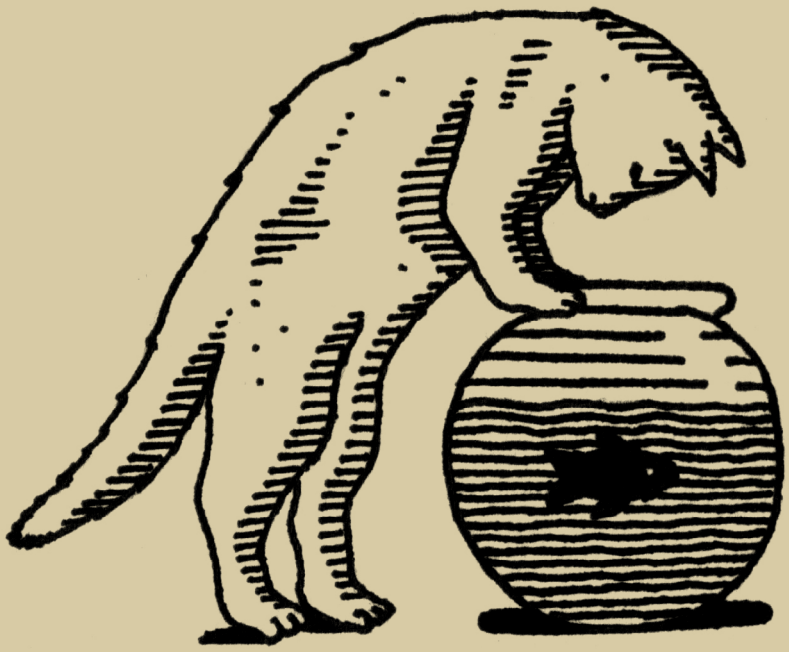
BUREAU BRANDEIS

CARTEL DAMAGES



QUARTERLY REPORT I
2017

We are pleased to present to you the latest version of our quarterly damages claims report

We have focused in particular on case law and rulings within Europe and nowadays, 'within Europe' almost automatically means focusing on the United Kingdom, Germany and the Netherlands. These are after all the main jurisdictions within Europe where civil law cartel damages cases are settled. In this edition, we have turned our attention to the imputability of harm. This includes imputability within parent-subsidiary relationships, but also even the imputability of the conduct of shareholders.

Although explicitly recognised in the Antitrust Damages Directive, there are difficulties associated with the passing-on defence within Europe; the standard has been set very high. In the Netherlands too, the claim to the passing-on defence made by the defendant in the so-called TenneT-ABB case was dismissed in no uncertain terms. The so-called efficiency defence has been paid particular attention in this context. What this infers is that if the court were to allow a passing-on defence too readily, then this could sometimes make obtaining compensation illusory.

There is naturally a lot of attention in the United Kingdom for the large number of Mastercard cases. We also discuss the difference that has arisen with Dutch jurisdiction regarding the recognition of arbitration clauses to accept jurisdiction. Where the Dutch court in principle rejects the applicability of arbitration clauses in agreements when infringements of competition law are involved, the English court takes a different view.

We trust that you will enjoy reading this report and as always, we welcome your observations, comments and additions.

Hans Bousie, **Louis Berger** and **Nammy Vellinga**

Index

Amsterdam, July 2017

1. Private enforcement in cartel damages claims – case law p. 2
2. Developments regarding public law aspects of cartel damages p. 6
3. Fines and procedural regulations by the Commission and European Court of Justice p. 7
4. Final remarks p. 9
5. Our details p.10

1

Private enforcement in cartel damages claims – case law

The Netherlands

- A common issue concerns the imputability of liability in the context of a corporate group. Is the parent company qualitate qua liable for the actions of the subsidiary or would more be needed for this to be the case? Under Dutch law, a distinction must in any event be made between imputability in the context of competition law and imputability in the context of civil law. The question of whether there is any imputability of the parent company in the context of competition law is dependent on the question of whether the parent company falls under the notion of "undertaking". A determining factor in this regard is whether the parent exercises a decisive influence on the subsidiary. The question has arisen in practice as to whether this competition law equalisation of parent and subsidiary also continues to apply in civil liability actions. The fact that the (competition law) equalisation cannot be extended to apply one-to-one to civil law issues is clear from the judgment of 20 July 2016 in the East West Debt versus United Technologies Corp. case, Otis B.V., Schindler Liften B.V., Thyssenkrupp A.G., Thyssenkrupp Liften B.V., Kone Corp., Kone B.V. and Mitsubishi Elevator Europe B.V. in which the Midden Nederland District Court dismissed this equalisation.[1]

- In another (administrative law) case, the question was whether the tenet of imputability could also be applicable to shareholders which in this case concerned a private equity party. On 26 January 2017, the Rotterdam District Court ruled as follows in the so-called flour cartel case. The District Court sees no reason to infer that the tenet of imputability should not be applicable to private equity parties.

The District Court found in legal ground 14.4:

> *"The tenet of imputability is applicable to multiple companies that belong jointly to the same chain and does not exclude investment companies. A relevant question is whether the portfolio companies determine their activities independently or whether the private equity company exercises a decisive influence in such a way that it can no longer be said that the portfolio companies act independently and can be regarded as forming an economic unit together with the private equity company. The activities and powers of a private equity company do not in fact have to be identical to those of a company operating exclusively as a financial investor."*

The District Court finds that the infringement by a subsidiary of the prohibition on cartels can be attributed to private equity parties as shareholders. This is due to the fact that in this case, the economic, organisational and legal ties that exist between the parties are such that the private equity company exercises a decisive influence on the portfolio company.[2]

---

1. Midden-Nederland District Court, 20 July 2016, ECLI:NL:RBMNE:2016:4284, *all citations from Dutch or German courts are informal translation.*
2. District Court of Rotterdam, 26 January 2017, ECLI:NL:RBROT:2017:588.

• Another step was taken in one of the first cartel damages cases in the Netherlands (TenneT – ABB). On this occasion the District Court of Gelderland gave short shrift to the passing-on defence of ABB. On 18 July 2016, the Supreme Court ruled in the cartel damages case between ABB and TenneT (the legal predecessor is Sep) that ABB was liable for the damage suffered by TenneT through the cartel on the market of gas-insulated switchgear. The District Court of Gelderland delivered judgment on 29 March 2017 and ABB was ordered to pay € 23 million in compensation for the damage caused by the cartel.

ABB put up a defence against the extent of the damage by invoking the passing-on defence. The District Court did not agree with this and found in legal grounds 4.14 and 4.15:[3]

> *"In this regard, the District Court states first and foremost that the case at hand does not involve a finished or semi-finished product that is sold on to the customers of the injured party of the infringer whereby the cost price, whether or not increased by handling and/or processing costs and/or a mark-up, is passed on to one or more subsequent customers in the supply chain. This concerns the additional costs charged to Sep [predecessor of TenneT HB] for an investment in its business assets or immovable property. These fixed assets and the additions to them either appear or will appear on the balance sheet and are subsequently depreciated, and in this case, this depreciation either is or will be partially passed on in the rates that Sep/TenneT charges to its customers. The additional costs therefore are not and will not be directly passed on to the customers of Sep/TenneT but are gradually factored into the customer prices, as would generally be the case for entrepreneurs such as manufacturers, traders and service providers, who will attempt to pass on their indirect costs and expenses in the prices they charge their customers.*
>
> *The court finds that in any company, the causal link between additional costs on the fixed assets and the passing on of the depreciation of these in the prices charged to customers is too weak to be able to find generally speaking that the increase in the prices charged to customers must be subtracted from the losses to be attributed to the infringer. It is after all the choice of the entrepreneur to either pass on these expenses or not or else only partially, which to a significant extent will determine the prices he can charge in the market without losing his competitive position. In the one case, the market will not allow him to pass on his additional costs and in the other case, he will even be able to pass on his additional costs with a considerable mark-up, and the one entrepreneur will in fact do this while the other will not."*

This pronouncement is an exceptionally positive one from the perspective of claimants. It is however uncertain to what extent they should feel optimistic. This issue will no doubt come up for discussion again in appeal proceedings. It will be extremely interesting to see the extent to which the Court of Appeal will lean on the so-called efficiency defence. Nowadays, almost every claimant advances this defence. Parties claim the harm suffered and alternatively claim compensation by invoking the efficiency defence. Briefly stated, the efficiency defence results in the court nevertheless awarding compensation to the claimant even if strictly speaking, the claimant is unable to prove the harm. This is a slippery slope from the point of view of legal certainty. But from the European starting position which is that the process should not be made too difficult for claimants and which also forms the basis for the Directive on Antitrust Damages Actions, it is a means of ensuring that private litigation is not made impossible from the very start.

• On 17 January 2017, the ConsumentenClaim foundation initiated proceedings against Philips among others due to their participation in the CRT cartel[4]. The judgments in these cases will be reported in future Quarterlies.

3. District Court of Gelderland, 29 March 2017, ECLI:NL:RBGEL:2017:1724.
4. NOS, television manufacturers taken to court for cartel agreements, 17 January 2017.

United Kingdom

- Multilateral Interchange Fees (MIFs) are fees that are charged in a credit or debit transaction by the bank of the cardholder (the "Issuing Bank") to the bank of the merchant (the "Acquiring Bank"). When cardholders purchase from the merchant, the Issuing Bank pays the Acquiring Bank the sales prices less the fee for the transaction, i.e. the MIF. In a series of decisions, the European Commission has targeted MasterCard and Visa, stating that MIFs appear to constitute a restriction of competition. The European Commission stated in 2007:[5]

> *"The MIF in MasterCard's scheme restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby setting a floor under the merchant fee. In the absence of the multilateral interchange fee the merchant fees set by acquiring banks would be lower."*

On 11 September 2014, the ECJ confirmed that MasterCard's inter-bank fees for cross-border payment transactions in the EEA restrict competition in breach of EU competition rules.[6]

Furthermore, the case against Visa Inc. and Visa International Service Association is ongoing.[7] Visa Europe adopted commitments that were made binding in February 2014 for four years in order to comply with the concerns of the European Commission.

In the area of private enforcement of competition law, several proceedings concerning the MIFs are pending before different institutions. We discuss below the cases initiated by Asda Stores & Others against MasterCard Inc. & Others before the High Court of England and Wales; Arcadia Group Brands Ltd. and Others against Visa Inc. before the High Court of England and Wales and Walter Hugh Merricks CBE before the Competition Appeal Tribunal against MasterCard Inc. and Others.

- On 30 January 2017, the High Court of England and Wales ruled in the MasterCard interchange antitrust proceedings that the interchange fees set by MasterCard are not anticompetitive.[8] The multilateral interchange fees were found to be objectively necessary for the smooth operation of a payment card scheme and an economically viable UK business.[9] The Judge found:

> *"I conclude, therefore, that in the zero MIF counterfactual world with Visa MIFs unconstrained, the MasterCard scheme would not have survived in the UK in a materially and recognisably similar form. On that hypothesis:*
>
> 1. *The MIFs as set were objectively necessary as an ancillary restraint; and*
> 2. *The MIFs as set were not restrictive of competition because in the restriction counterfactual, there would not have existed lower MasterCard MIFs (nor lower Visa MIFs).*

- On 15 February 2017 in the antitrust damages proceedings between Visa Inc. and retailers[10] before the High Court of England and Wales, Visa settled with 13 of the 14 retailers. The terms of the settlement are confidential. The antitrust damages proceedings concern the violation of European competition law due to setting minimum prices for cross-border interchange fees.[11] Similar proceedings against MasterCard have been discussed in Q2-4 (2016) and here above.

- In the proceedings between Walter Hugh Merricks CBE and MasterCard Inc. and Others, the plaintiffs have applied to commence collective proceedings combining follow-on actions for damages due to a decision of the European Commission (COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards). Walter Hugh Merricks CBE will

5. European Commission, COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580, 19 December 2007.
6. European Court of Justice, C-382/12P, 11 September 2014.
7. Competition, Banking & Payment Systems, 8 June 2016.
8. Alex Davis, MasterCard scores in UK Court as swipe fee suits pile up, 30 January 2017.
9. High Court of England and Wales, [2017] EWHC 93. 30 January 2017, paragraph 225.
10. Companies involved were: Arcadia Group Brands Ltd, Asda Stores Ltd., B&Q PLC, Comet Group Ltd., Debenhams Retail PLC, House of Fraser (Stores) Ltd., Iceland Foods Ltd., New Look Retailers Ltd., Next Retailers Ltd., Record 2 Shop Ltd., WM Morrison Supermarkets PLC, Argos Ltd., Marks and Spencer PLC and Sainsbury's Supermarkets Ltd.
11. Alex Davis, Visa settles with 13 retailers in £500M UK swipe fees trial, 16 February 2017.

represent individuals who purchased goods and/or services between 22 May 1992 and 21 June 2008 from businesses selling in the UK that accepted cards at a time at when those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over.[12] The proceedings are pending before the Competition Appeal Tribunal. MasterCard has opposed the application stating that the class members do not have enough in common. Judgement has been reserved.[13]

- On 28 February 2017, the High Court of Justice of England & Wales ordered a stay in the proceedings between Microsoft Mobile OY and Sony Europe Ltd., Sony Corp., LG Chem Ltd., and Samsung SDI CO Ltd. The Court found Microsoft Mobile OY to be bound by an arbitration agreement which means that the proceedings should take place before the International Chamber of Commerce in the UK.[14] Dutch and other courts have stated that general arbitration agreements do not in principle encompass disputes regarding competition law infringements.[15] The European Court of Justice only addressed jurisdiction clauses, leaving the effect of general arbitration clauses uncertain.[16]

Microsoft Mobile brought the proceedings in its own rights and as assignee of the rights of Nokia and its relevant subsidiaries. The agreement between Nokia and Sony Europe provided for an arbitration clause in paragraph 25.2 *"Any disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration in the English language in United Kingdom, in accordance with the Arbitration Rules of the International Chamber of Commerce in United Kingdom. However, any disputes related to BUYER's Intellectual Property Right(s) or Confidential Information, or for injunctive relief, may, at BUYER's sole election, be resolved by a court of competent jurisdiction. The decision of the arbitrators shall be final, binding and executable. The arbitration shall be the exclusive remedy of the Parties to the dispute."*

Sony Europe stated that Microsoft Mobile was bound by the arbitration clause as it was unaffected by the assignment of Nokia's rights. The parties did not see eye-to-eye on whether the claims brought by Microsoft Mobile fell within the scope of the arbitration clause.

The English High Court found in paragraph 81 of the decision:

> *"In conclusion, whilst I accept that it is possible for the provisions of EU law to permit a court to sideline or declare ineffective an arbitration clause, there is nothing in the decision of the Court in CDC to mandate such a course. Indeed, to the contrary, to do so, would be to disregard the entire trend and direction of the approach of the Court. I appreciate that the Court did not consider arbitration clauses specifically. However, that fact cannot disguise the basic truth that the Court's approach to the risk of "fragmentation of claims" was fundamentally different to that of the Advocate General, and involved a wholesale rejection of his approach. I can see nothing in the decision of the Court to require me to displace the effect of the arbitration clause as something inimical to EU law. Accordingly, I reject Microsoft Mobile's contention that the arbitration clause should be set aside or disregarded on the grounds of EU law."*

12. CAT, Walter Hugh Merricks CBE v Mastercard Incorporated and Others, 1266/7/7/16, Notice of an application to commence collective proceedings under section 47B of the Competition Act 1998, 21 September 2016.
13. CAT, Walter Hugh Merricks CBE v Mastercard Incorporated and Others, 1266/7/7/16, 18-20 January 2017.
14. High Court of England and Wales, [2017] EWHC 374 (Ch), 28 February 2017.
15. Amsterdam Court of Appeal, 21 July 2015 ECLI:NL:GHAMS:2015;3006 and District Court Midden-Nederland, 27 November 2013 ECLI:NL:RBMNE:2013:5978.
16. EU Court of Justice, C-352/13, 21 May 2015.

2

Developments regarding public law aspects of cartel damages

European Union

• On 14 March 2017, the Court of Justice of the European Union ruled in the proceedings between Evonik Degussa GmbH and the European Commission regarding the disclosure of confidential information from a statement given by a leniency applicant in the decision of the European Commission. The finding of the Advocate-General was already discussed in Q3 (2016). The Court of Justice of the European Union found with regard to the handling of the confidentiality of the information as follows in legal ground 87:[17]

In that regard, it must be pointed out that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances.

• On 1 February 2017, the Court of Justice of the European Union ruled in the matter of Kendrion's appeal as follows. Kendrion was ordered by the European Commission on 30 November 2005 to pay a fine for infringing the cartel ban. One of its subsidiaries allegedly participated in the industrial plastic bags cartel. Kendrion lodged an appeal against this ruling at the Court of Justice (T-54/06). The appeal proceedings eventually lasted for 5 years and 9 months.

Under Article 47 of the Charter of Fundamental Rights of the European Union, everyone is entitled to a fair and public hearing of his case within a reasonable period. In the Kendrion proceedings, the long period was not justified by any factual, legal or procedural complexity of the case. As a consequence of exceeding a reasonable period, the European Union was ordered to pay compensation for damages of € 594,769.18 to Kendrion.[18]

• On 9 March 2017, the Court of Justice of the European Union upheld the penalty imposed on Samsung in the CRT cartel case. The CRT cartel was already discussed in Q2 (2016).[19]

17. EU Court of Justice, C-162/15 P, 14 March 2017.
18. EU Court of Justice, T479/14, 1 February 2017.
19. Philip Blenkinsop, EU court upholds cathode ray tube cartel fines on Samsung SDI, 9 March 2017.

3

Fines and procedural regulations by the Commission and European Court of Justice

• On 17 March 2017, the European Commission made a new decision in the matter of the Air Cargo cartel. The 11 airline companies were fined a total of € 776,465,000.

A fine had been imposed by the European Commission on the 11 airline companies previously in November 2010 against which almost all the airline companies had lodged an appeal at the European Court of Justice. The European Court of Justice found that a procedural error had been made; namely a discrepancy between the decision and the operative part thereof. It was not completely clear from the decision whether the European Commission found that there was a single continuous infringement or whether there were four separate infringements. If there was a single continuous infringement, than all parties would be liable for damages suffered through the behaviour of all other cartel members. The European Commission remedied the procedural error, confirmed that there was a single continuous infringement, and imposed the same fine on the 11 airline companies in the new decision.[20]

• On 12 January 2017, the EU Court of Justice dismissed an appeal of Timab Industries S.A. (FR). As stated in Q3 (2016), Timab (among others) was fined for being in a cartel with producers of animal phosphates. The decision of the European Commission was the first hybrid case in which both the settlement and ordinary procedures were followed.[21] Timab did not settle in the proceeding and felt punished for not doing so. The highest court of the EU however decided that Timab had suffered no discrimination for not settling the case.[22]

• On 8 March 2017, the European Commission fined six air conditioning and engine cooling suppliers for a total amount of € 155 million in a settlement. The addressees of the settlement decision are Behr, Calsonic, Denso, Panasonic, Sanden and Valeo. The parties coordinated prices and markets and exchanged sensitive information.[23]

• On 8 February 2017, the European Commission imposed a penalty on three companies due to an infringement of the cartel ban. The companies, Campine,

20. European Commission, Competition: The Commission upholds the decision once again and imposes fines of EUR 776 million on air freight companies for a price fixing cartel, 17 March 2017 Brussels. Qantas did not appeal.
21. European Commission, Antitrust: European Commission fines animal feed phosphates producers € 175 647 000 for price-fixing and market-sharing in first "Hybrid" cartel settlement case, 20 July 2010 Brussels.
22. European Commission, Antitrust: Commission welcomes Court of Justice judgment on Animal Feed Phosphates Cartel, 12 January 2017 Brussels.
23. European Commission, Antitrust: Commission fines six car air conditioning and engine cooling suppliers € 155 million in cartel settlement, 8 March 2017 Brussels.

Eco-BAT Technologies and Recyclex, have made price fixing agreements for the purchase of discarded batteries. Johnson Controls brought the cartel to the attention of the European Commission and therefore, as a leniency applicant, did not receive a fine.[24]

- On 19 January 2017, the Court of Justice of the European Union rendered judgment in the proceedings between the European Commission, which was supported by the EFTA Surveillance Authority, and Total SA and ELF Aquitaine SA with regard to interest claimed on a fine imposed for infringing the cartel ban.

- We wrote about this in Q3 (2016): On 31 May 2006, the Commission issued a decision in which it established a cartel infringement in the market of methacrylate. Addressees of the Commission decision included Arkema France SA (Arkema) and its parent companies Total SA and Elf Aquitaine SA. All addressees were held jointly and severally liable for the infringement. Arkema paid its fine in time. Arkema noted that it had paid the sum of EUR 219,131,250 *"in its capacity as joint and several debtor and that, since that payment, the Commission [had] received full satisfaction as against Arkema and as against all the other joint and several debtors"*. In appeal of the Commission decision, Arkema's fine was reduced. As a result of the appeal, the Commission repaid the difference after the reduction of the fine plus interest. As the fine of the parent companies was not reduced, the Commission demanded the remaining part of the fine from the parent companies. It also demanded default interest.

Although the parent companies complied with the demands of the Commission, they requested annulment of default interest. The General Court annulled that part of the decision and reimbursed the companies for the default interest.

The Court of Justice of the European Union joined with Advocate-General Wahl and the General Court and ruled as follows.[25]

> *"In view of the preceding, it should be found that just as the General Court rightly found in paragraph 116 of the contested judgment, the litigious letters do not provide sufficient grounds for the Commission to claim default interest from the defendants by virtue of the fine imposed in the methacrylate judgment.*

24. European Commission, Competition: The Commission imposed fines of € 68 million on three companies for a cartel in the recycling of car batteries, 8 February 2017 Brussels.
25. EU Court of Justice, C-351/15 P, 19 January 2017.

4

Final remarks

- On 16 March 2017, the European Commission introduced a new tool. The whistleblower tool makes it possible to anonymously report a (suspected) cartel infringement to the European Commission.[26]

26. European Commission, Anonymous Whistleblower tool.

5

Our details

Editors
Hans Bousie and Louis Berger

Authors
Louis Berger, Hans Bousie, Nammy Vellinga and Kristina Sirakova

Louis Berger is a founding partner of bureau Brandeis. He is an expert on corporate and commercial litigation with more than 20 years of extensive experience in this field. He is recognized for his legal strategy and his ability to think beyond the law itself. Louis is experienced in (international) litigation and advising in relation to (potentially) litigious situations. He has extensive experience as local counsel in multi-jurisdiction litigation. This part of the practice involves complex and cross-border disputes that are brought to court in multiple jurisdictions.
Before joining bureau Brandeis, Louis was partner at Spigt Litigators, a prominent firm renowned in the Netherlands for its outstanding litigation practice.

Hans Bousie is a founding partner of bureau Brandeis. Internationally, Hans specializes in cross border antitrust damage litigation. His excellent skills in combining market economics with legal frameworks beef up his in depth knowledge of antitrust law obtained through 20 years of experience in antitrust litigation before the Dutch Courts, the European Commission, the Dutch competition authority and the European Court of Justice. As we speak, Hans is involved in the main cartel damages cases in the Netherlands: the Air Cargo Case and the Trucks Case. Hans is the founder and editor of the Cartel Damages Quarterly: the world's one and only journal on cartel damage competition case law. Hans is consequently on top of all new developments in cartel damage case law and regularly visits conferences and symposia on this matter.

Nammy Vellinga is a junior associate at bureau Brandeis. She specializes in corporate litigation and focuses on civil enforcement of competition law. Nammy is involved in corporate as well as commercial dispute resolution.

Kristina Sirakova is a doctoral candidate at the University of Heidelberg and a Research Fellow at the Max Planck Institute Luxembourg for Procedural Law. She graduated from the University of Heidelberg in 2012. In November 2014, Kristina completed her bar exam at the Higher Regional Court of Koblenz with a specialization in the field of antitrust law and competition law. In the course of this specialization she undertook an internship at the Court of Justice of the European Union. Her current research focuses on civil procedure and antitrust law.

bureau Brandeis is a Dutch law firm which specializes in complex litigation. bureau Brandeis is a boutique firm, but at the same time also one of the largest firms in the Netherlands with a 100% focus on litigation. We litigate corporate, commercial, and competition disputes. We represent our clients during all stages of proceedings, before all courts and tribunals. From courts of first instance to the Dutch Supreme Court and the European Court of Justice.

We are a genuinely independent law firm. We are outspoken about the causes we represent. In order to avoid conflicts of interest, we choose not to represent banks, big accountant firms, (quasi-) governmental bodies and supervising authorities.

bureau Brandeis

Sophialaan 8 1075 BR Amsterdam Nederland
+31 (0)20 7606505 info@bureaubrandeis.com
bureaubrandeis.com