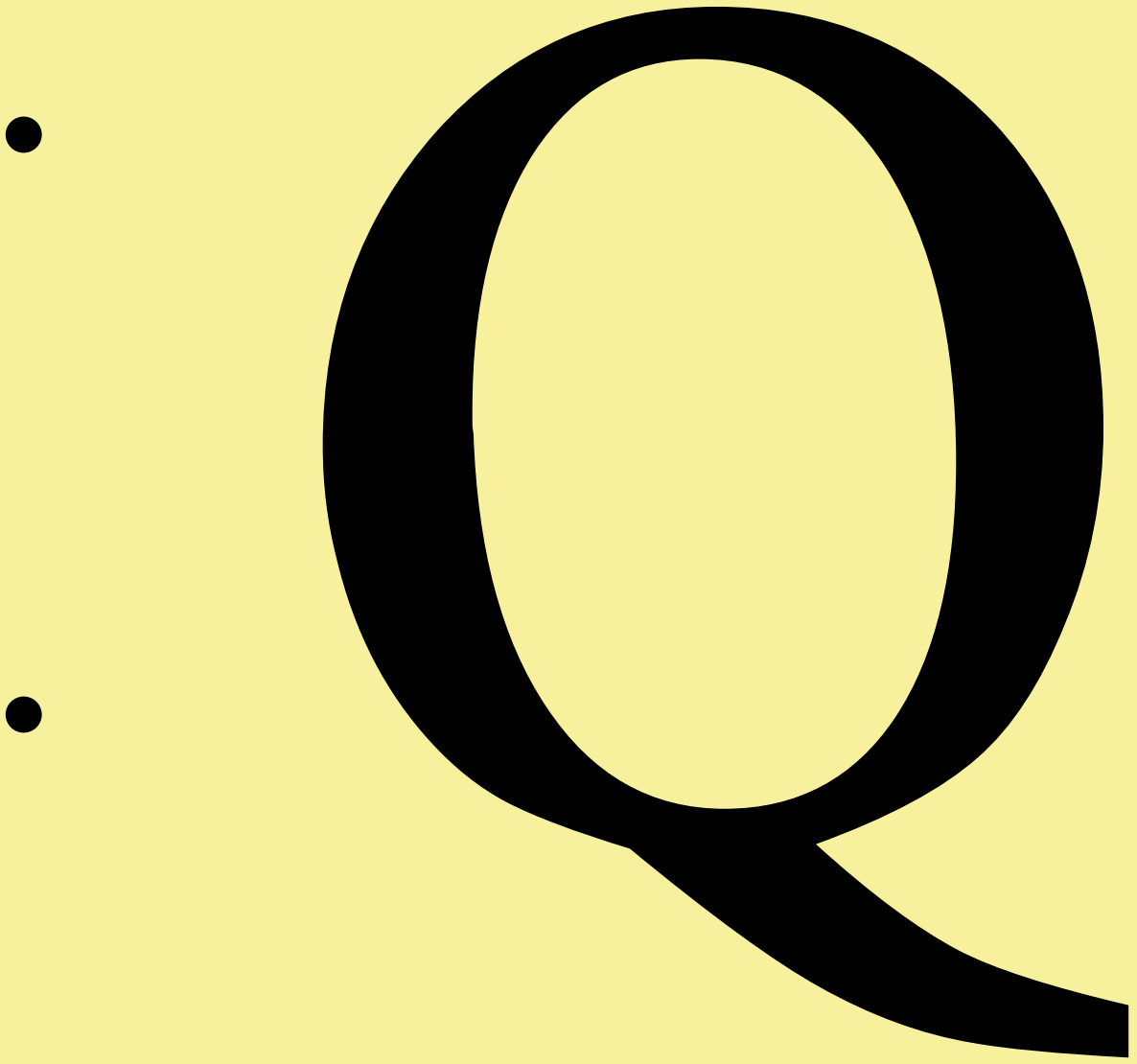
BUREAU BRANDEIS

CARTEL DAMAGES QUARTERLY



Q3 2017

We are pleased to present the third quarterly report on cartel damages litigation of 2017

Dear reader,

Time has also not stood still during the third quarter of 2017 in the world of cartel cases.

In the Netherlands, a lot of attention was given to three interim judgments of the District Court of Amsterdam of 2 August 2017 and 13 September 2017 in two different follow-on cases concerning the Air Cargo cartel.

In Germany, the Dortmund District Court (Landgericht Dortmund) ruled on 13 September 2017 that in the case in question, an arbitration agreement also determines the jurisdiction in cartel follow-on cases.

And furthermore, the fine that the European Commission imposed on Scania for its role in the Trucks cartel on 27 September 2017 naturally also drew the necessary attention.

More importantly for this introduction however is the fact that we are very proud to be able to introduce two new editors of Q. Starting from this edition of Q, Anneli Howard will cover the developments in the UK and Evelyn Niitväli will cover those in Germany. Both Anneli and Evelyn have more than earned their spurs in European competition law and, each in their own individual ways, have built up an in-depth expertise over many years. We have included brief bios on pages 15 and 16.

Hans Bousie, **Louis Berger**,
Sophie van Everdingen and **Nammy Vellinga**

Index

Amsterdam, January 2018

1

Private enforcement in cartel damages claims – case law

The Netherlands

In the third quarter of this year, Dutch courts issued three decisions in connection with the Air Cargo cartel which we discussed in Q (2016-3). The decisions concerned (1) the legal validity of the assignments of claims arising from the price-fixing cartel and (2) the question regarding which law governs the damage claims assigned by the shippers to the claimant.

• Two of these decisions were issued on 2 August 2017 in the case between Stichting Cartel Compensation ("SCC") and Koninklijke Luchtvaart Maatschappij N.V., Martinair Holland N.V., Deutsche Lufthansa A.G., Lufthansa Cargo A.G., British Airways PLC., Société Air France S.A., Singapore Airlines Limited and Singapore Airline Cargo PTE LTD (the "Defendants").[1] SCC is a so-called claim vehicle. It is a Dutch foundation that was founded in order to claim compensation for damage suffered by shippers due to the cartel. The shippers have assigned their claims to SCC.

In the first decision, the District Court of Amsterdam ruled on the legal validity of the assignment of claims to the claim vehicle SCC. The District Court of Amsterdam ruled that the burden of proof lies with SCC (the court had decided as such in the pre-trial hearing of 22 June 2016).[2]

In this case, the Amsterdam court held on the basis of the assignment documents provided by SCC that the assigned claims were described in a sufficiently clear and precise manner: [3]

> *4.21. The court finds that it is sufficiently clear from the aforesaid assignment documentation and bailiff's notifications that this concerns claims from the shippers for compensation for all damages resulting from the cartel, including overcharge, interest, lost profit and costs. […] It has also been taken into account that this concerns claims arising from tort by virtue of a cartel (the size and duration of which was apparent to the cartel members but not to the shippers). The position of the airline companies basically boils down to the fact that the shippers did not wish to assign their entire claim for damages arising from the cartel but excluded parts of it which, in the absence of evidence to support this, seems to the court to be implausible. It is furthermore clear that this concerns claims from all the members of the cartel referred to in the decision (as debtors of the claims). The deeds of assignment (due in part to the reference to the assignment agreements) accordingly contain sufficient details to be able to determine which claims are concerned. Contrary to what the airline companies have argued, it is not necessary for the determinability of the assigned claims, namely the claims for damages that are based on tort (participation in the cartel), that it can be established (now already) which shippers purchased which flights (which routes).*

1. District Court of Amsterdam 2 August 2017, ECLI:NL:RBAMS:2017:5512.
2. District Court of Amsterdam 2 August 2017, ECLI:NL:RBAMS:2017:5512, para. 4.14.
3. District Court of Amsterdam 2 August 2017, ECLI:NL:RBAMS:2017:5512, para. 4.21 et seq.

4.32. Based on all of the preceding, the conclusion is that the assignments that are governed by Dutch law are legally valid. This implies that the defence of the airline companies that the litigation assignments are not valid does not need to be discussed.

4.33. It has neither been argued nor has it become apparent that the assignments are subject to more stringent requirements under French or German law than under Dutch law. The airline companies have not stated that the assignments exhibit any concrete flaws in accordance with German and French law other than those that have already been discussed. The conclusion is therefore that, just like the assignments that are governed by Dutch law, the assignments that are governed by French and German law are legally valid."

- The second decision between SCC and the Defendants was given on 2 August 2017 and concerned the question regarding which law governs the damage claims assigned by the shippers to SCC. [4]

Of great relevance for these proceedings is Article 4(1) of Unlawful Acts (Conflict of Laws) Act ("UAA") which states: '*[...] matters relating to unfair competition shall be governed by the law of the state in whose territory the competitive action affects competitive relations*.' It is worth pointing out that the UAA is not a part of current Dutch law but that it was previously valid law which has already been declared by the District Court as being applicable to a part of the period when the damage was caused by the cartel.

According to Article 4(1) UAA, damage claims arising from 'unfair competition' are governed by the law of the state where the anti-competitive behaviour affected competition. In this regard, the court refers to the Explanatory Memorandum of the UAA which ascribes a broad definition to the phrase 'unfair competition'. The court found:[5]

> *"According to the Explanatory Memorandum, this term must be broadly interpreted; in general, this involves unauthorized acts that affect competition, to be assessed by the civil court."*

The court must therefore determine ex officio for each claim (arising from the cartel), for each individual shipper, against every individual airplane company, the law that is applicable to the claim. The fact that these claims have been assigned to (and bundled by) SCC does not alter the manner in which the applicable law must be determined.

The court, by referring to the Explanatory Memorandum, found that it is unclear how Article 4(1) UAA is to be applied in the case at hand, as it would not result in a workable solution. In cases of cross-border competition distortion, the Dutch legislature has acknowledged that this rule of reference may lead to an unavoidable fragmentation regarding the applicable law. This suggests a practical solution. The court does not state it explicitly, but here seems to be an implicit reference to the so-called *l'effet utile* (principle of effectiveness) of European Competition law. We also saw this approach in the so-called TenneT/ABB case[6] and the Dutch Supreme Court decided that even without retroactive effect for material law, the Guideline Cartel Damages nevertheless has to be taken into account in order to secure *l'effet utile*.

The court considered other reference points as well and stated that a practical solution is not apparent. Due to the high financial interests in all of these cases, the court found that the issue is eligible for prejudicial questions to the Dutch Supreme Court. The Amsterdam court intends to refer the prejudicial questions to the Dutch Supreme Court.

- On 13 September 2017, the District Court of Amsterdam rendered yet another judgment in the matter of the Air Cargo cartel.[7] In the case between Equilib Netherlands B.V. versus Koninklijke Luchtvaartmaatschappij N.V., Martinair Holland N.V., Société Air France S.A. Singapore Airlines Cargo PTE LTD, Singapore Airlines Limited, Lufthansa Cargo A.G., Deutsche Lufthansa A.G., Swiss International Air Lines A.G., British Airways PLC, Air Canada, Cathay

4. District Court of Amsterdam 2 August 2017 [not published].
5. District Court of Amsterdam 2 August 2017 [not published], paragraph 4.8.
6. Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483.
7. District Court of Amsterdam 13 September 2017, ECLI:NL:RBAMS:2017:6607.

Pacific Airways Limited ("Defendants"), the District Court likewise rendered judgment regarding the legal validity of assignments to Equilib. It applied the same criterion as the one cited above in the first judgment between SCC and Air Cargo cartelists. The District Court concluded that the criterion was satisfied and that the assignments were therefore legally valid.

United Kingdom

- The UK's nascent class action regime received an early blow in July 2017 when the Competition Appeal Tribunal ("CAT") dismissed an opt-out class application for a collective proceedings order ("CPO") under the new provisions in the Competition Act 1998. The £ 14 billion claim was filed against MasterCard on behalf of 46.2 million UK consumers who made purchases on MasterCard payment cards between 1992 and 2008. The claim was a follow-on claim based on the Commission infringement decision which found that MasterCard's interchange fees restricted competition in breach of Article 101 TFEU.

The CAT scrutinised whether the claims met the eligibility conditions in s.47B(6) CA98, namely that the claims raised common issues and were suitable for collective proceedings. Fortunately the CAT held that the claims did not have to be identical and that there was no requirement that all or a majority of the issues should be common issues. It was keen to avoid a mini-trial with extensive economic evidence on the extent of parity. It was also willing to recognise the applicant as a suitable individual to be authorised as class representative and was in principle also prepared to treat payments made to a third party funder, whether out of the damages recovered or otherwise, as a cost or expense incurred in connection with the proceedings which could be reimbursed out of the unclaimed portion of the damages recovered.

However, the CAT went on to hold that the claims were not suitable for an aggregate award of damages as the applicant had not put forward a sustainable distribution methodology which could be applied in practice. The applicant proposed that the Tribunal should arrive at an aggregate award of damages which would then be distributed to individual claimants. Although the calculation of global loss through the proposed weighted average pass-through was methodologically sound in theory, the CAT held that there was insufficient data available for it to be applied on a sufficiently sound basis. Furthermore, there was no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant. Collective proceedings would not result in damages being paid to those claimants in accordance with the governing compensatory principle that damages for breach of competition law were to restore the claimants to the position they would have been in but for the breach.

In September 2017, the CAT refused permission to appeal against its decision. Although it recognised that its refusal was very significant for the parties, the statutory framework did not provide for an appeal against the novel form of its decision making or refusing a CPO. It considered that if the legislature had intended that the decision should be susceptible to appeal, the CA98 would have included express provision enabling an appeal to the appropriate court. In October, the Applicant announced that it is now seeking permission to appeal to the Court of Appeal and has also sought judicial review against the CAT's decision.

- In August 2017, in the *Servier* pay for delay claims, the Chancery Division (Roth J) struck out part of the claim relating to the tort of causing loss by unlawful means.[8] (The Claimant, NHS authorities, claims that Servier had entered into a series of agreements with generic manufacturers not to enter the market with a generic version of perindopril and/or to withdraw their patent challenges thereby infringing Art.101, and/or had abused its dominant position in the UK in breach of Art.102 (and the domestic equivalents). They also claimed that Servier had made deceitful misrepresentations in patent proceedings to obtain interim relief which interfered with the claimants' economic interests by unlawful means, resulting in them having to pay higher prices for perindopril.

The defendants submitted that this part of the claim should be struck out as it disclosed no cause of action. The relevant "third party" was the Patent office or the English court, and there was no question of

8. Secretary of State for Health v Servier Laboratories Ltd [2017] EWHC 2006 (Ch).

any interference with their "freedom to deal" with the claimants or anyone else so the claim was not within the ambit of unlawful means tort.

The High Court held that the tort comprised three elements: (a) the use of unlawful means towards a third party; (b) which was actionable by that third party, or would be if he suffered loss; (c) an intention to injure the claimant. The tort needed to be confined within careful limits so that the unlawful means had to affect the third party's freedom to deal with the claimant. If the claimants were correct in their interpretation, then their right to claim against the defendants would cover not only all the various UK NHS health authorities but all potential generic competitors, private insurers and potentially foreign EU authorities and insurers as well. Although the common law tort was still in the process of development and the court needed to exercise caution before striking out a ground of claim on a summary application, it was appropriate to dispose of a claim that was bound to fail at an early stage so that the parties knew where they stood and the potentially significant costs of additional disclosure on that aspect could be avoided.

Germany

- On 22 February 2017, OLG Jena dismissed an appeal brought by members of the rail cartel against an interlocutory judgment of the Regional Court of Erfurt (LG Erfurt) on the merits of damages claims brought by a local public transportation company.[9] LG Erfurt had decided that the cartel damages claims were in principle justified but had left the precise amount to a "follow-on judgement".

In its decision, OLG Jena dealt with several issues that are regularly debated in the context of cartel damages cases in Germany: (i) the binding effect of decisions of the competition authority for claims that arose prior to the important reform of the German Act against Restraints of Competition (ARC) in 2005 (so-called "old claims"), (ii) the scope of prima facie presumptions, (iii) the validity and applicability of a clause in the purchasing conditions according to which the supplier is obliged to pay lump sum damages, and (iv) the statute of limitation for old claims. OLG Jena's positions concerning these points can only be regarded as claimant-friendly:

- As regards the binding effect of decisions of the competition authority pursuant to section 33 para. 4 ARC (in the version of 2005), OLG Jena confirmed its applicability also for claims that arose prior to 2005. According to OLG Jena, the decisive factor in this regard would be the date of the non-appealable decision of the authority. As the cartel decision of the German Federal Cartel Office was issued after section 33 para. 4 ARC had entered into force, the binding effect was applicable in the case at hand.

- OLG Jena resorted to prima facie presumptions for establishing the causation of harm. It held that the claimant could rely on such prima facie presumptions in two respects: Firstly, it was presumed that the rail cartel, which consisted of price, quota and customer protection agreements, had the effect of driving up prices. And secondly, OLG Jena assumed that the concrete procurement transactions of the claimant had been affected by the cartel.

- With respect to a clause in the claimant's purchasing terms and conditions stipulating that in case of a proven competition law infringement by the seller, the seller had to pay a lump sum damage in the amount of 15% of the respective order value "unless damages amounting to a different total are proven", OLG Jena found such clause to be valid. In particular, OLG Jena confirmed that a lump sum damage of 15% was appropriate and did not exceed the damage expected under normal circumstances. Moreover, the court pointed out that a lump sum damage in this amount was in line with current commercial practice.

- Finally, OLG Jena dealt with the hotly-debated question as to whether or not the limitation period should be suspended during a cartel investigation of the authority pursuant to section 33 para. 5 ARC (in the version of 2005) for claims arising prior to the date when this provision entered into force. OLG Jena, following decisions of the Higher Regional Court of Düsseldorf and the Regional Courts of Frankfurt am Main and Hannover[10], argued in

9. OLG Jena, ECLI:DE:OLGTH:2017:0222.2U583.15KART.0A, 22 February 2017.
10. The Regional Courts of Berlin and Düsseldorf have also decided in favour of an application of section 33 para. 5 ARC to old claims.

favour of a suspension. Thus, the decision diverges from judgements of the Higher Regional Court of Karlsruhe and the Regional Court of Mannheim which denied such "retroactive effect".[11]

- On 28 June 2017, LG Dortmund issued an interlocutory judgment on the merits of damages claims brought by a local public transportation company against members of the rail cartel.[12] It found the damages claims to be justified. However, the precise amount of the damages is still subject to dispute and will be decided upon at a later stage in a separate decision.

Just like OLG Jena in the case discussed above, LG Dortmund dealt with old claims, i.e. claims that had at least partially arisen prior to the reform of the ARC in 2005. Thus, LG Dortmund had to decide on similar issues as OLG Jena and took similarly claimant-friendly positions. In particular, LG Dortmund confirmed the binding effect of decisions of the competition authority pursuant to section 33 para. 4 ARC (in the version of 2005) as well as the suspension of the limitation period during a cartel investigation of the authority according to section 33 para. 5 ARC (in the version of 2005) for claims arising prior to the date when these provisions entered into force.

The decision of LG Dortmund is particularly noteworthy for its detailed analysis of the price increasing effects of the cartel and its application of the prima facie presumption to prove a causation of harm in favour of the claimant.

It is more or less established case law in Germany that there is a rebuttable presumption that cartels lead to overcharges. Furthermore, there is an additional rebuttable presumption that transactions of the claimant were affected by the illegitimate conduct of the cartelists. LG Dortmund now held that, particularly in light of the CJEU's decision in the Kone case (C-557/12), the latter presumption was not required in order to prove causation.

According to the Kone decision, a victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them (see case C-557/12, para. 33 et seq.), and would consequently not be able to establish that each purchase was indeed subject to the cartel agreement. LG Dortmund reasoned that it would not be in line with the principle of full effectiveness of Art. 101 TFEU if a claimant that actually purchased from a cartelist would have to prove that the goods purchased were in fact individually affected by the infringement. It would be absurd if the requirements for proving causation would be higher for a claimant that bought the cartel products from the cartelists themselves than for a claimant that bought from third parties and claimed umbrella damages.

Finally, LG Dortmund rejected the passing-on defence invoked by the defendants. It argued that the claimant did not resell the products bought from the cartelists. Rather, as a public transportation company it sold tickets to end customers. The costs for investments in tracks and tracklaying materials would be taken into account for a mixed calculation but would not be passed on to customers one-to-one.

- On 13 September 2017, LG Dortmund issued a decision on cartel damages claims brought by a consortium founded to realize a rail work construction project against a manufacturer of rail tracks.[13] The peculiarity of the case was that the claimant and the (predecessor of the) defendant had entered into arbitration agreements regarding their procurement contracts. According to such arbitration agreements, all disputes arising from the contract should be dealt with by an arbitrational tribunal and any recourse to ordinary courts of law is excluded. The parties were in dispute as to whether LG Dortmund was competent to deal with the damages claims in light of such agreements.

The defendant contested the competence of LG Dortmund. It raised the objection that the matter was subject to valid arbitration agreements and that in accordance with the German Code of Civil Procedure, it should therefore be dismissed. The claimant argued on the other hand that taking into consideration the decision practice of the CJEU, the arbitration agreements would not cover claims for damages of undertakings affected by a cartel.

---

11. Reference is made to the discussion in Q (2017-2).
12. LG Dortmund, ECLI:DE:LGDO:2017:0628.8O25.16KART.00, 28 June 2017.
13. LG Dortmund, ECLI:DE:LGDO:2017:0913.8O30.16KART.00, 13 September 2017.

LG Dortmund followed the position of the defendant. The court held that cartel damages claims could be subject to arbitration agreements under German law and that the arbitration agreements in the case at hand actually covered such claims. LG Dortmund stressed that its assessment would not be in conflict with the principle of full effectiveness of Art. 101 TFEU and would also not contradict the CJEU's judgement in the CDC case (C-352/13).

In the CDC decision, the CJEU held that a clause conferring jurisdiction which abstractly refers to all disputes arising from contractual relationships does not extend to a dispute relating to the tortious liability arising from an unlawful cartel. The CJEU argued that tortious litigation could not be regarded as stemming from a contractual relationship as the undertaking suffering the loss from a cartel could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause (see case C-352/13, para. 69 et seq.). LG Dortmund rejected this line of argument. It pointed out that breaches of the contractual relationship, wilful deceit or initial impossibility to fulfil a contract – all instances that would result in contractual claims – would also not be foreseeable for the other party. Moreover, LG Dortmund added that the principles developed by the CJEU in the CDC case would in any event not be applicable to arbitration agreements. It reasoned that the CJEU in the CDC judgement did not deal with the question of arbitration agreements but solely focused on a jurisdiction clause. In contrast to such a jurisdiction clause, an arbitration agreement would be subject to the lex fori principle, i.e. it would have to be interpreted by the national court applying primarily national law. Against this background, LG Dortmund doubted whether the CJEU would actually be competent to interpret an arbitration agreement.

Consequently, LG Dortmund considered the arbitration agreements as covering the cartel damages claims in the case at hand and dismissed the case as inadmissible.

2

Developments regarding public law aspects of cartel damages

United Kingdom

● The CMA is consulting on proposed changes to its fining guidance to reflect recent developments in its decisional practice. The proposed changes include:

- further details as to how the CMA will assess the seriousness of an infringement and in particular apply the starting point range (Step 1);
- addition of a further illustrative example of an aggravating factor and some further detail on the requirements for certain mitigating factors (Step 3);
- additional details concerning the financial indicators which the CMA typically uses when assessing proportionality and deterrence (Step 4);
- new text detailing the possibility of a discount where the CMA considers approving a voluntary redress scheme (Step 6); and
- clarification of how the CMA will apply discounts for leniency, settlement or redress schemes (Step 6).

● Following a recent consultation, the CMA is now streamlining its process for market investigations to meet shorter statutory timescales. The key changes are:

- Assessing potential remedies to improve the market at an earlier stage in the investigation – updated thinking on potential remedies could be included in working papers and tailored depending on the specifics of the case.
- Reducing the number of formal publication and consultation stages – removing the Updated Issues Statement, and combining provisional findings and provisional remedies into a single Provisional Decision Report.
- Earlier interaction with stakeholders during the investigation, including holding hearings sooner in the process.
- Allowing market studies to carry out preparatory work when they are likely to lead to a full investigation.
- Introducing the option for the CMA board to give an advisory steer on the scope of the market investigation which is run by an independent group of CMA panel members.

3

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

European Commission

- The European Commission stated on 17 July 2017 that it had informed pharmaceutical company Teva of its preliminary view that it had breached antitrust laws with its agreement with Cephalon regarding a medicine against sleep disorders, modafinil. Cephalon owned patents for modafinil and for its manufacture. When some drug patents expired in the European Economic Area (EEA), Teva shortly entered the UK market with its cheaper version, which lead to lawsuits in the UK and the US for alleged violation of Cephalon's non-expired patents. In order to settle these cases, parties agreed in 2005 in a worldwide agreement that Teva would not sell its generic products until October 2012, including in the EEA, in exchange for payments and other agreements. The Commission's preliminary view is that the transferred value served as a significant pay-for-delay inducement which may have delayed the entry of a cheaper generic medicine thereby causing substantial harm to EU patients and health service budgets.[14]

- On 22 July 2017, a spokesman of the European Commission announced that antitrust regulators were investigating a possible auto industry cartel between BMW, Volkswagen and Daimler. Germany's competition enforcer confirmed its cooperation with the European Commission. The authorities are reviewing information that suggests that the suspects discussed suppliers, pricing of crucial emissions technologies and components to the disadvantage of foreign carmakers.[15]

- The European Commission sent a supplementary Statement of Objections (SO) to Visa Inc. and Visa International in its ongoing investigation into the collective setting of inter-regional multilateral interchange fees (MIFs) on 3 August 2017. An MIF is the price for a credit card transaction which the card issuing bank withholds from the sales price that it transfers to the acquiring bank. Basically, the merchant basically pays for the MIFs, which it may pass on in the form of higher retail prices. We discussed in Q (2017-1) that the investigation against Visa Inc. and Visa International in respect of inter-regional MIFs continued as they did not offer commitments to the European Commission, as Visa Europe did in February 2014.

The current SO relates to inter-regional interchange fees which are charges on payments with cards issued outside the European Economic Area (EEA) for purchases in

14. 'Antitrust: Commission sends Statement of Objections to Teva on 'pay for delay' pharma agreement', IP/17/2063, 17 July 2017.
15. 'Volkswagen calls crisis meeting to discuss EU cartel probe', Reuters 22 July 2017 and 'German cartel authorities receive more documents from VS – Der Spiegel', Reuters, 28 July 2017.

the EEA. The SO takes into account the fact that Visa Europe became a subsidiary of Visa Inc. in June 2016 and ceased to exist as a separate undertaking.[16] That moment could have been a 'gotcha' moment for the European Commission to issue this SO, thus Global Competition Review (GCR) reported from a statement of Frances Murphy at Morgan Lewis & Bockius in London. She also said that jurisdiction over Visa Inc. and Visa International was an issue in the 2014 commitments.[17]

In the area of private enforcement of competition law, several proceedings concerning the MIFs are pending before different institutions. We discussed in Q (2017-1) three cases against Mastercard and Visa.[18]

- On 27 September 2017, the European Commission fined Scania AB, Scania CV AB and Scania Deutschland GmbH approximately € 880 million in total for its engagement in the trucks cartel.[19] We reported in Q (2016-3) that the European Commission had already reached a settlement in July 2016 on this cartel with the five other large truck manufacturers and members of the cartel, DAF, Daimler, Iveco, MAN and Volvo/ Renault for € 2.93 billion.[20] The Commission concluded that the truck manufacturers have engaged in a cartel related to (1) coordinating prices at 'gross list' level for medium and heavy trucks in the European Economic Area (EEA), (2) the timing for the introduction of emission technologies for medium and heavy trucks to comply with the European emission standards and (3) the passing on to customers of the costs for the emission technologies required to comply with these emission standards. According to the Commission, the truck manufacturers colluded for 14 years. The five truck manufacturers received reductions of their fines according to the Commission's 2006 Leniency Notice and according to the 2008 Settlement Notice. MAN even received a 100% reduction as whistle blower.

Scania did not participate in the settlement of 2016 and therefore was not (yet) fined in 2016.

Over a year later, Scania was found guilty of the same price fixing and collusion as the other manufacturers. Scania was given the second highest fine of the cartel members after Daimler (and Daimler received a fine reduction of 40%). Scania's fine was set on the basis of the Commission's 2006 Guidelines on fines. In setting the level of fines, the Commission took into account Scania's sales of heavy trucks in the EEA, as well as the serious nature of the antitrust infringement, the high combined market share of all participating companies, the geographic scope and the duration of the cartel. The Commission did not award Scania with a fine reduction, as Scania chose not to cooperate with the Commission during the investigation. Given that the other truck manufacturers cooperated with the Commission, no appeal was lodged against the decision of 2016. However, Scania still has the possibility to fight this 2017 decision.

The Air Cargo situation was the same. All parties, except for Qantas, appealed the first decision of the Commission (which was later overturned by the Court of Justice) which led to the complicating situation that for all defendants only the second decision counts and for Qantas, only the first decision counts.

Follow-on cases have already been filed in Ireland, Germany and the Netherlands and there are more to come.

EU General Court and European Court of Justice

- Eco-BAT Technologies Ltd, Berzelius Metall GmbH and Société Tratements Chimiques des Métaux have appealed against the fine that the European Commission imposed in February 2017 for price fixing agreements for the purchase of discarded batteries. We reported on this fine in Q (2017-1).[21]

- It became public in August 2017, that Air France-KLM has filed their appeal with the General Court against the latest decision of the European Commission in the Air Cargo cartel.[22] In Q (2017-1), we reported that the European Commission imposed a

16. Daily News of the European Commission, 3 August 2017.
17. 'DG Comp Charges Visa extra', 4 August 2017.
18. In Q (2017-1) we discussed the cases initiated by Asda Stores & Others against MasterCard Inc. & Others before the High Court of England and Wales; Arcadia Group Brands Ltd. & 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. & Others.
19. Press release of 27 September 2017, IP/17/3502.
20. Decision of 19 July 2016 in case AT.39824 – Trucks.
21. OJ 25 September 2017, C-318/17, case T-361/17.
22. OJ 7 August 2017, C-256/32, case T-337/17.

fine in March 2017 for the second time after the European Court of Justice found that a procedural error had been made in the decision of 2010 regarding the same conduct. The European Commission remedied the procedural error and imposed the same fine of € 775 million. Air-France-KLM filed its appeal in May 2017. Journals report that the other freight transporters have also filed their appeals, but this has not been made public yet.[23]

- On 6 July 2017, the European Court of Justice (ECJ) dismissed the appeal of Toshiba Corporation against the judgment of the General Court. This was in line with the statement of Advocate-General Evgeni Tanchev which we reported on in Q (2017-2). The ECJ upholds the fine imposed on Toshiba for its participation in the gas insulated switchgear cartel. The fine of € 61.44 million has thus become final.[24]

- We reported in Q (2017-2) that the European Commission has fined Google Inc. and its parent company Alphabet Inc. for a breach of Article 102 TFEU. It imposed a fine of € 2.42 billion for abuse of dominance of 'Google Shopping' in its decision of 27 June 2017. The Commission stated that the companies have systematically given prominent placement to their own comparison shopping service by means of their algorithm. In addition to the fine, the European Commission ordered Google to cease illegally promoting its own comparison shopping service ahead of those provided by its rivals in search results. On 11 September 2017, Google and Alphabet filed their appeal against this decision with the EU General court.[25]

To avoid fines for delay, the companies also filed a proposed change of the search engine with the European Commission on 29 August 2017. Reuters reported that Google's remedies involve a return to an auction-based system in which rivals can bid for spaces in its shopping section. Competitors have criticised this proposal as inadequate as they are afraid that Google would have the deepest pockets and therefore Google would still be favoured.[26] The DG Comp is currently reviewing them. In a press conference on 27 September 2017, EU competition chief Margrethe Vestager said the Commission had contracted with KPMG and market researcher Mavens to help monitor Google's proposed remedies.[27] A week earlier she said that market reactions will be one of the things that the European Commission will be taking into consideration.[28]

- On 6 September 2017, the Court of Justice of the EU rendered a judgment on Intel Corporation Inc. for breach of Article 102 TFEU.[29] Between 2002 and 2007, Intel gave substantial discounts to computer manufacturers, including Dell, HP and Lenovo, in exchange for a promise that they would not do any business with Intel's largest competitor, AMD. In addition, Intel paid Media-Saturn-Holding (owner of Media-Markt) to only sell computers with Intel-chips (x86C-PUs). In 2009, the European Commission imposed a fine on Intel of € 1.06 billion for these agreements.

The General Court dismissed Intel's appeal which the ECJ has set aside in its decision. The ECJ found that the General Court failed to take into consideration Intel's arguments regarding the Commission's application of the "as-efficient-competitor" (AEC) test. The AEC test is an analysis to determine whether a competitor (i.e. AMD) that was forced out of the market was equally efficient as Intel. If it turned out that AMD was less efficient than Intel, it could be argued that Intel was not behaving in an anti-competitive manner when it excluded AMD from the market.

In its appeal, Intel had disputed the application and findings of the AEC test, but the General Court ignored these arguments. According to the ECJ, the AEC test was a key aspect of the Commission's assessment and the General Court would have had to take into account all the arguments put forward by Intel concerning this test. Therefore, the ECJ referred the case back to the General Court to examine the arguments of Intel.

- The General Court of the EU reduced fines by € 10 million for Austrian bathroom-fitting cartelists in its

23. 'Airlines appeal European Commission's cartel fines of € 775m', 26 July 2017.
24. ECJ 6 July 2017, C-180/16 Toshiba Corp./European Commission.
25. 'Google appeals € 2.4bn EU antitrust fine', 11 September 2017.
26. 'Exclusive - Google offers to treat rivals equally via auction: sources', Reuters, 18 September 2017.
27. 'Vestager: We will 'actively' watch Google's remedies', 27 September 2017.
28. 'Google 'offers to include rival shopping results in bid to dodge € 2.4bn EU fine", Independent, 19 September 2017.
29. ECJ 6 September 2017, C-413/14 P Intel Corporation Inc. v Commission.

decision of 12 September 2017.[30] One of the cartelists, Laufen Austria AG, appealed against the fining decision first with the General Court, which upheld the Commission's decision, and then with the European Court of Justice. The ECJ found that the Commission's fining methodology regarding Laufen Austria's fine did not comply with the rules. It therefore referred the case back to the General Court for a review of the amount fined. The General Court decided on 12 September 2017 that the individual fine that was imposed on Laufen Austria should be reduced by € 10 million as the basis had changed for calculating the turnover that Laufen Austria made during the cartel period.

- On 15 September 2017, the ECJ rejected the appeals of LG Inc. and Koninklijke Philips Electronics NV against the General Court's judgment of 2015 which confirmed the Commission's infringement decision in the cathode ray tube cartel (CRT cartel).[31] We discussed the CRT cartel in Q3 (2016-3) and the statement of Advocate General Szpunar in this case in Q (2017-2).

In the CRT cartel, the European Commission only sent a statement of objections to the parent companies and not to their joint venture, which actions led to the Commission's decision. LG and Philips accordingly claimed that the European Commission had breached their rights of defence. The ECJ rejected this argument in line with the Advocate-General's statement, and found: *"if the Commission has no intention of establishing that infringement [of competition rules] by a company, the rights of defence do not require a statement of objections to be sent to that company."* The ECJ ruled that in the present instance, the Commission chose to pursue solely the appellants, the parent companies of the joint venture, and not to pursue the joint venture itself.

Secondly, Philips and LG challenged the Commission's method of calculating the fine. According to them, the Commission should not include turnover from the parent companies of the joint venture in its calculation of the 'value of sales' which is a basis for the fine calculation. The cartel that the Commission ascertained was related to CRTs. Therefore, only sold CRTs from the joint venture to the parent companies should be included. The parent's turnover of the so-called 'transformed products', the monitors in which CRTs were incorporated, should not be taken into account.

The ECJ rejected these arguments and ruled that Philips, LG and these entities formed a vertically integrated undertaking, and as such, constituted a single undertaking 'only as regards competition law and the relevant market for the infringement'. The ECJ considered in par. 66:[32]

> *"it would be contrary to the objective pursued by Article 23(2) of Regulation No 1/2003 if vertically integrated participants in a cartel could, solely because they incorporated the goods forming the subject matter of the infringement into products finished outside the EEA, expect to have excluded from the calculation of the fine the proportion of the value of their sales of those finished products within the EEA that are capable of being regarded as corresponding to the value of the goods forming the subject matter of the infringement (...)"*

- On 21 September 2017, the ECJ annulled the fines imposed by the European Commission on Italian steel manufacturers Ferriera Valsabbia SpA, Valsabbia Investimenti SpA, Alfa Acciai SpA, Feralpi Holding SpA, Ferriere Nord SpA and Riva Fire for participating in a cartel in four decisions. The appellants successfully argued that, contrary to Articles 81 and 82 of the EC Treaty (now 101 and 102 TFEU), the Commission had denied them the opportunity of a court hearing in the presence of their national competition authorities. The Commission's argument that the companies had already attended an oral hearing was dismissed by the ECJ; the applicable rules had changed between the first and the second hearing and cartelists therefore should have had the opportunity to present their arguments in the context of a second hearing in which the authorities of the Members States were present. As the Italian competition authority was not present in the second hearing, the procedural rules had been breached and thus the appellants' rights of defence had been breached by the Commission. As a consequence, the ECJ annulled the Commission's decision concerned.[33]

30. General Court of the EU, 12 September 2017, T-411/10 RENV (Laufen Austria AG v European Commission).
31. ECJ 14 September 2017, C-588/15 P and C-622/15 P, ECLI:NL:EU:2017:679.
32. ECJ 14 September 2017, C-588/15 P and C-622/15 P, ECLI:NL:EU:2017:679.
33. ECJ 21 September 2017 in joined cases C-86/15 P and C-87/15 P, ECLI:NL:EU:2017:717; ECJ 21 September 2017, C-85/15 P, ECLI:EU:C:2017:709; ECJ 21 September 2017, C-88/15 P, ECLI:EU:C:2017:716 and ECJ 21 September 2017, C-89/15 P, ECLI:EU:C:2017:713.

4

Fines and procedural regulations by national competition authorities

The Netherlands

• In Q (2017-2), we discussed the fine that was imposed in connection with the traction battery cartel. It was already known earlier that the ACM had imposed a fine on Exide, Hoppecke, EnerSys, Celentric and R&W. These importers acknowledged the infringement of the cartel ban. The ACM published a new decision on 3 July 2017 in which it announced that no fine would be imposed on the trade association, BMWT, because it was not sufficiently clear that Article 6 of the Dutch Competition Act and Article 101 TFEU had been breached. On 9 August 2017, the ACM decided that a fine would be imposed on Midac Nederland and Era. Due to the fact that Midac Nederland and Era did not acknowledge the cartel, they received the full fine of EUR 583,000 and EUR 450,000 respectively. The parties may put forward an objection against the decision to impose a fine.[34] During this quarter, the German competition authorities have also imposed fines (see below).

United Kingdom

• The CAT upheld the CMA's infringement decision in connection with an information exchange related to galvanised steel tanks. Balmoral was not party to the main 7 year cartel but attended a single meeting in 2012 during which future pricing intentions were disclosed to other manufacturers. Although it attended the meeting with the legitimate purpose of informing its competitors that it did not want to be involved in the cartel, the discussions moved on to sensitive pricing. The CAT upheld the £130,000 fine, holding that attendance at a single meeting was sufficient to constitute an object infringement and the fine was not disproportionate.

• The CMA has fined golf club manufacturer Ping Europe £1.45 million (€1.57 million) for preventing two online retailers from selling its golf clubs online. Ping has appealed the decision to the CAT arguing that the ban is designed to promote its custom fitting services. The CMA has agreed an interim suspension of its order to terminate the practice pending the appeal.

In October 2017, the CMA accepted commitments from the Showmen's Guild of Great Britain, the main association for travelling showmen who earn their living at funfairs. The commitments addressed the CMA's concerns by amending the Guild's rules to (i) make it easier for new members to join the Guild; (ii) remove restrictions on the participation of non-members at fairs and (iii) make it easier for members to transfer rights to grounds at fairs and for landowners to make improvements to fairs on their land. The rule changes now have to be approved by the Guild's members.

Germany

• On 27 June 2017, the German Federal Cartel Office imposed fines totalling approx. EUR 28 million on two manufacturers of industrial batteries and their representatives. The manufacturers Hawker GmbH, Hoppecke Batterien GmbH & Co. KG and Exide

34. ACM, Fines for Midac and Era for price fixing agreements on batteries for forklift trucks, 9 August 2017

Technologies GmbH (leniency applicant) agreed to levy the so-called "lead surcharge" as a key price component of lead batteries. In early 2004, the three companies agreed to generally re-apply the lead surcharge in the domestic sale of network batteries. This agreement was regularly confirmed until the authority's dawn-raid in April 2014. In addition, the three companies also had an agreement from 11 September 2012 to 18 March 2014 to pass on the increased costs for lead in connection with the sale of so-called motive power batteries.[35] The Dutch and Belgian cartel authorities also imposed fines for this cartel earlier this year which we reported on in Q (2017-2).

- On 13 July 2017, the German Federal Cartel Office fined three manufacturers of heat shields and their representatives a total amount of EUR 9.6 million. In 2011, Elring Klinger Abschirmtechnik (Schweiz) AG (Switzerland), Estamp S.A.U. (Spain), Lydall Gerhardi GmbH & Co. KG (Germany) as well as Carcoustics International GmbH (Germany) allegedly exchanged sensitive information and agreed to pass on increased material costs to their customer VW.[36]

- On 25 July 2017, the German Federal Cartel Office imposed fines totalling approx. EUR 10.9 million on two companies in the clothing industry on account of vertical price fixing.[37] Clothing manufacturer Wellensteyn International GmbH & Co. KG set minimum sales prices and prohibited its retailers from reducing such prices and selling goods online. The retailer Peek & Cloppenburg KG, Düsseldorf, accepted these conditions and also asked Wellensteyn International GmbH & Co. KG to take measures against price undercutting by other retailers. According to the findings of the German Federal Cartel Office, the infringements were committed between April 2008 and February 2013.

As regards such vertical restrictions of competition law, we would like to point readers to a decision of the Higher Regional Court of Düsseldorf (OLG Düsseldorf) of 13 November 2013.[38] In this decision, OLG Düsseldorf awarded damages to a retailer of bathroom fittings for restrictions of online sales by a manufacturer. The case is noteworthy in that it was a stand-alone claim as the German Federal Cartel Office had opened proceedings against the manufacturer but terminated them after the manufacturer had agreed to remove the critical clauses from its agreements. Against this background, the claimant in this case could not benefit from a decision of the competition authority with binding effect on the court.

35. German Federal Cartel Office, press release of 27 June 2017.
36. German Federal Cartel Office, press release of 13 July 2017.
37. German Federal Cartel Office, press release of 25 July 2017.
38. OLG Düsseldorf, ECLI:DE:OLGD:2013:1113.VI.U.KART11.13.00, 13 November 2013.

5

Team

Editors
Hans Bousie
Louis Berger

Authors
Louis Berger
Hans Bousie
Sophie van Everdingen
Anneli Howard
Marc Reysen
Evelyn Niitväli
Nammy Vellinga

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 reinforce 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 only journal on cartel damage competition case law. Hans is consequently on top of all new developments in cartel damage case law and regularly speaks at conferences and symposia on this matter.

Sophie van Everdingen is experienced in litigation with a focus on competition law. Before joining bureau Brandeis in September 2016, Sophie worked at the competition law department of an international law firm in Brussels, where she advised manufacturers and dealers in the automotive sector and litigated several times against the Belgian competition authority (BMA) and the Dutch competition authority (ACM). At bureau Brandeis, Sophie is involved in civil litigation on the plaintiff's side against the members of the truck cartel. In addition, she advises several national and international clients on competition issues.

Anneli Howard is a barrister specialising in EU law and competition law at Monckton Chambers in London. She is Standing Counsel to the Civil Aviation Authority on competition and regulatory matters and advises private parties on competition law compliance, leniency, complaints and investigations. She is also active in several damages proceedings before the Commercial Court, Chancery Division and

Competition Appeal Tribunal, having represented Visa Europe in the interchange litigation and parties in PU Foam, National Grid power cables and Vattenfall wind farms.

Evelyn Niitväli is one of the co-founding partners of RCAA, a dedicated antitrust boutique firm with offices in Frankfurt and Brussels. She has extensive experience advising clients on all aspects of German and European antitrust law, with a particular focus on merger control, cartel and abuse of dominance cases, and private antitrust litigation. Prior to founding RCAA, Evelyn was a partner at a Munich-based antitrust boutique firm and headed the German antitrust practice of Weil, Gotshal & Manges LLP in Frankfurt. She started her career at Hengeler Mueller in Düsseldorf and Brussels. Evelyn is recognized in various directories, including Chambers Europe, The Legal 500 Germany, and JUVE.

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.

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