

I. ADMINISTRATIVE ENFORCEMENT

Which administrative mechanisms are available to enforce the Directives?

- In the Netherlands, Directives 93/13 (Unfair Contract Terms), 98/6 (Price Indication), 1999/44 (Consumer Sales and Guarantees), 2005/29 (Unfair Commercial Practices), 2006/114 (Misleading and Comparative Advertising), 2011/83 (Consumer Rights), 85/577 (Doorstep Selling), 97/7 (Distance Selling), 2008/122 (Timeshare), 90/314 (Package Travel), 2009/22 (Injunctions) are all enforced by the Authority for Consumers & Markets (in Dutch: "De Autoriteit Consument en Markt") (hereinafter:"ACM") and the Authority for Financial Markets (in Dutch: "Stichting Autoriteit voor Financiële Markten") (hereinafter: "SAFM").
- These competencies arise from the provisions in sections 2.2 and 3.1 of the Consumer Protection (Enforcement) Act (in Dutch: "Wet handhaving consumentenbescherming") (hereinafter: "Whc"). A link to the Whc can be found at: <http://wetten.overheid.nl/BWBR0020586/2017-03-10#Aanhef>.
- The ACM proactively enforces consumer rights related to all of the abovementioned Directives and is also competent to receive and process administrative complaints. The general website of the ACM can be found at: <https://www.acm.nl/>.
- The AFM is designated as the competent authority in intra- Community infringements regarding all of the abovementioned Directives and specifically related to a financial service or activity. In all other intra- Community infringements the ACM is the competent authority. The general website of the AFM can be found at: <https://www.afm.nl/>.

Who can file administrative complaints? Can investigations be initiated ex officio?

Administrative complaints and/or concrete tips (signals) can be filed by i) natural persons ii) the business community iii) anonymous informers or can be derived by the ACM from the Dutch website for consumers iv) "Consuwijzer".

There are two inducements for the ACM to start an enforcement investigation.

A formal request for enforcement from any interested party:

This request is subject to and must be in agreement with art. 1:2 and 4:1 - 4:6 of the General Administrative Law Act (in Dutch: "Algemene wet bestuursrecht") (hereinafter: "Awb").

A concrete tip (signal):

These might derive from Consuwijzer, businesses or may be done anonymously. Complaints by consumers can be filed at Consuwijzer. Consuwijzer is constituted by the ACM. Businesses may contact the ACM for any indications they might have (e.g., of other firms that do not abide to the Dutch rules and regulations). All tips and reports which are not to be regarded as an application for enforcement are signals. A signal may cause the ACM to officially launch an enforcement investigation.

Concrete tips (signals) can lead to investigations by the ACM ex officio.

Do any specific procedural requirements apply to filing administrative complaints?

Formal administrative requests:

If and in so far as the ACM receives a formal request for enforcement, it checks whether the request is in agreement with art. 1:2 and 4:1 - 4:6 of the General Administrative Law Act (in Dutch: "Algemene wet bestuursrecht") (hereinafter: "Awb").

There are two requirements that must be fulfilled in order to file an official enforcement request:

The applicant must be an interested party as described in art. 1:2 Awb;

The application must meet the requirements as described in art. 4:1-4:6 Awb (e.g. the applicant shall supply information and documents that he/she can be reasonably expected to be able to obtain and that are required for a decision on the application).

A concrete tip (signal):

Complaints can be filed at Consuwijzer by phone, e-mail or regular mail.

Businesses can tip the ACM by filling in a form on their website.

It is also possible to submit tips anonymously through a phone call.

Do the administrative authorities have an obligation to investigate the complaint?

There is no explicit obligation to investigate formal administrative complaints and/or concrete tips or signals.

The ACM receives more requests for enforcement and tips about possible violations than they can take on for capacity reasons. Therefore, the ACM has set policy rules for the priority decisions relating to these administrative complaints/signals. The ACM applies the following three criteria:

How harmful is the conducted behaviour - that the administrative request or signal relates to - for the consumers prosperity;

To what extent an investigation of ACM will benefit the public interest;

To what extent is the ACM capable of effective and efficient enforcement.

The ACM will often follow up on a request or signal in case it scores high on more than one of the abovementioned criteria.

Are there any specific requirements regarding the provision of evidence to the competent authorities?

Formal administrative requests:

As mentioned here above, there are two requirements that must be fulfilled in order to file an official enforcement request:

The applicant must be an interested party as described in art. 1:2 Awb;

The application must meet the requirements as described in art. 4:1-4:6 Awb This means that with regard to the provision of evidence, the applicant shall supply information and documents that he/she can reasonably be expected to be able to obtain and that are required for a decision on the application.

A concrete tip (signal):

No specific requirements apply regarding the provision of evidence.

II. ENFORCEMENT THROUGH COURT ACTION

Which court actions are available to enforce the Directives?

- A civil procedure against an unlawful act and a general claim for civil damages under article 6:162 of the Dutch Civil Code (in Dutch: "Burgerlijk Wetboek") (hereinafter: "BW"). Civil proceedings are initiated either by writ of summons or by petition.
- Pursuant to art. 3:305d BW, the following specific procedure may be initiated under specific circumstances: the Court of Appeal in The Hague may order the cessation of any infringement - within the meaning of Article 1.1 of the Whc - of the statutory provisions referred to in part a of the Annex to the Whc.
- In addition, according to Article 3:305a, paragraph 1, BW, any foundation or association with full legal capacity may bring proceedings to protect similar interests of other persons.

Who can start a court action?

- Both consumers and the ACM may initiate a court action against an unlawful act. However, they must have sufficient interest to do so according to art. 3:303 BW: without sufficient interest, no one has legal standing in a civil procedure before a Dutch Court.

With regard to the special procedure at the Court of Appeal in The Hague: these proceedings may only be initiated by a foundation or an association with full legal capacity that - pursuant to their by-laws or constitution - carries the obligation to protect the similar interest of other persons.

- With regard to the special procedure mentioned in Article 3:305a, paragraph 1, BW, the legal person's bylaws or constitution require the same obligation to protect the similar obligations of other persons, but the legal person must also be able to demonstrate that they can sufficiently safeguard these interests. Paragraph 2 adds that requirement 3) is met if the legal person is sufficiently representative to act on behalf of the persons of whom they protect their interests, taking into account the proven connection to these stakeholders and the extent of the represented claims, and if they have a supervisory organ;

suitable and effective mechanisms exist for the participation or representation of stakeholders in the decision-making process of the foundation/association they possess sufficient means to cover the costs of the legal proceedings

they have a generally accessible internet page where specifically mentioned information is listed

they possess sufficient experience and expertise in similar proceedings.

The claim is admissible (paragraph 3) only if neither the original nor the current directors of the legal person have a direct or indirect personal aim for profit which is realised through the legal person, the claim is sufficiently closely connected to the Dutch legal sphere, and the legal person has sufficiently tried to reach an out-of-court agreement with the counterparty.

This last requirement (an out-of-court settlement attempt) also applies to a procedure based on Article 3:305d (see paragraph 2 thereof).

Can court actions be initiated by competitors?

In a general claim for civil damages, competitors may have legal standing if they have suffered damages.

Can the case be handled through an accelerated procedure?

- Via the general civil procedure against an unlawful act by means of interim injunction proceedings.
- Via preliminary relief proceedings. Please note that such proceedings do not lead to a binding decision, but only arrange for a provisional situation. Furthermore, the plaintiff needs to have and assert an urgent interest for preliminary relief for the matter to be admissible in preliminary proceedings.
- Moreover, via the procedure of 3:305d BW as subsection 3 states that the Court of Appeal must deal with such petition promptly.

Are there any specific requirements regarding the provision of evidence to the court?

- As a general rule, the burden of proof in proceedings primarily rests on the plaintiff.
- The general rules on evidence as laid down in the Code of Civil Procedure (in Dutch: "Wetboek van Burgerlijke Rechtsvordering") (hereinafter: "Rv") are applicable. The general rule is laid down in Article 150 Rv and provides that the burden of proof in proceedings on the merits primarily rests on the plaintiff (notwithstanding specific laws or regulations and/or specific circumstances on grounds of which this general rule does not apply).
- Pursuant to art. 6:195 under 1 Dutch Civil Code (hereinafter: BW) there is a revised burden of proof with respect to the correctness and completeness of the advertisement (implementing Misleading and Comparative Advertising Directive (2006/114).
- Pursuant to art. 6:193j BW, there is a revised burden of proof with respect to the correctness and completeness of the provided information (implementing Unfair Commercial Practices Directive (2005/29)).

Are there specific procedural reliefs for consumers or consumer associations?

Under certain circumstances, evidentiary presumptions for consumers may exist.

III. SANCTIONS

What are the possible civil sanctions and remedies for the infringement of the provisions of the Directives?

Most of the Directives contain a standard provision that states that Member States have to ensure that adequate and effective procedures and provisions exist to ensure compliance with the Directives.

The civil sanctions for the infringements are found in the Dutch Civil Code (hereinafter: BW). Book 6 BW (the law of obligations) provides general civil sanctions and remedies:

- Art. 6:74 BW: every imperfection as to the compliance with an obligation is a non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance is not attributable to the debtor.
- Art 6:162 BW: a person who commits a tortious act against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
- Art. 6:167 BW: a rectification can be claimed.

Book 3 BW (Property Law in General) provides general rules as well:

- Art. 3:296 BW: where a person is legally obliged towards another person to give, to do or not to do something, the court shall order him, upon a request or claim of the entitled person, to carry out this specific performance, unless something else results from law, the nature of the obligation or a juridical act.

- Art. 3:305d BW: order to cease infringement and publication of the decision.

Specific implementations of the Directives are to be found in:

- Article 7 of the Unfair Contract Terms Directive (93/13) is implemented in art. 6:240 BW. On the basis of a legal claim, the court may declare specific stipulations in specific standard terms and conditions unreasonably burdensome.
- Art. 6:195 BW and art. 6:196 BW implement the Misleading and Comparative Advertising Directive (2006/114). If someone determined the content of the misleading announcement, then this person is liable for the damage caused as a result. If the announcement has caused damage to another person, the court may, upon a right of action, disallow any further use of the announcement and order to publish a correction of the announcement.
- Art. 6:193a-193j BW implements the Unfair Commercial Practices Directive (2005/29). According to art. 6:193j under 2 BW, if a trader contracts with a consumer after having committed an unfair commercial practice, then he/she is liable for the damage caused as a result.
- The Timeshare Directive (2008/122) is implemented in Book 7 Title 7.1a BW. Art. 7:50b under 7 BW rules that a trader acting in conflict with this article conducts an unfair commercial practice as referred to in Art. 6:193b BW.
- Book 7 Title 7A implements the Package Travel Directive (90/314). It contains specific provisions on damages.

What are the possible criminal sanctions for the infringement of the Directives' provisions?

There are no possible criminal sanctions for the infringement of the Directives' provisions.

What are the possible administrative sanctions for the infringement of the Directives' provisions?

Most of the Directives contain a standard provision which states that Member States have to bring into force the administrative provisions necessary to comply with the Directives. These administrative provisions have been incorporated in the Whc, which is enforceable by the ACM (and in some rare cases by the SAFM).

The ACM has a wide range of instruments at its disposal in case it is of the opinion that an infringement or intra-Community infringement has been committed:

- Administrative fine up to € 900.000 or, if this is more, 1% of the trader's annual turnover or, in case the infringement pertains to an unfair commercial practice, up to 10% of the trader's annual turnover; ,-) (art. 2.9 under b and 15 Whc);
- Binding instructions (art. 2.8 Whc);
- Burden under penalty per breach or per unit of time until the breach is remedied up (art. 2.9 under a Whc);
- A public warning (art. 2.23 Whc).

What are the contractual consequences of an administrative order or a judgment on an individual transaction under the Directives?

- Book 6 Dutch Civil Code foresees in a number of possibilities for the entitled party on which the judge can decide to end a contract.
- Art. 6:193j paragraph 3 BW: An agreement which has been entered into under the influence of an unfair commercial practice is voidable.
- Art. 6:228 BW: An agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he/she had had a correct view of the situation, is voidable.
- Art. 6:258 BW: Upon a right of action of one of the parties to an agreement, the court may change the legal effects of that agreement or it may dissolve this agreement in full or in part if there are unforeseen circumstances.
- Article 6:262 BW: Mutual right to withhold performance until the other party performs his/her due and demandable obligation.
- Art. 6:265 BW: Rescission of a mutual agreement for a breach of contract.

Based on Art. 6:267 BW, rescission of a mutual agreement is only possible by a party who is entitled to rescind the agreement, either by written notification or by a judgement of the court.

Every consumer is free to file a complaint with ConsuWijzer or ACM.

Book 3 Dutch Civil Code foresees in a number of general possibilities to declare a judicial act null or voidable.

- Art. 3:40 BW: A juridical act that, by its content or necessary implications, violates public morality or public order, is null and void.
- Art. 3:44 BW: A juridical act is voidable when it has been performed under the influence of threat, fraud or abuse of circumstances.

Can authorities order the trader to compensate consumers who have suffered harm as a result of the infringement?

Dutch courts may order:

- damages resulting from unlawful acts (art. 6:162 BW);
- damages due to breach of contract (article 6:74 BW);
- general rules on compensation and damages are stated in art. 6:95 and 6:96 BW.

Can the administrative authorities or the courts require the publication of their decisions?

- Yes, as a general rule all court judgements in the Netherlands are public (Art. 121 Constitution of the Kingdom of the Netherlands). Hence, the courts are - notwithstanding certain exceptions - required to publicise their decisions.
- The ACM publishes its decisions regarding sanctions, however, it does not publish the underlying reports.

IV. OTHER TYPES OF ENFORCEMENT

Are there any self-regulatory enforcement systems in your jurisdiction that deal with aspects of the Directives?

In relation to advertising:

- The Dutch Advertising Code Authority (in Dutch: "Stichting Reclame Code") (hereinafter: "SRC") is a body that deals with the self-regulating system of advertising.
- The advertising industry formulates the rules with which advertising - with a nexus to consumers - must comply. These rules are codified in the Dutch Advertising Code (in Dutch: "de Nederlandse Reclame Code") (hereinafter: "NRC").
- Complaints about advertisements may be submitted by consumers to the Advertising Code Committee (in Dutch: "Reclame Code Commissie") (hereinafter: "RCC"). The RCC assesses whether the advertisement complies with the rules laid down in the Dutch Advertising Code. Any decision of the RCC is open to appeal before the appeals Tribunal (in Dutch: "College van Beroep).
- Examples of decisions by the RCC and College van Beroep can be found on the following website:

<https://www.reclamecode.nl/zoekschem.asp?hID=72>.

In relation to unfair commercial practices:

- The SRC is also authorised to act against unfair commercial practices, as it has been appointed as an organisation with a legitimate interest based on Section 6 of the Whc and Section 1 of the Decree appointing organisations with a legitimate interest (in Dutch: "Besluit Aanwijzing instanties met een rechtmatig belang").
- As a general rule, the SRC is not allowed to impose penalties. Fines may only be imposed when companies give their permission through an agreement.

Are there any out-of-court dispute settlement bodies available that deal with aspects of the Directives (e.g. mediation, conciliation or arbitration schemes ombudsmen)?

National Ombudsman:

- Merely on a general level, no specific regulations. Dutch citizens can file their complaints regarding any Dutch governmental authority to the National Ombudsman. Furthermore, citizens can also complain about private institutions exercising a public function. The decisions of the Ombudsman are not binding, but they are public.

The Dutch Consumers' Association:

- The Dutch Consumers' Association (in Dutch: "Consumentenbond") (hereinafter: "CB") is an association that stands up for the interests of consumers. The CB does this by, inter alia, lobbying with politicians about Dutch Consumer laws and regulations. The CB also participates in meetings of branch organisations to help them negotiate better terms of use for consumers. Furthermore, the CB takes action to resolve complaints from consumer groups.

The Dutch Foundation for Consumer Complaints Committees:

- The Foundation for Consumer Complaints Committees (in Dutch: "Stichting Geschillencommissie voor Consumentenzaken") (hereinafter: "SGC") is an independent institution which ensures that disputes between consumers and traders are resolved quickly, easily and at reasonable costs. It is the largest recognised ADR institutions within the meaning of the ADR Directive (Dir. 2013/11) in The Netherlands.

Last update: 09/11/2021

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