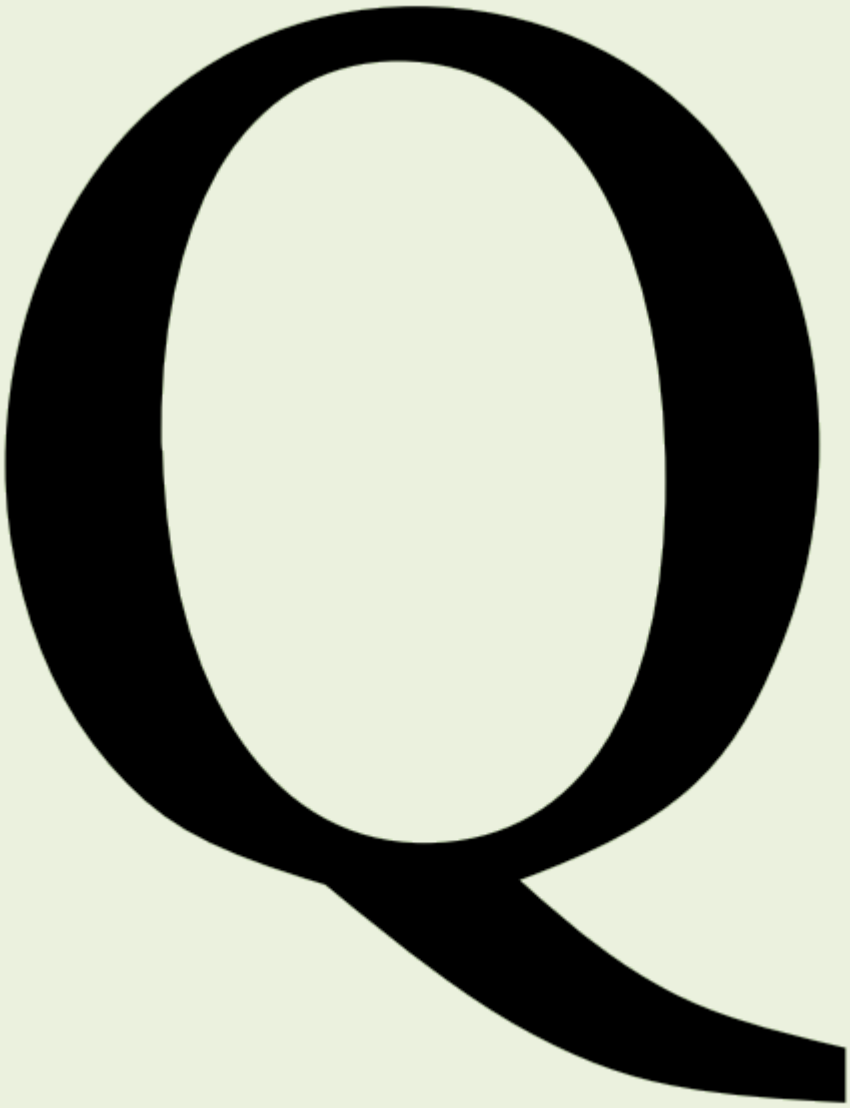
CARTEL DAMAGES QUARTERLY



Q3 + Q4 2018

We are pleased to present the third and fourth quarterly report on cartel damages litigation of 2018

You have before you an extra-large issue of Q, reporting important developments from the second half of 2018. Quite a bit has happened. While the truck cartel case exploded on all sides, a great deal occurred in other cases during this period as well, especially in Germany and the Netherlands. Below we discuss decisions in the following cases: Insulated Switch Gear, sodium chlorate, Bitumen and Rail.

In England, Royal Mail joined the queue of parties duped by the truck cartel, which has since unseated the Air Cargo case as the largest cartel damages case to date. The festivities may be cut short in the United Kingdom somewhat with the government's announcement that parties seeking to start a follow-on case in the United Kingdom will have to take into account that post-Brexit, the European Commission's decisions will no longer be assumed to be binding. But the situation may not be all that bad, since the CMA head, Andrea Coscelli, stated that the CMA will take over the European Commission's role in state aid cases, whereby virtually the same frameworks will be used. In England, litigation continues on various levels in relation to the Mastercard judgment and in the Pfizer / Flynn Pharma case on the abuse of a dominant position by charging excessively high prices for medications.

The European Commission published guidelines aimed at helping national courts to calculate pass-on damage. The Commission is moving forward assiduously and has published the decisions it took earlier in the cases concerning power cables, maritime car carriers, spark plugs and braking systems. At the same time, new cases have already been announced, as witnessed by the investigations at BMW / Daimler / Volkswagen concerning emission standards and the investigation into the price of airline ticket distribution services. I wonder whether German car manufacturers (in particular) might do good to remember that making cartel agreements can prove to be very costly. The costs of fines may be substantial, but the costs ensuing from follow-on claims are many times greater (the total damage in the truck case is estimated at more than €100 billion).

Nor are the European courts sitting idly by. The Court of Justice set aside the Infinion judgment and remitted it to the General Court, with the pointer that all the circumstances of the case must be taken into account in the event of a leniency application. In the case concerning heat stabilisers, the General Court set aside a European Commission decision in which it reportedly showed discrimination when imposing fines.

On the national level, the Bundeskartellamt in particular was extremely active. It imposed fines of more than €200 million on six steel producers, for instance, making this fine among the highest ever imposed by a national competition authority. With this, the Bundeskartellamt demonstrates that national competition authorities can also play a formidable role as watchdog.

Kind regards,

In behalf of the team **Hans Bousie**

With contributions from **Louis Berger, Hans Bousie, Evelyn Niitväli, Sophie van Everdingen, Nathan van der Raaij, and Tessel Bossen**

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Amsterdam, September 2019

1

Private enforcement in cartel damages claims – case law

The Netherlands

- On 28 August 2018, the Court of Appeal of Arnhem-Leeuwarden handed down an interlocutory judgment in the appeal proceedings between French companies Alstom, Grid Solutions SAS, Cogalex and Alstom Holdings, on the one hand, and Tennet TSO B.V. and Saranne B.V., on the other, in relation to the gas-insulated switchgear cartel.[1] The European Commission had fined Alstom et al. in 2007 for participating in prohibited cartel agreements in the context of tenders.[2] In the first instance, TenneT et al. claimed compensation for damage they suffered as a result of the cartel, which was awarded by the district court.

Alstom et al. appealed this decision, whereby they presented the entire dispute anew. The Court of Appeal of Arnhem-Leeuwarden discussed the arguments one by one and ruled as follows.

1. The Dutch court has jurisdiction on grounds of Article 5 (3) of the Brussels I Regulation because TenneT has its registered office in the Netherlands and this is (therefore) regarded as the location where the 'damage occurred', in the sense of that article.
2. The Court of Appeal assessed the applicable law on grounds of the 'market rule' contained in Dutch law and as such reached the conclusion that Dutch law applies. The pricing agreements also affected the Dutch market.
3. The Court of Appeal also ruled that the claimants (who are successors to the contract parties at that time) were entitled to lodge their claims.
4. As concerns the limitation period, the Court of Appeal found that the statutory limitation period of 5 years did not start running at the moment the European Commission announced an investigation at Alstom (in 2005) but at the moment the European Commission published the Decision which indicated the unlawful conduct.
5. Alstom argued that TenneT could already have complained when the contracts were being performed, but that it failed to do so. According to the Court of Appeal, the obligation to complain does not apply here because TenneT was not complaining about the performance delivered by Alstom et al., but rather about the price paid for it, so that this argument failed.

The Court of Appeal ruled that three Alstom companies were jointly and severally liable for the damage allegedly suffered by TenneT et al.

[1] Court of Appeal Arnhem-Leeuwarden 28 August 2018, ECLI:NL:GHARL:2018:7753.

[2] European Commission decision of 24 January 2017, case COMP/38.899 (*Gas* Insulated Switchgear).

The Court of Appeal stayed the decision on the other company and the height of the damage (including the passing-on defence).

- On 5 September 2018, the Amsterdam district court handed down an interesting interlocutory judgment concerning proceedings in the sodium chlorate cartel.[3] Subsidiary Kemira Chemicals Oy (one of the participants in the cartel) was involved in cartel damages proceedings and had in turn involved its (former) parent company Erikem Luxemburg S.A. in the proceedings via a third-party action. In such a case, it is customary for the principal action and the third-party action to be consolidated to prevent contradictory judgments. Now the parent company was demanding that the proceedings be split. The district court agreed and considered as follows:[4] *'As Erikem likewise rightly argued, the discussion in the principal action on the duty to contribute concerns the question of what duty each of the fined undertakings has to contribute to the damage for which they are jointly and severally liable. The question that will have to be answered in the third-party action is whether Erikem is obligated towards its former subsidiary Kemira (which belonged to the same undertaking) to contribute anything. That is a different discussion. With Erikem, the district court does not believe at this point that splitting and disposing of the third-party action earlier can result in contradictory decisions being handed down in the principal action and in the third-party action.'*

- On 26 September 2018, the District Court of Rotterdam ruled that Van Gelder Groep B.V.'s claims against the bitumen cartel, participated in by Shell Nederland Verkoopmaatschappij B.V. and Kuwait Petroleum (Nederland) B.V., among others, have not expired and that Shell's liability can be based on article 6:166 of the Dutch Civil Code.[5]

Van Gelder is involved in road construction. Shell and Kuwait Petroleum supplied Van Gelder with road pavement bitumen for asphalt. Van Gelder claims to have suffered damage as a result of the cartel. According to Shell, the claim is time-barred because the limitation period started running when Shell's involvement in the cartel was widely publicised in the news. Although the Court agreed with this argument, it also noted that Kuwait's involvement was not mentioned in the news and that Van Gelder could not have had the required subjective knowledge. Van Gelder's claim is therefore not time-barred.

Although the EU Antitrust Damages Directive did not yet exist at the time of the cartel, it is desirable, with due observance of the principles of equivalence and effectiveness under European Union law, to interpret Dutch law in accordance with the directive. That is why the rule of evidence favourable to Van Gelder is applicable with regard to the existence of damage.

Shell insisted it could not be held liable on the basis of article 6:166 of the Dutch Civil Code because this article is intended for the situation in which damage was caused by a group performance in which it cannot be established which act by which participant actually caused the damage. According to the court, this is incorrect. The degree to which individual participants are involved is not relevant. It is sufficient that they contribute to creating the likelihood that damage will occur, even when that likelihood should have deterred them from their behaviour in a group context.

[3] District Court Amsterdam 5 September 2018, ECLI:NL:RBAMS:2018:6332.
[4] District Court Amsterdam 5 September 2018, ECLI:NL:RBAMS:2018:6332.
[5] District Court Rotterdam 26 September 2018, ECLI:NL:RBROT:2018:8001.

With regard to direct and indirect damage, both Van Gelder, on the one hand, and Shell and Kuwait, on the other, will be given the opportunity to further elaborate and substantiate their arguments regarding the damage.

Germany

- On 19 July 2018, the regional court of Stuttgart ruled[6] that a regional authority representing 11 villages can claim damages from a truck manufacturer that was the subject of the European Commission decision regarding the truck cartel.[7] The ruling does not disclose which of the fined companies is the defendant. The court ruled that the claimant can seek damages for purchasing a fire engine chassis from the company. The defendant disputed the claim by stating that this individual procurement process had not been part of the anti-competitive agreements as established by the European Commission, but the court said that prima facie evidence applies and found in favour of the plaintiff, thus that this could indeed be assumed. The existence of damages in the present case can also be assumed with the application of prima facie evidence, the court stated, given the general price-increasing effects of a cartel.

- On 3 August 2018, the District Court of Mainz issued a ruling[8] regarding a damages claim against Scania for its participation in the truck cartel.[9] Scania requested that the private damages proceedings be stayed until the EU General Court rules on Scania's appeal against the European Commission's decision. The court ruled in favour of Scania and concluded that the proceedings should be put on hold while Scania's appeal is pending.

- On 11 December 2018, the German Federal Court of Justice overruled a judgment in relation to a damages lawsuit filed by VBK (Karlsruhe's public-transport provider) seeking compensation from a rail infrastructure supplier that participated in a quota-fixing and customer-allocation rail cartel. The federal court stated that it could not agree with the lower courts that there was 'prima facie' evidence, meaning that it could be assumed that VBK suffered damage when purchasing from the cartel. The federal court stressed the complexity of antitrust agreements, their implementation and their effects over time and therefore advised caution in applying the principle of prima facie evidence in cartel cases. This ruling could mean that it will be more difficult for claimants in cartel cases to prove harm, therefore. The federal court referred the case back to the Karlsruhe higher regional court.[10]

- On 14 December 2018, the Federal Association of Road Haulage Logistics and Disposal (BGL), working with legal services provider financialright claims GmbH, filed a second lawsuit for more than 3,800 transport and logistics companies with more than 64,000 trucks from 26 countries at the Munich Regional Court. Legal representation is being handled by law firm Hausfeld Rechtsanwälte LLP. Together with the first lawsuit, damages are being claimed in relation to more than 149,000 trucks in total.

[6] Regional Court of Stuttgart 19 July 2018, case 20 O 33/17.
[7] European Commission decision of 19 July 2016, AT.39824 (*Trucks*).
[8] LG Mainz 3 August 2018, Az. 9 O 49/18.
[9] European Commission decision of 27 September 2017, AT.39824 (*Trucks*).
[10] Bundesgerichtshof, 11 December 2018, KZR 26/17.

United Kingdom

- On 3 July 2018, the High Court of England decided that Swedish energy company Vattenfall AB can use UK power cable subsidiaries NKT Cables Limited (NKT UK) and Prysmian Cables & Systems Ltd (Prysmian UK) as anchor defendants in their follow-on damages claim. The court hereby confirmed that there is a low threshold for the English courts accepting jurisdiction in cartel damages claims.[11]

In 2014, the European Commission (EC) fined 11 producers of underground and submarine high-voltage power cables for participating in the power cable cartel which lasted almost a decade, starting in 1999. The fines amount to almost €302 million. Only a provisional non-confidential version of the decision was made public in July 2018.

Vattenfall filed its claim against two groups of the addressees, NKT and Prysmian. NKT UK and Prysmian UK, as anchor defendants, are not addressees in the EC's fine. They argued that they were not liable for the damage caused by the cartel and demanded that Vattenfall's claim be struck out. Vattenfall argued that the English anchor subsidiaries were being sued on the basis of 'knowing implementation' of the power cable cartel.

According to the court, there is at least a realistic prospect that the anchor defendants are liable for the power cable cartel on the basis that they 'knowingly implemented' it. There are two aspects to establishing knowing implementation: 'knowledge' and 'implementation'.

According to the court, it was not necessary for Vattenfall to establish that the anchor defendants had 'knowledge' of the cartel, because in certain circumstances there is supposed knowledge if the anchor defendant is in the same undertaking as a direct cartel participant. The court decided that this was the case for both Prysmian UK and NKT UK, even though NKT UK was only a 50% subsidiary of an NKT cartelist and Vattenfall had not pleaded evidence about NKT UK's knowledge.

Regarding 'implementation', the court held that there is no *de minimis* threshold for sales of a cartelised product by an anchor defendant and that the following behaviours by the anchor defendant can indicate implementation: 1) the indirect sales via other defendants, 2) involvement of employees in cartel activities, 3) being a cartelist's fiscal representative and 4) dealing with customers on behalf of other members of the group in relation to products or services that fall with the scope of the cartel. The court concluded that the anchor defendants 'knowingly implemented the cartel.'

- On 10 July 2018, BMW filed a claim seeking damages from Mitsui O.S.K. Lines (MOL) and Kawasaki Kisen Kaisha (K Line) at the High Court of England and Wales, after they were fined by the European Commission for participating in the maritime car cartel, a cartel in the market for deep-sea transport. MOL had filed an immunity application. BMW claimed over €11.3 million in damages

- On 15 July 2018, the High Court of England and Wales ordered DAF and Iveco to disclose documents related to the truck cartel within two months. The disclosure of the documents was requested by Veolia Environment S.A., Suez Groupe SAS, Ryder Limited and Wolseley UK Limited in four parallel follow-on damages claim cases.[12] The documents concerned are a redacted confidential version of the decision from the European Commission (EC) and

[11] High Court of Justice of England and Wales, HC-2017-000682.

[12] High Court of Justice of England and Wales, 26 and 27 July 2018, case no. 1291/5/7/18 (T), 1292/5/7/18 (T), 1293/5/7/18 (T), 1294/5/7/18 (T).

documents from the EC's file relating to the investigation into the truck companies. It is the first decision in the English courts to apply the new procedural rules implementing Directive 2014/104/EU (the 'Antitrust Damages Directive') which govern access to the case file.

- On 17 July 2018, Road Haulage Association (RHA) applied to file an opt-in class action claim against truck companies MAN SE, MAN Truck & Bus AG, MAN Truck & Bus Deutschland GMBH, Fiat Chrysler Automobiles N.V., CNH Industrial N.V., Iveco S.P.A., Iveco Magirus AG, PACCAR Inc., DAF Trucks N.V. and DAF Deutschland GmbH.[13] In 2016, the truck companies received the largest fine ever imposed by the European Commission in cartel cases, amounting to more than €2.93 billion, for their participation in the truck cartel. Earlier, on 18 May 2018, UK Trucks Claim Limited (UKTC) applied to file an opt-out class action against Iveco Magirus AG and Daimler AG, representing over 600,000 trucks. The damages could be worth €23,000 per truck; the claim could be one of the largest of its kind in UK legal history.[14] We discussed this case in Q (2018-2).

- On 13 November 2018, the UK's Court of Appeal accepted jurisdiction to hear the appeal of Walter Merrick, who wishes to challenge the decision of the Competition Appeal Tribunal (CAT) that his £14 billion class action against Mastercard does not meet the criteria to allow for a collective lawsuit.[15] Merrick had first sought permission from the CAT to appeal the ruling to a higher court, but the Tribunal refused. He therefore asked the Court of Appeal directly for permission to appeal. Mastercard argued that the Court of Appeal did not have jurisdiction in this case because the competition laws from 1998 only allowed for appeals on decisions in collective proceedings falling within a limited scope, which scope excluded Merrick's appeal. Mastercard further argued that claims could still be pursued individually even though permission to bring a collective lawsuit had been refused. The Court of Appeal rejected Mastercard's arguments and accepted that Merrick's appeal could be heard. Merrick now has to argue before the Court that permission to challenge the CAT's ruling should be granted. Merrick had also requested a judicial review of the CAT ruling by the Administrative Court as an alternative to an appeal challenge. This request was dismissed because the Court of Appeal accepted jurisdiction to hear the claim.

- On 5 December 2018, Deutsche Bahn AG and Mastercard settled their dispute over the charging of anti-competitive credit card fees, meaning they will not face each other before the UK's Supreme Court. The case stems from a 2007 European Commission decision that Mastercard's fee system violated antitrust rules and resulted in excessive charges for consumers and retailers in cross-border card transactions. The proceedings before the Supreme Court would have pertained to a request from Deutsche Bahn to amend its lawsuit in order to include certain losses and to backdate its claim. The alleged losses Deutsche Bahn wanted to include resulted from certain conduct by Mastercard which the Commission was still investigating. Deutsche Bahn asked to backdate its claim to the date of the original claim, as opposed to the date on which Deutsche Bahn asked to amend its lawsuit. No details on the settlement agreement were made public.[16]

[13] Competition Appeal Tribunal, case no. 1289/7/7/18, Road Haulage Association Limited v Man SE and Others.

[14] Competition Appeal Tribunal, case no. 1282/7/7/18, UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others.

[15] Court of Appeal, 13 November 2018, Case no. C3/2017/2778, [2018] EWCA Civ 2527.

[16] Mlex, Global Antitrust: Deutsche Bahn, Mastercard reach accord over UK Supreme Court appeal in card claim, 5 December 2018.

- On 11 December 2018, the Competition Appeal Tribunal (CAT) issued a judgment in the grouping of follow-on damages actions submitted by Royal Mail, BT, Ryder, Suez and others against members of the truck cartel.[17] The judgment was rendered after a two-day hearing held in November 2018 in order to clarify several pre-trial matters. The CAT ruled that the sharing of unofficial translations of foreign language documents from the Commission file with other claimants in order to save costs is disproportionate. The Tribunal further ruled that the question of whether a disclosed document should be treated as confidential should not be referred to the Commission or the UK Competition and Markets Authority.[18]

- On 31 December 2018, a damages lawsuit was filed before the High Court in London by several large asset managers, hedge funds and pension funds including Allianz, Pimco and Global Investors against several banks including HSBC, UBS and Barclays. The claimants accuse the banks of conspiring to manipulate the foreign exchange market in breach of European and UK competition law. The lawsuit is not based on a decision of the European Commission.[19]

[17] European Commission decision of 19 July 2016, Case AT.39824, 19 July 2016 (*Trucks*).
[18] Competition Appeal Tribunal, 11 December 2018, Case no. 1284/5/7/18 (T), [2018] CAT 19.
[19] Mlex, Global Antitrust: HSBC, UBS, Barclays and others targeted in forex damage claim in London court, 31 December 2018.

2

Public law aspects of cartel damages

European Union

- On 5 July 2018, the European Commission published its draft version of the guidelines for national courts on how to calculate the price increases that are passed on to direct and indirect purchasers.[20] The guidelines intend to provide national courts with practical guidance on how to estimate the passing-on of overcharges. They are non-binding and there is no obligation for a national court to follow them. After the introduction, the guidelines set out the legal framework, including the right to full compensation and the role of evidence. In the next section, the guidelines explain the economic theory of passing-on, along with examples. In the last section, the guidelines describe the price and volume effects of passing-on.

- On 5 July 2018, the European Court of Justice (ECJ) clarified the rules governing jurisdiction in damages claims in an airline predatory pricing dispute between AB Fly LaL-Lithuanian Airlines versus Starptautiska lidosta 'Riga' VAS and Air Baltic Corporation AS. [21]

The Lithuanian airline Fly LAL suffered damage as a result of predatory prices offered by the Latvian airline Air Baltic. Air Baltic was able to offer these low prices because it received an 80% discount from Airport Riga (Latvia) on aircraft take-off, landing and security services. By introducing such discounts, Airport Riga abused its dominant position.

To determine which court has jurisdiction, the location 'where the harmful event occurred' must be identified. In the context of an action seeking compensation for damage caused by anti-competitive conduct, the place where the harmful event occurred is the place where the loss of income, i.e. loss of sales, occurred. That is the location of the market which is affected by that conduct. The place where the harmful event occurred can also be defined, in this context, as the place of the predatory pricing and the place where the anti-competitive agreement was concluded.

- On 23 July 2018, the European Commission published its updated cartel statistics.[22] The statistics included an overview of the total amount of the fines imposed, the ten highest cartel fines per case and per undertaking since 1969, the number of decisions and an overview of the fines as a percentage of the global turnover.

[20] Draft EC guidelines for national courts on how to calculate the price increases that are passed on to direct and indirect purchasers.

[21] ECJ 5 July 2018, C-27/27, ECLI:EU:C:2018:533.

[22] ECJ Cartel statistics, 23 July 2018.

United Kingdom

- On 13 September 2018, the UK government said in a 'no-deal' guidance paper[23] that businesses should be aware that it is possible that there will be no agreement on jurisdiction over live EU merger and antitrust cases to the extent that they address effects on UK markets.

The UK government warned that if a decision is made by the European Commission after exit, claimants who wish to pursue private damages claims in UK courts for infringements of EU competition law will no longer be able to rely on that decision as a binding determination of an infringement in follow-on claims.

The main change for businesses will be that companies may be investigated by both authorities in parallel for breaches of UK and EU antitrust rules where there are effects in both markets. UK businesses that conduct business in the EU (or that otherwise act in a way that affects competition in the EU) will continue to be subject to EU competition law. EU firms that conduct business in the UK will continue to be subject to UK competition law.

[23] Guidance, Merger review and anti-competitive activity if there's no Brexit deal, 13 September 2018.

3

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

European Commission

- On 4 July 2018, the European Commission published the non-confidential version of its decision in the power cable cartel (decision of 2 April 2014), in which the European Commission fined power cable companies a total of €302 million.[24] From 1999 onwards, the companies allocated projects among themselves according to the geographical region or customer and they exchanged information on prices and other commercially sensitive information to ensure that the designated power cable supplier would submit the lowest bid in tenders. The cartel agreements covered underground power cables and submarine power cables and all products, activities and services sold there to a customer.

- On 6 September 2018, the European Commission published the provisional non-confidential version of the decision on four cartel participants in three different cartels involving fines totalling €395 million.[25] The European Commission fined four maritime car carriers €395 million, two suppliers of spark plugs €76 million and two suppliers of braking systems €75 million. In Q (2018-1), we discussed the fines imposed in this case.

- On 18 September 2018, the European Commission announced that it was opening an in-depth investigation to assess whether BMW, Daimler and Volkswagen colluded to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars.[26] The Commission carried out inspections at the premises of BMW, Daimler, Volkswagen and Audi in Germany as part of its initial inquiries into possible collusion between car manufacturers on the technological development of passenger cars.[27] At this stage, the Commission had no indications that the parties coordinated with each other in relation to the use of illegal defeat devices to cheat regulatory testing.

- In the official journal of 24 September 2018, the European Commission announced that investment bank JP Morgan Chase had appealed against the Commission's decision from 10 July 2018. JP Morgan is seeking to

[24] European Commission decision of 2 April 2014, Case AT.39610 (*Power Cables*).
[25] European Commission decision of 21 February 2018, case AT.40009 (*Car Carriers*).
[26] EC Press Release, Antitrust: Commission opens formal investigation into possible collusion between BMW, Daimler and the VW group on clean emission technology, Brussels 18 September 2018.
[27] EC Press Release, Antitrust: Commission confirms inspections in the car sector in Germany, 23 October 2017.

block the publication of the EC's 2016 infringement decision, in which it was fined for colluding on the setting of a benchmark interest rate. After the European Commission had rejected JP Morgan's objections to the publication of the infringement decision in 27 April 2018, JP Morgan applied on appeal for annulment of the infringement decision, with the consequence that the infringement decision cannot be published before the General Court has taken a decision.[28]

- On 23 November 2018, the European Commission (EC) announced that it was opening an investigation into airline ticket distribution services. It will assess whether agreements between booking system providers Amadeus and Sabre, on the one hand, and airlines and travel agents, on the other, may restrict competition. The agreements may restrict the ability of airlines and travel agents to use alternative suppliers of ticket distribution services. This may make it harder for suppliers of new ticket distribution services to enter the market, as well as increase distribution costs for airlines, which higher costs are ultimately passed on in the ticket prices paid by consumers.[29]

- On 7 December 2018, the European Commission announced it was imposing legally binding commitments on TenneT TSO GmbH that will increase electricity supply between Germany and Denmark, after investigating the grid operator for abuse of a dominant position.[30] TenneT is the largest of the four German transmission system operators that manage the high-voltage electricity network in Germany. The Commission opened a formal investigation in March 2018 to assess whether TenneT infringed antitrust rules by limiting southward capacity at the electricity interconnector between Western Denmark and Germany. This prevents the export of cheap electricity from the Nordic countries, where it is largely generated from renewable energy sources (mostly wind and hydro), to Germany, resulting in less competition between electricity producers on the German wholesale market and therefore higher electricity prices.

European Court of Justice

- On 3 July 2018, the General Court upheld the fine of €58 million imposed on Sanitec Europe Oy and its subsidiaries in the bathroom cartel. In 2010, the European Commission (EC) imposed fines totalling more than €622 million on 17 bathroom equipment manufacturers. Extensive court proceedings then commenced, as first the companies appealed with the General Court, the EC subsequently appealed against the General Court judgment with the European Court of Justice (ECJ), which found the appeal well-founded and referred it back to the General Court. In its second judgment, the General Court reassessed the probative value of the evidence and came to the conclusion that, in contradiction to its own 2013 decision, the fines imposed on two of the subsidiaries should not have been annulled because they did participate in the cartel. The General Court therefore upheld the €58 million fine on Sanitec and its subsidiaries.[31]

- On 12 July 2018, the General Court denied all claims from investment bank Goldman Sachs Group Inc., the world's biggest cable maker Prysmian and 13 other cable companies. The European Commission (EC) had imposed a fine of €302 million in 2014 for their participation in the power cable cartel. Goldman Sachs got involved because it had acquired Prysmian through one of its private

[28] Action brought on 10 July 2018 – JPMorgan Chase and Others v Commission (Case T-420/18).
[29] EC press release 23 November 2018, Antitrust: Commission opens investigation into airline ticket distribution services.
[30] EC press release 7 December 2018, Antitrust: Commission imposes binding obligations on TenneT to increase electricity trading capacity between Denmark and Germany.
[31] General Court 3 July 2018, T-379/10 and T381/10, ECLI:EU:T:2018:400.

equity funds. It asked the General Court to annul the decision and reduce the fines imposed claiming that it should not be held liable for the payment of the fine, as it is only a financial investor.[32] The General Court denied all claims and confirmed the EC's application of the presumption of actual exercise of decisive influence over subsidiaries' market conduct, despite the fact that it holds less than 100% of the shares, since its ability to exercise all of the voting rights attached to the subsidiaries' shares, its power to appoint and dismiss board members and its access to regular updates and reports on commercial strategy was comparable to the ability it would have enjoyed as sole owner. It is therefore not a 'pure financial investor'.

- On 13 July 2018, the General Court annulled the €1.13 million fine imposed on Stührk Delikatessen Import GmbH & Co for its participation in the shrimp cartel. In 2013, the European Commission (EC) fined four shrimp traders a total of €28.7 million for making agreements regarding the minimum price of shrimp in the period from 2000 to 2009. By applying paragraph 37 of the fining guidelines, the EC reduced the fines by 70% to 80%. According to the Court, the EC failed to provide adequate reasoning in determining the fines because it was unclear which criteria the Court had used for calculating each reduction. This did not allow Stührk to assess whether it had been treated equally or not. Therefore, the Court annulled the fine imposed on Stührk.[33]

- On 26 September 2018, the EU Court of Justice set aside the judgment of the General Court in the case between Infineon Technologies AG and the EC in the smart card chip cartel.[34] In 2014, the European Commission (EC) imposed a total fine of €138 million on three chip manufacturers for this cartel. Infineon appealed against the EC's decision, first with the General Court and, after the General Court had dismissed its appeal, then with the Court of Justice (ECJ). According to Infineon, the fine imposed was too high because of its limited participation in the cartel. The ECJ rejected the appeal on annulment of the EC decision, but set aside the General Court's judgment insofar as Infineon's application for a reduction of the fine was rejected. The ECJ ruled that the General Court should take into account all reasonable circumstances and contacts for a reduction of a fine and referred the case to the General Court. In Q (2018-2) we discussed Advocate General Melchior Wathelet's opinion on Infineon's appeal in the smart card chip cartel.

- On 18 October 2018, GEA Group AG won an appeal before the EU General Court regarding two fines for its involvement in the cartel for heat stabilisers (chemical additives that protect plastics from high temperatures).[35] The appeal is directed against an EC decision from 2016.[36] The GEA Group argued that in imposing the fine, the EC did not treat it in the same way as two other cartel participants. According to the Court, in order to assess whether the principle of equal treatment has been infringed, the fines of both participants

[32] General Court 12 July 2018, T-419/14 (The Goldman Sachs Group v EC), T-422/14 (Viscas v EC), T-438/14 (Silec Cable and General Cable v EC), T-439/14 (LS Cable & System v EC), T-441/14 (Brugg Kabel and Kabelwerke Brugg v EC), T-444/14 (Furukawa Electric v EC), T-445/14 (ABB v EC), T446/14 (Taihan Electric Wire v EC), T-447/14 (NKT Verwaltungs and NKT v EC), T-448/14 (Hitachi Metals v EC), T-449/14 (Nexans France and Nexans v EC), T-450/14 (Sumitomo Electric Industries and J-Power Systems v EC), T-451/14 (Fujikura v EC), T-455/14 (Pirelli & C. v EC) & T-475/14 (Prysmian and Prysmian cavi e sistemi v EC).

[33] General Court 13 July 2018, T-58/14, ECLI:EU:T:2018:474.

[34] ECJ 26 September 2018, C-99/17 P, ECLI:EU:C:2018:773.

[35] General Court 18 October 2018, T-640/16, ECLI:EU:T:2018:700.

[36] European Commission decision of 29 June 2016, case AT.38589 (*Heat Stabilisers*).

should be considered. The position of the GEA Group and another cartelist was the same. The EC could therefore also have distributed the fine in a proportionate manner. By failing to do so, the EC infringed the principle of equal treatment without objective justification. On 27 December 2018, the European Commission appealed against the decision.

- On 21 November 2018, Campine N.V. appealed against the 2017 EU cartel decision in the battery-buying cartel, for which it was imposed a fine of €8.1 million by the European Commission. Other cartel members were Eco-BAT Technologies and Recyclex. Campine argued that its involvement was so minor that the fine was disproportionate.[37] According to Campine, it cannot be demonstrated that it participated in the cartel throughout the entire period, and the EC's decision to increase the fine by 10% should be reversed. The verdict is expected in the second half of the year 2019. We also discussed this case in Q (2017-1).

- On 6 December 2018, food-packaging manufacturer Coveris Rigid France lost its appeal before the EU General Court against a €4.7 million cartel fine. It failed to convince the Court that liability for its infringement should be passed on to ONO Packaging, which bought part of its business during the infringement period and was allegedly responsible for the conspiracy.[38] According to established case law, the entity liable for the infringement by the transferred company is the transferor. This is what is referred to as the principle of personal liability. The Court applied this principle and ruled that Coveris, as transferor, was liable for the infringement because the conditions for the application of the exceptional criterion of economic continuity were not met. None of the exceptions were applicable. Coveris had not ceased to exist, nor had it ceased all economic activities. Also, Coveris provided no evidence that the transfer of a part of its business was an intra-group transfer, which would also exclude it from liability. Further, even if Coveris and ONO Packaging were structurally linked during the transfer, the EC has a wide margin of discretion to establish liability in cases of intra-group economic succession.

[37] The report from the hearing in case T-240/17 is available via Mlex.

[38] ECJ 6 December 2018, T-531/15, ECLI:EU:T:2018:885.

4

Fines and procedural regulations by national competition authorities

The Netherlands

- On 15 October 2018, the Netherlands Authority for Consumers & Markets (ACM) announced that it was investigating the procurement market for projects involving the renovation and maintenance of roofs.[39] The ACM had received tips that companies may have been making prohibited agreements in advance of tenders. These mainly involve public procurement processes started by the government.

- On 23 October 2018, the Trade and Industry Appeals Tribunal (CBb) ruled on a cartel of laundry businesses serving the healthcare industry in the Netherlands. The ACM had imposed fines on four laundry businesses for making prohibited market-sharing agreements between 1998 and 2009. The CBb reduced the fine for one of the parties and left the fine the same for the remaining parties, which mean over €12 million in fines was imposed in total.[40] An exception for franchises did not apply because the case involved horizontal market-sharing agreements.

- On 30 October 2018, the CBb ruled that the ACM had rightly imposed cartel fines on three collectors of ship-generated waste in the Rotterdam port area in 2011.[41] The companies were making pricing agreements and allocating contracts amongst themselves for the collection of ship-generated waste.

- On 27 December 2018, the ACM announced that it was investigating pricing agreements between manufacturers and (online) retailers of consumer goods. The ACM suspects that some consumer goods manufacturers try to make agreements with retailers on prohibited minimum prices for their products and even raided a number of businesses. The ACM did not want to disclose to the press what businesses it raided or even what sector is involved.[42]

Germany

- On 12 July 2018, the German Federal Cartel Office (FCO) imposed fines totalling approx. €205 million on six special steel companies, a trade association and ten individuals for

[39] Press release from the Netherlands Authority for Consumers & Markets dated 15 October 2018, 'ACM investigates roofing contractors'.
[40] Trade and Industry Appeals Tribunal 23 October 2018, ECLI:NL:CBB:2018:526.
[41] Trade and Industry Appeals Tribunal 30 October 2018, ECLI:NL:CBB:2018:527.
[42] Website of RTL Z 27 December 2018, 'ACM suspects prohibited pricing agreements and raids businesses'.

concluding price-fixing agreements and exchanging competitively sensitive information.[43] The steel companies are: ArcelorMittal Commercial Long Deutschland GmbH, Cologne; Dörrenberg Edelstahl GmbH, Engelskirchen; Kind & Co. Edelstahlwerke GmbH & Co.KG, Wiehl; Saarstahl AG, Völklingen; Schmidt + Clemens GmbH + Co. KG, Lindlar; and Zapp Precision Metals GmbH, Schwerte. The trade association concerned is Edelstahl-Vereinigung e.V., which has since been liquidated. The proceedings were initiated in November 2015 with a sector-wide dawn raid triggered by a leniency application from Voestalpine AG, Linz, Austria. The leniency applicant was not fined. The companies that were fined admitted to the accusations and agreed to a settlement. Moreover, four of the companies also cooperated with the FCO during the investigation – a fact that was taken into account in the calculation of the fine. Investigations into four other companies and a trade association are still ongoing. The special steel products which were the subject of the agreements were generally sold based on a price model which essentially consisted of a so-called base price and surcharges for certain inputs, especially scrap and alloys. According to the authority's findings, the steel producers had jointly agreed on and implemented a uniform method for calculating the scrap and alloy surcharges. There was also a basic agreement between the companies that the surcharges were supposed to be passed on to the customers on a 1:1 basis. According to the FCO, the agreements were in place at least from 2004 until at the latest the dawn raid in November 2015. The FCO found that trade associations played a decisive role in the agreements: association meetings were used as a platform for implementing the cartel. Moreover, they also played an active role by processing data and providing the companies involved with data for coordinating the scrap and alloy surcharges.

- On 4 September 2018, the FCO imposed fines amounting to a total of €16 million on DuMont Mediengruppe GmbH & Co. KG (DuMont), an individual responsible as well as a lawyer who had advised DuMont.[44] The FCO accused DuMont of concluding an illegal territorial agreement with the Bonner General-Anzeiger group. According to the FCO, in December 2000, DuMont and the Bonner General-Anzeiger group had agreed that either one of the two newspaper publishers would largely withdraw their respective distribution from certain areas in the Bonn region. In 2005, the companies safeguarded the territorial agreements via mutual participations and by granting the DuMont group a pre-emptive right to the Bonner General-Anzeiger group. The parties eventually terminated their agreements in December 2016. The Bonner General-Anzeiger group filed a leniency application with the FCO and escaped a fine. The DuMont group and the individual responsible agreed to a settlement.

- On 16 October 2018, the German Federal Cartel Office (FCO) announced that it would be reviewing the cooperation between the pay television provider Sky Deutschland and the operator of the DAZN streaming service Perform as regards the broadcasting of the Champions League in Germany.[45] Sky had acquired the broadcasting rights for all matches between 2018 and 2021 in a tender. Following this tender, Sky and DAZN divided the rights between themselves. The FCO is concerned that the agreement could contribute to a further consolidation of Sky's market position and will examine whether the cooperation may restrict competition by object or effect.

[43] See FCO, press release of 12 July 2018.
[44] See FCO, press release of 4 September 2018 as well as case summary of 20 September 2018.
[45] FCO, press release of 16 October 2018.

- On 29 November 2018, the FCO initiated abuse of dominance proceedings against online retailer Amazon with the aim of examining Amazon's terms of business and practices towards sellers on its German marketplace amazon.de.[46] According to the FCO, the terms of business and practices which might be considered abusive are liability provisions to the disadvantage of sellers in combination with choice of law and jurisdiction clauses, rules on product reviews, the non-transparent termination and blocking of sellers' accounts, withholding or delaying payment, clauses assigning rights to use the information material which a seller has to provide with regard to the products offered and terms of business on pan-European despatch. The proceedings were triggered by complaints the FCO had received from sellers. In contrast to the investigation by the European Commission, the FCO will not focus in its proceedings on Amazon's use of data to the disadvantage of marketplace sellers.

- On 10 December 2018, the FCO imposed a fine amounting to €1.43 million on Gaul GmbH, a manufacturer of asphalt mixes, for participating in a cartel.[47] Gaul GmbH has been a subsidiary of the STRABAG group since 2011. The cartel agreement involved prices, sales areas, customers and quotas for the supply to construction companies in the Rhine-Main area between 2005 and 2013. Another company involved in the cartel was Südhessische Asphalt-Mischwerke GmbH & Co. KG, a company of the Werhahn group. Südhessische Asphalt-Mischwerke GmbH & Co. KG had informed the FCO about the cartel in a leniency application and was therefore not fined. The proceedings against a third company, Mitteldeutsche Hartstein-Industrie AG, and its former subsidiary, Mitteldeutsche Hartstein-Industrie GmbH, were discontinued due to a legislative loophole and discretionary reasons. Against this background, it has not been clarified in the context of the proceedings whether the MHI group was involved in the cartel.

United Kingdom

- On 4 July 2018, the UK's Court of Appeal ruled in three linked appeals from UK supermarkets against Mastercard and Visa on the lawfulness of card charges known as 'interchange fees'. Interchange fees are fees paid by retailers to banks on all card purchases. The Court upheld all the appeals, holding that the banks' interchange fees were restrictions of competition under Article 101(1) TFEU. The Court also overturned the rulings of the lower courts to the extent that they considered the restrictive practices justified in the interest of economic efficiency under Article 101(3) TFEU. The Court has remitted the cases to the Competition Appeal Tribunal (CAT) for further directions, but this ruling could potentially expose the banks to significant damages claims from retailers.[48] We already reported on interchange fees lawsuits against Mastercard and Visa in previous editions of Q (in 2018-1, 2017-2, 2017-3 and 2017-4).

- On 25 July 2018, the Competition Appeal Tribunal (CAT) denied requests from Pfizer, Flynn Pharma and the Competition and Markets Authority (CMA) for permission to appeal its judgment in relation to two appeals against a decision of the CMA addressed to Pfizer and Flynn Pharma, for abusing their dominant position by charging excessive prices for a pharmaceutical product. In its judgment, the CAT set aside that part of the CMA decision relating to abuse and invited written submissions from the parties on whether to remit the matter to the CMA. In addition to refusing the parties permission to appeal the judgment, the CAT ordered an immediate

[46] FCO, press release of 29 November 2018.
[47] FCO, press release of 10 December 2018.
[48] Court of Appeal, 4 July 2018, Case nos. C3/2016/4250, A3/2017/0889, A3/2017/0890 and A/3/2017/3493, [2018] EWCA 1536 (Civ).

remittal of the issue of abuse to the CMA. The CAT considered that the CMA might be worried about issues concerning parallel appeal proceedings that might conflict with or add confusion to its conduct of the remittal if any party were to seek permission to appeal the judgment from the Court of Appeal (CoA). However, the CAT decided against staying the remittal. It found that the public interest would be best served by the CMA proceeding swiftly to reconsider the issue of abuse in accordance with the principles set out in the CAT judgment. The Tribunal further considered that the CoA could itself consider whether it was appropriate to make any order in relation to parallel proceedings if any party were to seek permission from the CoA.[49]

- In Q (2017-3), we discussed the fine imposed by the Competition Markets Authority (CMA) on the golf club manufacturer Ping Europe for preventing two online retailers from selling its golf clubs online. On 7 September 2018, the UK Competition Appeal Tribunal (CAT) upheld the CMA's decision in a judgment on an appeal by Ping challenging the CMA's decision. The CAT stated that the online sales ban was a restriction by object under Article 101(1) TFEU and that Ping could not benefit from an individual exemption under Article 101(3) TFEU. The CAT did however reduce the penalty by £200,000 to £1.25 million because it found that the CMA had erred on the facts of this case in treating director involvement as an aggravating factor.[50]

- On 10 September 2018, Andrea Coscelli, the chief executive of the UK's Competition and Markets Authority (CMA), said at a conference in the US[51] that the CMA would be taking on the European Commission's functions in respect of state aid to companies after Brexit. The UK plans to implement a regulatory state-aid regime in national law that is very close to that of the European Commission. Coscelli stressed that the CMA is preparing for all Brexit deal or no-deal scenarios.

- On 18 September 2018, the UK's Competition and Markets Authority (CMA) issued a press release stating that Heathrow and Arora admitted to an anti-competitive car park agreement. An agreement between the parties for the lease of an Arora hotel at one of Heathrow's terminals included a clause restricting how parking prices should be set by Arora for non-hotel guests. The CMA considered in particular whether the clause to prevent Arora from charging parking prices that were lower than those charged at the Heathrow airport car parks was compliant with competition law. Heathrow agreed to settle the case and pay a fine of £1.6 million (€1.8 million). The Arora group was granted immunity for coming forward under the CMA's leniency programme and will thus not be fined.[52]

[49] Competition Appeal Tribunal, 25 July 2018, Case no. 1275-1276/1/12/17, [2018] CAT 12.
[50] Competition Appeal Tribunal, 7 September 2018, Case no. 1279/1/12/17, [2018] CAT 13.
[51] Fordham Conference on International Antitrust Law and Policy, New York, 7 September 2018.
[52] CMA press release, Heathrow and Arora admit to anti-competitive car park agreement, 18 September 2018.

5
Other

- In July 2018, the Dutch Arbitration Journal (*Tijdschrift voor Arbitrage)* published an article (in Dutch) on the scope of jurisdictions and arbitration clauses in cartel damages actions.[53] The author is P.N. Malanczuk, who usually represents cartel participants in cartel damages cases. Malanczuk discusses how Dutch courts deal with specific choice of forum or arbitration clauses as agreed in contracts between cartelists and their direct customers. In its CDC judgment of 21 May 2015[54], the Court of Justice gave different indications for cartel cases concerning abstractly formulated choice of forum clauses which fall within the scope of the EEX Regulation (now Brussels 1 bis). Malanczuk asserts that the Dutch court (implicitly) carried this approach over to arbitration clauses and that English and German courts saw no reason to do this in other cartel cases.

[53] P.N. Malanczuk, The scope of choice of forum and arbitration clauses in cartel damages cases, Tijdschrift voor Arbitrage July 2018, 47. This document is not publicly accessible unfortunately.

[54] ECJ 21 May 2015, case C-352/13, ECLI:EU:C:2015:335 (CDC).

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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 amongst others 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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