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ITALIANA

**23 - 24** MAGGIO / MAY 2019

I PRINCIPALI SVILUPPI  
NEL DIRITTO DELLA  
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EUROPEA E NAZIONALE

*MAIN DEVELOPMENTS  
IN EUROPEAN  
AND ITALIAN  
COMPETITION LAW*

# Developments in The Netherlands regarding cartel damage litigation

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24 May 2019

## General developments

1. Netherlands increasingly 'popular' jurisdiction for cartel damage litigation
2. With Dutch anchor defendants, jurisdiction of Dutch court is not an issue
3. Most cases brought before Amsterdam District Court
4. Mass litigation in cases involving mass products / services sold to SME's:
  - Air Cargo
  - Trucks

# Mass claims

- Numerous claims vehicles
- All operating on the same basis
  - Collect assignments of claims by end customers
  - Operate on 'no cure no pay' basis: will deduct certain percentage/amount from any compensation obtained from defendants
  - Dutch advocates are not allowed to act on 'no cure no pay' basis, but claims funders are
- Strong competition for assignors among claims vehicles, competing on alleged size of damage ("we believe we can claim overcharge of 20% plus legal interest over many years"...) and withholding percentage (20%, "no more than 35%", "competitive percentage"...) )
- Claims vehicles seek wide publicity to attract assignors; try to team up with road hauliers associations in numerous EU countries
- Massive number of proceedings, notably in trucks case; many claims announced by branch associations etc., but not yet filed

# Recent developments in case law

## A. Trucks case

- Duty to substantiate for claims vehicles
  - Claims vehicles generally limit statement of claims to mentioning names of individual assignors and asserting that each assignor has bought on or more cartel products from one or more cartel members and therefore must have suffered damage
  - On that basis claims vehicles aim to obtain at short notice declaratory judgment stating that defendants are liable for damage caused by the cartel
  - Amsterdam District Court 15 May 2019: claims vehicles must substantiate for each individual assignor:
    - Which cartelised products were bought
    - When
    - From which supplier

# Recent developments in case law

## B. Air Cargo

- Judgment on applicable law Amsterdam District Court 1 May 2019
  - All claims against all airlines by all claimants from anywhere are under Dutch PIL (as applicable until entry into force of Rome II in November 2009) subject to Dutch law
  - Criterion: "*the law of the state on whose territory the anti-competitive act has influenced the competitive conditions in the market*"
  - Interpretation by District Court driven by aim to ensure efficient application competition rules
  - Judgment will be appealed to Court of Appeal ---> many more years of uncertainty
  - Unclear what will be the approach under Rome II (criterion: "*law of the country where the market is, or is likely to be, affected*")

# Recent developments in case law

## B. Air Cargo

- Judgments on applicability of Article 101 TFEU to flights to/from third countries before entry into force of applicable implementing EU Regulation
- Issue affects large part of damage claims
  - ECJ in *Asjes* (1986): Article 101 TFEU cannot be applied by national court to agreements in the air transport sector generally, before entry into force of procedural rules provided for in Article 103 TFEU
  - English High Court (October 2017): Article 101 TFEU cannot be applied to restrictive practices affecting air transport between EU and third countries prior to 1 May 2004, i.e., before Regulation 1/2004 introduced procedural rules based on Article 103 TFEU for air transport sector as a whole
  - Amsterdam District Court (1 May 2019):
    - disagrees with High Court; believes that Article 101 TFEU may be enforced by national court to practices affecting flights between EU and third countries prior to 1 May 2004, based on direct effect of Article 101 TFEU
    - decides to refer issue to ECJ for preliminary ruling