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The International Comparative Legal Guide to:

# Competition Litigation 2009

## A practical insight to cross-border Competition Litigation

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# Netherlands

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## 1 General

### 1.1 Please identify the scope of claims that may be brought in The Netherlands for breach of competition law.

Depending on the circumstances, a breach of European or national competition law can lead to demands for damages, restitution, injunctions and declaratory judgments (e.g. a judgment declaring that an anticompetitive agreement is null and void). Dutch law also allows representative actions.

### 1.2 What is the legal basis for bringing an action for breach of competition law?

As a matter of European law, it is assumed that losses suffered as a result of an infringement of Article 81 or 82 EC are recoverable. See the decisions of the European Court of Justice in the *Courage* case and the *Manfredi* case. Under the relevant principles of Dutch law, infringements of competition law may also constitute a tort. Victims of a tort are entitled to compensation under Article 6:162 Dutch Civil Code ("DCC") and can demand that the wrongdoer be enjoined from continuing the wrongful conduct (Article 3:296 DCC).

Contracts that infringe the cartel prohibitions of Article 6 Dutch Competition Act and/or Article 81 EC, are illegal and are therefore null and void. Some have argued that parties who have entered into sale/purchase agreements with one or more members of a price-fixing cartel are entitled to avoid those contracts, but it is doubtful whether that is correct. There is no authoritative case law that confirms whether a contract that amounts to an abuse of dominant market position in contravention of Article 24 Dutch Competition Act and/or Article 82 EC is null and void.

A claimant who has made payments on the basis of an illegal contract is entitled to restitution under Article 6:203 DCC ("undue payment"). Illegality can also be invoked as a "shield" against claims for specific performance. Under Article 3:302 DCC, a claimant can ask the court to issue a declaratory judgment confirming, for example, that a contract is void or that the defendant has committed a tort.

### 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Competition law claims can be based both on European competition law and on national competition law. Articles 6 and 24 Dutch Competition Act are almost identical to Articles 81 and 82 EC.

### 1.4 Are there specialist courts in The Netherlands to which competition law cases are assigned?

There are no such special courts. The Dutch civil court system consists of three layers: the district courts, the courts of appeal and the Supreme Court. Civil claims based on infringements of competition law can be brought before the Dutch district courts. The district courts (*rechtbanken*) are the courts of first instance. There are nineteen district courts. The district courts have jurisdiction to hear any disputes that are of a civil law nature, including cases involving claims based on competition law infringements. Civil disputes tend to be heard by one professional judge or - in large or complex cases - a panel of three professional judges. There is no jury.

### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any individual who has suffered damages as a result of a competition law infringement, has standing to bring an action before the Dutch civil courts. Under Article 3:305a DCC, foundations or associations with the statutory aim to serve the interests of a group of individual claimants, can bring "representative actions" and seek declaratory judgments. Claimants with parallel interests can also "bundle" their claims by electing a party to represent them in court and providing that party with specific powers of attorney.

Relatively recently, the Dutch legislator has introduced class settlements that can be approved and declared binding upon anyone within the defined settlement class who did not make use of the opportunity to "opt out".

### 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

As a general rule, Dutch courts will assume jurisdiction over claims against companies that have a registered office in the Netherlands. Under certain circumstances, Dutch courts may also assume jurisdiction over disputes that concern competition law infringements that occurred in the Netherlands or had a direct effect in the Netherlands.

### 1.7 Is the judicial process adversarial or inquisitorial?

The civil judicial process in the Netherlands is adversarial.


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## 2 Interim Remedies

### 2.1 Are interim remedies available in competition law cases?

Interim remedies are available in competition law cases.

### 2.2 What interim remedies are available and under what conditions will a court grant them?

Claimants can bring interlocutory proceedings demanding a preliminary injunction. An injunction can also be demanded in pending proceedings on the merits. Whether a court will grant an injunction depends, *inter alia*, on the likelihood that the claimant will win in the proceedings on the merits, the urgency of the case, and the interests involved.

Interim relief may also be granted by way of an order to the defendant to make an advance payment of damages pending the proceedings on the merits. However, demands for such relief are rarely granted.

A claimant may request permission from the court to levy prejudgment attachments, pending the outcome of the proceedings on the merits. Courts generally grant such a request if the creditor's claim is *prima facie* supported by evidence. Usually, the request for permission to levy a prejudgment attachment is heard in an *ex parte* hearing at which only the claimant is represented.

## 3 Final Remedies

### 3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

If it is established that the defendant's conduct constitutes an infringement of competition law, the court can issue an injunction prohibiting the continuation of that conduct. Furthermore, if a contractual agreement is found to contravene competition laws, the court can issue a judgment declaring that the agreement is null and void. In principle, such a finding entitles both parties to the contract to restitution of any payments made or of services rendered under the contract, regardless of whether the infringement was negligent.

A person whose interests have been prejudiced by an infringement of competition law may be able to claim compensation. To be successful, the claimant needs to establish that (i) the defendant is guilty of a negligent infringement of competition law; (ii) that the rule that was infringed seeks to protect the claimant's interests; (iii) that the claimant has suffered a loss; (iv) that there is a causal connection between the damage and the infringement; and (v) that the damage can reasonably be attributed to the defendant.

### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

As the burden of proving loss rests with the claimant (see the answer to question 4.2, *infra*), debates on damages tend to be shaped by the calculations submitted by the claimant. In complex competition litigation, the parties often rely on expert reports ("before-and-after" comparisons, market comparisons, regression models, etc.) It may prove difficult to show the exact level of loss that has been suffered. However, under Article 6:97 DCC the court is allowed to estimate the damages. Furthermore, under certain conditions courts may assess the damage at an amount equal to all or part of the profits the defendant made as a result of the competition law infringement (Article 6:104 DCC).

Exemplary or punitive damages are not available under Dutch law.

### 3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

When calculating the claimant's damages, the court disregards fines imposed by the competition authorities.

## 4 Evidence

### 4.1 What is the standard of proof?

To prove an allegation of fact, the court must be persuaded that the allegation is "plausible" ("*aannemelijk*"). The courts have considerable freedom in weighing the evidence.

### 4.2 Who bears the evidential burden of proof?

Each party has the burden of proving the allegations on which he relies. Generally, therefore, the claimant will have to prove all facts that are necessary to uphold his claim. The defendant has the burden of proving the facts that support the specific defences he has raised. If, for example, the defendant argues that a claim is barred by statutory limitation, he bears the burden of proving the facts that are necessary for his defence to succeed.

The court may order a party who does not bear the burden of proof to disclose information that the other party needs to discharge its burden of proof. For example, a court may consider it unreasonably difficult for a defendant to prove that an overcharge has been passed on to the claimant's downstream customers, unless he is given access to the claimant's data concerning input costs and customer pricing.

### 4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Article 152(1) Dutch Code of Civil Procedure expressly states that all forms of evidence are admissible. Expert evidence is accepted by the courts. Indeed, in the context of competition law claims the submission of expert evidence is very common.

### 4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Under Dutch law, the possibilities to obtain documentary evidence are much more limited than in some common law jurisdictions. The law of civil procedure does not include a general obligation to disclose information to the other party. However, under Article 843a Code of Civil Procedure ("DCCP") any party can file a claim seeking the disclosure of certain documentary evidence. A claim under Article 843a DCCP can be filed in separate (summary) proceedings before a district court. A claim for disclosure of documentary evidence can also be brought as a separate claim or a counterclaim in any pending proceedings on the merits.

In order for a party to obtain a court order for the production of documentary evidence, the following conditions of Article 843a DCCP need to be met:

- the party claiming the documents must have a legitimate




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interest therein;

- the claim must concern specific documentary evidence; and
- the claim must concern documents that relate to a legal relationship to which the claimant is privy.

These are cumulative conditions. Within the limits set by Article 843a DCCP, disclosure can be obtained from third parties.

### 4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Under the relevant rules of civil procedure, the court can order a witness to appear in court and testify in a civil case. A witness who refuses to testify can be taken into custody for a maximum period of one year and is liable for damages caused by his or her refusal to testify.

The hearing is before the court and the witnesses are under oath. A single judge presides over the witness hearing and puts the court's questions to the witness. There is no common law style cross-examination. Towards the end of the hearing the (attorneys for) the parties are given the opportunity to put their own questions to the witness, but it depends very much on the presiding judge how long and how vigorous this questioning can become.

Witness hearings are not recorded on audiotape or videotape. Instead, the judge takes notes of the witness's answers. At the end of the hearing, the judge makes a written summary of the testimony, which is read aloud to the witness and to the parties who are present.

### 4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Pursuant to the 2000 Decision of the ECJ in *Masterfoods*, national courts cannot take a decision running counter to a final decision by the European Commission establishing an infringement of competition law. Formally, a decision by the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*) is not binding upon the civil courts. However, in practice the courts are reluctant to deviate from the findings by the Competition Authority.

### 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

If and when the court orders disclosure of certain documentary evidence (cf. the answer to question 4.4, *supra*), it can impose an obligation of confidentiality upon the recipients of the disclosed documents. Alternatively, the court can order that the documentary evidence be deposited with the court and allow the party seeking disclosure to study the materials in person, while prohibiting the making of photocopies.

## 5 Justification / Defences

### 5.1 Is a defence of justification/public interest available?

The Dutch Competition Act must be applied in accordance with EC competition law. In as far as there is a public interest defence available in EC competition law that defence is therefore also available in Dutch competition law. The Dutch Competition Authority has accepted that undertakings do not infringe the relevant provisions of the Competition Act if a public body prescribes the relevant behaviour and the undertakings are under an obligation to comply with the instructions of the public authority. Similarly, if legislation or acts of public authorities prevent undertakings from competing, these undertakings cannot infringe the competition rules, either because they do not qualify as undertakings or because their conduct is justified on the basis of the public law framework.

### 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

While there is no authoritative case law on the availability of the "passing on" defence, the predominant view is that a claimant cannot recover overcharges that have been passed on to his/her downstream customers. The availability of the passing on defence follows from the compensatory principle on which Dutch tort law is based. This view is reinforced by the official response of the Dutch government to the European Commission's 2008 White Paper on Damages Actions, in which it was stated that the passing on defence is indeed available in the Netherlands.

## 6 Timing

### 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The general rule is that civil claims are barred after twenty years. There are however a number of important exceptions. For example, damage claims must be brought within a period of five years, counting from the date on which the claimant has become aware of his damage and of the identity of the responsible party. Regardless of the claimant's knowledge, damage claims become unenforceable twenty years after the event that caused the damage. The statutory period of limitation for an action seeking avoidance of a contract is three years.

### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Depending on the degree of urgency, claims for interim relief can be decided within a matter of days. It is almost impossible to predict the duration of proceedings on the merits. Much depends on the complexity of the case, the procedural posture of the parties and on the workload of the specific court before which the claim is brought.

## 7 Settlement

### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

If parties agree to discontinue the court proceedings, they do not need permission of the court to do so. As long as the defendant has not filed a statement of defence, the claimant is permitted to withdraw his claim unilaterally. If the claimant withdraws the claim, he has an obligation to reimburse the defendant's attorneys' fees.


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## 8 Costs

**8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?**

While in the Netherlands the "loser pays" principle applies, an award of attorneys' fees rarely covers the actual costs incurred by the winning party. The courts calculate the awards of attorneys' fees on the basis of a system of points, with points awarded for each court submission or court appearance and every point representing a fixed fee. However, in exceptional cases the court may allow a party to recover its full legal costs. These cases generally involve an abuse of procedural rights by the losing party.

**8.2 Are lawyers permitted to act on a contingency fee basis?**

Under the Rules of Conduct of the Netherlands Bar Association attorneys are not permitted to act on a contingency fee basis.

**8.3 Is third party funding of competition law claims permitted?**

There are no rules on third party funding of competition law claims.

## 9 Appeal

**9.1 Can decisions of the court be appealed?**

Judgments of the district courts may be appealed to the courts of appeal. There are five courts of appeal (*gerechtshoven*), each having jurisdiction to hear appeals against the judgments of the district courts within its own geographical district.

The Supreme Court (*Hoge Raad*) hears appeals against the judgments of the courts of appeal. The Supreme Court rules only on issues of law.

## 10 Leniency

**10.1 Is leniency offered by a national competition authority in The Netherlands? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?**

The Dutch Competition Authority has had a leniency program since 2002. A successful or unsuccessful application under this leniency program does not shield the applicant from or otherwise limit the applicant's exposure to civil claims.

**10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?**

In view of the limited possibilities under Dutch law to obtain documentary evidence (cf. the answer to question 4.4, *supra*), it is highly doubtful whether a claim for disclosure of a leniency application would succeed. In its 2008 White Paper on Damages Actions for breach of EC antitrust Rules, the European Commission urged the Member States to ensure adequate protection against disclosure of leniency applications in private actions for damages, regardless of whether or not the application for leniency is accepted. In an official reaction, the Dutch government has stated that it agrees with the Commission's view that leniency applications should be protected from discovery.




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Jeroen Kortmann (1974), a partner in Stibbe's Commercial Litigation department, acts as a defence counsel in large commercial disputes. Jeroen has gained considerable experience in cross-border litigation. Together with Christof Swaak, he heads Stibbe's integrated Antitrust Litigation Group. From 2005 to 2006, Jeroen was detached to Cravath, Swaine & Moore LLP in New York. He holds a Ph.D. from the University of Oxford and is the author of several publications, chiefly on the subject of tort law.
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## Stibbe

Stibbe has its main offices in Amsterdam and Brussels and "satellite" offices in London and New York. The firm has approximately 80 partners and more than 300 attorneys. Through its alliance with Gleiss Lutz and Herbert Smith, Stibbe can provide a global cross-border service.

Stibbe's dispute resolution department - described by Chambers Europe 2008 as a "highly respected international dispute resolution group" - frequently acts as defence counsel in antitrust litigation. To ensure the highest level of service to its clients, expert attorneys from Stibbe's dispute resolution department have teamed up with colleagues from their competition law department to form one, integrated group that specialises in defending clients against antitrust damage claims. The combined experience of the members of Stibbe's Antitrust Litigation Group is unrivalled by any competitor in the Dutch market. Currently, members of the Group are representing companies in antitrust damage disputes concerning the pharmaceutical, chemical, electro-technical and elevator industries.


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