

## Het rechterlijk bevel en verbod als remedie

### The court injunction and prohibition as a remedy

#### Summary

Anyone who has a right to have another person doing something or refraining from doing something must be able to enforce that right. This requires legal remedies or sanctions. This book deals with a specific remedy, namely the court injunction and prohibition. The court injunction and prohibition is a preventive remedy, the purpose of which is to prevent a violation of a legal duty. This book examines the requirements for an effective remedy and explores whether the court injunction and prohibition satisfies these requirements. Chapter 1 introduces the topic, and Chapter 2 explains the key concepts.

What follows consists of three parts. Part I describes the requirements for an effective remedy. Chapter 3 deals with the aims of civil law and civil procedural law in the Netherlands. The chapter sets out that the purpose of civil law is not only to compensate damage after it has been caused, but also to prevent damage. Therefore and to that extent, civil law has a preventive effect. Article 3:296 of the Civil Code reflects this by stipulating that anyone who is obliged to do or refrain from doing something can be ordered to do so by the court. The objectives of procedural law support this. The procedural law serves the substantive law and aims at the fulfilment of this substantive law. The most important function of procedural law is the provision of justice and the prevention of self-justice. Procedural law also has other functions, namely the promotion of legal development and unity of law, but these functions are less relevant to the topic of this book.

Chapter 4 examines to what extent requirements for an effective remedy result from the European Convention on Human Rights (ECHR). Article 13 of the ECHR stipulates that an 'effective remedy' must be available. That requirement only relates to the rights that arise from the ECHR itself, so it creates a dependent right. The ECHR does not harmonise national sanctions or remedies. It is up to the Member States themselves to determine what means they provide in national law to prevent or remedy a violation of the rights contained in the ECHR.

Article 13 ECHR has a procedural and a substantive aspect. The procedural aspect relates to court proceedings and the requirements arising from Article 6 of the ECHR. The substantive aspect relates to the remedies themselves. The ECHR does not stipulate a compulsory remedy. The question which remedy is appropriate depends in part on the question of which right has been or is likely to be violated. A preventive remedy is permitted by the ECHR, but is not always required.

Chapter 5 examines whether EU law imposes certain requirements on a remedy. Article 47 of the Charter of fundamental rights of the European Union requires effective legal protection against a violation of rights derived from Union law. Article 47 of the Charter therefore also creates a dependent right. The requirements stemming from Article 47 of the Charter cannot be applied to a purely national dispute and these requirements do not determine the actual content of the remedy to be applied. Like the ECHR, the Charter does not harmonise remedies. It is up to the Member States to determine what remedies should be made available, subject to compliance with the principles of equivalence and effectiveness. It follows from the caselaw of the Court of Justice that a remedy must be effective, dissuasive and proportionate. Chapter 5 elaborates on these requirements.

Chapter 5 also discusses two situations in which EU law *does* set requirements for remedies, by means of the Directives on legal protection of procurement law and the Directive on unfair terms in consumer contracts. Chapter 5 describes how the requirements ensuing from these Directives can be met in the Netherlands by applying the court injunction and prohibition in interlocutory proceedings.

Chapter 6 first of all answers the question whether there exists a right to a preventive remedy. Under national law this is the case, because this follows from article 3:296 of the Dutch Civil Code. Under supranational law it cannot be said automatically that a preventive remedy must be available. In some

cases it should, but in other cases a compensatory remedy will suffice. Chapter 6 further recapitulates the requirements for an effective remedy. A preventive remedy is effective if it

- (a) enables the enforcement of substantive rights
- (b) is timely
- (c) is dissuasive
- (d) is proportionate

Because proportionality plays an important role in the requirements for remedies, Chapter 6 also discusses the question whether proportionality is a principle of Dutch national procedural law. This is not the case, but proportionality does play a role in several articles in the Dutch Civil Code.

Part 2 of the book deals with the way in which court injunctions and prohibitions are regulated in Dutch law. Chapter 7 describes the requirements that must be met in order for a court injunction or prohibition to be issued. Chapter 8 deals with the grounds for refusal and Chapter 9 describes when a court order or prohibition expires.

Chapter 7 sets out the requirements that have to be met in order for a court injunction or prohibition to be issued. There must be an imminent breach of a legal duty. A legal duty is an obligation towards another person to do or not to do something. A court injunction or prohibition can only be issued following a request to a court. Without a court, there is no court injunction or prohibition. It follows from article 3:296 of the Dutch Civil Code that a court order or prohibition must be consistent with the legal duty that is in danger of being violated. The court injunction or prohibition cannot prohibit something that is not unlawful. Nor can a court force someone to do something that he is not already obliged to do. The court injunction and prohibition do therefore not create new obligations, but merely confirm what someone was already obliged to do.

It follows from Article 3:303 of the Dutch Civil Code that a plaintiff in proceedings must have a sufficient interest in a claim. This also applies to a plaintiff wishing to obtain a court injunction or prohibition. For court injunctions and prohibitions this means that there must be a "real threat" of a breach of a legal duty. If there is no threat of a duty being breached, there is no reason to involve the court.

Chapter 8 deals with the grounds for rejection of a court injunction or prohibition. Article 3:296 of the Dutch Civil Code contains three grounds for rejection: the law, the nature of the obligation and a legal act. Chapter 8 discusses the relevance of these grounds for rejection and gives examples. Attention is also paid to Article 6:168 of the Civil Code, on the basis of which an injunction may be denied if an unlawful act involves substantial social interests. Grounds for rejection not specifically relating to the court injunction and prohibition, but nonetheless relevant, can also be found elsewhere in the Civil Code. Chapter 8 also discusses the doctrines of reasonableness and fairness and the abuse of power. It also deals with the question of whether an undertaking not to perform a particular act prevents the court order or prohibition from being issued.

Chapter 9 elaborates on the fact that court injunctions and prohibitions do not have a permanent effect as they have a limited duration. Firstly, the court issuing an order or prohibition may determine that it has a limited period of validity. In particular, if an order or ban infringes certain rights of a person (e.g. a prohibition on entering an area), there will be a reason to limit its duration. In addition, a court order or ban is issued in the light of certain circumstances. If those circumstances change, the order or prohibition may come to an end of its own accord. Finally, a court injunction or prohibition imposed in interlocutory proceedings may be overtaken by proceedings on the merits and in that case comes to an end as well.

Part 3 of the book uses three themes to determine whether problems can arise in the application of court injunctions and prohibitions. These themes are introduced in Chapter 10 and elaborated on in Chapters 10, 11 and 12.

Chapter 10 deals with the position of the court and examines how the court can provide tailor-made solutions when applying a remedy. The starting point is that article 3:296 Dutch Civil Code does not give the court the possibility to weigh the interests involved: if there is a legal obligation, that obligation simply can be enforced. The court does have a certain freedom to let the interests of the parties play a role if it has to determine what are the legal obligations of the parties. In the application of the remedy, reasonableness and fairness on the one hand and the doctrine of abuse of power on the other hand can be used as corrective mechanisms.

In summary proceedings, the court has more freedom to weigh the interests of the parties in coming to a decision. The main question in summary proceedings is whether an intervention is necessary to enforce a legal duty without further delay. Also in summary proceedings the basic principle is that legal obligations must be fulfilled.

Chapter 10 also deals with the question to what extent the court is bound by the petition of a plaintiff. The starting point is that the court *is* bound by the petition. The court may award less than what is claimed, but not something else than what is claimed. This is a matter of interpretation of the claim. The chapter also deals with the question which requirements the actual order or prohibition (the dictum of the judgment) must satisfy. It will have to be clear *who* is being ordered to do something or to refrain from doing something and *what* is expected of him or her. Sometimes this also requires an explanation of the dictum. For that purpose, the dictum must be understood against the background of the considerations of the judgment.

Chapter 11 examines whether a court order or prohibition can be given if a performance is impossible or has become impossible. There are various forms of impossibility, which are discussed in the chapter. Furthermore, the relation between impossibility and force majeure is elaborated upon, as well as the relation with a guarantee that has been given. No order or prohibition can be pronounced that stipulates an impossible performance. Nobody is obliged to do the impossible and nobody can be forced to do the impossible. However, when it is foreseen that a performance is going to be impossible, a court injunction or prohibition can be requested to prevent performance from becoming impossible. In this way, the injunction can still be an effective remedy.

Chapter 12 discusses the role of court injunctions in collective actions against public authorities. A collective action can be submitted on the basis of Article 3:305a of the Civil Code. With such an action a legal entity is able to assert an interest affecting a large group of persons. This can also be an idealistic interest. In the case of idealistic interests, the claim will often be directed against a government. However, the government occupies a special position in this case because it has many duties and takes part in legal transactions in various capacities. Especially when it comes to government, the authorities enjoy a certain freedom. This means that the court must take a step back in such cases. Moreover, the court cannot order the government to enact a law. The importance of this principle has diminished with the *Urgenda* judgment.

Chapter 13 draws conclusions. In essence, they are as follows. Under national law, there is an unquestionable right to a preventive remedy. This follows from article 3:296 of the Civil Code. Whether a right to a preventive remedy follows from supranational law cannot be said in general terms. What is certain is that the ECHR and EU law do not oppose preventive remedies. Preventive remedies are even prescribed in some situations. Although it cannot be said in general that the ECHR or Union law prescribes a preventive remedy, there are situations in which such a remedy is to be preferred.

As listed above, a preventive remedy is effective if it

(a) enables the enforcement of substantive rights

(b) is timely

(c) is dissuasive

(d) is proportionate

The conclusion of chapter 13 (and this book) is that the court injunction and prohibition satisfies these requirements.