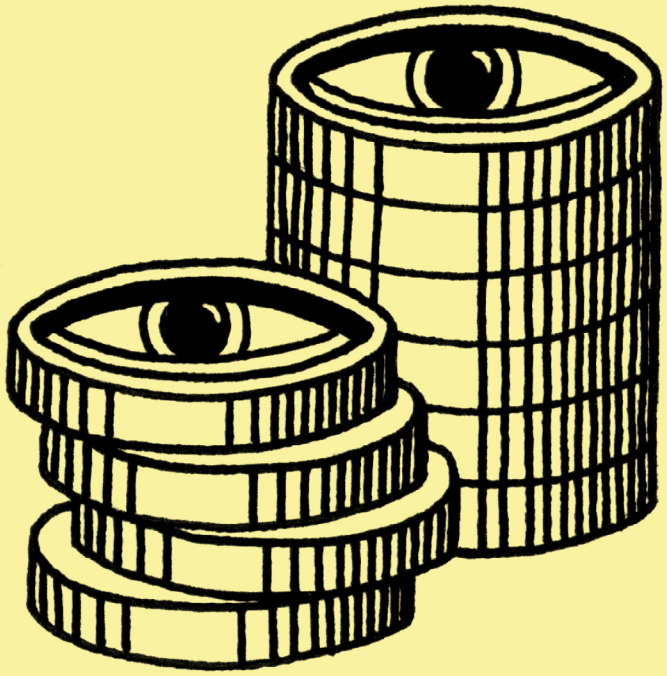
BUREAU BRANDEIS

CARTEL DAMAGES



QUARTERLY REPORT IV

We are pleased to present the fourth quarterly report on cartel damages litigation

This fourth quarterly summary already marks the end of our first year of summaries.

The fourth quarter of 2016 displayed once again a great deal of decisional law and developments.

There were developments in the cases referred to earlier such as MasterCard versus Sainsbury's, Pride Mobility, and with regard to the prestressing steel cartel.

The Supreme Court of the Netherlands delivered an interesting judgement with regard to the prestressing steel cartel in which the Supreme Court ruled on the application of foreign law in the event of prescription.

It is also interesting to examine a judgment rendered by the Supreme Court of British Columbia due to the reasoning in connection with its jurisdiction.

This last quarter was supposed to have been the quarter in which all EU Member States should have transposed the Directive 2014/104/EU into national legislation. However, most of the Member States have not reached this point yet. A total of 21 Member States have received a warning.

We hope that we can be of service to you by providing you with this summary. We welcome any additions or comments you may have regarding this report.

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

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Amsterdam, March 2017

1

Private enforcement in cartel damages claims – case law

United Kingdom

- As discussed in Q2, Socrates claimed in the proceedings Socrates versus the Law Society of England and Wales that the Law Society forces law firms to buy both their anti-money laundering training and mortgage fraud training in order to maintain its CQS accreditation. On 8 November 2016, the first fast-track trial before the Competition Appeal Tribunal commenced. The fast-track trial is designed to impose a very tight time constraint on the proceedings. The first issue to be decided on liability.[1]

- As touched upon in Q3 in the proceedings before the Competition Appeal Tribunal between MasterCard and Sainsbury's supermarkets, MasterCard was refused permission to appeal. On 22 November 2016, the Competition Appeal Tribunal considered that MasterCard's appeal on liability from the Tribunal is limited to an appeal on a point of law. The grounds for appeal are not deemed by the Competition Appeal Tribunal to have a real prospect of success nor is there any other compelling reason for why the appeal should be heard.[2]

- On 8 December 2010, the European Commission fined Samsung Electronics and LG Display among others for their participation in the LCD cartel. Computer producer Granville Technology Group and computer distributor Ingram Micro filed claims for damages at the High Court of England & Wales on 7 December 2016.

- In Q1 we introduced the first ever opt-out class action in the UK between Pride Mobility and purchasers of its mobility scooters. On 14 December 2016, the Competition Appeal Tribunal rejected the proposed class of purchasers on the ground that it did not distinguish between alleged victims who had purchased mobility scooters from eight retailers who were participating in an illegal retail price maintenance scheme with Pride Mobility, and those who had bought scooters from other retailers. The Competition Appeal Tribunal reserves judgment to decide whether the applicant should be able to propose a new class.[3]

The Netherlands

- On 16 November 2016, the District Court of Limburg dismissed the claim for compensation by Deutsche Bahn. In October 2010, the European Commission had imposed a penalty on 17 manufacturers on account of their participation in the international prestressing steel cartel.[4] Deutsche Bahn instituted an action for damages as the aggrieved party. The defending parties were however of the opinion that the claim of Deutsche Bahn was already time-barred.

1. CAT 'Socrates Training Limited v The Law Society of England and Wales' Case no. 1249/5/7/16.
2. CAT, Sainsbury's Supermarkets Ltd - Ruling (Permission to appeal) Case no. 1241/5/7/15(T), 22 November 2016.
3. CAT 'Dorothy Gibson v Pride Mobility Products Limited' Case no. 1257/7/7/16, 14 December 2016.
4. European Commission, the Commission imposed a fine of 458 million EUR on manufacturers of prestressed steel in a cartel that made agreements for almost twenty years on prices and distribution of markets, IP/10/1297, 6 October 2010 Brussels.

The District Court of Limburg ruled as follows on the matter:

> *"In accordance with Article 4 of the Conflict of Laws (Tort, Delict or Quasi-Delict) Act, obligations arising from impermissible competition are governed by the law of the State in whose territory the act in restraint of competition affects competitive relationships; or, as the parties have argued, Germany."*

Furthermore, the District Court found in legal ground 3.6:

> *"The District Court shares the position of the parties that in a case such as the one at hand, German law recognises two prescription periods. The brief, subjective limitation period of three years (Article 195 Bürgerliches Gesetzbuch (BGB)) and the long, objective period of ten years (Article 199 BGB). As the defendants have argued in the absence of challenge on the part of DB et al., this last limitation period commenced in September 2002 at the latest. This means that the claims of DB et al. were in any case prescribed by September 2012 unless this period of prescription had been rendered inoperable or suspended."*

According to the District Court, Deutsche Bahn did not claim that the limitation period was interrupted or suspended pursuant to Article 33(5) BGB.

By way of substantiation of its defence, Deutsche Bahn also referred to Article 10(3) of Directive 2014/104/EU. This states that the Member States are to ensure that the limitation period for filing a claim in damages is at least five years. With regard to this point, the District Court found in legal ground 3.14:

> *"This Directive had not yet come into force at the time of the existence of the Cartel and furthermore, it stipulates that Member States had up until 27 December 2016 at the latest to comply with the Directive and that the measures taken in this respect are not to have any retrospective force. In addition, Article 10 pertains to the subjective limitation period. It is specifically stated in the opening recitals that the Member States may retain generally applicable absolute limitation periods provided that the length of these limitation periods does not render the exercise of the right to full compensation either practically impossible or excessively difficult, which, as has been found in the previous paragraph, is not the case."*

The claim of Deutsche Bahn is accordingly time-barred and will be dismissed.[5]

Germany[6]

- In its judgment of 12 July 2016 in the Lottoblock II case, the Bundesgerichtshof[7] ("BGH") clarified two issues which have been vigorously discussed in the German doctrine. First, the BGH dealt with the scope of the binding effect pursuant to § 33 (4) GWB in a fundamental way and stated that the binding effect has a wide scope. It is not restricted to the operative part of a decision but must be extended to the factual and legal findings which support the operative part.

Second, the court clarified the standard of proof concerning the damage and its amount. The standard of proof pursuant to § 287 ZPO applies not only to the amount of damages but also to the question of whether damage has occurred, paragraphs 41 et seq. In this respect, the judgment is in line with the EU Damages Directive. In paragraphs 66 et seq., the BGH gives some general guidelines on estimating the amount of the damages.

- In the judgment of 9 November 2016, the Higher Regional Court (OLG) of Karlsruhe ruled in the matter of the Grey Cement Cartel, (6 U 2014/15 Kart (2)-Grauzementkartell) as follows.[8] This case involves a customer of raw materials which brought a claim for

5. District Court of Limburg, 16 November 2016 ECLI:NL:RBLIM:2016:9897.
6. The German judgments came about thanks to Kristina Sirakova. 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.
7. Der Bundesgerichtshof KZR 25/14 12 July 2016 (Lottoblock II) ECLI:DE:BGH:120716UKZR25.14.0
8. OLG Karlsruhe, 6 U 204/15 Kart (2) 9 November 2016 (Grauzementkartell).

compensation against a raw material producer in connection with the so-called Grey Cement Cartel which was active on the German market from 1993 to 2002. The Bundeskartellamt fined the participants in the cartel in 2013. The OLG stipulated that compensation can only be paid to the extent that the surplus proceeds qualify as unjustified enrichment. At the same time, the OLG ruled that the period of prescription of a claim for damages is interrupted from the date that an antitrust authority institutes an investigation. The judgment includes a useful summary of points of departure which in the meantime have become generally accepted in German case law:

- A quota cartel is deemed to generally have the effect of driving up prices;
- As a rule, it can be assumed that after it has ended, a cartel still has an after-effect for one year on the same price level;
- In any event, if a cartel has a considerable market share and lasts for a longer period, this cartel is deemed prima facie to have a so-called umbrella effect.

USA

- On 20 October 2016, a federal judge of the Eastern District of Virginia stated that the allegations that Black & Decker, Robert Bosch and other table saw manufacturers conspired to boycott the safety technology of SawStop were time-barred. The Judge stated:

> *"At that time, SawStop knew the material facts that it alleged in its complaint, [...] In fact, SawStop and its agents repeatedly stated, in court filings and elsewhere, that SawStop was the victim of collusion by table saw manufacturers. Despite this knowledge, SawStop did not bring a claim and did not investigate."*[9]

- On 14 December 2016, 20 states filed a lawsuit against Aurobinmdo Pharm USA Inc., Citron Pharma LLC, Heritage Pharmaceuticals Inc., Mayne Pharmaceuticals Inc., Mylan Pharmaceuticals Inc. and Teva Pharmaceuticals USA Inc. The 20 states filed a complaint at the United States District Court of Connecticut. The complaint focused on the illegal and anticompetitive conduct with regard to two drugs: Doxy DR and Glyburide. With these complaints, the 20 states are seeking among other things a permanent injunction preventing the defendants from continuing their illegal conduct and the disgorgement of the defendants' ill-gotten gains.[10]

- On 28 December 2016, in the Levothyroxine antitrust litigation, direct purchasers brought a class action complaint against Lannet Company Inc., Mylan Pharmaceuticals Inc., Sandoz, Inc., and Novartis AG. The plaintiffs are suing the defendants for damages after the defendant's allegedly unlawfully conspired by increasing the price and eliminating competition for generic Levothyroxine. The plaintiffs filed a complaint at the United States District Court for the Eastern District of Pennsylvania.[11]

Others

- On 23 November 2016, in the class proceedings between Ewart and Nippon Yusen Kabushiki Kaisha, the Supreme Court of British Columbia ruled on a jurisdictional challenge by one of the defendants, Höegh Autoliners AS and Höegh Autoliners Inc. (Höegh Autoliners).

Höegh Autoliners is one of the vessel operators that allegedly conspired to limit competition and inflate prices for the transportation of vehicles by vessels worldwide. Höegh Autoliners does not have any business presence in British Columbia nor did it ship any vehicles that were sold in British Columbia. However, the Supreme Court of British Columbia stated:

> *"Rather, the correct focus of the analysis is the case's connection to British Columbia and in turn, the defendant's connection to the case."*[12]

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9. Y. Peter Kang, Reuters Black & Decker, Bosch, Ryobi Beat SawStop Antitrust Suit, 18 October 2016.
10. United States District Court of Connecticut, The States of Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Nevada, New York, North Dakota, Ohio and Washington and the Commonwealths of Kentucky, Massachusetts, Pennsylvania and Virginia v. Aurobindo Pharma USA, Inc., Citron Pharma LLC, Heritage Pharmaceuticals Inc., Mayne Pharma (USA) Inc., Mylan Pharmaceuticals Inc. and Teva Pharmaceuticals USA Inc., 14 December 2016.
11. US District Court for the Eastern District of Pennsylvania, Rochester Drug Co-operative Inc., on behalf of itself and all others similarly situated v. Lannet Company Inc., Mylan Pharmaceuticals Inc., Sandoz Inc., and Novartis AG, 28 December 2016.
12. Supreme Court of British Columbia, in Ewart v. Nippon Yusen Kabushiki Kaisha, 2016 BCSC 2179, 23 November 2016.

The Court can assume territorial competence over a proceeding and person in several circumstances based on the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003 c.28. The plaintiff relied on:

> “ *[that] there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.*”

This means that given that the conspiracy case alleging harm within British Columbia is connected to the jurisdiction, Höegh Autoliners, as a co-conspirator, is connected to the case and thus British Columbia is the competent jurisdiction.

2

Developments regarding public law aspects of cartel damages

European Union

• On 8 December 2016, Canal Plus requested EU judges to annul an antitrust settlement that was reached between Paramount and the Commission. Canal Plus argues that the settlement puts at risk a system of financing films based on broadcasts in specific national territories that are released at certain intervals.[13]

• On 15 December 2016, the Court dismissed the appeal of Koninklijke Philips NV and Philips Franceen Infineon Technologies AG which they filed after they had received a fine on 3 September 2014 imposed by the Commission in the Smart Card Chip cartel.[14]

13. OJ of the European Union, case T-873/16 (Groupe Canal + v European Commission), 8 December 2016.
14. Press communiqué of the Court of Justice of the European Union, 'The Court of Justice of the EU dismissed the claims of Philips and Infineon with regard to the cartel in the Smart Card Chip Market' Luxembourg, 15 December 2016.

3

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

• On 25 October 2016, the Commission opened an investigation into a network sharing agreement between two Czech operators of mobile telephony, O2 CZ / CETIN and T-Mobile CZ. The parties are two major telecoms operators in the Czech Republic. The Commission is investigating whether the agreement and cooperation is compatible with the European competition rules.[15] The Commission will examine whether the cooperation restricts competition and thereby harms innovation in breach of EU antitrust rules.

• On 27 October 2016, the Commission sent a statement of objections to Brussels Airlines and TAP Portugal regarding code-sharing on the Brussels-Lisbon route. The statement of objections is linked with a code-sharing agreement between the aforesaid parties dating from 2009. The Commission has various objections against the agreement. The objections of the Commission come down to the parties pursuing an anticompetitive strategy.

First, according to the Commission, they agreed on a reduction of the number of seats which meant that the pricing policy on the route was also aligned. Second, the parties granted each other unlimited rights to sell seats on each other's flights on this route. Previously, the parties had competed against each other in this regard. Third, the parties agreed to decrease their actual capacity and coordinated their pricing structures and their ticket prices on this route.[16]

• On 10 November 2016, the European Commission announced that it had started an investigation of the practices of Czech railway incumbent České dráhy in passenger transport. The investigation focuses on the assessment of whether or not České dráhy charged prices below costs in order to hinder competition in rail passenger transport services.[17]

• On 12 December 2016, the European Commission imposed a fine of € 166 million on Sony, Panasonic and Sanyo for infringement of the cartel ban together with Samsung. Samsung made use of the leniency scheme and was granted a full immunity from fines. The parties infringed the ban on cartels with regard to rechargeable lithium batteries by jointly increasing

15. European Commission, press release, 'Antitrust: Commission opens formal investigation into mobile telephone network sharing in Czech Republic' 25 October 2016 Brussels.
16. European Commission Press release, 'Antitrust policy: the Commission sends Brussels Airlines and TAP Portugal a notification of points of objection regarding code-sharing on the route Brussels-Lisbon' 27 October 2016.
17. European Commission press release, 'Antitrust: Commission investigates practices of Czech railway incumbent České dráhy in passenger transport' Brussels 10 November 2016.

the price of one of the components of the rechargeable batteries and by sharing sensitive information with one another. Panasonic is liable for € 137,000,000 (Sanyo merged with Panasonic which is now responsible for the joint penalty amount) and a fine of € 30,000,000 was imposed on Sony. All the companies have received a 10% discount on the fine on account of their cooperation.[18]

- On 10 December 2014, the Commission imposed a fine in the matter of the envelope cartel. Printeos was one of the companies fined. The decision to impose a fine came about via the settlement proceedings. Curiously enough, and in fact very unusual after settlement proceedings, Printeos filed an appeal because the Commission did not describe the methodology it had used for calculating the fine. On 13 December 2016, the Court of First Instance subsequently dismissed the fine because the Commission had departed from the Guidelines for setting fines.[19] The Commission argued in vain that the departure was justified because Printeos had knowledge of the evidence and this concerned a decision which came about as a result of the settlement proceedings. The Commission is considering imposing a new fine.[20]

- On 21 December 2016, Advocate-General Nils Wahl published his conclusion in the matter of Akzo Nobel NV, Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV ("Akzo") versus the Commission.[21] Advocate-General Wahl is of the opinion that Akzo must succeed in its claim. On 11 November 2009, the Commission ruled that a number of companies, including Akzo, had infringed the cartel ban as a result of participation in the heat stabilisers cartel.

Akzo has lodged an objection against this. It points out that the Court of Appeal has recently confirmed in its judgment of 17 September 2015 in the matter of Total/Commission (C-597/13 P, EU:C:2015:613), that when the liability of a parent company is derived entirely from that of its subsidiary, the liability of the parent company cannot reach further than that of its subsidiary. If, in such a situation the parent company has filed an appeal based on the same ground as that of its subsidiary, then the parent company should in principle benefit from an eventual limitation of the scope of the liability of its subsidiary.[22]

- On 17 November 2016, Advocate-General Juliane Kokott stated in the conclusion in the matter of FSL Holdings et al. versus the Commission, that the fine imposed on FSL Holding and its subsidiary Pacific Fruit Italy (Pacific Group) must be upheld.[23]

On 12 October 2011, the Commission found that the Pacific Group had infringed the cartel ban (by means of the so-called banana cartel). The Pacific-group challenged this decision by applying for a declaration of voidness on 22 December 2011. The Court partially dismissed this claim in its judgment of 16 June 2015. The Pacific Group has now filed its appeal with the High Court of Justice.

In order to determine the infringement of the cartel ban, the Commission made use of evidentiary material that it received from a national tax authority. The Italian fiscal investigation service had seized personal records during a search of a private residence of an employee of Pacific Group in the context of a criminal investigation into tax offences. Pacific Group has accused the Court that by accepting this evidence, it has not taken fundamental procedural requirements into account and has infringed defence rights. Advocate-General Kokott concluded first that there was no injunction forbidding the use of evidence because the evidence was not obtained in breach of procedural rules and the evidence was not used for an unlawful purpose. Second, there was no infringement of defence rights and third, there was no distortion of the evidence by the Court. The imposed fine must be upheld according to Advocate-General Kokott.

18. European Commission - Press release, 'Antitrust: Commission fines rechargeable battery producers €166 million in cartel settlement' Brussel 12 December 2016.
19. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance).
20. Judgment of the Court of Justice, 13 December 2016, T-95/15 (Printeos et al. v the Commission) ECLI:EU:T:2016:722.
21. Conclusion of Advocate-General N. Wahl of 21 December 2016 in the case C-516/15 P ECLI:EU:C:2016:1004.
22. High Court of Justice, 17 September 2015 in the matter of Total/Commission C-597/13 P legal ground 41.
23. Conclusion of Advocate-General J. Kokott of 17 November 2016 in the case C-469/15 P ECLI:EU:C:2016:884.

4

Opinion

• On 25 October 2016, the Commission published a report in which it explained how national courts could calculate the passing on of defence charges or the overcharges in actions for damages for the purpose of enforcing competition law. This concerns an extensive report containing recommendations on how to deal with expert evidence, data and applications to disclose documents. Also included is a checklist for courts when they deal with the passing on of defence charges in cartel cases.[24]

5

Final remarks

• On 27 December 2016, the EU Member States ought to have transposed the Directive 27/2016/EU into national legislation. Many of the Member States missed the deadline which has resulted in official warnings being handed out to 21 Member States.

24. European Commission, Study on the Passing-on of Overcharges – final report, 2016 Brussels.

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.

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