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FIDE 2016 Questionnaire

Private Enforcement and Collective Redress in European Competition Law

The Netherlands

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Introduction

The responses to this questionnaire were prepared be the rapporteurs in close collaboration with a working group consisting of members of the Nederlandse Vereniging voor Europees Recht (NVER). Amongst the members of this working group – Elsbeth Beumer, Rick Cornelissen, Albert Knigge, Marc Kuijper, Pieter van Osch, Erik-Jan Zippro and Clio Zois – are representatives of the Dutch bar (acting both for plaintiffs and for defendants), as well as of Dutch academia. While the aim is to echo the consensus within the working group, the rapporteurs assume sole responsibility for the responses to the questionnaire.

I. General Questions on Private Enforcement of Antitrust Law:

Q1: Did the *judgments of the ECJ* in the cases "*Courage*" (C-453/99) and "*Manfredi*" (C-295/04) produce effects on the private enforcement of European antitrust law (Article 101 and 102 TFEU) in your national legal order? If this is the case, please specify the effects? Had the principles of equivalence and effectiveness an impact on these effects? While it is difficult to identify the precise effects of these judgments and principles, occasionally rulings issued by Dutch civil courts do contain references to the principles enunciated in *Courage* and *Manfredi*. A prime example is a 2013 decision in the case of *CDC Project 14 v. Shell et al,* in which the District Court of the Hague rejected a request to stay the proceedings for the duration of ongoing appeal proceedings against the Commission decision on *candle wax*.[1] The court held that staying the civil proceedings would undermine the principle of effectiveness.[2] Dutch civil courts have also referred to the Directive on antitrust damage actions. In a 2014 decision in the case of *TenneT v. ABB*, the Court of Appeal of Arnhem-Leeuwarden referred to the draft Directive to substantiate its view on the passing-on defense.[3] Again, in two 2015 decisions in the cases of *Equilib v. KLM et al* and *Stichting Cartel Compensation v. KLM and others*, the Amsterdam District Court noted that the Directive offers relevant insights on the issue of document disclosure.[4]

Which law is regarded as the legal basis for claims in your country: Union law and/or national law – contract law and/or tort law or the law of unjust enrichment? In line with the recent ruling of the Court of Justice in *CDC v. AkzoNobel and others*,[5] Dutch civil courts apply the national law of obligations as the legal basis for antitrust damages claims.[6] If Dutch

[1] District Court Den Haag 1 May 2013, C/09/414499 / HA ZA 12-293 (*CDC v. Shell et al*), paragraph 4.27.
[2] Other examples include Dutch Supreme Court 20 September 2013, 12/04752, ECLI:NL:HR:2013:2123 (*BP v. Benschop*), paragraph 2.46; Supreme Court 7 January 2011, 09/00928 (*X3 BV v. Staat*) and Supreme Court 7 January 2011, 09/00618 (*X2 BV v. Staat*), paragraphs 7.3-5; and Supreme Court 7 December 2012, 11/02221 (*Commerz v. Havenbedrijf Rotterdam*), paragraph 2.52.
[3] Court of Appeal Arnhem-Leeuwarden 2 September 2014, 200.126.185 (*ABB v. TenneT*), paragraphs 3.26-7.
[4] District Court Amsterdam 25 March 2015 C/13/486440 (*Equilib v. KLM et al*), paragraph 4.11 and District Court Amsterdam 25 March 2015 C/13/562256 / HA ZA 14-348 (*CDC v. KLM et al*), paragraph 4.11.
[5] European Court of Justice 21 May 2015, Case C-352/13 (*CDC v. Akzo Nobel et al*).
[6] See District Court Den Haag 17 December 2014, C/09/414499 / HA ZA 12-293 (*CDC v. Shell et al*), paragraph 4.33-4.58.

law governs the claims, the legal basis can be found in the provisions on both contract law and tort law, as well as unjust enrichment.

Q2: For which *types of claims* are private enforcement actions of antitrust law available and used in practice in your country? What kinds of instruments/remedies (such as nullity of contracts, injunctive relief, compensation, forfeiture of profits) are available in private actions and to whom are they available? Available remedies include nullity and compensation for loss suffered. Forfeiture of profits and punitive damages are not generally available under Dutch law. In case of a realistic threat of anticompetitive conduct, injunctive relief can be granted in interim proceedings (Articles 254 and 223 Dutch Code of Civil Procedure ("**DCCP**")).

Q3: *How frequent* are, if applicable, (a) claims concerning alleged nullity of contracts because of alleged infringement of antitrust law?, (b) claims for injunctive relief in antitrust law?, (c) claims for compensation of damages? (d) claims concerning forfeiture of profits? Both Articles 101 and 102 TFEU and their Dutch law equivalents Articles 6 and 24 of the Dutch Competition Act ("**DCA**") are fairly frequently invoked before the Dutch civil courts. In 2014, approximately 37 civil court decisions were published in which the cartel prohibition and/or the prohibition on abuse of dominance were invoked.

There is significant overlap between claims of type (a) and (b). A large number of cases involves nullity claims in the context of contractual exclusivity or non-compete clauses. Almost half of all cases involve claims for injunctive relief. When the cartel prohibition of Articles 6 DCA and 101 TFEU is invoked in injunctive relief proceedings, this happens mostly in the context of public tender procedures. Articles 24 and 102 TFEU appear to be less suited for interim relief proceedings, mainly because of the high burden of proof on claimants and the resulting need for (costly and time consuming) economic substantiation of the theory of harm in dominance cases.

A significant number of cases concerned some claim for damages (21 of the published cases), with four following-on from a prior decision by a competition authority.

The Netherlands is a very popular jurisdiction for private damages claims (See Q4). In all of the cases of which we are aware, the claimants are seeking compensation for loss (allegedly) suffered. Forfeiture of profits is not available as a separate remedy in Dutch tort law. However, in the context of the court's discretionary authority to estimate the damages, Article 6:104 Dutch Civil Code ("DCC") provides that the extra profits made by the tortfeasor may serve as a "proxy" for the loss suffered by the claimant. We know of no example of an antitrust damages case in which that provision has been applied.

Are there any problems concerning these types of litigation in your country? If so, how could they be overcome? Do you see significant problems for claims of type (a) (b) and (d) concerning infringements of Articles 101 and 102 TFEU under the aspect of the principles of equivalence and effectiveness? Where it concerns actions for damages

following on from a public finding of an antitrust infringement ("follow-on actions"), there do not appear to be significant problems with which claimants in the Netherlands are faced. In the absence of such a public finding, however, claimants seem to have difficulty in proving a competition law infringement (whether it be in an action for damages, for an interim injunction, or for nullity). More often than not, claimants fail to substantiate their claim. Furthermore, it is our impression that lower courts sometimes struggle to apply complex competition law concepts to the facts of the case.

Q4: Are *stand-alone actions* legally possible and used in practice in your jurisdiction? Have there been any *follow-on actions* based on infringement decisions of the European Commission or the National Competition Authority? If this is the case, please provide a brief overview of the relevant cases. Stand-alone actions are legally possible and occur occasionally. Examples are a litigation concerning anticompetitive conduct by the association of distributors of electro-technical supplies,[7] a case of alleged abuse of dominance by the International Air Transport Association,[8] and a claim by taxi drivers regarding excessive pricing of the required documentation.[9]

Over the past decade, many follow-on cases have been filed in the Netherlands. Several of those cases have resulted in one or more court decisions (most of which concern procedural issues): the road construction infringement,[10] the bitumen infringement,[11] the gas insulated switchgear infringement,[12] the (alleged) air cargo infringement,[13] the paraffin wax infringement,[14] the elevator and escalator infringement,[15] the hydrogen peroxide infringement,[16] and the pre-stressing steel infringement.[17] Also pending are cases relating to

[7] District Court Rotterdam 7 March 2007, 243213 / HA ZA 05-2163 (*BC X v. Y*) and District Court 's-Gravenhage 8 April 2008, C06/1042 (*CEF v. Bernard et al*).
[8] Dutch Supreme Court 21 December 2012, NJB 2013,143, RCR 2013,17, LJN BX0345 (*ANVR et al v. IATA-NL*).
[9] District Court Den Haag 4 March 2015, C-09-454521 – HA ZA 13-1279 (*Stichting SDU Gedupeerden v. Bestax*).
[10] District Court Den Haag, 19 May 2004, 03/3021 (*Zuiveringsschap Hollandse Eilanden en Waarden v. Aannemers*).
[11] District Court Rotterdam 9 February 2011, 337005 / HA ZA 09-2311 (*MNO v. Shell*).
[12] See e.g. Court of Appeal Arnhem-Leeuwarden 2 September 2014, 200.126.185 (*ABB v. TenneT*), District Court Oost-Nederland 16 January 2013, 208812 (*TenneT v. ABB*) and District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*).
[13] See e.g. District Court Amsterdam 6 April 2011 486440 - HA ZA 11-944 (*Equilib v. KLM et al*); Court of Appeal Amsterdam 29 November 2011, 200.094.931/01 (*KLM et al v. Equilib et al*); District Court Amsterdam 7 March 2012, 486440 - HA ZA 11-944 (*Equilib v. KLM et al*); District Court Amsterdam 7 January 2015, C-13-561169 - HA ZA 14-283 (*Equilib v. British Airways and Lufthansa*); District Court Amsterdam 25 March 2015, C/13/486440 / HA ZA 11-944 (*Equilib v. KLM et al*) and Court of Appeal Amsterdam 7 January 2014, 200.122.098/01 (*East West Debt v. KLM et al*).
[14] See e.g. District Court Den Haag 17 December 2014, C/09/414499 / HA ZA 12-293 (*CDC v. Shell et al*).
[15] See e.g. District Court Rotterdam 17 July 2013 C/10/390424 / HA ZA 11-2071 (*Stichting Elevator Cartel Claim v. Kone et al*), District Court Midden-Nederland 27 November 2013, C-16-338073 - HA ZA 13-117 (*East West Debt v. UTC et al*).
[16] District Court Amsterdam 4 June 2014, C/13/500953 / HA ZA 11-2560 (*CDC v. Akzo et al*).
[17] District Court Limburg 25 February 2015, C/03/190094 / HA ZA 14-204 (*Deutsche Bahn v. Nedri et al*).

the beer infringement and the cathode ray tube infringement, but as far as we are aware, these cases have not yet resulted in court decisions.

Q5: Is it possible that the *level of legal costs and/or fees* in your country may deter potential claimants from bringing meritorious private enforcement claims in competition law? If so, what measures could alleviate the problem? Do possibilities exist to deviate from the general rules of legal costs and/or fees? We do not consider it likely that the level of legal costs deters claimants from bringing private enforcement claims in the Netherlands. Legal costs in the Netherlands consist of the cost of instructing a bailiff to serve the writ of summons, court registry fees and attorneys' fees. Court registry fees at the court of first instance amount to € 613 for claims of which the value has not been particularised (including collective actions claims pursuant to Article 3:305a DCC), €1,909 for claims up to €100,000 and €3,864 for claims over €100,000 (fees in 2015).

While the "loser pays"-rule applies, in practice the compensation for legal representation is fixed at only a fraction of its actual cost. The fee awards are determined based on the number and type of procedural actions, which are categorized using a standardised point system. If the claim exceeds €1 million, no maximum is set on the number of points. The fee per point, however, is very limited, ranging from €452 for claims with a value below €10,000 to €3,211 for claims with a value exceeding €1 million. In practice, it is very unusual for adverse cost awards to exceed €30,000 (even in very large, multi-party litigation).

The court has the discretion to apportion the costs differently between parties, when both parties have decisions going against them on certain aspects of the case (Article 237 DCCP).

Q6: Is *funding* for private enforcement litigation reasonably available in your country? What are the most common forms of funding? Do third-party funding and/or contingency fees play a substantial role? Are there any regulations/restrictions of those forms of funding in your country? Are there any specific rules applicable to collective actions under this aspect? Litigation funding is entirely unregulated in the Netherlands, whether it be in the context of individual litigation or collective redress. Anecdotal evidence suggests that occasionally large, individual claimants may rely on external funding for their antitrust damages litigation. In the context of collective redress, there is more concrete evidence of external funding. The most popular model in the Netherlands involves the assignment of individual claims to a 'claim vehicle', with a deferred purchase price that is expressed as a percentage of the damages that are ultimately received under a judgment or settlement. Some of these claim vehicles – for example the claim vehicles created by *CDC Cartel Damage Claims* – are known to receive further funding from external litigation funders.[18]

Regarding contingency fees see Q35.

[18] See for example http://www.calunius.com/media/6432/121004%20press%20release%20cdc_calunius_final.pdf.

Q7: Are there in your country adequate ways through which victims, in particular consumers and small and medium enterprises (SMEs), can in practice obtain *information* about competition infringements and the possibilities of taking legal action, including damages claims? If not, how could the situation be improved? The most likely way in which consumers and SMEs will obtain information about infringements and the possibility of taking legal action is through the press releases of the competition authorities (and the ensuing media attention). Also, commercial claim vehicles that are active in the Dutch market have an interest in advertising the possibility of bringing damage claims to the individual victims of anticompetitive conduct. However, currently most of the attention of claim vehicles is focused on larger claims. Small claims, in particular consumer claims, are targeted by only a few parties (most notably an entity by the name of ConsumentenClaim).

This situation may change with the forthcoming introduction of a new collective redress regime that would allow representative entities to bring damages claims on behalf of a 'class' of (alleged) victims of wrongful conduct, on an 'opt-out' basis (see Q34).

Do rules applicable to limitation periods for bringing actions for damages take into consideration the date of knowledge of the victim concerning the infringement, the harm caused by it and the identity of the infringer? 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 twenty years after occurrence of the damage (the 'long-stop'), whichever occurs first (see Article 3:310 DCC). However, if the existence of a claim has remained undiscovered as a result of the conduct of the debtor(s), the applicable limitation periods are extended until half a year after the existence of the claim has become public (Article 3:321(f) DCC).

Furthermore, claimants can interrupt the limitation periods relatively easily, by sending the defendant a written notice in which the claimant unequivocally reserves his or her right to claim damages (Article 3:317 DCC).

Will Art. 10 (2) Directive 2014/104/EU affect the current practice? If so, in which way? Article 10(2) of the Directive will require some changes to the Dutch rules on limitation, but it is not entirely clear to what extent. Under our current rules, it is conceivable that a claim becomes time-barred before the proceedings before the competition authorities have been concluded and have resulted in a final decision.[19] Presumably, these rules will have to be amended to ensure that a claimant is always given an additional period of one year to claim damages after the decision of the competition authority has become final. The rules on the starting moment of the five year limitation period will also require some amendment, to account for the rule that limitation periods cannot commence until after the infringement has ceased.

[19] District Court Rotterdam 7 March 2007, 243213 / HA ZA 05-2163, ECLI:NL:RBROT:2007:BA0926 (*CEF City Electrical Factors v. Bestuurders FEG*).

We are not sure to what extent the Directive also affects the 'long-stop' limitation period of twenty years. Under our current laws, the twenty-year period commences at the moment the loss is suffered (which, in cartel cases, is likely to be every time a customer 'overpays' for the cartelized product). Arguably, the Directive requires that even this twenty-year period cannot commence until after the infringement has ceased. From a draft proposal of law that was submitted for public consultation on 8 October 2015 we infer that the Dutch government is indeed of that view.[20]

Q8: *What courts* are empowered to hear private enforcement cases of antitrust law in your jurisdiction? Are these general courts, or is there a specialization or exclusive competence to hear such cases? Is the system (specialisation/no specialisation) chosen in your country considered to work well for private enforcement cases? What, if any, aspects of the system should be changed to ensure a more effective administration of justice in this field? Are courts equipped with sufficient *case-management powers* in general and in collective actions? If so, in what way do judges make use of such powers and to what extent does case management contribute to an effective and efficient handling of a case? There are no specialized courts in the Netherlands for antitrust damages litigation. The court empowered to hear private enforcement cases is, in first instance, the competent District Court (civil chamber). An exception concerns requests for approval of collective settlements under the Dutch Collective Settlements Act 2005 ("**WCAM**", See Q28). The Amsterdam Court of Appeal has exclusive jurisdiction to hear such requests and declare a collective settlement binding.

Q9: Do you think that *judges* in your country are sufficiently equipped and trained to deal with such private enforcement litigation? If not, what measures could improve the situation? The experience with private antitrust litigation differs from court to court (and indeed from judge to judge). Over the past decade, some courts have developed certain specializations. The District Court of Rotterdam now has a competition chamber. Thus far, no court has developed a specialisation specifically for private antitrust litigation. However, we feel that the Dutch courts are reasonably well equipped to deal with such litigation.

Arguably, the most significant problem is the general workload in our civil courts. Some courts are faced with a serious backlog of cases and, as a result, appear to have difficulty managing large cross-border antitrust damages litigation effectively. Perhaps some of these problems can be alleviated if the courts take a more proactive approach with regard to the management of cases (as the Amsterdam District Court has been doing in recent years).

Q10: Is the *average duration* of the court proceedings in private enforcement cases reasonable in your country? If not, what are the main causes of delays and how should these be overcome? In 2014, the average duration of civil commercial proceedings in courts

[20] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193t DCC (available at www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht).

of first instance in the Netherlands – not counting cases in which no defence was filed – was 63 weeks. On appeal, civil cases concerning commercial matters took on average 53 weeks in 2014.[21]

So far, the only large antitrust damages claim that was brought before a Dutch court and resulted in an actual award of damages, concerned the Gas Insulated Switchgear infringement.[22] With a total duration of nearly five years, these follow-on proceedings took significantly longer than average (and an appeal is still to follow). Based on their current status, other large antitrust damages cases that are pending before the Dutch courts are also expected to take five years or longer.

The relatively long duration may be due to the fact that most of these cases concern multi-party, cross-border litigation. More often than not in such cases, the (alleged) claims must be adjudicated under several foreign systems of law.

Going forward, the application of the rules of the Rome II Regulation may reduce the number of cases in which private antitrust damages cases have to be adjudicated under different legal systems (cf. Article 6(3)(b) Rome II Regulation). Furthermore, antitrust damages litigation is still an area of law that raises many novel issues of law. In our view, the expectation is justified that within a few years the average duration of antitrust damages cases in the Netherlands will be considerably shorter than it is now.

In which way does the principle of expedient procedures for claims for injunctive orders (principle 19 of Recommendation 2013/396/EU on collective redress) affect the current law and practice? We consider it unlikely that the principle of expedient procedures for claims for injunctive orders will affect the current law and practice in the Netherlands.

By-and-large, the Dutch system is already in accordance with this principle. If the claimant has a pressing interest in receiving immediate injunctive relief, such relief can be granted in interim relief proceedings (Articles 254 and 256 DCCP). In 2014, the average duration of interim relief proceedings in commercial matters was 6 weeks.[23] Although there are some instances where the court considered the required competition law assessments to be too complicated for interim relief proceedings,[24] there are ample examples of cases in which the courts have granted injunctive relief and ordered the immediate cessation of anticompetitive conduct.[25]

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[21] Annual report of the judiciary, *De Rechtspraak: Jaarverslag Rechtspraak* 2014, page 61, table 19.
[22] District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*).
[23] Annual report of the judiciary, *De Rechtspraak: Jaarverslag Rechtspraak* 2014, page 61, table 19.
[24] Mainly concerning abuse of dominance cases in which a further economic investigation into the relevant market is required for which preliminary relief proceedings are not appropriate. See for example Court in preliminary relief proceedings 29 July 2011, 232032 – KG ZA 11-414 (*Nestlé v. Mars*).
[25] See for example Court in preliminary relief proceedings 10 February 2005, 121916 KG ZA 05-39 (*Albert Heijn v. Peijnenburg*), and Court in preliminary relief proceedings 3 December 2009, 437668 / KG ZA 09-1941 (*Claimants v. Kia*).

II. Questions on Liability for Damages: Parties, Quantification, Passing-On Defence, Causality, Culpability, Joint and Several Liability

Q11: Is *any natural or legal person*, including indirect purchasers and co-infringers, who has suffered *harm* caused by an infringement of competition law able to claim and to obtain *full compensation* for that harm in your legal order? Will Article 3 (1) and Article 12 (1) of Directive 2014/104/EU require basic changes? The predominant view in the Netherlands is that a European competition law infringement will result in an obligation to compensate anyone who suffers loss as a result of that infringement, including indirect purchasers. Most authors infer from the *Manfredi* decision of the European Court of Justice that, as a matter of European law, indirect purchasers have standing to sue for antitrust damages.[26] In *Manfredi*, the Court ruled that the full effectiveness of the European cartel prohibition would be at risk if it were not "*open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*".[27] The fact that the Court used the phrase "*any individual*" is seen as confirmation that anyone who suffered harm is entitled to damages, regardless whether they are direct or indirect purchasers. This view is further reinforced by the 5 June 2014 decision in *Kone et al v. ÖBB Infrastruktur*.[28] The view that indirect purchasers who can prove that they have suffered a loss are entitled to damages, also draws support from both the European Commission and the Dutch government.[29] Against that background, it is not surprising that the Dutch legislator does not see any need to implement Articles 3(1) and or 12(1) of the Directive.[30]

Q12: Who is considered as *infringer* of competition law for the purpose of liability for the compensation of damages in your national legal order? Can the parent company be held liable for the infringement of competition law committed by a subsidiary? While there is no authoritative case law on this issue, in our view the parent company's joint and several liability in competition law does not translate automatically into civil liability. We

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[26] See for example Oosterhuis, Respect voor deze Rechter!, *Nederlands Tijdschrift voor Europees Recht* 2007/3, p. 37; Van Leuken, Zo. Nu eerst een … passing-on verweer?, *Weekblad voor Privaat- en Notarieel Recht* 2007/6734, p. 1029 and Hartkamp, Ontwikkelingen: Het EU-recht en het algemene deel van het privaatrecht (2012), *Weekblad voor Privaat- en Notarieel Recht* 2013/6991, p. 840.

[27] European Court of Justice, 3 July 2006, Joined Cases C-295-298/04 (*Manfredi*), [2006] ECR I-6619 at paragraph 94.

[28] European Court of Justice, Case C-557/12, 5 June 2014, *Kone AG et al v. ÖBB Infrastruktur* AG, at paragraph 33.

[29] European Commission, White Paper on Damages Actions for Breach of EC Antitrust Rules, COM(2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html (date of last access: 7 October 2015), p. 4 and The Dutch Ministries of Economic Affairs and Justice, The Netherlands' response to the White Paper on damages actions for the breach of the EC antitrust rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/nether_en.pdf (date of last access: 7 October 2015), p. 4.

[30] The draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht* of 8 October 2015 includes a table that connects each of the provisions of the Directive with the relevant provision(s) in the draft proposal of law. In those instances in which the Dutch legislator sees no need to implement the provision, the table specifically states: "*behoeven geen implementatie*" (available at www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht).

draw support for this view from Advocate-General Bot, who in *Bolloré et al v. Commission* opined that if a Commission decision gives rise to civil liability of the addressees, "*it is only because they have been found to have participated in the collective conduct that has been collectively penalised and correctly defined*".[31] It is thus the participation in the infringing conduct itself that gives rise to the liability for damages.

Likewise, in a Dutch Supreme Court case between ANVR and the Dutch branch of IATA, Advocate-General Keus recognized that in the context of public enforcement under certain conditions the conduct of a infringing subsidiary can be attributed to a parent company. He questioned, however, whether the relatively broad rules of attribution in competition law can also be applied in a private law context. The Advocate-General pointed out that if the doctrine of parental liability – as developed by the ECJ in decisions like *Akzo Nobel NV v. Commission* (Case C-97/08) – were applied without reservation in a private law context, this would undermine the existing case law on the issue of 'piercing the corporate veil'.[32] Therefore, in antitrust damage cases – like in any other area of Dutch tort law – a mere finding of control over a subsidiary that acted wrongfully is probably not sufficient to extend liability to the parent company.

The reverse question whether a subsidiary that was not implicated in a cartel investigation is liable because it followed the pricing policies set by a parent company that was found to have participated in a competition law infringement, was addressed in the Gas Insulated Switchgear case between the Dutch electricity company TenneT and three entities of the ABB-group. In that case, the District Court for the Eastern Netherlands held that the mere fact that, in competition law terms, subsidiary ABB BV was part of the same 'single economic unit' as its parent ABB Ltd – which had been involved in an infringement – was insufficient to render the subsidiary liable for damages. An entity within a group of companies is liable for cartel damages only if that entity *itself* was guilty of wrongdoing. However, the District Court went on to hold that such wrongdoing exists if the subsidiary was (generally) aware of the infringement and therefore knew or should have known that it was being used as an instrument for the implementation of a cartel agreement. Based on the specific facts of the case and the defendants' procedural posture during the court hearing, the court found that ABB BV did in fact have knowledge of the infringement and was therefore liable vis-a-vis TenneT.[33] On appeal, the Court of Appeal of Arnhem-Leeuwarden confirmed the District Court's finding that both ABB Ltd and its subsidiary ABB BV are liable vis-à-vis TenneT. While the precise legal basis on which the Court of Appeal found ABB BV liable is

[31] Opinion of Advocate General Bot of 2 April 2009 – C-327/07 P, BeckRS 2009, 70397 para. 123-126.
[32] Opinion of Attorney General Keus, Hoge Raad, 21 December 2012 – LJN BX0345, RvdW 2013, 83 – *ANVR et al v. IATA* (Netherlands), para. 3.12. See also Olaerts, Perikelen in concernverhoudingen, *Tijdschrift voor Ondernemingsbestuur* 2011/1, p. 9, , S.J.J.J. Kortmann, "Toerekening van externe (rechts)handelingen aan de rechtspersoon" in Van Solinge, Van Olffen, Nieuwe Weme and Bulten, Relativering van Rechtspersoonlijkheid (2012), pp. 67-76 at p. 75; and Braet, Kartelschade In Nederland; een eerste aanzet, *Nederlands Tijdschrift voor Europees Recht* 2013/9, p. 321.
[33] District Court East-Netherlands, 16 January 2013, LJN BZ0403, JOR 2013/129 with case comment Katan – (*TenneT v. ABB* et al), para. 4.10-4.15.

somewhat unclear, the Court specifically considered that it had *not* employed the competition law concept of the 'single economic unit' to arrive at its finding of liability.[34] The case is currently pending before the Supreme Court of the Netherlands.

Q13: How is "*damage*" defined in the general private law in your country? Do differences exist in the definition of "damage" in damage claims in antitrust law? Which form of compensation can be awarded for damages caused by the *passing of time* since the emergence of the original harm? Damages are awarded on the basis of the actual harm suffered by the claimant (Articles 6:95 and 6:109 DCC), to the extent that the harm can reasonably be attributed to the wrongful conduct of the defendant(s) (Article 6:98 DCC). The basic principle is that the damages should put the claimant in the same financial position as he or she would have been absent the illegal behaviour ('*restitutio in integrum*'). There are no separate rules or principles for the assessment of damages in antitrust cases.

To compensate for loss suffered by the passing of time, claimants are entitled to statutory interest – compounded on an annual basis – on the loss initially suffered. Interest accrues automatically from the day the loss was suffered until the day the damages have been paid (Article 6:119 DCC). The percentage is determined by governmental decree and is currently fixed at 2% (in the fall of 2015). [35]

What types of damages/interest (in particular: damnum emergens, lucrum cessans) can be awarded following a successful claim? An injured party can claim actual losses suffered and lost profits, as well as the reasonable costs incurred to prevent or reduce the loss suffered, to determine the amount of damages and/or to obtain compensation out of court (Article 6:96 DCC). A profit the claimant has enjoyed as a consequence of the wrongful conduct will be deducted from the damages, insofar as this is reasonable (Article 6:100 DCC).

Can *punitive* damages be imposed? If so, is the principle of "ne bis in idem" applied if the competition authority has already fined the infringer? Punitive damages are not available under Dutch law. Public fines are not a relevant factor in determining the amount of the damages. Still, Article 6:109 DCC gives the court a discretionary power to mitigate the damages if a full award would lead to inequitable results.

Will Article 3 (2) and (3) of Directive 2014/104/EU affect the current practice? The Dutch rules on damages quantification appear to be compatible with the Directive and, in our view, should not affect current practice before the Dutch courts. Our only hesitation concerns the decision of the District Court Gelderland in the case *TenneT v Alstom*. There, the Court adopted a very narrow interpretation of the passing-on defence and held that it is not unreasonable that TenneT be 'in a sense overcompensated'.[36] That holding would appear to be

[34] Court of Appeal Arnhem-Leeuwarden, 2 September 2014, 200.126.185, JOR 2014/1265 with case comment Katan & Kortmann (*TenneT v. ABB* et al), paragraphs 3.16-18.
[35] Besluit wettelijke rente, Stb. 2014, 491, 4 December 2014.
[36] District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*), paragraph 2.31.

in direct conflict with Article 3(3) of the Directive. However, the decision of the District Court is unlikely to be upheld on appeal (see also Q. 18, below). Therefore, it is understandable that the Dutch legislator does not see a need to implement Article 3 of the Directive.[37]

Q14: What is the *level of proof* normally required from the claimant in regard to damages? Do differences exist to damage claims in antitrust law? To prove an allegation of fact in civil proceedings, the claimant must show the court that the allegation is 'plausible' ('*aannemelijk*'). However, the courts have a broad discretion to estimate the damages (Article 6:97 DCC). This is no different for damage claims in antitrust law. Indeed, there are instances of Dutch courts employing their discretionary power to estimate the damages, in circumstances in which claimants appeared to have difficulty proving the levels of loss they (allegedly) suffered. [38]

Q15: What are the established or most frequently used approaches or methods to *quantify damages* in your country in general and in damage claims in antitrust law in particular (such as comparator-based methods with regression analysis, simulation methods, cost-based methods, finance-based methods)? In the context of antitrust damages litigation, litigants usually submit expert reports that employ the type of methods and models that are described in the European Commission's Practical Guide on Quantifying Harm.[39] Thus far, it appears that 'before-and-after' comparisons and regression analyses are most commonly relied on.

Is the Practical Guide of the European Commission for quantifying harm in antitrust damage actions (SWD(2013) 205) consulted and helpful in the practice? Is the principle of proportionality of the costs of the applied methods to the damage claimed taken into account? In certain cases, the court referred to the Practical Guide in the context of damage quantification. In a recent case, the District Court of Amsterdam noted that the Practical Guide could provide relevant insights for the analysis of the actual price and the 'but-for price'.[40]

Q16: Could you indicate whether, and to what extent, the possibility exists for national courts to *estimate* (as opposed to calculate precisely) the harm suffered in tort cases? The

[37] Draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht* of 8 October 2015, p. 26.
[38] See e.g. and Court of Appeal Amsterdam, 26 June 2012, ECLI:NL:GHAMS:2012:BX0258 (Benschop v. BP), paragraph 2.38 and District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (TenneT v. Alstom), paragraph 2.12.
[39] Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 11 June 2013, SWD(2013) 205 (available through http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html).
[40] District Court Amsterdam 25 March 2015, C/13/486440 / HA ZA 11-944 (*Equilib v. KLM et al*), paragraph 4.14. See also District Court Amsterdam 25 March 2015, C/13/562256 / HA ZA 13-348 (*SCC v. KLM et al*), paragraph 4.12.

court may estimate the amount of damages if it cannot be determined with precision (Article 6:97 DCC).[41]

Q17: To what extent are the rules of Article 17 of Directive 2014/104/EU on quantification, power of estimation, and the rebuttable presumption of cartel harm likely to *change* the existing practice in your country and to *make a difference* for parties to damages actions? Dutch law is already in line with Article 17(1) Directive and our legislator – rightly in our view – sees no need to implement that provision. By contrast, Article 17(2) – introducing a presumption of harm – and 17(3) – ensuring that a national competition authority will have a procedural avenue to render its assistance in damages litigation when it comes to the determination of the quantum of damages – will require implementation into Dutch law.[42] Yet, we doubt whether in practice the rules of Article 17 of the Directive will have much impact.

The rebuttable presumption of harm does nothing to relieve claimants from the burden of having to *quantify* the damages they are claiming. In this context, it is worth noting that in a 2004 arbitral decision, the Dutch Arbitral Tribunal for the Construction Industry rejected an allegation that it is "generally accepted" that cartels "inflate prices by 5% to 10%" and dismissed the claim, as the claimant had failed properly to quantify his alleged damages.[43]

We also doubt whether our competition authority will be inclined to make use of the possibility to give its views on the quantum of damage, as damage estimation is not amongst its competencies.

Q18: Is the *passing-on defence* admissible before your national courts in competition law disputes? Please quote the legal sources where this question is regulated in your country. Is there any *relevant jurisprudence* ("case-law") on the question of passing-on of overcharges and/or related loss of profit available in your country? Which rules on the burden of proving apply in the case of admissibility of the passing-on defence? Will Article 13 of Directive 2014/104/EU affect the current situation? No specific rule exists on the passing-on defence in Dutch law. The general rules regarding damages quantification and the burden of proof apply. However, it is generally assumed that the passing-on defence is a valid defence under current Dutch law. In the recent draft proposal of law for the implementation of the Directive, a very brief provision is included that states 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.[44]

[41] See for instance District Court Alkmaar 5 February 2003, 50626/ HAZA 01-57 (*WINO v. FTP Vis*).
[42] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Articles 6:193i DCC and 44a DCCP.
[43] *Arbitral Court for the Construction Sector* 13 April 2011, Nr. 31.476. See also J.S. Kortmann, "The Draft Directive on Antitrust Damages Actions and its Likely Effects on National Law", in A.S. Hartkamp and C.H. Sieburgh (eds.), *The Influence of EU Law on National Private Law: a brief introduction*, at p. 686.
[44] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193q DCC.

However, it is clear from the draft explanatory memorandum with the proposal of law that our legislator has only included that provision to confirm what it already considers to be the law.[45]

Still, in June 2015 the District Court Gelderland rejected the passing-on defence invoked by defendant Alstom against claimant TenneT in the gas insulated switchgear litigation. The District Court considered that it was not inequitable that TenneT would be 'in a sense overcompensated', given that otherwise Alstom would be allowed to retain profits that were illegally gained.[46] However, this ruling would appear to be in direct contravention of a ruling by the Court of Appeal of Arnhem-Leeuwarden in a parallel case concerning the same infringement (and indeed the same claimant: *TenneT v. ABB*).[47] There, it was confirmed that defendant ABB could invoke the passing-on defence. In that context, the Court of Appeal specifically acknowledged that the consequence of its decision might be that ABB would be able to retain illegal profits, noting that the aim of the law of damages is not to disgorge the defendant's profits but to compensate the claimant for loss that was actually suffered.[48] The case is currently before the Supreme Court of the Netherlands.

Q19: Could you specify the means currently available to your courts when *assessing the passing-on of overcharges* and its rate: (a) "soft law" – best practices/guidelines on the assessment of the rate of passing on; or (b) legislation? (c) What role do expert witnesses play and how are expert opinions evaluated by courts? Are experts appointed by courts or chosen by the parties? Are there any established concerning the admissibility of expert witnesses (such as the "*Daubert*" standard used in the US)? No legislation or guidelines are in place for courts to assess the passing-on of overcharges. Parties can submit expert reports to substantiate their standpoint (e.g. regarding the amount of passing-on of overcharges). The court can also appoint an expert on request of the parties or on its own initiative (Article 194 DCCP).

Q20: Is there legislation on damage claims by *indirect purchasers/consumers* or any relevant jurisprudence ("case law") in your country involving damages claims by *indirect purchasers/consumers*? If not, what are the reasons or key factors? If so, will Article 14 of the Directive 2014/104/EU require changes of the current situation? In 2015 the District Court of Limburg rendered an interim decision in a case brought by Deutsche Bahn, an indirect purchaser of pre-stressing steel.[49] One of the follow-on cases in relation to the elevator infringement also appears to involve both direct and indirect purchasers.[50] Indeed,

[45] Draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, p. 17.
[46] District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*), paragraph 2.31. Cf also District Court Oost-Nederland 16 January 2013, 208812 (*TenneT v. ABB*).
[47] District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*).
[48] Court of Appeal Arnhem-Leeuwarden 2 September 2014, 200.126.185, ECLI:NL:GHARL:2014:6766 (*ABB v. TenneT*), paragraph 3.32.
[49] District Court Limburg 25 February 2015, C/03/190094 / HA ZA 14-204 (*Deutsche Bahn v. Nedri et al*).
[50] District Court Midden-Nederland 27 November 2013, C-16-338073 - HA ZA 13-117 (*East West Debt v. UTC et al*), paragraph 2.1.

the air cargo litigation before the District Court Amsterdam appears to involve almost exclusively indirect purchasers.[51]

Of Article 14 of the Directive, only section (2) – introducing what is effectively a rebuttable presumption of pass-through on which indirect purchasers can rely – will be implemented into Dutch law.[52]

Q21: Are there any *procedural mechanisms* aimed to ensure that the compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level in order to *avoid overcompensation* and does *not eliminate* the liability of the infringer (see Article 12 (1) of Directive 2014/104/EU)? There are no procedural mechanisms specifically aimed at avoiding overcompensation. A Dutch court may, of course, decide to stay proceedings for the duration of other actions relating to the same infringement by claimants from a different level of the supply chain (cf. Article 30 Brussels I Regulation (Recast) and Article 12 DCCP). Depending on the circumstances of the case, staying the proceedings may help avoid a situation in which a defendant is ordered to pay twice for what was effectively the same overcharge: once to a direct customer and once to an indirect customer (or even more times, depending on the length of the supply chain and the purchasers' appetite for litigation). However, the court is not obliged to stay the proceedings. Furthermore, even if proceedings are stayed, the decisions of the other court are not binding upon the claimants in the Dutch proceedings.

Q22: Do *devices exist* that courts are able to take due account of the facts and information listed in Article 15 (1) of Directive 2014/104/EU in order to avoid that actions for damages by claimants from different levels of the supply chain lead to a multiple liability or to an absence of liability of the infringer? There are no specific 'devices' or procedural mechanisms that enable courts to take account of other on-going cases. In our view it is doubtful whether the concept of "taking due account" of other judgments can be effective to prevent conflicting rulings. Of course, if "taking due account" implied that courts should defer to decisions that were already taken by other courts in cases relating to the same infringement, that would significantly reduce the risk of overcompensation. For example, if Court A ruled that a defendant wrongfully inflated the prices of his cartelized product by 10%, that no passing-on occurred and that therefore the claimants – a group of direct purchasers – should recover the full overcharge of 10% (plus interest), from the perspective of avoiding overcompensation it would be helpful if Court B, having been asked to adjudicate claims by customers of the claimants who prevailed before Court A (hence: indirect customers), would simply accept the finding of Court A that no pass-through

[51] E.g. See e.g. District Court Amsterdam 7 March 2012, 486440 - HA ZA 11-944 (*Equilib v. KLM et al*), paragraph 3.2 and District Court Amsterdam 25 March 2015 C/13/562256 / HA ZA 14-348 (*SCC v. KLM et al*), paragraph 3.2. Cf. however District Court Amsterdam, 22 July 2015, ECLI:NL:RBAMS:2015:4408 (*KLM et al. v. DB Schenker*), paragraph 5.6.

[52] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193r DCC.

occurred and dismiss the claims. However, in terms of due process and fair trial, it clearly would not be right for Court B to dismiss the claims of indirect purchasers out of hand, on the basis of a finding of no pass-through by Court A, in court proceedings in which their interests were not represented.

Ideally, therefore, the claims by claimants of different levels of the supply chain should be concentrated in court proceedings before the same court. There are some instruments in Dutch civil procedure that can help achieve that. Under Article 220 DCCP, a Dutch civil court can refer the case to another court where a related action is already pending. After referral, the proceedings can be joined on the basis of Article 222 DCCP. Still, the procedural instruments of referral and joinder presuppose that in terms of timing, claimants from different level of the supply chain initiate court proceedings during roughly the same time period. They do not – and cannot – protect the defendant against being ordered to pay compensation for an alleged overcharge to direct purchasers, only to find that this very court order 'triggers' entirely new court proceedings by indirect purchasers, who wish to be given an opportunity to show that the overcharge found by the court was in fact passed on to them. In its decision in *TenneT v. Alstom*, the District Court of Gelderland appears to have assumed that in such circumstances, the defendant can reject the claims of the indirect customers and simply refer them to the direct customers (who after all, upon court order, have received compensation for the entire overcharge found by the court).[53] While this is an interesting thought, we are not sure of the basis on which the direct purchasers could be forced to address the claims of the indirect purchasers. From an earlier ruling by the same court, we infer that the court may be thinking of the doctrine of unjust enrichment.[54] Yet, when faced with a claim based on unjust enrichment, could the direct customers not simply point to the fact that the payments to them were made by the defendant pursuant to a *final court order*, in which it was held that they absorbed the full overcharge?

Q23: How is "*causality*" defined in the general private law of your country? Are normative categories relevant such as, e.g., imputability, adequacy, objective predictability of damages triggered by an infringement, interposing decisions of other persons, scope of the protective provision, remote or vague effects? Do differences exist in the definition of "causality" in damage claims in antitrust law? Do you expect difficulties in view of the principle of effectiveness of Union law? As a threshold issue, the claimant is required to prove that the wrong committed by the defendant(s) was a 'but for' cause of the alleged loss (a *'condicio sine qua non*'). This requirement, which follows from the general provision on liability in tort (Article 6:162 DCC), needs to be met in antitrust damage cases like in any other tort cases. Furthermore, the claimant must show that the loss he or she suffered can reasonably be 'attributed' to the defendant (Article 6:98 DCC: '*toerekenbaarheid*')

[53] District Court Gelderland 10 June 2015, 208814, ECLI:NL:RBGEL:2015:3713 (*TenneT v. Alstom*), paragraph 2.29 *in fine*.
[54] District Court Oost-Nederland 16 January 2013, 208812, ECLI:NL:RBONE:2013:BZ0403 (*TenneT v. ABB*) paragraph 4.32.

and that the loss falls within the scope of the rule that was infringed (Article 6:163 DCC: '*relativiteit*'). We do not see particular difficulties claimants in antitrust damage cases will face in terms of proving causality. Of course, a claimant may be unable to prove that the conduct of a particular participant in the infringement was a *condicio sine qua non* for his or her alleged loss. However, that is a problem with which claimants in other complex tort cases are also faced. Furthermore, the claimant's burden of proving causality will be alleviated if he or she can show that the loss was caused by a "group tort" ("*onrechtmatige daad in groepsverband*"). In terms of causality, under Article 6:166 DCC it is sufficient if the claimant can show that the defendant participated in wrongful "group conduct" and that conduct was a *condicio sine qua non* of the loss (even if the conduct of the individual defendant was not). See also Q. 26.

Q24: In view of ECJ´s judgment in the case "*Kone*" (C-557/12), will the national rules on causality have to be changed or applied differently by your national courts to ensure that *"umbrella" customers* can in practice claim and obtain compensation? Could the "*Kone*" finding also affect the way the *causality rules* are applied with regard to damage claims by indirect customers? The Dutch causality rules do not include a categorical rejection of claims comparable to the Austrian rule that led to the preliminary questions in the *Kone* case. We do not expect that the *Kone* ruling will have much impact on the way in which Dutch courts interpret the rules on causality.

Q25: Does your national law require "*culpability*" for a successful damages action in competition law? If so, must the fault be proved by the claimant or is a rule of a non rebuttable or a rebuttable presumption of fault applicable? Article 6:162 DCC requires that the conduct in question is "attributable" ("*toerekenbaar*") to the defendant as a wrong. Culpability is one way in which the infringement can be attributed to the defendant, but attribution is possible without culpability as well.

An infringement of competition law will normally be attributed as a wrong to each participant in the infringement.[55] In exceptional circumstances, for example if the defendant acted pursuant to a government order or upon advice of a competition authority, it is conceivable that the conduct complained of does not amount to an attributable wrong (but, instead, is an 'excusable error'). In general, however, the requirement of "attributability" under Article 6:162 DCC does not appear to be much of an obstacle for antitrust damages claimants.

Q26: Are *co-infringers* of an infringement of EU competition law jointly and severally liable for the compensation of harm resulting from such infringement under the national legislation of your country? Are there *any exceptions* from the application of those rules in general private law (e.g. in the questions of causality, the volume of liability, the qualification of the infringer as SME or immunity recipient)? If so, could you indicate their legal basis or relevant jurisprudence ("case-law")? Will the rules of Article 11 (1)

[55] See also E.-J. Zippro, *Privaatrechtelijke handhaving van mededingingsrecht*, Wolters Kluwer 2009, at p. 342-343.

to (4) of Directive 2014/104/EU on joint and several liability affect the current law and practice in your country? In *CDC v. AkzoNobel et al*, the European Court of Justice confirmed that the competition law concept of a "single and continuous infringement" cannot be relied on in civil litigation. The requirements for holding the competition law infringers liable in tort, "*jointly and severally as the case may be*" are to be determined by the national law of each Member State.[56]

Under Dutch tort law, it is the participation in the infringing conduct itself that is considered wrongful. In most cases, a party who participated in illegal price fixing or market allocation and implemented the cartel agreement, will be deemed guilty of an individual fault within the meaning of Article 6:162 DCC ("*onrechtmatige daad*"). All parties involved in that conduct may be held liable for their involvement in a "group tort" ("*onrechtmatige daad in groepsverband*"), which gives rise to joint and several liability under Article 6:166 DCC. However, in our view joint and several liability does not extend to the loss caused by parts of a "continuous infringement" in which a particular defendant had no involvement and of which he or she may not even have known. This view can draw support from a recent decision by the Dutch Supreme Court, in which it was held that members of a criminal organization are not individually liable for all loss caused by the organization, but only for the loss resulting from the crimes in which they actually participated.[57]

There is no provision in Dutch law that shields the immunity recipient and/or impecunious SMEs against joint and several liability. In this respect, the Dutch rules on joint and several liability will need to be altered in order to comply with the Directive.[58]

Q27: Which rules apply to the *recourse* of one co-infringer against the other co-infringers under the legislation of your country? Are there any exceptions from the normal application of those rules? If so, could you indicate their legal basis or relevant jurisprudence ("case-law")? Will the rules of Article 11 (5) and (6) of Directive 2014/104/EU on joint and several liability and in case of consensual settlement the rules of Article 19 (2) to (4) of Directive 2014/104/EU affect the current law and practice in your country? As a general rule, a debtor who pays more than his or her own share of a liability that is joint & several, can seek recovery from the other debtors under Articles 6:10, or 6:12 DCC. Article 6:13 DCC stipulates that in case recourse from one of the liable parties is impossible (e.g. because of bankruptcy), the irrecoverable part of his debt is apportioned among the co-infringers.

In the area of antitrust damages, there is no case law that provides insights into the apportionment of liability amongst the participants in an infringement. As a point of departure, Article 6:166(2) DCC suggests that each defendant is to contribute in equal shares

[56] European Court of Justice, Case C-352/13, 21 May 2015 (*CDC v. Akzo Nobel et al*), at paragraph 21.
[57] Supreme Court 2 October 2015, 14/01909 (*TVM v. X*).
[58] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193n DCC.

to the damages. However, we consider it likely that in most cases the courts will apply the standard of apportionment of Articles 6:102 and 6:101 DCC. Under those provisions, a debtor's share is determined by reference to (i) his contribution in causing the loss; and (ii) considerations of equity (specifically including the gravity of the wrong committed by the debtor, relative to the other debtors' wrongs).

The Dutch rules will have to be amended to account for the exceptions in Article 11(5) of the Directive, limiting the possibility of claiming contribution from immunity recipients.[59]

The provisions in Article 19 of the Directive have, we assume, been inspired upon a "proportionate share reduction-method" that already exists in some of the Member States.[60] As the Netherlands is amongst those Member States, implementation of Article 19 of the Directive should be straightforward. However, our legislator has proposed to implement Article 19 in a manner that (i) suggests that it is unaware that the proportionate share reduction-method is already part of Dutch law; and (ii) does not correctly reflect the way that method operates.[61]

III. Questions on Collective Redress

Q28: In view of the Recommendation of the European Commission on collective redress (2013/396/EU), the principles of which should be implemented in all Member States by July 2015, are there mechanisms of collective redress, including compensatory and injunctive redress, *already available* in your country? If so, could you briefly describe their main features and scope of application?

1. **Collective action based on Article 3:305a DCC**: This instrument permits a representative entity to initiate proceedings on behalf of a group of injured parties. However, a collective action cannot be used to claim monetary compensation for loss suffered. The representative entity can claim, for example, injunctive relief and/or a declaratory judgment. A declaratory judgment that establishes the unlawfulness of the defendant's behaviour can subsequently be relied upon by individual claimants, if they decide to bring claims for damages. In practice, this instrument has rarely been used in the context of competition law infringements.

2. **The Dutch Collective Settlements Act (Articles 7:907-910 and 1013-1018 DCC)**: If a representative entity manages to agree on the terms of a collective settlement with one or

[59] See for more detail J.S. Kortmann, 'Collective Settlements en Individuele Schikkingen door Hoofdelijk Aansprakelijke Debiteuren', *Tijdschrift Voor Privaatrecht* 2010, pp. 1167-1177, J.S. Kortmann and R.Wesseling, "Two Concerns Regarding the European Draft Directive on Antitrust Damages", *CPI Antitrust Chronicle* 2013(1), pp. 7-9 and E-J Zippro, "Het Richtlijnvoorstel betreffende schadevorderingen wegens mededingingsinbreuken", *Mededingingsrecht in de Praktijk* 2013(8), p. 282.

[60] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193o DCC.

[61] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 6:193p DCC and Draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, p. 16.

more defendants, the parties can jointly request the Amsterdam Court of Appeal to declare this settlement binding on all persons that suffered a similar harm (a 'class'). The collective settlement will be publicly notified and the members of the class will be given a specific period of time to exercise their right to 'opt out' of the collective settlement. Any member of the 'class' who does not exercise his or her right within the opt-out period, will be bound by the terms of the settlement. Thus far, the no antitrust damages litigation has resulted in a settlement under the Dutch Collective Settlements Act.

3. **The 'assignment model': individual claimants assign their claims to one (legal) person, who 'bundles' and pursues the claims at his or her own risk.** In most cases, the person acquiring the claims is a special purpose vehicle (a 'claims vehicle').

4. **The 'power of attorney-model': individual claimants grant a power of attorney to one (legal) person, who pursues the claims on their behalf**. This party may then initiate a claim against the defendant in the name of those who have issued power of attorney.

5. **Claimants can jointly bring a legal action in their own name.** It is also possible for parties to act as joint claimants when they initiate legal proceedings.

Q29: Have *there ever been collective antitrust damages actions* (successfully) brought in your country? If not, what are the obstacles that would need to be removed? Would you consider that introducing a competition-specific regime of collective actions in your country would improve the situation? This structure described in Q28 sub 3 – the assignment model – is widely used in antitrust damages actions in the Netherlands. Examples include the claims brought by separate claims vehicles set up by Cartel Damages Claims (CDC) in the paraffin wax litigation and the sodium chlorate litigation, East West Debt's claims in the elevator litigation and Equilib's, East West Debt's and SCC's claims in the air cargo litigation.

Q30: If mechanisms of collective redress are available in your country, how is the issue of *legal standing* to bring a collective action clarified, in particular in the case of a representative action as different from a group action? Do those rules comply with the principles 4 to 6 of Recommendation 2013/396/EU? Are also public authorities empowered to bring representative actions? In collective actions based on Article 3:305a DCC, the representative entity must be a foundation or association that represents and pursues the interests of injured parties. In accordance with principles 4 to 6 of the Recommendation, the representative entity must have a non-profit character and the objective to represent the interests of injured parties.

By contrast, the assignment model and the power of attorney model – Q28 sub 3 and 4 – do not appear to be subject to any legal restrictions, regulatory or otherwise. To the extent that methods of collective redress are covered by Recommendation 2013/396/EU, they do not comply with Principles 4 to 6.

Q31: If mechanisms of collective redress are available in your country, is the claimant party required to declare to the court at the outset of the proceedings the *origin of the funds* that it is going to use to support the legal action? Do legal safeguards exist in funding situations such as those listed in the principles 15, 16 and 32 of Recommendation 2013/396/EU? There is no provision in Dutch law that requires a claim vehicle or a representative entity to disclose the origin of the funds it uses to support the legal action. No code of conduct comparable to that for attorneys applies to claim vehicles. When it comes to representative entities, there is some evidence of self-regulation. In July 2011, a 'Claim Code' was introduced. Representative entities that bring collective actions are requested to adopt and comply with the principles of the Claim Code on a voluntary basis. However, independent researchers have since suggested that in practice there is not much appetite amongst representative entities to adopt the Claim Code.[62]

Q32: Is the principle ensured in your legal order that the party that loses a collective redress action has to reimburse the necessary *legal costs* borne by the winning party ("*loser pays principle*") and, if so, which conditions are provided for? See Q5.

Q33: If mechanisms of collective redress are available in your country, which rules are provided for ensuring the possibility for the representative entity or for the group of claimants *to disseminate information* about a claimed violation of rights or a mass harm situation and their intention to bring a collective action (injunction, action for damages? It is in the interest of the representative entity or the claim vehicle to disseminate information about the claim, in order to collect as many claims as possible. In practice, they make use of both the internet and more traditional methods of approaching potential customers – letters, telephone calls, visits – to develop their business. In our view, special mechanisms to ensure the dissemination of information do not appear to be necessary.

Q34: If mechanisms of compensatory collective redress are available in your country, which rules apply for the *constitution of the claimant party*? In particular:

(a) Is the "opt-in"-principle or an other principle applicable? (b) Do exceptions exist? If so, how are they justified? The Dutch Collective Settlements Act is an opt-out procedure. The court declares the settlement binding if certain procedural requirements and substantive criteria have been met (Articles 7:907 and 7:1013 DCC). Furthermore, in 2014 the Dutch government proposed new legislation on collective redress, which, if adopted, will introduce a collective action based on the opt-out principle, through which damages can be recovered.[63]

(c) Is a member of the claimant party free to leave the claimant party at any time before the settlement of the case without being deprived of the possibility to pursue its claim in another form? If so, under which conditions? Under the Dutch Collective Settlement Act, a

[62] E. Bauw en T. Bruinen, 'Slow start of veeg teken? Gebrekkige naleving Claimcode vereist ingrijpen', *NJB* 2013/140, 168.
[63] Proposal for an Act on settling mass claims in a collective action (*Wetsvoorstel Afwikkeling massaschade in een collectieve actie*), 7 July 2014, available at https://www.internetconsultatie.nl/motiedijksma.

'class member' will be given at least three months to exercise the right of opt-out, starting from the public announcement that the agreement will be declared binding by the court. (Article 7:908 DCC).

If the assignment-model or the power of attorney-model is used, it depends on the terms agreed between the claims vehicle and the individual claimants whether the claimant can leave the litigation and pursue the claim in another form. An assignor will not typically be resume control over the claim that originally belonged to him or her.

(d) Are persons claiming to have been harmed in the same mass harm situation able to join the claimant party at any time before the settlement of the case? If so, under which conditions? A settlement agreement under the Dutch Collective Settlement Act may include a clause that 'class members' who are entitled to compensation have a period of one year to claim their share from the proceeds of the settlement, starting from the public announcement that the agreement will be declared binding.

Q35: Do rules exist in your country that the system of *lawyers´ remuneration* does not create an *incentive* to litigation that is *unnecessary* from the point of view of the interest of any of the parties? Article 23(2) of the Code of Conduct for the Dutch Bar (CCDB) forbids lawyers to cause unnecessary costs for clients and other parties. Article 3 CCDB states that settling a dispute is often preferable to litigation. Furthermore, Article 5 CCDB provides that only the clients' – and not the lawyers' – interests should be taken into account in handling cases. And, as a general rule, Article 25(1) CCDB decrees that a lawyer's remuneration should always be reasonable taking into account all the circumstances of a case. Next to that, Articles 25(2) and 25(3) CCDB prohibit the use of contingency fees.[64] All these rules ensure that the system of lawyers' remuneration does not create an incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.

If *contingency fees* are permitted, does their national regulation in collective redress cases correspond to principle 30 of the Recommendation 2013/396/EU? The prohibition on contingency fees is not absolute. Lawyers' remuneration may be partly based on the outcome of litigation or a certain result, provided that the base fees are sufficient to cover the costs of providing the legal services, including a modest remuneration for the lawyers involved. All the aforementioned rules in the CCDB could be considered appropriate regulation to avoid excessive fees that could impinge upon the right to full compensation of the members of a claimant party, in accordance with Principle 30 of the Recommendation.

However, these rules apply to *lawyers* and not to claim vehicles and those who run claim vehicles (unless of course they are members of the Dutch Bar). Virtually all claim vehicles use remuneration models that are contingent upon the success of the action.

[64] See also Article 7.7 of the Dutch Regulation of the legal profession.

Q36: Which procedural safeguards and guarantees of parties to civil actions are provided against *abusive litigation* in mass harm situations? Do they comply with the fundamental safeguards identified in consideration 15 of the Recommendation 2013/396/EU (in particular avoidance of punitive damages, intrusive pre-trial discovery procedures and jury awards)? Punitive damages are not available under Dutch law, pre-trial discovery is rather limited and there are no juries in the court system in the Netherlands. Having said that, Dutch law does not provide procedural safeguards against abusive litigation, other than the general provision on abuse of the right to bring proceedings (Article 3:13 DCC). Dutch courts are generally reluctant to hold that a litigant has abused his right to bring proceedings.

Q37: In view of the provisions of Directive 2014/104/EU designed to facilitate damages claims by *indirect purchasers* (in particular Articles 12, 14), are the collective redress mechanisms available in your country (if any) *adequate* to ensure a practical possibility for indirect purchasers, including consumers, to claim antitrust damages? Indirect purchasers, especially if individually they have suffered only limited loss (as is often the case when it concerns consumers) may have difficulty in funding a lawsuit. While occasionally claim entities are active in consumer cases – for example: the cathode ray tube case[65] – most commercial claim vehicles focus is on larger businesses and SME's (with some reportedly requiring customers to have at least € 1 million of affected business to join the action). Unless and until the Dutch legislator introduces the possibility of claiming damages through a collective action – see Q34 – we do not expect the current situation to change significantly. And even then, we doubt based whether in consumer cases full compensation can be achieved through civil court proceedings. In many such cases, the loss suffered by individual consumers is simply too small to identify legitimate claims (as most consumers do not keep records of their low-priced purchases).

Q38: Do rules on *collective follow-on actions* exist in your country in competition law where the public authority is empowered to adopt a decision finding that there has been a violation of Union law? If so, do they meet the principles 33 and 34 of the Recommendation 2013/396/EU? Courts may stay collective redress actions until the public proceedings have been concluded. However, the rules on collective redress mechanisms do not require that the action be launched after the public proceedings have been concluded, as principle 33 suggests. Under the current Dutch statutory limitation regime, it is conceivable that an action for damages becomes time-barred before the public proceedings have ended, as a 2007 case illustrates.[66] However, since (i) the Dutch limitation period does not generally expire unless the claimant has knowledge of his or her claim; and (ii) interrupting the limitation through a written notice is relatively straightforward, these rules should not form an

[65] See http://www.consumentenclaim.nl/.

[66] In District Court Rotterdam 7 March 2007, LJN BA0926 (*CEF v. Defendants*), CEF filed a claim for damages after its complaint filed with the European Commission had resulted in an infringement decision. CEF found its claim time-barred, as it had waited more than five years without sending as much as a notice of claim after having obtained knowledge of the infringement and the harm.

obstacle to claimants seeking redress. In any case, the current rules on limitation will be amended to bring Dutch law in line with Article 10 of the Directive (See Q7 for more detail).

IV. General Questions on the Relationship and Cooperation between Courts and Competition Authorities and Binding Effect:

Q39: Have your courts ever *asked* for an opinion from a national competition authority on the issue of application of the (EU) competition rules in the context of private enforcement litigation? (a) If not, what may be the reasons and what could be done to encourage courts to use this possibility? (b) If yes, could you please refer to the relevant cases and indicate whether the opinions were followed by the courts? (c) Are you aware of any cases where a national competition authority intervened on its own initiative by means of an amicus curiae submission before a national court? In the KIA summary proceedings before the District Court of Amsterdam, the court requested the Dutch Competition Authority ("**ACM**") to intervene as an *amicus curiae*.[67] The ACM accepted this request and intervened based on its Amicus Curiae Guidelines ("**Guidelines**").[68] The District Court followed the ACM's non-binding opinion (cf. Paragraph 36 Guidelines), but found that a further factual inquiry was necessary before a final judgment could be rendered. As far as we are aware, the ACM has never spontaneously intervened in civil court proceedings to give an opinion on the application of the (EU) competition rules. Request for intervention have been declined by the Dutch courts and the ACM at least twice.[69]

Several factors may account for the – hitherto – limited cooperation between the Dutch courts and the ACM. First, the Guidelines limit the ACM's power to intervene to summary and appeal proceedings (Paragraphs 16 and 30 Guidelines), and only if the general interest of the uniform application of EU competition law so requires (Paragraphs 10, 15 and 19 Guidelines). The ACM may refuse a court's or party's request to intervene if such an intervention would be detrimental to its core tasks (Paragraphs 20 and 21 Guidelines). Second, relatively few Dutch private enforcement cases relate to an investigation by the ACM. In cases involving EU competition law, courts may prefer to ask for the European Commission's opinion, rather than the ACM's.[70] Third, thus far the difficulties in cases concerning the private enforcement of competition law appear to relate to the discovery and assessment of the facts, for which no

[67] District Court of Amsterdam 16 October 2009, and 3 December 2009, 437668 / KG ZA 09-1941 *(X v. KIA*).
[68] Amicus Curiae Guidelines of the DCA, Netherlands Government Gazette 2004, 158 (currently under revision). The competence to intervene stems from Article 15(3) of Regulation 1/2003, enshrined in Dutch law by means of Article 8:45a Dutch General Administrative Law Act ("**GALA**") (*Algemene Wet Bestuursrecht*).
[69] See e.g. the KIA summary proceedings (footnote 67 above) as well as Utrecht District Court 30 September 2009*,* 271007 / KG ZA 09-750 (*De Bilt auto's v. KIA*). Unlike the Amsterdam District Court in the KIA case, the Utrecht District Court did not request the ACM's assistance, and reached a different conclusion. Cf. also Amsterdam Court of Appeal 23 December 2008, 106.005.440/01 (*British American Tobacco v. Chipknip*); and Arnhem Court of Appeal 17 November 2009, 200.002.794 (*De Nieuwe Heuvel et al v. Koninklijke Vereniging "Het Friesch Paarden-Stamboek"*).
[70] See e.g. Court of Appeal Den Haag 27 January 2005 and 24 April 2008, C02/1136 (*Vereniging Producentenorganisatie van de Nederlandse Mosselcultuur v. X*).

intervention of the ACM is appropriate or required, rather than to the application of the core concepts of competition law.[71]

Q40: Have your courts ever made a *preliminary reference* to the Court of Justice in the context of private enforcement litigation? (a) If yes, could you please refer to the relevant cases? (b) If not, are you aware of any cases where such reference may have been appropriate? Except on issues of state aid,[72] as far as we are aware the Dutch courts have not yet made a preliminary reference to the Court of Justice in the context of private enforcement litigation.

A possible case in which a preliminary reference was not made but could have been considered is the sodium chlorate litigation before the District Court Amsterdam.[73] The defendants in this case challenged the jurisdiction of court, arguing that none of the alleged infringements had taken place in the Netherlands, that Dutch law was irrelevant to any of the alleged claims and that the only connection with the Netherlands was a parent company that had not been involved in any of the anticompetitive conduct found by the Commission. The defendants also relied on choice-of-forum clauses and arbitration clauses. Unlike the Regional Court of Dortmund, which in a related case faced very similar challenges of its jurisdiction and did refer preliminary questions to the European Court of Justice, the District Court of Amsterdam did not seek the assistance of the ECJ.[74] Ultimately, however, it is not clear whether the decision of the European Court of Justice would have made a difference to the findings of the Amsterdam Court (holding that it had jurisdiction).[75]

Q41: Are there any *(new) forms of cooperation* between courts and/or competition authorities (including cross-border cooperation) that may be beneficial for effective and coherent private enforcement discussed in your country? On at least one occasion, the ACM used its discretion to reduce the fine for undertakings that entered into early settlements with civil claimants in private damages actions.[76] In a case concerning the road construction sector, the ACM offered up to 10% reduction of fines to undertakings that contributed to a collective, sector-wide settlement within a given period of time.[77]

Q42: *Which part(s)* of an infringement decision of the National Cartel Authority, the European Commission, the Cartel Authority of an other Member State or the court of

[71] M. Van Oers and A. Prompers, The courts and the art of concentration, in H. Don, J. de Keijzer and others (eds) *The Art of Supervision: Liber amicorum Pieter Kalbfleisch* (ACM 2013).
[72] E.g. on state aid see European Court of Justice 17 July 2008, Case C-206/06 *(Essent v. Aluminium Delfzijl et al*); European Court of Justice 8 December 2010, Case C-275/10 (*Residex v. Gemeente Rotterdam*); European Court of Justice 17 September 2014, Case C-242/13 (*Commerz v. Havenbedrijf Rotterdam*); European Court of Justice 12 December 1995, Case C-399/93 (*H.G. Oude Luttikhuis et al v. Vereniging Coöperatieve Melkindustrie Coberco*).
[73] District Court Amsterdam 4 June 2014, C/13/500953 / HA ZA 11-2560 (*CDC v. Akzo et al*).
[74] LG Dortmund 29 April 2013, 13 O (Kart) 23/09.
[75] European Court of Justice 21 May 2015, C-352/13 (*CDC Hydrogen Peroxide v. Akzo et al)*.
[76] Fine rules ACM (*Boetebeleidsregel*) 2014, Section 2.10 under b.
[77] NMa, case GWW, number 4363-96, decision of 1 February 2008.

another Member State acting in the function of a Cartel Authority is (are) considered *binding* in your national system in a private follow-on litigation? Does Article 9 of Directive 2014/104/EU require changes in your national legal order? Only the findings that are included in the operative part of a final ACM or Commission decision are binding in civil proceedings. However, as far as ACM decisions are concerned, there is some debate as to whether their binding effect also applies in horizontal relationships (e.g. in case of follow-on actions) or only in vertical relations. For this reason it can be argued that legislative action is required. In the draft proposal of law of 8 October 2015 our government has included a provision that implements Article 9 of Directive 2014/104 EU into Dutch civil procedure.[78]

Dutch courts dealing with follow-on damages are not bound by final decisions of the national competition authority of other Member States. Under the general rules on evidence, however, the findings of foreign competition authorities can be submitted as evidence of the claimant's allegations (which evidence can be rebutted by the defendant). In the view of our legislator, Article 9(2) of the Directive therefore does not require implementation into Dutch law.[79]

Q43: Can an infringement decision taken by one of the mentioned institutions (Q42) be considered *final* in your country for the purposes of the binding effect in the context of follow-on litigation or for the purposes of the running of limitation periods, *if* pending appeals against the decision are *limited* to disputing the level of fines imposed? In the context of the air cargo litigation, the Amsterdam Court of Appeal has ruled that follow-on civil proceedings should only be suspended for the duration of appeal proceedings against an infringement decision, if "reasonable doubt" exists regarding the validity of the decision.[80] If that is correct, it would appear to follow that if an appeal against an ACM or Commission Decision is limited to disputing the fines that were imposed, that decision can be regarded as final and binding for purposes of the civil proceedings.

Under current Dutch law, for the purpose of the running of limitation periods it is not yet relevant when the decision is considered final. This will change once the Directive has been implemented (see Q7).

Q44: Are national courts in your country obliged to *stay proceedings* once the National Competition Authority has initiated proceedings on the same matter until a decision has been reached? There is no obligation in Dutch law for the courts to stay civil proceedings during the investigation by the national competition authority. Nevertheless, Dutch courts can decide to stay proceedings based on general principles of procedural economy and due process.

[78] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Article 161a DCCP.
[79] Draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, p. 8.
[80] Court of Appeal Amsterdam 24 September 2013, 200.109.253/01 (*Equilib v. KLM et al*), paragraph 3.14.

V. Questions on Disclosure and Confidentiality

Q45: Is there any specific right for victims to get access to the documents in the *file of a competition authority* in your country with a view to bringing a private enforcement action? Besides the general rules on disclosure in civil proceedings, a specific right to access to documents in possession of the ACM is enshrined in the Government Information Act ("**GIA**").[81] The GIA provides that every (natural or legal) person may request access to documents about governmental matters, unless these documents are covered by one of the absolute or relative exceptions (Article 10 GIA).[82] However, the ACM takes the view that Article 7 of the Act Establishing the ACM, a much more limited provision, overrides the GIA.[83]

Q46: If -in view of the rule on the burden of proof in Article 2 of Regulation EC/1/2003- parties to a civil dispute do not have the evidence they need at their disposal what is the *most common way of obtaining such evidence* in your Member State? Is it inter partes disclosure or disclosure from third parties, discovery, obtaining evidence from public authorities on the basis of transparency rules, informal ways of obtaining evidence, etc.? The most common way for parties to a civil dispute to obtain evidence is by claiming disclosure of documents under Article 843a DCCP. A party can claim documents from anyone who is the custodian of certain data, provided (i) that the party claiming disclosure can establish a legitimate interest in the disclosure; (ii) that the claim for disclosure relates to specific documents (and does not amount to a "fishing expedition"); and (iii) that the data requested relate to a legal relationship – either contractual or non-contractual – to which the party requesting disclosure is a party.[84] Disclosure may be denied in case the data are subject to a legal privilege (Article 843a(3) DCCP), if there are compelling reasons that militate against disclosure, or if a fair administration of justice is also secured without disclosure of the requested data (Article 843a(4) DCCP).

Another possibility is for parties to request the court to order (preliminary) witness hearings or expert testimony (Articles 163, 186, 194 and 202 DCCP).[85]

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[81] The GIA is the equivalent of Regulation 1049/2001.

[82] The absolute exception covers e.g. personal data and business and manufacturing data which have been communicated to the government in confidence. The relative exceptions include the detection and prosecution of criminal offences, the inspection and supervision by administrative bodies and the respect for privacy.

[83] Article 7 of the Establishing Act provides that data and information obtained by the ACM in the conduct of its statutory duties may only be used inasmuch as required in performing these duties. The ACM may share this information with other national and foreign governmental bodies assigned with regulatory duties. See for a confirmation of this view District Court Rotterdam 13 May 2015, 8959 (*Sandd v. ACM*).

[84] The person to whom the request for disclosure is directed needs not to be a party to that legal relationship himself.

[85] For an example of a private enforcement case in which witness hearings were held: District Court Rotterdam 17 July 2013 C/10/390424 / HA ZA 11-2071 (*Stichting Elevator Cartel Claim v. Kone et al*). By contrast, a request to hear witnesses was twice denied in the air cargo litigation, see District Court Amsterdam 25 September 2014, C-13-553534 - HA RK 13-353 and Court of Appeal Amsterdam 22 September 2015, case 200.160.896/01 (*Stichting Cartel Compensation v. KLM et al*).

Q47: What are the conditions that currently have to be satisfied under your national legislation for the national court to be able to order *inter partes* disclosure in a case pending before it? Under Article 22 DCCP, the court has a discretionary power to order parties to submit any documents pertaining to the matter at hand and that are in the custody of parties, or to provide further clarification of any statements. Compelling reasons could, however, justify a party's refusal to disclose certain information. In this case the court must balance the parties' interests.[86] A more or less similar regime applies to a party's claim on the basis of Article 162 DCCP for the *inter partes* disclosure of books and records.

Q48: Is there a possibility for the national court *to order disclosure from third parties*? If so, under which conditions? Does the possibility exist in your country that national *courts request* the disclosure of evidence in the file of a *competition authority* directly from that competition authority? If so, are there any specific conditions that need to be fulfilled? What are the limits of use? Under Article 843a DCCP, a party can claim documents from anyone who is the custodian of certain data – including third parties - subject to the requirements set out in Q46. Dutch law does not include a specific statutory provision that enables the court to request disclosure of evidence in the file of the ACM directly from the ACM.

Q49: Could you indicate whether it is possible under your national legislation or jurisprudence ("case law") for a national court to order the disclosure of *categories of evidence*? If this possibility exists, could you please enumerate the conditions that need to be fulfilled in relation to such disclosure? Could you also give an indication of how often disclosure of categories of evidence is ordered by your national courts? Dutch law does not provide for an order for disclosure of categories of evidence as mentioned in Article 6 of Directive 2014/104/EU. On the basis of Article 843a DCCP, lower courts however have ordered disclosure of certain specified categories of evidence (e.g. "all correspondence between [a bank" and the financial markets authority regarding file [x], including any reports that may have been drafted and any enforcement measures that may have been taken"[87]).

Q50: Will the *implementation* of the rules of Directive 2014/104/EU, in particular of Articles 5 and 6, on disclosure of evidence, including crucially the possibility to order disclosure of relevant categories of evidence (e.g. Article 5 (2), Article 6 (5) (9) (10)) *affect the approach* claimants in your country take when trying to obtain the evidence they need to substantiate their claims? Do you expect that, as a result of Article 6 par. (4) to (6) and (10), Article 7 of Directive 2014/104/EU, there will be fewer requests for access to documents in the file directed by (potential) claimants towards competition authorities? The rules on disclosure in the Directive are not expected to affect the approach of claimants to obtaining documents. While it is reasonable to expect that under the new rules

[86] Examples of categories of documents or information that could remain confidential are privileged information or business secrets. See the parliamentary proceedings with Article 22 DCCP, *Kamerstukken II* 1999/2000, 26855, 3, p. 55.
[87] Dutch Supreme Court 26 October 2012, ECLI:NL:HR:2012:BW9244 (*Theodoor Gillissen Bankiers*).

claimants will see even less need to direct their request at the competition authorities, in our experience such requests are not particularly common in the Netherlands anyway (see also Q45).

Q51: Do you consider that your national rules governing access to documents in the file of competition authorities and their use in court proceedings *need to be adapted* to match the Directive's rules concerning the protection of certain documents, such as leniency statements and settlement submissions? The limitations the Directive puts on the disclosure and use of documents included in the file of the competition authorities, will require implementation. Most of Articles 6 and 7 of the Directive will be implemented lock, stock and barrel into the DCCP. This includes the "black list" in Article 6(5) Directive of documents of which disclosure cannot be ordered at any time.[88]

Q52: The rules of Directive 2014/104/EU on disclosure of evidence introduce a minimum standard. Member States are explicitly allowed to maintain or introduce *wider* disclosure of evidence (Article 5 (8)). Does your country currently have a system of *wider or narrower disclosure* (compared to the Directive) in place? Would it be sensible in your country to make any new rules on disclosure of evidence more generally applicable (e.g. covering any type of private enforcement claims, introducing a unified approach covering also claims relating to the enforcement of intellectual property rights (previous implementation of the Intellectual Property Rights Enforcement Directive 2004/48/EC)), or even a wider scope of application? In the view of our legislator, the existing Dutch rules on the discovery of documents are already broader than the regime prescribed by the Directive.[89] However, in practice Dutch courts sometimes prove reluctant to order the disclosure of relevant documents. Two decisions in which defendants requested disclosure from the claimants, are illustrative. In *TenneT v. Alstom* the District Court of Arnhem refused to grant Alstom access to documents necessary for assessing the level of pass-through between TenneT and its downstream customers.[90] Likewise, in *CDC v. Shell* the District Court of Den Haag denied a defendant's request for disclosure of documents regarding loss and pass-through, holding that the request was premature.[91] To avoid potential uncertainty regarding the defendants' right to disclosure, arguably the Dutch legislator should consider a specific provision or subsection implementing the last sentence of Article 13 Directive ([regarding pass-through] "the defendant … may reasonably require disclosure from the claimant or from third parties").

Q53: What is the definition of "*confidential information*" that is applied in your country? Is this definition the same in public enforcement cases and private enforcement

[88] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Articles 846-850 DCCP.
[89] The draft explanatory memorandum with the *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht* of 8 October 2015, p. 21-22.
[90] District Court Arnhem 16 May 2012, 208814, ECLI:NL:RBARN:2012:BW7444 (*TenneT v. Alstom*), paragraph 3.9.
[91] District Court Den Haag 1 May 2013, C/09/414499 / HA ZA 12-293 (*CDC v. Shell et al*), paragraph 4.44.

cases? Generally, leniency documents and company confidential information will be deemed confidential information, both in public and private law cases.[92] In public enforcement cases the definition of confidential information given in the GIA applies. The GIA offers absolute protection to confidential business and production secrets.

The courts have interpreted confidential business and production secrets restrictively, meaning that only documents that contain information about the technical management, the production process, the sale of products or the circle of the buyers and suppliers are covered by this exception.[93] Information that concerns the financial management of the company might qualify as business and production information.[94] In addition, recent documents are more sensitive than documents containing data that are outdated.[95] In practice, the various courts may give different weight to the interests in disclosure and the interests in protection.[96]

Q54: Could you indicate whether national courts in your country have mechanisms to *protect* confidential information in proceedings relating to the public enforcement of competition law and in proceedings relating to the private enforcement of competition law? If so, could you please provide a short description of what these mechanisms entail, what their legal basis is and whether there are sanctions in place if confidentiality protection is not respected? Will the current practice be affected by the requirement of Article 5 (4) of Directive 2014/104/EU that courts need to have the power to order disclosure of confidential information (if relevant to the action for damages)? Parties may refuse to submit certain documents (Article 8:29 General Administrative Law Act ("**GALA**")) or request for documents to be disclosed to the court only. In the latter case, the court may only rely on the documents with the consent of the other parties. A similar (confidentiality) procedure has been followed by the Supreme Court, despite the lack of a legal basis in the context of private proceedings.[97]

Article 27 DCCP also gives the courts the possibility to order that the entire proceedings be conducted confidentially ("behind closed doors"). While the courts are generally reluctant to issue such an order, if they do Article 29 DCCP prohibits the parties from informing third parties about the exchange of information that took place in the litigation. Under the same

[92] Article 10 GIA and parliamentary proceedings (*Kamerstukken*) *II* 2005/06, 30 071, nr. 34, p.2.
[93] Dutch Administrative Supreme Court 29 April 2008, *AB* 2008, 209, (*X v. Ministerie van Binnenlandse Zaken*).
[94] Dutch Administrative Supreme Court 16 March 2011, *AB* 2011/206 (*P1 Holding v. Gemeente Maastricht*; Dutch Administrative Supreme Court 29 April 2008, *AB* 2008, 209, (*X v. Ministerie van Binnenlandse Zaken*); Dutch Administrative Supreme Court 4 November 2009, *AB* 2010/28; and Dutch Administrative Supreme Court 8 October 2010, *AB* 2010/336. Information which does not contain real revenue numbers does not qualify as business or production information (see Dutch Administrative Supreme Court 6 June 2012, *AB* 2012/241).
[95] Dutch Administrative Supreme Court 11 April 2012, *AB* 2012/230.
[96] E.g. compare District Court Leeuwarden 24 June 2009, 86771 / HA ZA 08-11 (*Unis Onderhoud v. X*), on the one hand, and District Court Rotterdam 21 December 2012, 413570 / KG ZA 12-959 (*X v. Food for the Mind*) and District Court Zutphen 4 March 2009, 95409 - HA ZA 08-887 *(Holding v. X*), on the other.
[97] Dutch Supreme Court 11 July 2008, C06/306HR (*De Telegraaf v. Staat*) and Court of Appeal Amsterdam 13 October 2009, 200.039.611-01 SKG (*Staat v. De Telegraaf*). See also Dutch Supreme Court 20 December 2002, *NJ* 2004, 4 (*Lightning Casino v. Nederlandse Antillen*).

provision, the court can issue additional confidentiality orders. The court-ordered confidentiality is criminally sanctioned.[98]

Q55: What type of measures for *protecting* confidential information (as required by several provisions of Directive 2014/104/EU in the context of disclosure, e.g. by Article 5 (3) (c) and Article 8 (1) (c) (d) and (2) and Article 7 (3)) might best fit with the legal system/practice in your country? While we do not have much experience in the Netherlands with strict confidentiality in civil proceedings, we suppose that UK-style confidentiality rings could conceivably be introduced in Dutch civil proceedings.

VI. Specific Question on the Impact of a Cross-Border Element

Q56: Have there been any significant problems in the application of the rules on the relevant rules on *jurisdiction* of Regulation EU/44/2000 (Brussels I) or Regulation EU/1215/2012 or in the application of the *law applicable* to non-contractual obligations EC/864/2007 (Rome II) concerning antitrust damage actions in the practice of the courts in your country? If you see problems, do you consider that a solution may require changes of these rules? In our view, no significant problems have occurred in the application of the Brussels I Regulation. The Dutch civil courts take a rather broad view of their own jurisdiction under these rules. On occasion their interpretation of the Brussels I Regulation may be erroneous,[99] but such errors can be corrected on appeal. We do not consider a change of the rules necessary.

As far as we are aware, no examples of civil antitrust litigation exist in the Netherlands in which the Rome II Regulation was applied. This is unsurprising, since the Regulation applies only to cases concerning facts that occurred in 2009 or afterwards.

Q57: Based on the experience in your country, do you see any particular problems arising for courts when dealing with individual or collective private enforcement cases involving a cross-border element? In particular: In cases in which a dispute concerns persons *from several Member States* is a single collective action in a single forum prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems? A single collective action before a single (Dutch) forum is not prevented by our national rules on standing or admissibility. Indeed, many of the group antitrust litigations that are currently pending in the Netherlands, involve claimants from many different Member States. The main problem we see with the cross-border nature of such cases, is that the Dutch courts may have to adjudicate the claims under many different systems of law (sometimes *not* even including

[98] See Article 272 Dutch Penal Code and *Kamerstukken II* 2011/2012, 33079, nr. 3, p. 8-9.
[99] District Court Anhem 26 October 2011, 208814 / HA ZA 10-2412, ECLI:NL:RBARN:2011:BU3548 (*TenneT v. Alstom*), paragraph 4.9. Cf. however European Court of Justice, Case C-352/13, 21 May 2015 (*CDC v. Akzo Nobel et al*), at paragraph 52.

Dutch law).[100] Going forward, the application of the rules of the Rome II Regulation may help alleviate that problem (see also Q10).

VIII. Questions on ADR/Consensual Dispute Resolution:

Q58: Could you indicate which *types of consensual dispute resolution mechanisms* are most commonly used in your country (and in relation to which types of disputes)? The most commonly used type of consensual dispute resolution is amicable settlement. Arbitration and mediation also occurs in relation to antitrust damage claims, but we are not aware of any statistics on the frequency with which such mechanisms are employed.

Q59: Are *collective* alternative dispute resolution and settlements in the sense of principles 25 to 28 of the Recommendation 2013/396/EU available and encouraged in your country? The Dutch Collective Settlements Act provides for collective settlements (See Part III on Collective Redress).

Q60: Could you provide an *overview* of damages claims for infringements of Articles 101 and 102 TFEU that have been resolved through settlements or other forms of consensual dispute resolution (including arbitration) in recent time? Settlements generally remain confidential. One example that has become public is the collective settlement in the road construction sector, in which over a thousand individual claims were ultimately resolved for a total value of € 73.5 million.

Q61: Do rules on the *suspensive and other effects of consensual dispute resolution* including effects on subsequent actions for damages, exist in your country? If so, which experiences have been made? Will Article 18 and Article 19 of Directive 2014/104/EU affect the current situation of law and practice? Dutch civil courts have a general discretion to stay proceedings. As a matter of general practice, a joint request by parties who are negotiating a consensual settlement to stay the proceedings is granted by the court. Under the Dutch Collective Settlements Act, a request to declare a settlement binding on the 'class' interrupts the statute of limitation vis-à-vis the settling defendant.[101]

Article 18 Directive will be implemented into Dutch law. [102] However, we doubt whether this implementation will have much practical impact, as in our view staying the proceedings and interrupting the statute of limitations do not pose problems under current Dutch law, if the parties are able to agree on consensual dispute resolution.

Article 19 Directive will have only a minor impact in the Netherlands, but we consider it helpful that the European legislator has decreed that the proportionate share reduction method be recognized and enforceable throughout Europe. See Q27.

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[100] See District Court Den Haag 17 December 2014, C/09/414499 / HA ZA 12-293 (*CDC v. Shell et al*), paragraph 4.51.
[101] Article 7:907(5) DCC.
[102] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015, Articles 6:193t and 6:193u(1)(a) BW.

Q62: In view of the judgment of the ECJ in the case "*Eco Swiss*" (C-126/97) do you see obstacles in the legal order or practice in your country for a court to review an *arbitration award* which it considers to be contrary to Article 101 TFEU? Provided that the request is made within the relevant time period, the working group does not see significant obstacles.

Q63: In your view, how can a meaningful use of out-of-court settlements and ADR mechanisms in the context of private enforcement in competition law be *best promoted*? First and foremost, in our view a clear and uniform EU-wide rule regarding the commencement and the duration of the limitation period would facilitate settlements. Defendants are understandably reluctant to settle claims as long as limitation periods are running and settlements can therefore still 'trigger' new claims. Under current national laws, in cross-border cases it can take quite a long time until the parties can be reasonably comfortable that limitation periods have expired vis-à-vis claimants who have not yet come forward. Article 10 of the Directive will not improve that state of affairs, but in fact is likely to exacerbate the problem. In our view, it would be in the interest of botyh claimants and defendants if an EU-wide limitation period were introduced, that could be interrupted by a simple notice letter (and that would *not* be suspended for the duration of any appeals against an infringement decision).[103]

Secondly, uniform rules on contribution would foster settlements. As far as we are aware, it is not clear under any of the laws of the Member States how contribution should be apportioned amongst the defendants (e.g. market shares, sales to the claimant, relative culpability?). This leaves the parties with significant uncertainty regarding their ultimate share in the liability. The Directive does not resolve this issue. If claimants and defendants had a clearer understanding of the manner in which a defendant's ultimate share in the liability ought to be determined, that would facilitate settlements between an individual defendant and the claimant(s).

Finally, the English system in which parties can make a confidential settlement offer (a "Part 36 Offer") that can shift the liability for costs to the party who declined an offer that later turns out to have been adequate, could help to promote settlements. While cost orders are not very significant in the Dutch system – see Q5 – perhaps a similar system could be introduced in relation to statutory interest.

IX. Questions on Legislative Perspectives:

Q64: Please summarize the *main challenges* for the implementation of Directive 2014/104/EU and of Recommendation 2013/396/EU in your country; and Q65: Are there any legal practical obstacles which are *not addressed* by Directive 2014/104/EU which would in your view need to be removed in your country to make antitrust damages

[103] See J.S. Kortmann and R.Wesseling, "Two Concerns Regarding the European Draft Directive on Antitrust Damages", *CPI Antitrust Chronicle* 2013(1), pp. 7-9.

actions (or private enforcement litigation in general) work in practice? If so, how could these obstacles be removed? In our view, the wording of many provisions of the Directive is ambiguous and/or does not sit easily with the terminology generally employed in tort law. Examples include the terms "undertaking" and "joint behaviour" in Article 11(1), "consensual dispute resolution process" in Article 18(1) and "share of the harm" in Article 19(1) of the Directive. The implementation of ambiguous provisions into Dutch law could prove challenging. In its draft proposal of law of 8 October 2015 the Dutch government has – in our view: wisely – tried to stay very close to the terminology of the Directive (in most instances: without adding its own interpretation to the provisions it seeks to implement).[104]

Q66: Taking a broader perspective, would it be useful in your country that the implementing provisions (or some of them) apply *beyond* the category of claims covered by Directive 2014/104/EU, e.g., also to (a) damages claims relating purely to breaches of national competition law (a); non-damages types of civil claims in the competition area of competition law and (b) civil claims in general? The members of the working group hold different views as to whether special rules for antitrust damages actions were necessary or desirable in the first place. However, there appears to be a general consensus that the manner in which the Directive has sought to facilitate such actions, is sub-optimal. For that reason, alone, the working group would already advise against applying the rules of the Directive beyond the area of antitrust damages actions. In addition, extending the scope of the provisions of the Directive to other categories of civil claims would result in further (unnecessary) fragmentation of Dutch civil law, which the working group also considers undesirable.

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[104] *Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*, 8 October 2015. www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht).