

# National report for the Netherlands

## FIDE XXIII Congress, Linz 2008

### Topic 2: The Modernisation of the European Competition Law – First Experiences with Regulation 1/2003

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#### Part 1: Implementation of Regulation and other adaptations of national law

- 1.1. *With regard to agreements restricting competition (i.e. as to the scope of Article 81 EC) has national law made use of the opportunity to provide for national legislation differing from Article 81 EC in cases where trade between Member States is not affected?*

The Dutch legislator has only made use of this opportunity to a limited extent. In principle the norm of the national equivalent of Article 81 EC is the same. Leaving the effect on trade between Member States criterion aside, the cartel prohibition in Article 6 of the Dutch Competition Act ("CA") is therefore equal to Article 81 EC.<sup>2</sup> There is, however, an additional statutory *de minimis* exception in Article 7 CA.

Article 7(1) CA stipulates that the prohibition provided for in Article 6 CA is not applicable to agreements which involve no more than eight undertakings, provided the joint turnover of the undertakings involved does not exceed either € 5,500,000 if the core activity of the undertakings involved is the supply of goods or € 1,100,000 in all other cases. This *de minimis* exception is also applicable in the case of agreements and concerted practices which have as their object the restriction of competition.<sup>3</sup> Pursuant to Article 9 CA the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit* or NMa) can by decision 'revoke' the exception of Article 7 CA in individual cases if competition is significantly hampered due to the prevailing market conditions.

Article 7(2) CA provides for a further exception to the general cartel prohibition for smaller undertakings. This exception generally applies to agreements, decisions and concerted practices involving undertakings that are (actual or potential) competitors on the relevant market(s), provided that:

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<sup>1</sup> This report is in fact the product of a working group. The working group consisted of Elske Boerwinkel, Wynand Brants, Michael Frese, Maartje de Visser, Lidy Wiggers-Rust, Florus Wijsenbeek and Rein Wesseling. The resulting report is truly a co-production. It would be presumptuous therefore for the rapporteur to thank the other members of the working group but there should be no doubt that any merit in this report belongs to the working group. The working group would like to thank Fanny-Marie Brisdet of the Dutch Ministry of Economic Affairs and André Andeweg of the Dutch Competition Authority for their assistance (which consisted of providing oral background information relating to the operation of the ECN in practice). Their input was indispensable to answering the questions in section two in particular.

<sup>2</sup> In the interpretation of the prohibition of article 6 CA national courts and the Dutch competition authority are also usually quite closely guided by European case law and Commission decisions.

<sup>3</sup> See to this effect also: M.R. Mok, *Kartelrecht Nederland, de Mededingingswet*, Beknopte editie, Deventer 2004, p. 75.

a) the joint market share of the undertakings involved does not exceed 5 per cent on any of the relevant markets affected by the agreement, decision or concerted practice; and

b) the joint turnover of the undertakings involved during the year preceding the agreement with respect to the goods or services to which the agreement, decision or concerted practice applies does not exceed € 40,000,000.

Article 7(2) CA was inserted into the Act only recently but it too would seem to be applicable to "hard core" infringements (such as horizontal price-fixing and market sharing arrangements) even if the objective was to allow smaller companies to cooperate in a pro-competitive manner. In addition to the statutory exceptions to Article 6 CA provided for in Article 7 CA the following national block exemptions apply:

- (1) an exemption for companies forming a consortium in a specific tender procedure,<sup>4</sup>
- (2) temporary agreements with regard to the admission of competing shops in shopping centres,<sup>5</sup> and
- (3) certain specific co-operation agreements between retail businesses.<sup>6</sup>

There are therefore limited national exceptions to the general application of the national equivalent of Article 81 EC.

1.2. *To what extent was the possibility offered in Article 3(2) of Regulation 1/2003 made use of to adopt and apply "stricter national laws"?*

The Dutch legislator did not make use of this possibility.

1.3. *Does the catalogue of sanctions in national law correspond with Regulation 1/2003 or does national law provide for other penalties [Art 5(1) of Regulation 1/2003]?*

## **Overview**

The Dutch legislator has chosen for an institutional framework similar to that of the Community.

The NMa is vested with the power to enforce both the Articles 81 and 82 EC (Article 88 CA) and the equivalent national provisions for anti-competitive behaviour lacking an effect on trade. It exercises this power in the general interest and for this purpose it was granted sanctioning competences (Article 89 CA, conferring similar sanctioning powers for infringements of the Articles 81 and 82 EC as for infringements of the equivalent national provisions). For this purpose the term 'sanction' is understood to include both penalties (punitive) and remedies (reparatory). Any decision by the NMa, sanction decisions included, can be appealed in two instances before specialised administrative courts. These appeal courts review the legality of the decision, with a full review of the sanctions.

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<sup>4</sup> *Besluit vrijstelling combinatieovereenkomsten*, 25 November 1997.

<sup>5</sup> *Besluit vrijstelling branchebeschermingsovereenkomsten*, 25 November 1997.

<sup>6</sup> *Besluit vrijstelling samenwerkingsovereenkomsten detailhandel*, 25 November 1997.

Obviously, the Dutch civil courts also apply the (Community and national) competition provisions having direct effect, thereby contributing to overall enforcement. Their role is restricted to civil law disputes, initiated by parties whose rights are breached by anti-competitive conduct. In ascertaining the protection of, and respect for Community rights, the Dutch courts can impose remedies or award compensation.<sup>7</sup>

The imposition of punitive and reparatory measures in the general interest for competition law contraventions is therefore limited to the discretion of the NMa. The NMa can, in principle, rely on two types of sanctions: fines and periodic penalty payments. Both can be applied in a variety of ways, as will be elaborated on below. Before undertaking this exercise it merits to expand briefly on the changes brought about by recent amendments to the CA (the "Amendments").<sup>8</sup>

With some minor differences, the NMa's sanctioning arsenal has thus far resembled that of the Commission. In keeping with this equivalence, the Amendments confer to the NMa powers similar to those the Commission has pursuant to Reg. 1/2003. The introduction of a commitment decision-making power for the NMa (Article 49a CA), comparable to Article 9 Reg. 1/2003, provides an example of this deference.

However, during the same legislative process this parallelism in enforcement instruments has been abandoned by introducing an autonomous, non-accessory liability for individuals. Chief executives, managers and company officers now face personal sanctions for competition law contraventions in the Netherlands. Today the sanctions for individuals are still limited to administrative law fines but a legislative proposal introducing criminal sanctions is awaited.<sup>9</sup>

Like the Commission, the NMa can take enforcement decisions against substantive and procedural offences, with 'substantive' taken to mean the actual prohibited restriction of competition and 'procedural' the cooperation obligations resting upon undertakings. Both types of offences are threatened with fines and periodic penalty payments, addressed to both natural and legal persons.

The NMa can, separately or jointly, impose the following sanctions by decision:

#### **a. Fines**

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<sup>7</sup> For a more comprehensive analysis of the Dutch institutional framework, see: R. Wesseling, Report for the Netherlands, F.I.D.E. Dublin 2004, Topic 2: Competition Law and Policy of the European Union: The Reform of Competition Law Enforcement – Will it Work?

<sup>8</sup> Official Journal ("*Staatsblad*") 2007, 284.

<sup>9</sup> Letter from the Minister of Economic Affairs to Parliament of 13 September 2007, identification code EP/MW 7082281.

The NMa can impose fines on undertakings and on individuals ordering the infringement or conducting the behaviour constituting an infringement of Articles 81 and 82 EC and the equivalent national provisions (Article 56(1) and (4) CA).

In fixing the amount of the fine the NMa shall take regard of the gravity and duration of the infringement. The amount of the fine may not exceed EUR 450,000 for natural persons and the same amount or 10 per cent of the undertaking's world-wide turnover of undertakings in the case of infringements of the substantive competition rules (Article 57 CA). The NMa may also impose fines for procedural violations and the amount of those fines may again not exceed EUR 450,000 or in the case of undertakings the same amount or 1 per cent of the undertaking's world-wide turnover in the business year preceding the adoption of the decision (Article 69 CA).

The NMa has adopted a Fining Code (*Boetecode*) which contains guidelines on the way the NMa will apply its power to impose fines. The NMa applies these guidelines both for the decentralised enforcement of the Articles 81 and 82 EC and for the enforcement of national competition law. The NMa's Fining Code resembles the Commission's Guidelines on the method of setting fines.<sup>10</sup> Although the order of elements is somewhat different, the resulting fine is normally comparable in both systems. The NMa will first determine a base quotient which forms the basis of the fine. This base quotient represents 10 per cent of the value of sales of the goods or services concerned with the infringement during the period of the infringement. The basic fine is multiplied by a factor between 0 and 3, depending on the gravity of the infringement and the economic context. For this purpose three levels with corresponding factors have been provided, each level applicable to a particular type of restrictive conduct. The resulting product can be upwardly adjusted so as to yield a desirable preventative effect. Aggregating and attenuating circumstances can further increase or decrease this amount.

Met opmaak: Engels (V.S.)

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In accordance with the obligations under the European Convention on Human Rights and Fundamental Freedoms, penalties imposed by the NMa are subject to full review on appeal before the Dutch administrative courts.<sup>11</sup>

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#### **b. Periodic penalty payments**

The NMa can take the decision to order a firm to behave or stop behaving in a certain way or to take structural measures on pain of forfeiting a periodic penalty. This penalty can take the form of a single amount (one period) or a periodic amount. Periodic penalty payments can be imposed both on companies and individuals. A structural measure can be imposed either when there is no equally effective behavioural measure or when any equally effective behavioural measure would be more burdensome for the addressee.

A decision imposing a behavioural measure, i.e. requiring (abstinence from) particular conduct, should always mention its applicable term (Article 62(2)(b) CA) and can be imposed for a

<sup>10</sup> OJ 2006/ C 210/02.

<sup>11</sup> See: Rotterdam Court, July 18 2007, (Bicycle cartel) LJN BB0440.

maximum period of two years (Article 58(2) CA). In accordance with provisions of the General Administrative Law Act (*Algemene wet bestuursrecht* or 'Awb'), the NMa is moreover obliged to fix a maximum amount for the total sum of the periodic penalties. Unlike the provisions on fines, the provisions on periodic penalty do not give indications as to the calculation of the penalties ultimately imposed; neither on the level of the incremental amounts, nor on the total amount forfeited.

#### **c. Interim measures**

The NMa may adopt interim measures if conduct irreparably damages competition or other undertakings and the full administrative procedure cannot be awaited. These measures take the form of interim periodic penalty payments. Although not explicitly provided for the Articles 83(2) and 56(4) CA read in conjunction seem to allow interim measures addressed to individuals too.

If required, interim periodic penalty payments should be adopted as early as possible (Article 85(1) CA). The term of application of the measures may be fixed but is in any case limited by two events; the issuance of the statement of objections and the adoption of a decision. Within six months after the adoption of the interim measures a statement of objections should be issued and the measures will always expire after adoption of a final decision (Article 85(3) CA). Apart from that, the same terms apply as to the behavioural measures referred to above.

#### **d. Binding instructions**

The NMa may impose binding instructions after it has established an infringement of the Articles 81 or 82 EC or the equivalent national provisions, requiring natural persons or undertakings to respect the CA. Breach of such instructions may again lead to the imposition of fines or periodic penalty payments.

#### **e. Commitments**

The NMa can by decision accept binding commitments offered by an undertaking (Article 49(a) CA) to prevent an infringement of the Articles 81 or 82 EC or the equivalent national provisions from being established, breach of which is punishable by fines solely.

### **Conclusion in relation to question 1.3**

Pursuant to Reg. 1/2003 and for the purpose of applying the Articles 81 and 82 EC, NCAs may require that an infringement be brought to an end, order interim measures, accept commitments, impose fines, periodic penalty payments or any other penalty provided for in their national legislation. In contrast to the Commission the NMa does have the ability to impose fines on individuals.

1.4. *Is there a national leniency programme? If yes, which differences are there in comparison to the ECN Model Leniency Programme?*

The NMa operates a leniency programme since 2002. Apart from its general leniency policy the NMa has once applied an *ad hoc* lenient fining scheme for large-scale infringements in the Dutch construction sector in order to cope with the large number of applications.<sup>12</sup>

On 9 October 2007 the NMa adopted new leniency guidelines ('2007 Guidelines'). The 2007 Guidelines distinguish between three types of leniency applications: applications by undertakings, simultaneously providing a 'blanket leniency' for current and, in principle<sup>13</sup>, former employees, provided that each employee fulfils the leniency conditions; applications by corporate actors on personal title; combined applications by different corporate actors of the same undertaking on personal title. This scheme is intended to pit the interests of the individuals involved against that of the undertaking, leading to earlier cartel exposure. Providing for personal leniency in parallel to the application of a corporate leniency programme is being stimulated by the ECN Model Leniency Programme ('Model'). The personal scope of the 2007 Guidelines is thus in accordance with the Model. The same can be said for the material scope. Both the Model and the 2007 Guidelines solely apply to hard core cartels: horizontal agreements and practices with an anti-competitive objective.

The 2007 Guidelines provide for two types of leniency: immunity and reduction. These two types are divided into three ranges: guaranteed immunity, 60-100 per cent fine reduction and 10-40 per cent fine reduction. All ranges require full cooperation by the applicant from the moment of contemplating an application until the appeal procedures before the courts. Only the first applicant can receive full immunity or 60-100 per cent reduction. Undertakings having coerced others to join the cartel and second and later applicants will never receive more than a 10-40 per cent reduction. The exact level of reduction in the 60-100 and 10-40 per cent ranges depends on the value of the evidence which should in any case significantly add to the NMa case file until then and on the place in line a particular applicant holds. Although this strict distinction between first and later applicants and the resulting difference in the level of reduction granted is in line with the Model, the latter does envisage another subdivision; namely one with two types of guaranteed immunity for first applicants and a reduction for later applicants of up to 50 per cent.

Under the 2007 Guidelines guaranteed immunity seems more difficult to obtain than foreseen by the Model. Already when the NMa has laid down its suspicion of cartel existence in an internal memo, full immunity will no longer be guaranteed and first applicants can only hope for a 60-100 per cent reduction.

In line with the Model and to protect applicants from increased risk of civil litigation and to lessen the administrative burden from parallel applications for multi-jurisdictional cartels, the 2007 Guidelines allow both oral and summary applications to be made. For oral applications a

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<sup>12</sup> These *ad hoc* leniency schemes were divided according to the specific sub-sector and published in the official journal individually. See: State Gazette (*Staatscourant*) of 25 November 2005, 1 September 2005, 21 April 2005 and 13 October 2004.

<sup>13</sup> Former employees are not admitted under the 'blanket leniency' if this could frustrate investigations.

reasonable interest is required. Summary applications are accepted on the cumulative conditions that immunity is available, the Commission is best placed to pursue the case and leniency is or will be applied for at the Commission. The NMa is further willing to provide 'markers' to incomplete applications, in order to allow the applicant within a short period to supplement its application without losing its place in line (a full application consists of oral or written statement with annexes containing contemporaneous evidence). In contrast to the Model, the NMa does not reserve the marker exclusively for immunity applicants, also second and later applicants are eligible.

Before applications are submitted, potential applicants can anonymously and on the basis of confidentiality discuss hypothetical situations with the NMa to learn whether immunity is still available.

As a final point it should be noted that the information submitted by an applicant cannot be used against that applicant to aggravate the infringement, as advocated by the Model, but if leniency is eventually withheld (for instance, due to insufficient cooperation) the information submitted can be used as evidence.

1.5. *Is there a legal foundation similar to Article 17 of Regulation 1/2003 for conducting inquiries into a particular sector of the economy? If yes, which experiences have been made in terms of effort and competitive impact onto the markets in question?*

There is no legal foundation equivalent to Article 17 Reg. 1/2003 in Dutch competition law. However, this has not prevented the NMa from conducting investigations covering entire sectors of the economy, both on the basis of indications that infringements were actually taking place (for example in the construction sector and the concert ticket trade) and on the basis of a more general opinion that competition in a particular market might not be as brisk and unhampered as it should be (for instance the financial services sector and the legal profession). In the financial sector this assessment took the form of a "Financial Services Sector Monitor" including structural economic research into the competitiveness of various parts of the financial services sector which remains ongoing. In case of the legal profession, the NMa's investigations led to recommendations to alter professional regulations with regard to, *inter alia*, remuneration systems, advertising and procurement.

1.6. *Have measures, for example for abating the statute of limitations, been taken so that the suspension of proceedings pursuant to Article 13 of Regulation 1/2003 does not result in a situation where infringements cannot be sanctioned any more?*

The NMa's power to impose sanctions on account of infringements of the CA and Articles 81 and 82 EC expires five years after the infringement has taken place. The period of limitation is interrupted by each act of investigation or instigation of proceedings by the NMa with regard to the infringement, "as well as by each such act of the Commission or of the competition authority of another EU member state with respect to the infringement of article 81 or article 82 of the Treaty". The interruption of the period of limitation occurs on the day on which at least one of the undertakings or association of undertakings which has participated in the infringement is

informed of such an act in writing. At the moment of interruption the period of limitation starts afresh. However, the NMa's power to impose a sanction expires at the latest ten years after the infringement has taken place, extended by the period during which the decision is appealed.

1.7. *Are there provisions for an easier enforcement of civil claims?*

No. See further below, at question 3.9.

1.8. *Are there any indications for an inconsistent application of EC competition law due to the decentralization of enforcement?*

There are no indications for an inconsistent application of EC competition law in the Netherlands. In this regard, it is important to stress that the highest administrative court in the Netherlands on competition matters, the *College van Beroep voor het bedrijfsleven* (CBb), on numerous occasions, both concerning abuse cases and collusion cases, has held that in the application of Dutch competition law the case law of the Community Courts functions as guidance, considering the orientation of Dutch competition law on EC competition law. For application of the Articles 6 and 24 CA, the Dutch equivalents to Articles 81 and 82 EC, the NMa and the courts refer to interpretations of the latter provisions by the ECJ and the CFI.

In connection with the above it should be noted that the Dutch courts take an economic approach to the application of Article 6 CA, by assessing restrictions which have as their object a restriction of competition within their factual, economic context.<sup>14</sup> Also interesting is that the NMa has applied Article 81 EC in administrative review procedures taking place after 1 May 2004 but concerning sanction decisions predating the entry into force of Reg. 1/2003. This was done irrespective of the fact that the original decisions were only concerned with Dutch competition law. The first instance administrative appeal court considered this to be acceptable.<sup>15</sup>

## **Part 2: Cooperation between competition authorities**

2.1 *Can clear statements be made about the advantages and disadvantages resulting for the national competition authorities from the close cooperation within the network of public authorities applying Community competition rules?*

It would seem that experiences with the ECN are overwhelmingly positive, at least from the perspective of the NMa. The ability to coordinate and to learn from experiences in other jurisdictions in an informal and flexible manner is a clear advantage of the network. The absence of formalistic or mandatory procedures implies that there are no clear disadvantages of the network from the perspective of the NMa.

The ECN has functioned as a breeding ground for firm personal contacts between the competition authorities. This, in turn, facilitates consultations on various points on a relatively

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<sup>14</sup> CBb, December 07 2005 (Secon) LJN AU8309 and CBb, October 28 2005 (Modint) LJN AU5316.

<sup>15</sup> Rotterdam Court, July 18 2007, (Bicycle cartel) LJN BB0440.

informal basis, outside of the scope of the formal measures and procedures enshrined in the Regulation. Typically, contacts between representatives of the NMa and other NCAs are on a bilateral and informal basis, often via e-mail or a phone call. The suggestion was made that the established personal link leads to enhanced enthusiasm within the NCAs to cooperate within the more formal framework, like answering requests from other NCAs for information or assistance in the sense of Article 22 of the Regulation.

The NMa appears to be a relatively active player within the network, together with the German *Bundeskartellamt*, the French *Conseil de la Concurrence* and the English *Office of Fair Trading*. The recently introduced revised leniency guidelines of the NMa are a *de facto* copy of the OFT leniency guidelines. No doubt the existence of the network and the contacts within the other NCAs within that context has facilitated a process of mutual assistance in the adoption of policy guidelines such as these.

## 2.2 *Which experiences have been made with the allocation of cases up to now?*

The Dutch experience confirms what the Commission stated in recent Annual Reports on Competition Policy, namely that case (re)allocation is extremely rare.<sup>16</sup> Pursuant to Article 11(3) of the Regulation, the NMa informs the members of the network of the opening of proceedings. Thus far, there have been no instances where a case taken up by the Dutch authority was transferred to another authority following this Article 11(3) notification. Neither has the converse situation occurred in as far as this can be concluded on the basis of public information; the Dutch authority has not initiated proceedings in respect of a case initially investigated by another ECN member.

In those instances where cases have been transferred, either to or from the Commission or between NCAs, reallocation is said to have been voluntary and consensual. Reportedly, no national competition authority has thus far made use of the possibility of requesting the Commission to put a national case on the agenda of the Advisory Committee under Article 14(7) of the Regulation, and neither has the Commission done so on its own initiative.

## 2.3 *How are those obligations under Article 11(4) of Regulation 1/2003 carried out in those Member States in which the competition authority has court-like characteristics (Ireland, Austria)? Does the Commission receive the envisaged decision of the court? How much consideration is given to observations of the Commission (cf. para 46 of the Commission Notice)? Are the inquiries submitted to the Commission as well as eventual observations by the Commission communicated to the parties?*

As an administrative authority the NMa does not have court-like characteristics. The NMa typically sends a draft of its final decision to the Commission in fulfillment of its obligations under Article 11(4) of the Regulation. It provides an English summary for the other national competition authorities. However, where a competition authority shows a keen interest in the matter, the

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<sup>16</sup> EC Commission Report on Competition Policy 2006, COM(2007) 358 final, p 19 and Commission Report on Competition Policy 2005, SEC(2006) 761 final, p 71-2.

Dutch authority has in the past responded favourably to requests for a full English version and has had its translation service prepare a translation of the report. In other instances, where a NMa case is considered to be of a wider ("Network") interest, the Commission has also made available its translation service to have the national decision – or even the Statement of Objections – translated into English.

The Commission's observations can be formal or informal and are communicated to the competition authority in written or oral form. In terms of their contents, Commission observations are mostly focused on questions of legal interpretation. The Commission reportedly had a particular emphasis on the application of the criterion 'effect on trade between Member States'.

2.4 *Which experiences have been made with the right of evocation by the Commission as well as with the consultation procedure [Art 11(6) of Regulation 1/2003]? Are there mechanisms within the network that render reliance by the Commission on the right of evocation unnecessary?*

At the time of writing, the Commission has yet to make use of Article 11(6) of the Regulation to take over a case initiated by a Network member. We may offer the following reasons in explanation. First, there are few cases where allocation has proven unclear or controversial. This is a consequence of the fact that most cases will either have a clear Community dimension to them – making them obvious candidates for a Commission investigation – or concern markets that are primarily national in nature – where the relevant national authority is easily determined with the help of the – flexible – allocation criteria. Secondly, the Commission seems quite satisfied with the way in which national competition authorities dispose of their cases, as evidenced in the limited number of observations it submits under Article 11(4) of the Regulation and the contents of those observations.

2.5 *Have there been problems with the use in evidence of information collected by the Commission or by another national competition authority? How broadly is the term "subject-matter for which it [the evidence] was collected" in Article 12(2) of Regulation 1/2003 to be understood?*

As far as we know, the use of information collected by another ECN member has not led to problems in the Netherlands. The likely reason for this is that the information exchanged between the NMa and other competition authorities is reportedly typically of a general nature, e.g. relating to market characteristics and market definition.

2.6 *Is there any experience on how a uniform level of protection as stated in Article 12(3) second indent of Regulation 1/2003 can be guaranteed?*

Not to our knowledge.

2.7 *Have undertakings ever taken court action against the exchange of information between EU competition authorities? Are the undertakings concerned informed about the communication of information?*

For the reasons highlighted in response to question 2.5, court actions have not been initiated to date. Similarly, undertakings are not informed about the communication of information. To the extent that the information concerns market data and is more or less widely available and hence not confidential, we believe that this is the right approach. Informing the undertakings would entail unnecessary administrative costs for the national competition authority involved.

2.8 *What has been done to meet the obligations resulting from Article 16(2) of Regulation 1/2003? What is the method of verifying whether a decision has already been adopted by the Commission? How is the term "subject" (of a Commission decision) interpreted?*

Beyond the measures foreseen in the Network Notice we are not aware of any specific measures the NMa has taken in this respect.

2.9 *Which experiences have been made with respect to investigations by competition authorities of Member States which are carried out on behalf and for the account of the competition authorities of another Member State (Article 22 of Regulation 1/2003)?*

2.10 *Were requests for administrative assistance by other national competition authorities within the framework of Art 22(1) of Regulation 1/2003 rejected and if so, for what reasons?*

Questions 2.9 and 2.10 are answered together.

Requests for assistance are not infrequent and are commonly acceded to. In as far as we are aware requests for administrative assistance by other national competition authorities have not been denied by the NMa to date.

2.11 *Has the power to withdraw the benefit of a block exemption regulation (Article 29(2) of Regulation 1/2003) ever been exercised?*

No not by the NMa. In 2001-2003, hence before the adoption of Regulation 1/2003, the NMa contemplated withdrawing the benefit of the EC block exemption regulation for vertical agreements in relation to (aspects of) the distribution agreements between suppliers of petrol and gas stations. This intention was withdrawn after a fuller investigation of the market situation and in view of market developments at the time.

2.12 *Other points: (How) have deliberations between the national competition authorities in the context of the ECN impacted on the Commission's willingness to act according to the opinion of the Advisory Committee?*

Under the regime of Regulation 17, there were several instances where the opinion of the Advisory Committee concerning a Commission draft decision did not seem to exert much, if any, impact on the content of the final decision. It could have been expected that, as a result of preliminary deliberations between the competition authorities in the context of the ECN and the enhanced relationships between the national competition authorities and the Commission under Article 11 of Regulation 1/2003, this practice would be halted. Reportedly, however, the establishment of the ECN has not changed much in this respect.

2.13 *Other points: How is the cooperation between the national competition authority and the Ministry of Economic Affairs designed? How does it work in practice?*

The relationship between the Dutch competition authority and the Dutch Ministry of Economic Affairs is one of harmony.<sup>17</sup> The Dutch competition authority is an independent institution (*zelfstandig bestuursorgaan*), albeit without legal personality. The Minister of Economic Affairs cannot give the NMa instructions relating to its policies or decision, although "general instructions" can be provided by the Minister.<sup>18</sup> The Minister is responsible for financial, personal and organizational matters relating to the NMa.<sup>19</sup> The Ministry bears primary responsibility for policy issues, whereas the competition authority is charged with the execution of its mandate through enforcement in individual cases.<sup>20</sup> This division notwithstanding, both bodies appreciate that cooperation is important to allow each to exercise its responsibilities effectively and efficiently. Officials of the competition authority and the Ministry are in regular contact with each other, through email, phone or face-to-face meetings. The Ministry frequently requests the competition authority for suggestions on policy-making (and the authority also offers such suggestions of its own initiative). Conversely, the competition authority informs the Ministry of the agenda for ECN meetings. While the Ministry is not permitted to attend ECN meetings where individual cases are discussed, it sends officials to the Plenary ECN meetings when the items on the agenda would seem to require its attendance. Finally, where the Commission asks for advice on proposals for new guidelines, notices and the like, the Dutch competition authority and the Ministry will consult to see whether it is possible to arrive at a joint response, rather than submit two separate sets of comments.

### **Part 3: The Role of National Courts in Applying Articles 81 and 82 EC**

3.1 *Has there been any case-law in your country with respect to Article 81 (3) EC? If so, were the cases in which courts were dealing with Article 81 (3) EC administrative or civil procedures?*

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<sup>17</sup> In a recent report, the Dutch National Audit Office found that the relationship between the competition authority and the Ministry was indeed functioning satisfactorily, 'Toezicht op mededinging door de NMa' Kamerstukken II 2006/07, 31 055, nr 1 and the reactions by the competition authority and the Ministry, available at <<http://www.rekenkamer.nl/>>.

<sup>18</sup> Article 5b and d(1) Dutch Competition Act.

<sup>19</sup> Relatie-Statuut NMa-EZ (1 December 2005), available at the website of the Dutch competition authority at <<http://www.nmanet.nl/>>. Although the Minister must give a *mandaat* to the competition authority for personnel matters and for matters involving the exercise of legal personality, Article 5 Relatie-Statuut NMa-EZ (1 December 2005).

<sup>20</sup> Preamble and Article 10 Relatie-Statuut NMa-EZ (1 December 2005).

3.2 *Has the transition to the legal exception system led the courts, apart from assessing the conditions of a block exemption regulation, to also assess the substantive requirements of Article 81 (3) EC?*

Questions 3.1 and 3.2 are answered together.

Article 81 (3) EC has been invoked in a number of administrative and civil proceedings in the Netherlands but in many of those the parties aimed to rely on a block exemption regulation. In some cases, however, national courts have substantively and individually assessed whether the conditions of Article 81 (3) EC were fulfilled. First, we will discuss the administrative procedures in which the courts dealt with Article 81 (3) EC. Secondly, we will assess the civil proceedings in which this provision has been applied.

#### Administrative procedures

##### *The North Sea Shrimps-cases*<sup>21</sup>

Article 81(3) EC has been assessed in two administrative cases relating to the same investigation by the NMa. In these *North Sea Shrimps-cases* several shrimp-traders and shrimp-producer associations were fined for maintaining fishing restrictions and fixing prices and thereby infringing Article 81 (1) EC and Article 6 (1) CA. Parties argued that if they would have had filed for an exemption under the then still applicable individual exemption regime, the exemption would have been granted. Parties did not file for the exemption because they were of the opinion that their activities were exempt from the applicability of the Treaty's competition law provisions by Article 33 EC<sup>22</sup>, Regulation 3759/92<sup>23</sup>, Regulation 104/2000<sup>24</sup> or Regulation 26.<sup>25</sup> In the proceedings before the first instance administrative review court the parties invoked Article 81 (3) EC. The parties argued that the fixing of prices and agreements on quota ("catch restrictions") contributed to the improvement of production, as these arrangements enhanced the stability of the supply of shrimps. The administrative appeal court, however, decided in both cases that the exemption conditions of Article 81 (3) EC were not fulfilled. The court considered that it was unclear in which way stability was created and that even if the agreement improved the production, the restrictions would still have to be indispensable and proportionate. It concluded that the price-fixing and the establishment of fishing quota went further than necessary in order to attain stability of the shrimps-supply and that the criteria set out in Article 81 (3) EC were not fulfilled.

#### Civil proceedings

The number of civil proceedings cases in which Article 81 (3) EC has been applied is also limited. Most cases relate to the interpretation of block exemption regulations. In total we counted 18

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<sup>21</sup> Rotterdam Court, June 20 2006,(Landesvereinigung/RvB NMa) LJN: AX9223. Rotterdam Court, July 19 2006,(Coöperatieve Producentenorganisatie/ RvB NMa) LJN: AY4888.

<sup>22</sup> This article relates to the objectives of the Common Agricultural Policy.

<sup>23</sup> Regulation 3759/92, 17 December 1992, OJ 1992 L 388.

<sup>24</sup> Regulation 104/2000, 17 December 2000, OJ 2000 L 17.

<sup>25</sup> Regulation 26, 20 April 1962, OJ 1962 30.

cases which involved the application of Article 81 (3) EC.<sup>26</sup> Due to restrictions with regard to the length of this report we will only mention the most relevant cases.

In general the Dutch courts seem to take a rather reluctant approach to applying Article 81 (3) EC. As far as we can tell there has not been a case in which Dutch civil courts have assessed the substantive conditions of Article 81 (3) EC in detail. In *Polar*, for example, the Zwolle District Court concluded that the relevant distribution system had to be qualified as selective distribution. The court concluded that the criteria set by the distributor were not objective and that the block exemption regulation for vertical agreements did not apply.<sup>27</sup> However, it did not assess whether these criteria could still be exempted individually on the basis of Article 81 (3) EC. It cannot be deduced from this judgment whether the parties had actually applied for the individual exception in the proceedings before the court.

There is at least one case (*Batavus*) where the parties did invoke the Article 81(3) exception in a summary proceedings case. The court did not substantively examine all four conditions.<sup>28</sup> This case dealt with the introduction of a new selective distribution system which was introduced after the introduction of the legal exception in May 2004. In this case the Court of Appeal Leeuwarden simply concluded:

*"Batavus has pled that it or Accell, in case their market share is above the threshold of 30% would be able to invoke the individual exception (The Court of Appeal presumes that Batavus meant the individual exemption under art. 17 Dutch Competition Act), however, the court concludes that such an exception requires an extensive substantive test and that, for this reason, it is therefore by no means certain that the exemption will be granted. As the court, in the light of these interim-proceedings, is not able to form an opinion about the question whether Batavus c.q. Accell can benefit from the exception, (partly) because Batavus has failed to substantiate its claim, the court shall base its further judgment on the actual situation, in which no exception is granted."*

This case also points out that misconceptions remain as to the application of the legal exception in Article 81 (3) EC. In fact, Article 17 CA referred to the individual exemption which could be

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<sup>26</sup> Some cases were appealed and in those situations only the appeals were counted. The judgments are available from the internet database of Dutch court judgments: [www.rechtspraak.nl](http://www.rechtspraak.nl). Court Zwolle, 4 April 2005, (*Polar*), LJN: AT4337; Court of Appeal Leeuwarden, 2 March 2005, (*Batavus*), LJN: AS9708; Court Leeuwarden, Court of Appeal The Hague, 16 December 2004, (*Sunfield/Dekker Breeding*), LJN: AR7840; Court Arnhem, 19 January 2005 (*Market Food Group*), LJN: AS8572; Court of Appeal Arnhem, 16 January 2006, (*Keytech*), LJN: AZ7009; Court of Appeal The Hague, 24 March 2005, (*Marketing Displays International*) LJN: AT4660; Court of Appeal Arnhem, 18 November 2006, (*Blue Cab Emmen/De Vier Gewesten*), LJN: AZ6291; Court Utrecht, 9 May 2007, (*BP*), LJN: BA5375; Court Arnhem, 19 May 2004, (*Van der Sluijs/X*), KG ZA 04-217; Court of Appeal Amsterdam, 23 June 2005, (*Daewoo*), LJN: AU0329; Court Utrecht, 3 November 2005, (*Peugeot*), LJN: AU5477; Court of Appeal Leeuwarden, 14 June 2006, (*Euro-Modul-Systeme*), LJN: AX9093; Court Zutphen, 30 December 2005, (*Groen Trend*), LJN: AU8878; Court Amsterdam, 25 April 2007, (*Autobedrijf Twello*), LJN: BA4508; Court Utrecht, 15 June 2007, (*Wijn/Peugeot*), LJN: BA8288; Court Utrecht, 22 April 2004, (*X/Pon*), not published; Court Assen, 13 December 2006, (*Hometeam*), LJN: AZ5003; Court The Hague, 19 February 2007, (*Make It Easy*), LJN: BA0407, Court Zwolle, 1 November 2006, (*Vitilec/Micronic*), LJN: BB0745.

<sup>27</sup> Court Zwolle, 4 april 2005, (*Polar*), LJN: AT4337.

<sup>28</sup> Court of Appeal Leeuwarden, 2 March 2005, (*Batavus*), LJN: AS9708

granted by the NMa, similar to the exemption which could be granted by the Commission prior to the coming into force of Regulation 1/2003.<sup>29</sup> Article 17 CA was abolished shortly after the introduction of the legal exception in Article 81(3) EC in May 2004 and replaced by the legal exception in Article 6 (3) CA, mirroring the structure of Article 81 EC.

The *Batavus* case was not the only case in which a Dutch court's reasoning in the application of Article 81(3) EC was flawed. In the *Market Food Group* case the court considered that if the Block Exemption Regulation for vertical agreements did not apply due to the fact that the market share of the supplier exceeded the threshold of 30%, it was no longer necessary to determine whether the relevant agreement(s) were compatible with Article 81(1) EC and, if not, whether they could benefit from an individual exception on the basis of Article 81(3) EC.<sup>30</sup>

In *Keytech* the Court of Appeal Arnhem first considered that Article 81 (3) EC could be applicable, as it was a legal exception.<sup>31</sup> It then considered that the clause under scrutiny of the Court contained an undeniable restriction of competition. The Court continued to state that parties should submit proof to assess whether certain exceptions could be applicable and referred the case back to the cause list. However, clauses which have as object the restriction of competition are very unlikely to be exempted by Article 81 (3) EC.

In *Blue Cab Emmen*,<sup>32</sup> the Court of Appeal Arnhem considered that an agreement to divide the taxi market could be void under Article 81 (2) EC or Article 6 (2) CA. It then invited parties to comment on the application of competition law to the agreement and to assess whether Article 81 (3) EC was applicable.

Finally, in *Marketing Displays International* The Hague Court of Appeal decided that Regulation 1/2003 does not have retroactive effect. As the agreement had already been terminated before the introduction of Regulation 1/2003, the Court of Appeal considered that the agreement was not covered by the Regulation, with the effect that the legal exception did not apply. Moreover, the Court concluded that MDI had not submitted any proof that 81 (3) EC was applicable.<sup>33</sup>

### 3.3 *Have the courts used the possibility offered in Article 15(1) of Regulation 1/2003 to ask the Commission for information and opinions?*

Regarding civil law, the Netherlands have implemented Article 15(1) of Regulation 1/2003 in Articles 67 and 68 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, "Rv").

Article 67 (1) Rv prescribes that if the judge asks the Commission for information in its possession or its opinions on questions regarding the application of the Community competition

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<sup>29</sup> Regulation 1/2003, 16 December 2002, OJ 2003 L 1.

<sup>30</sup> Court Arnhem, 19 januari 2005 (*Market Food Group*), LJN: AS8572.

<sup>31</sup> Court of Appeal Arnhem, 16 January 2006, (*Keytech*), LJN: AZ7009.

<sup>32</sup> Court of Appeal Arnhem, 18 November 2006, (*Blue Cab Emmen/De Vier Gewesten*), LJN: AZ6291.

<sup>33</sup> Court of Appeal The Hague, 24 March 2005, (*Marketing Displays International*) LJN:AT4660.

rules, he will inform both parties, in writing, of the questions asked and the documents sent to the Commission. Parties are allowed to give their observations. Parties have the power to submit their view in writing, in the event that they would like to prevent the Commission from giving certain confidential information or to express its opinion(s) in relation to the questions which have been asked and/or in relation to the documents which have been sent to the Commission (cf. Article 67(2) Rv). The judge decides by interlocutory judgment on the contents of the request to the Commission (cf. Article 67(3) Rv). With regard to asking the Commission for information in its possession or its opinion(s) on questions in relation to the application of the Community competition rules the judge has a discretionary power. No legal remedy exists against the decision of the judge to request information or the opinion(s) of the Commission.

According to Article 68(1) Rv the registrar of the court sends the parties involved a copy of the Commission's response to the request. The judge then determines the day on which the proceedings will continue. Within a certain term - fixed by the judge - parties are allowed to give their comments on the given response or on the request itself.

Regarding administrative law, the Netherlands have implemented Article 15(1) of Regulation 1/2003 in a similar way in Article 89i CA.

To the best of our knowledge, judges in the Netherlands have little practical experience with the procedure in question. Based on the competition reports produced by the Commission (up to and including 2005), it appears that the judges in the Netherlands have made one request to the Commission. That was the Court of Appeal of The Hague in the case 'Mosselcultuur v. Praet', in which case the Commission has been asked for information and its opinions regarding Article 81(1) and (3) EC and Regulation no. 26 pursuant to Article 15 (1) Regulation 1/2003.<sup>34</sup> Referring to Article 15(3) of Regulation 1/2003, the Court of Appeal The Hague also asked the Commission whether it would like to submit observations in relation to the case in question.

3.4 *How does the court take into account observations submitted by competition authorities (Article 15(3) of Regulation 1/2003)?*

3.5 *Which procedural role do competition authorities (Commission, national competition authorities) play if they have submitted an oral or a written observation to a national court according to Article 15(3) of Regulation 1/2003? Has the possibility been used to submit oral statements?*

Questions 3.4 and 3.5 are answered together.

In view of Article 15(3) of Regulation 1/2003, Article 44a has been laid down in the Code of Civil Procedure and Article 89h CA. The last two Articles prescribe that the NMa and the Commission, respectively, at their own discretion, are allowed to submit observations in writing. With consent of the judge, both authorities are allowed to submit (oral) observations. These Articles also prescribe that the judge, when asked, sends the documents, which are described in Article 15(3)

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<sup>34</sup> Court of Appeal The Hague, judgment of 27 January 2005, 02/1136, NJF 2004, 509.

of Regulation 1/2003, second paragraph, to the parties after they have given their opinion on these documents within the term prescribed by the judge. The judge will also fix a term in order to procure that the parties can give their opinion on the observations. When needed, parties are allowed to react to the observations made by the other party. Parties can indicate whether they want to be heard by either the NMa or the Commission during the preparation period of the NMa or the Commission in relation to their observations. In that case the judge can require parties to submit their observations in writing or make their (oral) comments.

The NMa has prepared guidelines, called "Richtsnoeren amicus curiae" in which the NMa indicates the manner in which it will use these stipulations.<sup>35</sup> The NMa will adopt a reticent attitude; it will try to prevent as much as possible parallel procedures and aims to ensure consistency.

To the best of our knowledge, there has not been any practical experience in the Netherlands with the NMa and/or the Commission acting as amicus curiae yet. However, reference should be made to the following case. The Court of Appeal Amsterdam asked for a preliminary ruling from the Court of Justice of the European Communities concerning the scope of the competence of the Commission to submit observations of its own accord, as mentioned in Article 15 (3) of the Regulation: is it limited to the 'real competition cases' or is it wider?<sup>36</sup> This case is still pending.

3.6 *Do the national competition authorities have wider powers to make observations before courts than the Commission (Article 15(4) of Regulation 1/2003)?*

No, national competition authorities do not in principle have wider powers to make observations before courts than the Commission. There is no equivalent to Article 15(1) or Article 15(3) of Regulation 1/2003 in the Dutch Competition Act. Dutch law does not provide for a procedure to ask questions to the NMa, respectively the NMa lacks jurisdiction to submit observations in proceedings in which (only) Dutch competition law is at stake.

3.7 *What is the way of ascertaining whether decisions pursuant to Article 16(1) of Regulation 1/2003 have been taken or are being contemplated? How broadly is the term "subject" understood?*

Within the scope of Article 15(1) of Regulation 1/2003 and pursuant to Article 67 Rv and 89i CA, the judge can acquaint himself with the decisions which have been taken or are being contemplated by the Commission on a certain subject by asking certain information from the Commission.

When the Commission has taken a decision, in the sense of Article 16 Regulation 1/2003, the following applies: besides the possibility of referring a question to the Court of Justice for a preliminary ruling, the validity of a decision taken by the Commission cannot be discussed in front of a national court. If the Commission decision is not appealed before the Community Courts it

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<sup>35</sup> *Guidelines amicus curiae* published in the 'Staatscourant' (State Gazette) 2004, 159, p. 19

<sup>36</sup> Court of appeal Amsterdam, judgment of 12 September 2007 in re Inspecteur van de Belastingdienst v. X B.V.

becomes *res judicata*. In the Netherlands the question is under discussion whether this means that the assessment of the facts by the Commission is binding for the courts.

3.8 *Which experiences have been made with the procedures provided in Article 20 (8) and 21 (3) of Regulation 1/2003 so far?*

Reportedly, there have been no experiences with these procedures as yet.

3.9 *Are there any particular provisions as to civil law remedies for the enforcement of competition law? Are actions for an injunction or actions for damages in your opinion rather frequently or rather rarely based on infringements of Article 81 and 82 EC?*

In the Netherlands there are no particular provisions as to civil law remedies for the enforcement of competition law. It is currently under discussion whether the introduction of civil law remedy provisions is desirable. In reaction to the Commission's Green Paper the Dutch government has given a negative answer to this question.

An action for damages can be brought on the basis of three articles in the Dutch Civil Code ("CC"). First and foremost this is the general article on tort or wrongful acts in the Dutch Civil Code, Article 162 in Book 6 (6:162 CC). The second possibility is a claim for damages for undue payment, for instance overcharging as a result of bid-rigging. The statutory provision is unjust enrichment Dutch Civil Code, Article 212 of Book 6 (6:212 CC).<sup>37</sup> A third basis for a claim is said to be Article 6:203 BW (unjust payment) but this is not undisputed.<sup>38</sup> The competent court to bring an action for damages is one of the nineteen civil courts in the Netherlands. Outside the scope of Regulation 44/2001 the Dutch courts have jurisdiction if the defendant has chosen domicile in the Netherlands or if the act that caused the damage took place in the Netherlands.<sup>39</sup> In cases with several claimants where the Dutch court has jurisdiction with respect to one of them, jurisdiction can also be awarded for the other claimants. The only situation in which an action cannot be pursued is if the claimant lacks sufficient interest. In general the existence of sufficient interest is presumed. The lack of relativity is able to limit the possibility of actions by third parties.

Class actions and public interest litigation 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. However, it is not possible for such a legal person to claim damages.<sup>40</sup> Therefore collective claims had to be brought to court individually and it was not possible to assess these claims collectively. However, a recent Act creates the possibility to settle mass claims collectively.<sup>41</sup> The specific Dutch

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<sup>37</sup> I.W. VerLoren van Themaat & J. Hetteema, National Report The Netherlands, [http://ec.europa.eu/comm/competition/antitrust/others/actions\\_for\\_damages/national\\_reports/netherlands\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/netherlands_en.pdf), last visited August 19 2007.

<sup>38</sup> E.-J. Zippo, *Privaatrechtelijke handhaving van het mededingingsrecht*, *Ars Aequi* 2006, p. 599.

<sup>39</sup> Article 1 juncto Article 2 juncto Article 6 sub (d) Dutch Civil Proceedings Act.

<sup>40</sup> See article 3:305a section 3 CC

<sup>41</sup> Kamerstukken II, *Memorie van Toelichting Wet Collectieve Afwikkeling Massaschade 2004-2005*, 29414, nr. 3.

substantive and procedural rules and rules of evidence, however important, will not be discussed for reasons of size limits of this report.<sup>42</sup> The same applies for the calculation of damages, the timing of a claim and the specific provisions on legal costs. It should be noted though that a *passing-on defence* is not explicitly prohibited in the Netherlands, in contrast to Germany and United States.<sup>43</sup> The Dutch Supreme Court has not ruled on this issue so far.

In 2005 the Ministry of Economic Affairs issued a report about private enforcement of competition law in the Netherlands ("Houthoff-report"). This was published as a national equivalent of the European wide Ashurst-report.<sup>44</sup> This report found that actions for damages on the basis of an infringement of competition law were relatively rare in the Netherlands.<sup>45</sup> The report also made several suggestions in order to resolve this presumed lack of private enforcement.<sup>46</sup>

The Houthoff-report stood at the basis of an intensive discussion within the legal profession as to whether a special regime for private enforcement is necessary. In 2007 Pijnacker Hordijk and Van Lierop concluded in their preconsultative report on the private law aspects of competition law that both the Houthoff-report and the European Ashurst-report are biased with regard to private enforcement.<sup>47</sup> The authors claim that the reports were written in order to support the European Commission's desire to improve private enforcement in the Member States and therefore were written from the implied conclusion that strengthening private enforcement was a necessity.<sup>48</sup> They, furthermore, do not consider it necessary to introduce special provisions for damage claims based on infringements of competition law.<sup>49</sup> Moreover, they note that the report could not assess the numerous out of court settlements and arbitrations. Finally, the authors conclude that the Netherlands has a vivid private enforcement culture.<sup>50</sup>

The Houthoff-report points out that damages have only been awarded in exceptional cases and it appears that usually only relatively small disputes are being settled in court. Since the introduction of the new Dutch Competition Act in 1998 (containing similar provisions to Articles 81 EC and 82 EC) there have been around 30 to 40 private enforcement cases per year. Only in a few cases award of damages was sought.<sup>51</sup> We mention two new cases here. In the case *Home-team* the court concluded that an agreement between a franchiser and franchisee was void under Article 81 (1) EC.<sup>52</sup> The Court further concludes that damages can be awarded on the basis of

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<sup>42</sup> I.W. VerLoren van Themaat & J. Hetteema, National Report The Netherlands, p. 9.

<sup>43</sup> E.-J. Zippo, p. 605.

<sup>44</sup> I.W. Verloren van Themaat & M. Haak, Houthoff Report on Private Enforcement in the Netherlands, 3 November 2005.

<sup>45</sup> I.W. VerLoren van Themaat & J. Hetteema, National Report The Netherlands, p. 1

<sup>46</sup> I.W. Verloren van Themaat & M. Haak, Houthoff Report on Private Enforcement in the Netherlands, p. (i)-(xvii).

<sup>47</sup> Mr. W van Lierop & mr. Pijnacker Hordijk, *Privaatrechtelijke aspecten van het mededingingsrecht*; Preadvies 2007 uitgebracht voor de Vereniging voor Burgerlijk Recht, Kluwer, 2007, p. 87-97.

<sup>48</sup> Mr. W van Lierop & mr. Pijnacker Hordijk, *Privaatrechtelijke aspecten van het mededingingsrecht*, p. 91.

<sup>49</sup> Mr. W van Lierop & mr. Pijnacker Hordijk, *Privaatrechtelijke aspecten van het mededingingsrecht*, p. 90.

<sup>50</sup> It should be noted however that the Ashurst- report and Houthoff-report were written with regard to the award of *damages* and not to assess private enforcement in general. Therefore, the reports conclusions about the total underdevelopment relate to the award of damages in private enforcement cases. It does not relate to private enforcement culture in general.

<sup>51</sup> Between 2003-2005 an award for damages was sought in only three cases.

<sup>52</sup> Court Assen, 13 December 2006, (*Hometeam*), LJN: AZ5003.

Article 6:162 CC and on the basis of unjust payment of Article 6:203 CC. The court continues to conclude that an assessment of the damages will be difficult and it orders parties to discuss the further proceedings with the court, in the light of a possible settlement.

In March 2007 the Rotterdam Court ruled in another interesting case. In *CEF* City Electrical Factors sought a claim for damages against all the directors of the Dutch Federal Association for Wholesale trade in the Electrotechnical field ("**FEG**").<sup>53</sup> In 1991 the Commission found that FEG had infringed article 81 EC and imposed a fine of 4.4 million Euro on the Association. In appeal the fine was upheld by the European Court of Justice. CEF held the directors of FEG liable for all damages suffered due to the infringement of competition law by FEG. The claim was based on director liability because of wrongful act. CEF claimed (i) the directors knew that FEG was not able to pay damages. Furthermore, it claimed (ii) the directors did not put enough effort in acquiring financial resources in order to be able to pay damages. The Rotterdam Court ruled that the first action was limited. Therefore CEF could not be held liable and the Rotterdam Court was not able to assess the substantive criteria. With regard to the second action the Rotterdam Court considered CEF did not give sufficient reasons to support its claim.

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<sup>53</sup> Court Rotterdam, 7 March 2007, (CEF), LJN: BA0926. Case note: J.M.M. van Hel, AM 7 (2007), issue 6, p. 117-124.