

# Dutch Supreme Court clarifies the passing-on defence in cartel damage cases

July 8, 2016

Today the Dutch Supreme Court ruled in TenneT/ABB on the application of the passing-on defence in cartel damage cases. The case is relevant for both claimants and defendants in cartel damage cases because the Supreme Court explained the criteria for the passing-on defence under Dutch law.

The passing-on defence in cartel damage cases means that the party that is held liable for the cartel damage argues that the claimant has suffered no or less damage because the claimant passed on the price overcharge in whole or in part in the price of its products or services.

The Supreme Court had to answer the question whether the passing-on defence is a defence that disputes the amount of the damage or whether it must be characterised as a deduction of collateral benefits from the amount of the damage. In the latter case, it must be established that there is a causal link between the harmful event and the benefits and that deduction of the benefits is reasonable. The Supreme Court held that a court may choose between these approaches. According to the Supreme Court, the requirements are on balance the same in both approaches, especially that in both approaches the deduction must be reasonable. The decision of the court of appeals did not clarify whether a reasonableness test should be applied.

Also, the Supreme Court held that the burden of proof that part or all of the price overcharge has been passed on is with the liable party. With this judgment, the Supreme Court anticipates the implementation of the Cartel Damage Directive (2014/104/EU). The Dutch bill implementing the Cartel Damage Directive (34 490) would have to enter into force by 26 December 2016 at the latest.

For the entire text of the decision of the Supreme Court in Dutch click [here](#).

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