

CASE CARD | 8 November 2022

Batavus v Vriend's Tweewielercentrum (10/00372)

Restriction by object / appreciability requirement

1. CASE SUMMARY

A. Summary of facts

Batavus is a manufacturer of bicycles and has a long-term commercial relationship with a distributor, i.e., Vriend's Tweewielercentrum ('Vriend'), an online and offline retailer of bicycles. Batavus terminated the distribution relation with Vriend after 30 years without stating reasons. Batavus' decision was taken following pressure from several important distributors that were unsatisfied with the low online prices offered by Vriend. Batavus terminated the distribution relation with Vriend to preserve a sound relationship with these distributors, without previously having raised any concern about Vriend's performance.

After termination, Vriend purchased the products from other distributors and continued to sell Batavus bicycles online and offline.

In 2004, Batavus introduced a selective distribution system. Vriend objected to this new system and summoned Batavus to (re-)appoint Vriend as an authorized distributor.

Following Batavus' refusal to do so, Vriend instituted proceedings claiming that it had not been lawfully terminated. It ordered an injunction to pay compensation for the damage suffered as a consequence thereof, as well as an injunction to re-appoint it as an authorized distributor.

The issues at stake were the following:

- Batavus claimed that there was no distribution agreement to terminate because parties had conducted business on the basis of individual sale and purchase orders. The Court of Appeal rejected this argument stating that parties had done business for more than 30 years. During this period, Vriend had ordered a considerable amount of bikes yearly, as a result of which the relationship had to be qualified as a continuing framework agreement ('distribution agreement').
- Therefore, Batavus was obliged on the basis of reasonableness and fairness to give reasons for the termination. The Court of Appeal concluded that Batavus had terminated the distribution agreement with Vriend due to the pressure of other distributors because of the low online prices offered by Vriend. So the real reason for terminating the distribution agreement was to limit the price competition.
- The termination of the distribution agreement was held to constitute a prohibited concerted practice under

Article 6(1) of the Dutch Competition Act ('DCA') and had to be regarded as null and void under Article 6(2) DCA. Vriend had to be admitted to the Batavus selective distribution system.

Batavus appealed to the Supreme Court.

B. Legal analysis

The judgment of the Court of Appeal was largely upheld by the Supreme Court, except for its finding regarding the appreciability of the object restriction.

The Court of Appeal considered that an agreement or a concerted practice that has the object of restricting competition is presumed to restrict competition appreciably. Therefore, a restriction by object does not require further investigation and determination of the actual effects on competition. The Court of Appeal drew this conclusion with reference to established case law of the European Court of Justice ('ECJ').

The Supreme Court disagreed with the Court of Appeal. The mere fact that the effects on competition must no longer be examined in the case of an object restriction of competition does not generally justify the conclusion that the appreciability requirement no longer applies at all. Whilst the Court of Appeal was correct in ruling that there was an object infringement, it erred in law when ruling, without any apparent further investigation, that a restriction of competition must always already be qualified as appreciable when there is an object infringement. The mere fact that an agreement has the object of restricting competition does not, under Dutch competition law, justify the conclusion that the requirement of appreciability no longer applies.

The Supreme Court annulled the judgment of the Court of Appeal and referred it back to another Court of Appeal, which found that the object restriction was in any case appreciable.

If the concerted practice would have affected the trade between EU Member States appreciably, then EU law would have applied. In the *Expedia* case, which came after the *Batavus* case of the Supreme Court, the ECJ confirmed that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

2. QUOTES

"That in the case of an object restriction, the effects on competition must not, or not entirely, be examined, does not generally justify the conclusion that the appreciability requirement no longer applies at all." (free translation of §3.9.3)

"The Court of Appeal ruled in an understandable and properly substantiated manner that there was a restriction

by object in the present case, but subsequently ruled incorrectly and without any identifiable further investigation that a restriction of competition must always be considered appreciable when it concerns a restriction by object."
(free translation of §3.9.3)

3. RELEVANT LEGISLATION

- Dutch Competition Act (Articles 6 and 7)
- Article 101 TFEU

4. PRACTICAL SIGNIFICANCE

Under Dutch law, as opposed to EU law, agreements and concerted practices with an anti-competitive object do not constitute, by their very nature and independently of any concrete effect that they may have, an appreciable restriction on competition. Rather, appreciability must be assessed in light of the economic and legal context of the case.