Follow-on cartel damage claims: the Netherlands still a popular jurisdiction

Overview recent Dutch case-law on cartel damage claims

For quite some time, the Netherlands has been considered one of the most popular jurisdictions in Europe for bringing (follow-on) cartel damage claims. As shown by a summary of the developments that we published earlier, it is only in relatively exceptional situations that the Dutch court declares that it lacks jurisdiction to hear cartel damage claims. Recent case law has clarified, among other things, the jurisdiction of the national court, the possibilities to stay proceedings, the possibility to implead other parties, and the passing-on defence. This blog will outline these recent developments.

Jurisdiction of the national court
A recurring issue in follow-on cartel damage proceedings is the jurisdiction of the Dutch court in this type of proceedings, for in nearly all proceedings that jurisdiction is disputed. Meanwhile, the EU Court of Justice has given more clarity on this point in a recent ruling. In that ruling, the EU Court of Justice answered a number of questions referred for a preliminary ruling by a German court in follow-on proceedings in relation to the hydrogen peroxide cartel. In that case the EU Court of Justice confirmed that the competent court is the national court of the country where (i) the cartel was definitively concluded (i.e. the cartel infringement took place), (ii) the cartel was implemented (i.e. the place where the damaging event took place) and (iii) one of the (allegedly) infringing companies has its registered office. Usually, claimants in cartel damage proceedings, such as CDC, SCC and Equilib, opt to summon all the applicants of a cartel decision to appear before a court in the country where one of the companies involved has its registered office (the "anchor defendant"). As long as there is a close connection between the claims of the claimant(s) against the applicants of the cartel decision, pursuant to Article 6(1) of the EEX Regulation (which European regulation determines the (national) court that has jurisdiction to hear cross-border civil disputes. This Regulation was amended by Brussels I recast), all claims against the applicants of a cartel decision can be decided by one and the same court. This is to avoid irreconcilable decisions being given in separate proceedings on the cases.

This played a role, among other things, in the Equilib/KLM case dated 7 January 2015, based on the airfreight cartel, in which KLM and Martinair acted as the anchor defendants, and the Dutch court based its jurisdiction to hear the claims against British Airways and Lufthansa on the place where KLM and Martinair were based. According to the Amsterdam District Court, the situation was legally and factually identical, and there was a risk of divergence in decisions if the claims against British Airways and those against Lufthansa were handled by different courts. In the decision dated 25 February 2015, too, (Deutsche Bank/Nedri Spanstaal et al.) relating to the follow-on proceedings based on the prestressing steel cartel, the Limburg District Court reached the same conclusion. The court held that this approach was in line with the objectives of the EEX Regulation, i.e. the simultaneous handling and trying of claims ensuing from cartel decisions of the European Commission. The ruling of the EU Court of Justice in the hydrogen peroxide cartel case recently also made it clear that if the proceedings against the anchor defendant are withdrawn because a settlement is reached, the national court will still retain its jurisdiction in respect of the other defendants.

In the CDC/Shell case (candle waxes cartel), the Hague District Court repeated that follow-on proceedings may be governed by the laws of the country where the wrongful act took place or the laws of the country where the customers were damaged. Since CDC fully invokes the cartel against the defendants, irrespective of whether the defendant in question had supplied paraffin wax to one or more customers, the court first of all saw ground, in this case, to link on to the production locations. This led to the applicability of the legal systems of various member states. Subsequently, the court held that this would result in an unwanted fragmentation of the law. The court tried to solve this by asking the parties to make a choice of law in their filings.

In the follow-on proceedings between CDC and Akzo et al., based on the sodium chlorate cartel, the question before the Amsterdam District Court was whether a (broadly worded) arbitration clause ruled out the jurisdiction of the Dutch court. The court held that the scope of an arbitration clause was not so broad as to extend to claims on account of competition law infringement. In its above-mentioned decision dated 21 May 2015 the ECJ reached a similar conclusion. According to the ECJ, this is different only for
arbitration clauses specifically regarding disputes relating to liability on account of competition law infringement.

**Masterfoods defence**
The so-called "Masterfoods defence" means that national civil proceedings must be stayed or suspended until the decision of the Commission to impose a fine has become irrevocable. Dutch civil courts have, however, accepted that the fact that a cartel decision is still the subject of proceedings before a Union court does not necessarily (directly) lead to a stay of national follow-on proceedings (see, e.g., the ruling of the Amsterdam Court of Appeal dated 24 September 2013 in the Equilib/KLM et al. case).

The *decision* of the Gelderland District Court dated 15 April 2015 in the proceedings based on the gas insulated switchgear cartel shows that the same holds true for proceedings before the Supreme Court in a related case. In other words: the national court will, in line with settled European case law, reject the defence that the national civil proceedings should be stayed or suspended until the decision of the Commission to impose a fine has become irrevocable or until the Supreme Court (and/or a higher instance) has decided a related case. The foregoing will in any event apply if and to the extent that the national civil proceedings relate only to procedural aspects (such as jurisdiction).

**Indemnifications, access to documents and witness examinations**
Of course, indemnifications play an important role in follow-on cartel damage proceedings, given the interest of a company that is held jointly and severally liable in recovering the damage in the event of an adverse court order, or sharing such damage with one or more other applicants of the cartel decision, or other companies that may otherwise be involved. For example, in its decision dated 25 March 2015 regarding the airfreight cartel, the *Amsterdam District Court* allowed impleading of parties (both cartel participants and other airline companies). In its *ruling* dated 4 February 2014, the Amsterdam Court of Appeal decided the appeal lodged by Lufthansa in the proceedings in which KLM had impleaded Lufthansa (the "impleader"). These proceedings ran parallel with the proceedings initiated by Equilib against KLM seeking damages (the "main action"). The court of appeal held that the main action and the impleader should be heard simultaneously. For that reason, the case was referred back to the court for continuation of the proceedings. The court thereby held that KLM, which had been held jointly and severally liable for the total damage of the (alleged) airfreight cartel, had a substantial interest in learning Lufthansa’s arguments in a timely manner, so that it could submit those arguments in the main action.

In the SCC/KLM case, too, the Amsterdam District Court granted KLM’s request to implead a number of parties that had allegedly been involved in the airfreight cartel. Also noteworthy is the fact that SCC requested a provisional examination of witnesses in order to obtain more clarity as to, among other things, the existence of the cartel, its scope and the working method of the participants in the cartel. In its decision dated 25 September 2014, the court referred to the decision of the European Commission to impose a fine in which these subjects had already been discussed. According to the court, therefore, SCC did not have any interest in the witness examinations. The court held that it had to assume that the decision was valid and that a witness examination would not bring any new relevant facts to light. In other cases based on the airfreight cartel, the Amsterdam District Court rendered decisions to that effect (see here and here). In these cases, the court rejected the claims for inspection, surrender or provision of extracts of certain records, because it did not deem such documents necessary in the interest of proper administration of justice.

**Passing-on defence**
Despite the fact that the Netherlands is a popular jurisdiction for follow-on cartel damage proceedings, most of the proceedings pending in the Netherlands are still at the stage of procedural defences. An exception is two proceedings initiated by TenneT on account of damage allegedly suffered by it as a result of the gas insulated switchgear cartel.

In the former case, *ABB et al./TenneT et al.*, the court of appeal assessed the question of how to apply the passing-on defence. The court of appeal thereby considered that the claim brought by TenneT, which alleged to have suffered damage as a result of the cartel, "against that background, reasonably comprised the price surcharge to be determined in follow-on proceedings to assess the damages (...), minus that part of such damage that TenneT et al. (may) have passed on to their customers, (...) in addition to lost profit and interest." The court of appeal thereby calls to mind that damages are about compensating TenneT for the loss suffered by it as a result of ABB's wrongful acts by infringing competition law. The angle is not (indirectly) to take away from ABB everything that it may have gained as a result of the cartel. This basic principle also prevents ABB from being given multiple orders to compensate one and the same damage. Therefore, the court of appeal accepted ABB's passing-on defence, but failed to give a decision on the division of the burden of proof in respect of that defence. The court of appeal left that up to the court assessing the damages.

Another (less advanced) case in this respect is *TenneT et al./Alstom et al.*, in which the court decision dated 24 September 2014 paid attention to assessment of the
scope of the cartel damage. For example, the court held that TenneT would, in principle, be required to prove the scope of the overcharge. The assessment of damages is based on the criteria of national law. According to settled European case law, those criteria may not render compensation of damage impracticable or extremely difficult. Furthermore, the court referred to the principle of effectiveness and held that TenneT could not reasonably be expected to know what - under the circumstances of a global cartel - a reasonable price would have been for the relevant products. The principle of effectiveness may also entail that Alstom is to provide an insight into the price calculation of the products and that it would have to substantiate the costs at the time and the surcharges used. Furthermore, the court held that - save evidence to the contrary to be submitted by Alstom - TenneT could limit itself to an appropriate estimate of the damage. Such an estimate may, for instance, be made by comparing the quotation issued at the time of the cartel to the quotation issued after the cartel arrangements.

Thus, TenneT has brought two separate proceedings against two different (alleged) cartel participants (ABB and Alstom) in the context of the same cartel. This is different than the usual route as referred to above, in which proceedings are initiated against a defendant, which is then likely to implead other participants. According to the decision of the Gelderland District Court dated 15 April 2015, TenneT was free to choose this route. The court held that TenneT was not under any obligation to bundle claims against different defendants in the same proceedings.

The cases described above are often still at the stage of procedural defences. Except for the discussion on the passing-on defence, however, there is still a great deal of uncertainty as to how Dutch courts will handle issues such the calculation and the attribution of the damages. Eventually, this will be the litmus test for the question as to whether the Netherlands will continue to be a popular jurisdiction for follow-on cartel damage proceedings. To this effect, the coming into force and implementation (not later than 27 December 2016) of the Damages Directive might also be of influence.

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