The Netherlands: Developments in Cartel Damages Proceedings

Jolling de Pree & Daan Beenders
(De Brauw Blackstone Westbroek N.V.)

While the European Commission is making progress on the cartel damages Directive, the Netherlands appears to have developed into an attractive jurisdiction for cartel damages proceedings. Dutch courts seize jurisdiction easily and legal costs are capped. Furthermore, most Dutch courts intend to keep up the pace in proceedings.

Damages actions are currently pending in the Netherlands against cartels in regard of paraffin wax, sodium chlorate, elevators, airfreight, gas insulated switch gear and beer. Below, a non-exhaustive overview is provided of how Dutch courts have dealt with cartel damages claims so far.

Jurisdiction

Dutch courts appear quite willing to claim jurisdiction over cartel damages claims. As a general rule, Dutch courts have jurisdiction if the natural or legal person sued is domiciled in the Netherlands. In damages actions for unlawful acts, the Dutch courts also have jurisdiction if the harmful event occurred in the Netherlands. Where there are several defendants and the Dutch courts have jurisdiction because (at least) one of these is domiciled in the Netherlands, jurisdiction is also awarded with respect to the other defendants, provided that the claims are so closely connected that it is expedient to handle these cases jointly.

Despite arbitration clauses, the District Court of Central Netherlands considered itself competent to rule on a damages claim by litigation vehicle *East West Debt* (*EWD*) following the European Commission's decision on the elevator cartel. The defendants had claimed the court lacked jurisdiction given the industry-wide practice of including arbitration clauses in the applicable General Conditions to their contracts. However, since *EWD* had neglected to indicate on which specific contracts it had based its damages claims, the defendants had only submitted examples of such contracts to substantiate their claim. The court considered these examples insufficient proof that the parties had agreed to arbitration and thus declared itself competent. Similarly, the District Court of Amsterdam found itself competent to rule on the damages claims against the non-Dutch participants of a sodium chlorate cartel through "anchor defendant" *Akzo Nobel*, which is domiciled in the Netherlands. The arbitration and choice of forum clauses laid down in the customer contracts did not alter this. According to the court, the scope of these contractual clauses was not so broad as to include claims arising from competition law violations. Customers could have reasonably anticipated that disputes relating to (secret) anticompetitive behavior would be covered by these clauses.

The District Court of The Hague found it had jurisdiction over *CDC*'s damages claim against *Shell*, *Esso*, *Sasol* and *Total* following the European Commission's decision regarding the paraffin wax cartel. In regard of *Shell Petroleum* it considered itself competent because *Shell Petroleum*, addressee of the Commission decision and parent company of direct cartel participants *Shell Oil* and *Shell Deutschland*, was domiciled in the Netherlands. Furthermore, the court found there was a sufficiently close connection to rule on the claims against the other defendants. The reason is that cartel behavior is usually of such nature that it is committed jointly by all direct participants. Therefore, it is not possible to

separate the liability of the parent companies as established in the Commission decision from the liability by the subsidiaries, which were qualified as direct cartel participants in the same decision.

However, a similar close connection was not found in regard of damages claims initiated by *Stichting Elevator Cartel Claim* against four separate cartels on the elevators and escalators markets in the Netherlands, Belgium, Germany and Luxemburg. The District Court of Rotterdam ruled it only had jurisdiction over the claims brought against the defendants held liable for the Dutch cartel in the European Commission's cartel decision, i.e. the Dutch subsidiaries of *Kone* and *ThyssenKrupp* directly participating in the cartel and their (foreign) parent companies as a result of their "parental liability." It had no jurisdiction to rule on the claims against the other defendants since they had not participated in the Dutch cartel but in one of the cartels in the other jurisdictions. The European Commission decision distinguished between four national cartels that, although similar, differed in regard of (i) the nature of the anti-competitive behavior, (ii) the duration of the infringement and (iii) the product and services involved. Consequently, the claims could not be regarded as so closely connected for the court to assess them jointly.

Keeping up the pace

A number of Dutch courts have ruled on the question whether a civil damages procedure needs to be suspended pending an appeal against the European Commission's cartel decision before the EU Courts on the basis of Article 16 of Regulation 1/2003 and the (preceding) *Masterfoods* case law. The rulings mentioned below show that the courts intend to keep up the pace as much as possible.

The question of staying proceedings until a European Commission cartel decision has become final was considered by the Court of Appeal of Amsterdam in the damages claims based on the Airfreight cartel by litigation vehicles *Equilib* and *East West Debt*. In the case *Equilib/KLM* a.o., the Court of Appeal of Amsterdam overturned an earlier decision by the Amsterdam District Court of Amsterdam on whether the civil procedure had to be suspended pending the appeal against the European Commission's Airfreight decision before the EU Courts. According to the district court, the judgment of the EU Court regarding the nature, duration and scope of the airlines' participation in the infringement might affect the question as to whether the airlines acted unlawfully in respect of the claimants, since not only is the airlines' participation in the infringement relevant in this respect, but the periods, locations and manner in which the airlines participated are also relevant, as well as whether their participation concerned services/shipments delivered to the claimants. The court of appeal did not agree and held that a stay of the proceedings pending an appeal before the EU Courts is only necessary if there is reasonable doubt about the validity of the Commission decision. Consequently, the airlines should first specify which arguments they wish to raise in order for the national court to decide on whether these relate to the validity of the Commission decision and thus necessitate the delay of the proceedings pending the EU Court's ruling. On similar grounds, the Court of Appeal of Amsterdam decided that the contribution proceedings initiated by *KLM* against the other airlines included in the European Commission decision, should not be stayed either but

should be heard together with the main proceedings. In the *EWD/KLM* a.o.-case, the Court of Appeal of Amsterdam referred to its earlier reasoning mentioned above to rule that there was no need to suspend the proceedings until the European Commission's decision becomes final

Similarly, the Rotterdam District Court rejected an interim application to stay the proceedings in a damages claim pending the final judgment by the EU courts on the European Commission's decision in the road bitumen cartel. The court held that staying the proceedings ex Article 16 of Regulation 1/2003 was not necessary now that a number of (preliminary) questions could be answered according to national law prior to a final judgment by the EU courts. *MNO Vervat-Wegen* (*MNO*) acquired road construction company *Koop Tjuchem* in 2006 and initiated the current "follow-on" damages action against *Shell* to recover the damages claimed to have been suffered by *Koop Tjuchem* in the period 1994-2002 as a result of the road bitumen cartel. *Shell* requested a stay of proceedings on the basis of Article 16 of Regulation 1/2003 pending *Shell*'s appeal against the Commission's decision before the EU Courts on *inter alia* liability issues, the duration of the cartel and its role of leader in the infringements. *MNO*, however, argued that it was not necessary to await the EU courts' final judgment since *Shell* acknowledged its participation in the road bitumen cartel and provided the Commission with evidence of the infringement during its investigation. The court ruled that *Shell*'s arguments were insufficiently compelling to stay the proceedings ex Article 16 of Regulation 1/2003, particularly since *MNO* could be hampered in its production of evidence due to the period during which the cartel existed and the number of years a final judgment by the EU courts would probably take. The court considered that the questions on (i) the assignment of *Koop Tjuchem*'s damages claim to *MNO* and (ii) the prescription of the right of action could already be answered according to national law, irrespective of the outcome of the EU court appeal procedure. The court therefore deemed it practical to continue the proceedings and rule on those questions first.

The first substantive rulings on cartel damages

The first substantive ruling on cartel damages was published in January 2013. The District Court East Netherlands ruled that *ABB* must compensate *TenneT*, operator of the Dutch electricity grid, for the damages it suffered as a result of the Gas Insulated Switchgear (GIS) cartel. The court found that even though the Commission decision on the GIS cartel does not explicitly mention the Dutch GIS projects, it does establish that *ABB* participated in a worldwide cartel which had a particular impact on the EEA and thus, according to the court, also on the Netherlands. This, in combination with the fact that *ABB* failed to substantiate why the cartel would not apply to the Dutch project, made it safe to assume that the price paid by *TenneT* for the GIS-installation was affected by the cartel. The exact amount of damages will be established in follow-up proceedings, but the district court already dismissed *ABB*'s argument that *TenneT* did not suffer any loss because it passed on the overcharge to its customers. However, in September 2014, the Court of Appeal of Arnhem-Leeuwarden concluded that, on the basis of earlier EU case law as well as the upcoming Directive on damages, the passing-on defense should be available to *ABB*. It ruled that in the follow-up proceedings for the determination of damages, *TenneT*'s claim should

be assessed on the basis of the price difference between what was actually paid and what would have been paid in the absence of the infringement minus the loss which was passed on to *TenneT*'s customers. The court of appeal considered that in this way, the passing-on defense would not only prevent *TenneT* from being overcompensated for the harm done but it would also stop *ABB* from being sued for the same damages multiple times. In a parallel case, the District Court of Gelderland found that *Alstom* should compensate *TenneT* for the damages it suffered as a result of the GIS-cartel. With reference to the Court of Appeal's ruling, it considered that *ABB*'s passing-on defense requires further attention and invited *TenneT* to substantiate why the passing-on defense should be disregarded in this particular case.

In March 2013 the District Court Middle Netherlands dismissed a claim against *Otis*, because the claimant had failed to substantiate that its purchases had been affected by the cartel established by the European Commission in its decision on the elevator cartel. Therefore, the court also denied a causal link between the alleged high prices charged by *Otis* and the cartel.

In January 2014, the Dutch Supreme Court confirmed the Amsterdam Court of Appeal's ruling in regard of an action for damages initiated by the curator of software developer *HPC Hard & Software services* (*HPC)* against the Dutch Association of Real Estate Brokers (*NVM*). The Court of Appeal had ruled that *NVM*'s decision requiring its members to exclusively use *NVM*'s software module violated the cartel prohibition and thus constituted an unlawful act against software developer *HPC*. It subsequently had referred the case to follow-up proceedings for the determination of damages.

Settlement

The Netherlands is the only European country where a collective settlement of mass claims can be declared binding on an entire class on an 'opt-out' basis. Pursuant to the Dutch Act on Collective Settlements ("WCAM"), the collective settlement of mass damages concluded between one or more representative organizations and one or more allegedly liable parties can be declared binding upon an entire group of affected persons to which damage was allegedly caused. On the joint request of the parties, the Court of Appeal in Amsterdam may declare such a settlement binding. The agreement thus concluded will bind all persons that are covered by its terms and represented by the representative organization. Only a person that has expressly elected to opt out within a specific period can be excluded. If excluded, such person preserves its rights to bring a claim against the defendant. If other proceedings concerning claims covered by the agreement are pending, the alleged liable party may request to suspend such other proceedings during the period the WCAM proceedings are pending.

In a landmark case in January 2012, the Amsterdam Court of Appeal declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. As a result, even if the case is substantively not connected to the Netherlands, but a minority of the parties "to be sued" are domiciled in the Netherlands and one of the

parties to the settlement agreement is a Dutch entity (like, for example, a Dutch Stichting (foundation) representing the interests of the alleged victims), the court will assume jurisdiction.