

# Anti-competitive clauses: beware of civil enforcement risks

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Beware of the civil enforcement risks of anti-competitive clauses when in contract negotiations. The Supreme Court recently confirmed that the cartel prohibition's nullity sanction not only prevents clauses with an anti-competitive object, but also those with an anti-competitive effect, from being converted into valid ones.

The Dutch Civil Code's statutory conversion provision converts invalid clauses into valid ones that correspond as much as possible to the original clause. The Supreme Court had already [ruled](#) in 2009 that the cartel prohibition's absolute nullity sanction prevents the statutory conversion provision from applying to clauses with an anti-competitive object. The [ruling](#) at hand makes it clear that the same goes for clauses with an anti-competitive effect.

This case concerned an exclusive purchasing clause between petrol company BP and the defendant concluded for a duration of 20 years. The Supreme Court first confirmed the Court of Appeal's view that this clause had an anti-competitive effect, given the duration of the exclusivity (20 years), BP's market share in the relevant market (11-12%) and the existence of parallel networks by competitors. It subsequently considered the Court of Appeal's right to reject BP's argument that the clause could be converted into a valid one. According to the Supreme Court, the application of the statutory conversion provision to anti-competitive clauses would be contrary to the cartel prohibition's absolute nullity sanction, irrespective of whether these clauses had an anti-competitive object or an anti-competitive effect. Any other view would impair the cartel prohibition's effectiveness and deterrent effect and would be contrary to settled [EU case law](#) on the absolute nullity laid down in Article 101 of the Treaty on the Functioning of the European Union (the EU cartel prohibition). The remaining provisions of the agreement between BP and the defendant could, however, remain in force because these were not intrinsically linked to the void clause.

Keeping in mind that even though the statutory conversion road has definitely been cut off for all anti-competitive clauses, it does not prevent actors from concluding a new (valid) agreement to the same effect should the current agreement be caught by the cartel prohibition's nullity sanction. Whether including a contractual conversion clause in an agreement would also do the trick is not yet clear, as the Supreme Court left this question unanswered in an earlier case.

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