

# International Comparative Legal Guides



Practical cross-border insights into competition litigation

## Competition Litigation 2023

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# Netherlands

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## 1 General

### 1.1 Please identify the scope of claims that may be brought in your jurisdiction 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).

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

As a matter of European law, losses suffered as a result of an infringement of Article 101 or 102 TFEU are recoverable (see the decisions of the Court of Justice of the European Union in cases *Manfredi* (C-295/04) and *Skanska* (C-724/17)). Under 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). Participants in an infringement of Article 101 TFEU are jointly and severally liable for any damages caused by the infringement (Article 6:193m DCC, *cf.* Article 11 of Directive (EU) 2014/104).

Contracts that infringe the cartel prohibitions of Article 6 Dutch Competition Act and/or Article 101 TFEU 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 there is no authoritative case law that confirms whether that is correct. Similarly, 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 102 TFEU can be avoided or 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.

### 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 law and on national law. Articles 6 and 24 Dutch Competition Act are almost identical to Articles 101 and 102 TFEU.

### 1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no such specialist courts. The Dutch civil court system consists of three layers: the district courts; the courts of appeal; and the Supreme Court. In first instance, civil claims based on infringements of competition law can be brought before the district courts. 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.

Since 2019, claimants may furthermore bring claims based on competition law infringements in front of the Netherlands Commercial Court (“NCC”). The NCC specialises in complex commercial disputes and conducts proceedings in English. However, the NCC only has jurisdiction if the parties agree to bring their dispute there. Therefore, the NCC is expected to play a limited role in competition damages cases.

### 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? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

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, representative bodies may initiate collective proceedings to protect the common interests of a specific group and seek relief (including monetary compensation) on behalf of that group. The outcome of such collective proceedings is binding on all members of the affected group who reside in the Netherlands, unless they “opt out”. Affected class members from other jurisdictions may furthermore “opt in”. This mixed “opt-in/opt-out” style of collective proceeding was only recently implemented in Dutch procedural law, and applies to events that took place on or after 15 November 2016.

For events that took place before 15 November 2016, representative bodies can also bring collective proceedings, but they cannot claim damages in these proceedings. “Old style” collective proceedings only allow representative bodies to seek declaratory judgments (e.g. on the defendant’s liability), which can subsequently be used by individual claimants to claim monetary compensation.

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. In competition litigation cases, it is furthermore common for claimants to assign their claims to a “litigation vehicle”, which vehicle can then pursue these claims in its own name.

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

The rules of the Brussel I Regulation (Recast) and similar rules in the Dutch Code of Civil Procedure (“DCCP”) determine the international jurisdiction of Dutch courts. As a general rule, Dutch courts will assume jurisdiction over claims against companies that have a registered office in the Netherlands. 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; for example, if the infringement affected the Dutch market and the claimant has purchased a cartelised product or service on that market from one of the infringement participants.

#### 1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Netherlands is considered an attractive jurisdiction for claimants and claim organisations, as it is known for having a judiciary that over the years has built up vast expertise in competition litigation cases. Furthermore, court fees are low (compared to other jurisdictions) and, while a “loser pays” principle applies, adverse costs judgments are insignificant. Recently, a new mechanism for collective redress has been introduced that allows claims organisations to directly claim damages on behalf of an affected group (*cf.* question 1.5 *supra*), which can be assumed to further raise interest of claim organisations (and their funders).

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

The civil judicial process in the Netherlands is adversarial.

## 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 preliminary relief proceedings demanding a preliminary injunction (i.e. to refrain from continuing anti-competitive conduct). An injunction can also be demanded in pending proceedings on the merits. Whether a court will grant interim relief 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 that may be available and describe in each case the tests that 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.

A person whose interests have been prejudiced by an infringement of competition law can claim compensation. As a matter of Dutch law, the claimant needs to establish that: (i) the defendant is guilty of an infringement of competition law; (ii) the rule that was infringed seeks to protect the claimant’s interests; (iii) the claimant has suffered a loss; (iv) there is a causal connection between the damage and the infringement; and (v) 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? Are there any examples of damages being awarded by the courts in competition cases that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

As the burden of proving loss rests with the claimant (see 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 and/or any redress scheme already offered to those harmed by the infringement 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?

The parties have the burden of proving the allegations on which they rely. Generally, therefore, claimants will have to prove all facts that are necessary to uphold their 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 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Since the implementation of Directive 2014/104/EU, Dutch law provides for a rebuttable presumption that a competition law infringement causes damage (see Article 6:193l DCC). In addition, Article 6:193q DCC includes a rebuttable presumption of pass-through on which indirect purchasers may be able to rely. Neither the rebuttable presumption of harm nor the rebuttable presumption of pass-through relieve claimants from the burden of having to *quantify* the damages they are claiming.

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

Article 152(1) DCCP 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 common.

#### 4.5 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 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 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.

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

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 of 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 how long and how vigorous this questioning can become depends very much on the presiding judge.

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 the witness is then asked to review and sign.

#### 4.7 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* and Article 16 of Regulation 2003/1, national courts cannot take a decision running counter to a final decision by the European Commission establishing an infringement of competition law. A final decision by the Dutch Competition Authority (*Autoriteit Consument & Markt*) is binding upon the civil courts. However, a final decision of an authority from another EU Member State is not binding, but may be presented as *prima facie* evidence.

#### 4.8 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 4.5, *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.

#### 4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

According to Article 44a(1) DCCP and Article 15 of Regulation 2003/1, the Dutch Competition Authority and the European Commission, acting on their own initiative, may submit written observations to the civil courts on issues relating to the application of Articles 101 and 102 TFEU. With the permission of the relevant court, they may also make oral observations.

## 5 Justification / Defences

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

The Dutch Competition Act must be applied in accordance with EU competition law. In as far as there is a public interest defence available in EU 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 the relevant behaviour is imposed by a public authority 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?

The availability of the passing on defence follows from the compensatory principle on which Dutch tort law is based. In addition, since the implementation of Directive 2014/104/EU, Dutch law explicitly provides that the infringer can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law (see Article 6:193p DCC). Indirect purchasers have legal standing to sue.

### 5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

While it should technically be possible for defendants to join other cartel participants to the claim as co-defendants (on the basis of Article 118 DCCP), such joinders are rare. Instead, most defendants content themselves by filing contribution claims against other cartel participants on the basis of Article 210 DCCP. In general, such contribution claims are dealt with in parallel proceedings before the same court.

## 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?

Generally, actions for damages become time-barred five years from the day the claimant became aware of the damage and of the identity of the responsible party (the “short-stop”), or 20 years after occurrence of the damage (the “long-stop”), whichever occurs first (see Article 3:310 DCC). Since the implementation of Directive 2014/104/EU, Article 6:193s DCC provides that a claim for compensation arising from an infringement of competition law becomes time-barred five years after the infringement of competition law ceased and the injured party knows, or may reasonably be expected to know, of the infringement, the loss sustained by him from it, and the identity of the person responsible for it. In any event, the claim becomes time-barred 20 years after the infringement ceased.

### 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 full 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. In practice, complex cartel damages cases in which damages are pursued for large groups of claimants tend to take multiple years.

## 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.

### 7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

The new regime for collective proceedings (*cf.* question 1.5 *supra*) stipulates that once the court has decided that the claim organisation has standing and has defined the affected group, the claim organisation and the defendant are given the opportunity to engage in settlement negotiations. If the parties subsequently reach a settlement, they must submit that settlement to the court for approval. The court may refuse approval if it finds that the terms of the settlement are not “reasonable”, or if certain formalities have not been fulfilled. If the court does approve the settlement, it will become binding on all members of the affected group that have opted in (if they reside outside of the Netherlands) or have not opted out (if they reside in the Netherlands). After approval, class members are given a final opportunity to opt out of the settlement.

Dutch procedural law furthermore enables claim organisations and defendants to jointly submit any collective settlement to the Court of Appeal in Amsterdam for approval. This (separate) proceeding can be utilised even if the parties were not previously involved in any litigation (or initially submitted their dispute to the courts of another jurisdiction). The Court of Appeal in Amsterdam has authority to declare the collective settlement binding on all members of the affected group. Members of the affected group that do not wish to be bound by the settlement may opt out.

## 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 in principle not permitted to act on a contingency fee basis.

### 8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no rules on third-party funding of competition law claims, and third-party funding of competition law claims has not yet been fully tested by the civil courts. So far, the option of third-party funding is often used in cases where many parties have been affected by the (alleged) infringement of competition law. It frequently concerns cases in which third-party funders finance commercial litigation vehicles that claim damages on behalf of parties that have assigned their claims to these claim vehicles. In addition, third-party funding is used in collective actions based on the Act on the Settlement of Mass Damages Claims in Collective Actions (“WAMCA”).

## 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 their geographical district.

The Dutch 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 your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Dutch Competition Authority has a leniency programme that is largely similar to that of the European Commission. A successful or unsuccessful application for leniency does not shield the applicant from civil damages claims, but a successful application may limit the applicant's liability. A party that has received immunity under a leniency programme is only liable for the damages suffered by its own direct or indirect purchasers or providers, unless the claimants cannot obtain full compensation of their damages from the other undertakings that were involved in the infringement of competition law (see Article 6:193m(4) DCC and Article 11(4) of Directive 2014/104/EU).

### 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?

Dutch courts are not allowed to order the disclosure of leniency statements (see Article 844(1) DCCP and Article 6(a) of Directive 2014/104/EU).

## 11 Anticipated Reforms

### 11.1 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The Directive has been implemented in Articles 6:193k–6:193t DCC and Articles 44a, 161a and 844–850 DCCP. So far, the Directive has not yet been directly applied by the Dutch courts, because no judgments on the merits have been rendered in cases that were initiated after the provisions implementing the Directive entered into force/were applicable.

However, in some cases where the Directive was not temporally applicable, the courts ruled that Dutch law should – taking into consideration the principles of equivalence and effectiveness – be interpreted in such a way that it leads to an outcome that is compatible with the Directive and the Dutch implementation legislation.

### 11.2 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

The provisions of the Directive on disclosure of evidence and the effect of national decisions (implemented in Articles 44a, 161a and 844–850 DCCP), and the provision with regard to the suspension of the proceedings if the parties are involved in consensual dispute resolution (implemented in Article 6:193r DCC) are, according to the Dutch implementation legislation, already applicable to civil proceedings that were brought after 26 December 2014. Dutch implementation legislation does not contain a provision determining as of when the other provisions implementing the Directive (e.g. on joint and several liability or passing on) are applicable. In Dutch legal literature, it is assumed that these provisions – implementing the substantive provisions of the Directive – are only applicable to infringements of competition law that took place after the implementation legislation entered into force on 10 February 2017.

### 11.3 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No, there are no significant other proposed reforms relating to competition litigation.



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Private Equity  
Product Liability  
Project Finance  
Public Investment Funds  
Public Procurement  
Real Estate  
Renewable Energy  
Restructuring & Insolvency  
Sanctions  
Securitisation  
Shipping Law  
Technology Sourcing  
Telecoms, Media & Internet  
Trade Marks  
Vertical Agreements and Dominant Firms