

FORUM SHOPPING ON THE DUTCH HIGH STREET
JURISDICTION ISSUES IN FOLLOW-ON LITIGATION CASES

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Antitrust damages cases invariably involve multiple defendants and often large groups of claimants. In most cases, these parties are domiciled in different countries. Moreover, the relevant conduct often took place in multiple countries. In such cases, the question which courts have international jurisdiction to hear a case will arise.

The applicable legal framework and the way in which it is applied by the national courts may result in multiple courts having international jurisdiction to hear a case. As a result, both plaintiffs and defendants can – to some extent – select among the courts of different Member States. The relatively low bar to establish jurisdiction, in combination with the differences between the jurisdictions, opens up the gate for forum shopping. While claimants and defendants usually have different preferences as to which court should hear the case, the Netherlands is considered a particularly popular jurisdiction for antitrust litigation cases by claimants and defendants alike. As a result there is a significant number of Dutch Court judgments on jurisdictional issues. Generally, Dutch courts readily assume jurisdiction in international antitrust follow-on litigation cases.

In this paper, we discuss the European legal framework to determine jurisdiction and recent Dutch case law on jurisdiction issues in the area of antitrust follow-on litigation.

1. LEGAL FRAMEWORK

1.1. Introduction

In the European Union ("EU"), the legal framework to determine international jurisdiction used to be Regulation 44/2001, also mentioned "Brussels I".² On 10 January 2015, an amended version of the Brussels I Regulation entered into force, which is commonly referred to as "Brussels I (recast)".³ The latter applies to proceedings commenced on or after 10 January 2015.

Brussels I and Brussels I (recast) apply when the defendant is domiciled in a EU Member State.⁴ The domicile of the claimants as well as the nationalities of the parties are in principle irrelevant.⁵

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² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16.01.2001 p. 1-23

³ Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

⁴ Articles 4(1) and 5(1) Brussels I (recast); Articles 2(1) and 3(1) Brussels I.

⁵ Court of Justice 13 July 2000, *Group Josi v. UGIG*, ECLI:EU:C:2000:399, Paragraph 61.

If the defendant is not domiciled in the EU, jurisdiction is governed by the forum's own national jurisdictional rules.⁶

As mentioned in the introduction, multiple national courts may have jurisdiction under the Brussels I regime. In the Paragraphs below, we discuss the different heads of jurisdiction and highlight the changes brought about by Brussels I (recast). Because amendments introduced in Brussels I (recast) are often minor, much of the guidance provided by the European Union Courts on the interpretation of the provisions in Brussels I will apply to their equivalents in Brussels I (recast).⁷ We also review the rules on parallel proceedings in different courts (*lis pendens*).

1.2. Main head of jurisdiction: Member State where defendant is domiciled

The main jurisdictional rule of the Brussels I regime can be found in Article 4(1) Brussels I (recast).⁸ It provides that "*persons domiciled in a Member State shall, whatever their nationality, be sued in the court of that Member State.*" The rationale of appointing the *forum domicilii* as primary connecting factor lies in the protection of the defendant. According to the Court of Justice of the European Union ("CoJ") in *Handte*, being sued in before the court of their domicile makes it easier, in principle, for a defendant to defend themselves.⁹

In *Handte*, the CoJ furthermore concluded that the objective of strengthening the legal position of EU residents requires a strict interpretation of the jurisdictional rules which derogate from the main rule. According to the Court, "a normally well-informed defendant" should be reasonably able to predict before which courts, other than the *forum domicilii*, they may be sued.¹⁰

1.3. Alternative heads of jurisdiction

1.3.1. Place where a co-defendant is domiciled

As already briefly touched upon above, it occurs more often than not that participants in an antitrust infringement are domiciled in different Member States. In these cases, claimants will generally prefer to sue all infringers in one forum rather than to bring proceedings before separate courts.

Article 8(1) Brussels I (recast)¹¹ permits a claimant to bring their claims against multiple defendants before a single court if the claims are "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*" In order for judgments to be regarded as irreconcilable, it is not sufficient that there be a divergence in the outcome of the dispute. According to the CoJ, "*that divergence must also*

⁶ Article 6(1) Brussels I (recast); Article 4(1) Brussels I.

⁷ Recital 34 of Brussels I (recast) provides that continuity between Brussels I (recast), Brussels I and its predecessor, the Brussels Convention should be ensured. The same need for continuity applies as regards the interpretation by the CoJ of the 1968 Brussels Convention and of the Regulations replacing it.

⁸ Article 2(1) Brussels I.

⁹ Court of Justice, 17 June 1992, *Handte*, ECLI:EU:C:1992:2678, Paragraph 14.

¹⁰ *Ibid*, Paragraph 18.

¹¹ Article 6(1) Brussels I.

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*arise in the context of the same situation of fact and law.*¹² In other words: in order to rely on Article 8(1) Brussels I (recast), the claim against the joint defendants must be based on a similar factual and legal situation. However, the CoJ has also noted that it is not necessary that the actions brought against the defendants have identical legal bases.¹³

An added benefit of relying on Article 8(1) Brussels I (recast) is that it allows for forum shopping. All defendants may namely be sued before a court where any of them is domiciled. Thus, a claimant is likely to choose the defendant domiciled in the most claimant-friendly jurisdiction as its "anchor defendant". For that reason, defendants often heavily oppose application of this provision.

This is no different for antitrust damages cases. Companies sued before another court than their natural forum oftentimes point out that a "single and continuous infringement" of competition law consists of a bundle of anticompetitive actions, in which the defendants participated at different places and at different times. Moreover, under EU competition law the European Commission can fine parent companies for infringements committed by their subsidiaries, even when the former were not involved in the infringement themselves. Pointing to these circumstances, defendants argue that the claim is not based on the same situation in law and in fact. Thus, the connection between the claims against the infringing parties should not be regarded as sufficiently close that hearing and determining them together is necessary to avoid the risk of irreconcilable judgments.

A recent judgment of the CoJ leaves little room to make this argument in damages cases following on an infringement decision of the European Commission.¹⁴ In that case, claimant CDC, who pursued the purported claims of 32 purchasers of hydrogen peroxide domiciled in 13 different EU and EEA Member States, brought an action for damages against six chemicals producers before the Landgericht Dortmund (Germany). Only one of the defendants, Evonik Degussa, was domiciled in Germany. Briefly after having served its writ of summons on Evonik Degussa and the other defendants, CDC withdrew its action against Evonik Degussa following a settlement between them.

In the proceedings that followed, the remaining defendants disputed the Landgericht Dortmund was competent to hear the case against them. The Landgericht decided to stay the proceedings and refer preliminary questions to the CoJ regarding the interpretation of various provisions of Brussels I. With regard to Article 8(1), the Court of Justice ruled that there is a sufficiently close connection between antitrust damages claims against the addressees of a Commission decision to allow them to be sued in the Member State where any one of them is domiciled.¹⁵ However, the Landgericht Dortmund may still decline jurisdiction if it can be proven that CDC and Evonik Degussa purposefully delayed the formal conclusion of the settlement until proceedings had been instituted.¹⁶

¹² See e.g. Court of Justice, 10 July 2007, *Freeport v. Arnoldsson*, ECLI:EU:C:2007:595, Paragraph 40.

¹³ Court of Justice, 10 July 2007, *Freeport v. Arnoldsson*, ECLI:EU:C:2007:595, Paragraphs 46-47.

¹⁴ Court of Justice, 21 May 2015, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335.

¹⁵ *Ibid*, Paragraphs 21-22.

¹⁶ *Ibid*, Paragraph 31.

1.3.2. Place where the harmful event occurred or may occur

A second possible connecting factor is Article 7(2) Brussels I (recast),¹⁷ which provides that the "court for the place where the harmful event occurred or may occur" is also competent to deal with "matters relating to tort, delict or quasi-delict". It is settled case law that the place where the harmful event occurred covers both the place where the damage occurs (*locus damni*) and the place of the event giving rise to it (*locus delicti*).¹⁸ If these connecting factors are not situated in the same Member State, Article 7(2) Brussels I (recast) allows the claimant to choose if they want to bring their claim before the court of the *locus damni* or the court of the *locus delicti*.

Antitrust damages claims are generally considered to fall within the ambit of this category.¹⁹ Given the fact that both anticompetitive actions as well as their effects often cross borders, Article 7(2) Brussels I (recast) seems to offer much potential for a claimant wishing to forum shop. In theory, when a pan-European infringement is established, a claimant could argue that both the damage as well as the event giving rise to it occurred in each jurisdiction in the EU, and that therefore all courts of all Member States are competent to hear their claim.

However, in *CDC HP*, the Court of Justice clarified that this is not the correct interpretation of Article 7(2) Brussels I (recast). Instead, the Court of Justice ruled that the *locus delicti* should be located at the place where "either that cartel was definitively concluded or one agreement in particular was made which was the sole causal event giving rise to the loss allegedly inflicted on a buyer."²⁰ The place where the damage occurs, is typically each individual claimant's registered office.²¹

Claim vehicles such as CDC, who purchased and consolidated several undertakings' alleged claims for damages, would therefore need to bring separate actions for every individual claimant before the courts with jurisdiction for their respective registered offices.²² However, if they want to consolidate the purported damages claims of companies located in different jurisdictions, they need an "anchor defendant" domiciled in the Member State of the court seized.

1.4. Exclusive jurisdiction: arbitration and choice-of-forum agreements

Because the application of Brussels I (recast) may result in multiple courts having international jurisdiction, parties are never sure at which forum a dispute between them may eventually end up in. Parties may furthermore agree that they prefer to litigate before a different forum than the ones which would be competent under Brussels I (recast). In these cases, they may wish to select the

¹⁷ Article 5(3) Brussels I.

¹⁸ Court of Justice, 30 November 1976, *Handelskwekerij Bier v. Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166, para. 19.

¹⁹ The CoJ has never confirmed explicitly that antitrust damages claims should be regarded as a matter "relating to tort, delict or quasi-delict" as opposed to a matter "relating to a contract". Nevertheless, in a slightly different context, the Court considered that an antitrust damages claim "cannot be regarded as stemming from a contractual relationship". Court of Justice, 21 May 2015, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335, Paragraph 70. See also Paragraph 1.4 below.

²⁰ Court of Justice, 21 May 2015, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335, Paragraph 50.

²¹ *Ibid*, Paragraph 52.

²² *Ibid*, Paragraph 55.

competent court or arbitral tribunal themselves. Article 25(1) Brussels I recast²³ allows parties to conclude arbitration or choice-of-forum agreements in which they appoint one or more courts or arbitral tribunals who have "jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship". Unless parties agree otherwise, the jurisdiction of the court or arbitral tribunal thusly appointed is exclusive: a valid arbitration or choice-of-forum agreement derogates from both the general jurisdiction under Article 4(1) Brussels I (recast) and the special jurisdictional rules.²⁴

Arbitration and choice-of-forum clauses can often be found in supply contracts. Typically, these clause will provide that a given arbitral tribunal or court will be competent to hear "any and all disputes relating to the contract". When it later appears that the supplier was involved in an anticompetitive agreement, the question may arise whether the parties to the supply contract may still rely on that clause. As mentioned above, the arbitration or choice-of-forum clause may only produce effects when the dispute at hand is connected with a specific legal relationship between the parties.

CDC HP is the leading precedent concerning this question too. The CoJ ruled that "a clause which abstractly refers to all disputes arising from the contractual relationship" should not be regarded as extending to a "dispute relating to the tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel".²⁵ According to the Court, such litigation cannot be regarded as stemming from a contractual relationship, as the alleged victim could not reasonably foresee litigation when it agreed to the arbitration or choice-of-forum clause because it had no knowledge of the infringement at that time. However, the CoJ considered that choice-of-forum clauses or arbitration clauses that explicitly refer to "disputes concerning liability as a result of an infringement of competition law" do validly derogate from the EU jurisdictional rules.

1.5. *Lis pendens* and related actions

When an undertaking foresees it will become a defendant in an antitrust damages action in the near future, it may not want to wait and see before which court the claimant elects to bring the proceedings. In such case, it can file a claim for a "negative declaratory judgment" before a forum of its own choice.

Of course, a claimant may subsequently attempt to bring proceedings before a more claimant-friendly forum. However, if these proceedings concern "the same cause of action between the same parties", Article 29 Brussels I (recast)²⁶ requires the court seized secondly to stay the proceedings of its own motion until the court seized first has ruled on its own jurisdiction. It follows from the CoJ's judgment in *Ship Tatry* that a claim for a negative declaratory judgment and its "mirror claim" (which will usually be a damages claim) can concern the same cause of action.²⁷ If the court seized

²³ Article 23(1) Brussels I.

²⁴ Court of Justice, 14 December 1976, EU:C:1976:177, *Estasis Salotti v Ruewa*, Paragraph 7.

²⁵ Court of Justice, 21 May 2015, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335, Paragraph 69-71.

²⁶ Article 27(1) Brussels I.

²⁷ Court of Justice, 6 December 1994, *Ship Tatry*, ECLI:EU:C:1994:400, Paragraph 49.

first finds it has jurisdiction to hear the case, then other courts must decline to deal with the dispute.²⁸

If proceedings are related, but do not concern "the same cause of action between the same parties", it is up to the discretion of the court seized if it will stay the proceedings.²⁹ Actions are deemed to be related where they are so closely connected that it expedient to hear them together to avoid the risk of irreconcilable judgments.³⁰ An innovation of Brussels I (recast) is that EU courts may also decide to stay proceedings if "an action involving the same cause of action and the same parties" is already pending before a court of a third State and it is expected that the latter will render a judgment which can be recognized and enforced in the EU and a stay is necessary for the proper administration of justice.³¹ If a court of a third State renders a judgment in such a case, any EU court seized must dismiss the proceedings.³² Similar rules have been enacted for related proceedings which have been brought before a court of a third State.³³ However, in such a case the decision to dismiss the proceedings is discretionary.³⁴

2. DUTCH CASE-LAW

As set out in the introduction, there is quite some case law on jurisdiction by the Dutch civil courts concerning follow-on cases. Below we will discuss the most important case law of the past few year in which the Dutch courts apply the European framework on jurisdictional issues. It has to be noted that many of the judgments concern rulings by district courts, which have not yet been challenged on appeal. The reason is that under Dutch procedural law, a ruling on jurisdictional issues is normally considered as an interim judgment which can only be appealed together with the final judgment. Only in exceptional cases do the courts allow an interim appeal. The majority of the cases discussed in this section have not yet reached the stage of a final judgment.

2.1. District Court Arnhem, 26 October 2011, *TenneT / Alstom* and *TenneT / ABB*; Court of Appeal Arnhem-Leeuwarden, 2 September 2014 *TenneT / ABB*

In these two cases before, TenneT claimed damages from a number of producers of gas-insulated switchgear. In *TenneT / Alstom* the defendants were several entities from the Alstom group. TenneT alleged that a subsidiary of Alstom, Cogelex, sold gas-insulated switchgear to TenneT for inflated prices. TenneT claimed that this constituted a tort. As a preliminary defence, Alstom alleged that the District Court of Arnhem did not have jurisdiction to hear the case. It argued that since (i) it was not domiciled in the Netherlands, (ii) was not bound to a choice of forum clause relied on by TenneT, and (iii) there were no other grounds for jurisdiction, the District Court should declare itself incompetent to hear the case. The District Court disagreed and assumed jurisdiction in relation to all the defendants.

²⁸ Article 29(3) Brussels I (recast); Article 27(3) Brussels I.

²⁹ Article 30(1) Brussels I (recast); Article 28(1) Brussels I.

³⁰ Article 30(3) Brussels I (recast); Article 28(3) Brussels I.

³¹ Article 33(1) and 34(1) Brussels I (recast).

³² Article 33(3) Brussels I (recast).

³³ Article 34 Brussels I (recast).

³⁴ Article 34(3) Brussels I (recast).

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It considered that none of the defendants were domiciled in the Netherlands, so no jurisdiction could be established on the basis of the main rule of the domicile of the defendant (the then applicable Article 2 Brussels I). The District Court then considered Article 5(3) Brussels I³⁵ and assessed where the harmful event occurred. The Court considered that it could assume jurisdiction over the claims against Cogalex on this basis since the agreement between Cogalex and TenneT, that contained the allegedly inflated prices was signed in Arnhem. Therefore, the District Court considered that the Netherlands was the Member State where the alleged harmful event occurred. Furthermore, since TenneT, the allegedly injured party, was domiciled in Arnhem, the damage also occurred in Arnhem. Consequently, the District Court ruled that "*both the harmful event as well as the damage occurred in the Netherlands, more specifically in Arnhem*".³⁶

The District Court declared itself competent vis-à-vis the other defendants too. In doing so, it considered that the question of liability of all of the defendants had to be assessed on the basis of the factual and legal circumstances and ruled that "*in order to avoid irreconcilable judgments, that question must be assessed by the same judge, given the rule of Article 6(1) Brussels I*".³⁷

It is questionable whether this (interim) judgment is correct. Article 6(1) Brussels I (Article 8 (1) Brussels I recast) requires that at least one of the defendants is domiciled in the Netherlands; "*where he is one of a number of defendants, in the courts for the place where any one of them is domiciled*". If that were the case, and the cases were closely connected, the other defendants could be sued in the Netherlands as well. However, in the case of *TenneT / Alstom*, none of the defendants were domiciled in the Netherlands.

The defendants were not yet able to appeal the interim judgment. The District Court rendered its final judgment in the matter on 10 June 2015. It awarded damages of € 14 million to TenneT.³⁸ The appeal period is still running at the time of writing but it is expected that the defendants will appeal both the final judgment and the interim judgment.

In the related case *TenneT / ABB*, TenneT sued three entities of the ABB group for damages for another gas-insulated switchgear station bought from ABB.³⁹ The District Court assumed jurisdiction on the same basis as in *TenneT / Alstom*, i.e. on the basis of Article 5(3) Brussels I⁴⁰ for the legal entity with which TenneT had done business and on the basis of Article 6(1) Brussels I⁴¹ for the other defendants. In this case however, two of the defendants were incorporated in the Netherlands. This raises the question why the District Court did not base itself on Article 2 in conjunction with Article 6(1) Brussels I. This judgment by the District Court was appealed, also on the question of jurisdiction. On appeal, the Court of Appeal of Arnhem-Leeuwarden ruled that irrespective of the legal ground of the alleged claim, the Dutch courts have international jurisdiction

³⁵ Article 7(2) Brussels I (recast).

³⁶ District Court of Arnhem, 26 October 2011, *TenneT / Alstom*, ECLI:NL:RBARN:2011:BU3548, Paragraph 4.6.

³⁷ *Ibid*, Paragraph 4.9.

³⁸ District Court of Gelderland, 16 June 2015, *TenneT / Alstom*, ECLI:NL:RBGEL:2015:3713.

³⁹ District Court of Arnhem, 26 October 2011, *TenneT / ABB*, ECLI:NL:RBARN:2011:BU3546.

⁴⁰ Article 7(2) Brussels I (recast).

⁴¹ Article 8(1) Brussels I (recast).

because two of the ABB defendants were domiciled in the Netherlands and the claims against them were closely connected with the claim against the third non-Dutch defendant.⁴²

It remains to be seen how the Court of Appeal will deal with the question on jurisdiction in *TenneT / Alstom* (if an appeal is lodged). As noted, none of the Alstom entities are domiciled in the Netherlands. Therefore, the main rule of domicile of (one of the) defendant(s) is not available as "fall back" ground for jurisdiction. Following *CDC HP*, it is likely that the Court of Appeal will rule that *locus damni* is located in the Netherlands and that the Dutch courts can therefore derive international jurisdiction from Article 5(3) Brussels I to hear the case against all the defendants.

2.2. District Court The Hague, 1 May 2013, *CDC / Shell et al.*

On 1 May 2013, the District Court of The Hague assumed jurisdiction in another antitrust damages case between professional claim vehicle CDC and Shell, Esso, Sasol and Total. The proceedings followed on a decision by the European Commission in which the defendants were fined for an infringement on the paraffin wax market. CDC not only instituted claims against the direct participants in the alleged infringement but also against their parent companies which were also addressees of the Commission's decision, among them Shell Petroleum NV and Total SA. In its judgment of 1 May 2013, the District Court ruled, inter alia, on preliminary defences concerning jurisdiction.

The court ruled that the Dutch courts have jurisdiction to assess the claims against the "anchor-defendant" Shell Petroleum NV given that it is established in the Netherlands.⁴³ The court subsequently ruled that it also had jurisdiction with regard to the other defendants, as there was a sufficiently close relationship between the claims to jointly assess them against all the defendants.⁴⁴ The District Court was thus prepared to assume jurisdiction against the other defendants on the basis of Article 6(1) Brussels I⁴⁵ even when – from a competition law point of view – the infringing conduct of the anchor defendant and the other defendants was different. The anchor defendant, as a parent company, was fined on the basis of the competition law concept of parental liability only, whereas the subsidiaries were fined for their own infringing conduct.

The court furthermore rejected Total's argument that a choice-of-forum clause would apply. The Court established that the choice-of-forum clause was included in a contract with its subsidiary and considered that the mere fact that the parent company is part of the same group of companies as the subsidiary was insufficient to accept that the choice-of-forum clause would also apply to the parent company.⁴⁶

⁴² Court of Appeal Arnhem-Leeuwarden, *TenneT / ABB*, ECLI:NL:GHARL:2014:6766, Paragraph 3.8.

⁴³ District Court The Hague, 1 May 2013, *CDC / Shell et al.*, ECLI:NL:RBDHA:2013:CA1870, Paragraph 4.3.

⁴⁴ *Ibid*, Paragraph 4.19.

⁴⁵ Article 8(1) Brussels I (recast).

⁴⁶ District Court The Hague, 1 May 2013, *CDC / Shell et al.*, ECLI:NL:RBDHA:2013:CA1870, Paragraph 4.9.

2.3. District Court Rotterdam, 17 July 2013, *SECC / Kone et al.*

Various Kone and ThyssenKrupp group companies were fined by the European Commission for four separate infringements on the elevator and escalator market. The infringements concerned national markets in the Netherlands, Belgium, Luxembourg and Germany. Claim vehicle SECC instituted proceedings against the ultimate parent companies and against the national subsidiaries which were directly involved in the infringements of the Kone and ThyssenKrupp groups before the Rotterdam District Court.

The Court ruled that it had jurisdiction to assess the claims against the Dutch subsidiary of ThyssenKrupp as it was domiciled in the Netherlands (more specifically within the judicial district of the Rotterdam Court).⁴⁷ The Rotterdam Court also found that it had jurisdiction over the Dutch subsidiary of Kone given that Kone did not dispute jurisdiction in that regard.

The Court however held that it did not have jurisdiction over the non-Dutch subsidiaries of ThyssenKrupp and Kone as the claims against these entities did not have the required close relationship to the claims against the Dutch subsidiaries. The Court considered that the Commission decision related to four separate, national infringements regarding the national subsidiaries of ThyssenKrupp and Kone. These four national infringements had different characteristics with regard to their nature, duration and the products involved. In addition, the Court considered that the applicable civil law would most likely also be different per infringement. Consequently, the claims relating to the alleged infringements in Belgium, Luxembourg and Germany against the non-Dutch subsidiaries were not considered to not have a sufficiently close relationship to the claim relating to the alleged infringement in the Netherlands against the Dutch subsidiaries. Therefore, the Court decided it could not assume jurisdiction on the basis of a sufficiently close connection with the claims against the anchor defendants.⁴⁸ The Court also could not assume jurisdiction on the basis of the location of the tort, given that neither the *Handlungsort* nor the *Erfolgsort* were in the judicial district of the Rotterdam District Court.⁴⁹

The Court did partly assume jurisdiction for the claims against the parent companies of Kone and ThyssenKrupp but only for the claims relating to the alleged infringement in the Netherlands. Should the Court decline jurisdiction for the claims against the parent companies based on the Dutch infringement, there would be a risk of contradictory decisions, which should be avoided.⁵⁰ The Court however rejected jurisdiction for the claims against the parent companies for the non-Dutch infringements.

As in the Shell case,⁵¹ this judgment shows that Dutch courts consider that there is a sufficiently close connection between claims against an infringing subsidiary and its parent company, even though their liability from a competition law perspective differs. If the Dutch court assumes jurisdiction to hear the claims against either the subsidiary or the parent on the basis of the *forum*

⁴⁷ District Court Rotterdam, 17 July 2013, *SECC / Kone et al.*, ECLI:NL:RBROT:2013:5504, Paragraph 5.4..

⁴⁸ *Ibid*, Paragraph 5.18-5.22.

⁴⁹ *Ibid*, Paragraph 5.23-5.5.25.

⁵⁰ *Ibid*, Paragraph 5.11.

⁵¹ District Court The Hague, 1 May 2013, *CDC / Shell et al.*, ECLI:NL:RBDHA:2013:CA1870. See Paragraph 2.2 above.

domicilii, it will assume jurisdiction for the claims against the other as well on the basis of the sufficiently close connection (Article 8(1) Brussels I (recast)). When it concerns a different, distinguishable infringement, however, a Dutch court will not (and should not) be prepared to assume jurisdiction over the claims relating to the separate infringement on the basis of a sufficiently close connection.

2.4. **District Court Central Netherlands, 27 November 2013, *EWD / UTC et al.***

In another case relating to the elevators and escalators infringement, the District Court of Central Netherlands declared itself competent to hear the claims against five Dutch elevator manufacturers and their parent companies. The claimant in this case, claim vehicle EWD, started proceedings in the District Court for Central Netherlands district.

In this case, the defendants challenged the Court's jurisdiction, arguing that during the infringement period it was a general practice in the industry to contractually agree upon arbitration. However, the defendants could not trace all the relevant contracts and could thus only submit examples, because EWD had not made it clear for which projects it claimed damages. In addition, there was no other way to ascertain to which projects the claims pertained, given that the turnover figures presented by EWD did not match the figures in the administration of the elevator manufacturers. The Court, however, considered that the burden of proving the existence of binding arbitration clauses rested firmly on the elevator manufacturers. Any possible failure of EWD to meet its burden of proof in the main proceedings could not excuse the defendants from not meeting theirs in the preliminary proceedings. The Court thus concluded that by submitting only examples of contracts, the defendants had failed to prove that the parties had agreed on arbitration.⁵²

In the absence of valid and applicable arbitration clauses, the District Court considered that it was competent to hear the claims against all defendants. Otis B.V. and Mitsubishi Elevator Europe B.V. were established in the jurisdiction of the District Court and could serve as an anchor defendants. The Court rejected the arguments by the other defendants that the Court could not assume jurisdiction on the basis of a sufficiently close connection for the foreign (ultimate) parent companies. The Court considered that since EWD based its claim on a group tort for which all defendants could potentially be held jointly and severally liable, separate proceedings would create a risk of irreconcilable judgments.⁵³

2.5. **District Court Amsterdam, 4 June 2014, *CDC / AkzoNobel et al.*; Court of Appeal Amsterdam, 21 July 2015, *CDC / Kemira***

Another judgment dealing with the issue of choice of forum clauses, was rendered in the proceedings initiated by CDC against various producers of sodium chlorate. Those producers, the defendants in this case, were based in different European countries: Arkema (France) Eka (Sweden), Kemira (Finland), and Akzo Nobel (the Netherlands). The defendants argued that the Dutch Court was not competent to hear the case.

First and foremost, Arkema, Eka and Kemira argued that the Court could not base its jurisdiction on a sufficiently close connection because the connection with the case against Dutch anchor defendant

⁵² District Court Central Netherlands, 27 November 2013, *EWD / UTC et al.* ECLI:NL:RBMNE:2013:5978, Paragraph 2.24.

⁵³ *Ibid*, Paragraph 2.12-2.15.

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Akzo Nobel was not sufficiently close.⁵⁴ In this context, they emphasized that the Commission had "only" fined Akzo Nobel on the basis of the competition law notion of parental liability. The Amsterdam District Court, like the The Hague and Rotterdam District Courts,⁵⁵ disagreed. While the Court explicitly acknowledged that Akzo Nobel's position as a parent company could differ from the position of the other defendants, for purposes of jurisdiction it sufficed that CDC alleged that Akzo Nobel was guilty of the same conduct as the other defendants. Moreover, the Court considered that a risk of irreconcilable judgments would arise if different courts would rule over the claims against Akzo Nobel and the other defendants.⁵⁶

In the alternative, the defendants invoked arbitration clauses and choice-of-forum clauses in the supply agreements between Arkema, Eka and Kemira and their customers (CDC's assignors). The Court also rejected this line of argument, holding that the wording of these clauses was not sufficiently broad to encompass damage claims based on competition law infringements.⁵⁷

As discussed before, judgments on jurisdictional issues are considered interim judgments that can only be appealed together with the final judgment rendered in a case. However, in this case, the District Court allowed interim appeal. Kemira appealed the judgment by the District Court, arguing *inter alia* that the claims against AkzoNobel were not closely connected with the claims against the other defendants because AkzoNobel was only held liable for the competition law infringement because of parental liability.

In the first judgment by an Appeal Court on this question, the Court of Appeal Amsterdam agreed with the District Courts of Amsterdam, Rotterdam and The Hague.⁵⁸ Absent a Supreme Court ruling, it can be concluded that Dutch Courts consider the nature of the liability from a competition law perspective, i.e. whether a defendant was held liable for its own conduct or for the conduct of a subsidiary, to be an irrelevant factor when it comes to establishing a sufficiently close connection under Brussels I.

Furthermore, the Court of Appeal rejected the application of forum clauses in the contracts between Kemira and its customers (CDC's assignors). The Court of Appeal considered that forum clauses only referring to contractual disputes do not encompass tort claims based on alleged competition law infringements. This would be different, however, if the forum clauses referred to disputes relating to competition law infringements⁵⁹. This is in line with the CoJ judgment in *CDC / HP*, discussed above in Paragraphs 1.3 and 1.4.⁶⁰

⁵⁴ Article 8(1) Brussels I (recast); Article 6(1) Brussels I.

⁵⁵ District Court The Hague, 1 May 2013, *CDC / Shell et al.*, ECLI:NL:RBDHA:2013:CA1870; and District Court Rotterdam, 17 July 2013, *SECC / Kone et al.*, ECLI:NL:RBROT:2013:5504. See Paragraphs 2.2 and 2.3 above.

⁵⁶ District Court Amsterdam, 4 June 2014, *CDC / AkzoNobel et al.*, ECLI:NL:RBAMS:2014:3190, Paragraphs 2.12-2.18.

⁵⁷ *Ibid*, Paragraphs 2.19-2.23.

⁵⁸ Court of Appeal Amsterdam, 21 July 2015, *CDC / Kemira*, ECLI:GHAMS:2015:3006, Paragraphs 2.6-2.12.

⁵⁹ *Ibid*, Paragraphs 2.13-2.16.

⁶⁰ Court of Justice, 21 May 2015, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335.

2.6. District Court Amsterdam, 7 January 2015, *Equilib / KLM et al.*

In a judgment of 7 January 2015, the District Court of Amsterdam ruled that it had jurisdiction over claims instituted by claim vehicle Equilib against British Airways and Lufthansa. The District Court decided that Equilib did not abuse civil procedural rules by instituting a duplicate claim against them and only including KLM and Martinair to "anchor" the case in the Netherlands.

Already back in 2010, Equilib had instituted claims against KLM, Martinair and Air France before the same court on the basis of an alleged infringement of competition law as established by the European Commission. Four years later, Equilib started a second round of proceedings largely based on the same facts, this time including British Airways and Lufthansa as co-defendants.

British Airways and Lufthansa argued that this duplicate claim abused rules of civil procedure and the framework of the Brussels I Regulation, by only including KLM and Martinair to create jurisdiction before a Dutch court instead of having to start a case in the English and German homelands of the airlines.⁶¹

The Amsterdam District Court disagreed and stated that claimants may add new defendants to a case, for example to rectify mistakes or to prevent limitation periods to expire. Dutch procedural law does not hinder claimants starting a second round of proceedings against new defendants, including the same defendants as in the earlier case to anchor the case in the Dutch jurisdiction, after which the proceedings can be combined. This process occurs in legal practice, is acceptable and does not violate the Brussels I Regulation, according to the District Court.⁶²

While this may be a rather atypical case, the judgment confirms that the threshold for denying jurisdiction on the basis of abuse of procedural law and abuse of the Brussels I regime is rather high. It also confirms that Dutch courts acknowledge and do not disapprove the practice of forum shopping.

2.7. District Court Limburg, 25 February 2015, *Deutsche Bahn / Nedri et al.*

On 25 February 2015, the District Court of Limburg declared itself competent to hear the claims against not only Dutch anchor defendants Nedri Spanstaal and Hit Groep but also against German defendants DWK and Saarlöhner.⁶³ The latter two had argued that there was no sufficiently close connection between the claims against the Dutch anchor defendants and themselves, thereby specifically relying on the adopted, but not yet implemented Actions for Damages Directive ("**the Directive**").⁶⁴

DWK and Saarlöhner argued that under the Directive, immunity applicants such as themselves cannot be held jointly and severally liable for all damage caused by the cartel, but only for damage incurred

⁶¹ District Court Amsterdam, 7 January 2015, *Equilib / KLM et al.*, ECLI:NL:RBAMS:2015:94, Paragraph 3.2.

⁶² *Ibid*, Paragraph 3.6-3.8.

⁶³ District Court Limburg, 25 February 2015, *Deutsche Bahn / Nedri et al.*, ECLI:NL:RBLIM:2015:1791, Paragraph 3.2.

⁶⁴ 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, OJ L 349, 5.12.2014, p. 1–19.

by their own customers. Therefore, DWK and Sairstahl maintained the sufficiently close connection required by Article 8(1) Brussels I recast was lacking. The District Court rejected this argument considering that even if it were to accept that the immunity applicants are only liable for damage caused to their own customers, the case against the immunity applicants still had a sufficiently close connection with the claims against the other defendants.⁶⁵

2.8. District Court Amsterdam, 22 July 2015, *KLM / DBS*

Most recently, the Amsterdam District Court assumed jurisdiction in another case relating to the alleged air cargo infringement. In this particular case, the claims were instituted by Commission decision addressees KLM, Martinair and Air France, who filed for a negative declaratory judgment that they were not liable to pay damages to DB Schenker. DB Schenker argued, inter alia, that the Brussels I regime would not apply to declaratory judgments. Furthermore, DB Schenker argued that KLM, Martinair and Air France artificially created the forum by involving an Amsterdam subsidiary that had nothing to do with air cargo and that the claims against certain non-Dutch DB Schenker entities were not closely connected with the claims against the Dutch DB Schenker entities due to a difference in applicable law.

The District Court considered it had international jurisdiction, as it was undisputed that at least two DB Schenker entities that were active on the market for air cargo were established in the Netherlands. The fact that these two entities were established in the district of the Rotterdam Court (and not within the district of the Amsterdam Court), is not relevant for the question of international jurisdiction.⁶⁶ Lastly, the Court rejected DB Schenker's arguments that a sufficiently close connection was lacking because different national legal systems were applicable to the different claims. According to the District Court, the similarity between the claims warranted that they be handled together, and the applicability of different national law systems is not relevant in this respect.⁶⁷

3. CONCLUDING REMARKS

In antitrust follow-on cases, the European framework on jurisdiction as provided for by the Brussels I (recast) Regulation typically results in multiple courts having international jurisdiction over a particular dispute. Claimants and defendants alike may work within this framework and direct proceedings to the court of their preference. The courts of the Netherlands have developed a vast body of case-law in the past few years on the topic of jurisdiction in antitrust follow-on cases.

In this paper we provided an overview of the relevant case-law by the Dutch courts over the last few years. It is clear that the threshold to assume jurisdiction is relatively low and only in exceptional cases do the Dutch courts decline jurisdiction. Generally speaking, as long as there is at least one Dutch "anchor defendant" and the claims against the non-Dutch defendants are closely connected with those against the Dutch anchor(s), the courts will assume jurisdiction over the entire case against all defendants. Even lacking a Dutch anchor defendant, there are examples of the Dutch

⁶⁵ District Court Limburg, 25 February 2015, *Deutsche Bahn / Nedri et al.*, ECLI:NL:RBLIM:2015:1791, Paragraphs 3.3-3.4.

⁶⁶ District Court Amsterdam, 22 July 2015, *KLM / DBS*, ECLI:NL:RBAMS:2015:4408, Paragraph 5.10.

⁶⁷ *Ibid*, Paragraph 5.8.

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courts assuming jurisdiction on other grounds, such as the fact that the damage occurred in, or the wrongful act was committed in, the Netherlands.

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