

# Compensation of Damages The Netherlands

Training of National Judges in EU Competition Law

14 October 2022

Justice Mieke Dudok van Heel

# **Dutch legal system - Procedures in competition law cases**

## **Administrative cases - Validity of the Administrative Decision**

EU: Commission - CJEU

NL: Administrative Division Rotterdam District Court (first instance) –  
Administrative Court for Trade & Industry (CBB) (appeal court)

## **Civil cases - Damages**

11 District Courts – 4 Courts of Appeal – Supreme Court (Hoge Raad)

Truck Cartel: all cases concentrated in Amsterdam District Court

# Different ways to bring a claim

1. individual claimants with separate actions
2. litigation vehicles - individual claimants assign their claims to the vehicle and the vehicle enforces the claims in its own name
3. class actions (or rather 'collective actions' as in the UK): actions initiated by a legal entity on behalf of a group sharing similar interests (no limitation to competition law claims or other kind of claims)

# Aspects of Dutch procedural law

1. No skeleton arguments – substantiation of claims
2. Case management
3. No pre-trial disclosure
4. Party experts vs court appointed experts

# Example: Trucks cases pending in The Netherlands

<p>Group 1 24 cases ('claimants')</p>	<p>5 litigation vehicles among which CDC, STCC and Chapelton, each representing up to 700 claimants 1 SPV representing 48 transport and logistic companies Some other claimants also representing (a great number of) other (group) companies In total: &gt; 200,000 trucks</p>
<p>Group 2 18 cases ('claimants')</p>	<p>1 litigation vehicle, 1 SPV representing several companies Approx. 1,000 individual claimants In total: &gt; 200,000 trucks</p>
<p>Group 3 22 cases ('claimants')</p>	<p>3 litigation vehicles, 7 SPVs representing several companies In total: approx. 190,000 trucks</p>
<p>Group 4 12 cases ('claimants')</p>	<p>4 litigation vehicles/SPVs representing several companies Number of trucks: ?</p>

# Litigation (or Claim) Vehicles

**Individual claimants assign/sell their claim to the vehicle and the vehicle enforces the claims in its own name. The vehicle is funded by third party litigation funders.**

- The vehicle takes over the claim
- About 50% claims filed by claim vehicles in first group
- Each vehicle in the first group represents up to 700 claimants with claims of various nature and origin, concerning up to 50,000 trucks each.
- The first group concerns in total more than 200,000 trucks.

[CDC - pioneer and leader in antitrust damage recovery in Europe  
\(carteldamageclaims.com\)](http://carteldamageclaims.com)

# Substantiation of Claims

- Article 111(2)(d) DCCP (Dutch Code of Civil Procedure):

The writ of summons initiating the proceedings must (among other things) specify the claim and its grounds.

- Article 111(3) DCCP:

The writ of summons / statement of claim must furthermore specify the exhibits (written evidence) available to the claimant and (the names of) the witnesses whose testimony he relies on to substantiate his claim.

# Case management

**Biggest challenge: to manage the sheer volume of claims**

- No legal framework, no procedural rules.
- The legal basis can (since recently) be found in Article 30o DCCP that provides that a hearing can be held in all situations and in any stage of the proceedings. According to the explanatory notes this can also be a case management hearing.
- Case management is entirely at the (presiding) judge's discretion / initiative.

# Practical case management steps/decisions to keep it manageable

- All Truck cases: District Court of Amsterdam
- Cases brought before another court (Den Bosch – DAF HQ) are referred to Amsterdam
- The cases are joined pursuant to article 222 of the DCCP (cases have the same subject and/or are 'related/connected')
- But divided in groups, each with their own time schedule, to keep it 'manageable'
- Judgments on preliminary issues and/or other legal points of dispute, as agreed with the parties
- Defendants (the truck manufacturers) and, to the extent possible, also the claimants, submit combined briefs (such as statement of defence)
- On each point of dispute, at the hearings claimants and defendants appoint one lawyer to plead on their behalf

# Disclosure

- In general: no pre-trial disclosure
- Article 843a DCCP: a judge can give an order to disclose documents, when a party (i) has a legitimate interest in access to (ii) sufficiently defined documents (iii) concerning a legal relationship in which this party or its predecessor is involved (= cartel damages claim).
- A motion seeking a disclosure order can be made at any stage during the proceedings. It can also be lodged as a separate request before the proceedings (=> pre-trial disclosure).
- The Damages Directive is implemented in articles 844-850 DCCP.

# Judgment 12 May 2022 (Group 1)

(binding character Decision)

3.15. Against the background of the Otis judgment of the Court of Justice of the EU and in the light of the provisions in Article 16(1) of Regulation 1/2003, the District Court considers the Decision to be binding in its entirety, and when determining the precise content and scope of the operative part, will take into account the fact that the Commission's considerations serve to substantiate and further illustrate the infringements listed in the operative part. Moreover, the Infringement mentioned in the Decision can - and must - be further interpreted and expounded upon in light of the submitted claims for damages. The District Court is therefore not bound by the very brief representation of concrete, factual conduct in the Decision.

# Judgment 12 May 2022 (Group 1)

## (binding character Decision) (2)

3.11. It is not appropriate to acknowledge the facts as outlined in the Decision in the Settlement Procedure with the Commission, and then subsequently call them into question in a subsequent civil procedure before another (national) court.

(In line with the judgment of the Competition Appeal Tribunal (CAT) in de UK of 4 March 2020 (Royal Mail), upheld by the Court of Appeal of 11 November 2020):

“But the defendants' contention that they can admit a fact to the Commission for the purpose of obtaining those benefits in the Decision but then not admit the same fact for the purpose of resisting a consequent damages claim based on the Decision, simply begs the question whether the latter conduct constitutes an abuse.”

The CAT answered the latter question in the affirmative.

# Judgment 27 July 2022 (Group 1)

The court ruled:

- The assignment model is accepted (again) and the claim vehicles are declared admissible (are allowed to 'represent' the assignors in these damages proceedings)
- Alle claims are governed by Dutch law
- The assignments of the claims to the claims vehicles are in principle valid

# Next steps

In its judgment of 12 May 2022, the court ruled:

3.69. It has not been established that it is excluded that the Infringement has led to damage for the Claimants. This does not alter the fact that an assessment will have to be made for each Claimant as to whether the threshold for referral to separate proceedings for the determination of damages has been met. For this to be the case, it must be plausible that a Claimant, or the Underlying Party, has possibly suffered damage as a result of the unlawful conduct by the Truck Manufacturers. The District Court has not yet ruled on this issue. This means that the proceedings will be continued, and that the Claimants' claims - in light of the further defences put forward by the Truck Manufacturers in their statements of defence - will be assessed further (in terms of content).

The **next step** is the assessment whether for each Claimant the threshold for referral to separate proceedings for the determination of damages has been met. For this to be the case, it must be plausible that a Claimant, or the Underlying Party, has possibly suffered damage as a result of the unlawful conduct by the Truck Manufacturers.

Hearing: April 2023

# European judges working together

Association of European Competition Law Judges  
(AECLJ)