



Damages Directive

Joint and several liability

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Overview Joint Liability for competition infringement

1. Current situation in The Netherlands:
 1. Dutch civil code
 2. Dutch case law
2. Impact of the Directive
3. Proposed bill to implement Directive



Legal basis damage claims

Tort – ‘onrechtmatige daad’ Article 6:162 Dutch Civil Code

1. Tortious act = Act in violation of a duty imposed by law
 - Decision European Commission/National Authority
 - Infringement Article 101 TFEU
 - Follow-on procedures
1. Attribution
2. Damage
3. Causal relation
4. Violated standard of behaviour must intend to offer protection against damage



Legal basis damage claims

- **Unjustified enrichment – Article 6:212 Dutch Civil Code**
- *‘A person who has been unjustifiably enriched at the expense of another person, has the obligation towards that other person to repair the damage up to the amount of his enrichment, as far as this is reasonable.’*
- If pricing too high due to fraudulent bidding
- Misbruik van dominate positie
- Van Ommeren vs Gemeente Rotterdam: port fees



Legal basis damages

- **Imperfection in the compliance with an obligation –
Article 6:74 BW Dutch Civil Code**
 - Non-performance
 - Damage
 - Attribution
 - Default



Dutch case law

- **Most recent case: Tennet**
- - Cartel agreements are qualified as tortious act
- - Liability based on tort
- - Mother and subsidiary are liable!
- - Attribution subsidiary → → awareness of cartel
- Passing on defense accepted



Dutch case law

TenneT

- Joint and several liability Article 6:166 and 6:102 DCC
 - i. Conscious joint action and both have contributed to the damage
 - ii. Both had to foresee the risk on damage and this had to withheld them from participation
 - iii. Participation is attributable to both parties
 - iv. Tort towards plaintiff has caused damage



Jointly and several liability in DCC

- **Article 6:102 DCC**

All infringers jointly and severally liable

- **Article 6:10 DCC**

Redress between infringers if paid more than attributable to them

- **Article 6:101 DCC**

Proportionality based on **attributability** unless reasonability requires a different outcome



New bill: Implementation in Dutch Civil Code

- New section in DCC → ‘Infringement Competition Law’
- Joint and several liability, even if already present, repeated
- Domestic vs international cases
- Proportionality based on article 6:101 DCC amended to reflect the special position of SME’s and immunity recipients
- Even though bill is to ‘merely implement’, it reaches on certain points beyond Directive re ‘infringer’ and ‘disclosure’ (proportionality requirement removed)
- And on other points it fails to implement such as re passing on



Discussion

- Is article 11 of the Directive fair in your view?
- Does this article require implementation and how is this achieved in your jurisdiction?
 - On the basic principle of joint and several liability?
 - On SME's?
 - On Immunity recipients?
 - On redress between infringers?
 - On (statutory) limitation?
- Do you expect much litigation in your jurisdiction?
- Will the carve out for domestic cases have impact and if so how?
- What complexities