

The Netherlands

2016

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Today's story from the Netherlands

*Hoge Raad 8 July 2016, Rechtspraak van de Week
2016/950 (TenneT c.s./ABB c.s.)*

Which was about:

- The position of the 'passing-on defence' in the law of damages, and
- The criterion for deduction of benefits

Context

An unlawful act may cause damage, but it can also provide benefits, for example:

- A financial services provider breaches his duty to provide information, but the financial product is profitable
- Someone pays a too high price because the seller is in a cartel, but he passes the damage on...

Facts



1988 - 2004



Passed-on



Legal question

The passing-on defence...

- part of the question to what extent did TenneT suffer damage (art. 6:95-97 DCC),
- or a deduction of benefits (art. 6:100 DCC)?

Art. 6:100 DCC:

'Where one and the same event has resulted in both loss for the person who suffered it and benefit, the benefit must, to the extent that this is reasonable, be taken into account in assessing the reparation of the damage to be made.'

European dimension

- Application of national tort law is restricted by EU law
- National court was allowed to ensure that compensation does not lead to unjust enrichment (*Courage and Crehan*)
- Directive 2014/104/EU prohibits over-compensation
- However, Directive 2014/104/EU was temporarily inapplicable

Hoge Raad: ruling is in conformity with Directive 2014/104/EU

Judgment

- Both approaches are allowed
- Art. 6:97 DCC allows the judge to ensure that the burden of proof between the two approaches is equal
- With respect to art. 6:100 DCC:
 - ✧ 'one and the same event' = *condicio sine qua non*
 - ✧ 'to the extent this is reasonable' = the same standard as art. 6:98 DCC, which is imputation according to reasonableness

Final remarks

- A new standard for deduction of benefits
- This case nicely shows how EU law affects national tort law
- Embedding the passing-on defence: inspiration for other Member States?
- The *Hoge Raad* does not include the possible effect of 'passing-on' on volume effects in its judgment