ICC COMpendium of
ANTITRUST DAMAGES ACTIONS
NETHERLANDS
Court proceedings
in key jurisdictions
This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Glossary**

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
Directive 2014/104/EU: European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

Follow-on: A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

Immunity: Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

Infringer: Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

Joint-and-several liability: liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

Leniency: A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

Limitation period: a statutory period after which a lawsuit or prosecution cannot be brought in court.

Passing-on defence: a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

SME (Small—and Medium-sized Enterprise): categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

Stand-alone action: A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

Standard of proof: In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

Tort: A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Due to its efficient and reliable judiciary, the Netherlands is an attractive jurisdiction for private antitrust litigation and damages actions. Dutch procedural law is characterised by pragmatism and cost-effectiveness. Courts fees are low, and judgments are automatically enforceable in all EU Member States.

In the Netherlands, private antitrust litigation is mainly based on (i) general rules of tort liability set out in the Dutch Civil Code (Burgerlijk Wetboek, “DCC”), (ii) the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, “DCCP”), (iii) competition law provisions set out in the Dutch Competition Act (Mededingingswet, “DCA”), (iv) competition law provisions set out in the Treaty on the Functioning of the European union (“TFEU”), (v) in the various other EU legislative acts adopted on the basis of the TFEU, and (vi) in the EU soft law tools regarding private enforcement.


1. Jurisdiction

In the Netherlands, the Consumer & Market Authority (Autoriteit Consument & Markt, “ACM”) is responsible for the public enforcement of competition law. Article 2 of the DCA assigns responsibility for the implementation and enforcement of the DCA to the ACM.

The ACM enforces the prohibition on restrictive agreements and the abuse of a dominant position. The ACM is also tasked with the merger control review. The ACM’s duties include (i) processing complaints about alleged violations of the DCA (or the corresponding provisions of the TFEU), (ii) monitoring compliance with the DCA, (iii) detecting and investigating the possible formation of cartels and abuses of dominant positions, (iv) assessing proposed concentrations, and (v) terminating as well as imposing administrative sanctions for violations. The ACM however has no jurisdiction in relation to the private enforcement of competition law and cannot grant civil damages for violations of competition law.

Antitrust damages claims must be brought before the Dutch civil courts. The jurisdiction of the Dutch civil courts is mainly governed by the DCCP and Regulation (EU) No. 1215/2012
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(“Brussel I recast”). In general, Dutch civil courts accept jurisdiction to hear antitrust damages cases:

1) if the claims are brought against legal or natural persons domiciled in the Netherlands (Article 4 Brussel I recast; and Article 2 Brussel I (old) for proceedings initiated before 10 January 2015);

2) if a claim is sufficiently closely connected with another claim that is submitted against a defendant that is domiciled in the Netherlands (‘anchor defendant’) (Article 8(1) Brussel I recast); or

3) if the harmful event resulting of the unlawful conduct occurred, or may occur, in the Netherlands. This may be the case, for example, if the practice has been active in, or focused on, the Netherlands (Article 6(e) of the DCCP or Article 5(3) of Brussels I (old)). Infringements of national competition law only are not governed by the new statutory provisions of the Implementing Act yet but are expected to be included in the scope of the Implementing Act at a later stage.

Damages claims can be brought before the Dutch civil courts following a decision of a competition authority establishing an infringement of competition law (follow-on actions) or, irrespective of a public enforcement procedure or decision, based on an alleged infringement of competition law to be determined by the civil court (stand-alone actions). In civil proceedings where a party pursuant to Article 6:193k(a) DCC claims damages for an infringement of competition law, Article 161a DCCP provides that an irrevocable ACM decision establishing that infringement of competition law will form irrefutable evidence.

2. Relevant legislation and legal grounds

The legal framework for antitrust damages claims is comprised of provisions of the DCC, the DCCP, specific provisions of the DCA and the TFEU. Antitrust damages claims are generally based on tortious liability (Article 6:162 DCC): the claimant must demonstrate that (i) the defendant committed a wrongful act, (ii) the wrongful act committed is imputable to the defendant, (iii) the claimant suffered damage, and (iv) there is a causal link between the wrongful act committed and the damage suffered.

The Implementing Act created a new section in Title 3 of Book 6 of DCC establishing a specific (but non-exclusive) statutory basis for damages actions arising out of infringements of EU competition law (Articles 6:193k through 6:193t). With a few exceptions in accordance with the Damages Directive, Article 161a DCCP provides that an irrevocable ACM decision establishing that infringement of competition law will form irrefutable evidence.

3. What types of anti-competitive conduct are damages actions available for?

Under Dutch law, damages may be claimed for damage suffered as a result of all types of anti-competitive agreements, concerted practices or unilateral conduct, including abuse of a dominant position, provided that the claimant can demonstrate that the conditions of Article 6:162 (wrongful act) are met. An infringement of Article 101 TFEU (prohibition on anti-competitive agreements and cartels) and/or Article 102 TFEU (prohibition on the
abuse of a dominant position) constitutes a violation of an obligation imposed by law and is therefore a wrongful act.

4. What forms of relief may a private claimant seek?

Article 6:193i DCC creates the legal presumption that an antitrust infringement causes damages. The starting point under Dutch law is full compensation for damage suffered as a result of the wrongful act or negligence by another party. In this sense, Dutch private competition enforcement is fully in line with the Damages Directive which aims at achieving full compensation. A claimant may claim actual loss, loss of profits, reasonable costs incurred by the claimant to prevent or reduce the damage suffered and the statutory interest over the amount of damages claimed (Article 6:99 DCC).

Compensation may not lead to overcompensation, whether punitive, multiple or any other form of compensation. Furthermore, any profits gained by the claimant as a result of the wrongful act will be reasonably deducted from any compensation.

5. Burden of proof/Passing-on defence

Pursuant to Article 6:193p DCC, defendants have a right to invoke a passing-on defence, arguing that a claimant has not suffered any damages because it passed the price increase on within the supply chain. Defendants asserting the passing-on defence carry the burden of proof.

In a 2016 ruling, the Dutch Supreme Court confirmed that passing-on is a valid defence under Dutch law. On the other hand, Dutch case law shows that Dutch courts are willing to reject a passing-on defence if it can be shown (i) that the claimant’s end-user base is generally widespread, (ii) that the claims of these individual end-users are relatively minor, and (iii) that for reasons of evidentiary complexity and procedural cost effectiveness these individual end-users are unlikely to file civil damages claims proceedings of their own.

That same Dutch case law confirms that, in the event that a passing-on defence is rejected by the court and individual end-users subsequently file a civil damages claim of their own against the defendant, the defendant always retains the possibility to implead the previously successful claimant for compensation already paid to that claimant in as far as that compensation covers the new claims of the individual end-users. A successful impleader would result in the defendant being able to deduct the end-consumers’ damages from what the defendant previously owed to the successful claimant.

6. Pre-trial discovery and disclosure, treatment of confidential information

In the Netherlands, there is no extensive pre-trial discovery system. Parties can, however, request the disclosure of information judicially and extra-judicially. The extra judicial method

1 Dutch Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483 (TenneT/ABB).
2 District Court of Gelderland, 29 March 2017, ECLI:NL:RBGEL:2017:1724 (Tennet/ABB) and District Court of Gelderland, 10 June 2015, ECLI:NL:RBGEL:2015:3713 (Tennet/Alstom).
for obtaining disclosure of documents is for the claimant to request the competition authority ACM to disclose certain documents pursuant to the Government Information Act (Wet Openbaarheid Bestuur, “GIA”). On the basis of the GIA, any member of the public may request disclosure of information contained in files of public authorities. Although the ACM is not required to disclose any documents obtained by it within the framework of its investigation, the files of the ACM itself do fall within the scope of the GIA.

However, articles 10 and 11 of the GIA provide several exceptions, inter alia for business secrets, on the basis of which the ACM can deny certain requests for the disclosure of information. In addition, the Rotterdam District Court ruled in a 2015 decision that, with the exception of certain circumstances, Article 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets (“Establishment Act”), pursuant to which the ACM is prohibited from disclosing any information in the performance of its statutory task, prevails over the GIA. In appeal, the Administrative Court for Trade and Industry (College van Beroep voor het Bedrijfsleven) upheld the decision of the District Court of Rotterdam and furthermore ruled that the documents requested may contain information which is not covered by Article 7 of the Establishment Act. Therefore, for each document requested, the ACM must determine which information contained therein is covered by article 7 of the Establishment Act.

Another method for obtaining (limited) disclosure is for a party to conduct a preliminary examination of a witness or expert. This method is often used by a party to assess the merits of its case up front. Furthermore, it is possible to seize evidence through the filing of an ex parte writ with the court for that purpose. However, it must be noted that a successful seizure of evidence does not provide any legal right to inspect or take copies of such evidence. This requires filing a separate claim for disclosure on the basis of Article 843a DCCP.

Pursuant to Article 843a DCCP—a claim on the basis of which can be filed as a motion in ongoing legal proceedings or in separate legal proceedings—parties can request specific (written or digital) information from any person who is in possession of such documents. In order to be successful, the claimant must have a legitimate interest in the disclosure. Dutch Courts will deny requests for the disclosure of documents if there are compelling interests to refuse such disclosure or if the requested information is not relevant. In accordance with Chapter II of the Damages Directive, the newly enacted Articles 844-850 DCCP provide for certain deviations from, and additions to, Article 843a DCCP (e.g. in relation to leniency and settlement applications). These provisions are applicable to actions for damages of which the Dutch courts were seized after 26 December 2014.

7. Limitation Periods

Article 6:193s DCC contains two statute of limitations periods for infringements of EU competition law:

- a five-year limitation period, which will start to run from the day following the day on which the infringement has ceased and the claimant has become aware, or can

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reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to it and the identity of the infringer; and

- a 20-year limitation period, which will start to run from the day following the day on which the infringement has ceased.

This provision does not substantially differ from, and is in accordance with, the provision included in Article 3:310 DCC, and which concerns general limitation of damages claims. Article 3:310 DC stipulates that an action for compensation of damages lapses 20 years after the event that caused the damage. It remains relevant because Article 6:193s DCC has no retroactive effect.

In principle, the limitation period for follow-on actions begins to run when the European Commission or another competition authority has issued an infringement decision or a decision imposing a fine for an infringement.5

Under Dutch law, it is relatively easy to interrupt and extend the limitation period by sending a letter in which a claimant unequivocally reserves its rights in relation to the claim. Furthermore, Article 6:193t DCC provides two grounds for extending the limitation period.

- The limitation period may be extended in case of non-judicial dispute resolution for the duration of the resolution process. In case of mediation, the extension will end when a party or the mediator informs the other party in writing of the termination of the mediation, or when no actions have been taken for six months during the mediation process.

- In addition, the limitation period will be extended if a competition authority takes action for the purpose of an investigation or proceedings in relation to 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.

8. Appeal

Final decisions in Dutch civil cases may be appealed on the basis of Article 322 DCCP. The case is heard by the Court of Appeal that has territorial jurisdiction. In case the lower court renders an interim decision or a decision in interim relief proceedings, appeal against such a decision is only possible with leave from the lower court. The Court of Appeal will conduct a full review of the merits of the case (i.e. factual and/or points of law).

A decision of the competent Court of Appeal may be appealed before the Dutch Supreme Court. However, the appeal to the Supreme Court is limited to points of law and insufficient reasoning concerning the decision of the Court of Appeal.

5 District Court of East Netherlands 16 January 2013, ECLI:NL:RBONE:2013:BZ0403 (TenneT/ABB).
9. **Class actions and collective representation**

Claimants have the option of initiating individual civil proceedings and collective proceedings. Following the entry into force of the Act on Collective Settlement of Mass Damages (Wet Afwikkeling Massaschade in Collectieve Actie, “WAMCA”) on 1 January 2020, the position of claimants seeking redress has improved. It has become easier for claimants to claim monetary damages in collective actions that relate to events on or after 15 November 2016. Class actions under the WAMCA can also be brought before the Netherlands Commercial Court (“NCC”), a new court allowing parties to resolve large and complex international commercial disputes where proceedings are conducted in English. It is expected that with this new act, which provides a U.S.—style class action, the number of representative collective actions will increase, putting the Netherlands ahead in Europe.

Under the WAMCA, class actions proceedings are subject to strict admissibility requirements in order to prevent a compensation culture. Third party litigation is possible in the Netherlands but is not regulated.

The action must have a sufficiently close connection with the Dutch jurisdiction which is presumed if any of the following requirements are met: (i) if the majority of the claimants reside in the Netherlands; (ii) if the defendant resides in the Netherlands; or (iii) if the event(s) which the class action is based on took place in the Netherlands.

Any claim organization that represents the interest of claimants will be assessed at an early stage of the proceedings (comparable to the US motion to dismiss) and must be admissible. Claim organizations must meet additional requirements in the field of representation, governance, and funding. A claim organization is only authorized to commence a class action if it has, by virtue of its articles of association, full legal capacity to protect similar interests of the claimants which it represents. In addition, claim organizations, inter alia, need to appoint a supervisory board and must operate as a non-profit.

Once all the admissibility requirements have been met, the claim organization needs to file its claim and must publish the claim in a dedicated class actions register. If there is more than one claim organization wishing to bring an action in relation to the same subject matter, the different actions will be joined and the court will appoint an Exclusive Representative to represent the interests of all the aggrieved parties in the action.

Following the appointment of the Exclusive Representative, the parties will be given the opportunity to reach a settlement. If the parties reach a settlement, the settlement agreement must be submitted to the court for approval. Members of the class will, in principle, have the opportunity to opt out within one month after publication in the class action register. Foreign claimants who are not domiciled in the Netherlands will have to opt in. If they do, they become members of the class.

The WAMCA creates a potentially powerful tool for claimants to use all types of action. Therefore, the number of collective actions pursued in the Netherlands is expected to increase.

The European Commission has proposed a new Directive on representative claims for the protection of consumers’ collective interests (COM(2018)184). It is still unclear whether and to what extent the proposed EU legislation will have an impact on Dutch legislation. It is however expected that the WAMCA is already largely in line with the proposed Directive.
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