Implementation of the EU Damages Directive in the Netherlands


With an eye to the differences in the national private enforcement regimes of the EU Member States, in 2014, the EU Parliament and the EU Council adopted Directive 2014/104/EU on antitrust damages actions (EU Damages Directive) to harmonize the private enforcement of EU competition law before national courts. The EU Damages Directive includes provisions on the disclosure of evidence, limitation periods, passing-on of overcharges, the principle of joint and several liability and the quantification of harm. Various provisions of the EU Damages Directive have not been implemented as Dutch law is already considered to be in line with it. As such, the Implementation Act does not contain any provisions in relation to the right to full compensation, the rights of indirect customers to claim damages and actions for damages by claimants from different levels in the supply chain.

The provisions of the EU Damages Directive largely correspond with the principles of liability and compensation for damages applicable under Dutch law, but the EU Damages Directive also provides a number of specific exceptions. Hereto, the Implementation Act introduces new separate sections in the Dutch Civil Code and the Dutch Code of Civil Procedure. Even though the Dutch competition damages regime was already well-established before the implementation of the EU Damages Directive, the new act certainly makes the existing legal framework more robust. The major changes are set out below.

**Presumption of harm**

In accordance with Article 17(2) of the EU Damages Directive, the Implementation Act inserts Article 6:193l into the Dutch Civil Code, which states that a cartel, which forms an infringement of competition law, is presumed to cause harm.

**Passing-on defense**

Cartelists often base their defense on the fact that direct purchasers passed the price increase on within the supply chain. The possibility to invoke this defense was acknowledged by the Netherlands Supreme Court in a landmark
decision (see our briefing note on this decision). The newly inserted Article 6:193p of the Dutch Civil Code expressly acknowledges the validity of the defense. Under the new Article 6:193q, indirect purchasers (to whom the price increase was passed on) can rely on the presumption that passing-on has occurred where

- competition law has been infringed
- the infringement has led to an overcharge for the direct purchaser of the infringer, and
- the indirect purchaser has purchased the goods or services that are the object of the infringement, or has purchased goods or services derived from or containing goods or services that were the object of an infringement.

**Liability for the harm**

With some exceptions, cartelists are jointly and severally liable for the harm caused by the infringement of competition law pursuant to the new Article 6:193m of the Dutch Civil Code.

**Other new rules**

Besides the rules mentioned above, the Implementation Act introduces Article 6:193s of the Dutch Civil Code which stipulates that the limitation period for bringing actions for damages shall be five years. Article 161a of the Dutch Code of Civil Procedure further stipulates that the irrevocable decisions of the Netherlands Authority for Consumers and Markets (ACM) have binding evidential value. New Articles 844-850 of the Code of Civil Procedure also provide further information on the possibility of gathering documents held by other parties, including competition authorities, through the Dutch courts.

**New legislative proposals**

The Implementation Act only applies to damages actions in relation to infringements of EU competition law, and infringements of Dutch competition law when applied in parallel with EU competition law. Therefore, damages actions that relate to infringements of Dutch competition law only are currently excluded from the scope. However, the Dutch legislator has indicated it will put forward a separate act for purely national competition law infringements. This act will declare the rules of the Implementation Act binding on infringements of Dutch competition law only.

On 15 November 2016, a new legislative proposal was submitted to make further amendments to the Dutch Civil Code and the Code of Civil Procedure.

In short, the proposed instrument offers an efficient and effective method for collective redress and intends to find a balance between the interests of injured parties to materialize their rights, and the interests of alleged perpetrators to be protected against unfounded and frivolous claims. If adopted, the proposal will make it easier for injured individuals to collectively sue for damages.

Currently, foundation(s) or association(s) making a claim in a Dutch collective action can only seek a declaratory judgment on whether as a general matter the defendant is liable towards the class or classes of victims that they represent. After such a declaratory judgment is made, injured individuals, either individually or jointly, may seek damages through settlement or by commencing additional proceedings on an individual basis. A settlement can be obtained through the highly innovative WCAM-legislation, under which out-of-court settlements may be certified by the Amsterdam Court of Appeal, declaring a settlement binding upon all parties represented by a representative body. The foundation(s) and association(s) themselves, however, are not eligible to seek damages under Dutch law. Upon adoption of the proposal, the current provision that prohibits a collective (monetary) claim for damages will be abolished.
The proposal also places demands on representative organisations that wish to bring a claim. If several representative organisations bring a claim alleging to represent similar interests, the Court will appoint one of these organisations to be the lead plaintiff. These requirements have been proposed to protect the interests of the alleged perpetrators. Other specifics of the proposal include an opt-out system and exclusive jurisdiction of the District Court of Amsterdam to handle such collective claims. It is as yet uncertain when the proposal will be adopted.

1This is the minimum in accordance with article 10(3) of the EU Damages Directive, which states that Member States shall ensure "that the limitation periods for bringing actions for damages are at least five years".