Any person or legal entity that has sufficient interest has standing to bring claims (Article 3:303 DCC). Sufficient interest (e.g., damages suffered) is typically not difficult to prove and generally presumed.

15 In what forums can private antitrust claims be brought in your country?

There are no specialised competition law courts in the Netherlands for civil matters. Civil claims for breach of competition law must be brought before one of the civil district courts.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

Article 99 DCCP applies if the claim has no foreign aspect. In that case the court of the district in which the defendant is located has jurisdiction. The DCCP does provide several exceptions to this rule.

If the case has an international aspect the rules of European or Dutch private international law need to be followed. In proceedings whereby the defendant is domiciled in EU Member States and that are instituted on or after 10 January 2015, the Brussels Recast Regulation ((EU) No. 1215/2012) applies. The main rule under the Brussels Recast Regulation is that a defendant should be sued in the jurisdiction of its domicile. There are several exceptions to this main rule. An exception often used in the Netherlands is the 'anchor defendant' rule: if there are multiple defendants domiciled in different Member States, a claimant can bring its claims against all those defendants in the courts of any Member State in which one or more of the defendants is domiciled (i.e., the anchor defendant), provided those claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments (Article 8(1) Brussels Recast Regulation).

In general, Dutch courts tend to easily adopt jurisdiction in international antitrust damages cases.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Yes. Claims can be brought based on foreign law, provided that it is based on the applicable law according to Dutch private international law or European private international law (e.g., the Rome II Regulation ((EC) No. 864/2007). Article 6(3) of the Rome II Regulation provides that the law applicable to claims in relation to restriction of competition shall be the law of the country where the market is or is likely to be affected. If the market is likely to be affected in more than one country, a claimant suing in the court of a country in which a defendant is domiciled may choose to base its claim on the law of that court, provided that the market in that country is directly and substantively affected.

The Rome II Regulation only applies to events giving rise to damages occurred after 11 January 2009. In respect of acts before 11 January 2009, the Conflict Law on Wrongful Acts (WCOD) applies. On the basis of Article 4 WCOD, competition damages claims are governed by the law of the country in which the competitive conditions were impaired (also known as the 'market rule'). If this is more than one country, multiple jurisdictions can be applicable. Because in large antitrust damages cases often various (sometimes up to thousands of) claims are bundled through cessation of those claims to a claim vehicle, it is currently being debated in proceedings whether that means that a variety of foreign law systems is applicable to the claims (also known as the Mosaic principle). The Amsterdam District Court recently proposed in one of such proceedings to refer the case to the Dutch Supreme Court for a preliminary ruling on the question of determination of applicable law. The Supreme Court, however, refused to answer the questions for technical, procedural reasons, which is why the position is still unclear.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Proceedings commence with the serving of a writ of summons on a defendant by a claimant. Subsequently, the case must be registered with the court by entering the case in the docket on the date stated in the writ of summons. On that date, the defendant has to appear in court by means of introducing its attorney to the court. After the writ of summons is registered with a court, the defendant has the opportunity to file a statement of defence. Both the plaintiff and the defendant have to pay court fees; these differ based on which court the case is tried before and whether the claim is brought by a natural person or legal entity and what the total amount of the claim is. Service of the claim is done by a bailiff. Service on foreign defendants must take place in accordance with the applicable rules (i.e., EU Service Regulation, Hague Service Convention).

19 What is the limitation period for private antitrust claims?

The position after the implementation of the Damages Directive is as follows. Pursuant to Article 6:193s (new) DCC, a claim for damages governed by Dutch law becomes time-barred five years after 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.

The position prior to implementation of the Damages Directive does not differ materially. Pursuant to Article 3:310 DCC, a claim for damages becomes time-barred five years after the date on which the prejudiced party becomes aware of the damages and the identity of the party responsible for the damages, and, in any event, on the expiry of 20 years following the event that caused the damages.

Unlike in other jurisdictions, under Dutch law it is relatively easy to interrupt the limitation period. This can be done by a 'simple' letter in which the claimant unequivocally reserves its rights. See also question 22.

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The limitation periods are part of the substantive law. The effect of their expiry is that the plaintiff has no cause of action.

21 When does the limitation period start to run?

See the answer to question 19.

22 What, if anything, can suspend the running of the limitation period?

After the implementation of the Damages Directive 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 (Article 6:193t(2) (new) DCC). 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. Further, Article 6:193t(1) (new) DCC provides for an extension of the limitation period in the case of out-of-court settlement discussions.

Further and more generally (therefore also applicable to cases in which the Damages Directive does not apply), a claim for damages becoming time-barred can be avoided by:

- the institution of formal legal proceedings (Article 3:316 DCC);
- submission of a written warning or a written notice by the claimant in which it unequivocally reserves its rights (Article 3:317 DCC); or
- the acknowledgement of the claim by the defendant (Article 3:318 DCC).

After the limitation period is interrupted, a new limitation period commences (Article 3:319 DCC). This new limitation period can in its turn be interrupted in the exact same ways as described above.

In addition, the parties can agree on standstill or tolling agreements in respect of Dutch law limitation applicable to claims.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

To start a claim, a writ of summons must be served. Apart from many administrative requirements, such as the names and places of residence from the plaintiff and defendant, the writ of summons must contain the claim and its grounds. In general, this must be a rather detailed description of the facts and the arguments.

Pleading standards as such do not exist in the Netherlands insofar as they are not claim specific. In general, the writ of summons must include not only the grounds of the claim, but also the defence of the defendant (if known) and the reasons for this defence, the evidence the plaintiff can produce and the witnesses he or she wants to examine. Furthermore, Article 21 of the DCCP contains the obligation to substantiate a claim. This means that the writ of summons must contain all grounds, pleas and claims upon which the case should be decided.

With respect to follow-on claims, the claimant can for a large part (except for substantiation of the damages) rely on the findings of the European Commission or the ACM (see question 5).

With respect to stand-alone claims the Dutch Supreme Court (in the *IATA* ruling) has held that a claimant who argues that another party acts or acted in violation with the competition law, must substantiate this with relevant (economic) facts and circumstances, so that a sufficiently adequate and founded (economic) party debate and subsequent legal judgment is made possible.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

In the case of an interim relief procedure, Article 254 DCCP states the requirements for granting interim relief. It describes the following requirements:

- the urgency of the case must be shown;
- the importance of the claim to the plaintiff must be clear; and
- there must be a balancing of the interests of both plaintiff and defendant.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

The defendant can put forward his or her defence (in a statement of defence) and while doing so he or she can also counterclaim. The notification of a motion to dismiss does not exist in the Netherlands, but the jurisdiction of the court, and the timely and proper service of the writ of summons, can be challenged at the start of the proceedings. Summary judgment as such does not exist in the Netherlands, but courts can give interim judgments on certain parts of the case that can already be decided.

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

The general concept of document discovery or disclosure does not exist under Dutch law. Under certain conditions, a party has the right to request document production by another party (even a third party) on the basis of Article 843a DCCP. In short these conditions are: the party making

the request has a legitimate interest; the party making the request has specified the relevant documents (in order to avoid fishing expeditions); and the documents relate to a legal relationship to which the requesting party or its legal predecessor was a party. A request for the disclosure of documents will be denied if there are compelling interests to refuse such disclosure.

A request for the disclosure of specific documents can be made by a motion during the proceedings or in separate preliminary relief proceedings and will be assessed by the court.

No or limited disclosure can be ordered in relation to documents on the black and grey lists (see question 7).

Prior to proceedings, it is possible to order a provisional examination of witnesses or a preliminary expert opinion or to seize evidence. However, when evidence is seized, this does not automatically give the attaching party the right for inspection. A subsequent request for inspection on the basis of Article 843a DCCP shall have to be made.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

If there are compelling reasons to refuse disclosure, for example, if the requested documents contain confidential business data, the duty to disclose documents may not apply for the requested party (Article 843a(4) DCCP). The court will then balance the interests of the requesting party and the requested party.

For ways in which confidential information can be protected during the proceedings, see question 10.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Pursuant to Article 843a(3) DCCP, the duty to disclose does not apply to those who have a right to refuse to give evidence because of their professional occupation, such as physicians, notaries and attorneys. Attorneys are considered to have absolute privilege for which reason they have the right to decline to give evidence once they appear in court.

Trial

29 Describe the trial process.

It is important to note that in Dutch litigation no such thing as a trial (a hearing in which all evidence is presented to the court, followed by a final decision) exists.

After the filing of the writ of summons and the statement of defence, the court usually orders the parties to appear in court. The purpose of such appearance is for the judge to investigate whether a settlement can be reached, to request the parties to provide additional information and to provide further directions for the case. Such directions can also be given in a separate case management hearing, which occur more and more frequently in complex international antitrust damages cases.

30 How is evidence given or admitted at trial?

Evidence may in principle be presented in any form (Article 152 DCCP). Usually, evidence is presented by submitting documents, hearing witnesses and/or submitting expert testimonies.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

In the course of court proceedings, the court can appoint experts, either *ex officio* or at the request of a party (Article 194 DCCP). Experts may advise on any aspect relevant to the proceedings; for example, causation or the evaluation of damages. Before court proceedings are under way, a party can request that the court allows preliminary expert advice on a certain issue (Article 202 DCCP). In addition, each party is free to file opinions of its own experts. However, such opinions are considered as coming from party experts (i.e., are taken to be partisan). If there are conflicting opinions of the party experts, the court usually appoints its own experts. If the court decides to appoint an expert, it will firstly consult the parties about the expert to be appointed and the questions to be raised.

32 What must private claimants prove to obtain a final judgment in their favour?

To obtain a judgment in its favour, a claimant in general has to prove that all elements of the statutory provision on which the claimant has based its claim are met. For example, if the claimant has based its claim on wrongful act (Article 6:162 DCC), the following elements will have to be proven.

With respect to stand-alone claims, the claimant will need to establish both a breach of competition law and that it caused the claimant harm. With respect to follow-on claims, the breach of competition law is proven by the competition authority that an infringement of competition law has occurred. In any case (irrespective of whether it concerns a stand-alone or a follow-on claim), the claimant will need to establish the quantum of damages and causation.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

Defendants in private antitrust cases can invoke the passing on-defence, thereby arguing that the claimant has not suffered any damages because it was able to pass on any damages to its customers (Article 6:193p (new) DCC).

Before the implementation of the Damages Directive, the Dutch Supreme Court confirmed that the passing-on defence is a valid defence under Dutch law. Before the judgment of the Supreme Court was handed down, there was discussion (and different approaches of lower courts) as to the question how the passing-on defence should in fact be qualified under Dutch law. Is it a defence against the amount of damages (i.e., the overcharge minus the part of the overcharge that was passed on)? Or is it an application of the concept of deduction of collateral benefits? This latter concept can be described as follows: where one and the same event has resulted in both loss for the person who suffered it (i.e., overcharge paid) and benefit (i.e., passing-on of that 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. Interestingly (and rather

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.

34 How long do private antitrust cases usually last (not counting appeals)?

It is difficult to estimate the length of private antitrust proceedings, because this is highly dependent on the complexity of the case, on whether or not the court stays the case, wants to hear witnesses or take expert advice and on whether one of the parties has made a request for documents (on the basis of Article 843a DCCP), etc. Usually, a final decision is rendered within one to two years after service of the writ of summons in an average civil claim case. In practice, the duration of an antitrust damages case is often longer. This has multiple causes; for example, the claims must be assessed under various foreign systems of law (see also question 17). If the court finds it impossible to assess the damage, it can refer the case to separate follow-up proceedings for the determination of the damages. These proceedings can take up approximately another six to 12 months (or longer).

35 Who is the decision-maker at trial?

The court (i.e., a single judge division or multiple judge division) is the decision-maker during a hearing.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

Article 6:193l (new) DCC provides for a rebuttable presumption that the competition law infringement caused harm. 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 needs to quantify the damages he or she is claiming.

37 How are damages calculated?

In principle, the court assesses on the basis of injuries suffered by the claimant. In general, the claimant should be put in the situation in which he or she would have been in had the tortious act not been committed. If the damages cannot be calculated precisely, they can be estimated (Article 6:97 DCC). Upon request of the claimant, the court may decide to assess the damages on the basis of the profit made by the defendant (Article 6:104 DCC).

There are different ways to calculate damages caused by a cartel. The following five methods are known in the Netherlands: the before-and-after method, the yardstick method, the cost-based method, the pride prediction method and the theoretical modelling of oligopoly method. These methods calculate the 'but for' price (i.e., the price how it should have been without the cartel). By comparing that price to the price after the cartel has been deformed the damages become measurable.

The court can request the ACM for assistance in assessing the amount of the damages (the Article 44a(3) (new) DCCP).

38 Does your country recognise joint and several liabilities for private antitrust claims?

Article 6:193m (new) DCC (implementing Article 11 of the Damages Directive) 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. There are various exceptions to this main rule.

The first exception relates to immunity recipients (see answer to question 6). In short, immunity recipients can only be held liable to their direct and indirect purchasers, unless full compensation cannot be obtained from the other infringers.

The second exceptions relates to small and medium-sized enterprises (SMEs) and immunity recipients (Article 6:193m(2) (new) DCC). SMEs can only be held liable to their direct and indirect purchasers if their market share in the relevant market was below 5 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.

Also, before implementation of the Damages Directive, it was well established under Dutch law that joint infringers may be held joint and several liable, but the foregoing exceptions did not apply.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Yes, it is possible to file a claim for contribution with other defendants or a third party. In order to do so, the defendant will have to file a motion to request the court to start indemnification proceedings (Article 210 DCCP). Strictly speaking, the name 'indemnification proceedings' is not a correct name for such ancillary proceedings because such proceedings can also relate to a contribution claim, instead of a claim for indemnification. Thus, Dutch law does not draw a clear distinction between contribution and indemnification claims.

Article 6:193n (new) DCC (implementing Article 11(5) of the Damages Directive) also provides a windfall for immunity recipients with respect to contribution claims from other infringers. 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.

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

The unsuccessful party is usually ordered to pay the legal costs (attorneys' fees and court costs) of the successful party (Article 237 CCP). The costs to be paid are fixed by the court, according to a scheme, which is based on the 'value of the case', namely, the amount claimed. The costs, as fixed by the court, are usually much lower than the actual costs. The successful party has no action at his or her disposal to claim the remaining part of his or her legal costs. This system has been criticised for a long time, but it is not expected to change in the near future.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

The court may decide that each of the parties will have to pay its own legal costs if the court decides in both the claimant's and in the defendant's favour. In addition, the liability of the party that loses the proceedings may be limited if the costs that were made by the claimants were made or caused unnecessarily (Article 237 DCCP).

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Dutch Rules of Professional Conduct prohibit Dutch attorneys to charge contingency fees (meaning no cure, no pay) or conditional fees (meaning no win, no pay). Attorneys ought to charge a 'reasonable fee'. It is possible for attorneys to charge a lower hourly rate, which will be raised when the proceedings turn out to be successful, provided that the lower rate is cost-effective. The entire system is subject to an ongoing debate.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Litigation funding is lawful in the Netherlands and has become increasingly popular although it is relatively new. It is also possible to assign a claim to a third party (e.g., a claim vehicle, Article 3:94 DCC).

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Because private antitrust claims are usually on the basis of wrongful act or tort it is possible for companies to have a liability insurance. However, an insurer will most likely not cover the damages: a deliberate breach of competition law cannot be insured because this is contrary to public order and public morality. After-the-event insurance is not available in the Netherlands.

Appeal

45 Is there a right to appeal or is permission required?

Parties can in principle lodge an appeal against final decisions in the first instance before the Court of Appeal (Article 322 DCCP). No permission is required. Interlocutory decisions can only be appealed if leave for appeal was granted.

46 Who hears appeals? Is further appeal possible?

Cases are heard by the Court of Appeal. Appeal in cassation is available before the Dutch Supreme Court. With mutual consent, parties may also decide to skip the appeal proceedings and lodge an appeal at once before the Supreme Court against a decision in first instance (Article 398 (2) DCCP).

47 What are the grounds for appeal against a decision of a private enforcement action?

The Court of Appeal will conduct a full review of the merits of the case (*de novo* appeal), for which reason any ground for appeal can be brought forward against a decision in first instance (both related to issues of facts or law).

The Supreme Court appeals are limited to points of law and points of insufficient motivation (that is: allegations that the Court of Appeal did not provide sufficient reasons for its decision or that the reasoning was incomprehensible).

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Collective redress cases are common in the Netherlands and can be shaped in different ways.

Firstly, as a matter of law, there is no limit to the number of claimants who can bring an action and an enormous amount of claimants could simply be added to one action. This will be permitted if there is sufficient connection between the claims of the different claimants. The criteria for determining whether there is 'sufficient connection between the claims' are, inter alia, the point in time at which the claim arose and whether the claims concern the same subject manner. Furthermore, courts take the question of efficiency into account when determining whether the claimants can jointly take action.

Secondly, collective actions are possible (Article 3:305a DCC). The collective action can be used, for example, to obtain a declaratory judgment against the third party responsible for the damages. After the introduction of the collective damages action (see question 52), also actual damages can be claimed.

Furthermore, claim vehicles often ask injured parties to assign their claims to them after which the claim vehicle will start proceedings (the Dutch Assignment Model). The (deferred) purchase price will be set at a percentage of the damages that will be received under a judgment or settlement.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Collective actions can be brought by an interest group in the form of a foundation or an association, whose statutory goal it is to represent (groups of) injured parties having similar interests in order to obtain a declaratory judgment against a third party (Article 3:305a (1) DCC).

Consumer associations or professional associations can therefore bring claims, provided that they have legal personality and provided that they are established for the purpose of protecting the interests of a certain group of persons – whether this is before or after the dispute has arisen – whose interests are of a similar nature.

50 What is the standard for establishing a class or group?

There is no minimum standard for establishing a class or group to initiate a collective action, although the interests of the class members should be sufficiently similar.

51 Are there any other threshold criteria that have to be met?

A foundation or association wanting to initiate a collective action shall have no *locus standi* if, in the given circumstances, it has not made a sufficient attempt to achieve the objective of the action through consultations with the defendant. A two-week period from receipt by the defendant of a request for consultations giving particulars of the claim shall in any event suffice for such purpose (Article 3:305a(2) DCC).

In addition, the foundation or association must ensure that the interests of the persons on whose behalf the proceedings are being initiated are sufficiently guaranteed. Relevant aspects in this respect are, inter alia, the following:

- the foundation or association should have a correct corporate governance (which is often tested on the basis of the principles of the Dutch Claim Code, which principle inter alia cover topics as payment of the directors, a supervisory board, etc.);
- the foundation or association should have sufficient knowledge and experience (e.g., a track record); and
- commercial gain should not be the key driver for the foundation or association.

52 How are damages assessed in these types of actions?

The previous disadvantage of the collective action under Article 3:305a DCC was that these proceedings could be used by the foundation or association to claim damages from the third party (Article 3:305(3) DCC). The main reason why the Dutch legislator decided to exclude the possibility of claiming (monetary) damages in a collective action is because it took the view that damage claims would be less suitable to be dealt with by way of collective action considering all individual circumstances of the injured parties involved.

This will soon change. On 19 March 2019, the Dutch Senate approved the legislation introducing collective damages actions in the Netherlands. The legislation introduces an option to claim monetary damages in a 'US style' class action on an opt-out basis and thus lifts the previous prohibition on representative organisations to claim monetary damages in a collective action.

The collective damages case can be used for any type of case and claim and therefore also for cartel damages cases.

The exact date on which the new legislation will enter into force has not been determined yet but this will likely be some time in 2019. The new legislation will apply to harmful events that took place on or after 15 November 2016.

The new legislation will not change the way in which damages can be assessed (see answer to question 37).

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

A foundation or association currently cannot claim damages on behalf of the persons it represents, although this is about to change. See question 52 for an explanation.

In the new collective damages action, the court will have a lot of discretion as to how the damages awarded will be distributed. For example, in big damages cases the individual parties could submit their claim with a claims administrator who will take care of the actual payment on the basis of various categories of damages. In small damages cases the court could determine

an overall damages amount that can be deposited in a fund for the further distribution amongst the injured parties. In addition, it will also be possible that part of the damages awarded will be a payment in kind, for example, in the form of a discount on future insurance premiums to be paid.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Yes. It is possible to reach a collective settlement on the basis of the Dutch Act on Collective Settlement of Mass Claims (WCAM). The WCAM provides for a mechanism for collective redress in mass damages on the basis of a settlement agreement concluded between, one the one hand, one or more foundations or associations representing the interests of a group of injured parties that suffered damages and on the other hand, the party or parties allegedly causing the damages. Once all parties involved have reached a collective settlement, they may submit a joint application to the Amsterdam Court of Appeal, requesting the Amsterdam Court of Appeal to declare the collective settlement binding on all injured parties falling within the scope of the settlement agreement. The Amsterdam Court of Appeal has the sole jurisdiction to declare such a collective settlement binding. If the Amsterdam Court of Appeal indeed declares the collective settlement binding on all injured parties, the settlement agreement will bind all injured parties falling within the scope of the settlement agreement, whether known or unknown and whether residing in the Netherlands or abroad. Those injured parties that do not want to be bound by the settlement agreement have the option to opt-out, but they must do so within a limited period of time to be set by the Amsterdam Court of Appeal (which should at least be three months following the day on which the collective settlement is declared binding).

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

No, the Dutch competition authority cannot impose redress schemes.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes. Any dispute that has arisen or that may arise between the parties out of a defined legal relationship whether contractual or not, are arbitral (Article 1020 DCCP).

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

A court shall declare that it has no jurisdiction to hear the dispute if the parties have entered into a valid arbitration agreement and one of the parties relies on this agreement (Article 1022 DCCP). However, defendants cannot always rely on an arbitration clause in a cartel damages case. There is case law available in the Netherlands in which it is held that the scope of the

contractual arbitration clause was not so broad as to include claims arising from competition law violations. Customers could not reasonably expect that disputes relating to (secret) anti-competitive behaviour would be covered by them.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

A court can recommend mediation before proceeding with a trial if the court finds the case suitable for mediation. However, a court cannot compel parties to enter into mediation. After the mediation process has started, the role of the court is finished and the proceedings will be stayed.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The Netherlands implemented the Damages Directive on 10 February 2017. Although this was after the deadline set by the European Commissions (i.e., 26 December 2016), this was far earlier than most other Member States. Whether the implementation of the Damages Directive will increase the popularity of the Netherlands as being a preferred forum for competition damages claims has yet to be seen. This may depend on a number of factors, including a relative comparable level playing field across Europe after implementation of the Damages Directive and the current Brexit-related uncertainties. The Netherlands is and will remain a relatively small country. Since jurisdiction in international antitrust damages cases in the Netherlands is often based on a Dutch anchor defendant, it is logical that the UK and Germany – being the current other two popular jurisdictions – host more potential anchor defendants.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

The current collective redress mechanisms in the Netherlands is about to be supplemented with a collective damages action (see further question 52 on the legislative proposal). This new collective action (comparable with a US-style class action) can be initiated for any type of damages, so therefore also with respect to anti-trust damages claims, as the Dutch legislator has specifically held. This might further increase the popularity of the Netherlands as a preferred forum for competition damages claims.

Appendix 1

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Klaas Bisschop is a partner in Hogan Lovells' Amsterdam office. Klaas' practice focuses on dispute resolution in complex cases. He also has extensive experience in arbitration before, among other things, panels of the ICC and the Netherlands Arbitration Institute. He has represented clients before the Dutch courts of first instance, the Dutch courts of appeal, arbitral panels and the European Court of Justice. Klaas has been involved in many international disputes. He has been responsible for coordinating cross-border litigation in Europe, the US and other jurisdictions. Klaas is recommended for his work in all major directories.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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