

Dutch Court Awards Damages in Follow-On Case

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The District Court Gelderland in the Netherlands has rendered a landmark decision in the follow-on damages case between multinational engineering company ABB and the Dutch electricity grid operator TenneT in respect of the Gas Insulated Switchgear (“GIS”) cartel. On March 29, 2017 the District Court awarded EUR 23.1 million (to be accrued with interest) to TenneT.¹ The ruling provides important views with regard to i.e. the assessment of overcharges and the passing-on defence.

Introduction: The Passing-On Defense

The passing-on defense is frequently relied upon in cartel damages actions in the Netherlands. Under it, the cartel participant states that its direct purchaser has not in fact sustained any damages because the direct purchaser has passed on the cartel’s overcharges to its own purchasers.

The Damages Directive (2014/104/EU)² establishes that any person who has suffered harm caused by a competition law infringement may claim full compensation for that harm. The Directive, and its national implementing legislation, will become the principal legal basis for adjudication of pass-on issues by national courts in the EU as this new regime becomes effective.

Article 16 of the Damages Directive provides that the European Commission is to issue guidelines on how to estimate the share of passed-on overcharge to indirect purchasers. The Commission published on October 25, 2016 an extensive study on the passing-on of overcharges.³ This study is intended to provide judges, and other practitioners who are not economic experts, with practical guidance on obtaining and assessing economic evidence in relation to the passing-on of overcharges in the context of competition law infringements. The study reviews national and EU case law and describes in a detailed manner relevant economic theories in this field. The study also provides a 39-step checklist with practical advice.

Background of the Case

ABB had previously been held liable to TenneT for ABB’s participation in the GIS cartel throughout the years 1998-2004, and the case already has been reviewed by the Supreme Court. The Supreme Court ruled in general that the passing-on defense is available under Dutch law.⁴ In addition, the Supreme Court held that courts are free to choose how they qualify the passing-on defense, considering the different approaches the lower courts had chosen in this case. The passing-on defense had been qualified as a defense that disputes the amount of damages, and it also had been held that it may be used to offset against

the amount of any damages any collateral benefits from the infringing conduct. The Supreme Court held that a court may choose between these approaches, because the requirements are, on balance, equivalent, especially taking into account that in both approaches the deduction must be reasonable.

Following a judgment of the Supreme Court in July 2016, the case was referred to the District Court Gelderland to rule on the quantum of damages.

Overcharge

The District Court assessed the overcharge on the basis of a comparison of ABB’s quotes during the GIS cartel (1999) and thereafter (2005). Based on this comparison, TenneT had substantiated that the average overcharge amounted to EUR 23.1 million. ABB contested this approach with reference to its profit margins. The District Court decided that ABB’s line of reasoning, focusing on its profit, is irrelevant for the assessment of the overcharge. It also held that ABB had not provided sufficient evidence of commodity prices and its production costs to establish what would be realistic and competitive market prices.

Passing-On

The passing-on defense by ABB was rejected by the court. ABB argued that TenneT had passed on the premium price for buying the GIS installation through higher electricity prices to its customer. The District Court found that TenneT likely had passed on the overcharge to its direct customers, who, in turn, passed on this overcharge to the general public. Nevertheless, the District Court awarded the entire overcharge to TenneT, taking into account that:

- the general public is very unlikely to initiate legal proceedings against ABB to recover their damages, and
- the damages awarded to TenneT are likely to benefit the general public, taking into account that TenneT is a fully-owned entity of the Dutch state. Compensation paid to TenneT is assumed to ultimately benefit all Dutch citizens and thereby also the end users who have suffered damages.

The District Court stressed that the damages awarded to TenneT are in conformity with the principle of effectiveness, as laid down in the Damages Directive, which requires that a Member State’s rules for obtaining compensation must not be such as to render it practically impossible or excessively difficult for a victim to claim damages.

¹ District Court of Gelderland, Mar. 29, 2017 (Tennet TSO BV, Saranne BV / ABB BV, ABB Ltd.), available at <http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2017:1724> (in Dutch).

² 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, 2014 O.J. (L 349) 1.

³ Eur. Comm'n, DG Competition, *Study on the Passing-On of Overcharges* (Oct. 2016), available at <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf>.

⁴ HR, July 8, 2016 (Tennet TSO BV, Saranne BV / ABB BV, ABB Ltd.), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:1483>.



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