REPORT FOR THE XXIVth FIDE CONFERENCE

THE JUDICIAL APPLICATION OF EUROPEAN COMPETITION LAW IN THE NETHERLANDS*

1. Was competition law privately enforced in your country before Regulation 1/2003 entered into force?

Before Regulation 1/2003 entered into force private enforcement through civil courts was possible but not much used. The 2005 Houthoff Report[1] indicates that competition law has been privately enforced in the Netherlands since at least 1975.[2] The overall conclusion of that report is that the number of civil cases concerning competition law until 2005 is quite low. From 1975 until 1998 there were generally less than 10 cases per year. Since the entry into force of the Dutch Competition Act ('CA') on 1 January 1998 and the establishment of the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*, 'NMa') the awareness of competition law in the Netherlands has increased and the number of civil cases has grown. From 1998 until 2008 the average number of cases is estimated at approximately 20-40 cases per year.[3] It is difficult to make a good estimation because these cases are not recorded and not every court judgment is published. It should be noted that the requirement of prompt notification of civil court judgments pursuant to Article 15(2) of Regulation 1/2003 only relates to judgments concerning Community (not: national) competition law and that this requirement became operative on 1 May 2004 only.

Before the entry into force of the CA the public enforcement of Dutch competition law was in the hands of criminal courts. The public enforcement of Community competition law in the Netherlands was performed by the Commission. With the entry into force of the CA and the establishment of NMa the system of criminal enforcement was exchanged for a system of administrative enforcement. Community and national competition law are now enforced by NMa, against whose decisions judicial review is available before specialized administrative courts.

2. If yes, was competition law applied as the main or principal issue of the dispute (à titre principal) or only as a subsidiary issue (à titre d'incident)?

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* This report is prepared by a working group of the Dutch Association for European Law under coordination of Marc Fierstra. The working group consisted of Elsbeth Beumer (University of lLeiden), Marc Fierstra (judge, Supreme Court), Michael J. Frese (PhD researcher, University of Amsterdam), Luke Haasbeek (lawyer, Allen & Overy, Amsterdam), Anke Prompers (NMa), Prof. René Smits (Chief Legal Counsel NMa, University of Amsterdam) and Christiaan van Veen (lawyer, Brinkhof, Amsterdam). All questions have been answered in accordance with the legal regime in force on 20 October 2009.

[1] I.W. Verloren van Themaat & M. Haak, Houthoff Buruma, De mogelijkheden voor civielrechtelijke handhaving van de mededingingsregels in Nederland (Houthoff Report on Private Enforcement in the Netherlands), Amsterdam, 3 November 2005 ('Houthoff Report').

[2] There are some examples of private enforcement in the Netherlands from before 1975.

[3] The exact number of cases will depend on the definition of the term 'competition cases', which could relate to cases primarily dealing with competition law disputes, or could cover any case in which arguments based on competition law are adduced.

The application of competition law in private disputes has been relied upon *à titre principal* and *à titre d'incident*. These competition law claims were either aimed at obtaining damages or at altering the defendant's future market behaviour. In addition, defendants relied on competition law to shield off private law claims.

The Houthoff Report concludes that until 2005 civil claims for damages in which a breach of competition law is the main issue, were rare. The majority of cases based on competition law were aimed at altering future market behaviour, i.e. to end certain contractual obligations or to obtain certain contractual conditions. It is difficult to identify specific trends in the case law since 2005. In the past few years, in approximately 20 per cent of all cases in which competition law was invoked, the action was based on a breach of competition law *à titre principal*. In the rest of cases competition law was used either as a subsidiary issue or as a defense. It is noticeable that 70 per cent of the civil cases on competition law concerned section 6 CA / Article 81 EC, whereas only 30 per cent concerned section 24 CA / Article 82 EC.

3. Were stand-alone actions possible/frequent? Were follow-on actions possible/frequent?

Almost all civil claims in the Netherlands concerning competition law are stand-alone actions. In the majority of these cases, competition law is invoked in disputes about contractual provisions (such as non-compete clauses). In some cases, parallel complaint procedures before NMa were initiated by one of the parties to the private proceedings. However, follow-on actions are still uncommon. In the period 2006-2008 no follow-on cases based on a decision of NMa were reported. However, the Commission proceedings in *FEG/TU* did lead to follow-on actions before the Dutch courts.[4]

4. Has the entry into force of Regulation 1/2003 substantially increased the possibility to bring actions in practice or the number of actions brought?

The entry into force of Regulation 1/2003 has neither increased the possibility to bring civil actions, nor has it significantly increased the number of actions in the Netherlands.

5. Was there a need to modify the national competition law and/or the procedural legislation to facilitate the application of Regulation 1/2003?

Apart from the necessary modifications in relation to the public enforcement of Articles 81 and 82 EC by NMa[5], several legislative amendments were made to allow for the application of these provisions by Dutch courts.

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[4] ECJ, Case C-113/04 P, FEG/TU; The Hague Court of Appeal, 08 April 2008, LJN: BC9233; Rotterdam District Court, 07 March 2007, LJN: BA0926. Please note that the abbreviation "LJN" stands for "*Landelijk Jurisprudentie Nummer*", i.e. State-wide number of judicial cases and can be used to find judgments in the www.rechtspraak.nl database.

[5] Following Regulation 1/2003, section 88 CA provides that NMa is the competition authority within the meaning of Regulation 1/2003 and that it is competent to apply Articles 81 and 82 as well as 84 of the EC Treaty. Furthermore, sections 89 and following CA implement the powers provided for in Regulation 1/2003, which mainly concern (i) the inspection competences of the European Commission; (ii) an extension of the competences of the national competition authority in cases where it assist the European Commission in an inspection; and (iii) the cooperation between national courts and other judicial authorities.

Several provisions of both the CA and the Code of Civil Procedure ('CCP') have been modified in order to comply with Regulation 1/2003. The modifications of the CCP relate to the possibilities for the courts to request information on foreign law and Community competition law, as well as the amicus curiae procedure foreseen by Article 15 Regulation 1/2003. For proceedings before civil courts, Article 15 Regulation 1/2003 has been implemented through the CCP. For review proceedings before administrative courts, Article 15 Regulation 1/2003 has been implemented through the CA. Article 15(1) Regulation 1/2003 has been implemented through sections 89i CA and 67 CCP. Article 15(3) Regulation 1/2003 has been implemented through sections 89h CA and 44a CCP.

6. Has your national legislation been modified to take into account the recommendations included in the Commission's White Paper and Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules? Are any of these recommendations already part of your national law? Are there concrete legislative proposals to implement any of these recommendations?

National legislation has not been modified to take into account the Commission's White Paper or Staff Working Paper. However, under the aegis of the Minister of Justice an Advisory Committee (*Adviescommissie voor het burgerlijk procesrecht*)[6] has evaluated the rules for discovery under CCP. In 2008 this Committee recommended to modify section 843a CCP (exhibition duty) in order to facilitate discovery. Thus far no proposal for such a modification has been forwarded to Parliament.

Section 843a CCP is a general rule applicable to all civil proceedings. The Houthoff Report suggested that this provision could facilitate civil actions in the field of competition law. However, until now section 843a CCP has only been successfully applied to few competition cases.[7]

7. Is private litigation in competition cases dealt with by ordinary civil/commercial courts or by a specialized court? Is there a difference depending on whether competition law is applied à titre principal or à titre d'incident?

Private litigation in competition law cases is dealt with by ordinary civil courts. Private actions should be brought before the District Court which has jurisdiction. Small claims (currently below € 5,000) should be brought before the Subdistrict Section (*Kantonrechter*). Summary proceedings are to be brought before the judge in interlocutory proceedings (*voorzieningenrechter*) of the competent District Court. Appeal against a decision of the District Court can be lodged before the Court of Appeal with jurisdiction. Against judgments of the Court of Appeal, appeal in cassation (limited to points of law) can be instituted before the Supreme Court (*Hoge Raad der Nederlanden*). There is no difference depending on whether competition law is applied *à titre principal* of *à titre d' incident*.

[6] The advice (*Advies over gegevensverstrekking in burgerrechterlijke zaken, juli 2008*) could be found in Dutch at: www.justitie.nl/onderwerpen/wetgeving/over wetgeving/privaatrecht/commissie.

[7] For an example of case where the conditions of section 843a CCP were not met reference could be made to Amsterdam Court of Appeal, 3 May 2007 (1338/06) British American Tobacco the Netherlands BV v CHIPKNIP C.V. .

Contrary to private litigation, public enforcement by NMa falls within the jurisdiction of specialised courts. Judicial review of decisions of NMa is concentrated at the Administrative Section of the Rotterdam District Court. This Section specialises in reviewing the legality of decisions of economic regulators, amongst which those of NMa. The Administrative Court of Appeal for Trade and Industry (*College van Beroep voor het bedrijfsleven*, 'CBb') exercises judicial control over judgments of this section of the Rotterdam District Court. CBb rules in last instance.

Apart from the preliminary reference procedure under Article 234 EC, no formal mechanisms exist to avoid interpretative inconsistencies between the specialised administrative courts and the civil courts. In practice, however, judges appointed in the specialised administrative courts and judges appointed in the civil sections of District Courts and Courts of Appeal, participate in a national network of competition law judges. This network, managed by the Rotterdam District Court, provides for training – sometimes in collaboration with SSR (*Stichting Studiecentrum Rechtspleging)*, the training institute for the Dutch judiciary – and establishes a framework for the exchange of views and experiences. Judges participating in the network sometimes act as substitute judge in proceedings at the Rotterdam District Court to review the legality of NMa decisions.

8. Is private litigation in practice essentially circumscribed to specific practices or industries (e.g. supply exclusivity of petrol stations; motor vehicles distribution, etc.)?

Private litigation concerning competition law is neither in theory nor in practice circumscribed to specific practices or industries. However, some industries are more prone to competition law litigation than others. Especially, several cases have been decided in the following sectors: healthcare[8]; real estate (online advertisements)[9];,the car industry[10]; and agriculture[11].

9. Has the national court to stay its proceedings once the National Competition Authority ("NCA") has initiated proceedings on the same matter, until a decision has been reached?

National civil courts are under no obligation to stay proceedings once NMa has initiated proceedings on the same matter. Although parties to a civil dispute may request the court

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[8] A non-exhaustive list of cases: Breda District Court, 14 April 2008, LJN: BC1188; 's Hertogenbosch Court of Appeal, 08 April 2008, LJN: BC8903; Amsterdam Court of Appeal, 03 June 2008, LJN: BG1471; Amsterdam Court of Appeal, 03 July 2008, LJN: BG3736; Arnhem District Court, 03 December 2008, LJN: BG6981; Breda District Court, 30 December 2008 LJN: BG8891; Arnhem District Court, 09 January 2006, LJN: AV3317; 's Hertogenbosch Court of Appeal, 14 February 2006, LJN: AV2394; Utrecht District Court, 31 March 2006, LJN: AW2111; Dordrecht District Court, 28 September 2006, LJN: AY9276; Supreme Court, 10 November 2006, LJN: AY9317; Utrecht District Court, 14 November 2006, LJN: AZ2861.

[9] A non-exhaustive list of cases: Almelo District Court, 11 February 2008, LJN: BC8032; Alkmaar District Court, 21 May 2008, LJN: BD2570; Amsterdam Court of Appeal, 24 June 2008, LJN: BG1062; Alkmaar District Court, 07 August 2007,LJN: BB1209; Arnhem District Court, 16 March2006, LJN: AV5236; Arnhem District Court, 04 July 2006, LJN: AY0089.

[10] A non-exhaustive list of cases: The Hague Court of Appeal, 17 January 2008, LJN: BC2567; Breda District Court, 26 November 2008, LJN: BG6220; Amsterdam District Court, 23 May 2007, LJN: BA6823; Amsterdam District Court, 19 September 2007, LJN: BB3936; Supreme Court, 21 April 2006, LJN: AV0650.

[11] A non-exhaustive list of cases: The Hague Court of Appeal, 27 March 2008, LJN: BC8020; The Hague Court of Appeal, 05 June 2008, LJN: BD3247; The Hague District Court, 01 February 2006, LJN: AV0892.

to stay proceedings until NMa has reached a decision, usually the courts do not suspend their judgment to await a decision of NMa in parallel proceedings.[12] In a number of cases Dutch civil courts have reviewed a request to stay proceedings until a decision by NMa had been taken. The courts' approach can be illustrated by the following examples:

In a judgment by the Arnhem District Court of 30 January 2008[13], the defendant requested the court to stay proceedings until NMa had decided on a complaint of the defendant accusing the claimant of violating Article 81 EC (and section 6 CA). The claimant objected to this request. The court considered that, in the light of Article 16 Regulation 1/2003, an evaluation could be made as to whether it is warranted to suspend proceedings until NMa has decided upon a complaint. However, since it was neither clear in this specific case at what moment NMa would decide upon the complaint nor whether NMa would thereupon start a full investigation, the District Court decided to review the case without awaiting the outcome of the complaint procedure before NMa.

In a judgment by the The Hague Court of Appeal of 30 January 2001, in an appeal against an interlocutory judgment by the judge in interlocutory proceedings of the The Hague District Court, the Court of Appeal ruled that it is conceivable that a civil judge in interlocutory proceedings decides to stay proceedings if a decision by NMa on an objection to an earlier decision is to be expected within a relatively short term.[14] The Court of Appeal then considered that in the case at hand no decision by NMa was to be expected in the short term and decided to assess the alleged abuse of a dominant position (by denying a license to the claimants) itself, effectively overruling the interlocutory judgment in first instance. Moreover, the Court of Appeal also considered that the counterclaim by the defendants against the claimants, asking the Court to order an immediate halt to any infringement of their intellectual property rights, should be denied if it was plausible that the CA would consider the defendants' behaviour an abuse of a dominant position.

10. Has the NCA to stay its proceedings once a national court has initiated proceedings on the same matter, until a decision has been reached?

There is no obligation under national law for NMa to stay proceedings when the same case is brought before a civil court. However, in several cases in which NMa was requested to start an investigation upon a complaint, NMa took into account that a civil procedure was already initiated on the same matter and subsequently denied the request.[15]

In case 1006/15 NMa has given an overview of the relevant considerations for not pursuing a case and for leaving a competition law issue to be decided by civil courts. NMa sets out that it has discretion to act upon a complaint, to monitor certain behaviour on the market or to start an investigation. Its discretionary choice to pursue a certain case

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[12] Breda District Court, 04- January 2008, LJN: BC1188; The Hague Court of Appeal, 17 January 2008, LJN: BC2567; Amsterdam District Court, 10 July 2008, LJN: BD6905.

[13] Arnhem District Court, 30 January 2008, LJN: BC3895, par. 5.5.

[14] The Hague Court of Appeal , 30 January 2001, LJN: AA9717, par. 14.

[15] Decision by the director-general of NMa of 19 February 1999, Case nr. 1006/15; Decision by the director-general of NMa, Case nr. 3576/55, 15 September 2004; Decision by NMa of 18 February 2008, Case nr. 5985.

will depend on its enforcement-priorities. A relevant consideration for NMa in selecting cases is whether private litigation provides a suitable alternative to administrative enforcement. Especially when public interests are not directly at stake and the subject matter mainly relates to the individual interests of the parties involved (e.g. in a dispute about a contract), private litigation may be a good alternative to public enforcement. Moreover, enforcement by a civil judge may be more efficient (i.e. faster) than enforcement by NMa. In the case *Bree* (decision no. 3477) the Rotterdam District Court condoned this policy of enforcement priorities.[16]

11. Are national courts bound by the final decisions adopted by a NCA declaring that a certain practice amounts to an infringement? Is the response the same where the NCA rules that the practice does not infringe competition law?

As a preliminary point we note that Article 5 Regulation 1/2003 does not allow NCAs to rule that a practice does not infringe the Articles 81 and 82 EC. Rather, NCAs may conclude that there are insufficient grounds for action on their part.

As yet, it has not been decided whether final decisions of NMa bind the civil courts as to the existence of an infringement. No statutory provision to this effect exists. There is no equivalent to Article 16 Regulation 1/2003 in Dutch law. However, the Supreme Court has ruled on numerous occasions that where a decision of the administrative authority has become final, i.e. (i) when no appeal has been instituted or (ii) when the decision has been upheld on appeal, this decision obtains ‘formal legal effect’ (*formele rechtskracht*). Addressees of these decisions, as well as others that qualify as "interested parties" in relation to these decisions, cannot question the legality of the decision before the civil court.[17] The latter will assume the lawfulness of this decision, both as to its substance and the way it was adopted (procedure). This assumption can only be rebutted on a limited number of grounds, e.g. if the administrative authority itself recognises that the decision is unlawful. The rationale underlying the concept of the formal legal effect lies in the division of tasks between administrative courts and civil courts. In accordance with this case law one could argue that once a decision of NMa obtains formal legal effect, the civil court seized with a follow-on damages claim should presume the illegality of the practice. This would mean that in respect to the parties that had the possibility to challenge the administrative decision the facts and infringements that have been established in the decision are binding in follow-on private actions.

However, it can be debated whether the scope of the formal legal effect of NMa decisions indeed extends to follow-on private proceedings. These horizontal situations differ from the situations in which the concept of the formal legal effect is normally applied. Generally, this concept is applied in vertical situations. It helps the administrative authority to deflect claims in private proceedings by the addressee of its decision. We are aware of only two cases where the formal legal effect of an administrative decision predetermined the civil law duties between private parties (Supreme Court, 22 December 2006, NJ 2007, 218, *Van Rattingen/Loenen*; Supreme Court, 8 September 1995, JB 248, AB 1996, 57, *Budinovshi and Pejkovski*).

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[16] Rotterdam District Court, 22 March 2005, MEDED 04/2631-HRK, not reported

[17] Supreme Court, 8 September 1995 (AB 1996, 57).

In *Van Rattingen/Loenen* both the claimant and defendant were addressee of the administrative decision ordering the removal of contaminated waste, disposed by Van Rattingen on the premises of Loenen. In private proceedings for damages (the costs of removal) initiated by Loenen against Van Rattingen, the Supreme Court based the illegality of Van Rattingen's conduct on the administrative decision, thus applying the concept of formal legal effect in a horizontal situation. In *Budinovshi and Pejkovski* an order of vacation addressed to Pejkovski also obtained formal legal effect in relation to Budinovski, even though the latter was only an interested party, not-addressee of the decision.

The facts underlying the above cases and the effects of applying the concept of the formal legal effect differ from follow-on damages claims, since the claimant for damages will (normally) not be an interested party of the administrative decision of the NMa. The implications for the addressee of an infringement decision of extending the concept of formal legal effect to follow-on damages actions would be severe. The addressee would possibly have to take into account possible future claims in taking position in the administrative proceedings. However, since the cartel participant – against whom the formal legal effect of the decision of the NMa would be directed – is an interested party and the formal legal effect would have no negative implications for the claimant, it could be envisaged that the formal legal effect would be applicable in follow-on damage claims. Considering the above it is still too early to conclude without reservations that final decisions of NMa bind the civil courts as to the existence of an infringement.

As the binding effect of administrative decisions in private proceedings remains undecided, we refer to the general rules on proof before the civil law court, applicable by default. On the basis of the CCP it remains within the discretion of civil law courts to attach value to infringement decisions of NMa. To the extent considered reasonable and fair, the civil law court may for instance require the accused to bear the burden of rebutting the facts established in the infringement decision. Both possibilities could facilitate follow-on claims for damages and are discussed below in reversed order.

Section 150 CCP lays down the burden of proof and provides that, in principle, the party claiming the application of certain legal effects bears the burden of proof in relation to the relevant facts and rights triggering these legal effects. A shift of the burden of proof may follow from (i) any specific rule to his effect; or (ii) from the requirements of reasonableness and fairness (*redelijkheid en billijkheid*). The latter requirements constitute a general principle of Dutch private law. As regards their effects on the burden of proof for the private enforcement of competition law, the requirements of reasonableness and fairness are to a certain extent comparable to the principle formulated by the ECJ in *Aalborg Portland* concerning enforcement proceedings by the Commission. In this case the ECJ held that

> "*the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged*"[18].

18 ECJ, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P en C-219/00 P, Aalborg Portland, para. 79

If the civil law court considers it reasonable and fair, it could require the accused to bear the burden of rebutting the facts established in the infringement decision.

The evidential value of infringement decisions falls within the discretion of the court. The court is not obliged to accord binding status to these decisions. Section 151 CCP foresees the possibility of attributing by law a binding status to some types of evidence, so-called “binding evidence”. The status of binding evidence could either mean that the content of a certain piece of evidence should be deemed accurate, or that the evidential value of a certain piece of evidence is determined by law. Unless otherwise provided, binding evidence may always be rebutted by proof to the contrary (section 151(2) CCP). Examples of binding evidence are recorded observations by a designated official (*authentieke akten*) and judgments of the Dutch criminal courts with *res judicata* that were rendered under opposition (*op tegenspraak*)[19] (section 161 CCP). Decisions of NMa have not been accorded the status of binding evidence. Therefore, the general rule of section 152(2) CCP applies to such decisions, and their value in evidence remains at the discretion of the civil court.

Although no particular value has been attributed to decisions of NMa in proceedings before the national civil courts, these courts will take them into consideration. In practice, a decision by NMa establishing an infringement of competition law will be an (important) indication for the civil court that a violation has in fact taken place, and might even serve as a rebuttable presumption that the infringement took place. In practice, much will depend on the quality of the motivation of the decision by NMa and the arguments raised by the defendant in the private proceedings.

12. Is the NCA bound by the final decisions adopted by a national court declaring that a certain practice amounts to an infringement? Is the response the same where the national court rules that the practice does not infringe competition law?

NMa is not bound by final decisions adopted by a national civil court. The binding effect of civil court judgments is limited to the parties to the proceedings at issue.[20]

13. If not, what is the value for a national court of a final decision adopted by a NCA and vice versa?

A decision by NMa establishing an infringement of competition law will at least be an important indication for the civil court that an infringement has taken place (cf. answer to question 11). We observe that civil courts are generally prone to follow NMa’s practice.[21]

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19 A procedure “rendered under opposition” is a procedure in which the defendant is actually present to defend its case before the criminal court

20 Article 236 CCP.

21 See: Haarlem District Court, 28 December 2004, LJN: AR8299 (in relation to NMa’s assessment of the application of the Dutch equivalent to Article 81 EC generally); Amsterdam Court of Appeal, 30 March 2006, LJN: AV7725 (in relation to NMa’s assessment of the application of the Dutch equivalents to Articles 81 and 82 EC Treaty generally); Zwolle District Court, 1 November 2006, LJN: BB0745 and Haarlem District Court, 3 October 2006, LJN: BA5648 (in relation to NMa’s practice on ‘restriction of competition’); Leeuwarden Court of Appeal, 2 March 2005, LJN: AS9708 (in relation to NMa’s market share calculation); Arnhem District Court, 25 November 2005, LJN: AX7750 (in relation to NMa’s definition of ‘undertaking’); Utrecht District Court, 24 July 2009, LJN: BJ3474 (in relation to NMa’s assessment of inherent restrictions).

As yet, it is uncertain to what extent NMa will attach value to a civil court judgment in drafting its decision. We are not aware of any cases in which this issue arose.

14. Is the final review of all disputes (civil and administrative) related to competition law under the jurisdiction of a single court of last instance? Are there mechanisms to avoid inconsistencies in the case law?

We refer to the answer to question 7. Final review of all disputes relating to competition law does not fall within the jurisdiction of a single court of last instance.

15. Does your legal/constitutional system allow courts to be bound by administrative decisions – as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions – ? In the absence of a specific legal provision such as Article 16 of Regulation 1/2003, what is or could be the value for a national court of a final decision adopted by a NCA of other Member State? And of a judgment of the court of another Member State?

We refer to the answers to questions 11 and 12. The final decisions of foreign competition authorities and judgments of foreign courts are to be treated similarly to the decisions of NMa and judgments of the national courts. We add that the application of the concept of formal legal effect to administrative decisions of foreign competition authorities is even more uncertain than the application of this concept to infringement decisions of NMa. We are not aware of any cases where a foreign administrative decision predetermined the civil law duties between two private parties.

16. Is there any form of discovery, either pre-trial or court ordered based on fact-pleading? If not, what mechanisms are available under your national law to obtain evidence from the opposing party? Are they sufficient?

Pursuant to section 843a CCP it is possible to obtain evidence from the opposing party. Section 843a CCP is a general rule applicable to all civil proceedings. Under this provision, a party may request access to documents needed to substantiate his claim. The court may decide on the modalities for access. The following requirements would have to be fulfilled[22]:

- The applicant has a legitimate interest to obtain access to the documents. This condition is essentially fullfilled if a party enjoys an unreasonable advantage or the opposing party an unreasonable disadvantage because of the fact that certain evidence becomes not part of the civil procedure.

- The documents must concern a legal relationship to which the applicant or its legal predecessors are party. This can be a legal relationship based on contract, or undue payment. It is yet to be determined whether a legal relationship on the basis of a wrongful act satisfies this criterion; case-law answering this question in the positive and

22 Article 843a CCP.

in the negative can be found.[23] Yet, this issue is crucial for the private enforcement of competition law, where a legal action on the basis of a wrongful act is the most likely option to obtain damages;

- The requested documents must be specified. The request must specify as precisely as possible to which documents it relates. In order to fulfil this criterion, the applicant should have knowledge of the existence and content of the documents requested;

- The documents need to be at the disposal of or located with the (legal or natural) person to whom the request is addressed;

The requested access may be refused, however if this is justified by overriding reasons (e.g. confidential information) or if fair administration of justice can be served without granting access. With regard to the latter criterion, the court will assess whether the claim can also be substantiated without the requested evidence and whether the request has been prematurely made. Overriding reasons to refuse the requested access will not be easily accepted.

In 2008, an Advisory Committee recommended the Minister of Justice to modify section 843a CCP in order to facilitate discovery. So far no proposal for such modification has been forwarded to Parliament (cf. answer to question 6).

In order to prevent incriminating evidence from disappearing, seizure of evidence is possible on the basis of section 730 CCP. The evidence can be placed in custody of the court (section 709(3) CCP). The same limitations apply as in relation to section 843a requests. Another possibility to obtain evidence from the opposing party is provided by section 843b CCP. Pursuant to this provision, a claimant having lost evidence can request access to (copies of) evidence. For the purpose of competition law enforcement this provision will only have limited significance.

In practice, it may prove to be rather difficult to obtain access to documents under section 843a CCP or to secure evidence under section 730 CCP, due to above mentioned restrictive conditions.[24] A balance of interests has to be struck between the interests of the applicant and those of the defendant, especially in relation to confidential business data. It could be envisaged that in follow-on actions, where an infringement of competition law has already been established, a judge will be less inclined to accept overriding reasons requiring secrecy of the documents, especially those reasons relating to the premature nature of the request.

Further to obtaining documentary evidence, it is possible to obtain evidence by hearing witnesses before a judge or by having the court appoint an expert (to compute damages) in the pre-trial stage.

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[23] See for example Rotterdam District Court, 10 June 2009, 322279 HA ZA 09-131, Tele2 c.s. v. KPN., para. 3.8; The Hague Court of Appeal, 22 November 2007, JIN 2008/76; Amsterdam District Court 28 March 2007, LJN: BA3125; The Hague provisional arrangements judge, 21 September 2005, KG 05/845.

[24] As an example of where the request for information was denied we refer to Amsterdam Court of Appeal, 3 May 2007, (1338/06) British American Tobacco the Netherlands BV v CHIPKNIP C.V.

The provisional examination of witnesses is governed by sections 186-193 CCP. This procedure can be used to determine whether sufficient evidence is available to substantiate the claim. Requests for provisional examination of witnesses are in principle granted, except when these requests are used for a "fishing expedition" or where the applicant has not sufficiently indicated which facts need to be proven.

The provisional expert opinion is provided for in section 202 CCP. Provided there are sufficient indications for an infringement, the request is relevant and sufficiently concrete and concerns facts that can be proven with the expert opinion, the request for a pre-trial provisional expert opinion will normally be granted.[25] Parties are obliged to cooperate with the investigation of the expert (section 198(3) CCP).

17. In case of follow-on litigations, can private parties claim access to the administrative file to prepare their action before the national court? If so, will they also have access to documents that have been declared confidential by the NCA and to internal documents of the NCA?

Apart from confidential and internal documents, private parties can claim access to documents which are included in the administrative file of NMa. In accordance with the Government Information (Public Access) Act (GIPAA) every (natural or legal) person may request access to documents which contain information about governmental matters and which are located with a government body (section 3 GIPAA). There is no need to prove an interest or to motivate the request. Once access is granted to one person, it will be available for everyone and at all times. Also documents in NMa's case-file are accessible under the conditions of GIPAA.[26] In the past, NMa has rejected applications concerning documents not in its possession.[27]

The grounds for denying access to documents in NMa's case-file are exhaustively enumerated in sections 10 and 11 GIPAA. The grounds for refusal contained in section 10(1) GIPAA are absolute grounds for refusal, i.e. access to the file will always be denied in relation to data falling within one of the categories mentioned in that provision. The grounds for refusal of section 10(2) GIPAA are relative grounds for refusal. The disclosure of information shall not take place insofar as its importance does not outweigh the interests enumerated in section 10(2) GIPAA.

Some grounds for refusing access are particularly relevant in competition law cases (in relation to NMa's case-file). These grounds are mentioned in section 10(1c) GIPAA (the protection of business- and manufacturing data), section 10(2a) GIPAA (the relations of the Netherlands with other States and international organizations), section 10(2c, d and g) GIPAA (the detection and prosecution of criminal offences; the inspection, verification and supervision by administrative bodies; and the disproportionate advantaging or disadvantaging of natural or legal persons involved in the matter or of third persons) as

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25 The request can also be rejected if the appointment of expert witness would be disproportionate to the damage of the applicant.

26 In a judgment of 7 February 2007 the Council of State determined that the GIPAA is also applicable to information held by NMa, Council of State, 7 February 2007, *Gazelle.* Until this judgment NMa took a different view.

27 NMa 29 March 2007, No. 3795, *Gazelle.*

well as section 11(1) GIPAA (policy opinions contained in documents drafted for the purposes of internal consultation).

The protection of business and manufacturing data is an absolute ground of refusal. Access to such data will be refused if and in so far as knowledge of the technical conduct of business or the manufacturing process, or regarding the sales of products or the identity of the customers is contained in those data or can be implied from them.[28] Also data solely concerning the financial conduct of business may fall within this definition.[29]

Section 10(2c, d and g) GIPAA contain relative grounds for refusal in situations of ongoing administrative proceedings. NMa often uses these grounds in combination, whereby section 10(2g) GIPAA is used as "safety-net".[30] The latter provision is of specific relevance to follow-on private litigation. Where publication of the administrative file would inflict a disproportionate disadvantage on the cartel participant or dominant firm, or individuals working for such undertakings, this provision could in theory be used as an 'escape' which would make it difficult for applicants in civil proceedings to obtain evidence to support their civil claims.

Pursuant to section 11(1) GIPAA internal NMa documents are not accessible. This provision ensures free exchange of thoughts and opinions within NMa or between NMa and other administrative bodies or advisory organs. Documents drafted for the purpose of internal consultation may originate from third parties.[31] However, access to internal documents may only be refused in so far as they contain personal policy opinions. To fulfil this condition, it is not enough that personal opinions have some effect on the content of the documents.[32] As a general rule, access cannot be denied categorically. If partial publication is possible, access will have to be granted for that part. Categorical refusal is only allowed where the objective facts and the personal policy opinions cannot be distinguished.[33]

18. Who bears the burden of proof of the existence of an infringement in private litigation cases? What does the plaintiff have to prove to claim damages? Does the burden of proof shift during the proceeding? Are there legal presumptions affecting the burden of proof?

Section 150 CCP lays down the basic rule with respect to the burden of proof in private litigation cases. Pursuant to this provision, the party who invokes the legal consequences of the alleged facts and rights bears the burden of proof. The party claiming damages for breach of competition law has to prove the infringement as well as the damage suffered. The allocation of the burden of proof seems in conformity with Article 2 Regulation 1/2003 and the case law of the ECJ (*Aalborg Portland*).[34]

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28 Council of State, 9 April 2003. See also NMa, case 6074, Broadcast Partners, 28 June 2007.

29 Council of State, 11 July 2007, AB 2007/273.

30 See for example: NMa, case 6259, rapport 5697_1/102 Inbreukprocedure; NMa, case 6407, 9 July 2008, Heijmans & IBC.

31 Council of State, 26 November 2003.

32 Council of State, 21 maart 2007, AB 2007/147.

33 See: NMa, case 6074/35, 13 december 2007, *Wob verzoek Broadcast Partners*, objection procedure.

34 ECJ, 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P en C-219/00 P, Aalborg Portland

Judgments of the civil courts can solely be based on those facts or rights of which the courts were informed or of which the courts acquired knowledge during the proceedings. The court must consider facts or rights stated by one party and not disputed or rebutted by the other as established facts or rights.

In an action for damages, the plaintiff must substantiate with sufficient and provable facts that Articles 81 and 82 have been breached. In most cases the action for damages is based on wrongful act (section 6:162 CC):

> *(1) A person who commits a wrongful act against another which is attributable to him, is obliged to repair the damage suffered by the other in consequence thereof.*
>
> *(2) Except where there are grounds for justification, the following qualifies as a wrongful act: a violation of a right and an act or omission in breach of a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.*
>
> *(3) A wrongful act can be attributed to the person committing the act when it is due to his fault or to a cause for which he is accountable by law or generally accepted principles.*

In order to succeed in obtaining damages, the plaintiff must establish that the following elements are present: (i) an unlawful act (breach of competition law as established in case of an infringement of sections 6 and 24 CA or the equivalent Articles 81 and 82 EC); (ii) attributability; (iii) relativity, (iv) damage; and (v) causality. With respect to the second requirement it should be noted that in most cases a violation of competition law will imply fault, and as such attributability.[35] The causal link between the unlawful act and the damage suffered is more difficult to prove. In order to comply with above mentioned requirement, it is sufficient to establish the *condicio sine qua non*-relation between the infringement and the damage suffered. The establishment of the *condicio sine qua non*-relation is based on a counterfactual analysis (what would have happened in case the event of the wrongful act did not occur?).

The court may decide to mitigate the burden of proof. A shift in the burden of proof may follow from the requirements of reasonableness and fairness (cf. answer to question 11). Where the plaintiff does not have all data available which are required to prove the infringement, the requirements of reasonableness and fairness may require the defendant to refute the propositions put forward by the plaintiff. The defendant may be obliged to make available to the plaintiff certain factual data. This enhanced obligation for the defendant to furnish facts may have the consequence that the court qualifies the statements of the claimant as established facts when they have not been sufficiently refuted.

19. What forms of orders or remedies are available (i) in private actions before the courts; and (ii) in administrative proceedings by the NCA (e.g. declaration of

[35] E.J. Zippro, Privaatrechtelijke handhaving van mededingingsrecht, Recht & Praktijk nr 174, Kluwer, Deventer 2009, p. 343.

infringement; declarations as to compliance with Article 81 (3); annulment of agreements or of particular clauses; injunctions to restrain repetition of infringements; positive injunctions; interim measures in advance of final judgment, damages, etc.)?

(i) Private actions before the courts
Dutch law does not contain an exhaustive catalogue of remedies and orders available to parties in civil law proceedings. In addition to declaring any prohibited agreement null and void, Dutch civil courts may thus award compensation or impose any suitable remedy.

(ii) Administrative proceedings by the NCA
In relation to the enforcement of Dutch and European competition law, NMa is vested with the following powers[36]:

Punitive sanctions:

- Fines: NMa has the power to impose fines on undertakings and individuals.[37] In determining the amount of the fine, NMa shall take into consideration the gravity of the infringement, the degree of fault of the perpetrator and the circumstances under which the infringement took place.[38] The fine may amount to a maximum of € 450,000 or, if imposed on an undertaking or an association of undertakings and this would lead to a higher amount, to a maximum of 10 per cent of the undertaking's worldwide turnover or of the combined turnover of the undertakings that are members of the association, in the financial year preceding the decision.[39] NMa may also impose fines for procedural violations.[40] The amount of those procedural fines may not exceed € 450,000 or, if it relates to an undertaking or an association of undertakings, and if this amount is higher, to 1% of the turnover of the undertaking or, respectively, the joint turnover of the undertakings comprising the association of undertakings, in the financial year preceding the decision.[41]
- Periodic penalty payments: NMa can also impose periodic penalty payments.[42] By imposing periodic penalty payments, NMa can order an undertaking to take behavioural or structural measures on pain of forfeiting a periodic penalty payment. The periodic penalty payment can take the form of a single amount or a periodic amount and can be imposed both on companies and individuals. The imposition of a periodic penalty payment may be combined with the imposition of a fine.

Reparatory sanctions:

- Structural measures: Structural measures have the same meaning in as Article 7 Regulation 1/2003. A structural measure may only be imposed if no equally effective

36 The sanctioning powers of NMa should be read in conjunction with section 89 CA, which provides that these powers may also be applied to counter infringements of Articles 81 and 82 EC .

37 Section 56(1)(a) CA.

38 Section 5:46(2) General Act on Administrative Law (*Algemene wet bestuursrecht*) Prior to 1 July 2009, section 57(2) CA provided that NMa should take into account the gravity and the duration of the infringement.

39 Section 57(1) CA.

40 Procedural violations relate to violations of the duty to cooperate with NMa investigations. See section 69(1) CA.

41 Section 69 CA.

42 Section 56(1)(b) CA.

behavioural measure is available or if such a behavioural measure would be more burdensome for the undertaking or association of undertakings.[43]

- Behavioural measure: A behavioural measure is a measure requiring (the termination of) particular conduct. The measure can be imposed for a maximum period of two years.[44]
- Interim measures: Interim measures (in the form of interim periodic penalty payments) may be adopted if a *prima facie* infringement causes irreparable damage to other undertakings or to competition and the full administrative procedure cannot be awaited (section 83 CA). The order expires (i) after six months, if a statement of objections has not been issued in the meantime; (ii) with the adoption of a final decision (section 85 CA).
- Binding instructions: NMa may also impose binding instructions.[45] In the event of a violation of a binding instruction NMa may impose a fine or a periodic penalty payment in accordance with the rules described above.[46]
- Commitments: In order to prevent an infringement of Articles 81 or 82 EC or the equivalent national provisions, NMa can – by decision – declare the commitments offered by an undertaking legally binding.[47]

20. Are the administrative limitation periods for the imposition of penalties different from the term within which it is possible to bring an action for breach of competition law before a national court? What is the time limit to bring an action for damages.

The limitation period for private claims is somewhat more generous to the claimant than the administrative limitation period for the imposition of fines is to NMa.

In accordance with section 5:45 General Administrative Law Act (*Algemene wet bestuursrecht*) the limitation period for the imposition of fines for the infringement of a provision of substantive competition law by NMa expires five years after the infringement has been committed. This limitation period is interrupted by any act of investigation or procedure in relation to the infringement by NMa. Moreover this limitation period is interrupted by any such act by a competition authority of another Member State or by the Commission on the basis of Articles 81 or 82 EC. The limitation period is interrupted on the first day on which one of the undertakings involved is notified in writing of the act of interruption. At that moment, the limitation period commences anew. The limitation period shall never exceed the duration of 10 years plus the period for dealing with an objection lodged before NMa and/or judicial review.

A limitation period of five years applies to actions for damages (section 3:310 CC). This limitation period starts on the day after the victim has become aware of the damage and knows who is liable for the damage. Once a victim files a complaint with the Commission he must be considered to be aware of the putative infringement for the purpose of the

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43 Section 58a(1) CA.
44 Article 58(2) CA.
45 Section 56(1)(c) CA.
46 Section 56(2) CA.
47 Chapter 5A CA.

limitation period.[48] Provided the limitation period has not expired, it can be interrupted. This can be done by a written reminder or written notice by the creditor explicitly reserving his rights, or by the institution of legal proceedings. Recognition by the debtor also interrupts the limitation period. A new limitation period of 5 years starts to run on the day after the interruption. However, 20 years after the day the wrongful act has been committed the limitation period will be exceeded in any case.

21. Are there special rules for competition law issues in relation to standing? Can indirect purchasers claim redress?

There are no special rules on standing for competition law purposes. Section 3:303 CC stipulates that there is no right of action without a sufficient interest. This general rule for civil actions also applies to claims based on breach of competition law. No national statutory provision or case-law in relation to standing requirements precludes indirect purchasers from claiming redress based on an infringement of competition law. Yet, indirect purchasers may be effectively withheld from obtaining damages under Dutch tort law for two other reasons.[49]

An action for damages will, in most cases, be based on an act of tort in accordance with section 6:162 CC (please see answer to question 18). Section 6:163 CC codifies the 'relativity requirement' and reads:

> *"No duty to compensate damages exists, if the violated norm does not extend to protect against the damages suffered by the injured party."*

Lack of relativity may pose an obstacle for a successful action for damages by an indirect purchaser. With regard to damages suffered by consumers or distributive traders (in their capacity as indirect purchasers), one may question whether the violated competition rules aim to protect these specific groups of operators.[50] In the light of the ECJ judgment in *Manfredi* national rules on relativity do not seem capable of restricting individuals '*to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*'.[51]

Secondly, and more importantly, pursuant to section 6:162 CC, a causal link between the unlawful act and the damages suffered has to be proven (causality requirement). This may prove to be very difficult, since the indirect purchaser has to demonstrate that a violation of competition rules has resulted in higher prices than he or she would have paid in absence of the alleged violation. This conditions is in line with ECJ case law, more specifically with *Manfredi*, where it was held: '*that any individual can claim compensation*

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[48] Rotterdam District Court, 7 March 2007 (CEF City Electrical Factors), 243213 /HA ZA 05-2163, LJN: BA0926.

[49] Houthoff Report; E.J. Zippro, 'Het passing-on verweer; samenloop van directe en indirecte acties tot verkrijging van schadevergoeding', in: Houben and others, *Samenloop*, (Deventer, 2007).

[50] The Dutch government believes that 'both direct and indirect purchasers must be able to claim damages': The Netherlands' response to the White Paper on Damages Actions for breach of the EC antitrust rules, p. 4, to be found at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/nether_en.pdf

[51] ECJ, Joined Cases C-295/04 and C-298/04, *Manfredi*, para. 60.

for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.'[52]

22. Are there collective redress mechanisms allowing for the aggregation of individual claims for competition law infringements? Do your national procedural rules allow for (i) representative actions being brought by a specified body?; (ii) class actions generally; (iii) the consolidations of claims?

There are two sets of rules in the Netherlands that govern the resolution of mass disputes. The first set of rules is laid down in sections 3:305a-c CC and is applicable to so-called public interest and group interest collective actions. Collective actions concern representative proceedings by representative organisations.[53] All causes of action and forms of relief can be pursued in a collective action with one important exception, an action for monetary relief. Monetary compensation is explicitly excluded in the final sentence of section 3:305a paragraph 3 CC.

It was felt that for the award of damages all kinds of questions relating to the aggrieved party (e.g. causal link, fault of the victim, magnitude of loss) had to be answered according to the specific circumstances of the individual claimant. On the other hand, however, a declaratory judgment on liability for sustained damages can be obtained.[54] When representative organisations start a collective action, they do so in their own name and the judgment binds only the organisation and the defendant, but not the individual class members. The arguments for introducing this type of collective action were: (i) to enable persons with individual non-recoverable claims to bring actions; (ii) to enhance access to justice; and (iii) prevention.[55] In practice it is common to establish joint actions either by instructing the same lawyer or by assignment of individual claims to a particular (legal) person. With respect to damages for infringements of competition law in the construction sector, one legal person was founded, "Foundation for Recourse and Recovery of Damages and Costs resulting from Construction Fraud" (*Stichting Regres en Verhaalschade en Kosten Bouwfraude).* For more information about the infringements of competition law in the construction sector see the answer to question 29.

The second set of rules is laid down in sections 7:907-910 CC and 1013-1018 CCP and provides for a declaration by the Amsterdam Court of Appeal making the collective settlement generally binding (*Wet collectieve afwikkeling massaschade*). If the parties reach an out-of-court settlement, they can apply to the Amsterdam Court of Appeal to declare the settlement fair and binding. The court can then issue an order declaring the collective settlement binding for all eligible injured parties. By exercising the right to opt out, individual injured parties can withdraw from the settlement before the deadline set by the Amsterdam Court of Appeal. The conditions to obtain court approval are, among

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52 ECJ, Joined Cases C-295/04 and C-298/04, Manfredi, para. 61.

53 A representative organisation is a foundation or an association which represents the interests of other persons in accordance with the objects described in its articles of the association

54 The latter was confirmed in a recent decision of the Supreme Court. In the Vie d'Or-litigation where the former policyholders of life insurance company Vie d'Or sought to hold the Dutch Central Bank and Deloitte liable for the bankruptcy of Vie d'Or: Supreme Court, 13 October 2006, LJN AW 2082, Nederlandse Jurisprudentie (Dutch Court Reports), 2008, No. 529 with annotation by Prof. Cees van Dam.

55 Explanatory Memorandum to the Act, Dutch Parliamentary proceedings, 2003- 2004, 22 486, No. 3, p. 2

others: (i) the amount of the compensation may not be unreasonable; (ii) the fulfilment of the agreement must be sufficiently guaranteed; (iii) the representative organisation that negotiated the settlement must sufficiently represent the class; and (iv) the number of class members must be sufficient to warrant certification.

23. If such possibilities do exist, can claimants having suffered damages in another member state may bring action in your country ? Would they have to prove that they had a direct relation with the defendant or would it be sufficient if they had this direct relation with the defendant's mother/sister company ?

A Dutch Court is competent to hear and decide cases where the defendant is established in the Netherlands. If the infringement of competition rules was committed outside the Netherlands by a company not having its seat in the Netherlands it is not possible to submit the claim to a Dutch Court. Neither is it possible in these circumstances to start an action against a parent company established in the Netherlands for infringement of competition rules by its subsidiary.

24. Can a party claim full damages from one of the members of a cartel based on joint and several liability ?

If an agreement contrary to Article 81 EC causes harm to a third party, the parties to this agreement are jointly and severally liable for the damage caused. Each of the parties is liable for the entire amount (section 6:102 CC). If one of the parties pays full compensation, it has recourse to the other parties (section 6:10 CC). Each of the parties that are jointly and severally liable should bear a part of the compensation (to be) paid that is in proportion to the amount of the damages imputable on it. If one party pays full compensation, the victim cannot claim the damage once more from the other partie(s). If a party reimburses only part of the damage the claim against other parties will diminish with the amount already paid (section 6:101 CC)

25. What is the level of the costs and/or fees of legal procedures as compared with the cost of filing a complaint before the NCA?

(i) The costs of legal procedures before the Dutch civil courts can be divided into several categories:

Court fees[56]
Section 2(2) of the Civil Cases Fees Act (*Wet tarieven in burgerlijke zaken*) sets the fees payable to the Civil District Courts in relation to several claims. The costs for claims on the basis of violation of competition law are dependent on the amount of the claim. For claims between € 4,538 and € 11,345, the fee amounts to € 313. For claims above € 11,345 the fee will be 2.2 per cent of the amount of the claim, with a minimum of € 316 and a maximum of € 4,938 or € 1,185 (in case the defendant is a natural person). The fee due will be rounded to the nearest multiple of € 5.

[56] All tariffs as effective since 1 February 2009.

For appeals instituted against the judgment of the District Court, or appeal in cassation, the fees are slightly higher. For claims between € 4,538 and 11,345 the fee is € 419, whereas for claims above € 11,345 it will be 3 per cent of the amount of the claim, with a minimum of € 422 and a maximum of € 6,174 (for legal persons) or € 1,185 (in case the defendant is a natural person).[57] The fee due will be rounded to the nearest multiple of € 5.

Bailiff costs

Further to the Court fees bailiff costs are involved. According to section 240 CCP, bailiff tariffs are calculated according to the method determined by governmental decree.[58]

Costs of witnesses

In accordance with section 182 CCP the costs of witnesses in principle come at the expense of the party calling the witness.

Costs of experts appointed by the court

In accordance with section 195 CCP, the costs of experts appointed by the court come at the expense of the applicant, unless the court decides otherwise.

Lawyer fees

Representation by a lawyer is compulsory to institute proceedings before a Dutch civil court. A party would have to pay lawyer fees for proceedings before a civil court. Generally, and especially in complicated cases like civil procedures concerning the violation of competition provisions, the legal fees are (substantially) higher than the other costs of the procedure.

The losing party may be ordered to pay (part of) the winning party's costs (section 237 CCP). The order to pay the costs of the proceedings normally covers the court fees, as well as the bailiff costs and the costs of witnesses and experts. However, the costs of legal assistance will be only partly recoverable (cf. section 239 CCP). A calculation method based on the court-approved scale of costs is used to calculate the legal costs that will be covered by the order to pay. In complicated cases a major part of each party's legal fees will be borne by the parties themselves.

Extrajudicial costs

Extrajudicial costs include: (i) costs made in order to avoid or limit damages; (ii) costs made in order to establish damages and liability; and (iii) costs made in order to achieve out of court settlement. There is a possibility of reparation of extrajudicial costs (section 6:96(2) CC). These costs will only be covered in so far as (i) it is reasonable that these costs were made; and (ii) the amount of these costs is reasonable in view of the specific circumstances of the case ("test of double reasonableness").

Conclusion on the costs for private litigation

It is concluded that a claimant in civil proceedings for breach of competition law always, regardless of whether he wins or loses, will have substantial costs i.e. a major part of his

[57] Section 2(3) Civil Cases Fees Act.

[58] Bailiffs serve legal documents.

own legal fees. Furthermore, if a claimant loses the case, he will most likely be ordered to pay the court fees, bailiff costs, costs for witnesses and experts, part of the legal fees and, possibly, the extrajudicial costs of the winning party.

(ii) Costs involved with filing a complaint with NMa.

Issuing a complaint before NMa is free of charge and can be done by every (natural or legal) person, even anonymously. However, the result is wholly uncertain. First of all, it is for NMa to determine whether to follow up on a complaint. Only in relation to complaints submitted by interested parties NMa is obliged to respond. The prioritisation policy of NMa will determine whether complaints are followed up. Furthermore, even if NMa follows up on the complaint and eventually establishes an infringement of competition law, this does not result in the reparation of damage. Of course, the complainant could use the decision of NMa in out-of-court settlement negotiations with the perpetrators, or in civil procedures for damages. Legal fees for the drafting of the complaint or the proceedings before NMa are not recoverable.

26. Do the legal costs and/or fees deter claimants from bringing stand-alone actions? Idem from follow-on actions. Are there procedural mechanisms to avoid this?

We are not aware of any research concerning the deterrent effect of legal costs and/or fees on bringing stand-alone or follow-on actions before civil courts. In spite of this question not being of a legal nature, we venture the following answer. The above mentioned costs could be deterrent to institute civil proceedings for breach of competition law. The costs for stand-alone actions are possibly higher than for follow-on actions, as the claimant in stand-alone actions does not benefit from the administrative enforcement decision. Yet, in practice we observe more stand-alone actions than follow-on actions (cf. answer to question 3). The procedures for collective action might provide an alternative for individual action which makes it possible to share costs among more victims.

27. Are there any specific substantive or procedural rules applicable to undertakings that have filed a leniency application? If so, are they only applicable to undertakings qualifying for full immunity?

Apart from the conditions for lenient treatment by NMa, there are no specific substantive or procedural rules applicable to undertakings that have filed a leniency application. A leniency application does not entail a specific (preferred) position in a related civil procedure. However, in view of the fact that only single damages can be claimed, the absence of specific substantive or procedural rules is not expected to prevent businesses and certain natural persons[59] from submitting a leniency application with NMa in order to be granted immunity or reduction of the fine.

Pursuant to the Policy rules of the Minister of Economic Affairs on the reduction of administrative fines in connection with cartels, NMa may provide immunity or a reduction of the fine to leniency applicants. First-in applicants may be eligible for either type A

[59] Natural persons refers to individuals who may be fined by NMa for giving instruction or exercising de facto leadership with regard to a cartel, as laid down in section 51 of the Dutch Penal Code (*Wetboek van Strafrecht*).

(immunity) or type B (either immunity or reduction of the fine between 60 and 100 per cent). Second-in and following applicants may be eligible for type C (reduction of the fine between 10 and 40 per cent). In all cases (immunity or reduction of the fine) the applicant must fully cooperate with NMa.

28.What is the average length of judicial proceedings before a final and binding judicial decision has been adopted and enforced? Compare with the proceedings followed before a NCA.

Dutch law does not contain any provisions with regard to the length of court proceedings. The length of the proceedings differs according to the circumstances of the case. Moreover it is difficult to compare civil proceedings with proceedings before NMa, whose decisions are subject to judicial review before the administrative court. Hardly any information is available on the average duration of competition law proceedings. Significant hold-ups for a procedure are interlocutory judgments ordering proof of specific facts, and interlocutory orders for expert evidence.

Since 2003 the average length of proceedings conducted by NMa in cases where a fine was imposed was 230 (working) days calculated from the moment that the statement of objections was issued to the day the decision was adopted. The review procedure before the Rotterdam District Court in 2006 took on average 259 (working) days. In 2008 this was 290 (working) days.

The duration of proceedings by NMa and review courts is governed by Article 6(1) ECHR. In the case *AUV/Aesculaap* the CBb had to rule whether the proceedings of NMa had taken place within a reasonable duration. It concluded that a reasonable duration depends on the specific circumstances of each individual case and the complex nature of competition cases has to be taken into account. Therefore, the duration reasonable for NMa to conduct its administrative proceedings cannot be determined in advance. However, it was held that in ordinary cases, NMa should take a decision within two years counted from the moment that the statement of objections has been issued. The subsequent first instance review proceedings may in principle not take any longer than one and a half years. Nevertheless, there may be objective reasons for exceeding this total duration of three and a half years. In case of an unreasonable duration contrary to Article 6 ECHR the court may lower the fine imposed by NMa (as the CBb did by 20 per cent in *AUV/Aesculaap*) or reward (fixed) damages for immaterial grieve.[60]

29.Is there any judicial settlement procedure? Can administrative proceedings conclude with a settlement? What would be, if any, the differences in the settlement procedure?

(i) Civil proceedings
Although there is no legal basis for an individual settlement procedure in the Netherlands, parties in court proceedings may at any time terminate the proceedings by reaching an individual settlement. According to section 87 CCP, the judge can, either on request of the parties or on his own initiative, order an appearance of parties at any stage of the

[60] CBb, 3 March 2009 A B.V. (AWB 07/118), LJN: BH6281. In this case, the CBb applied a fixed fee of € 500 for each half year the reasonable duration was exceeded.

procedure for the purpose of reaching a settlement. Competition law disputes could also be settled through methods of alternative dispute resolution.

As mentioned in response to question 22, if certain conditions are fulfilled, a collective settlement can be declared generally binding by the Amsterdam Court of Appeal.

(ii) Administrative proceedings
NMa does not have an official settlement procedure. However, since 1 October 2007 NMa may adopt a decision declaring binding the commitment offered by an undertaking to prevent or terminate an infringement of Articles 81 or 82 EC or the equivalent national provisions (section 49(a) CA). This possibility exists until the adoption of a sanction decision. This power of NMa mirrors the Commission's power under Article 9 Regulation 1/2003. In June 2008, NMa accepted commitments for the first time. This case concerned five child day-care centres in Amsterdam that committed to changing their behaviour in relation to information sharing and market sharing.[61] After adopting a commitment decision NMa will monitor whether the undertakings comply with the commitments.

In addition to this institutionalised early resolution procedure, NMa used an *ad hoc* fast-track procedure to deal with a nationwide system of bid-rigging in the construction sector. In 2004 NMa has offered all undertakings involved in a structural infringement of section 6 CA in the construction sector (known in Dutch as the *bouwfraudezaken*) a clean sweep by following a specially designed procedure. Undertakings that opted for this procedure instead of the regular procedure, were granted substantive reductions of their fines in exchange for their admission of participation. The outcome of this settlement has been implemented through individual decisions, which are subject to judicial review. Part of the settlement is that undertakings should not challenge the (evidence for the) infringement as such. Undertakings are allowed to challenge the fine. Currently, the conditions of these special proceedings are the subject of judicial proceedings before CBb.

29./35. Is there any non-judicial settlement procedure? What would be, if any, the differences in the settlement procedure. Can competition law issues be solved by private arbitration or other forms of alternative dispute resolution mechanisms?

Dutch law basically provides for two types of non-judicial dispute resolution: arbitration and binding decision. Competition law disputes can in principle be settled by arbitration and binding advice. Other forms of alternative dispute resolution may be ventured too, but have no legal basis.

Arbitration is governed by sections 1020-1076 CCP. Parties may agree on arbitration to settle their dispute, thereby excluding the competence of the court.[62] The arbitration decisions are binding on the parties. It is in principle not possible to lodge an appeal against such a decision. The rights and obligations deriving from competition law can be the object of arbitration procedures. The relationship between Dutch arbitration procedures and competition law has been dealt with by the ECJ in *Eco Swiss*.[63] The ECJ held that EC competition law is to be considered as an issue of public policy. In

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61 NMa Annual report 2008.

62 Section 1022 CCP.

63 ECJ, Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International N.V.*, ECR. [1999] I-3055.

accordance with the principle of equivalence EC competition law is thus to be treated as domestic issues of public policy. Where the jurisdiction of domestic courts in relation to arbitration awards is limited to issues of public policy, the courts should also assume jurisdiction in relation to the application of EC competition law. Effectively this means that Dutch arbitration awards handed down in disregard of EC competition law can be put to the court for review under equivalent conditions as issues of public policy.

Binding decision has a general legal basis in sections 7:900-7:910 CC as a settlement agreement (*vaststellingsovereenkomst*). With a settlement agreement parties can settle their conflicts in a binding way even if the agreement differs from previously existing legal situation. A settlement agreement could also be used between the parties, to provide for a binding decision on the parties' mutual rights and obligations. Courts can only perform a limited review, by considering whether under the given circumstances and according to the standards of reasonableness and fairness, the decision is unacceptable in view of its contents or the way in which it was reached.[64]

31. Do national courts have to inform the NCA and/or the European Commission of any claims where competition law would have to be applied? Is the obligation established in Article 15.2 of Regulation 1/2003 to transmit judgments regularly complied with?

Dutch courts do not have to inform NMa and/or the Commission of any claims in relation to which competition law would have to be applied.

For the purpose of administrative proceedings, the obligation of Article 15(2) Regulation 1/2003 has been implemented in section 89j CA. This provision obliges administrative courts to transmit to the Commission every final judgment relating to Articles 81 and 82 EC (with the exception of decisions relating to procedural matters). In practice, judgments are transmitted through the Council for the Administration of Justice (*Raad voor de Rechtspraak*) which has entrusted the Rotterdam District Court with this task. The Supreme Court and the Council of State send their judgments to the Commission directly. Section 28(8) CCP applies to judgments of civil courts and is virtually identical to section 89j CA.

The obligation in Article 15(2) Regulation 1/2003 is regularly complied with. However, not every judgment sent to the Commission is also posted on its website. Out of the six judgments concerning the application of Articles 81 or 82 EC transmitted to the Commission in the period August 2007 – August 2009 only one has been published on DG Comp's website.[65] The Commission has reportedly informed the Rotterdam District Court that it wants to receive only judgments *applying* Articles 81 or 82 EC. The Commission apparently is not interested in receiving other decisions, not even if the procedure itself concerns the application of Article 81 or 82 EC. Also judgments applying

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64 Section 7:904 CC. For example, fundamental principles of procedural law should not have been ignored.

65 On 13 October 2009 the website of the Commission listed only 17 judgments by Dutch courts regarding Articles 81 and 82 EC, the latest dating from 2007. The most notable judgment missing from the website is the one that gave rise to the judgment of the ECJ in T-Mobile: ECJ, Case C-8/08, T-Mobile Netherlands et al. The referring judgment of the CBb of 31 December 2007, LJN: BC1996, was transmitted to the Commission by letter of 9 January 2008.

the Dutch equivalents of Articles 81 and 82 EC are not to be transmitted, not even those in which reference is made to Articles 81 and 82 EC. It seems that the Commission's interpretation of Article 15(2) Regulation 1/2003 is more limited than its – and more important, the Court's – interpretation of Article 15(3) Regulation 1/2003.[66]

32. Have your national courts asked for Preliminary Rulings ex Article 234 EC in cases concerning Articles 81 or 82 EC? If not, why?

National courts in the Netherlands have asked for preliminary rulings regarding Articles 81 or 82 EC on several occasions. Since the year 2000, the ECJ has rendered five preliminary rulings on questions of Dutch courts concerning Article 81 or 82 EC:

Judgment of 11 June 2009 (*Inspecteur van de Belastingdienst/X*), Case C-429/07: The Amsterdam Court of Appeal asked the ECJ whether the third sentence of the first subparagraph of Article 15(3) Regulation 1/2003 had to be interpreted as meaning that it permits the Commission to submit on its own initiative written observations to a national court in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Article 81 EC.

Judgment of 4 June 2009 (*T-Mobile Netherlands et al*), Case C-8/08: The CBb asked the ECJ (i) which criteria must be applied when assessing whether a concerted practice (Article 81 EC) has as its object the prevention, restriction or distortion of competition within the common market, (ii) whether Article 81 EC has to be interpreted as meaning that, when a national court applies that provision, the evidence of a causal connection between concerted practice and market conduct must be adduced and appraised in accordance with the rules of national law, provided that those rules are no less favourable than the rules governing similar domestic actions and they do not make the exercise of the rights granted by Community law in practice impossible or excessively difficult and (iii) whether there always is a presumption of a causal connection between concerted practice and market conduct even if the concerted practice is an isolated event and the undertaking which took part in the practice remains active on the market or only in those cases in which the concerted practice has taken place with a certain degree of regularity over a lengthy period.

Judgment of 19 February 2002 (*Wouters*), Case C-309/99[67]: The Council of State asked the ECJ if a regulation on joint professional activity between members of the Bar and other professionals, adopted by the Bar of the Netherlands, is to be treated as a decision adopted by an association of undertaking in the sense of Article 81 EC and whether such a regulation infringes that provision. Furthermore, the Council of State asked if a body such as the Bar of the Netherlands constitutes either an undertaking or a group of undertakings for the purpose of Article 82 EC.

Judgment of 21 September 2000 (*Van der Woude*), Case C-222/98[68]: The Subdistrict Sector of the Groningen District Court asked whether the provisions of a collective labour

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66 ECJ, Case C-429/07, *Inspecteur van de belastingdienst/ X.*

67 ECR [2002] p. I-1577.

68 ECR [2000] p. I-7111.

agreement which relate to sickness insurance for employees covered by the agreement and under which employers' contributions are paid only in respect of insurance taken out with the insurer or insurers selected for the purposes of implementing that agreement are compatible with Articles 81 and 82 EC.

Judgment of 12 September 2000 (*Pavlov*), Case C-180/98[69]: The Subdistrict Sector of the Nijmegen District Court asked the ECJ whether Articles 10 and 81 EC prohibit a Member State's public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body. It further asked whether a pension fund responsible for managing a supplementary pension scheme set up by a profession's representative body and of which membership has been made compulsory by the public authorities for all members of that profession is an undertaking within the meaning of Articles 81, 82 and 86 EC.

33. Have your national courts requested your NCA or the European Commission intervention in judicial proceedings between private parties involving the application of competition law? How? Was their intervention required by one of the parties or decided ex officio? Are there any national procedural rules providing for the intervention of NCAs or the Commission in judicial proceedings?

As yet NMa has never acted as amicus curiae in a civil procedure. In accordance with its Guidelines concerning the Amicus Curiae function[70] NMa will “exercise restraint” in performing such a function, avoiding any overlap with normal duties of NMa under competition law.

In a case before the The Hague Court of Appeal, the latter requested the Commission to submit observations.[71] In its ruling the Court of Appeal (willingly) followed the Commission’s advice.[72] In another case, the Commission wished to submit written observations to the Amsterdam Court of Appeal *ex officio* and asked for the transmission of documents. The Court of Appeal referred questions to the ECJ relating to the Commission’s intervention possibilities under Article 15(3) Regulation 1/2003.[73]

34. Can any other bodies representing public interest (e.g. public prosecutor) and/or consumer associations bring judicial actions for breach of competition law? Can they intervene in judicial proceedings between private parties involving the application of competition law? How?

We understand the above questions as follows. The second question relates to the possibility for a particular group of third parties to intervene in private actions, either as a party to the proceedings or in a different capacity. The first question is phrased more broadly and is not limited to private actions. This question seeks to establish all available

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69 ECR [2000] p. I-6451.

70 Available in Dutch at: http://www.nmanet.nl/Images/11_27830_tcm16-21193.pdf, and in English at: http://www.nmanet.nl/Images/14_27829_tcm16-75171.pdf.

71 The Hague Court of Appea, 27 January 2005, LJN: AT4659.

72 The Hague Court of Appeal, 24 April 2008, LJN: BD1227.

73 ECJ, Case C-429/ *Inspecteur van de belastingdienst/ X* .

actions before a court for bodies other than NMa representing the public interest and for consumer associations. These questions are discussed separately below.

(i) Can any other bodies representing public interest (e.g. public prosecutor) and/or consumer associations bring judicial actions for breach of competition law?

The enforcement of Articles 81 and 82 EC and their national equivalents (sections 6 and 24 CA) in the public interest is the sole responsibility of NMa. NMa is an administrative authority with investigatory, prosecutorial and adjudicating powers (as illustrated in the answer to question 19). Other public institutions (e.g. sector regulators and the public prosecutor) might be indirectly involved in the enforcement of competition law, as some practices might fall within the scope of both competition law and other legislation (e.g. sector-specific regulation or criminal law[74]). The parallel application of competition law and other legislation could require some coordination between NMa and other institutions.[75] Yet, NMa is the sole authority responsible and competent to enforce the Articles 81 and 82 EC and their national equivalents in the public interest.[76]

Consumer organisations may bring judicial actions for breach of competition law to pursue their ‘private’ interests, as defined in their articles of association. Actions may be brought in pending administrative proceedings, or private actions could be initiated. We refer to the possibility for consumer organisation to participate in administrative proceedings as interested (third) party. Pursuant to section 93 CA, consumer organisations fulfilling certain objective criteria are always considered ‘interested parties’ in relation to decisions adopted on the basis of the CA.[77] In this capacity, consumer organisations may appeal decisions of NMa. This allows consumer organisations to bring judicial actions in relation to rejections of their complaints and other decisions negatively affecting them.

Consumer organisations may also initiate private actions. In accordance with section 305a CC[78], incorporated foundations or associations may initiate actions for a group of persons, provided that these persons have equivalent interests and the foundation/association promotes and protects these interests in accordance with its articles of association. Consumer organisations could make use of this possibility.

(ii) To what extent could bodies representing public interest (e.g. the public prosecutor) and/or consumer associations intervene in judicial proceedings between private parties involving the application of competition law?

Other than NMa and the public prosecutor, no other public body or person may ‘intervene’ in proceedings before the civil courts concerning competition law. For our

74 There is no specific provision in Dutch criminal law for competition law infringements, yet some of these infringements may also fall within the scope of more conventional criminal provisions (e.g. defraud). Especially section 328bis of the Dutch Penal Code, dealing with unfair competition, is formulated broadly enough to cover practices also falling within the scope of Articles 81 and 82 EC, cf. Supreme Court, 12 June 1984 (NJ 1985, 174).

75 Cf. The Hague Court of Appeal, 21 May 2008, LJN: BD3383, 3387, 3389, 3391, 3392, 3397, 3400 en 3402, where it was held that in case of concurrence the CA, as lex specialis, takes precedence over conventional criminal law.

76 Sections 5 and 88 CA. In reality, the Board of Directors of NMa is the decision-taking authority responsible and competent for the enforcement of the Articles 81 and 82 EC and their national equivalents.

77 This preferential status only applies to consumer organisations that are incorporated as foundations or associations and that promote and protect the collective interests of consumers in accordance with their articles of associations, Section 1(n) CA.

78 See in more detail the answer to question 24.

purposes, intervention by the public prosecutor is of little importance. In accordance with section 42 CCP the public prosecutor may be present at civil court proceedings and submit documents for and have access to the case file. It may also be heard.[79] The initial objective of sections 42 *et seq.* CCP was to allow the public prosecutor to fulfil its supervisory role vis-à-vis the judiciary as a representative of the executive branch of state power.[80] Not only has this objective become outdated, any intervention from the side of the public prosecutor will have little relevance for the private enforcement of competition law. More important is the possibility for NMa to intervene. In accordance with Article 15(3) Regulation 1/2003, as implemented through section 44a CCP, NMa may assume the role of amicus curiae in private actions. We conclude that beyond the possibilities provided by Regulation 1/2003, there is little room for public bodies to intervene in judicial proceedings between private parties involving the application of competition law.

36. What are the kinds of damages that can be awarded following a successful claim for breach of competition law (i.e. compensatory, punitive, disgorgement, etc.)?

Damages can be awarded in the form of compensation or disgorgement. In case of a successful claim for breach of competition law damages can amount to a restitution of incurred losses or loss of profit (section 6:96(1) CC). In addition, reasonable costs which have been made to assess the damage and the liability can also be awarded as damages (section 6:96(2)(b) CC). The aggrieved party also has right to compensation of interest (article 6:119 CC). Damages can also be calculated on the basis of (a part of) the profits made by the party that has breached competition law (section 6:104 CC). For this purpose it is necessary that the breach of competition law has indeed led to illegal profits for the party that committed the infringement. Damages claimed both in the form of incurred losses and in the form of illegal profits can never exceed the largest of both claims.[81]

For claims based on unjust enrichment rather than tort, damages can amount, as far as this is reasonable, to repayment of unjustly paid sums by the aggrieved party to the party that has breached competition law (section 6:212 CC). According to this section: "*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."*

Damages shall in principal be paid in money (section 6:103 CC). However, the aggrieved party may request the court to award damages in another form (section 6:103 CC).

37. What is the discretion of the courts on the calculation of damages? Is the existence of an administrative penalty, imposed either by the European Commission or by a NCA, taken into account when awarding damages?

Dutch law contains only few rules on the calculation of damages. Under Dutch law only single damages are available (incurred losses, illegal gains, unjust enrichment). For the

79 Section 44(1) Rv.

80 Van Mierlo, *Burgerlijke Rechtsvordering Tekst & Commentaar*, Deventer 2008, p. 118.

81 Supreme Court, 14 April 2000, NJ 2000, 489

assessment of incurred losses, the court has a number of methods available. If the loss cannot be established accurately, it may be estimated.

Actual damage

Starting point is the compensation for actual damage. The assessment of actual damages is based on sections 6:95 and 6:96 CC and may consist of the losses suffered, the profits lost and the various costs incurred.

Actual damage can be calculated by making a comparison between the actual position of the plaintiff and its hypothetical situation in the absence of the infringement. The amount of damages should bring the plaintiff in the (financial) position it would have been in absent the infringement. In order to fulfil the burden of proving the actual loss, the plaintiff may – instead of making a comparison – rely on other models, such as cost-based approaches, regressions models, etc.[82]

Estimated damage

As it may be difficult to establish the exact level of loss suffered, the amount of damages may also be estimated by the court (section 6:97 CC). This allows the court to base its award of damages on the illegal profits instead (section 6:104 CC). Determining the method to calculate damages falls within the exclusive competence of the court.

With respect to the question whether the courts take into account administrative penalties when awarding damages, it is to be noted that they have full discretion in calculating damages. We are not aware of case law in this field. Under normal circumstances, fines imposed by the competition authorities will not be taken into account. However the court is allowed to reduce damages if a full award of damages would lead to 'clearly unacceptable results in the given circumstances' (section 6:109 CC). Given that only single damages are available, it is unlikely that the accumulation of fines and damages will often lead to clearly unacceptable results.

38.Does the NCA take into account the compensation paid or to be paid by the company when determining the fine?

NMa may take into account the compensation paid or to be paid by the undertaking in setting the amount of the fine. However, compensation does not automatically lead to a reduction in the amount of the fine.

NMa derives its power to impose fines from the CA. The power to impose fines for infringements of the Articles 81 and 82 EC is laid down in section 56(1) CA, in conjunction with section 89 CA. Pursuant to the CA, the maximum amount of the fine is either € 450,000 or 10 per cent of the undertaking's (worldwide) turnover, whichever is more. In determining the amount of the fine NMa shall have regard to the gravity of the infringement, the degree of fault of the perpetrator and the circumstances under which the infringement took place (section 5:46(2) General Act on Adminstrative Law, 'GAAL')). NMa is further bound by more general principles of administrative law, among which, the

[82] R. van den Bergh, W. van Boom & M. van der Woude, The EC Green Paper on Damages Actions in Antitrust Cases – An Academic comment, Erasmus University Rotterdam, April 2006, paragraph 3.7. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/erasmus_university.pdf

principle of proportionality, as laid down in section 3:4(2) GAAL. The interplay of the fining provisions of the CA and the GAAL leaves NMa considerable discretion in setting the amount of the fine.

It follows that NMa is not bound to 'reward' compensation. Yet, when determining the amount of the fine, NMa may take into account the compensation paid by the undertaking. In order to guarantee transparency and legal certainty and to prevent infringements from being committed, the Minister of Economic Affairs has limited NMa's statutory discretion in setting the amount of the fines by adopting Policy Guidelines Fining by NMa.[83] In September 2009, the Minister of Economic Affairs issued these Guidelines, replacing the previously applicable Fining Code 2007 adopted by NMa. It was considered that the independent enforcing agency should not determine the sanction policy but this should be done by the Minister who is accountable to Parliament.[84]

These Guidelines provide for a method to calculate fines, which resembles the Commission's fining guidelines. The circumstance that the perpetrator has reimbursed damage on its own initiative forms one of the attenuating circumstances.[85] NMa is thus not committed to reward every form of compensation all the time. Instead, it has created for itself the possibility to reward particular forms of compensation, namely compensation that has already been paid on the undertaking's own initiative.[86] However, as the Policy Guidelines Fining by NMa 2009 do not list the attenuating circumstances exhaustively, it cannot be excluded that NMa will reward others modes of compensation as well.

In practice, NMa has taken into account the compensation paid by the undertaking in setting the amount of the fine. For example, in a sanction case in 2005 NMa reduced the undertakings' fines by 30 per cent of the amount which the undertakings had agreed to pay as a settlement to the involved local council.[87] In 2006 NMa reduced fines in several sanction cases in the construction sector because the undertakings had repaired the damages caused to the affected government department. The undertakings had contributed to the Collective settlement in the building industry (*Collectieve Regeling Bouwnijverheid*) through which the government department was compensated for its damages. NMa reduced the fines of these undertakings by 10 per cent of their financial contribution to the collective settlement.[88]

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[83] Policy Guidelines of the Minister of Economic Affairs of 11 September 2009 containing guidelines for the imposition of fines pursuant to legislation the supervision whereof has been attributed to the Board of Directors of the Netherlands Competition Authority.

[84] The Fining Guidelines mainly follow the previously applicable Fining Code 2007 with some amendments, including an increase in the factor with which the basic fine will be multiplied, the introduction of a 25 % top-up of fines for very serious infringements and an increase by 100 % for repeat offenders unless the latter will be evidently unreasonable.

[85] Section 14 of the Policy Guidelines Fining by NMa 2009. Already under the old regime where Fining Guidelines were still adopted by NMa instead of by the Minister of Economic Affairs and dating back till 2001, reimbursement of the damage suffered formed one of the attenuating circumstances.

[86] This is also the case in the construction sector fining guidelines. See, e.g., the special guidelines for the civil engineering sector (Calculation of fines concerning certain anticompetitive activities in the civil engineering sector; IV fine reduction: sundry), Government Gazette, 14 October 2004.

[87] Sanction decision *Openbaar Groen Maastricht* (4014), 5.2.6., p. 53. In this sanction case the fine was reduced by 50% after agreeing that the undertaking would pay a settlement to the local council and would not contest the facts of the case.

[88] See NMa decisioms: *Noord Holland Acht* (case 2873), *Atletiekbanen* (case 3054), *Asfaltzware wegenprojecten Noord-Nederland* (case 3064).

39. Is the passing on defense admissible as a defense before national courts in a competition law dispute?

The passing-on defence is legally admissible and can be used to deflect claims. Damages claimed on the basis of an act of tort will be unsuccessful if it cannot be established that the infringement caused damage to the claimant. For this purpose the passing-on defence could be used by the defendant. If it is established that damage has been suffered, the award of damages can be based on incurred losses and illegal profits (cf. answer to question 36). To the extent the awarded damages are based on illegal profits, the passing-on defence cannot successfully limit the defendant's liability. In other words, the passing-on defence is available to dispute the existence of damage, but will not necessarily lower the amount of damages to be paid once the existence of damage is proven.

40-42 Identify three main elements which, in your view, hinder the development of private enforcement of competition law in your country. Indicate at least three measures which, in your view, would facilitate the development of private enforcement of competition law in your country. The Commission and the European Parliament have been pushing for a "European" model of judicial application of competition law that would avoid the "potential excesses of the US system". Given the present underdevelopment of private enforcement in Europe, do you think it is possible to find right away a correct equilibrium or would it be necessary, to reverse the present atrophy of private enforcement in Europe, to introduce some positive incentives that could be eventually removed if excesses also appear?

(i) Introduction

Already in 1983 the Commission advocated application of (European) competition law by national courts because these courts could award damages which could contribute to an improved enforcement of these rules.[89] The discussion has been furthered by the decentralisation of the application of European competition law. The Commission considers the private enforcement of competition law in 2008 still to be in a state of 'total underdevelopment'. This assumption can be traced back to the Ashurst Report of 2004.[90] A study from 2005 commissioned by the Dutch Ministry of Economic Affairs, showed that since 1999 every year between 30 and 40 cases involving competition law were brought before civil courts in the Netherlands. Only in a handful of these cases damages were claimed and, if claimed, damages were hardly ever awarded.

This could be considered problematic given the impact of violations of competition law on the European economy. The Commission, in its impact study accompanying the White Paper on Damages actions for breach of EC antitrust rules, estimates the total annual cost for hardcore cartels alone in the EU to range from approximately € 25 billion (on the most conservative assumptions) to approximately € 69 billion (on the least

89 13th Report on Competition Policy 1983, § 217-218.

90 Ashurst, 'Study on the conditions of claims for damages in case of infringement of EC competition rules', 31 August 2004.

conservative).[91] Implementing changes to national civil procedures concerning actions for damages is proposed to effectively tackle this problem.

There are, however, numerous principles and interests at stake which warrant a cautious approach to this subject. As various governments and other interested parties have expressed in their comments during the public consultation on the Commission's Green Paper and White Paper, public authorities should keep their central role in the enforcement of EC competition rules, whereas the main objective of civil damages claims should remain compensation of losses. Concerns have also been voiced regarding the coherence of national tort laws, which should be guaranteed. Furthermore, national courts are wary of an increase of the already considerable caseload and the legal community as well as politicians fear the development of a 'litigation culture'.

In analysing which elements hinder the development of private enforcement in the Netherlands and which measures would enhance the effectiveness of private enforcement, proper consideration must therefore be given to a broader range of considerations and principles, rather than just the effective enforcement of EC competition rules. Furthermore, regarding the Netherlands, several authors have concluded that the proposed measures by the Commission in its White Paper will have little impact on Dutch tort law, since most of these measures are already in place.[92] Other authors have concluded that there has been an increase in damages actions for breach of competition law in the Netherlands, without any changes in the relevant legal provisions.[93] It can further be argued that any complications relating to the award of damages are not specific to competition cases but are inherent in any action for damages and that therefore specific provisions with regard to competition law are not justified.

Given the fact that questions 40, 41 and 42 are closely related to each other, we have chosen to answer them in one comprehensive reply. However, in discussing our group's response to (the issues involved in) these questions, we have had to conclude that no consensus could be reached. Some favoured a 'European approach' towards private enforcement, whereas others were not even convinced of the need to make it more attractive to initiate private actions. Hereafter we will therefore refer to a number of elements which currently limit the amount of private litigation and to a number of measures which may enhance private litigation, without having agreed upon each individual analysis and suggestion mentioned. The individual contributors to these answers, or the institutions they sometimes represent, are not bound to any of the views expressed below. Nevertheless, taken together, these elements do constitute, in our common view, certain key issues in the debate, even though several among us do not welcome the debate as such as they do not perceive the need to start a discussion about the effectiveness of private enforcement of competition law.

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91 European Commission, 'Impact assessment', 2 April 2008, SEC(2008)405, p.14-15

92 R. Meijer, 'Het witboek schadevergoedingsacties wegens schending van communautaire mededingingsregels bezien vanuit Nederlands recht', *Maandblad voor Vermogensrecht*, June 2008, nr. 6, p.137; S. Hoes-Weishut, D. Lunsingh Scheurleer en H.Speyart, 'Het Witboek Schadevergoeding afgezet tegen de huidige Nederlandse situatie: verworvenheden en vernieuwingen', *Actualiteiten Mededingingsrecht*, July 2008, nummer 6, p.148

93 J.S. Kortmann en C.R.A. Swaak, 'The EC White Paper on antitrust damage actions: Why the member states are (right to be) less than enthusiastic', *European Competition Law Review*, 2009, 30 (7), p. 350

(ii) Elements which hinder private enforcement

- The absence of the possibility for collective actions which seek compensation for infringement of rights and obligations, the law currently only permitting a court to declare an out-of-court settlement directly applicable to all victims of an injury.

- The current provisions requiring specific (kinds of) documents to be identified in order for them to be produced in court, as well as other difficulties relating to the rules of evidence in civil proceedings (for example: does section 843a CCP apply in proceedings based on unlawful act, rather than breach of contract?).

- The costs associated with civil proceedings. This will especially hinder private litigation when the actual loss for a party (the overcharges the party has paid) does not weigh up to the costs of legal proceedings. Especially end consumers will be dissuaded by potential litigation costs.

(iii) Measures which would facilitate private enforcement

- Pursuant to section 3:305a CC, a foundation or association has the right to institute judicial proceedings involving a collective claim in so far as the foundation or association represents the comparable interests of those involved in accordance with its articles of association. The scope of this collective redress is currently restricted to declaratory judgments, injunctions or replacements in kind. Thus, it is not possible to collectively claim for damages using section 3:305a CC. Pursuant to a resolution submitted by two members of Parliament[94], the Minister of Justice has recently announced his intention to study the possibility of a collective claim for damages.[95]

  In order to overcome passivity of consumers in case of violation of competition law, consideration could be given to amending section 3:305a CC to include collective claims for damages.[96] In order to preserve the coherence of the Dutch legal system as much as possible, collective claims for damages could be limited to joint actions by associations or foundations representing consumers (and not undertakings) whose claims must be based on a breach of Article 81 or 82 EC (and their Dutch equivalents, sections 6 and 24 CA). Furthermore, the amendment could be adopted provisionally, by way of an experiment, with automatic expiration after a couple of years.

  The amendment should be specifically directed at groups of consumers that are currently disinclined to start or join in any damages action: i.e. consumers that suffered only limited monetary loss. It should be an opt-in system, where victims of the violation of competition law can join the action during the procedure. An opt-in system will be less likely to face objections relating to Article 6 ECHR and the Dutch Constitution than an opt-out system which potentially limits consumers in their right to have access to a court. The disadvantage of an opt-in system will be that consumers may not join, given the costs involved and the lack of motivation. To overcome these potential problems an

94 Dutch Parliament, 2005-2006, 30 071, nr. 28

95 Ministry of Justice, Evaluation of the Dutch Class Action Act, 23 October 2008, 5567439/08/6 (text only available in Dutch)

96 For this part, suggestions by M.F.J. Haak and I.W. Verloren van Themaat in their 2005 Houthoff Report (pp. 101-108) have been used.

abstract method for calculating damages could be considered. This will make it easier to start a collective action, as it will not be necessary to check beforehand whether every single consumer has suffered any specific loss.

- More favourable arrangements for the collection of evidence could be envisaged. Short of introducing full-scale American discovery-type of procedures, the scope for discovery could be expanded.

- Introducing the possibility of contingent or conditional fees, i.e. fees to be paid to attorneys in relation to the outcome of the case; maybe the only feasible method of inducing victims of cartel damage to initiate successful proceedings.

- The enforceability of an NCA's final decision establishing an infringement in private enforcement proceedings would help facilitate such enforcement. Currently, pursuant to Article 16(1) Regulation 1/2003, only the Commission's decisions are binding on the courts. Possibly, by virtue of national law, decisions of NCAs may also be binding, for instance because of the effect to be given by courts to a final decision of a public authority, or because of a specific statutory provision to that effect. A widening of the application of the principle underlying Article 16 Regulation 1/2003 and section 33(4) of the German Competition Act could be ventured. Section 33 (4) of the German Competition Act reads as follows[97]:

  '*Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty.*'

  This provision reportedly served as a benchmark in the discussions on the Green Paper as it widens the scope of Article 16 Regulation 1/2003 to final decisions of NCAs. Of course, judicial protection should be ensured, e.g. through the option of asking for a ruling of the ECJ through the preliminary reference proceedings.

- A far less intrusive measure to facilitate private enforcement has been proposed by the Dutch Council for the Administration of Justice ("*Raad voor de Rechtspraak*") in its response to the Commission's White Paper.[98] The Council points out that the application of competition law is complicated given the required economic analysis of the relevant facts. The significant amount of time to analyse the relevant claims in a civil suit based on competition law is also a relevant factor. These elements may hamper the private enforcement of competition law through damages claims before civil courts. It would facilitate the application of competition law if more time and effort would

97 See: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

98 http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/raad_nl.pdf

be invested in training the people involved (judges as well as lawyers). Also, extra funding for courts to effectively deal with long and complex competition cases might facilitate the private enforcement of the rules involved.

In this line of reasoning, the effective enforcement will be promoted if NCAs give priority to investigations of cartels or behaviour that can not easily be suppressed by private individuals because of lack of investigative powers or specialised know-how. Moreover reimbursement of damages caused by infringements of competition rules will be fostered if NCAs make all the documentary evidence gathered by the NCA during the investigation available to victims or collective organisations acting on behalf of victims. This will make it easier to assess the impact of the infringement. However, the protection of ongoing proceedings and the confidentiality requirements to which the NCAs and the Commission are subject, argue against implementation of this suggestion. Also, the protection of leniency as an effective instrument for public enforcement may require the protection of the applicant. According to one member of the working party such a protection of the applicant may not have as aconsequence that obtaining damages from the applicant becomes more difficult than obtaining damages from other companies that commited the infringement. A commitment to compensate for damages might be added as a condition for admittance to a leniency program.

(iv) Finding the right equilibrium

Question 42 suggests that, possibly apart from any facilitation of private enforcement which is permanent in nature, additional measures may have to be introduced which may have to be withdrawn once they are "too successful" and lead to an excessively litigious climate. One opinion is that excesses – such as suggested by the question – should be prevented under all circumstances and that such measures would thus not be desirable. It would be preferable to introduce a balanced set of rules from the start and to develop private litigation slowly but steadily on the basis of consistent legislation and case-law.

A general requirement that courts can refuse to admit litigation if no alternative dispute resolution (ADR) or mediation has been tried in appropriate cases may help reduce any litigiousness that would be introduced by measures facilitating private enforcement. Reference is made to the English court practice of case management that permits courts, under the Civil Procedure Rules[99], to use ADR if this is considered appropriate, and to English case law[100] which deprives a winning party of the costs of the case, if they have unreasonably refused to consider mediation or ADR.

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99 http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm.

100 Halsey v Milton Keynes General NHS Trust, Court of Appeals, [2004] EWCA (Civ) 576.