

PELS RIJCKEN



Chronicle Cartel Damages Cases 2024: a Year of Pivotal Rulings

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Introduction

This chronicle provides an overview of the most important competition law decisions by Dutch civil courts in 2024. Last year was another intensive year in the follow-on field, with a notable number of developments in several long-running cases which appear to be gaining momentum. In the follow-on area, the publication of four conclusions, divided into two key legal issues¹, by the Public Prosecutor's Office at the Supreme Court was particularly noteworthy. In addition, two cases have been stayed pending the outcome of preliminary questions raised earlier by the Amsterdam Court of Appeal.² The need for definitive answers to fundamental legal questions appears to be great. The most striking developments concern

¹ In short: clarification questions regarding the explanation of the term “single and continuous infringement” (in the line of *Trucks*-cases and in *AirCargo*) and the question whether the extension of time under the WAMCA has general effect (in *Apple*).

² Amsterdam District Court 10 January, 2024, ECLI:NL:RBAMS:2024:98(CSS/Google) and Amsterdam Court of Appeal 18 June, 2024, ECLI:NL:GHAMS:2024:1683(FX).



the (virtually) identical conclusions of Advocate General Vlas in the *Trucks* and *AirCargo* cases. These discuss the question of whether a single and continuous infringement should be qualified as an unlawful conduct leading to separate claims for damages per transaction, or as a single claim for damages per aggrieved party, consisting of different items of damage. Vlas concludes that such an infringement under Article 101 Treaty on the Functioning of the European Union (TFEU) results in one claim for compensation per injured party. This has implications not only for the burden of proposition and proof but also for the determination of applicable law: instead of a per-transaction approach, an assessment per injured party suffices. The final judgment of the Supreme Court on this matter is awaited with great interest by legal practice.

In addition to these questions of principle, other fascinating issues raised in follow-on cases have included statutes of limitation, the doctrine of *res judicata*, economic methodologies and the threshold for referral to damages state proceedings.

As per usual, this year's standalone cases represent a diverse palette of decisions in which parties seek to invoke competition law within a variety of commercial disputes. Once again, 2024 shows how difficult it is to successfully invoke competition law. The bar is high: plaintiffs must convincingly substantiate an anti-competitive object or appreciable effect, or abuse of a dominant position. This requires thorough market analysis and economically substantiated evidence; a threshold that parties often fail to meet. Nevertheless, this chronicle also contains a number of note-worthy standalone cases. In *Vignette & Visa v. Google*, the question arises whether Google abuses a dominant position with its advertising policy and account suspensions. The summary proceedings in *Cycling Service* highlight the obligations of sports organizations and examines whether centralization of prize money in cycling violates the cartel- or abuse prohibition. *Eureco-Pharma* shows how a drug wholesaler comes up against health insurers' joint purchasing and markdown strategies. Finally, the next stage in the *Buma/Stemra* saga deals with the question of whether price discrimination violates Article 102(c) TFEU only if the actual competitive position is actually harmed, as the Supreme Court has ruled.

The running theme in the standalone rulings is the continuing tension between the abstract, seemingly broad standards of competition law and the strict burden of proof and careful market analysis that judges require before they will accept a violation. Those seeking to invoke competition law in a commercial dispute must come up with hard data, thorough



reasoning, and a well-thought-out contextual analysis. This year's standalone cases show once again how demanding this test is in practice and how difficult it remains to convince judges of a competition law violation.

Next up are some numbers. In 2024, we report 25 judgments, namely 14 follow-on and 11 *standalone* cases. By comparison, in 2023 we counted 22 cases (eleven *follow-on* and eleven *standalone*) and in 2022 we counted a total of nineteen rulings (seven *follow-on* and twelve *standalone*).

Follow-on cases

Liability: general

In the *Elevator-cartel*, two judgments were published in January 2024 by the Hague Court of Appeal.³ In the first case, the Rotterdam District Court ruled in first instance that elevator producers Otis and Kone had acted unlawfully against certain housing corporations, which had united in the claim foundation “De Glazen Lift” (DGL), and that they were liable for the damages suffered by 37 housing corporations affiliated with DGL, to be further ascertained by state.⁴ Otis' and Kone's defenses on appeal focus on, inter alia, the district court's assessment of (1) the scope and effect of the infringement, (2) the threshold for referral to the damages state proceedings, (3) the pass-through of the (alleged) price surcharge (*pass on* defense), and (4) the joint and several liability of the cartel participants.⁵ These grounds for appeal are briefly discussed below.

Otis and Kone argue that the cartel was far from far-reaching in the Netherlands. According to Otis and Kone, the infringement did not cover the whole Dutch market and was of an ad hoc nature. This would involve a very small percentage of projects and there would only have been consultations regarding projects in which one of the cartel participants had a specific interest.⁶ The district court did not follow this line of reasoning. Among other things, the court considered that the European Commission had established that in practice it was not necessary to allocate “each and every project” to a particular cartel participant, because the cartel participants operated on the principle that they would retain their existing customers.

³ The Hague Court of Appeal January 23, 2024, ECLI:NL:GHDHA:2024:141 (DGL/Otis c.s.) and The Hague Court of Appeal, January 23, 2024, ECLI:NL:GHDHA:2024:132 (SECC/Kone).

⁴ Rotterdam District Court June 23, 2021, ECLI:NL:RBROT:2021:6635.

⁵ DGL/Otis c.s., para. 5.2. In addition, Otis and Kone submitted grounds for appeal which concern the likelihood of the possibility of damage regarding the individual housing corporations and specific losses.

⁶ DGL/Otis c.s., para. 6.3.



As a result, according to the court, one-on-one traffic was also affected by the cartel.⁷ The court - citing various passages of the European Commission's decision - also rejected Otis and Kone's argument that it was not shown that the cartel had a price driving effect.⁸

However, the court does go along with Kone's argument that it did not participate in the cartel for the entire infringement period in the Netherlands. Therefore, the Court of Appeal considers that, contrary to DGL's argument, Kone cannot be held jointly and severally liable for the harmful consequences of conduct of the other elevator manufacturers in cartel context in the period before its participation. To this end, the court of appeal considers that the basis of Kone's (joint and several) liability lies in its participation in the cartel. According to the court, a basis for that liability is lacking during the time when Kone did not participate in the cartel. Contrary to DGL's contention, such liability also cannot be inferred from Article 11(1) of the Damages Directive.⁹ Quite apart from the fact that the cartel does not fall within the temporal scope of the Damages Directive, Article 11(1) of this directive, in the court's view, provides for joint and several liability for companies that have infringed competition law through "joint behaviour". In the period during which Kone did not participate in the cartel, in the court's view, there was no "joint behaviour" by Kone with the other cartel participants for which it can be held jointly and severally liable.¹⁰

Otis and Kone further argued that the threshold for the follow-on proceedings for the determination of damages was not met because, given the limited scope of the decision, it would be necessary to determine whether there had been a prohibited restriction of competition for each individual order to an elevator manufacturer.¹¹ The Court of Appeal ignored this defense. Referring to the established case law on the three main requirements for referral to the follow-on proceedings for determination of damages by the State¹², the Court of Appeal reaches the same conclusion as the district court: the basis for Otis' and Kone's liability is the unlawful participation in the cartel. The Court of Appeal held that the district court correctly used the criterion that a housing corporation had, in at least one

⁷ *DGL/Otis c.s.*, para. 6.5-6.12.

⁸ *DGL/Otis c.s.*, see para. 6.15-6.19.

⁹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ EU 2024, L 349/1-19).

¹⁰ Incidentally, the court signals that it had recognized this, but failed to express it in para. 2.15 of the final judgment and in the decision, so Kone's objection succeeds on this point (see para. 6.69).

¹¹ *DGL/Otis c.s.*, para. 6.26.

¹² Specifically: (1) the basis for liability must be clearly established, including identifying which party is liable and the grounds for that liability; (2) the possibility of damage must be plausible; and (3) the court must not be in a position to assess the damage within the main proceedings. (with reference to T.F.E. Tjong Tjin Tai, *De schadestaatprocedure*, Deventer: Wolters Kluwer 2012, no. 401 and the case law cited therein).

instance, directly or indirectly (e.g., through a developer or a contractor) purchased products and/or services from a cartel participant during the infringement period so it could be referred to the follow-on proceedings.¹³

Finally, the Court of Appeal also did not accept the *passing on* defense. Without reviewing the merits of the defense, the Court of Appeal concludes that there is no room for it in the current (main) proceedings, so that it will have to be addressed in the follow-on proceedings for determination of damages by the State.¹⁴ The Court of Appeal upheld the interim judgment of the Rotterdam District Court and ruled that Otis and Kone had acted unlawfully towards the housing corporations during the infringement period.

Limitation-period

The other *elevator cartel* case¹⁵ involves two entities of Kone on the one hand and Stichting Elevator Cartel Claims (SECC) on the other hand. In these proceedings, the Hague Court of Appeal ruled on the same (type of) grievances with the same outcome, except for SECC's statute of limitations defense. SECC argued that the court applied an incorrect standard for the commencement of the limitation period by assuming that everyone must be deemed to have taken cognizance of the Commission's press release.

According to SECC, the statute of limitations did not begin to run until the Court of Justice of the European Union issued its final decision in Kone's appeal against the Commission's decision on October 24, 2013. In that regard, SECC refers to the Damages Directive, which provides that the limitation period is extended by the period necessary for the adoption of a final infringement decision or otherwise ending the proceedings, plus one year. SECC argues that given the principles of equivalence and effectiveness, it is desirable to interpret Dutch law in such a way that it leads to outcomes compatible with the Damages Directive.¹⁶

The Court of Appeal rejected this argument. The Court reasoned that the relevant facts for assessing the statute of limitations in this case all took place before December 27, 2016¹⁷ and that the summonses were all issued before December 26, 2014.¹⁸ The Court of Appeal

¹³ *DGL/Otis c.s.*, para. 6.30.

¹⁴ *DGL/Otis c.s.*, para. 6.59-6.62.

¹⁵ The Hague Court of Appeal 23 January 2024, ECLI:NL:GHDHA:2024:132 (*SECC/Kone*).

¹⁶ *SECC/Kone*, para. 6.19.

¹⁷ The transposition period of the Damages Directive.

¹⁸ Pursuant to Art. III Implementation Act, Art. 6:193s of the Civil Code (BW) does not apply to cases brought before the court before December 26, 2014.

considers that an obligation for the Dutch court to interpret national law in accordance with an EU Directive only exists from the time of the transposition period mentioned in the Directive. According to the court, although it may generally be desirable to interpret, before the transposition of the directive into domestic law, domestic law in such a way that it leads to outcomes that are compatible with the directive, such consistent interpretation cannot lead to an interpretation of domestic law that is contrary to the law.¹⁹ Against this background, the Court of Appeal finds that the interpretation of the general limitation rule of Article 3:310 (1) of the Civil Code (BW) such as advocated by SECC is not at issue.²⁰ Applying Article 3:310 BW and Article 3:316 BW as a starting point for the assessment of the statute of limitations, the Court of Appeal concludes that a legal claim for compensation of damages is time-barred by the expiration of five years after the publication of the (summary of the) Commission's decision.²¹ In doing so, the Court considers that the point in time in which the statute of limitations starts running cannot be made dependent on the point in time in which the injured party made a proper assessment of the available information. What matters is that injured parties had the requisite knowledge and insight to assess the agreements made. In the court's view, the claimants could derive said necessary knowledge and insight from the (summary of the) Commission's decision.²² The Court of Appeal agreed with the District Court that the claims of fourteen claimants were time-barred.

Similarly, the statute of limitations issue played a role in the interlocutory judgment in the *Google-case* handed down by the Amsterdam District Court on May 1, 2024.²³ The Amsterdam Court applied the principle that from the moment a summary of the European Commission's decision is published in the Official Journal, it can reasonably be assumed that an injured party has the information necessary to bring a claim for damages.²⁴ Whereas SECC (as plaintiff in the previously mentioned *Elevator-case*) unsuccessfully argued that the statute of limitations began to run *later* than the publication date of the decision, in this case Google (as defendant) argued the opposite: according to Google, two parties would have known about the infringement earlier than the deadline for implementation of the Damages Directive (and thus well before the publication date), so the statute of limitations, according to Google, began to run *earlier* than the implementation date of the Damages Directive (and

¹⁹ SECC/Kone, para. 6.25.

²⁰ SECC/Kone, para. 6.25-6.27.

²¹ SECC/Kone, para. 6.28-6.30

²² SECC/Kone, para. 6.30, with reference to the Supreme Court May 4, 2018, ECLI:NL:HR:2018:677 and Supreme Court January 12, 2019, ECLI:NL:HR:2024:19.

²³ Amsterdam District Court May 1, 2024, ECLI:NL:RBAMS:2024:2292 (*Wolfson Capital/Google*).

²⁴ *Wolfson Capital/Google*, para. 3.12, referring to the ECJ EU April 18, 2024, C-605/21, ECLI:EU:C:2024:324 (*Heureka Group/Google*).

thus *before* the publication date).²⁵ The District Court rejected this argument by stating that, firstly, the publication date must be taken as the starting point: in principle, it can reasonably be assumed that an injured party has the information necessary to bring a claim for damages from the moment a summary of the decision is published. In addition, in the Court's view, the statute of limitation cannot begin to run before the moment the infringement has ended. Since, in this case, the infringement ended after the publication date and, moreover, the summons had been issued within the five years after the publication date, the Court found that the statute of limitations had not expired in any case.²⁶

Bitumen: statute of limitation – knowledge of the Netherlands Competition Authority (NMa) is knowledge of the State?

The Bitumen-case revolves around a claim by the State (Rijkswaterstaat) against various bitumen suppliers (Shell c.s., Kuwait and Total) in connection with the so-called Bitumen cartel, for which the European Commission imposed fines on both Bitumen suppliers and road construction companies in 2006.²⁷ The State claims to have suffered damages due to artificially high prices and reduced discounts in the tenders for road bitumen for years. A core defense by the defendants is that the State's claims are time-barred; in their view, the State had the relevant knowledge well before the first interruption acts in September 2011.

In earlier interlocutory judgments, the District Court ruled that neither media reports, or the fact that the Netherlands Competition Authority (NMa) was involved in discussions surrounding the construction fraud, were sufficient to allow the state to initiate follow-on proceedings at an earlier stage.²⁸ The question remained whether the NMa gained knowledge in the context of the Commission's proceedings against the Bitumen cartel (including as a member of the so-called Advisory Committee), and whether that knowledge could be imputed to the state. In an earlier interlocutory ruling, the court asked the European Commission to clarify whether and when parts of the state, other than the NMa itself, had been informed of the cartel investigation. The information provided showed that there was only limited contact between the Commission and the Ministry of Economic Affairs (EZK) in early October 2002, and that this exchange was of a purely logistical nature at a very early stage of the investigation. According to the Commission (and affirmed by the Court), at the

²⁵ Namely: December 26, 2016.

²⁶ *Wolfson Capital/Google*, paras. 3.7-3.18.

²⁷ Rotterdam District Court June 26, 2024 ECLI:NL:RBROT:2024:5984 (*Bitumen*).

²⁸ See Rotterdam District Court October 26 2022, ECLI:NL:RBROT:2022:9160 (*State/Shell c.s.*).

time, there was no actual substantive information available about (the scope or duration of) the cartel.²⁹ This again raised the question of whether, from a civil law perspective, the knowledge of the NMa resulting from participation in the Advisory Committee could be attributed to the state.³⁰

In this ruling, the Court reaches a "preliminary opinion" and asks the parties to respond to it. In the preliminary opinion, the court highlights the duty of confidentiality and purpose limitation of national competition authorities (such as the NMa) under Regulation (EC) No. 1/2003³¹: they may not share information obtained from the Commission in the context of public law enforcement and advice with other public authorities if this is for the purpose of private law (follow-on) proceedings.³² This purpose limitation and the protection of confidential business information override the fact that the NMa and other ministries are part of the same legal person (the State). According to the Court, if the NMa was not allowed to pass on data obtained by the Commission, the NMa's knowledge cannot simply count as knowledge of the State, even if the NMa and the State are the same legal person for purposes of civil law.

On that basis, the court comes to the preliminary opinion that attribution of the NMa's knowledge to the State is not self-evident and that the mere fact that EZK knew about an investigation into potentially unlawful anti-competitive conduct at the beginning of October 2002 is not sufficient to start running the limitation-period at that same moment. The doctrine of imputation of knowledge of one (the NMa) to the other (the State), cannot be applied if that knowledge may not be shared, even if both belong to the same legal entity; after all, the rationale of imputation of that knowledge is that the other party, in this case the defendants, were justified in trusting that the State had at its disposal the knowledge of the NMa. In this case, given the NMa's duty of confidentiality known to the defendants, there exists no such legitimate expectation.³³ The Court does make one further qualification: if the NMa were to have violated its duty of confidentiality in this case by passing on the information to the other parts of the State, it might be possible that the State did have possess over sufficient knowledge at an earlier point in time. In light of this, the defendants brought a conditional claim for inspection (art. 843a Rv) to ascertain whether the State had

²⁹ *Bitumen*, para. 2.8 and next.

³⁰ *Bitumen*, para. 2.15 and next.

³¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EU 2003, L 1/1-25).

³² *Bitumen*, para. 2.18.

³³ Rotterdam District Court June 26, 2024, ECLI:NL:RBROT:2024:5984, para. 2.22.

previously obtained that information. The Court has granted the parties the opportunity to comment on the preliminary interpretation of the relevant provisions of the regulation, after which it will issue a final decision on whether or not the State's claim is time-barred.³⁴

Trucks-cases: threshold for reference to follow-on proceeding

In the Trucks cases, the Amsterdam District Court issued an interlocutory ruling in early 2024 on the question of which requirements must be met for referral to follow-on damages proceedings.³⁵ The claimant argue that the threshold is met by merely stating sufficient facts from which it can be inferred that it is plausible that a buyer trucks may have suffered damages as a result of the cartel. According to the claimants, the infringement should be characterized as *one* wrongful act by each of the truck manufacturers and that such a determination is sufficient for referral to follow-on damages proceedings. The claimants argue, therefore, that it is not required to specify the items of damages in the main action already, nor that it is necessary to elaborate on or further substantiate each specific truck transaction separately in the main proceedings. This would only need to take place in the follow-on proceedings, according to the claimants.³⁶

The truck manufacturers argue the opposite: they dispute the claimants arguments that they have met the burden of proof and argue that the threshold for referral to follow-on damages proceedings is in fact higher than the claimants assert. The truck manufacturers acknowledge that while the bar for follow-on damages proceedings is low, this does not eliminate the claimant's obligation to sufficiently substantiate allegations as to the affected transactions underlying the truck manufacturers' potential liability to each customer. In other words, for each allegedly affected transaction, the claimants must meet their burden of proof, and only those transactions for which the burden of proof is met can proceed to the follow-on damages proceedings.³⁷

The District Court starts off by stating that the threshold for referral to the follow-on damages proceedings is low and by noting that, according to established case-law, it is sufficient that the possibility of damages is plausible. Therefore, claimants are generally successful: the Court only has to assess whether the truck manufacturers acted unlawfully towards them –

³⁴ Rotterdam District Court June 26, 2024, ECLI:NL:RBROT:2024:5984, para. 2.23.

³⁵ Amsterdam District Court February 28, 2024, ECLI:NL:RBAMS:2024:1119 (*Trucks*).

³⁶ *Trucks*, paras. 2.5-2.7.

³⁷ *Trucks*, para. 2.8 e.v.

that is, the customers/subcontractors – and are therefore liable for the damage suffered by the customers/subcontractors as a result. In doing so, it is sufficient that the possibility of damages is plausible. However, due to the special nature of these proceedings – many customers have assigned their claims to litigation vehicles and over 200,000 trucks are involved in the first group of Trucks cases alone – the Court finds itself compelled to create direction. The Court finds in this interlocutory judgment, after having given the claimants the opportunity in the “burden of proof” judgment³⁸ to submit as much specific data per individual truck as possible, and after having given the truck manufacturers the opportunity to respond, that an additional written round is necessary. The claimants are given the opportunity to respond to the truck manufacturers’ analysis in this additional written round. The purpose of this additional written round is for the claimants to substantiate (with exhibits) all of the transactions of trucks for which they claim damages, so that the extent of the claims is as clear as possible and trucking manufacturers know what to defend against.³⁹

Although the District Court provides extensive guidance on the documents to be submitted which “seem appropriate” to satisfy the burden of proof⁴⁰, the District Court also makes it clear that the additional written round is motivated by the (practical) consideration that it is in the interest of all parties to map the playing field as well as possible.⁴¹ With this, the Court’s opinion in this interlocutory judgment seems to consist mainly of a practical approach focusing on the specifics of this case and the Court has not (for the time being) been willing to definitively answer the question under which conditions the claimants have fulfilled the burden of proof.⁴²

The cathode-ray tube cartel: authority of res judicata and the limit of procedural recognition

In the follow-on proceedings before the Oost-Brabant District Court surrounding the cathode-ray tube cartel, Vestel et al., a Turkish producer of televisions and computer screens (together with a few European subsidiaries), claimed damages for the alleged “cathode-ray tube cartel” (CPT- and CDT cartel). Vestel et al. argued that the defendants – including

³⁸ The interlocutory judgment of the Amsterdam District Court in the Trucks-cases of May 15, 2019, ECLI:NL:RBAMS:2019:3574.

³⁹ Amsterdam District Court February 28, 2024, ECLI:NL:RBAMS:2024:1119 (*Trucks*), para. 3.7.

⁴⁰ See the enumeration in para. 3.9.

⁴¹ *Trucks*, para. 3.7.

⁴² In that regard, see also para. 3.9: ‘The District Court cannot require the Claimants to substantiate their contentions in a particular way (...)’.

Samsung had violated the Turkish and European cartel prohibition and that Vestel et al. were allegedly disadvantaged in their procurement of cathode-ray tubes as a result.⁴³ However, the Turkish Court of Appeal had previously ruled on the basis of a Turkish procedural rule (contested by Vestel et al.) that the same claims by Vestel et al. were inadmissible due to the absence of an infringement decision by the Turkish Competition Authority (TCB).

In the Dutch proceedings, Samsung, LGE and Technicolor argued that this Turkish judgment constituted *res judicata* and that it was eligible for recognition in the Netherlands under the so-called Gazprombank-criteria.⁴⁴ Vestel et al. countered that the Turkish procedural rule which had been applied (a case condition requiring a decision of the TCB) was contrary to Union law and the fundamental principles of a fair trial (art. 6 of the European Convention on Human Rights (ECHR)), so that the Turkish judgment could not be recognized. The Court rejected this argument and ruled that the ruling by the Turkish Court could indeed be recognized.⁴⁵ The doctrine of *res judicata* applied to the matter at hand under Turkish law, partially because the condition for admissibility used by the Turkish Court could not be met in the meantime. This was true even if the case was 'procedurally' settled: since there was no prospect of still meeting that condition (a TCB violation decision), it was a final rejection barred by *res judicata*.⁴⁶ The Court further ruled that this rejection did not violate the requirements of due process or public policy, also based on the *Kapferer* and *Eco Swiss* judgments of the Court of Justice.⁴⁷ This meant that Vestel c.s. could not again litigate in the Dutch courts on the same subject matter and claims. As a result, the claims of Vestel c.s. against Samsung, LGE and Technicolor were declared inadmissible.⁴⁸

Two parties (TTD and TDP), whose lawyer apparently withdrew shortly after the start of the proceedings, were ordered to pay damages. The Court, however, waived the triple damages claimed, considering them to constitute punitive damages contrary to Dutch public policy.⁴⁹

Instead, they must transfer a total of €684.4 million in damages to the Turkish manufacturer, minus the share of companies with which Vestel et al. already settled. The conclusion is that due to the recognition of the Turkish judgment, the claims of Vestel c.s. against Samsung, LGE

⁴³ Oost-Brabant District Court January 17, 2024, ECLI:NL:RBOBR:2024:117 (*Cathode-ray tube cartel*).

⁴⁴ Supreme Court September 26, 2015, ECLI:NL:HR:2014:2838.

⁴⁵ *Cathode-ray tube cartel*, paras. 4.5.-4.9 en 4.33.

⁴⁶ *Cathode-ray tube cartel*, para. 4.21.

⁴⁷ ECJ EU March 16, 2006, C-234/04, ECLI:EU:C:2006:178 (*Kapferer*) and ECJ EU June 1, 1999, C-126/97, ECLI:EU:C:1999:269 (*Eco Swiss*); *Cathode-ray tube cartel*, paras. 4.33 and 4.43.

⁴⁸ *Cathode-ray tube cartel*, para. 4.46.

⁴⁹ *Cathode-ray tube cartel*, para. 5.1.-5.3.

and Technicolor are inadmissible, whilst the claims against TTD and TDP were (largely) awarded in the absence of defense.

Prestressing steel: umbrella-effects and likelihood of damage

In the long-running *Prestressing steel* proceedings, the Court of Appeal of 's-Hertogenbosch has ruled on the liability of various producers of prestressing steel (including Nedri c.s., ArcelorMittal c.s. and DWK c.s.) towards Deutsche Bahn (DB c.s.).⁵⁰ The European Commission had previously found that between 1984 and 2002 these producers, collectively accounting for more than 80% of the relevant market, formed a cartel around the supply of prestressing steel in (much of) the European Union. DB c.s. - which makes large purchases of railway sleepers containing prestressing steel products through various entities - claims to have suffered damages due to higher prices and seeks a declaratory judgment ruling that the cartel participants are liable, with reference to a follow-on damages procedure. In establishing liability under German law, the Court of Appeal considered it important, first of all, that the European Commission had found in its final (irrevocable) decision that the producers concerned had been part of a pan-European cartel in the “prestressing steel” sector (with the exception of certain special product variations) for nearly 20 years (1984-2002).⁵¹ The Court points out that the Commission found the cartel agreements to be aimed at stabilizing market distribution and price levels, and that the participating companies collectively covered more than 80% of the prestressing steel market. Consequently, in its decision, the Commission itself already concluded that the cartel by virtue of its nature and intent had a significant price driving effect on the market and affected “all” customers, including customers of parties that were not themselves cartel participants (the so-called “umbrella-effect”).⁵²

The Court adopts the Commission's conclusion as its starting point and considers it likely that the cartel led to higher prices, even without the need for detailed calculations of individual transaction prices. In making this assessment, the Court also took into account the Commission's explicit finding that the cartel affected the entire market, as well as indications within the decision that the cartel agreements were, in fact, implemented. The Court adds that the ‘Oxera reports’ submitted by DB et al. provide additional support for the assumption that cartels with such extensive market coverage (approximately 80% in this sector) can

⁵⁰ 's-Hertogenbosch Court of Appeal January 30, 2024, ECLI:NL:GHSHE:2024:225 (*Prestressing steel*).

⁵¹ *Prestressing steel*, paras. 9.4.1.-9.4.2.

⁵² *Prestressing steel*, para. 9.4.4.

typically lead to higher prices. Although the defendants attempted to refute this with their own expert reports (from Compass Lexecon), it is sufficient at this stage for DB et al. to make a plausible case that it purchased products covered by the infringement, and that such a cartel is, by its nature, likely to drive prices up.⁵³

The Court further stated that, based on recent German case law, in this cartel damages case, a distinction applies between the establishment of liability (the requirement that the conduct of the cartel participants is “likely to cause” damages) and the precise extent of damages (in this case, the “umbrella-effect” and other individual aspects of damages). The determination of the concrete (excessive) prices and how much DB c.s. actually paid will take place in a separate follow-on damages assessment procedure. The Court of Appeal, nevertheless, considers it credible beforehand that the cartel had a real price-increasing effect and grants the declarations in law.⁵⁴ The Supreme Court will probably rule on the cassation appeal filed in this case by late 2025 or early 2026.

Heineken: economic unit and liability of parent companies in the context of Article 102 TFEU

In an extensive interlocutory ruling in the Heineken case, the question was raised of whether Heineken, together with its Greek subsidiary Athenian Brewery (AB), should be regarded as one “undertaking” (within the meaning of Article 102 TFEU).⁵⁵ The Hellenic Competition Authority (HCC) had previously ruled that AB had abused its dominant position on the Greek beer market for many years (mainly through exclusivity and discounts), but it had not initiated proceedings against Heineken as the parent company. The civil action brought by Macedonian Thrace Brewery (MTB) in the Netherlands revolves around whether Heineken, as a parent company, may be partly liable for damages caused by this Greek infringement.

The Amsterdam District Court considered that the decision by the HCC did not rule out Heineken being part of the same economic unit as AB. The HCC had merely – by invoking its discretionary powers – decided not to initiate a separate proceeding against Heineken, but, therefore, had not “positively” determined that Heineken stood outside the scope of the infringement.⁵⁶

⁵³ *Prestressing steel*, para. 9.4.6.

⁵⁴ *Prestressing steel*, paras. 9.9.1.-9.9.5.

⁵⁵ Amsterdam District Court October 23, 2024, ECLI:NL:RBAMS:2024:6476 (*Heineken/AB*).

⁵⁶ *Heineken/AB*, para. 5.3.4.



The Court then examined, based on the established case law of the Court of Justice (including Akzo Nobel, Skanska and Goldman Sachs), whether the parent company could exert ‘decisive influence’ over the subsidiary. Factors considered included the fact that Heineken (indirectly) owns 98.8% of the shares in AB, that Heineken appoints (and replaces) the key executives, and that AB is subject to periodic reporting and approval procedures within the group. According to the Court, all of this leads to the conclusion that Heineken and AB form a single ‘undertaking’ within the meaning of Article 102 TFEU.⁵⁷

The arguments put forward by Heineken – that Greek market decisions were made by local teams and that Heineken did not directly participate in the abuse – are insufficient to counter this. The Court reiterates that even a parent company that does not itself engage in the infringing actions can be held liable if it owns (almost) all the shares in the subsidiary and the subsidiary cannot independently decide on its market conduct. The ‘Akzo presumption’⁵⁸ from European case law applies, even in civil procedures (not only in public law fine cases).⁵⁹ With this ruling, it is established that Heineken can be jointly liable for the abuse committed by AB, according to the HCC. The procedure now continues with the determination of any damages suffered by MTB.

Aviation Cartel: One-step analysis for cartel damages accepted

In an interim judgment of the follow-on claims in the aviation cartel (AirCargo) case on November 6, 2024, the Amsterdam District Court ruled that the overcharge in the so-called ‘aviation cartel case’ should be calculated using a one-step analysis based on the total price paid by the *shippers* (the buyers).⁶⁰ The court had to decide which economic method is suitable for determining the overcharge and on which (transaction) data the statistical analysis should be based.

Stichting Cartel Compensation (SCC) and Equilib, supported by their experts Oxera and Brattle, argued that a one-step model was sufficient, focusing solely on the actual end prices paid by the shippers (including margins from intermediaries such as freight forwarders). According to SCC and Equilib, the regression analysis should be based on the data provided by the shippers (the shipper data), which would immediately account for whether (and to

⁵⁷ *Heineken/AB*, para. 5.5.3.

⁵⁸ ECJ EU May 21, 2015, C-352/13 ECLI:EU:C:2015:335 (*CDC Hydrogen Peroxide*).

⁵⁹ *Heineken/AB*, para. 5.5.3.

⁶⁰ Amsterdam District Court November 6 2024, ECLI:NL:RBAMS:2024:6650 (*Aviation cartel*).

what extent) a price markup applied by the airlines was passed on. Moreover, statistical techniques (control variables, dummy variables) could be used to adjust for various other factors, such as the costs of freight forwarders and the so-called ‘waterbed effect’ (reduced prices for other components due to higher surcharges).⁶¹

The airlines, assisted by BRG, defended a two-step method, starting with determining the overcharge charged to freight forwarders and then assessing to what extent those higher costs were passed on to the shippers. According to the airlines, the airline data would be more comprehensive and reliable, as the surcharges involved in the cartel (fuel and security surcharges) make up only a part (around 20%) of the total price.⁶²

The court held that the available shipper transaction data (about €1.3 million) provided a solid basis for a statistically supported regression analysis, thereby confirming that a one-step model was sufficient. It was unnecessary to first conduct an additional analysis with the freight forwarders or match the data from the airlines.⁶³ The court did not consider a separate determination of the pass-on to be required, as a direct analysis of the final price paid also indirectly provided insight into potential cost shifts or pass-on. The two-step model not only requires matching airline data with shipper data but also a separate analysis of how much freight forwarders might have passed on overcharges. The court found it unlikely that this would lead to better or more reliable outcomes, particularly because matching could only be done for a relatively limited number of transactions, and the exact coverage of the available airline data remained unclear due to limitations in the data offered.⁶⁴

The Court's approach appears to be driven by pragmatism: the data from end-users is deemed sufficiently representative and comprehensive to quantify the cartel's impact, whereas a two-step model involving separate data for airlines and freight forwarders would be considerably more complex and potentially less accurate. Consequently, the Court affirmed that in cartel damage cases involving indirect buyers and intermediaries, a one-step method based on final purchaser data may be sufficient, provided the dataset is both large and reliable, and experts can demonstrate their ability to account for any variables using econometric adjustments.

⁶¹ *Aviation cartel*, para. 2.7.4.

⁶² *Aviation cartel*, para. 2.7.1.

⁶³ *Aviation cartel*, para. 3.4.

⁶⁴ *Aviation cartel*, para. 3.6.

The court therefore set out the principles for the methodology: the analysis will be conducted in one step, based on the total prices paid by the shippers and using only the shipper data (the one-step model on an all-in basis). This has set the concrete course for calculating damages in this aviation cartel case. The case will continue, including determining the extent of any damages.

Ethylene: Anchor Defendants and International Jurisdiction

In a 'new' cartel damage procedure pending before the Amsterdam District Court, brought by the Stichting Ethylene Claims, the jurisdictional issue was, as usual, the primary focus at the outset.⁶⁵ The defendants (Celanese, Clariant, Orbia/Vestolit, and Westlake) were identified in a European Commission decision of July 14, 2020 (Case AT.40410 – Ethylene) as participants in a pan-European infringement of Article 101 TFEU. The defendants (except for Celanese) raised jurisdictional objections based on their respective places of establishment abroad, arguing that the Dutch court should declare itself incompetent. Nevertheless, the court ruled that it had jurisdiction. It based this on the "anchor defendant rule" (Article 8(1) of Brussels I-bis⁶⁶, and the corresponding provisions in the Dutch Code of Civil Procedure and the Lugano Convention⁶⁷). Since Celanese Europe B.V. is established in the Netherlands and was also identified by the Commission as an infringer, the Dutch court can, in principle, also rule on the other defendants. Referring to the *CDC/Akzo* judgment of the Court of Justice⁶⁸, the court emphasized that all defendants, based on the same Commission decision, are part of a single "single and continuous infringement" and that separate trials could lead to inconsistent rulings. The court rejected the defendants' argument that the case should await responses to preliminary questions currently pending at the Court of Justice concerning jurisdictional issues. Therefore, the case will proceed.

Cargill: Connection and the Geographical Limits of Jurisdiction

In the case of *Cargill et al.*, Cargill argued that the Amsterdam District Court lacked international jurisdiction to hear Comcitrus' claims against the Brazilian entity Cargill

⁶⁵ Amsterdam District Court December 18, 2024, ECLI:NL:RBAMS:2024:8003.

⁶⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ EU 2012, L 351/1-310).

⁶⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano September 16, 1988.

⁶⁸ ECJ EU May 21, 2015, C/352/13, ECLI:EU:C:2015:335 (*CDC/Akzo*).



Agrícola and the U.S. entity Cargill Inc.⁶⁹ Comcitrus primarily based its claims on Article 7(1) of the Dutch Code of Civil Procedure (Rv), the rule of connection, and alternatively on Article 6(e) Rv, which relates to the place of the harmful event. The court examined whether there was sufficient connection between the claims against the Dutch entities, referred to as “anchor defendants” (Cargill BV et al.), and the foreign entities. Comcitrus asserted that a global cartel existed within the Cargill group, aimed at purchasing oranges and culminating in the Netherlands with the trade of frozen concentrated orange juice.

However, the court found that the Brazilian competition investigation specifically focused on the purchase of oranges in Brazil and that there was no evidence of involvement by Dutch entities. The TCC (Brazilian settlement agreement) and documents from the Brazilian competition authority CADE confirmed only a procurement cartel in Brazil, without indications of a broader vertical cartel or Dutch involvement. Furthermore, the statements and emails relied upon by Comcitrus were deemed insufficiently convincing to establish the role of the Dutch entities in the cartel.

Since the court found no connection between the claims against the Dutch and foreign defendants, it rejected the reliance on Article 7(1) Rv. Additionally, the court ruled that the harmful event had occurred exclusively in Brazil, meaning that the Netherlands could not be considered the place where the damage occurred. Consequently, the reliance on Article 6(e) Rv also failed.

The court therefore declared itself incompetent to hear the claims against Cargill Agrícola and Cargill Inc. but remained competent to handle the claims against the Dutch defendants. Comcitrus was ordered to pay the procedural costs related to this jurisdictional dispute. A request by Cargill et al. for full reimbursement of legal costs due to abuse of process was rejected, as the claims were not deemed manifestly hopeless. The main proceedings against the Dutch entities will continue.

Jurisdiction: Suspension Due to Preliminary Questions on the Anchor Defendant Rule

In the previous chronicle, various issues concerning the anchor defendant were discussed. It was noted that multiple cases were brought before Dutch courts by claimants seeking to hold a parent entity (co-)liable for breaches of EU competition law committed by a foreign

⁶⁹ Amsterdam District Court July 3, 2024, ECLI:NL:RBAMS:2024:4872.



subsidiary (“upward liability”).⁷⁰ Similarly, situations may arise where claimants attempt to hold subsidiaries (co-)liable for infringements committed by their parent entities (“downward liability”).⁷¹ The common denominator in these cases is that claimants aim to bring proceedings before Dutch courts for infringements committed by a related non-Dutch entity. This relates to the anchor defendant rule: under certain conditions, multiple foreign defendants can be sued in the jurisdiction where one of them has its place of business.⁷²

In 2023, both the Dutch Supreme Court (Hoge Raad) and the Amsterdam Court of Appeal submitted similar preliminary questions to the Court of Justice of the European Union (CJEU) regarding the application of Article 8(1) of the Brussels I-bis Regulation.⁷³ This article states that the anchor defendant rule applies if there is such a close connection between the co-defendant and the anchor defendant that proper administration of justice requires their joint examination and adjudication. The preliminary questions from the Supreme Court specifically seek further clarification on the concept of “close connection” and whether the presumption of decisive influence implies that the conditions for jurisdiction under Article 8(1) of Brussels I-bis are met. The questions from the Court of Appeal also touch on the relationship between the anchor defendant rule and the concept of decisive influence.

Over the past year, two rulings have been published by the Amsterdam District Court and the Amsterdam Court of Appeal, both of which issued interim decisions suspending the proceedings pending the outcome of the preliminary questions referred by the Court of Appeal.⁷⁴

Applicable Law: Advocate General Vlas' Opinion on Single and Continuous Infringement

In the previous chronicle, it was noted that the Amsterdam District Court referred preliminary questions to the Dutch Supreme Court (Hoge Raad) in the *Trucks* cases regarding the interpretation of a single and continuous infringement of Article 101 TFEU under Dutch law. The same legal question arose in the *AirCargo* cartel case. In essence, the question is whether the infringement should be classified as an unlawful act giving rise to separate claims for

⁷⁰ For reference, also see *MTB/Heineken-case* and the *Cartboard-case*.

⁷¹ For reference, also see *Powercables-case*.

⁷² See Article 8(1) Brussels I-bis, Article 6(1) Lugano Convention and Article 7(1) Dutch Code of Civil Procedure.

⁷³ Supreme Court June 23, 2023, ECLI:NL:HR:2023:965 (*MTB/Heineken*), and Amsterdam Court of Appeal September 19, 2023, ECLI:NL:GHAMS:2023:2570 (*Powercables*).

⁷⁴ Amsterdam District Court January 10 2024, ECLI:NL:RBAMS:2024:98 (*CSS/Google*) and Amsterdam Court of Appeal June 18, 2024, ECLI:NL:GHAMS:2024:1683 (*FX*).

damages at the moment the damage is suffered (i.e., when the transaction with the infringer is concluded) or as a single claim per injured party, consisting of various heads of damage. This question is crucial because the outcome determines whether establishing the applicable law per injured party is sufficient or whether it must be determined for each individual transaction.

In both cases, the court ruled that claimants, based on Article 6(3) of the Rome II Regulation⁷⁵, were allowed to claim damages before the court of the defendant's domicile under the law of that forum (*lex fori*). To rely on the law of the court where the claimant has chosen to litigate, the infringement must have directly and substantially affected the market of the Member State of that court. The court (and in *AirCargo*, the Court of Appeal) found that this requirement was met.⁷⁶ If a single and continuous infringement of Article 101 TFEU under Dutch law entails a single claim per injured party consisting of various heads of damage, determining the applicable law per claimant is sufficient. However, if such an infringement must be classified as an unlawful act giving rise to separate claims, then the applicable law must be determined for each transaction.

Advocate General Vlas addressed this question in his identical opinions on the preliminary questions referred by the district court in *Trucks*⁷⁷ and in the cassation appeal in *AirCargo*⁷⁸. For readability, the following refers to one of his opinions in an *AirCargo* case. The *AirCargo* cartel involved multiple airlines coordinating fuel and security surcharges on flights to, from, and within the EEA and Switzerland between December 1999 and February 14, 2006.

In the subsequent follow-on litigation, the claim vehicle Stichting Cartel Compensation (SCC) purchased and bundled claims from alleged injured parties and attempted to recover damages in its own name against the airlines before the Amsterdam District Court.

After several (interim) judgments in first instance and appeal, the cassation proceedings concern, among other things, whether the Court of Appeal correctly ruled that the single and continuous infringement established by the European Commission constitutes a single and

⁷⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ EU 2007, L199/40-49).

⁷⁶ For reference, see last year's competition chronicle.

⁷⁷ Concl. A-G April 5, 2024, ECLI:NL:PHR:2024:561.

⁷⁸ Concl. A-G April 5, 2024, ECLI:NL:PHR:2024:369 and concl. A-G April 5 2024, ECLI:NL:PHR:2024:370.

continuous wrongful act against each individual shipper, resulting in a single claim per shipper.

In cassation, the airlines argued that the direct effect of EU law does not imply that a single and continuous infringement of EU competition law results in a single and continuous wrongful act. They contended that whether a person suffering damage due to a competition law infringement acquires one or multiple claims for damages falls within the procedural autonomy of Member States. The airlines further argued that requiring one claim per transaction under national law does not make it impossible for shippers to exercise their right to compensation, meaning there is no conflict with the EU effectiveness principle.⁷⁹

Referring to the *Scania* judgment of the CJEU⁸⁰ and Advocate General Kokott's opinion in *Heureka/Google*⁸¹, Vlas expressed the view that the Court of Appeal correctly ruled in accordance with EU law. He concluded that the infringement established by the European Commission must be seen as a single and continuous infringement of Article 101 TFEU and, therefore, as a single and continuous wrongful act against each individual shipper who purchased air cargo services. Vlas rejected the airlines' argument regarding the procedural autonomy of Member States.⁸²

Vlas then elaborated on the effectiveness principle and its underlying rationale.⁸³ He argued that the airlines' position—that each shipper has one claim per transaction rather than a single claim covering all transactions—would make the proceedings unnecessarily complex. According to Vlas, such complexity would make it practically difficult for claimants to exercise their right to compensation under Article 101 TFEU, thereby undermining the full effectiveness of that provision.

⁷⁹ Concl. A-G April 5, 2024, ECLI:NL:PHR:2024:370, para. nr. 5.3.

⁸⁰ CJEU February 1, 2024, C-251/22 P, ECLI:EU:C:2024:103 (*Scania*).

⁸¹ Concl. A-G Kokott September 21 2023, C-605/21, ECLI:EU:C:2023:695 (*Heureka/Google*).

⁸² Concl. A-G April 5 2024, ECLI:NL:PHR:2024:370, para. 5.1-5.7.

⁸³ Concl. A-G April 5 2024, ECLI:NL:PHR:2024:370, para. 5.8-5.10, referring to: CJEU EC March 9 1978, C-106/77, ECLI:EU:C:1978:49 (*Simmenthal*), para. 16; CJEU EC September 20 2001, C 453/99, ECLI:EU:C:2001:465 (*Courage en Crehan*), para.s 23 en 29; CJEU EC July 13 2006, Joint cases C-295/04-298/04, ECLI:EU:C:2006:461 (*Manfredi*), para.s 62 en 89; K. Lenaerts & P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2023, nrs. 854 e.v.; Asser/Hartkamp 3-I 2023/109 and.; CJEU June 5 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone e.a.*), para.s 24 en 25; CJEU December 7 2010, C-439/08, ECLI:EU:C:2010:739 (*VEBIC*), para.s. 57, CJEU June 14 2011, C-360/09, ECLI:EU:C:2011:389 (*Pfleiderer*), para. 24.

Vlas ultimately concluded that the airlines' arguments failed and that a single and continuous infringement of Article 101 TFEU under Dutch law must be classified as an unlawful act giving rise to a single claim per injured party, consisting of multiple heads of damage.⁸⁴

Other Procedural Issues: General Applicability of the WAMCA Extension Period?

In the *Apple* case⁸⁵, an opinion was also issued in the context of a cassation appeal.⁸⁶ The key question in this case is whether the extension period under Article 1018d(2) of the Dutch Code of Civil Procedure (Rv) has general applicability. This case involves three foundations (RCJ, ASC, and CCC)⁸⁷ that initiated legal proceedings against Apple following a European Commission press release dated April 30, 2021. In that release, the Commission's preliminary findings indicated that Apple had distorted competition in the market for music streaming apps and abused its dominant position in the App Store.

Under the Dutch Collective Damages Settlement Act (Wet afwikkeling massaschade in collectieve actie, WAMCA), a summons initiating a collective claim under Article 3:305a of the Dutch Civil Code must be registered in the central registry for collective actions⁸⁸ within two days of issuance (Article 1018c(2) Rv). Within three months of this registration, another representative organization may initiate a collective claim for the same event(s) and similar factual or legal questions (Article 1018d(1) Rv). This period can be extended by a maximum of three months if, within one month of the initial registration, another representative organization has registered its intent to bring a collective claim but deems the initial three-month period insufficient (Article 1018d(2) Rv).

RCJ registered its summons against Apple in the central registry in October 2021. The court extended the summons period at ASC's request by three months until April 4, 2022, allowing ASC to summon Apple in a timely manner on April 1, 2022. CCC issued its summons on March 31, 2022, arguing that it was also within the deadline. However, the court declared CCC's claim inadmissible because it had not independently requested an extension.

⁸⁴ Concl. A-G April 5 2024, ECLI:NL:PHR:2024:370, para. 5.9. Also see conclusion of A-G Vlas in the *Trucks-cases*: concl. A-G April 5 2024, ECLI:NL:PHR:2024:561 (in particular paras. 3.5-3.8).

⁸⁵ See in first instance: Amsterdam District Court August 18 2024, ECLI:NL:RBAMS:2023:5310.

⁸⁶ Concl. A-G November 8 2024, ECLI:NL:PHR:2024:1190.

⁸⁷ Respectively: Right to Consumer Justice Foundation, App Stores Claims Foundation and Consumer Competition Claims Foundation.

⁸⁸ As defined in art. 3:305a lid 7 BW (Dutch Civil Code).

The court reasoned that CCC's collective claim related to the same event(s) as RCJ's initial claim. Since CCC did not issue its summons within the original three-month period of Article 1018d(1) Rv and had not requested an extension under Article 1018d(2) Rv, it was not entitled to rely on the extension granted to ASC.⁸⁹ CCC filed a direct cassation appeal (sprongcassatie), arguing that the court had wrongly ruled that the extension under Article 1018d(2) Rv does not have general applicability.⁹⁰

Advocate General (A-G) Wissink took a different position. After an extensive analysis of the legislative history concerning the extension provision, Wissink argued that the extension under Article 1018d(2) Rv is not automatic. He emphasized that the decision to grant an extension is at the court's discretion, based on the specific facts and circumstances known at the time. According to Wissink, this system does not support the idea that an organization that was not yet known in the proceedings (or even did not yet exist at the time of the decision) should be able to initiate proceedings within an extension period granted to another organization.⁹¹

Wissink concurred with the court and opposed CCC's argument, stating that the legislative history does not indicate that lawmakers intended for the extension to have general applicability. Moreover, he argued that the statutory text does not support the notion that other organizations can automatically benefit from an extension granted to a different organization.⁹² He found no merit in CCC's additional arguments⁹³ and ultimately concluded that CCC's position should be rejected.⁹⁴

⁸⁹ Amsterdam District Court August 18 2023, ECLI:NL:RBAMS:2023:5310, para. 5.24.

⁹⁰ Amsterdam District Court August 18 2023, ECLI:NL:RBAMS:2023:5310, paras. 5.18-5.22.

⁹¹ Concl. A-G November 8, 2024, ECLI:NL:PHR:2024:1190, para. 5.19.

⁹² Concl. A-G November 8, 2024, ECLI:NL:PHR:2024:1190, para. 5.18-5.22.

⁹³ In short: (1) an appeal to efficiency, (2) the argument that granting an extension of time to CCC will not lead to additional delays, (3) the argument that a larger group of claimant parties increases the chance that the judge can appoint the most suitable party as the exclusive representative, (4) the argument that the function and content of the central register bring about a general effect, and (5) the argument that not granting a general effect to an extension of time would result in the judge being 'overloaded' with separate requests for an extension of the three-month deadline, which the judge would have to assess individually (see paras. 5.30-5.36.2).

⁹⁴ Wissink concludes that the judgment should be annulled insofar as it concerns the conviction of CCC for the legal costs, a topic that falls outside the scope of the discussion in this commentary.



Standalone Cases

Google Ads: Platform Rules and Abuse of Dominance

In a preliminary injunction proceeding before the Amsterdam District Court, Vignette & Visa (V&V) sought an order compelling Google, under penalty of a fine, to refrain from suspending its existing and future Google accounts due to an alleged violation of Google Ads policies.⁹⁵ V&V, which started offering digital toll vignettes for (Eastern) European countries online in mid-2023, used Google Ads, Google's European advertising platform. Customers who accept Google's Advertising Terms and Google Ads Policies can place paid advertisements that appear at the top of search results. These policies stipulate that only certified governments and authorized suppliers may promote government documents or services (such as electronic toll vignettes). Violations may lead to ad rejection and account suspension.

On August 2, 2023, V&V received notice that its ads violated Google's policy on "Government Documents and Services." On August 22, 2023, Google further notified V&V that its account had been suspended under the "Circumventing Systems" policy, which prohibits users from evading or disrupting Google's advertising systems and processes. After V&V's objections were unsuccessful, Google informed the company on December 15, 2023, that its account remained in violation of the Google Ads policies and that any new accounts created by V&V would also be suspended.

V&V argued that Google's actions were unlawful, alleging that the company abused its dominant position under Article 102 TFEU and Article 24 of the Dutch Competition Act (Mw) by terminating its services. V&V claimed that Google held a dominant position in the market for online advertising services and was classified as a "gatekeeper" under Article 3 of the Digital Markets Act (Regulation (EU) 2022/1925)⁹⁶, meaning it had a duty to avoid abusing its position. V&V also claimed that Google acted unfairly and discriminatorily because a comparable German company (Barely Digital) was allegedly allowed to advertise in Germany, effectively excluding V&V from the market.⁹⁷

⁹⁵ Amsterdam District Court April 30, 2024, ECLI:NL:RBAMS:2024:3096 (*Vignette & Visa*), para. 3.1.

⁹⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022, L265/1/1-66).

⁹⁷ *Vignette & Visa*, para. 3.3.

The court dismissed V&V's claims. The judge held that, in principle, an online service provider like Google is free to determine what content is permitted on its platform. Furthermore, the court found no immediate reason to conclude that Google violated competition law, particularly since no evidence suggested discriminatory treatment⁹⁸: Google generally applied its policy prohibiting the promotion of government documents to all advertisers in similar situations. The fact that Barely Digital was permitted to continue advertising resulted from a preliminary ruling by a German court, which did not establish a comparable situation.⁹⁹

Additionally, the court emphasized that Google's advertising policies were partly designed to protect consumers from mistakenly believing they were dealing with an officially authorized entity. Given this, V&V's method of offering toll vignettes could indeed be misleading for some consumers. The court ultimately ruled that, absent a comprehensive competition law analysis, no basis existed to compel Google to allow V&V's advertisements or reinstate its account. Google was therefore permitted to maintain the suspensions as long as they remained justified under the Google Ads policies. The judge noted that a more in-depth investigation into potential abuse of dominance would be a matter for proceedings on the merits (main proceedings, bodemprocedure).

Cycling Service: No Competition Restrictions in Professional Cycling

In the Cycling Service case, the Court of Appeal of 's-Hertogenbosch ruled in the appeal of Cycling Service et al. that the decision by the Union Cycliste Internationale (UCI) and Cyclistes Professionnels Associés (CPA) to centralize the collection and distribution of prize money in professional cycling via a mandatory Central Prize Management Platform (CPM platform) does not violate Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).¹⁰⁰

Following complaints about the way prize money was distributed in professional cycling, UCI, the global governing body for the sport, commissioned a study into improving the existing prize management system.¹⁰¹ One of the recommendations from this study was to implement

⁹⁸ *Vignette & Visa*, paras. 4.8-4.10.

⁹⁹ *Vignette & Visa*, para. 4.9.

¹⁰⁰ 's Hertogenbosch April 12, 2024, ECLI:NL:GHSHE:2024:919 (Cycling Service c.s.), para.s 3.10-3.18.3.

¹⁰¹ Cycling Service c.s., para. 3.1.7.



a mandatory centralized platform managed by an independent entity.¹⁰² UCI subsequently asked CPA (which represents professional cyclists) to propose such a platform.

CPA held discussions with various parties, including the Dutch company Cycling Service (which offers its own platform, Cyclotivity) and the French company Matsport. Cycling Service proposed making Cyclotivity the mandatory platform, but CPA ultimately chose Matsport, making the CPM platform compulsory for all teams, riders, and race organizers. Cycling Service et al. argued on appeal that this decision made certain services financially unviable for them and claimed that it violated the cartel prohibition (Article 101(1) TFEU) and the ban on abuse of a dominant position (Article 102 TFEU).

However, the Court of Appeal ruled that there was no restriction of competition by object: merely requiring the use of a specific platform does not automatically mean that the decision has an anti-competitive purpose, especially since UCI organized a competitive tender for market selection.¹⁰³ The court also found that a different interpretation would conflict with the Court of Justice of the European Union's (CJEU) principle that restrictions of competition by object must be interpreted narrowly.¹⁰⁴

Furthermore, the court held that Cycling Service et al. failed to meet their burden of proof by not providing a market analysis demonstrating that the decision had anti-competitive effects. As a result, an assessment of possible abuse of dominance under Article 102 TFEU was not feasible.¹⁰⁵ Finally, the court found no indication that CPA was engaging in predatory pricing (within the meaning of Article 102 TFEU).¹⁰⁶

Pharmaceuticals: Parallel Import and the Limits of Joint Procurement

On April 16, 2024, the Court of Appeal of The Hague ruled that the actions of health insurer Zilveren Kruis, the manufacturer of the drug Imbruvica, and several hospitals did not violate competition law, despite objections from pharmaceutical wholesaler Eureco-Pharma.¹⁰⁷ Imbruvica is a hospital-only drug used to treat leukemia and lymphoma, which the manufacturer sells directly to Dutch hospitals. Parallel importer Eureco-Pharma purchases

¹⁰² *Cycling Service c.s.*, para. 3.1.9.

¹⁰³ *Cycling Service c.s.*, para. 3.15.

¹⁰⁴ *Cycling Service c.s.*, para. 3.15.

¹⁰⁵ *Cycling Service c.s.*, paras. 3.16.3-3.16.4.

¹⁰⁶ *Cycling Service c.s.*, para. 3.18.3.

¹⁰⁷ The Hague Court of Appeal, April 16, 2024, ECLI:NL:GHDHA:2024:608 (*Eureco-Pharma*).

the drug in other EU member states and also supplies it to hospitals. Typically, hospitals claim reimbursement from insurers based on the pharmacy purchase price (AIP) as the maximum compensation, meaning that any cost savings from lower procurement prices benefit the hospitals.

In 2019, Zilveren Kruis and other insurers signed a framework agreement with Imbruvica's manufacturer, allowing hospitals to claim the full AIP for the drug—provided they purchased it directly from the manufacturer. If hospitals sourced Imbruvica from other suppliers, Zilveren Kruis applied significant price reductions in 2020 and 2021 (49% in 2020, later adjusted to 7% or 17%, depending on the administration method). Other health insurers also applied reductions, though at varying rates. As a result, hospitals found it financially less attractive to purchase from parallel importer Eureco-Pharma, leading to its market share dropping from 60-70% to nearly zero, while the manufacturer's market share rose to 100%. Eureco-Pharma argued that (1) the framework agreement constituted a prohibited agreement or concerted practice between the insurers and the manufacturer and (2) there was a prohibited vertical agreement between Zilveren Kruis and the hospitals. The Court of Appeal differentiated between the jointly negotiated rebate with the manufacturer, which—according to the ACM Guidelines on Joint Procurement of Medicines—can be permissible – and the discount policy applied by individual insurers.

The court found no sufficient evidence that insurers had coordinated their discount policies among themselves. Each insurer had its own reasons for applying discounts, and the discount rates varied. The fact that multiple insurers imposed discounts did not automatically prove collusion.¹⁰⁸

The court also rejected the claim of an illegal vertical agreement between Zilveren Kruis and the hospitals. Although Zilveren Kruis unilaterally changed its agreements with hospitals by implementing the discount policy, there was no explicit or implicit agreement from the hospitals. In fact, the hospitals had no benefit from the discounts and had expressed dissatisfaction. Their eventual switch to direct purchasing did not constitute a concerted practice under Article 101 TFEU, as there was no evidence that they had explicitly or tacitly agreed to the arrangement.¹⁰⁹ Thus, the Court of Appeal concluded that the health insurers'

¹⁰⁸ *Eureco-Pharma*, paras. 6.21-6.24.

¹⁰⁹ *Eureco-Pharma*, paras. 6.25-6.27.



policies regarding Imbruvica did not violate Article 101 TFEU or any other competition law provisions.¹¹⁰

Buma/Stemra: Supreme Court Tightens Limits on Price Discrimination

In the *Buma/Stemra* case, the central question was whether applying different licensing fees for business-use music providers and streaming services constitutes a competitive disadvantage within the meaning of Article 102(c) TFEU.¹¹¹ Members of the interest group Associated Business Music Distributors (ABMD) provide background music to restaurants, shops, and gyms and pay higher fees to Buma/Stemra than streaming services like Spotify, which offer licenses for private use. ABMD argued that this created an uneven playing field, particularly since some businesses commercially used private subscriptions, and Buma/Stemra failed to enforce against this practice.

The Amsterdam Court of Appeal ruled in favor of ABMD, finding that Buma/Stemra had abused its dominant position under Article 102(c) TFEU.¹¹² The court dismissed Buma/Stemra's defense that the price difference resulted from unforeseen third-party behavior and rejected its argument that it did not intend to harm ABMD members' competitive position.¹¹³ Instead, the court held that it was sufficient that Buma/Stemra knowingly accepted the real possibility that its pricing would cause foreseeable harm to ABMD members.¹¹⁴ This ruling significantly expanded the special responsibility imposed on collective management organizations.

In cassation, however, the Supreme Court (Hoge Raad) overturned the Court of Appeal's ruling. The Supreme Court emphasized that, before a finding of price discrimination under Article 102(c) TFEU can be made, it must be proven that there is an actual competitive disadvantage.¹¹⁵ Referring to European Court of Justice case law, the Supreme Court stated that all relevant circumstances of the case must be considered. Specifically, an analysis must show that the price discrimination affects the cost structure, profit margins, or other essential interests of the disadvantaged party, and that these effects result in a tangible impact on its competitive position. The mere fact that ABMD members may face difficulties competing with

¹¹⁰ *Eureco-Pharma*, para. 6.28.

¹¹¹ Supreme Court, March 1, 2024, ECLI:NL:HR:2024:300 (*Buma/Stemra*), para. 3.2.2.

¹¹² Amsterdam Court of Appeal, May 24, 2022, ECLI:NL:GHAMS:2022:1512 (*ABMD/Buma/Stemra*).

¹¹³ Amsterdam Court of Appeal, *ABMD/Buma/Stemra*, para. 2.2.8.

¹¹⁴ Amsterdam Court of Appeal, *ABMD/Buma/Stemra*, para. 2.2.13.

¹¹⁵ Supreme Court, *Buma/Stemra*, para. 3.1.2.

streaming services was not sufficient evidence that price discrimination led to an actual competitive disadvantage. According to the Supreme Court, simply assuming that ABMD and its members could suffer harm due to the differential pricing—while streaming services were exempt from these fees—was not enough. The specific impact of the price difference on the competitive position of individual providers should have been assessed. Because the Court of Appeal failed to consider all relevant circumstances, the Supreme Court annulled the ruling and referred the case back for further review.¹¹⁶ The authors would also like to refer to Paul Kreijger’s insightful commentary on this ruling.¹¹⁷

Electric Tugs: Inspection Rules and Market Access

In the *Elektrotrekkers*-case, the Amsterdam Court of Appeal ruled in appeal that Royal FloraHolland (RFH) did not violate Article 6(1) or Article 24(1) of the Dutch Competition Act (Mw) by outsourcing the annual inspection of electric tugs used on its premises to a single third party, rather than allowing multiple providers to conduct the inspections.¹¹⁸ The appellants (ATT et al.) use these electric tugs for their business activities on RFH’s premises and argued that this inspection scheme constitutes a certification system, which, under the circumstances, should be considered a restriction of competition "by object" under Article 6 Mw. They also claimed that the scheme had anti-competitive effects, since only Motrac was permitted to conduct RFH inspections. Additionally, ATT et al. alleged that RFH holds a dominant position in the market for facilitating trade in ornamental horticulture products and abuses that position by appointing Motrac as the sole inspection provider (foreclosing the market) and imposing unfair conditions.¹¹⁹

The Court of Appeal rejected this reasoning. First, it held that the inspection scheme does not qualify as a certification system under the ACM Guidelines on Cooperation Between Competitors, since it is merely a requirement imposed by RFH on users of its premises, without unjustifiably excluding any competitors.¹²⁰ Second, ATT et al. failed to demonstrate that Motrac had de facto exclusivity. RFH retains the right to appoint multiple inspection providers—even if it has, for now, chosen to engage only one. The court also found insufficient evidence to support the claim that RFH holds a dominant position and that

¹¹⁶ Supreme Court, para. 3.2.3.

¹¹⁷ P. Kreijger, ‘Gelijke behandeling in de polder. HR 1 maart 2024, ECLI:NL:HR:2024:300’, M&M 2024 afl. 3, p. 134-139.

¹¹⁸ Amsterdam Court of Appeal, July 30, 2024, ECLI:NL:GHAMS:2024:2116 (Electric Tugs), paras. 5.11., 5.17.

¹¹⁹ *Electric Tugs*, para. 5.12.

¹²⁰ *Electric Tugs*, para. 5.9.

appointing a single inspection provider had market-foreclosing effects. Moreover, the Court of Appeal found no evidence of unfair conditions. Although the appellants argued that RFH's mandatory "RFH inspection" was an unreasonable requirement, they did not substantiate that the condition lacked a reasonable relationship to the economic value of the service provided by RFH. The court considered that RFH's mandatory inspection serves to ensure the safety and quality of electric tugs used on its premises.¹²¹ The fact that RFH could have appointed multiple inspection providers does not automatically make a single-provider system disproportionate. Additionally, there was insufficient evidence that inspection fees were excessively high. ATT et al. failed to provide data proving that fees were not aligned with actual costs or that they unreasonably hindered the operation of electric tugs. The Court of Appeal therefore concluded that no unfair condition exists within the meaning of Article 24(1) Mw, and no infringement of Article 6(1) Mw has occurred.¹²²

Bencis and Meneba: One Undertaking, Joint Responsibility

Bencis, an investment firm, indirectly held shares in Meneba (now Dossche), a producer of flour and flour-based products, through its funds. The Dutch Authority for Consumers & Markets (ACM) imposed fines for participation in a flour cartel, first on Meneba and later on Bencis itself. The ACM argued that Bencis was part of the same "undertaking" as Meneba during the infringement period and was therefore equally responsible for the cartel violation. Subsequently, Bencis initiated civil proceedings against Meneba, seeking compensation for the damage it allegedly suffered due to the fine imposed on it. However, the Rotterdam District Court ruled that, under EU law, Bencis itself qualifies as an infringer and that Meneba had not acted unlawfully towards Bencis. Bencis appealed this decision to the Court of Appeal in The Hague.¹²³ The Court of Appeal upheld the lower court's ruling. It emphasized that the EU legal concept of an "undertaking" means that a parent company can be fined if it exercised decisive influence over its subsidiary during the period of infringement.¹²⁴ This means that the parent and subsidiary together constitute a single economic unit under competition law. Since Bencis and Meneba jointly committed the infringement, Bencis cannot claim that Meneba alone acted unlawfully.¹²⁵ Additionally, Bencis's claim of unjust enrichment was rejected. The court found that Meneba was not enriched at Bencis's expense,

¹²¹ *Electric Tugs*, para. 5.10.

¹²² *Electric Tugs*, para. 5.16.

¹²³ The Hague Court of Appeal, August 6, 2024, ECLI:NL:GHDHA:2024:1412 (*Bencis and Meneba*).

¹²⁴ *Bencis and Meneba*, para. 6.7.

¹²⁵ *Bencis and Meneba*, para. 6.10.



as both companies had been fined separately through two distinct penalty decisions, each up to the legal maximum of 10% of their respective turnovers.¹²⁶ Consequently, both entities bear their own responsibility for the infringement of the joint undertaking. The Court of Appeal thus confirmed that Bencis has no right to seek recourse or claim damages from Meneba (now Dossche).¹²⁷

Non-Compete Clauses: Room for Reasonableness and Context

Two rulings during this reporting period addressed non-compete clauses and whether they were (by definition) in violation of competition law, rendering them null and void.

Tents/Shelters

In *Tents/Shelters* (main proceedings), the Oost-Brabant District Court examined the validity of a non-compete clause agreed upon between the plaintiff (the sole shareholder of [A], a company specializing in custom tent and shelter solutions) and the defendants (former shareholders of [A], who have since built their own tent empire operating in multiple countries, including the Netherlands, Belgium, the United States, and Poland).¹²⁸ The plaintiff accused the defendants of repeatedly breaching the non-compete clause, while the defendants primarily argued that the clause was void under Article 6 of the Dutch Competition Act (Mw) because it constituted a restriction of competition "by object."¹²⁹ Alternatively, they contended that the clause led to a noticeable restriction of competition. The court emphasized that, according to the Court of Justice of the European Union (CJEU), certain agreements are so inherently harmful to competition that their effects do not need further assessment.¹³⁰ These are considered restrictions "by object", which automatically qualify as noticeable restrictions. The court cited CJEU and Dutch Supreme Court rulings supporting this principle. However, it also noted that not every agreement— even if it appears restrictive in theory— can automatically be classified as a restriction "by object." Instead, the economic and legal context must be examined: if the context does not clearly indicate that the agreement is evidently harmful to competition, a more detailed assessment is required.¹³¹ Applying this approach, the court ruled that the defendants could not simply claim that the

¹²⁶ *Bencis and Meneba*, para. 6.11.

¹²⁷ *Bencis and Meneba*, para. 6.12.

¹²⁸ Oost-Brabant District Court, October 9 2024, ECLI:NL:RBOBR:2024:4700 (*Tents/Shelters*), paras. 2.1, 5.3.

¹²⁹ *Tents/Shelters*, para. 5.3.1.

¹³⁰ See for instance: ECJ EU October 13, 2011, C-439/09, ECLI:EU:C:2011:649 (*Pierre Fabre Dermo-Cosmétique*), para. 39; ECJ EU March 14, 2013, C-32/11, ECLI:EU:C:2013:160 (*Allianz*), para. 34, first sentence.

¹³¹ *Pierre Fabre Dermo-Cosmétique*, para. 35; *Allianz*, para. 36; Oost-Brabant District Court October 9 2024, ECLI:NL:RBOBR:2024:4700 (*Tents/Shelters*), para. 5.5.1.

clause was invalid solely because it was a non-compete agreement. While such clauses intrinsically have the potential to restrict competition, case law (including rulings like *Cartes Bancaires*)¹³² establishes that the abstract nature of an agreement alone is insufficient to classify it as a restriction "by object." Instead, the actual market impact of the clause must be assessed, considering whether it effectively hinders competition, such as by blocking market access or eliminating significant competitors.

The court particularly noted that in cases where a non-compete clause is part of a merger, share purchase, or cooperation agreement, legitimate business interests—such as preventing immediate devaluation of the acquired business—can justify the clause, provided it is reasonable in terms of duration, geographic scope, and content.¹³³

The court found that the defendants failed to provide sufficient facts and evidence to demonstrate that the non-compete clause was inherently harmful to market competition. Likewise, their alternative argument—that the clause caused a noticeable restriction of competition—was not supported by concrete market data or an analysis of competition levels. The court deemed insufficient their mere assertion that the parties operated in the same industry.¹³⁴

Consequently, the court concluded that the non-compete clause could not be declared null and void under Article 6 of the Dutch Competition Act (Mw).¹³⁵ The plaintiff retained the right to enforce the agreement. However, the court left open the possibility that a different ruling could be reached if additional factual evidence were presented or in a different procedural stage. For the time being, however, it was not established that the clause constituted a restriction "by object" or a noticeable restriction under competition law.

Oral Surgeons Case: Validity of a Non-Compete Clause

In *Kaakchirurgen* (Oral Surgeons), the dispute concerned a non-compete clause included in the partnership agreement of the relevant surgical practices, as well as a subsequent settlement agreement between the plaintiff and the defendants.¹³⁶

¹³² CJEU September 11, 2024, C-67/13, ECLI:EU:C:2014:2204 (*Groupement des cartes bancaires*), paras. 48-54.

¹³³ Oost-Brabant District Court, October 9 2024, ECLI:NL:RBOBR:2024:4700 (*Tents/Shelters*), paras. 5.5.2.-5.5.3.

¹³⁴ *Tents/Shelters*, para. 5.5.3.

¹³⁵ *Tents/Shelters*, para. 5.5.3.

¹³⁶ Gelderland District Court December 5 2024, ECLI:NL:RBGEL:2024:8608 (*Oral Surgeons*), paras. 2.1.-2.14.

The case revolved around the validity of a non-compete clause found in both the partnership agreement and a later settlement agreement between the plaintiff and defendants. The parties had worked together in two (MKA) partnerships. The partnership agreement stipulated that a departing oral surgeon could not establish a new practice within a 25-kilometer radius for five years, with violations subject to a penalty fine. Later, the parties agreed in a settlement agreement to reduce this restriction period from five years to three years. The plaintiff argued that this agreement—just like the original clause in the partnership agreement—was void under Article 6 of the Dutch Competition Act (Mw). Additionally, she referred to the European Commission's Notice on Ancillary Restraints, which states that a post-contractual non-compete clause should generally be limited to a maximum of two years if only goodwill is transferred and not know-how.¹³⁷

Unlike the *Tents/Shelters* case, which was handled in main proceedings, this dispute was heard in preliminary relief proceedings (*kort geding*) before the Gelderland District Court. This meant that the judge first had to provisionally assess whether there was sufficient basis to conclude that the non-compete clause was void under Article 6 Mw. The judge stressed that the burden of proof lies with the party claiming that an agreement violates competition law—they must provide relevant economic facts and circumstances. In this context, the court stated that a party alleging a competition law violation must substantiate their claim with relevant economic facts, such as market definition, relevant market structure and characteristics, how the market functions in practice, and the actual competitive impact of the alleged infringement by the defendants. This is necessary to enable a properly substantiated economic debate and a well-reasoned judicial ruling.¹³⁸ The court ruled that the plaintiff did not meet this burden of proof. The mere assertion that no know-how was transferred and that the three-year duration (instead of two) violated European ancillary restraint rules was insufficient to prove that the non-compete clause unlawfully restricted competition. No market study was submitted to show that the position of competitors was actually or significantly affected by this restriction.

As a result, the court rejected the plaintiff's claim under Article 6 Mw, ruling that, in the context of these preliminary relief proceedings, it was not sufficiently demonstrated that the non-compete clause was void.¹³⁹

¹³⁷ *Oral Surgeons*, para. 4.6.

¹³⁸ *Oral Surgeons*, paras. 4.8-4.9.

¹³⁹ *Oral Surgeons*, para. 4.9.



HP Printers: Selective Distribution Under Scrutiny

In main proceedings before the Amsterdam District Court, the court issued an interim ruling on December 18, 2024, regarding whether HP's selective distribution system for printers and cartridges violates competition law.¹⁴⁰

123inkt argued that HP's distribution system violated the cartel prohibition under Article 101(1) TFEU, as HP only allows retailers to participate in its distribution network as "Authorized Partners" and imposes specific obligations on how HP products and third-party brand products are offered. According to 123inkt, these restrictions are not based on the nature of printers and cartridges, but rather an attempt by HP to suppress competition from third-party brands.

HP, in response, argued that its system meets the criteria for selective distribution (the so-called Metro criteria) and is therefore not covered by the prohibition in Article 101(1) TFEU. Alternatively, HP invoked the block exemption for vertical agreements and claimed an individual exemption under Article 101(3) TFEU.

The court ruled that HP's selective distribution system does not meet the Metro criteria, as HP's printers and cartridges do not have characteristics that make a selective network "necessary", as required by case law from the Court of Justice of the European Union (CJEU).¹⁴¹ The court noted that HP printers and cartridges are not high-quality, high-tech, or luxury products, nor are they products that inherently require selective distribution. The court specifically stated that cartridges are merely "containers of ink or toner powder that have been available on the market for decades."¹⁴² As a result, HP's system falls within the scope of Article 101(1) TFEU and could constitute a prohibited restriction of competition.

Regarding the question of whether HP's system qualifies for a block exemption, the court found that HP's market share could not be confirmed as being below 30%, meaning HP cannot automatically benefit from the exemption.¹⁴³ However, the court left open the possibility that HP's selective distribution system could still qualify for an individual

¹⁴⁰ Amsterdam District Court December 18, 2024, , ECLI:NL:RBAMS:2024:7935.

¹⁴¹ Amsterdam District Court December 18, 2024, ECLI:NL:RBAMS:2024:7935, paras. 5.26-5.28; CJEU October 25 1977, C-26/76, ECLI:EU:C:1977:167 (*Metro/Commissie*).

¹⁴² Amsterdam District Court December 18 2024, ECLI:NL:RBAMS:2024:7935, para. 5.26.

¹⁴³ Amsterdam District Court December 18 2024, ECLI:NL:RBAMS:2024:7935, para. 5.38.

exemption under Article 101(3) TFEU. The court stated that HP had not yet sufficiently explained how and why its restrictions are indispensable and whether their benefits outweigh the anti-competitive effects. HP will be given the opportunity to provide further explanations, after which 123inkt will be allowed to respond.¹⁴⁴ The court has postponed a final ruling on this issue.

123inkt also alleged that HP's distribution system constitutes an abuse of a dominant position under Article 102 TFEU. However, the court reaffirmed its previous ruling in an earlier case, stating that HP does not hold a dominant market position in the market for HP printers and cartridges.¹⁴⁵ The previous ruling determined that the availability of cheaper third-party cartridges for HP printers, including those from 123inkt, still exerts enough price pressure to prevent HP from acting significantly independently of competitors and customers.¹⁴⁶ As a result, 123inkt's second claim was dismissed.

Semi-Finished Products: Commercial Dispute Without Competition Law Basis

The *Semi-Finished Products*-case serves as a clear example of competition law being invoked improperly in an attempt to force an outcome in a commercial dispute.¹⁴⁷

In preliminary relief proceedings before the Midden-Nederland District Court, a solar roof tile manufacturer claimed that the defendants—a manufacturer of ceramic and concrete roof tiles and a wholesale distributor of building materials—breached an alleged long-term agreement by discontinuing the production of a specific type of roof tile and its derived semi-finished product.

The claimant argued that its entire business operations depended on this production and that the termination without reasonable notice constituted abuse of a dominant market position under Article 24 of the Dutch Competition Act (Mw). However, the court found no evidence of a long-term agreement in the first place, noting that the claimant had not sufficiently substantiated this claim. Furthermore, the court determined that the defendants did not hold a dominant market position. The claimant failed to present sufficient evidence showing that the defendants were in a position to act independently of competitors,

¹⁴⁴ Amsterdam District Court December 18 2024, ECLI:NL:RBAMS:2024:7935, paras. 5.52-5.53.

¹⁴⁵ Amsterdam District Court December 18 2024, ECLI:NL:RBAMS:2024:7935, paras. 5.56-5.57.

¹⁴⁶ Amsterdam District Court December 15 2021, ECLI:NL:RBAMS:2021:8167, paras. 4.21.5-4.22.

¹⁴⁷ Midden-Nederland District Court July 2 2024, ECLI:NL:RBMNE:2024:4029 (*Semi-Finished Products*).



suppliers, buyers, or end-users in a way that could restrict effective competition in the Dutch market or a substantial part of it. As a result, the court dismissed the claimant's request.¹⁴⁸

Relevant Case Law of the Court of Justice Impacting Dutch Practice

Finally, as usual, we will briefly discuss several rulings from the Court of Justice of the European Union (CJEU) that are relevant to Dutch practice.

The central question in the *MOL/Mercedes-Benz Group AG* case¹⁴⁹ was whether a parent company can invoke the jurisdiction of the court at its own statutory seat for a damages claim related to harm suffered exclusively by its subsidiaries due to an infringement of competition law. MOL argued that, under the concept of an "economic unit," the damage had essentially affected the corporate group as a whole, making Hungary (its statutory seat) the place where the harmful event occurred.¹⁵⁰ However, the CJEU rejected this argument outright and ruled that Article 7(2) of Regulation (EU) No. 1215/2012¹⁵¹ must be interpreted restrictively.¹⁵² In line with previous case law (e.g., *Tibor-Trans*, C-451/18), the place where the damage occurred must be linked to the market where the anti-competitive conduct had its effect.¹⁵³ Since MOL's subsidiaries had purchased trucks in various Member States, the damage occurred at the level of those subsidiaries, not at the parent company's statutory seat.¹⁵⁴ The CJEU emphasized that the economic unit concept is primarily used to determine liability, not as a basis for jurisdictional claims.¹⁵⁵

The central issue in *Volvo AB vs. Transsaqui SL* was whether a parent company can validly be served legal documents at the address of its subsidiary in another Member State if both entities form a single economic unit.¹⁵⁶ In this Spanish case, Transsaqui filed a damages claim against Volvo following the European Commission's finding of an Article 101 TFEU infringement in the Truck Cartel case. The Spanish court served the lawsuit to Volvo at the address of its Spanish subsidiary, Volvo España, rather than at its statutory seat in Sweden.

¹⁴⁸ *Semi-Finished Products*, para. 3.9.

¹⁴⁹ ECJ EU July 4, 2024, C-425/22, ECLI:EU:C:2024:578 (*MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*).

¹⁵⁰ *MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*, para. 36.

¹⁵¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ EU 2012, L 351/1-32).

¹⁵² *MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*, para. 26.

¹⁵³ *MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*, para. 27.

¹⁵⁴ *MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*, para. 31.

¹⁵⁵ *MOL Magyar Olaj- és Gázipari Nyrt./Mercedes-Benz Group AG*, paras. 37-38.

¹⁵⁶ ECJ EU July 11, 2024, C-632/22, ECLI:EU:C:2024:60 (*Volvo AB/Transsaqui SL*).

Volvo did not appear in the proceedings and was convicted in absentia. The CJEU ruled that such service is invalid, even if the parent and subsidiary form a single economic unit.¹⁵⁷ The defendant must actually be made aware of the proceedings, and a subsidiary is not automatically deemed authorized to receive legal documents on behalf of its parent company.¹⁵⁸

Finally, the ruling in *Heureka Group/Google LLC* has significant implications for the limitation periods applicable to damages claims for competition law infringements.¹⁵⁹ The CJEU held that national limitation rules which start the limitation period for each separate damage occurrence individually—even before the infringement has ended—violate Article 102 TFEU and Article 10 of the Damages Directive.¹⁶⁰ At the same time, the CJEU acknowledged that a limitation period may start earlier if the injured party already had knowledge of all relevant facts to file a claim. However, this must be demonstrated by the defendant.¹⁶¹ The general rule remains that limitation periods should only begin after the infringement has ended and after the European Commission has published its decision.¹⁶²

Conclusion & Outlook

The case law of 2024 paints a clear picture of the current phase in which many follow-on cases find themselves: the foundations have largely been laid, and the focus is increasingly shifting toward the practical implementation of damage calculation and evidence submission. Courts and appellate judges are providing guidance on the requirements for damage claims and defenses, particularly in terms of the burden of proof and the methodologies that parties must use. This is particularly evident in the developments in the Trucks and AirCargo cases, where judges are sharpening the boundaries of evidence submission and the referral to damage assessment proceedings. The methodological debates surrounding damage calculation, such as in the aviation cartel case, illustrate that judges are making pragmatic choices while simultaneously imposing strict requirements on statistical justification and data quality. The coming year will be marked by the further concretization

¹⁵⁷ *Volvo AB/Transsaqui SL*, para. 77.

¹⁵⁸ *Volvo AB/Transsaqui SL*, para. 78.

¹⁵⁹ ECJ EU April 18, 2024, C-605/21, ECLI:EU:C:2024:324 (*Heureka Group a.s./Google LLC*).

¹⁶⁰ *Heureka Group a.s./Google LLC*, para. 55; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ EU 2014, L 349/1-19).

¹⁶¹ *Heureka Group a.s./Google LLC*, para. 55.

¹⁶² *Heureka Group a.s./Google LLC*, para. 67.



of damage assessment in large-scale, long-running follow-on cases. 2025 promises to be an interesting year.