NETHERLANDS

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I. Introduction

Although private antitrust litigation in the Netherlands is increasing, (successful) actions for damages brought for civil courts for infringements of Article 81 and/or 82 EC or their Dutch equivalents remain rare. The number of cases in which damages have been awarded are limited to only a very few. In our view several factors contribute to this.

First, the history of antitrust regulation and enforcement in the Netherlands itself. In the Netherlands, antitrust law was considered to be lenient, since the old competition act did not contain a prohibition provision similar to Article 81 EC.[1] Only severe infringements attracted attention, when they were scrutinised (and sanctioned) by the European Commission under European antitrust rules. Private litigation under antitrust rules was uncommon. Most cases involving antitrust regulation (still) deal with distribution agreements and challenge (early) termination, or the validity of non-competition or exclusivity clauses.

In 1998, the new Dutch **Competition Act** ("Mededingingswet", "**CA**") entered into force. Since then antitrust regulation has been in line with Articles 81 and 82 EC, but this new era has been too short to see results for the private enforcement of antitrust rules. It must be said here that several actions for damages for infringements of Article 81 EC/6 CA are pending with civil courts or arbitrators. Because of their complex nature and also for procedural reasons (for instance suspension of the case as long as the Commission or the European Courts are involved)[2], these cases take years to reach a decision.

Second, because of the long duration of civil proceedings, companies often prefer to conduct summary proceedings, asking for interim injunctions. In these proceedings however, judges are rather reserved about awarding damages (due to a lack of pressing interest), and claims for damages are as a rule dismissed.

Third, it cannot be ruled out that companies prefer settlement or arbitration to litigation in a public courthouse. There are, for example, numerous actions for damages pending before the court of arbitration for the construction sector (bid-rigging). The outcome of settlements or of arbitration proceedings remains outside the public domain.

Finally, without "deep pockets" and the ability to "hold out longest", the cost of litigation and the long duration of a case are dissuasive factors for both companies and private individuals to initiate actions for breach of antitrust rules.

II. Action for damages - status quo

A. Legal Basis

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

1 (Old) Competition act, "Wet economische mededinging". Cf. Pijnacker Hordijk and Noë, 75.
2 Case C-344/98, *Masterfoods v. HB Ice Cream,* [2000] ECR I-11369.

There is no explicit statutory basis for antitrust damages claims. An action for damages for breach of antitrust rules must be brought on a general statutory basis. Two articles in the **Dutch Civil Code** ("Burgerlijk Wetboek", "**CC**") are applicable.[3] The first and most important statutory basis is the general article on tort or wrongful acts in the Dutch Civil Code, Article 162 of Book 6 (6:162 CC). According to section 1 of this article:

"A person who commits an unlawful act against another which is attributable to him, must repair the damage suffered by the other in consequence thereof."

An unlawful act is defined in section 2 of the same article as:

"the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct."

Breach of the directly applicable Articles 81 EC and/or 82 EC constitutes a breach of a duty imposed by law and is therefore an unlawful act. There is no distinction between EC law and national law in this regard.

The second statutory basis is limited to cases of undue payment, for instance repayment of an overcharge attributable to bid-rigging[4], excessive pricing by a dominant company[5], or repayment of a penalty imposed on one of the members of a cartel for breach of a void cartel agreement.[6] The statutory basis here is Article 6:212 CC. According to this article:

"A person who has been unjustly enriched at the expense of another must, to the extent this is reasonable, repair the damage up to the amount of his enrichment."

B. Competent court

(i) Which courts are competent?

The competent court to settle actions for damages is the civil section[7] of one of the 19 **Civil Courts** ("Rechtbank") in the Netherlands. Which sector of the court is competent is dependent on the amount of damages sought. Claims for damages up to ▫ 5.000 must be brought before the small-claims-section or **Sub-District Court**, the "Kantonrechter".[8] In all other cases the "Rechtbank", another section of the Civil Court, will be competent.[9]

Interim injunction proceedings must be brought before the "**Provisional arrangements judge**" ("Voorlopige voorzieningenrechter"), one of the judges of a Civil Court.[10]

Cases initially brought before the Sub-District Court ("Kantonrechter") may be appealed to the Civil Court ("Rechtbank"). Cases initially brought before the Civil Court ("Rechtbank") may be appealed to the **Court of Appeal** (of which there are five spread throughout the country, "Gerechtshof"). Appeal in cassation is available before the **Supreme Court** ("Hoge Raad der Nederlanden") in The Hague.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There is no specialised court for private enforcement of competition rules.[11]

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3 Mok, 136; Dekker, 8.
4 Civil Court Rotterdam, case 4088/88, 23 October 1992, *Multiveste XXXVII v. Boender & Maasdam e.a*
5 Civil Court Rotterdam, case 106848/98-3016, 28 November 2002, *Van Ommeren Agencies e.a. v. Gemeente Rotterdam (gemeentelijk havenbedrijf Rotterdam).*
6 Mok, 136.
7 A Civil Court in the Netherlands has three sections: a civil, an administrative, and a criminal section.
8 Article 93, **Civil Procedure Act** ("Wetboek van Burgerlijke Rechtsvordering", "**CPA**").
9 Article 53, Judiciary System Act ("Wet op de Rechterlijke Organisatie").
10 Article 254 CPA.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Jurisdiction

Outside the scope of Regulation 44/2001[12], Dutch courts have jurisdiction if the defendant is domiciled in The Netherlands.[13] Furthermore, in actions for damages because of an unlawful act, the Dutch court has jurisdiction if the acts that caused the damage took place in the Netherlands.[14] In a case where there are several defendants, and the Dutch courts have jurisdiction with respect to (at least) one of them, jurisdiction is also awarded with respect to the other defendants, provided that the claims are so closely connected that it is expedient to handle these cases jointly.[15]

Standing

According to Article 3:303 CC "*A person has no right of action where he lacks sufficient interest*". The existence of sufficient interest is in general presumed, there is no requirement to address questions of substance before standing can be granted.

Lack of relativity may limit the possibility of actions by third parties. The first comments on introduction of the CA (in 1996) doubted whether the CA serves to protect consumers. Protection of consumers is by now generally considered one of the (ultimate) goals of competition law, but it is not obvious that competition law serves to protect competitors.[16]

Foreign states have *locus standi* to bring claims in Dutch courts. As defendants, they may rely on jurisdictional immunity according to international law.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Class actions and public interest litigation as defined in the Comparative Report as defined in the Comparative Report are not possible in the Netherlands.

Collective claims and representative actions are possible, provided they are instigated by special-purpose foundations or associations who have a clearly defined and actually pursued interest. According to Article 3:305a CC:

"A foundation or association with full legal capacity can institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests".

Locus standi is only awarded after prior consultation with the defendant:

"A legal person referred to in paragraph 1 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 further considerable limitation is that the legal person may not claim for damages. Monetary compensation is explicitly excluded in the final sentence of Article 3:305a section 3 CC:

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11 It must be noted that there is a specialised court for *administrative* enforcement of competition rules, the administrative section of the Civil Court ("Rechtbank") in Rotterdam, which is e.g. competent for all appeals against decisions from the director-general of the **Dutch Competition authority** ("Nederlandse Mededingingsautoriteit" or "**DCa**").

12 Article 1 CPA.

13 Article 2 CPA.

14 Article 6 sub (d) CPA.

15 Article 7-1 CPA.

16 Samkalden, 204-205; Slotboom, 295.

"The right of action referred to in paragraph 1 may have as its object that an order against the defendant to publish or cause publication of the decision in a manner to be determined by the court and at the expense of the party or parties, as directed by the court. Its object may not be to seek monetary compensation."

To avoid the abovementioned limitations, it is common to institute joint actions either by instructing the same lawyer or by assignment of individual claims to a particular (legal) person. The result is a bundle of claims brought to court by one authorized (legal) person. These actions may be joined procedurally.

With respect to damages for infringements of competition law in the construction sector, recently one legal person was founded especially to bring representative action claims to court. It concerns the "Foundation for Recourse and Recovery of Damages and Costs resulting from Construction Fraud" ("Stichting Regres en Verhaal Schade en Kosten Bouwfraude"[17]). This foundation is established by several local municipalities and it is authorized to pursue proceedings against construction companies, and other companies for bid-rigging. At present, five cases against numerous constructors are brought before Civil Courts as test cases.

D. What are the procedural and substantive conditions to obtain damages?

In order to succeed in obtaining damages, the plaintiff must establish the following factors:
- an unlawful act: breach of competition law;
- attributability: attributable to the defendant;
- relativity: the standard breached must serve to protect against damage such as that suffered by plaintiff[18];
- damage: plaintiff must establish the existence of damage;
- causation: causal link between the unlawful act and the damage occurred.

(i) What forms of compensation are available?

In principle, damages shall be paid in money. According to Article 6:103 CC, however, upon the demand of the person suffering the loss, the court may award damages 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.

Types of damage that can be compensated in cases of breach of competition law are restitution of incurred losses, loss of profit, and loss of chance.[19] In cases of unjust enrichment, damages extend to repayment of unjust profits by the defendant.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

There are no other forms of civil liability.

With respect to the position of directors, there is no possibility to disqualify directors for violation of competition law, neither as part of private litigation, neither under administrative procedures (e.g. by the DCa) nor under penal law.

The CA is undergoing several changes and amendments. In parliamentary debate, disqualification of directors was suggested as one of the measures that may be imposed by the DCa in case of "crass infringements". However, the official government position now is that at this moment it does not consider this option further, because it would involve too large an infringement on the personal

17 The foundation was founded 16th of June 2003, and it is seated in The Hague. Five proceedings were brought to court in February 2004.
18 "Schutznorm"-theory.
19 Article 6:95 and 105 CC.

freedom of the person, and moreover, the effects would only be limited, since it could only apply to Dutch companies.[20]

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

The infringement has to imply fault, Article 6:162 section 3 CC states that:

"A wrongdoer is responsible for the commission of an unlawful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles".

Fault is based on objective criteria. The wrongdoer is responsible for causes accountable to him "*by law*" or "*pursuant to generally accepted principles*". The Dutch Supreme Court has decided that the concept of "fault" has to be interpreted broadly.[21] It follows from Article 6:162 section 3 CC that bad faith or intent is not required to be accountable.

A violation of competition law automatically implies fault. Negligence is taken into account, but it can never serve as a defence. According to Article 6:162 section 2 CC not only an act but also "*an omission*" breaching a duty imposed by law, is deemed unlawful. The standard of care required is determined by the question whether or not by negligence the duties imposed by Articles 81 EC and/or 82 EC have been breached.[22]

Furthermore, in cases involving several offenders such as a cartel, Article 6:166 CC can be useful. According to this article, if one out of a group of persons unlawfully causes damage and the risk of thus causing damage should have restrained such persons from their collective conduct, all members of the group shall be jointly and severally liable if they can be held accountable for such conduct.

E. Rules of evidence

a. General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The basic rule for allocating the burden of proof is laid down in Article 150 of the **Civil Procedure Act** ("Wetboek Burgerlijke rechtsvordering" or "**CPA**"). According to this article the plaintiff has to prove its case. In line with Regulation 1/2003, in an action for damages for breach of antitrust law, it is the party claiming the infringement who has the burden of proof for the infringement of Article 81-1/82 EC (or 6-1/24 CA).

(ii) Standard of proof
NB any technical expressions that exist in national law such as for example "beyond reasonable doubt" must be clearly explained

The standard of proof is laid down in Article 149-1 CPA. Decisions of the courts must be based "*solely on those facts or rights of which the courts were informed or of which the courts acquired knowledge during the proceedings*", and in accordance with the requirements of the CPA. The court must consider facts or rights that are claimed by one party and not disputed (adequately) by the other as fixed, "*notwithstanding the authority of the courts to request evidence, to the extent*

20 Parliamentary proceedings ("Tweede Kamer der Staten-Generaal"), Statement received on 26 March 2004, TK 29 276, nr. 7, p. 25.

21 Supreme Court, 11 November 1983, Netherlands Case Law ("Nederlandse Jurisprudentie", "NJ") 1984, 331. If for instance due to a non-legally binding advice an unlawful act is committed, the act is to be classified as accountable.

22 Since agreements, concertation and abuse all require some form of action, it is unlikely that Articles 81 EC and/or 82 EC can be breached by mere negligence or omission. It is clear however that negligence can never serve as a justification or defence.

acceptance of the claims may result in legal consequences that are not for the free determination of the parties".

In an action for damages this means that it is the plaintiff who must substantiate with sufficient and provable facts that Article 81 EC or 82 EC has been breached. It is insufficient to merely state that an infringement of competition law has occurred, without stating what happened and why this is a violation.[23]

On the other hand, it is up to the defendant to give a reasoned challenge of the statements of the plaintiff. A mere denial without any substantiation of the facts is deemed insufficient. Furthermore, if the defendant relies on Article 81-3 EC or the application of a group or other exemption, it is up to him to bring forward all relevant aspects that should be taken into consideration, supported by sufficient and provable facts.[24]

A judge may not establish a fact if it is sufficiently denied and parties have brought forward concrete facts and have offered to produce evidence for these facts. The judge must then deliver an interlocutory order to produce evidence.

The normal rules on evidence are not applicable in injunction proceedings. Parties do not have to offer proof for their statements. Even if they do, the judge in his discretion may ignore the offer and he may freely reverse of divide the burden of proof over the parties.[25] The standard of proof as such is not lowered but the judge is free to shift or reverse the burden of proof in a manner he feels appropriate for the case. His decision is not open for appeal.[26]

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

Evidence may be submitted to the court in any form.[27] Most common forms of evidence are documentary evidence, witnesses, and expert opinions. This includes even "illegally obtained" evidence, e.g. telephone conversations that were taped without knowledge and consent of the other person.[28]

Everyone duly summoned as witness is obliged to appear in court to testify.[29] Parties may be called as witnesses as well, but their testimonies cannot deliver proof to their advantage, unless their testimony is only supplementary to otherwise incomplete evidence.[30] The only persons that may refuse to appear as witness in court are (a) close relatives of one of the parties, and (b) persons bound by professional secrecy.[31] Witnesses may refuse to answer questions if this would incriminate themselves or their close relatives.[32] Evidence from witnesses excludes "hearsay".[33]

Between the different forms in which evidence can appear (oral, documented, etc) there is no hierarchy. Within the group of documentary evidence there is a hierarchy between authentic deeds, drafted by the competent civil servant, and other documents. Authentic deeds are compelling evidence as to the truth of the statements in the deed.[34]

For all other evidence, the evaluation of the evidence is left to the discretion of the courts.[35]

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23 Van Dijk, 6.
24 Van Dijk, 6.
25 Supreme Court, 15 March 1968, Netherlands Case Law ("Nederlandse Jurisprudentie", "NJ") 1968, 228.
26 Supreme Court, 29 January 1943, Netherlands Case Law ("Nederlandse Jurisprudentie", "NJ") 1943, 198.
27 Article 152-1 CPA.
28 Brouwer, 115.
29 Article 165-1 CPA.
30 Article 164-1 and 2 CPA.
31 Article 165-2 CPA.
32 Article 165-3 CPA.
33 Article 163 CPA.
34 Article 157-1 CPA.
35 Unless the law determines otherwise, Article 152-2 CPA.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis: defendants, third parties, Competition authorities (national, foreign, Commission)

Discovery as such does not exist in the Netherlands. Before the courts, parties are obliged to present truthful and complete statements.[36] A judge may upon request or *ex officio,* order (one of the) parties to make its books available for inspection[37], he may also order (one of the) parties to submit documents relevant for the case.[38] However, parties are free to refuse these orders. The judge is free to decide on the consequences of such a refusal.[39]

Another limited form of discovery of documents is the inspection of records. In or outside trial any person with a legitimate interest may request a judge to order a third party to allow for inspection or copy of records with respect to a legal relationship to which the requesting person is a party. Third parties who keep custody over such records must comply with the order, unless they have legal privilege or if they bring "compelling reasons" not to do so.[40] Note that this inspection has little value in establishing evidence against third parties, since it is strictly limited to (those parts of) records that pertain to the plaintiff, and not to those (parts) that relate to third parties.

The fact that evidence is obtained in another country, through a procedural measure not known in the Netherlands, is as such insufficient reason not to admit the evidence obtained. Evidence from pre-trial discovery will be recognised by Dutch courts, unless this would result in an "unfair trial" in the sense of Article 6 ECHR, for instance if the evidence was put under a "protective order" by the judge who ordered the discovery.[41]

Materials from other National Competition authorities or the Commission may be brought forward as evidence. However, there is no protection of business secrets in civil proceedings. Parties must have the opportunity to give their statement on all materials brought forward to the judge. A judge may not use materials that were brought to him "for his eyes only". Consequently, Dutch courts cannot guarantee confidentiality as expected in nr. 25 of the Notice on Cooperation with National Courts.

At the request of the interested party, it is possible to have a pre-trial hearing of parties and witnesses. The requesting party must bring its request to the court that will probably be competent to hear the main case.[42] The party must state the nature and amount of the claim, the facts he aims to prove, the identity of the witnesses, and the identity of the opposite party.[43] It is in the courts discretion to allow an immediate provisional hearing of witnesses, no appeal lies to this decision.[44] Pre-trail hearings of witnesses can be held before a main proceeding is initiated before a court.[45] It is not even necessary to initiate a main proceeding afterwards. Pre-trial hearings may be held merely to find out if sufficient evidence can be produced. If the requesting party finds that the pre-trial hearing did not bring the results he hoped for, he is free not to pursue his case.

b. Proving the infringement

(i) Is expert evidence admissible?

According to Article 194 CPA, expert evidence is admissible.

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36 Article 21 CPA.
37 Article 166 CPA.
38 Article 22 CPA.
39 Article 22 and 162 CPA; Cf. Bos, 2003/6.
40 Article 843a CPA.
41 Court of Appeal The Hague, 13 July 2000, *Alfred Mol v. KTI*.
42 Article 187-1 CPA.
43 Article 187-2 CPA.
44 Article 188-2 CPA.
45 Article 186 CPA.

Parties may (separately) request the judge to hear experts.[46] They may request to bring forward their own experts. Experts may advise on any aspect relevant to the procedure, e.g. market definition, causation, the evaluation of damages and even the interpretation of (foreign) law.

A judge may also call *ex officio* expert evidence. A judge must do so if he is confronted with statements that are sufficiently substantiated and proven but still need some sort of expert valuation, or where parties each have submitted expert evidence that contradicts each other (e.g. on the definition of the relevant market, whether or not certain behaviour "significantly limited" competition or the level of damages). Before the judge calls an expert, he will render an interlocutory judgment in which he will indicate that he proposes one (or several) expert(s) and the questions that must be answered. Parties may bring their answer to these suggestions, after which the judge will give his order.

The judge is free in his valuation of the opinion of a party appointed expert, as well as the opinion of an expert appointed by himself.

There is no official lists for experts. Anyone can be called. It has been suggested that it is possible to appoint the director-general of the DCa as an expert.[47] Naturally, any person appointed as expert is free to accept or decline the appointment.

(ii) To what extent, if any, is cross-examination permissible? Can witnesses be subpoenaed?

Cross-examination of witnesses is possible. The judge hears the witness, after which the parties may ask their questions.[48] Witnesses can be subpoenaed by the judge *ex officio* or upon request of one of the parties. The judge has a discretionary power to refuse a subpoena request.[49]

A witness refusing to testify may upon request of one the parties be detained until he has fulfilled his duty to testify. The discretion of judge here is large: he may only order the custody if it is 'justified in the interests of arriving at the truth'.[50] A refusing witness can be ordered to compensate the wasted costs and he can be held liable for any damage resulting from his behaviour.[51]

Cross-examination of experts is permissible for experts brought forward by one of the parties. Each party may ask any question directly to the expert.[52]

(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?

It belongs to a courts discretion how to value statements or decisions by other national authorities as evidence. According to Article 152 section 1 and section 2 CPA, it is up to the judge to decide what value he attributes to these statements, unless there is a statutory exception.

Criminal judgments from a Dutch court are compelling evidence for the fact that the convicted person has committed the facts in the judgment.[53] There is currently a debate as to whether this article could be used in antitrust cases. In the Netherlands, there are no criminal sanctions in antitrust matters so the actual relevance of this article is limited. It has been suggested to use this article *by analogy* for decisions of competition authorities. However, it is also suggested that since it is possible to provide evidence to contradict compelling evidence (Article 152 CPA) and that therefore a criminal judgment does not in itself constitute

46 Article 200-1 CPA.
47 Van Dijk, 8; Dekker, 10-11. Specifically with respect to damages: Visser, 7.
48 Article 179-1 and 2 CPA.
49 Article 171 and 172 CPA.
50 Article 173 CPA.
51 Article 178 CPA.
52 Article 179-2 jo. 200-3 CPA.
53 Article 162 CPA.

irrefutable proof, the value of a decision by a national competition authority should *a fortiori* be even less.[54]

Rulings of courts from other member states have no special evidential value. They must be valued by the judge just as other documentary evidence.

c. Proving damage

(i) Are there any specific rules for evidence of damage?

There is no specific rule for evidence of damage. Parties are free to use all means and the judge is free to evaluate evidence brought forward. Expert evidence, e.g. from accountants or economic experts is admissible.

It is possible that the judge renders a partial judgment on all aspects except the quantum, which will be decided in a special procedure for quantifying damages ("Schadevergoeding op te maken bij staat" or "Schadestaatprocedure").[55]

d. Proving causation

(i) Which level of causation must be proven: direct or indirect?

The plaintiff has to prove that the infringement of antitrust rules is a "*conditio sine qua non*".[56] Further, he has to prove that the damage is *still attributable* to the person infringing antitrust rules. According to Article 6:98 CC, reparation of damage can only be claimed for damage which is thus related to the event giving rise to the liability of the obligor, that it can be attributed to him as a result of such event. It is up to the plaintiff to prove this.

Proving causation and attributability may be very difficult, especially in cases where the plaintiff is a third party who institutes proceedings against one or more members of a cartel agreement.[57] There is no strict criterion to determine whether damage is attributable or not. It is established on a case-by-case basis. To determine whether damage is attributable, a judge has to weigh all the relevant aspects.[58]

The court may decide to mitigate the burden of proof if this is reasonable. The main circumstance under which this occurs is where a risk of damage has been created by tort and has subsequently resulted in actual damage. In that case, causality between the damage arisen and the tort may be presupposed. It is then up to the person liable for the infringement to rebut this preposition, by proving that the damage would have occurred anyway.[59]

F. Grounds of justification

(i) Are there grounds of justification?

An act is not unlawful if there is a ground of justification. The most common grounds of justification are *force majeur* ("overmacht"), self-defence ("noodweer"), act of state or complying with a statutory provision and consent from the plaintiff.

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

The passing-on defence is not explicitly provided for in the law, nor is the indirect purchaser issue. Such a defence may be taken into account by the judge in

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54 Pijnacker Hordijk and Noe, 87-8. Cf. Grosheide, 96 and Pietermaat, 103-105.
55 Article 612-615b CPA.
56 Asser-Hartkamp 4-I, nr. 436*b*.
57 Case H-879/87, Civil Court Haarlem, 4 May 1993, *Burns v. Van Driel*. Distributor could not proof a causal link between the annulment of his order and an agreement between importer and producer not to deliver him.
58 Tekst en Commentaar, 1763.
59 Supreme Court, 29 November 2002, *Kastelijn v. Achtkarspelen*. The so-called "reversal rule", is rather controversial: see Asser-Hartkamp 4-I, nr. 436*c*.

assessing the level of damages however.[60] The judge may see reasons to mitigate the damages.[61]

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

The judge must take into account whether the plaintiff himself is (partly) responsible for the infringement. Contributory negligence by the plaintiff leads to an apportionment of damages, proportional to the contribution to the unlawful act attributable to the plaintiff. The apportionment may be done differently or even left aside if normal application of this rule would result in inequitable results.[62]

It is also relevant whether the plaintiff has benefited himself from the infringement. The benefit must, to the extent that this is reasonable, be taken into account in assessing the reparation of the damage.[63]

If a plaintiff himself has contributed to the amount of damage, there is reason to mitigate the claim.[64] A party who suffered damage is under an obligation to mitigate the amount of damage within reasonable limits. Reasonable costs incurred by plaintiff to prevent or mitigate damage, may be claimed as patrimonial loss.[65]

G. Damages

a. Calculation of damages

(i) 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 "in a manner most appropriate to its nature"[66] In principle this is on the basis of injuries suffered by the plaintiff.[67] However, it is possible that at the specific request of plaintiff the judge assesses damages on the basis of the profit made by the defendant. It is in the judges discretion to award this request or not.[68]

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

There is no territorial regulation for damages. It is in theory possible for a judge to award damages for injury suffered anywhere in the world.

(iii) What economic or other models are used by courts to calculate damage?

In principle, damages consist of "*full* compensation" for "*actual* damage". According to Article 6:95 CC the amount of damages:

"consists of patrimonial loss (loss to property, rights and interests) and any other prejudice, to the extent that the law confers a right to damages therefor."

This means that the amount of damages should as far as possible put the plaintiff in the same (financial) position it would have been absent the infringement. The valuation is done by making a comparison between the actual position of the plaintiff (at the time of the trial, therefore: *ex-post*) and the position it would probably have been in without the infringement.

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60 Asser-Hartkamp, 4-I, nr. 423, nr. 443 ("verrekening van voordeel").
61 See Article 6:100-102 CC.
62 Article 6:101 CC.
63 Article 6:102 CC and art 6:100 CC.
64 Article 6:101 CC.
65 Article 6:96 CC.
66 Article 6:97 CC.
67 *Damnum emergens et lucrum cedens*, "geleden verlies en gederfde winst".
68 Article 6:104 CC.

In certain cases, the Supreme Court accepted an "abstract method" for calculation of damages.[69]

In the abstract method, damages are calculated irrespective of the actual damage suffered by the plaintiff. Standard cases in which the abstract method is used concern non-delivery of certain goods at a certain price. The abstract amount of damages is the difference between the agreed price and the market price at the moment of default, irrespective whether the plaintiff actually bought replacing goods from elsewhere. Another group of cases in which the abstract method is used concerns costs of repair for damaged infrastructural goods (e.g. electricity wires or telephone cables). The fact the telephone or electricity company used its internal repair service, with salaried repairman (who would have been paid even if the damage had not occurred) does not mean the company suffered less or even no damage at all. The abstract method calculates damages at the costs that would have been made if external specialists were hired to repair the damage.

It has been suggested to use this method in antitrust litigation as well.[70] At present there is no case law on this.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

Estimates used are in principle *ex-post*, time of trial.

(v) Are there maximum limits to damages?

There is no maximum limit to damages. However, the judge is free to limit the amount of damages.[71]

(vi) Are punitive or exemplary damages available?

There is no possibility for punitive damages. Exemplary damages are only available in the form of publication of the court decision (e.g. in a newspaper).[72]

(vii) Are fines imposed by competition authorities taken into account when settling damages?

Under normal circumstances fines levied by competition authorities are not taken into account. However, the court may decide to reduce damages if a full award of damages would lead to "*clearly unacceptable results in the given circumstances*" (Article 6:109 CC). There is no case law on how the Civil Court might take fines by competition authorities into account when settling damages.

b. Interest

(i) Is interest awarded from the date the infringement occurred; or of the judgment; or the date of a decision by a competition authority?

Interests are awarded from the date the infringement occurred.[73]

(ii) What are the criteria to determine the levels of interest?

The level of statutory interest for unlawful acts or torts is determined by Royal Decree and regularly adjusted to market circumstances.[74] For non-fulfilment of commercial contracts the level of interest is determined by the refinancing interest rate applied by the European Central Bank, plus seven percentage points.[75]

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69 Asser-Hartkamp 4-I, nr. 417.
70 Bos, 316.
71 So-called mitigation and limitation ("matigen en limitering van schadevergoeding"). Article 6:109 CC.
72 Article 3:305a CC.
73 Article 6:6 , 6:83b and 6:119-1 CC.
74 Article 6:120 CC. At present the level is 4%.
75 Article 6:119a CC, implementing Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on Combating late payment in commercial transactions, OJ L200/2002, p. 35.

(iii) Is compound interest included?

Compound interest is included. At the end of each year after the infringement, the amount on which legal interest is calculated is increased by the interest due over that year.[76]

H. Timing

(i) What is the time limit in which to institute proceedings?

Prescription is laid down in Article 3:310 Section 1 CC. The time limit for initiating proceedings is five years from the day following that on which the plaintiff becomes aware of both the damage and the identity of the person responsible therefore, and, in any event, on the expiry of twenty years following the event which caused the damage.

(ii) On average, how long do proceedings take?

Proceedings for damages take one year to a year and a half to reach judgment in the first instance. In complex cases (including antitrust cases) proceedings that go to final instance can take more than a decade. Because of lack of case law in antitrust cases, it is impossible to say how long proceedings take "on average". Significant hold-ups for a procedure are interlocutory judgements ordering proof for certain facts, and interlocutory orders for expert evidence. National proceedings are also held up in case of a parallel procedure in "Brussels", before the Commission. A national court is obliged to suspend all proceedings pending the outcome of the Brussels proceedings.[77] In the FEG-case[78], the Civil Court of Rotterdam has extended the suspension awaiting the outcome of subsequent proceedings in Luxembourg, before the Court of First Instance in appeal against the Commission decision and the Court of Justice in appeal against the judgment of the Court of First Instance.

(iii) Is it possible to accelerate proceedings?

It is possible to accelerate the *commencement* of proceedings.[79] This reduces the time in which the case can be brought before court and the first exchange of written conclusions. Certainly in complex cases the effect is minimal.

Proceedings for interim injunctions can be settled very quickly (within days even). It is possible to claim (advance payment of) damages, but the court can only award these if there is (1) a pressing interest and (2) if there is no doubt that in proceedings on the substance of the matter damages would also be awarded. These are very high thresholds, and we do not know of any decision in interim injunction proceedings where (advance payment of) damages was awarded.

(iv) How many judges sit in actions for damages cases?

The normal number of judges in a civil section of the court ("Rechtbank") is one, unless the section, in its own discretion, decides that the case is unsuited to be handled by a single judge, in which case three judges are appointed to the section.[80] The Sub-District Court ("Kantonrechter") always works with a single judge.

In appeal, the Court of Appeal normally sits with a chamber composed of three judges, but it may decide to refer the case to a single judge chamber.[81]

The Supreme Court in cassation normally sits with a chamber composed of five judges, but it may decide to refer the case to a chamber with three judges.[82]

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76 Article 6:119-2 CC.
77 Case C-344/98, *Masterfoods v. HB Ice Cream*, , [2000] ECR I-11369 at point 60.
78 Pending case at the Civil Court of Rotterdam, case 99/0728, *CEF City Electrical Factors B.V. v. Elektronische Groothandel Bernard B.V*.
79 "Versnelde procedure".
80 Article 15-1/2 CPA.
81 Article 16-1/2 CPA.

(v) How transparent is the procedure?

All proceedings take place in public court.[83]

I. Legal costs

(i) Are Court fees paid up front?

Court fees must be paid up front by both plaintiff and defendant, under penalty of disallowance. The level of court fees is based on the tariffs as set down in the "Tariffs in Civil Procedures Act" ("Wet Tarieven in Burgerlijke zaken"). They are dependent on the height of the claim in question. At present, at the Sub-District Court ("Kantongerecht") the highest fee for a natural person amounts to ▫ 190 and for a legal entity ▫ 273.[84]

For claims brought before the Civil Court the legal fee amounts to ▫ 288 for claims up to ▫ 11.345. For higher claims the fee consists of 2,2% of the claim, with a maximum of ▫ 4.535.[85]

(ii) Who bears the legal costs?

The party against whom the court ruled, is ordered to pay the legal costs.[86] A court order to pay costs includes the bailiff fee[87], the court fees paid up front and an amount for the salary of the attorney.[88]

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Article 2 of the Regulation "Result based fees" ("Verordening op de praktijkuitoefening (onderdeel Resultaatgerelateerde Beloning")) and rule 25 of the ethical rules of the Dutch Bar Association ("Gedragsregels 1992") forbid lawyers to work with contingency fees or conditional fee agreements.[89] It is allowed to work with a bonus or uplift, as long as it is combined with an hours-based fee which covers the attorney's actual costs and a modest salary. A minimum tariff does not exist.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Upon request made in the writ of summons, plaintiff or defendant can recover (extra legal) costs from the party the court decided against.[90] This party can be ordered to pay reasonable costs made for the calculation of the amount of damages as well as costs made for extrajudicial settlement and administration costs, as far as they were reasonably necessary to obtain damages.[91]

Excluded items are the actual legal expenses or attorney salary. These are only partially recovered by the court order to pay costs.

The plaintiff/defendant can only recover an attorney salary as fixed by the court using the so-called "liquidation tariff" ("liquidatietarief"). The salary is calculated according to the number of acts of procedure performed by the attorney on the one hand and the financial weight of the case on the other. Acts of procedure are standardized and valued in points (e.g. 1 point for each statement and 2 points to

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82 Article 17-1/2 CPA.
83 Article 27 and 28 CPA.
84 As mentioned above, only claims up to an amount of €5000 may be brought before a Cantonal/Sub-District Court ("Kantongerecht").
85 Royal Decree, 30 January , 2004, Bulletin of Acts and Decrees ("Staatsblad") 37.
86 Article 237 CPA.
87 Article 240 CPA.
88 Article 239 and 241 CPA.
89 Cf. Rule 3.3 Pactum de quota litis, of the CCBE *Code of conduct*, 2002.
90 Article 237 CPA.
91 Article 6:96-2 CC. Cf. Supreme Court, 3 April 1987, Netherlands Case Law ("Nederlandse Jurisprudentie", "NJ") 1988, 275 and Supreme Court, 16 October 1998, ("Nederlandse Jurisprudentie", "NJ") 1999, 196.

argue the case). The financial weight of the case is classified in eight Tariff-groups. For each group points have a certain tariff-value, between ▫ 331 for Tariff I and ▫ 2.768 for Tariff VIII. The court fixes the salary irrespective of the fees actually paid to the attorney (or attorneys). The salary is in general substantially lower than the actual legal costs.

In cases where the plaintiff was only partially successful[92], the costs may be compensated.

By way of example: X claims ▫ 1 million in damages from Y on grounds of a discriminatory refusal to deal. The claim is totally awarded, Y is ordered to disburse the court fees of X ▫ 4.535 and to pay the legal fees of X. In an average procedure parties will have exchanged statements two times (each valued at one point), have made a personal appearance to try to reach a settlement (one point), and argued the case in pleading (valued at two points). The accumulated points for standardized acts of procedure is six. The financial weight of the case is above ▫ 998.316 and therefore the highest tariff-class is applicable, Tariff VIII where each point is worth ▫ 2.768. The recoverable salary will then be fixed at ▫ 13.840.

If the financial weight of the case was in the range of ▫ 19.512 to ▫ 39.025 (Class III), the salary would have been fixed at ▫ 2.495.
Suppose that Y brought as defense and as counterclaim against X the outstanding payment of all debts. If the counterclaim was partially allowed and partially dismissed (e.g. because there were outstanding debts, but for some of these debts X was not yet in default), and the claim is also partially dismissed (no or less damages awarded), the court has reason to compensate the costs. Full compensation means that X and Y bear all their own legal costs, partial compensation means that the least successful party is ordered to pay at least part of the salary to the more successful party.

(v) What are the different types of litigation costs?

The main litigation costs are the court fee, the lawyer's fee and for the plaintiff the bailiff costs. Depending on the proceedings costs for producing evidence, such as compensation for witnesses[93] and expert fees[94] are also part of litigation costs.

(vi) Are there national rules for taxation of costs?

Taxation of costs, as defined in the Comparative report, does not exist in the Netherlands. Costs are recovered by the cost order as described above under question I-iv.

(vii) Is any form of legal aid insurance available?

Legal aid insurance is available for both companies and private individuals. Depending on the conditions of the insurance, costs for litigation and attorneys' fees for recovery of damages may be fully insured.

Private[95] individuals with low income and limited property[96] can benefit from state-sponsored legal aid or *pro deo* work ("toevoeging" or "gesubsidieerde rechtsbijstand").[97] These individuals only pay a one-off contribution in the costs, depending on their marital status (single, or living with family) and their net-income.[98] Application for state-sponsored legal aid must be filed with one of the five Counsels for Legal aid. The individual is free to choose his attorney

92 If the court ruled partially against both plaintiff and defendant.
93 Article 182 CPA.
94 Article 199 CPA.
95 Only in extreme cases "*where the legal person cannot be expected to bare the costs*", legal persons without income and capital may be eligible for state-sponsored legal aid. Companies as well as associations founded for representative action are normally expected to bare their own legal costs, therefore this exception will rarely apply in competition cases.
96 In 2004 the income/property for singles is set at a maximum net-income of €1503/month and a maximum property of €6730. For families the figures are €2113 and €9100 respectively.
97 Legal Aid Act ("Wet op de rechtsbijstand").
98 For 2004 the own costs range from €89 to €761.

("advocaat") out of the group of attorneys that have registered themselves for this purpose with the Counsels. At present there are over 2.700 lawyers registered with the Counsels.[99] One of them has "competition law" listed among his areas of expertise.[100]

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

With respect to the legal costs to bring an action for a hard-core violation, the range starts at a few thousands of euros to bring an undisputable claim where evidence of the violation is readily available. On "average" third parties may face ten thousands of euros legal costs before a judgment in first instance is delivered. With respect to overall costs (including internal costs made by client) it is impossible to give an average.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

Most of the answers to the previous questions are not specific to the private enforcement of competition rules but follow the general rules on actions for damages because of unlawful acts. The scarce case law on the subject does not indicate any different treatment of enforcement of competition rules, nor worse nor better.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

As such, the fact that EC competition rules are regarded as being of public policy does not influence any of the answers given.[101]

In several cases decided by lower courts[102], Article 6 CA, equivalent to Article 81 EC, was regarded as not being of public policy. These decisions are highly debated and it is uncertain whether this view will be upheld by the Supreme Court.[103] The ultimate consequence would be that parties could agree that Article 6 CA (or Article 24 CA, equivalent to 82 EC) is inapplicable in their relationship.[104] Since this outcome would run contrary to the system of the CA and the explicit provision that agreements infringing Article 6 CA are void, it is suggested that the courts should have taken the Eco Swiss case[105] into account and have declared Article 6 CA of public policy, since Article 6 CA would pursue the same goals as Article 81 EC.[106]

Another viewpoint is that the Article 81 EC is a fundamental provision essential for the well-functioning of the internal market[107], and that Article 6 CA does not have such a goal. Furthermore, it should be taken into account that the Eco Swiss-case was specifically written for the circumstance that national law allows for an arbitration award to be annulled on the grounds of public policy. In its reasoning the Court of Justice took into account that arbitrators, unlike national courts and tribunals, are not in a position to request the Court of Justice to give a preliminary ruling on questions of interpretation of Community law, and that therefore there is a real risk of differences of interpretation and application of community provisions.[108] In these circumstances national courts must grant an application for annulment where the award is considered contrary to EC competition rules. These specific circumstances would however not mean that Dutch courts may put party-

99 Out of approximately 12.000 lawyers admitted to the bar in The Netherlands.
100 Mr. F.F.P.M. Vermeer, admitted to the bar of the Civil Court in Zutphen.
101 It could play a role in actions for damages instituted on grounds other than breach of antitrust legislation, where the question would be if the judge should nevertheless take the breach of antitrust regulations into account as well.
102 Court of Appeal Arnhem, 1 August 2000, *Goos v. Hanos*; Court of Appeal Amsterdam, 20 May 1999, *Pols v. OPG*.
103 Bos, 315-6; Schotanus, 263-4; Mok 310-1.
104 Bos, 316.
105 Case C-126/97, Eco Swiss, [1999] ECR I-3055.
106 Schotanus, 263-4.
107 Eco Swiss, para. 36.
108 Eco Swiss, para. 40.

autonomy in normal civil proceedings aside, instead they may only rely on Article 6 CA, or 81 EC for that matter, if this fits within the issues and facts as put forward by the parties.[109]

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

There are no differences according to whether the defendant is a public authority or a natural or legal person.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

Legally, there is no interaction between leniency programmes and actions for claims for damages under competition rules. The leniency notice of the DCa explicitly states that it does not affect civil proceedings.[110] As regards the effect of civil proceedings on DCa-fines, there is no case law yet. Also here, legally, there is no rule (in the CA or elsewhere) which would limit the discretionary power of the director-general of the DCa to impose a fine in such circumstances. However, if a party files for leniency, the confession likely results in a decision in which the cartel is fined and this decision will be published. In practice, therefore there will be some sort of interaction since a leniency applicant is likely to take into account the possibility of subsequent claims for damages when considering whether to file for leniency.

(v) Are there differences 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 as regards damages actions for breach of national or EC competition rules within the Netherlands.

(vi) 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 very rare in the Netherlands but it is growing fast: several cases are pending with Civil Courts, and more are being prepared[111]. Supermarkets for instance announced that they will claim ▫ 200 million in damages from the Dutch banks[112], after the DCa recently imposed a fine of ▫ 30,183,000 on Interpay for abuse of a dominant position by charging excessive rates for the provision of network services for debit-card.[113]

It must be mentioned though that private enforcement between companies can be the subject of arbitration procedures of which the outcome is not disclosed. It is a fact that after the construction fraud report by the Dutch Parliament in 2002, a large number of public authorities (local counsels, provinces) instituted almost 300 arbitration procedures against numerous construction companies for damages resulting from alleged bid-rigging. They have also established a foundation with the sole purpose of facilitating these proceedings. In February 2004, the public authorities brought a small number of these cases before the civil court by way of test cases.[114] The outcome of these procedures will take some time and is uncertain.

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109 Mok, 311, with reference to ECJ Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705.

110 Guidelines on leniency ("Richtsnoeren Clementietoezegging"), section 23: "*Verlening van clementie op grond van de Richtsnoeren heeft alleen gevolgen met betrekking tot het niet opleggen of verminderen van boeten in zaken ingevolge de artikelen 6 juncto 56, 57 en 62 Mw en biedt de karteldeelnemer geen bescherming tegen mogelijke andere gevolgen van betrokkenheid bij het kartel, zoals civielrechtelijke gevolgen of sanctionering door andere mededingingsautoriteiten.*" (2002).

111 VerLoren van Themaat (2002), 65

112 "Supermarkten bevorderen €200 miljoen van Interpay" in: Het Financieele Dagblad, 4 June 2006.

113 Decision of the Director General of the DCa, 29 April 2004, Interpay.

114 NRC Handelsblad, 3 February 2004, p. 1

(vii) 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

Statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon:

	Damages awarded			Damages refused			Pending cases		
	Based on EC law only	Based on national law only	Based on national and EC law	Based on EC law only	Based on national law only	Based on national and EC law	Based on EC law only	Based on national law only	Based on national and EC law
NL	3	-	1	2	2	-	-	2	1

III Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

A reversal for the burden of proof for damage as well as causal link would be a large facilitation.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Arbitration, mediation and settlement are frequently used alternatives to civil proceedings. How successful these are is difficult to establish, since the results of these procedures remain outside the public domain. The fact that parties free to initiate civil proceedings keep using these alternatives must mean that they are at least not seen as worse than 'normal' civil proceedings.

Conversely, parties that (by clause) have agreed to arbitration, may not at the same time bring an action for damages before the civil court, even if they would prefer this. They will be confronted with a judgment in which the civil court declares itself incompetent to handle the case until the arbitrator has ruled or declared himself incompetent.[115]

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115 Article 1052 CPA. Case 03/3021, Civil Court The Hague, 19 May 2004, Zuiveringsschap Hollandse Eilanden en Waarden and Stichting De Waterlandstichting v. eighteen construction companies.

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V. National case law summaries

District Court of Amsterdam, 30 March 1977; Court of Appeal Amsterdam, 11 January 1979 and Supreme Court of The Netherlands, 16 January 1981, Theal B.V. (renamed in Tepea B.V.) v. J.D. Wilkes [NJ 1981, 155].

Facts and legal issues

Wilkes, a distributor, had been excluded from the sale of record cleaners in The Netherlands as a result of export prohibitions and the assignment of trademark rights to preclude parallel trade.

Wilkes filed a complaint with the Commission and sued for damages. Prior to the adoption by the commission of a decision finding that Theal and Watts' practice of precluding parallel imports were in breach of Article 81 EC (Decision of 19 February 1977, OJ L39/19). The District Court of Amsterdam independently decided that Theal and Watts were in breach of Article 81 EC and awarded damages to Wilkes, to be calculated in a separate damages assessment procedure. Theal appealed, but the Court of Appeal confirmed the judgment. Theal appealed in Cassation, but on 28 August 1979 it went into bankruptcy, before the Supreme court had judged.

Held
The District Court of Amsterdam awarded damages to Wilkes, to be calculated in a separate damages assessment procedure.
In Appeal the Court of Appeal confirmed the judgment.
In Cassation the Supreme Court suspended the procedure because Theal (Tepea) had gone into bankruptcy and the claim for damages had to be brought before the receiver.

Note: because of Theal's bankruptcy, no court ever assessed Wilkes' damages.

Case 75/3948, Civil Court Amsterdam, 29 October 1980, A. Oosterhuis v. Eurofair B.V.

Facts and legal issues
In 1975 Eurofair refused Oosterhuis, producer of magnetic window cleaners, a place on an international household fair. Oosterhuis filed a complaint with the Commission and sued Eurofair for damages. Following the complaint, the Commission advised Eurofair to change its regulation and once this was carried out by Eurofair, the Commission gave notice to Oosterhuis that the Eurofair regulations were not longer in breach of Article 82 EC. The Civil Court of Amsterdam decided that the grounds on which Eurofair refused entry to the fair were in compliance with the amended regulations and therefore had not been in breach of Article 82 EC.

Held
Claim for damages dismissed

Case 89/6365, Civil Court Den Haag, 17 October 1990, O.E.C. Nederland B.V. v. Hart Nibbrig & Greeve B.V.

Facts and legal issues

O.E.C. Nederland B.V. (O.E.C.) is a company specialized in the computerization of car sale companies. For that purpose the company sells software packages to these car sale companies. Hart Nibbrig & Greeve B.V. (H.N.G.) is the sole importer in the Netherlands of cars and parts of the brand Mitsubishi. H.N.G. has announced to its clients that it can only fully cooperate with them if they make use of software of one specific other brand. As a result several contracts of O.E.C. are dissolved by its clients. O.E.C. argues that the conduct of H.N.G. interferes with the normal market and competition relations and therefore conflicts with Article 86 EEC (now 82 EC). O.E.C. claims compensation of the damage.

Held

The Court decides that the conduct of H.N.G. indeed conflicts with Article 86 EEC. Because of this H.N.G. has acted in conflict with a legal prescription and has committed an unlawful act. Therefore H.N.G. has to compensate the damage of O.E.C.

Note: The case was apparently settled.

Case 4088/88, Civil Court Rotterdam, 23 October 1992, *Multiveste XXXVII v. Boender & Maasdam e.a.*

Facts and legal issues

Multiveste XXXVII ("Multiveste") was a property developer who requested four building contractors to bid for a project. The building contractors met beforehand and agreed that Boender & Maasdam ("Boender") would be awarded the contract, for which Boender would compensate the other

contractors. The agreed amount was added up to Boender's bid as "compensation for calculation costs" ("rekenvergoeding"). Multiveste claimed the amount as unduly paid.

Held

The Court held that defendants had committed an unlawful act by bid-rigging. The agreement between parties to add up the compensation amount was contrary to Article 85-1 EC, and void. The amount was paid undue, and since Multiveste had paid it to Boender, Boender was ordered to repay.

Case H-879/87 , Civil Court Haarlem, 4 May 1993, *Burns Tractors v. Van Driel and Van Dorsten and Sperry New Holland* [not yet published]

Facts and legal issues

Tractor trader Burns ordered tractors of the Sperry New Holland brand with trader Coffeng. Coffeng never delivered and Burns suffered damage. Burns complained with the EC and initiated proceedings, stating that Sperry New Holland and its national importer Van Driel en Van Dorsten had agreed to prevent parallel trade and therefore stopped delivering tractors to Coffeng. The Court ordered Burns to deliver proof that his order with Coffeng was passed on to Van Driel and subsequently annulled by Van Driel with consent of Sperry New Holland.

Held

Action dismissed. Burns did not succeed in proving that his order was passed on by Coffeng to Van Driel. A general practice of this kind was not proven. Since there was no proof of this, a causal link between an annulment by Van Driel/Sperry New Holland and non-delivery by Coffeng could not be established.

Case 1999/53, Civil Court Leeuwarden, 7 April 1999, Lindeboom v. Albert Heijn B.V. e.a.

Facts and legal issues

Lindeboom is the owner of a restaurant situated in a shopping mall. In the vicinity of this restaurant Albert Heijn B.V. owns a supermarket. In the supermarket Albert Heijn B.V. has placed a bar where its customers can buy drinks. Lindeboom argues that Albert Heijn B.V. misuses its position of power by the way it advertises its bar, which is unlawful by virtue of Article 24 CA. Plaintiff claims a compensation of the damage on the basis of the unlawful behaviour.

Held

The Court dismisses all the claims. Therefore no compensation is awarded.

Case 139811/KG ZA 01-1304/RS, President of the Civil Court Utrecht, 14 February 2002, *Superunie v. Interpay* (injunction procedure)

Facts and legal issues

Superunie, a supermarket organisation, initiated proceedings against Interpay, a joint-venture between the large Dutch banks, responsible for the handling of electronic financial transactions. Interpay allowed discounts to supermarkets from the AHOLD organisation, but refused to offer the same or equal discounts to Superunie. Superunie stated that Interpay abused its dominant position by using discriminating tariffs and refusing to deal on non-discriminatory terms.

Held

The President in interim injunction proceedings held that there were sufficient grounds to presume that Interpay held a dominant position. It further held that there were strong indications that Interpay abused its dominant position by using discriminatory discounts. However, these indications were not beyond any reasonable doubt and therefore insufficient for an interim injunction ordering Interpay to deal on equal terms with Superunie or pay damages. Instead a deeper investigation was held necessary, preferably by the DCa.

Case 94/00, Civil Court Middelburg, 3 July 2002, *Praet en Zonen v. Coöperatieve Producentenorganisatie van de Nederlandse Mosselcultuur U.A.* [not yet published]

Facts and legal issues

Praet en Zonen company is a mussel farmer and one of the members of the Coöperatieve Producentenorganisatie van de Nederlandse Mosselcultuur (Dutch Cooperative Musselfarmers Organisation, "CMO"), a private association of mussel farmers. The articles of association and bylaws of the CMO include a regulation on the assignment of quotas for fishing seed mussels to each mussel farmer associated. Praet concludes that this regulation is a market sharing agreement which infringes Articles 81-1 EC and 6 CA and is therefore void. Praet sues for damages in amount of his loss of profit, estimated at ▫ 550.000 for each year he was bound by the void regulation.

Held

The Court decides that the Regulation is a horizontal agreement with respect to limiting and fixing the production of the individual mussel farmers. The CMO did apply for exemption under Article 81-3 EC with the Commission, but did not apply for exemption from Article 6 CA with the director-general of the DCa. Therefore, the Regulation infringes Article 6 CA and is void. The CMO is liable for Praets damage, to be calculated in a follow up procedure for the determination of damages.

Note: The Court decision is currently under appeal; a follow up procedure to determine damages has not been initiated, awaiting the outcome of the appeal.

Case 106848/98-3016/HA ZA, Civil Court Rotterdam, 28 November 2002, *Van Ommeren Agencies Rotterdam BV e.a. v. Municipality of Rotterdam*

Facts and legal issues

By virtue of the "algemene voorwaarden Zeehavengeld" the municipality of Rotterdam levies a tax for every ship which wants to make use of the harbour facilities. The height of the tax is based on the type of the ships. Plaintiffs consider that the tax is excessive and discriminating. Therefore the municipality misuses its economical position of power and acts in conflict with Articles 86 and 82 EC and 24 CA. Among other things plaintiffs claim compensation because the municipality acted unlawful in concluding contracts based on the "algemene voorwaarden Zeehavengeld".

Held

The Court decided that the municipality has an economical dominant position. However, it argues that it is not yet possible to demonstrate abuse. The Court has ordered to appoint experts who will draw up a report about the relation between the costs and the tax that is levied.

Case 03/3021, Civil Court The Hague, 19 May 2004, Zuiveringsschap Hollandse Eilanden en Waarden and De Waterlandstichting v. [eighteen construction companies]

Facts and legal issues

In 1996 Zuiveringsschap Hollandse Eilanden en Waarden, on behalf of De Waterlandstichting put out a tender for the renovation of the wastewater treatment facilities at Hellevoetsluis. Eighteen companies submitted tenders for the contract. In 2002, during the Parliamentary investigation into construction fraud, duplicate accounts turned up from which it appeared that the bid was rigged. The companies met beforehand and decided that one would be awarded the contract, and that the others would be compensated. The amount of the compensation, a total of ▫ 1.411.256,47, was added to the designated winning bid. The Zuiveringsschap and De Waterlandstichting claimed damages for the unduly paid amount.

Held

Since the same issue was already brought before the Arbitration Tribunal for the Construction sector, the Civil Court declared itself incompetent to hear the case as long as the Arbitration Tribunal has not declared itself incompetent.