Kluwer Competition Law Blog

Dutch Court holds former director personally liable for North Sea shrimps cartel fine

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Introduction

On 23 September 2020 a former director of one of the North Sea shrimps cartelists was held personally liable for damage of over € 13 million by the Dutch District Court of Noord-Nederland ("**Court**"). According to the Court, the director's personal involvement in the cartel qualified as improperly fulfilling his duties as a director. This justifies his personal liability to pay damages to the bankruptcy estate based on Dutch corporate directors' liability rules.

This judgment is of interest for several reasons. Firstly, because it shows that (former) directors involved in competition law infringements may be personally liable for a cartel fine, even though the European Commission did (and can)not impose personal fines.[1] Secondly, because the judgment shows how civil and/or corporate liability for competition law infringements could be established and how to calculate the damage.

In this blog we discuss the relevant facts of the case, the judgment of the Court and the impact of the judgment for practice in more detail.

Relevant facts of the case

EC decision

Back in January 2003, the Dutch competition authority ACM already fined several parties active in the North Sea shrimp sector for infringing Article 101 TFEU and its Dutch equivalent by setting minimum prices and catch limits in the period January 1998 – January 2000 ("**ACM Decision**"). Approx. 10 years later, on 27 November 2013, the European Commission also issued a decision in a cartel procedure against parties active in the North Sea shrimp sector ("**EC Decision**"). Those parties being (in short) Heiploeg, Klaas Puul, Stührk and Kok Seafood. They were fined almost € 29 million for infringing the EU cartel prohibition. From June 2000 until January 2009 they had fixed prices, shared markets and exchanged commercially sensitive information.

Heiploeg was by far the most heavily hit: its fine amounted to more than € 27 million. Heiploeg appealed the EC Decision, but the decision was upheld by the General Court of the European Union on 8 September 2016.[2] In the meantime, in 2014, Heiploeg was declared bankrupt.

Claims by trustees in bankruptcy of Heiploeg

The trustees in bankruptcy ("**claimants**" or "**trustees**") of Heiploeg[3] tried to claim damages from former managing and supervisory directors. Most former directors of Heiploeg settled with the trustees, but the former director to whom the trustees brought an action for damages in court ("**defendant**" or "**former director**") did not. The defendant was (indirect) director of several legal entities within the Heiploeg group in the period 1 February 1996 – 2 October 2004.

According to the trustees, the former director should be held personally liable for the damage because he was actively and knowingly involved in the cartel. The damage would consist of on the one hand, the deficit related to bankruptcy which allegedly was the result of the cartel fine, and on the other hand, the cartel fine which allegedly was the result from his involvement in the coordination of sale prices and arrangements made with regard to the distribution of the shrimps, weekly purchase prices and market allocation, the (more than) regular contacts he had with participants in the cartel and the strategic alliance he concluded. The trustees considered the defendant as the driving force of the cartel.

Ruling on liability of the former director

Central questions of law

The central questions of law before the Court were:

- whether the defendant acted wrongfully (whether a personal serious blame can be made) towards the joint creditors based on which he is liable pursuant to Article 6:162 of the Dutch Civil Code (tort) for the deficit related to bankruptcy, and/or
- whether improper management (improper performance of duties) can be established based on which he is liable pursuant to Article 2:9 of the Dutch Civil Code (corporate directors' liability) for the fine imposed on Heiploeg by the European Commission.

The Court ruled as follows.

Role of former director in cartel

The former director acted unlawfully as he knew (or must have known) about the infringing conduct and not only allowed it to take place but actively took part in the conduct. The former director had a long-term, direct and personal role in the infringement and influenced the purchase and sales prices of North Sea shrimps. It follows from the facts laid down in the EC Decision and the evidence note submitted by the claimants that the former director for example: had been personally present at several meetings where price fixing arrangements were made, sent emails confirming the infringing conduct and sent a letter to a third party stating that half of the turnover was made due to price fixing arrangements with a competitor. Furthermore, a competitor declared that he and the former director exchanged commercially sensitive information for almost every night during a period of approx. 20 years (until 2004). The Court concludes that the former director's acts or omissions in the given circumstances are so negligent that he acted wrongfully, and a personal serious blame can be made. The Court also refers to the before mentioned ACM Decision which should have been a warning that the conduct was in breach of competition law.

Claim based on tort unsuccessful

The Court however rejects the claim based on tort towards the joint creditors (Article 6:162 Dutch Civil Code), because the required causality between the conduct of the former director and the full deficit related to bankruptcy (the alleged damage by the trustees) is missing. According to the Court, at the time the cartel fine was imposed on the undertaking, Heiploeg was already in a very precarious financial situation. This leads to the conclusion that there is no direct link between the unlawful conduct that led to the cartel fine and the deficit related to bankruptcy. The claim of the trustees that Heiploeg would not have gone bankrupt if the cartel fine had not been imposed, failed.

Claim based on directors' liability successful

The claim based on directors' liability (Article 2:9 Dutch Civil Code) does succeed. Since the Court established that the former director acted unlawfully and that this can be attributed to him as personal serious blame, the Court is of the opinion that improper administration (improper performance of duties) can be assumed. Contrary to the claim based on tort, the required causality between the conduct of the defendant and the cartel fine is present according to the Court. The participation of Heiploeg in the cartel was actively carried out, or at least allowed, by the defendant in the period 2000 to 2003. The Court ruled that if the unlawful conduct and improper performance of the former director had not occurred, Heiploeg would not have infringed competition law and would not have received a cartel fine.

Competition rules serve to protect against damage (relativity requirement)

Furthermore, the Court does not accept the defendant's argument that the competition rules do not serve to protect against the damage Heiploeg has suffered (for which reason the relativity requirement is not met). The Court refers to standard case law of the Court of Justice of the European Union (*Courage/Crehan*; *Manfredi*) from which follows that any person should be able to claim damages following from a competition law infringement.[4] Insofar as the relativity requirement would apply to the claim, this would fulfilled. The Court does not see any grounds to deny the trustees the right to claim damages, which can be the case (at national level) if a party has been found significantly responsible for the competition law infringement. Since the defendant has infringed a standard of due care, he cannot – according to the Court – 'escape' maladministration by invoking the lack of relativity.

Calculation of damages

The Court continues with the calculation of the damages in case of temporal participation in a competition law infringement (the extent of the liability). The Court rules that the defendant can only be held liable for the period he was director of the undertaking while the infringement took place, as laid down in the EC Decision. Consequently, the former director is held liable for 48,05% of the infringement period, resulting in an amount of approx. € 13 million.[5]

Other matters

The judgment contains other interesting considerations and contentious matters. Those go beyond the scope for the purpose of this blog, but includes topics like admissibility, the period of limitation, forfeiture of rights, obligation to furnish facts and the burden of proof, discharge from liability, the limitation period for statutory interest, a reduction of the claim due to an out of court

settlement with other jointly and severally liable third parties, mitigation of the claim and provisional enforceability. Please do reach out for further details on these matters.

Practical meaning and next steps

This judgment is one of the very few examples in the Netherlands where civil or corporate claims to recover a competition law fine against individuals involved in a competition law infringement has been successful. The judgment shows that directors should be mindful about their potential personal liability in relation to competition law fines imposed on the undertaking.

Observations

Some observations:

- **Door opening for claims**
  This judgment (further) opens the door for (bankrupt) undertakings fined by a competition authority to claim damages from a director that was involved in the infringement. For a successful claim, we believe that it is at least necessary that the relevant person was deeply involved in the infringement for which the undertaking has been fined by the competition authority.

- **Description of role (former) director in cartel decision is of utmost importance**
  In this case, the former director had undeniably been actively involved in the cartel and was personally mentioned in the EC Decision. In that context, it is important to mention that even though the liability for damage of the former director that acted wrongfully does not immediately follow from the established infringement by the undertaking in the EC Decision (it has to be determined independently whether the requirements of damage and causality are met), the assessment of the Court may nevertheless be based on the findings in the EC Decision as regards the role of the former director in the cartel.

- **Claim can be based on *both* tort and corporate directors' liability**
  The judgment shows that a claim could be successful both based on tort and corporate directors' liability. Although in this case, the claim under tort failed because not all requirements were fulfilled, the Court did establish the conduct of the former director as being 'unlawful conduct'. This could make the claim successful under different circumstances, at least in theory.

- **Claims against other natural persons than directors**
  It should also be kept in mind that while the Dutch rules in relation to corporate directors' liability only apply to directors, the rules on tort apply to any natural or legal person. This judgment thus could be a stepping stone for claiming damages resulting from competition law infringements from less highly ranked individuals within an organisation based on tort. However, it is to be seen how this would relate to employer's liability.

- **Directors' liability insurance not always a safe harbour**
  Interesting fact is also that the directors' liability insurance company of the former director apparently stated that they will in principle refuse the claim made under his insurance policy as the claim was made five years late. Furthermore, they reserve their rights as regards the possibility to refuse the claim as the insurance policy excludes deliberate intent. This shows that directors' liability insurance policies might not always provide a safe harbour.

- **Judgment disregards own responsibility undertaking**

> The conclusion by the Court on causality (i.e. if the defendant would have acted lawfully, Heiploeg would not have received a cartel fine) is in our opinion quite far-stretching in the sense that it basically disregards the own responsibility of the undertaking on which the cartel fine was imposed. This can possibly be explained by the circumstances of the case, namely that the action is brought forward by trustees instead of by the undertaking itself.

These observations show that a settlement is something to consider seriously in the given circumstances.

Follow-up questions

Finally, the judgment raises some interesting follow-up questions to consider, such as:

1. Is it necessary for the action under tort that the undertaking concerned is bankrupt in order to be able to claim damages following a competition law fine from (former) employees involved in the infringement? And as a corollary, what if a fined undertaking raises a claim instead of trustees? Perhaps own fault, the responsibility to limit damage and other defences based on civil law could play a prominent role in such cases to limit the chances of success of such a claim.
2. What if a national competition authority ("**NCA**") can impose personal fines for infringing competition law (like the ACM in the Netherlands), but decides not to? For example, because the burden of proof for imposing such a fine is not met? I.e. in the Netherlands, the ACM can impose personal fines on natural persons who exercised de facto leadership over – or commissioned – a competition law infringement.[6] Would that make a difference in the establishment of liability of a (de facto) director under civil and/or corporate liability rules? This judgement shows that the Court takes the EC Decision into account insofar it concerns the role of the former director in the cartel. If the decision of the NCA does not mention the role of any natural persons involved, this could make it more challenging to prove the unlawful conduct of the natural person concerned.
3. Could the judgement increase the possibility for fined undertakings confronted with follow-on damage claims by third parties to also (partly) pass on these claims to a (former) director based on corporate directors' liability rules?

All in all, a very interesting judgment and development to watch closely. The former director can still appeal the judgment before the Dutch Court of Appeal Arnhem-Leeuwarden. Given the amount of damages he is being held liable for, we expect this not to be the end of the road.

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[1] We note that pursuant to Article 7 of Regulation 1/2003 the European Commission can only impose a fine on the undertaking and associations of undertakings, and not on a natural person. In the Netherlands, the NCA may impose a fine on undertakings as well as natural persons pursuant to Article 56 Dutch Competition Law Act in conjunction with Article 5:1, under 2 and 3, of the Dutch General Administrative Law Act.

[2] Stührk did successfully appeal the EC Decision resulting in the annulment of the fine imposed on Stührk on 13 July 2018 (ECLI:EU:T:2018:474).

[3] Please note that the judgment is anonymised, but it follows from the facts of the case that it concerns the Heiploeg group.

[4] As also laid down in Directive 2014/104/EU, Article 1(1).

[5] For completeness sake it is noted that this amount can be reduced with the amount that the defendant could have claimed from the directors who are party to the settlement.

[6] The exercise of de facto leadership with regard to cartel conduct occurs where a person, although authorised and reasonably required to do so, fails to take measures to prevent cartel conduct and thereby consciously accepts the significant risk that such conduct occurs. In such case, this person is considered to promote the cartel conduct willfully. A competition law infringement has been commissioned if a person gives explicit instruction to someone else to engage in cartel conduct.

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This entry was posted on Tuesday, October 13th, 2020 at 10:00 am and is filed under Competition law, Source: UNCTAD“>Damages, Liability, Litigation, Netherlands
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