Competition Outlook 2026

Competition law in an era of (r)evolution

In our Competition Outlook 2026, we look back at the main competition law developments over the past year and offer our insights on the key trends for 2026.

For decades, the European Union (EU) took pride in a competition regime guided by economics rather than politics. Its mission was to protect the competitive process, not particular firms or sectors. That technocratic ideal is fading. Successive crises – from the pandemic and energy shocks to mounting global industrial rivalry – have blurred the line between competition policy and industrial strategy. Under the banners of strategic autonomy and economic security, the EU is adopting a more pragmatic, interventionist stance. Conventional rules no longer seem sufficient, prompting calls for new instruments to achieve fairer and more strategic outcomes.

In this Competition Outlook 2026, we identify the key competition trends to watch out for. We look back at recent developments and offer our predictions for the new year.

Content

Towards ever closer scrutiny: the tightening net of European investment screening

The EU has been moving away from an open-by-default approach to foreign investment towards a framework of openness with safeguards. Encouraged by the EU, nearly all Member States have introduced Foreign Direct Investment (FDI) screening legislation. Currently, the focus is on consolidating and also expanding these regimes, while the European Commission (Commission) aims to extend its influence in this domain.

In 2024, the Commission proposed revising the FDI Regulation to standardise the essentials of national systems. According to the Commission's proposal, FDI screening would be mandatory in a minimum set of areas, including dual-use items, selected critical technologies such as semiconductors and artificial intelligence (**AI**), listed critical medicines and key functions in the EU's financial system. Furthermore, indirect investments via EU-based subsidiaries of foreign investors would be explicitly covered. The proposal also aims to tighten the often-criticised cooperation mechanism between Member States and the Commission by setting firmer timelines, expanding Brussels' information-gathering powers and clarifying how disagreements with Member States are resolved. To reduce uncertainty, the Commission plans to publish more detailed guidance on the risk factors that authorities should weigh, helping investors understand how proposals will be assessed.

The amendments of the European Parliament expand further on this. They back mandatory screening for certain greenfield projects, a broader and clearer list of sectors subject to compulsory review and, above all, decision-making powers for the Commission. If Brussels or a Member State raises duly justified objections to a notified investment, the Commission could authorise the deal with conditions or prohibit it – even if the host state favours approval. As expected, Member States have criticised this, arguing that it strays into national security prerogatives, where risk perceptions and political accountability differ.

Initiatives in the Netherlands show how regulatory toolkits can be reinforced. *The Investments, Mergers and Acquisitions (Security Assessment) Act* (*Wet veiligheidstoets investeringen, fusies en overnames*) is expected to be extended to cover new areas such as biotechnology and AI in 2026. Simultaneously, the legislature's proposal for a *Defence and Security Related Industry Resilience Act* (*Wet weerbaarheid defensie en veiligheid gerelateerde industrie*) would strengthen the strategic, operational and cyber resilience of firms supplying technologies relevant to defence and security. It would impose duties of care and security requirements, empower supervision and enforcement, and introduce sectoral notification for defence-related transactions. Echoes are audible at the EU level: companies under foreign control may face FDI screening before obtaining access to new European defence funds.

The Dutch government has also shown agility. In Nexperia's case, worried about production, knowhow and continuity, it invoked the little-known *Availability of Goods Act* (*Wet beschikbaarheid goederen*), a Cold War relic hitherto unused, to give the Minister of Economic Affairs (in Dutch) the power to block decisions that could harm the chipmaker's capacity, knowledge position or role in Europe's value chain for a one-year period. China responded by imposing countermeasures that could significantly affect the chip industry in the EU. The Hague seems to give in – for now - and suspended its intervention.

Europe's screening architecture is consolidating: more mandatory sectors, firmer timelines and consistent treatment of indirect ownership, with potentially closer scrutiny of greenfield investments. The unresolved question is how far Brussels will reach into the realm of national security. Whatever the outcome, investors should expect more detailed diligence, earlier authority engagement and greater transparency obligations regarding ultimate control. The era of permissive outliers is fading; a steadier, more predictable regime is taking its place.

The expanding reach of the Foreign Subsidies Regulation: Europe's market gatekeeper

The Foreign Subsidies Regulation (FSR) brings subsidies from third countries under the scrutiny of the Commission. Since its entry into force in 2023, the Commission has been swamped with filings and has struggled to launch the number of ex officio market investigations it had touted. Even so, the FSR's bite in Europe has been sharper than some expected, as it has caused significant uncertainty and delays in transactions. Greater clarity is expected in 2026, with the Commission set to publish new guidelines.

In our Competition Outlook 2024, we noted that, after Brussels blocked the Siemens-Alstom merger, critics accused the Commission of not sufficiently defending European interests. The message seems to have been delivered. The Commission is now wielding the FSR to scrutinise foreign firms once dismissed as fringe competitors. Its probe into the participation of Chinese train manufacturer CRRC in a Bulgarian public procurement tender is emblematic: limited market presence had been cited in the Siemens–Alstom decision, yet the FSR probe ultimately prompted CRRC to withdraw its bid. Other companies have likewise exited tenders following the opening of FSR investigations, underscoring the regime's deterrent effect.

Where firms have persisted and submitted to in-depth merger reviews, they have encountered a strict approach from the Commission. As we reported in our news update, the Commission handed down its first in-depth decisions under the FSR this year. The first case concerned e&, a state-owned telecoms giant from the Emirates, and its purchase of PPF Group's telecoms business. The deal was ultimately waved through, but only after e& agreed to a raft of conditions: amending its articles of association to forgo an unlimited guarantee, refraining from financing PPF or entering into transactions that are not on market terms, and reporting dealings between the two firms to a monitoring trustee.

Another high-profile FSR decision concerns the acquisition of German chemicals company Covestro by the Emirati state-owned oil company ADNOC. Like e&, ADNOC agreed to waive its unlimited state guarantee for ten years. ADNOC ultimately also agreed to share a number of Covestro's sustainability patents with other market operators as the Commission considers that the competitive benefits arising from wider access to the patents outweigh the potential distortions linked to ADNOC's committed capital injection into Covestro.

More decisions and in-depth reviews are likely to follow next year. Following Nuctech's unsuccessful challenge to the FSR dawn raids at its Dutch and Polish premises, the case is expected to move to an in-depth investigation. This China-based supplier of container and baggage scanning equipment came under Commission scrutiny following indications of potentially distortive foreign subsidies. In public procurement, the Commission has again opened an in-depth probe into CRRC over a suspected advantage in a Portuguese light rail tender. Whether the Chinese train manufacturer stays the course this time – and at what cost – remains to be seen.

The FSR's reach will grow in the year ahead. DG GROW, the Commission's Directorate responsible for handling public procurement notifications, recently established a designated FSR unit. Proposed guidelines, due by early 2026, promise an analytical framework for core concepts while still leaving the Commission ample room for discretion. Even so, they mark a first step towards much needed clarity and legal certainty. Meanwhile, the Commission's legislative review of the regime is likely to yield practical fixes, potentially including a simplified procedure similar to that used in merger control and a narrower scope to focus enforcement on genuinely problematic cases.

Making cartels smarter: the challenges of AI

AI promises profound economic gains but alarms regulators. Competition authorities now eye AI both as a potential tool for anticompetitive behaviour and as a sector vulnerable to such practices. Yet, real enforcement remains absent. In the meantime, authorities also see the appeal of AI and are beginning to deploy it themselves to optimise their enforcement capabilities.

For several years, competition authorities have expressed concern that AI might become a tool for anticompetitive behaviour. Reports from competition authorities, including the Netherlands Authority for Consumers and Markets (**ACM**), and academic literature have warned that, for example, algorithmic collusion and opaque machine learning models could undermine competition. Although this intellectual effort has found its way into policy documents – including Commission guidelines – actual enforcement has remained absent. This may be changing. In the Netherlands, the ACM is conducting a market investigation into computer-controlled and algorithm-supported pricing in the aviation industry. Moreover, Commission officials have revealed that several cases involving algorithmic pricing are pending, suggesting that the era of AI-related enforcement is dawning.

Competition authorities have also voiced reservations about the competitive landscape within the AI sector. In a policy brief, the Commission flagged concerns about high entry barriers and risks of vertical integration. These issues have prompted competition authorities to closely scrutinise AI transactions and partnerships, even pushing the boundaries of merger control powers. The ACM referred the partnership between Microsoft and Inflection to the Commission. The Commission's attempt to scrutinise this deal faltered for lack of jurisdiction. Nonetheless, it controversially considered the deal to be a "concentration", despite it involving no equity transfer but only the hiring of staff. Germany's *Bundeskartellamt* reached a similar conclusion.

Meanwhile, the Commission did assert jurisdiction over NVIDIA's acquisition of startup Run:ai. NVIDIA is now challenging that Decision. It argues that the Commission's acceptance of the referral from Italy is unlawful due to the transaction not meeting Italian merger thresholds. Instead, the referral was based on the Italian competition authority's exercise of loosely defined, ex post, discretionary call-in powers. Across the Channel, Britain's Competition and Markets Authority (**CMA**) launched a probe into Microsoft's ties with OpenAI, only to conclude that no merger situation had arisen. Although no deal has been blocked, the message is clear: competition authorities are no longer sitting on the sidelines.

Besides concerns, AI also creates opportunities for competition authorities. Several authorities have started to deploy AI tools in enforcing the competition rules. The Spanish Competition Authority uses an AI tool to uncover bid rigging. The CMA leverages AI in merger control and antitrust investigations, using network analyses to uncover patterns and natural language processing to systematically examine documents. In addition to appointing a professor with expertise in AI as Chief Technology Officer, the Commission uses AI tools to investigate potential breaches of the competition rules. This was seemingly accepted by the General Court in *Michelin v. Commission*. The Commission used AI technology to investigate signalling through earnings calls between tyre manufacturers. Hundreds of thousands of earnings-call transcripts were monitored by the Commission using automated keyword searches and rankings based on how often certain word combinations appeared. There have, however, been no indications that the ACM is operationalising AI-driven supervision. Dutch practice thus appears to lag behind the international trend of integrating AI in competition enforcement.

The global tech war: innovation vs regulation

In our previous Competition Outlook, we predicted that the Digital Markets Act (DMA) would truly bite in 2025. That prediction has materialised.

The Commission issued its first non-compliance decisions against Big Tech gatekeepers in 2025, finding that Apple and Meta had breached the DMA. According to the Commission, Apple's App Store rules prevented developers from directing users to cheaper offers and discouraged distribution outside the App Store. Meanwhile, Meta was criticised for offering only a 'consent or pay' model that left users without a less data-intensive alternative. While the fines – approximately EUR 500 million for Apple and EUR 200 million for Meta – are significant, the message is more important: Brussels intends to change behaviour, not just talk about it. This is also evidenced by the Commission's preliminary findings that Alphabet failed to comply with the DMA, citing self-preferencing in Google Search and restrictions in Google Play that make it harder for developers to direct users to better deals elsewhere. Apple remains under scrutiny, as the Commission's preliminary assessment suggests it failed to meet its obligation to allow third party app stores on iOS and allow apps to be downloaded to the iPhone directly from the web.

This enforcement action caused political tensions to rise. Although the Commission denies it, reports suggest that the fines for Apple and Meta were initially delayed so as not to complicate trade talks with the United States (**US**). Washington has since criticised the penalties, describing them as nontariff barriers to trade that unfairly target US firms, and has hinted at trade retaliation. While the Commission maintains that the obligations apply to any gatekeeper, regardless of nationality, the question remains whether the EU's concern is driven solely by size and market power or also by the firms' US origin. Yet, as this procedural document illustrates, the same US tech giants face scrutiny for similar antitrust practices on their home turf.

However, enforcement is not all stick and no carrot. The Commission has provided Apple with guidance on how it believes the company should comply, and it continues its 'regulatory dialogue' by organising compliance workshops with gatekeepers and third parties. Proof that this approach can be successful may be found in the Commission's decision to close its investigation into Apple's user choice obligations after constructive discussions with the firm.

The above developments will certainly shape the current review of the DMA: a report is due in 2026. A major consideration is whether the DMA is ready for AI-powered services. The review has been welcomed by the US.

Closer to home, enforcement is intensifying. The ACM has been empowered to investigate suspected DMA infringements and refer cases to the Commission, which retains exclusive enforcement powers. It has since opened two investigations under the DMA aimed at 'big international tech companies'. Private litigation is picking up too. In the Netherlands, Booking.com is facing claims (in Dutch) regarding alleged breaches of its DMA obligations. We expect a significant rise in private enforcement cases in the coming year, especially following the first non-compliance decisions under the DMA in 2025.

Levelling the field: the road to a fair and sustainable agrifood supply chain

Historically, the ACM has pursued robust cartel enforcement in the agrifood sector. However, over the past few years the ACM has pivoted toward instruments that are aimed at directly protecting consumers and small suppliers, such as rules on unfair trading practices (UTP), sector-specific consumer protection mechanisms and potentially a new competition tool. This year was no different, with the ACM's interventions once again highlighting the evolving landscape of competition enforcement in the agrifood sector.

Fairness is monitored by the ACM through the *Unfair Trading Practices (Agricultural and Food Supply Chain) Act* (*Wet oneerlijke handelspraktijken landbouw- en voedselvoorzieningsketen* (in Dutch), ***UTP (Agriculture) Act***), which seeks to redress bargaining power imbalance between small agricultural suppliers and powerful buyers. The ACM has been active in addressing contractual imbalances following two complaints from the Leveranciersvereniging Leerdammer Collectief (**LVLC**). Firstly, the ACM compelled dairy giant Lactalis to revise its pricing model (see last year's Outlook and this agrifood news update). In March 2025, the regulator deemed the new system compliant (in Dutch). A second complaint led to binding commitments (in Dutch) from ZuivelNL to improve transparency and ensure that the contribution levied on its behalf was only used for activities related to milk. Both cases are now subject to judicial review. The rulings in these cases will further define the ACM's UTP framework.

As discussed, enforcement was fuelled by complaints from LVLC. The ACM's evaluation report (in Dutch) on the UTP (Agriculture) Act, published in April 2025, revealed however that small agricultural suppliers are reluctant to report UTPs for fear of damaging their relationship with the most powerful buyers, risking revenue loss. This reluctance to report means that the scheme is currently less effective than it could be. The mechanism that exists for this purpose is the prohibition on retaliation. In May 2025, the ACM received its first formal retaliation complaint: a milk supplier alleged that Lactalis had terminated its contract due to involvement in the LVLC's board. However, the ACM dismissed the claim in July 2025, clarifying that termination alone does not automatically constitute retaliation; evidence of retaliatory intent remains crucial. As the outcome was negative for the complainant, it remains to be seen whether small suppliers will dare to claim their rights under the UTP (Agriculture) Act. At the same time, the case signals growing awareness of retaliation risks and suppliers' rights and gives guidance for future complaints.

At the EU level, UTPs remain high on the agenda too. To address cross-border enforcement gaps in the UTP Directive, Brussels proposed a new Regulation in December 2024. It aims to enhance cooperation between national authorities when suppliers and buyers operate in different jurisdictions. The proposed procedural improvements have not satisfied stakeholders. Farmers' organisations (e.g. COPA and COGECA, the European Council of Young Farmers and the European Milk Board) have demanded more substantive reforms, such as a ban on below-cost selling. Although the Commission was required to publish the full evaluation of the UTP Directive by 1 November 2025, at the time of writing, this report has not yet been made public. Nevertheless, a legislative initiative to revise the Directive was already announced by the Commission at the beginning of this year. Following the criticism from the sector, an expanded blacklist of prohibited practices and stricter enforcement mechanisms are expected.

This broader push for fairer practices is also reflected at the consumer level. Illustrative is the ACM's recent investigation into the allegedly high retail prices in Dutch supermarkets compared to neighbouring Member States, prompted by concerns that consumers are not benefiting from decreasing wholesale prices. The investigation examines price dynamics across the entire supply chain and could lead to measures if competition-distorting practices detrimental to consumers come to light. The ACM may also try to leverage the results to advocate for broader powers under a new competition tool.

This growing emphasis on consumer welfare, alongside the ongoing focus on fairness within the supply chain, are symptomatic of the evolving landscape of competition enforcement. Europe's agrifood sector now stands at a crossroads: as authorities deploy new enforcement mechanisms, regulators refine the rules, and stakeholders push for deeper reforms, a path towards a fairer future may be found, but some wariness of utopian regulatory overreach seems warranted.

Engineering competition: towards new competition tools

Decades of competition law enforcement have failed to deliver the desired results. Markets have grown more concentrated, and many forms of market failure remain beyond the reach of conventional competition rules. The push for new competition tools to address these gaps lies at the heart of the agenda for regulators such as the ACM and is gaining political momentum.

Several national legislatures have already equipped their competition authorities with market investigation powers: tools that allow authorities to probe and intervene in sectors where competition appears stifled, even in the absence of infringement of the competition rules. While the United Kingdom has long wielded this instrument, Denmark joined the club in 2024. In other parts of Europe, such as the Netherlands and Sweden, the debate continues over whether to empower the national competition authorities with a market investigation tool.

The ACM remains particularly vocal (in Dutch) in its campaign to secure such powers. Although its efforts have yet to appear fruitful, momentum is building. As we reported, Dutch MPs have tabled an initiative policy document (in Dutch) advocating for the ACM's ability to investigate and intervene in markets. The Minister of Economic Affairs has signalled support (in Dutch), citing the absence of any imminent EU-level equivalent as a rationale for national action. Yet, the debate is far from settled, as the scope and bite of any future tool is still under scrutiny: specifically, what remedies the ACM could impose if it finds a market structurally unsound. Would it merely issue recommendations, or could it mandate divestitures, behavioural changes, or even price controls? These questions are unlikely to be resolved swiftly, particularly in the wake of the recent Dutch elections (29 October 2025) and the slow grind of coalition-building. Even when a legislative proposal emerges, it faces scrutiny from the Dutch Council of State, which advises on all legislative proposals and, as noted in the merger control chapter, already poured cold water on a proposal to empower the ACM to call-in below-threshold mergers.

The case for a market investigation tool rests on a familiar diagnosis: that markets have become more concentrated and that competition is increasingly distorted not by overt collusion but by structural inertia. To bolster its argument in favour of a new competition tool, the ACM has drawn support from its sector inquiry into the savings market (in Dutch), where it concluded that consumer choice and pricing dynamics appear dulled. In what looks like a strategic prelude to obtaining broader powers, the ACM has launched a flurry of inquiries into consumer-facing sectors – veterinary services, digital education tools, budget broadband, algorithmic airline pricing, and groceries. Results are expected next year. In this context, the ACM has also published guidance (in Dutch) on how it selects sectors for inquiry and conducts investigations. The move may be designed to reassure stakeholders that any future powers will be exercised transparently and judiciously.

Notwithstanding all the talk of intervention, no European competition authority has recently imposed actual measures following a market investigation. Recommendations abound, but remedies remain rare. A Danish probe, instituted in 2025 shortly after the authority had gained a market investigation power, may offer a test case. For now, the direction of travel is clear. European competition authorities are no longer content to play referee. Increasingly, they want to redesign the pitch.

Reinventing European autonomy in security and defence

With war on the EU's doorstep and doubts over the US's security umbrella forcing Europe to rearm fast, Brussels unveiled its Readiness 2030 plan in March 2025. Formerly known as ReArm Europe, the initiative calls upon the EU and its Member States to mobilise a minimum of EUR 800 billion over a four-year period. The objective is to restore defence capabilities and readiness to a level sufficient to deter future acts of aggression. The strategy comprises two key components: a substantial increase in both public and private investment in the defence sector, and targeted modifications to competition policy to prevent regulatory barriers from hindering the scale-up process (see our earlier news update).

A central pillar in the initiative is the newly introduced Security Action for Europe (**SAFE**) Regulation, which frees up over EUR 150 billion in loans to support joint defence investments by Member States. It is flanked by the proposed European Defence Industry Programme, aimed at strengthening the technological and industrial foundations of the European defence sector. Additionally, the framework includes fiscal flexibilities, such as exemptions from EU budgetary rules for defence-related expenditures, and the reallocation, repurposing, and expansion of existing funds in the EU budget, such as the European Defence Fund.

Within the defence sector, competition rules are not always applicable. Where they do apply, the Commission emphasises that they should not impede the rapid expansion of defence capabilities. In its forthcoming review of the Merger Guidelines, expected by 2027, the Commission intends to place greater emphasis on the evolving security landscape. The underlying rationale is that enhancements in security and defence may yield cost savings, quality gains and innovation that may offset competitive harm.

Additionally, the Commission intends to provide guidance to firms engaged in joint defence projects. Efficiencies – in the form of enhanced defence readiness and increased resilience of supply chains and the internal market – will likely be considered. Projects aimed at scaling up production, developing new defence products, or jointly procuring raw materials are particularly likely to benefit.

Public support for general infrastructure or for the armed forces typically falls within the state's public remit, and is therefore excluded from the scope of EU State aid control. Where measures do constitute State aid, several exemptions may apply. The Commission may approve aid that facilitates specific economic activities – including essential inputs for defence – provided it does not distort trade contrary to the common interest. In its balancing test, the Commission will weigh the potential benefits against any negative impacts, taking into account the Readiness 2030 objectives and the unique characteristics of the defence market. Factors in favour of allowing aid include alignment with EU programmes, contributions to EU resilience and essential security interests, cross-border cooperation, improved interoperability and security of supply, reduced dependence on third countries and the closing of critical capability gaps, such as those identified in Readiness 2030 and SAFE.

Where prior authorisation is required, the Commission has indicated that it will give precedence to defence-related measures, particularly those tied to SAFE. The Commission hinted that it will provide further guidance on how it assesses public support for defence works.

Refocusing merger control

Europe's merger control regimes are straining beyond their traditional boundaries. Below-threshold mergers are no longer in the safe zone, as competition authorities seek new powers – or repurpose existing ones – to bring them under scrutiny. Meanwhile, Brussels is rewriting its Merger Guidelines, and, as the Commission's recent focus document suggests, is weighing how competition policy should align with industrial strategy.

National competition authorities have been testing how far competition law can be stretched to address mergers that fall outside the scope of their merger control rules. The European Court of Justice's Towercast judgment opened the door for ex post review of non-notifiable deals under the abuse-of-dominance prohibition. In 2025, the Belgian Competition Authority (**BMA**) followed through by applying Towercast reasoning in Dossche Mills (in Dutch) and the acquisition of Pukkelpop (in Dutch), arguing that completed mergers could qualify as restrictive agreements under the cartel rules. In the Netherlands, the ACM has been equally forward-leaning (see this news update). With Brink/Ziemann, the ACM opened its own Towercast case by challenging the merger under the EU prohibition of abuse of a dominant position.

The Dutch legislature is now updating the law to match practice. The carve-out shielding non-notifiable concentrations from review under the national abuse prohibition has been removed, aligning with Towercast and converting a doctrinal workaround into a sustainable enforcement track (see also this news update). A bill (in Dutch) to grant the ACM a call-in power would allow it to designate specific below-threshold transactions as notifiable and impose a standstill obligation during the investigation, aiming to create a jurisdictional safety net. The plan faces headwinds: the Council of State has questioned (in Dutch) the need for it and has suggested that sector-specific threshold reductions may suffice.

While the legislator pushes for call-in powers to scrutinise sub-threshold deals, the ACM has shown it can also take account of earlier transactions within a regular merger review. In its Foresco decision, the authority examined a series of seventeen acquisitions in the pallet sector – mostly below threshold – based on their combined impact on competition (see this news update). Although it cleared the transaction for lack of significant distortion, the method mattered more than the outcome: a transaction that is part of a sequence of small acquisitions in concentrated markets will be assessed based on the cumulative effects of that sequences, not as an isolated case.

At the same time, the enforcers are pairing expanded reach with inventive remedies and new theories of harm. The ACM cleared DPG Media's takeover of RTL Nederland subject to stringent safeguards to preserve media pluralism and access to independent news, including editorial separations and commitments to keep online news freely accessible. Brussels has shown similar creativity, introducing an ecosystem-based theory of harm in Booking/Etraveli, currently still under appeal, and deploying novel behavioural remedies in the Korean Air merger. Form is yielding to substance: toolkits are being adapted to market realities.

In 2025, the Commission launched a review of its Merger Guidelines, driven by digitalisation, globalisation and recent case law. A broad consultation canvassed innovation, sustainability and "killer acquisitions", with a draft expected in 2026 and final guidance in 2027. Companies can hope for clearer signposts for digital markets, innovation effects and serial acquisitions. The ACM, in parallel, is exploring how to integrate sustainability into merger assessments.

National authorities want sharper tools to block problematic deals; political currents urge approvals for combinations said to serve Europe's strategic aims. Yet tension lingers. It remains to be seen whether policymakers will be able to reconcile aggressive merger control policies with the industrial ambitions of Europe and the need for innovative forward-looking analysis. The refocusing may bring clarity – or even sharper contradictions.

Private enforcement: sharper, deeper and more assertive

Dutch courts are bracing for pivotal rulings from the Court of Justice of the EU on international jurisdiction. As the legal landscape shifts, damages cases are expected to hinge increasingly on fact-finding and the determination of harm. Parties are turning to disclosure tools to build or further substantiate their claims or to sharpen their defences. Moreover, claimants are less hesitant to pursue stand-alone actions. With a stronger focus on abuse of dominance claims, and with DMA-related damages claims looming – marked by the announcement of the first DMA collective action (against Booking.com) – the next wave of private enforcement is beginning to take shape.

The Netherlands remains a popular venue for antitrust litigation. Dutch courts are considered very experienced in dealing with complex, high profile antitrust damages cases, including those relating to trucks, ethylene, power cables and airfreight. Dutch law allows for opt-out collective actions and third-party litigation funding, which has led to a rise in collective claims under the Dutch collective action regime, such as those brought on behalf of Dutch Google Play (in Dutch) and Apple App Store users and the action against Sony on behalf of Dutch PlayStation users.

A forthcoming ruling from the Court of Justice of the EU is expected to clarify whether Dutch courts may readily accept jurisdiction over claims based on the anchor defendant rule, even if the anchor defendant is not an addressee of the infringement decision of the relevant competition authority, provided that it is active on the same market as the activities forming the subject matter of the infringement.

Meanwhile, the Dutch district courts are now increasingly focussing on how to determine whether damage occurred and how to quantify the harm in question. Claimants are front-loading their economic analyses, prompting courts to engage with damage quantification earlier in the proceedings. At the same time, effects analyses are being used as a defence against damage allegations at an early stage. Declaratory relief seems to be falling out of favour, with claimants being less eager to pursue a referral of their cases to follow-up proceedings for the determination of damages. This shift reflects a broader maturation of private enforcement: fewer procedural skirmishes and more substantive battles. The result is duelling expert debates and reports, each offering competing and mostly contradictory views on alleged harm. Dutch judges are closely observing their British and other foreign counterparts for guidance on managing complex economic debates. They are also looking for alternative ways to structure these discussions more efficiently.

Fact-finding is becoming increasingly essential, with the outcomes of economic analyses requiring explanation. In this new landscape, storytelling matters: parties are striving to present coherent narratives explaining why a competition law infringement may or may not have caused harm, rather than relying solely on complex calculations. Against this backdrop, an influx of extensive disclosure claims is to be expected. In the context of accessing evidence and determining damage, a key question is whether the EU law principle of effectiveness will come to dominate disclosure and the quantum phase to the extent that it has already shaped the procedural and other part of the merits phase.

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