

# Cartel members may argue that damage caused by cartel was passed on to customers

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In line with earlier EU case law and the upcoming Directive on damages claims, a Dutch court of appeal has ruled that cartel members can invoke a passing-on defence in claims for damages. This means that when calculating damages, any losses can be taken into account that the cartel victim has already passed on to its customers through price increases. Cartel members are thus safeguarded from having to pay for the same damage more than once. And cartel victims, whether direct or indirect customers of the cartel member, will be able to obtain compensation for the damage caused by the cartel.

In 2007, the European Commission imposed fines of more than EUR 750 million on eleven groups of companies for their involvement in the Gas Insulated Switchgear (GIS) cartel. TenneT, the operator of the Dutch electricity grid, took legal action against engineering company ABB to recover damages it suffered as a result of the GIS cartel.

The [East Netherlands District Court](#) ruled last year that ABB had to compensate GIS purchaser TenneT for losses suffered as a result of the cartel. Although the exact amount of damages still needs to be established in follow-up proceedings, the district court dismissed ABB's defence argument that TenneT did not suffer any loss because it had passed on the overcharge to its customers. But on appeal, the [Arnhem-Leeuwarden Court of Appeal](#) did not agree with the district court's dismissal of this defence. Referring to earlier EU case law as well as the upcoming [directive on damages](#), the court of appeal concluded that invoking the passing-on defence should be possible. The amount of damages should be based on the difference between what was actually paid and what would have been paid if no cartel infringement had taken place, minus the loss which was passed on to TenneT's customers. The Court of Appeal found that the passing-on defence thus not only prevents TenneT from being overcompensated for the harm done, but it also stops ABB from being sued for the same damages more than once.

This ruling provides a safeguard for cartel members, but also ensures that cartel victims, whether direct or indirect customers of the cartel member, will be able to obtain compensation for the damage caused by a cartel.

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