

Executive summary and overview of the national report for the Netherlands

Section I – Summary of findings	
<p>Actions for damages for breach of antitrust regulation in the Netherlands are brought under the same rules and principles as actions for damages based on tort. Apart from implementing measures for Regulation 1/2003, there are no special procedural rules with respect to an action brought for an infringement of competition law, nor for Articles 81/82 EC, nor the Dutch competition act ("Mededingingswet", "CA").</p> <p>Private antitrust litigation in the Netherlands is increasing. Most cases however are between contracting parties seeking rescission or suspension of provisions in contract. Actions for damages brought for civil courts for infringements of Article 81 and/or 82 EC or their Dutch equivalents remain rare. Several cases are pending however, and within the next few years this image may change.</p> <p>Complex antitrust cases can take years to reach a decision. Because of the long duration of civil proceedings, companies often prefer to conduct summary proceedings, asking for interim injunctions. In these proceedings however claims for damages are as a rule dismissed because of lack of pressing interest. Another alternative is arbitration or settlement, in both cases the result of the procedure remains outside the public domain.</p>	
Section II – status quo and forthcoming reforms – action for damages	
A. Legal Basis	
(i) Is there an explicit statutory basis?	There is no explicit statutory basis. Parties must refer to Article 162 of Book 6 of the Dutch Civil Code ("Burgerlijk Wetboek", "CC") or Article 6:212 CC (unjust enrichment).
(ii) Is this statutory basis different from other actions for damages?	No. Article 6:162 CC is the general article on tort.
(iii) Is there a distinction between EC and national law in this regard?	There is no such distinction. A breach of Article 81/82 EC is an unlawful act just as a breach of Article 6/24 CA.
B. Competent court	
(i) Which courts are competent?	The Civil Court is competent. In cases of damages up to €5.000, the Sub-District Court ("Kantonrechter") is competent. In other cases, the Civil Court ("Rechtbank") is competent.
(ii) Are there specialised courts for private enforcement of competition rules?	There are no specialised courts for private enforcement of competition rules.
C. Standing	
(i) Limitations on standing of natural or legal persons, including those from other jurisdictions?	The only limitation for natural or legal persons is a lack of sufficient interest.
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	The connecting factor is domicile of the defendant or the place where the infringement occurred.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	Representative bodies may bring claims but may not seek monetary compensation.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	Compensation normally consists of monetary

	compensation, but other forms are possible such as specific performance or forbidding certain behaviour.
(ii) What are the other forms of civil law liability (if any)?	There is no other form of civil liability.
(iii) Does the infringement have to imply fault?	Yes. A violation of competition law implies fault.
(iv) If so, is fault based on objective criteria?	Yes.
(v) Is bad faith (intent) required?	No.
(vi) Can negligence be taken into account?	A violation of competition law due to negligence is an unlawful act.
E. Rules of evidence	
a. General	
(i) Burden of proof and identity of the party on which it rests?	Burden of proof rest with the plaintiff who has to state the facts which constitute the infringement.
(ii) Standard of proof	If the facts are disputed the plaintiff must bring convincing evidence of the infringement.
(iii) Limitations concerning form of evidence	There are no limitations to the form of evidence, but the valuation of evidence is left to the judge.
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	Discovery does not exist. It is possible to order pre-trial hearings of parties as witnesses if a Dutch court has jurisdiction in the proceedings on the merits. There are limited possibilities to make a party submit documents to the court.
(v) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	Discovery on third parties does not exist. It is possible to order pre-trial hearings of witnesses if a Dutch court has jurisdiction in the proceedings on the merits.
(vi) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	Discovery on competition authorities does not exist.
b. Proving the infringement	
(i) Is expert evidence admissible?	Expert evidence is admissible.
(ii) To what extent, if any, is cross examination permissible?	Cross examination of parties, witnesses and experts brought forward by parties is permissible.
(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	Evaluation of the evidence is left to the discretion of the courts. Judgments from Dutch courts in criminal proceedings have evidential value, but may be rebutted. The value of statements by a national competition

	authority, other courts or authorities from another EU Member state are left to the discretion of the court.
c. Proving damage	
(i) Are there any specific rules for evidence of damage?	There are no specific rules for evidence of damage.
d. Proving causation	
(i) Which level of causation must be proven: direct or indirect?	Causation must be proven, in the sense that the damage must "still be attributable" to the infringement by the defendant.
F. Grounds of justification	
(i) Are there grounds of justification?	Grounds for justification are force majeure, consent or act of state.
(ii) Is the 'passing on' defence taken into account?	There is no explicit rule but the passing on defence may be taken into account in assessing the damages.
(iii) Are 'indirect purchaser' issues taken into account?	There is no explicit rule but the judge may take this into account when assessing damages.
(iv) Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Plaintiff's own role and/or his benefit from the infringement are relevant factors in assessing damages.
G. Damages	
a. Calculation of damages	
(i) What economic or other models are used by courts to calculate damage?	Actual damage. Theoretical comparison of the financial situation with and without the infringement.
(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	There is no limitation to the territorial ambit for damages.
(iii) Are ex ante (time of injury) or ex post (time of trial) estimates used?	Both estimates can be used, as long as it results in a reasonable and fair calculation of damages.
(iv) Are there maximum limits to damages?	No, but the judge is free to limit the amount of damages.
(v) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	Damages are assessed on the basis of injuries suffered by the plaintiff. In case this reflects a more just outcome, damages can also be assessed on the basis of the profit made by the defendant.
(vi) Are punitive or exemplary damages available?	No.
(vii) Are fines imposed by competition authorities taken into account when settling damages?	In principle not. Full damages are awarded, but the judge may limit the amount if this is reasonable.

b. Interest	
(i) Is interest awarded from the date the infringement occurred the date of the judgment or the date of a decision by a competition authority?	Interests are awarded from the date the infringement occurred.
(ii) What are the criteria to determine the levels of interest?	Levels of interest are determined by the government (tort) or on the basis of ECB interest + 7% (contracts).
(iii) Is compound interest included?	Compound interest is included. Each year after the infringement the accumulated interest is added to the base-amount.
H. Timing	
(i) What is the time limit in which to institute proceedings?	The normal time limit is five years after both the damage and the person who committed the infringement are known with a maximum of 20 years.
(ii) On average, how long do proceedings take?	Ranging from several weeks for an interim injunction proceeding, to a number of years for an action on the merits.
(iii) It is possible to accelerate proceedings?	Hardly.
(iv) How many judges sit in actions for damages cases?	The normal number of judges in the Civil Court ("Rechtbank") is one, but may be extended to three. Small claims before the Sub-District Court are dealt by a sole judge ("Kantonrechter").
(v) How transparent is the procedure?	Decisions and proceedings in court are public. The judgment is public. Other documents submitted to the court are not public.
I. Legal costs	
(i) Are Court fees paid up front?	Court fees must be paid up front both by plaintiff and defendant.
(ii) Who bears the legal costs?	The losing party must bear the legal costs as fixed by the court, which is in most cases substantially lower than the actual legal costs.
(iii) Are contingency fees permissible?	The Dutch Bar Association forbids lawyers to work with contingency fees. A mixed system is possible (success fee + hourly rate).
(iv) Are contingency fees generally available for private enforcement of EC competition law?	No.
(v) Can the plaintiff/defendant recover costs?	Only partially (see above).
(vi) What are the different types of litigation costs?	Court fee, bailiff costs, lawyer's fee and expert fees.
(vii) Are there any national rules for taxation of costs?	Taxation of costs does not exist. Costs are fixed by the court.

(viii)	Is any form of legal aid insurance available?	Yes, both for private individuals and legal entities.
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	This can range from several thousands to more than a million in euro.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	No.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	Not applicable.
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	In principle not.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	No.
(v)	What are the key differences, if any, from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?	There are no differences from region to region within the Netherlands.
(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	The leniency notice of the Dutch competition authority explicitly states that it does not affect civil proceedings. Vice-versa, there is no interaction signalled yet.
(vii)	Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	Private enforcement of competition law is as yet rare in the Netherlands, but it is growing. E.g. after the construction fraud report by the Dutch Parliament in 2002, a large number of public authorities (local counsels, provinces) instituted arbitration procedures against construction companies for damages resulting from bid-rigging.
(viii)	Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	In three known cases damages were awarded for infringement of EC competition rules. In one case for both EC and national rules. In four known cases damages were refused. At least three major cases are pending with the courts.
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC		
(i)	Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	Due to lack of case law it is difficult to establish which elements of claims for damages provide scope for facilitating private enforcement. In one case the impossibility to prove causation was a bottleneck. A reversal of the burden of proof in this respect would facilitate enforcement.
(ii)	How could that be achieved?	A reversal of the burden of proof for the causal link between infringement and damage could be included in the Civil Code.

(iii) Are alternative means of dispute resolution available?	Arbitration procedures are common. Settlement in and outside court is also possible.
(iv) If so, to what extent are they successful?	Due to their confidential nature, it is unclear to what extent arbitration procedures are successful. However, an estimate is that in the past there have been very little arbitration procedures with respect to Article 81/82 EC. The same applies to settlement.