

The Private Damages Directive and its implementation in the Dutch legal order: box ticked?

Competition law – private enforcement – Directive 2014/104/EU – damages claims – implementation – The Netherlands

Catalin S. Rusu, Associate Professor of European Law at Radboud University Nijmegen, c.rusu@jur.ru.nl, 5 March 2017

Introduction

Directive 2014/104/EU on private damages^[1] was adopted on 26 November 2014. Its aim is to harmonise certain domestic rules and procedures dealing with the private enforcement of EU competition law. According to Article 21 (1) of this Directive, a generous deadline was given to the Member States for the Directive's implementation in the domestic legal orders: 27 December 2016. Yet, less than half of the Member States managed to accomplish the implementation task within the given deadline.^[2] This is also the case for the Netherlands, a Member State generally known as diligently implementing harmonisation measures on time. The Private Damages Directive was implemented in the Dutch legal order with a delay of about six weeks.^[3] The implementation measures came into force on 10 February 2017. In the paragraphs below, I will attempt to draw up an inventory of the measures taken by the Dutch authorities with a view to the implementation exercise, while pinpointing the specific choices adopted by the Dutch legislator and the changes brought about to the existing legal framework of damages claims in the Netherlands.

Status quo

First of all, certain basics of the Dutch system concerning private enforcement of competition law infringements need to be mentioned. This is necessary for a correct understanding of the consequences of the Directive's provisions implementation.

It is a known fact that the Netherlands is one of the preferred jurisdictions in Europe when it comes to litigation on private damages connected to competition law infringements. This is so, despite the fact that the Dutch legal system offers no specific framework for damages claims based on competition law infringements. In this

respect, the relevant provisions of the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP) are used for such actions: breach of contract, unjust enrichment, the management of another's affairs, undue payment, and wrongful acts.[4] Further, regarding the legal standing in private damages claims Dutch law requires the existence of sufficient interest to bring an action.[5] Next, the claimant (be it a direct or an indirect purchaser) bears the burden of proving the causal link between the competition law infringement and the damages suffered.[6] Most damages claims in the Netherlands are follow-on actions, which rely on the administrative decisions of competition authorities, establishing the existence of a competition law infringement. Such actions are based on the EU right to claim damages, as put forward by the Court of Justice of the EU in the *Courage / Crehan*[7] and *Manfredi*[8] judgments.

Discussion

The implementation of the Private Damages Directive in the Netherlands kicked off in February 2015 when an implementation timeline was designed. The *Draft implementation legislative proposal* and an attached *Explanatory memorandum* were made available to the public in October 2015. The legislative implementation process entailed the involvement of both Dutch Parliament chambers,[9] and also of the Advisory Department of the Dutch Council of State,[10] and last but not least, of the key stakeholders[11] and the academic community.[12]

Given the specificity of the already existing Dutch private enforcement system, the Dutch authorities chose to implement the Private Damages Directive in the domestic legal order by inserting a series of new provisions into the DCC and the DCCP. Attention must be paid to the fact that this implementation relates only to damages claims connected to infringements of EU and Dutch competition law (in the latter case, only when the trade between the Member States is affected), and thus it does not relate to infringements of Dutch competition law. According to par. 2 of the *Explanatory Memorandum*, a separate legal instrument will be put in place for this setting.

As previewed above, in the following paragraphs, a checklist of the implementing measures and the corresponding Directive provisions is provided. It must be mentioned though that some of the Directive's provisions were not implemented in the Dutch legal order, given that implementation is either not required by their very nature,[13] or Dutch law is already in line with the Directive.[14]

Provision	Directive 2014/104/EU	Domestic Legislation	Observations
		<i>Book 6 DCC – Title 3: “Torts” Section 3B: “Infringement of Competition Law”</i>	
· Definitions	· Art. 2	· Art. 193k	
· Presumption of harm	· Art. 17 (2)	· Art. 193l	· Infringer may rebut the presumption
· Joint and several liability	· Art. 11	· Art. 193m	· Partial implementation
· Liability of immunity recipients	· Art. 11 (5), (6)	· Art. 193n	· See also Art. 6:102 DCC, 6:101 DCC, 6:10 DCC
· Out-of-court settlements	· Art. 19 (1)- (3)	· Art. 193o	
· Passing-on	· Art. 13 (1 st sentence)	· Art. 193p	· See also Art. 150 and 843a DCCP (already covering the content of Art. 13 –

			2 nd sentence, of the Directive)
· Indirect purchasers	· Art. 14 (2)	· Art. 193q	
· Suspension of proceedings (out-of-court settlements)	· Art. 18 (2)	· Art. 193r	
· Limitation periods	· Art. 10 (1)-(3) & 22 (2)	· Art. 193s	
· Out-of-court settlements & limitation periods	· Art. 18 (1) & 10 (4)	· Art. 193t	
		<i>DCCP – new article / paragraph</i>	
· NCA (i.e. the Dutch ACM) assistance for quantifying damages	· Art. 17 (3)	· Art. 44a (3)	
· Effect of NCA decision (i.e. the Dutch ACM)	· Art. 9 (1)	· Art. 161a	· See also Art. 152 (1), (2) DCCP ('somewhat' covering the content of Art. 9

			(2) of the Directive)
		<i>DCCP – new Section 1A: “Access to documents...”</i>	
		· Art. 844	· Circumscribes the application of this new section
		· Art. 845	· Derogation from obligation to grant access to documents
· Leniency and settlements submissions	· Art. 6 (6) & 7 (1)	· Art. 846	
· Access to documents from the file of a NCA	· Art. 6 (5) & 7 (2)	· Art. 847	
· Limitation on the use of documents obtained from NCA	· Art. 7 (3)	· Art. 848	

· Access to NCA file – last resort	· Art. 6 (10)	· Art. 849	
· Safeguarding public enforcement effectiveness	· Art. 6 (4) (c)	· Art. 850	

Conclusion

Summing up, the implementation of the Private Damages Directive into Dutch law was a rather straightforward process. Although the Dutch authorities were late in implementing the Directive's provisions, the approach to updating the relevant domestic legal provision may be characterized as practical and very much functional. Since the Dutch private enforcement system already contained coherent mechanisms to ensure that damages claims may realistically be fulfilled in the Dutch courts, not all provisions of the Directive needed implementation. Those provisions that however required transposition into domestic law, found their place in the DCC and the DCCP. All in all, box ticked. It now remains to be seen whether the issuing of the Directive (and its implementation) will indeed boost the private enforcement of EU competition law in the Netherlands.

[1] Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, 2014 OJ L 349.

[2] See overview of national implementation measures, available at: <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0104>, accessed on 1 March 2017.

[3] See Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), Staatsblad 28, 09.02.2017.

[4] See Articles 6: 162, 6:200, 6:203, and 6:212 DCC.

[5] Article 3:303 DCC.

[6] Articles 6:162 and 6:163 DCC.

[7] Case C-453/99, *Courage Ltd v. Crehan*, ECLI:EU:C:2001:46.

[8] Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461.

[9] See Tweede Kamer, vergaderjaar 2015-2016, 34 490, nr. 2; Verslag Tweede Kamer, Tweede Kamer, vergaderjaar 2015-2016, 34 490, nr. 5; Tweede Kamer, vergaderjaar 2016-2017, 34 490, nr. 7; Tweede Kamer, Handelingen TK 2016/2017, nr. 27, item 3; Eerste Kamer, vergaderjaar 2016-2017, 34 490, A; Verslag Eerste Kamer, 2016/2017, nr. 15, item 3.

[10] Advies Afdeling Advisering Raad van State en Nader Rapport, Tweede Kamer, vergaderjaar 2015-2016, 34 490, nr. 4.

[11] Internet consultatie: Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, available at:

https://www.internetconsultatie.nl/implementatiewet_richtlijn_privatrechtelijke_handhaving_mededingingsrecht, accessed on 02.03.2017.

[12] Nederlandse Vereniging voor Europees Recht (NVER), Reactie opgesteld door de Werkgroep 'Private Enforcement and Collective Redress in European Competition Law', 20.10.2015.

[13] Articles 1, 16, 20, 21, 22 (1) and 23 of Directive 2014/104/EU.

[14] Articles 3, 4, 8, 9 (2), 11 (6), 12 (1)-(5), 15, 17 (1) and 19 (4) of Directive 2014/104/EU.