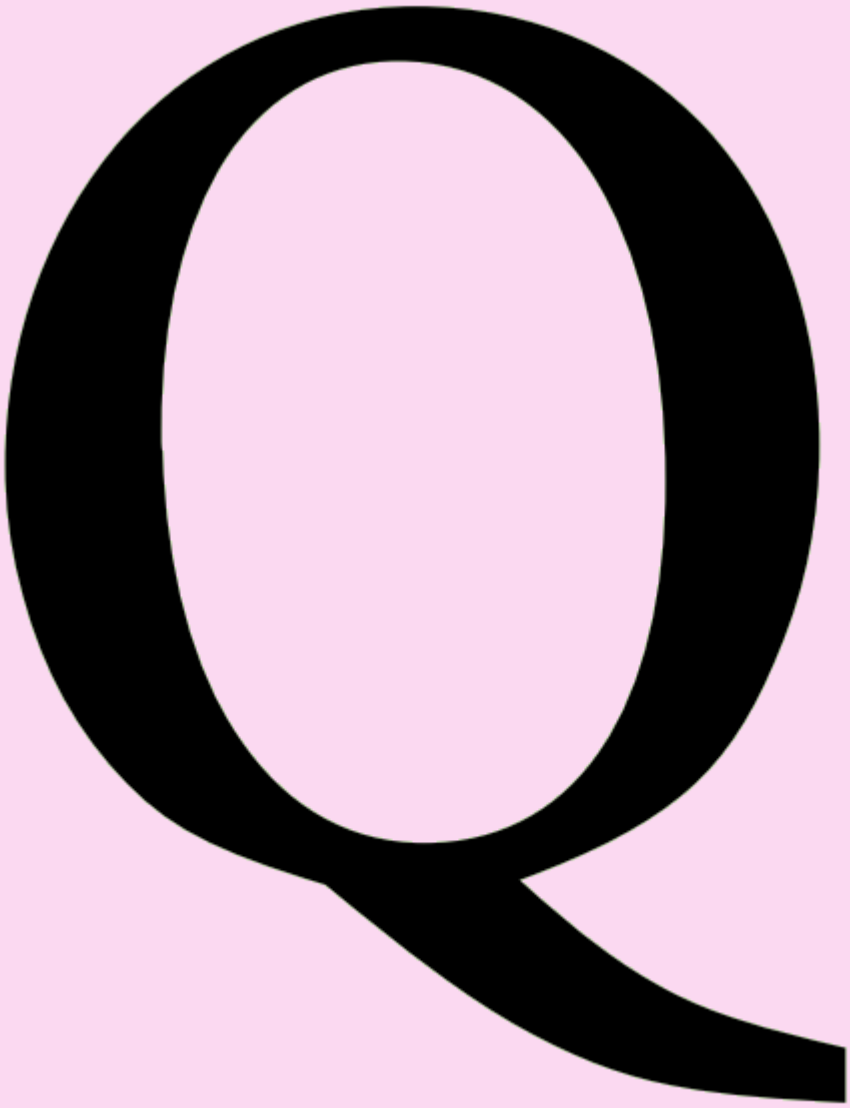
BUREAU BRANDEIS

CARTEL DAMAGES QUARTERLY



Q1 2019

We are pleased to present the first quarterly report on cartel damages litigation of 2019

The first quarter of this year was marked by two important rulings of the European Court of Justice ("ECJ"), which have strengthened the position of injured parties in cartel damages cases. In *Skanska*, the ECJ ruled that the broad concept of undertaking as applicable in competition law may also be applicable when a civil action is brought. In *Cogeco*, a case of at least equal importance, the ECJ ruled that while the Cartel Damages Directive does not have retroactive force, the so-called *effet utile* of competition law may nevertheless not be rendered ineffective. In that case, the five-year limitation period had been applied in accordance with the Cartel Damages Directive, so the Portuguese reliance on limitation failed. These cases teach us that the ECJ tends to strengthen rather than weaken the position of injured parties. In the Netherlands, the East West Debt ("EWD") claims collection vehicle made another slip-up. Whereas at first instance EWD had failed to provide any evidence of the damage, on appeal it did so too late. The claims were denied. The Court of Appeal in Düsseldorf ruled similarly in yet another trucks cartel case against DAF, which involved an indirect customer. There is a valuable lesson to be learned here for the injured parties. Even though the ECJ gives every opportunity to file claims, substantiation is nevertheless required. And also – but this should be self-evident – the rules of procedural law still need to be followed. For example, the ECJ ruled that Eco-Bat Technologies Ltd had no *locus standi* to appeal, simply because it had missed the appeal deadline.

Kind regards,

In behalf of the team **Hans Bousie**

With contributions from **Louis Berger, Hans Bousie, Bas Braeken, Sophie van Everdingen, Nathan van der Raaij** en **Tessel Bossen**

Index

Amsterdam, 22 October 2019

1

Private enforcement in cartel damages claims – case law

European Union

- On 6 March 2019, the European Court of Justice answered some questions that the Finnish court had referred for a preliminary ruling in *Skanska* regarding the application of the economic continuity test. The request for a preliminary ruling was made in the context of civil proceedings in which the Finnish city of Vantaa was claiming compensation for the damage it had suffered from a cartel in the Finnish asphalt market.[1] This case was not governed by the Cartel Damages Directive (Directive 2014/104).

The Finnish Competition Authority had imposed fines on several entities for that reason. However, those fines concerned not only the conduct of the entities in question but also that of their legal predecessors. The Finnish Competition Authority had based its decision in part on the doctrine of "economic continuity" developed in European competition law.

In the civil proceedings, the question that had subsequently arisen was whether the fined companies could also be held liable under civil law for the damage caused by their predecessors. The parties in question had of course disputed this, stating that the economic continuity test applied by the competition authorities when imposing fines was not also applicable in civil actions for damages.

As this was a new question of law, the Finnish Supreme Court, the *Korkein oikeus*, had referred questions on this point to the ECJ for a preliminary ruling. Those questions were essentially whether national actions for damages for competition infringements could be based directly on EU competition law (Article 101 TFEU and Article 102 TFEU) or on provisions of domestic law (such as the doctrine of unlawful act (*onrechtmatige daad*) in the Netherlands).

In answering the questions referred for a preliminary ruling, the ECJ first of all observed that Article 101 and Article 102 create direct rights and obligations. With reference to its judgment rendered in *Kone* (C-557/12), the ECJ pointed out that the full effectiveness of Article 101 TFEU would be put at risk if it were not open to any individual to claim damages for loss resulting from an infringement of the prohibition of agreements restricting competition. The ECJ recognised first of all that, in the absence of European provisions, cartel damages claims are governed by national law. However, regarding the question of *which* entities were liable for the damage suffered as a result of the cartel, the ECJ concluded that there was a direct basis in European competition law. According to the ECJ, this follows explicitly from Article 101(1) TFEU, which provides that undertakings may not make any agreements restricting competition. It furthermore follows from the case law that the concept of undertaking is interpreted broadly and that an undertaking cannot escape liability for the conduct of its predecessor when, from an economic point of view, the two are identical.

For Vantaa, the ECJ judgment meant that, to the extent that the companies held liable by Vantaa are identical from an economic perspective to the fined undertakings, these

[1] ECJ 14 March 2019, case C-724/17 (*Skanska*).

undertakings, as successors, have assumed their predecessors' liability for the damage caused by them.[2]

- On 28 March 2019, the ECJ answered for the first time questions for a preliminary ruling regarding the temporal scope of the Cartel Damages Directive (Directive 2014/104). These preliminary ruling proceedings had been prompted by a claim of Cogeco Cable for compensation for damage it had suffered as a result of an abuse of dominant position by Sport TV Portugal. The case had been brought before the Portuguese court prior to the Directive's entry into force and prior to the end of the transposition period. The practices that were the subject of the claim for compensation covered the period from August 2006 up to and including March 2011, but the action for damages had started only in 2015.

The question regarding the Directive's applicability was relevant because the Directive has a longer limitation period (of at least five years) than domestic Portuguese law (in principle three years). Application of this latter (shorter) period meant that Cogeco's claim had already lapsed by the passage of time.

The ECJ ruled that the rules transposing the procedural provisions were not applicable, because the Portuguese legislature had not used its discretion as referred to in Article 22(2) of the Cartel Damages Directive to apply procedural transposition provisions retroactively until 26 December 2014. According to the ECJ, the foregoing applied 'a fortiori' to the substantive provisions, because Article 22(1) of the Cartel Damages Directive prescribes that such provisions *must* not apply retroactively.[3] The Cartel Damages Directive therefore did not apply at all to Cogeco's claim.

Still, the outcome was not all bad for Cogeco, as the ECJ reviewed the admissibility of the limitation period under Portuguese law also in light of the EU-law principles of equivalence and effectiveness.[4] The ECJ then ruled that the Portuguese three-year limitation period, which starts to run from the date on which the person suffering harm became aware of the damage – even if he does not know *who* is liable for the infringement – which period may moreover not be suspended or interrupted, is at odds with the principle of effectiveness. After all, this rule renders the exercise of the right to full compensation for damage practically impossible or excessively difficult.[5]

The Netherlands

- On 5 February 2019, the Court of Appeal of Arnhem-Leeuwarden upheld a District Court ruling which allowed nine lift manufacturers including United Technologies Corporation, Otis B.V. and ThyssenKrupp A.G. to escape a claim for damages worth over 30 million euros.

The European Commission had fined the manufacturers in 2007 for forbidden cartel agreements. The multimillion claim in this case had been lodged by the claim collection vehicle East West Debt B.V. ("EWD"), which represented 144 hospitals and healthcare providers that had purchased lifts from the defendant lift manufacturers. EWD stated that the parties it represented had suffered damage as a result of the cartel. At first instance, the District Court had denied EWD's claims because – simply put – it had furnished insufficient facts to substantiate its assertions.

As substantiation on appeal, EWD submitted a spreadsheet showing the names of the healthcare institutions and the contracts with one of the lift manufacturers per period, in which the (asserted) expenses incurred for those contracts in the various periods had been combined. In addition, it submitted a calculation by SEO of the so-called cartel mark-up for delivery of the lifts. This was sufficient

[2] ECJ 14 March 2019, case C-724/17 (*Skanska*), para. 50.
[3] ECJ 28 March 2019, case C-637/17 (*Cogeco*), para. 30.
[4] ECJ 28 March 2019, case C-637/17 (*Cogeco*), para. 42.
[5] ECJ 28 March 2019, case C-637/17 (*Cogeco*), para. 52.

from EWD's point of view, since the manufacturers could peruse their own records for (more detailed) information to determine the *conditio sine qua non* connection and/or the existence and scope of the damage.

The Court of Appeal did not agree. It held that it was up to EWD itself rather than the manufacturers to enter specific information into evidence regarding the question of *which* healthcare institution had purchased *which* items or services from *which* lift manufacturers for *what* amount and *when*, preferably accompanied by copies of the underlying agreements.

Having considered giving EWD another opportunity to enter the requisite information into evidence, the Court of Appeal concluded that doing so in this case and at this stage – after oral arguments on appeal – would be in breach of the principle of due process. After all, the lack of this information had already been pointed out to EWD at first instance – which was why the District Court had denied the claims in the first place. The appeal therefore failed.[6]

Germany

- During a press conference on 16 January 2019, a group of road haulage logistic trade associations, Bundesverband Güterkraftverkehr Logistik und Entsorgung (BGL) e.V., and legal service provider financialright stated that they were preparing a third lawsuit against truck manufacturers for their involvement in the trucks cartel.[7] Two lawsuits have already been filed, which are said to be the largest to date. The litigants claim to represent 7,000 purchasers and almost 150,000 trucks. The claims are supported by the Federal Association of the Economy, Transport and Logistics (BWVL), the German Forwarding and Logistics Association (DSLV) and the Federal Association of Furniture Freight Forwarding and Logistics (AMÖ).[8]

- On 21 January 2019, the regional court in Münster ruled in a case between an insolvency administrator of an unidentified trader and repair shop against truck manufacturer DAF N.V.[9] According to the insolvency administrator, it might be possible to recover 1.2 million in damages from DAF for its participation in the trucks cartel.[10] In order to draft the damages claim, the administrator needed information from the former director of the insolvent company. It therefore requested the court to convene an assembly of creditors to approve a contract with the former director to oblige the company to submit the necessary information. The regional court ruled that the administrator had the right to submit this request and seek approval of the contract.

- On 17 March 2019, a damages lawsuit that had been initiated by German drugstores Rossmann, Schlecker and Müller against confectionery manufacturers such as Nestlé Kaffee und Schokoladen GmbH, Alfred Ritter GmbH & Co. and Mars GmbH was dropped. The lawsuit followed a decision of the German Competition Authority in 2013, fining the confectionery manufacturers EU 60 million for anti-competitive price agreements.[11] The withdrawal of the actions was based on multiple factors, as stated by Ritter's lawyers.[12] First of all, the original decision concerned three different (overlapping) sets of infringements, which made it difficult for the retailers to assess and support their specific damages asserted. Another challenge for the retailers was the new German case law regarding the issue of prima facie evidence.[13] The case in question, which we reported on in Q (2018-3 and 4), related to the

[6] Arnhem-Leeuwarden Court of Appeal 5 February 2019, ECLI:NL:GHARL:2019:1060.
[7] European Commission, case AT.39824 (*Trucks*).
[8] See in this regard report on MLex of 16 January 2019.
[9] Regional court of Münster, 21 January 2019, case reference 5 T 742/18.
[10] European Commission, case AT.39824 (*Trucks*).
[11] Bundeskartellamt 27 May 2013, B11-11/08.
[12] Statement by Gleiss Lutz of 15 March 2019, Gleiss Lutz achieves withdrawal of actions for ritter sport in confectionery damages litigation.
[13] Bundesgerichtshof 11 December 2018, KZR 26/17.

rail cartel and raised the bar for proving harm in cartel cases. Lastly, in separate vertical cartel proceedings, the German Competition Authority fined several retailers, including Aldi Einkauf GmbH Co. oHG and Kaufland Stiftung & Co. KG for sharing prices with confectionery manufactures, including Ritter Sport, regarding some of the goods that were affected by the cartel,[14] which raised the question of how the drugstores could have suffered any damage.[15]

- On 22 March 2019, the Higher Regional Court of Düsseldorf dismissed an appeal against a lower court's ruling which rejected a damages claim against DAF N.V. for its participation in the trucks cartel.[16] The lawsuit was initiated by logistics company NTL Nijmeijer (exact entity unknown) that purchased trucks not directly from DAF but from a third party dealer. The lower court ruled that there was no proof of harm since there was no evidence that the cartel had affected prices negotiated with or set by third party dealers. According to the court, the truck market is too complex to assume any effect on prices negotiated between dealers. Therefore, the court considered it quite reasonable that the list prices were raised in some countries and remained unchanged in others. NTL Nijmeijer (again) failed to prove the specific effects on truck prices in Germany on appeal, resulting in dismissal.[17]

United Kingdom

- On 14 January 2019, British Airways PLC settled with (unknown entities of) Emerald Supplies, Hyundai Heavy Industries, Allston Landing and Kodak who were seeking damages from British Airways for its participation in the air freight cartel. The claim followed a European Commission decision to fine British Airways, among other air carriers, for fixing prices for fuel and security surcharges on airfreight. The first decision of 2010 was annulled by the EU General Court, but the Commission adopted a new decision in 2017 that corrected the procedural flaws on which the annulment was based.[18] The terms of the agreement are confidential.

- On 15 January 2019, the UK Court of Appeal confirmed a judgment of the lower court in a damages suit initiated by La Gaitana Farms SA, a Colombian flower importer, seeking damages from British Airways PLC for its participation in the airfreight cartel.[19] The court confirmed that the temporal scope of the damages claim should be limited. The court ruled that the national courts did not have jurisdiction to rule on private damages claims relation to international air transport before 1 May 2004, because that was the date on which a relevant EU regulation introducing such jurisdiction entered into effect.[20] The claimants' argument that the airlines' conduct was retroactively unlawful was rejected. Nor did the UK court agree with the claimants that the case should be referred to the European Court of Justice.

- On 14 February 2019, the Competition Appeal Tribunal (CAT) ruled that damages claims by DSG Retail Limited, Dixons Carphone PLC and Europcar UK Limited against MasterCard Incorporated should not be time-barred.[21] The claimants are seeking damages for losses suffered between May 1992

[14] Press release Bundeskartellamt of 18 June 2015, "Vertical resale price maintenance in the food retail sector – Majority of fine proceedings concluded".
[15] Gleiss Lutz, "Gleiss Lutz Achieves Withdrawal of Actions for Ritter Sport in Confectionery Damages Litigation", 15 March 2019.
[16] European Commission, case AT.39824 (Trucks).
[17] Oberlandesgericht Düsseldorf 22 March 2019, 8 O 24/17 [Kart], full decision published on Mlex.
[18] European Commission decision of 17 March 2017, Case AT.39258 (*Airfreight*).
[19] A3/2017/3424 La Gaitana Farms SA & Others -v- British Airways PLC & Anr., A3/2017/3432 Kodak Limited & Others -v- British Airways PLC., A3/2017/3434 Emerald Supplies Limited & Ors -v- British Airways PLC and Ors.
[20] Regulation 411/2004 ("Modernisation Regulation"), which amended Regulation 1/2003.
[21] Competition Appeal Tribunal 14 February 2019, Case 1236/5/7/15.

and June 2008 as a result of Mastercard's participation in the interchange fees cartel. The suit relies on an European Commission decision of 2007.[22] Mastercard argued that, according to court rules, the transactions that took place before June 1997 should be time-barred. According to the claimants, however, the Commission decision of 2007 included findings that were "essential" to their cause of action, for which reason their claims could not be time-barred. Additionally, the claimants argued that the nature and commercial reality of their businesses up to 1997 was such that it would be implausible to bring legal claims over the fees at that time (card payments formed a very low proportion of business at that time). The CAT ruled in favour of the claimants and dismissed Mastercard's applications.

- On 25 February 2019, the London's High Court dismissed a damages claim of Marme Inversiones S.L. (Marme), a Spanish investment vehicle, against Royal Bank of Scotland Group PLC (RBS).[23] The claim stemmed from a European Commission decision of 2013 in which it was held that several international banks participated in cartels in the interest-rate derivatives industry, in which regard (inter alia) the banks entered into agreements to fix the Euro Interbank Offered Rate (Euribor).[24] Marme entered into interest-rate swaps for a loan of 1.6 billion euros from RBS and other banks in 2008, which it was later unable to repay or finance. According to the investment vehicle, it entered into the loan based on misrepresentations by RBS about the integrity of the process by which Euribor was set. Therefore, it sought damages of almost 700 million euros from RBS. The judge ruled in favour of the banks and affirmed the validity of the contracts between RBS, the other banks and Marme. Marme's claims were dismissed.

- On 12 March 2019, the CAT ruled on the disclosure of evidence in a pre-trial hearing for a damages lawsuit initiated by transport company Ryder Limited against 20 different entities of several truck manufacturers, including MAN, Volvo and Daimler, for their involvement in the truck cartel.[25] Ryder had requested and argued for the (broad) disclosure of specific documents, including documents that had not initially been shared with the Commission. The tribunal dismissed the request. It stated that the application was misconceived because it should have been based on a pleading, which was not the case. The presiding judge also stated that the leniency applicant could be expected to have submitted all relevant documents to the Commission.[26]

- On 28 March 2019 global leading packaging company DS Smith[27] became the latest claimant to seek damages from truck manufacturers for their role in the truck cartel.[28] Seeking redress for the excessive price it claims to have paid for the trucks concerned, DS Smith filed its claim before the UK High Court against MAN, Daimler, Volvo/Renault, Iveco and DAF Trucks.[29]

- In March 2019, Fiat Chrysler Automobiles[30] started a private action against car and truck bearings producers who had been

[22] European Commission, case COMP/34.579 (*Mastercard*).
[23] CL-2014-000348 Marme Inversiones 2007 S.L. v. The Royal Bank of Scotland Plc and others.
[24] European Commission, case AT.39914 (*Euro Interest Rate Derivatives*).
[25] European Commission, case AT.39824 (*Trucks*).
[26] Competition Appeal Tribunal, Case reference 1291/5/7/18 (T) (Ryder Limited and Another v MAN SE and Others).
[27] A total of 6 UK based DS Smith entities commenced litigation: DS Smith Packaging Limited, DS Smith Paper Limited, DS Smith Corrugated Packaging Limited, DS Smith (UK) Limited, DS Smith Recycling UK Limited and DS Smith Logistics Limited.
[28] As reported by MLex on 8 April 2019: Daimler, MAN, DAF, other truckmakers face UK damages claim from DS Smith.
[29] There are 15 defendants in total, all entities belonging to the aforementioned truck manufacturers. Scania is not amongst the defendants.
[30] Besides parent company Fiat Chrysler Automobiles N.V. (FCA) the group of claimants consists of its subsidiaries Maserati S.p.A, FCA Italy

part of the cartel in the market for automotive bearings.[31] Amongst the defendants in the case brought before the High Court in London is the leading Swedish bearing and seal manufacturing company AB SKF. The long list of defendants also includes various subsidiaries of the German Schaeffler Group and Japanese companies JTEKT, NSK, NFC and NTN.[32] In its 2014 decision[33] the European Commission had imposed a fine on these producers of car and truck bearings amounting to €953 306 000 for secretly coordinating their pricing strategy vis-à-vis automotive customers. The cartel covered the whole European Economic area for a period of seven years.

S.p.A., FCA Melfi S.p.A, FCA Srbija, FCA Poland SA and Sevel S.p.A.

[31] As reported by MLex on 22 March 2019: Fiat Chrysler files UK lawsuit against steel-bearings cartelists.

[32] The full list of defendants is: AB SKF, SKF GmbH, SKF industrie, INA-Holding Schaeffler GmbH & Co. KG, IHO Holding GmbH & Co. KG, Schaeffler AG, Schaeffler Technologies GmbH & Co. KG, Schaeffler Schweinfurt, Schaeffler Italia, NSK Europe, NSK Ltd., NSK Deutschland, NSK Italia, JTEKT Corporation, JTEKT Europe Bearings B.V., Koyo France SA, Koyo Deutschland GmbH, NTN Corporation, NTN Walzlager (Europa) GmbH, NTN-SNR Roulements SA.

[33] Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (*Bearings*).

2

Public law aspects of cartel damages

The Netherlands

- On 1 January 2019, a new Dutch court came into being: the Netherlands Commercial Court (NCC). The NCC was created for the highly efficient handling of international disputes. As it is a specific chamber of the Court of Appeal in Amsterdam (*gerechtshof*), it is part of the Dutch court system; its judgments carry as much weight as 'regular' Dutch judgments. The only difference is that proceedings and judgments are in English. Parties have to agree to their dispute being conducted before the NCC in English.[34]

The NCC may be relevant to international disputes in which both parties are willing to bring the proceedings to a swift conclusion. For example, it may be a useful platform for dispute resolution in cartel damages cases initiated by an important client of the cartelist in question. However, it is less likely that the NCC will handle large cartel cases with multiple parties, as the willingness to resolve the dispute quickly and efficiently seems to be limited in such cases.

[34] Website of the Netherlands Commercial Court.

3

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

European Commission

- In its decision of 22 January 2019, the European Commission imposed a fine of € 570 million on Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA for obstructing merchants' access to cross-border card payment services.[35] According to the Commission, Mastercard maintained a set of cross-border acquiring rules that were contrary to Article 101 TFEU and Article 52 of the EEA agreement, by creating an obstacle to cross-border trade in acquiring services. The decision covers the period between 27 February 2014 and 8 December 2015.

- On 31 January 2019, the European Commission issued a press release stating that it had informed eight banks of its preliminary view that they have breached EU antitrust rules.[36] The Commission is concerned that the banks participated in a collusive scheme aiming to distort competition when trading European government bonds. During different periods between 2007 and 2012, bank employees allegedly "*exchanged commercially sensitive information and coordinated on trading strategies*" through (mainly) online chatrooms. Italian Unicredit S.p.A is one of the banks under investigation.

- On 19 February 2019, the European Commission conducted unannounced inspections in the farmed Atlantic salmon sector in several EU member states. The Commission is concerned that the (unnamed) companies under scrutiny may have violated EU antitrust rules prohibiting cartels and restrictive business practices.[37]

- On 5 March 2019, the European Commission fined Autoliv[38] and TRW[39], two car safety equipment suppliers, in a cartel settlement for a combined amount of € 368 million. The third cartelist, Takata[40], was not fined because it had blown the whistle on the cartel. The companies were fined for their role in two cartels pertaining to the supply of car seatbelts, airbags and steering wheels to the Volkswagen group and the BMW group. According to the Commission, the cartel is likely to have had a significant effect on these European customers, given that the Volkswagen group and the BMW group sell approximately three of every ten cars purchased in Europe.[41]

---

[35] Commission Decision of 22 January 2019, C(2019) 241 final, case AT.40049 (*MasterCard II*)
[36] European Commission press release of 31 January 2019, IP/19/804.
[37] European Commission press release of 19 February 2019, STATEMENT/19/1310.
[38] The decision was addressed to both Autoliv, Inc. and Autoliv B.V. & Co. KG.
[39] ZF TRW Automotive Holdings Corp., TRW Automotive Safety Systems GmbH and TRW Automotive GmbH.
[40] Takata Corporation and Takata Aktiengesellschaft.
[41] European Commission press release of 5 March 2019, IP/19/1512.

European Court of Justice

- In January 2019, the European Commission ("Commission") appealed a decision of the EU General Court ("General Court")[42], in which it annulled Commission decision to fine the German GEA Group, one of the largest suppliers of technology for the food processing industry, for entering into anti-competitive agreements regarding heat stabilisers. The General Court stated that the Commission had, in its (readopted) decision of 2016, discriminated against GEA. The Commission's appeal against the decision will be heard by the European Court of Justice.[43]

- On 23 January 2019, Crédit Agricole and Crédit Agricole Corporate and Investment Bank and JPMorgan Chase won a case against the European Commission in which they requested that the EU be prohibited from publishing the Euribor decision, which decision the applicants were challenging in court. The decision imposed fines on the applicants for participating in a cartel in euro interest rate derivatives.[44] The European Court of Justice issued interim orders against the Commission to suspend publication of a detailed version of the decision pending their appeals.[45]

- On 21 March 2019, the European Court of Justice ruled that Eco-Bat Technologies Ltd cannot challenge the decision of the European Commission imposing fines on the company for participating in a cartel in the market for buying scrap lead-acid batteries. Eco-Bat missed the deadline for appealing the original decision, and the fact that the Commission amended the decision did not 'reset' the deadline, the Court ruled.[46]

- On 21 March 2019, Crédit Agricole and Crédit Agricole Corporate and Investment Bank and JPMorgan Chase lost a case against the European Commission in which they requested that the EU be prohibited from publishing the Euribor decision. The European Commission was ordered to refrain from publishing the decision by order of 16 January 2019 pending the banks' appeals before the European Court of Justice against publication. As the Court has now ruled in favour of the Commission on appeal, the Commission can publish the non-confidential version of the decision.[47]

- On 28 March 2019, the EU General Court reduced the fine imposed on Pometon SpA for fixing prices of abrasive powders used in the steel industry from EUR 6.2 million to 3.9 million. The General Court stated that the European Commission had failed to adequately explain its fine calculations.[48]

[42] EGC 18 October 2018, case T-640/16.
[43] ECJ, case C-823/18 P.
[44] European Commission, case AT.39914 (*Euro Interest Rate Derivatives*).
[45] Order of the Vice-President of the Court of 21 March 2019, Cases C-4/19 P(R) and C-1/19 P(R).
[46] ECJ 21 March 2019, case C-312/18 P.
[47] Order of the Vice-President of the Court of 21 March 2019, cases C-4/19 P(R) and C-1/19 P(R).
[48] European Union General Court, case T-433/16 (*Pometon SpA v European Commission*).

4

Fines and procedural regulations by national competition authorities

The Netherlands

- On 26 February 2019, the Netherlands Authority for Consumers & Markets ("ACM") published revised guidelines for the rules of play for intercompany collaboration. Those guidelines state what is and what is not allowed in the collaboration with competitors and when making agreements with suppliers or customers. The press release furthermore mentions two investigations currently being conducted by the ACM as part of its enforcement of the rules of play. One of those investigations concerns whether roofing contractors have been allocating work between themselves in calls for tender and made price-fixing agreements in that regard. The other investigation relates to forbidden price-fixing agreements made by consumer goods manufacturers and retailers.[49]

- On 19 March 2019, the Trade and Industry Appeals Tribunal required the ACM to provide further substantiation for a fine it had imposed on the general partners of a limited partnership under German law (Kommanditgesellschaft, "KG") for its participation in the flour cartel.[50] The ACM had attributed the KG's infringement to the two general partners, since a KG does not have legal personality. The District Court had ruled that the ACM was right to do so, which ruling was appealed by the general partners.

The general partners argued that the District Court had applied an incorrect test regarding the question of attribution. The Court should have assessed whether the partners had had 'decisive influence' on the market behaviour of the undertaking, a test that ensues from European case law. The ACM countered this by arguing that this was only an optional step that concerned the possible attribution of infringement to parent companies, which was therefore irrelevant here. The Tribunal ruled in favour of the general partners, as further investigation into the decisive influence of each of the natural persons was indeed called for in this case, in which control was in fact exercised differently pursuant to an agreement between the partners.

The first ground for appeal thus succeeded, but the second one failed. With the second ground for appeal, the general partners had argued that the ACM should not have denied their hardship request on the grounds that they did not wish to provide access to their (personal) financial situation. The Tribunal ruled that the ACM was indeed entitled to demand access for its assessment of the hardship request, in other words to assess whether the undertaking would likely be bankrupted by the fine. The ACM was right to assume that a rational partner would contribute to payment of the fine, which made this information relevant.

The Tribunal upheld the District Court's decision, ordering the ACM either to further substantiate the fine imposed in respect of each of the general partners or to revoke its fine,

[49] Netherlands Authority for Consumers & Markets, press release of 26 February 2019, "Wat mag wel en niet bij samenwerking tussen ondernemingen".

[50] Decision of the Netherlands Authority for Consumers & Markets (ACM) of 16 December 2010, case 6306 (*Flour*).

depending on the conclusions of further investigation.

Germany

- On 21 January 2019, the Bundeskartellamt said in a press release that the Austrian competition authority and itself had terminated their proceedings against Google Inc. and Eyeo GmbH because the companies had amended the (potentially) anti-competitive 'whitelisting' contract between them.[51] Eyeo offers advertisers the possibility of concluding 'whitelisting' contracts on the basis of which it will exclude certain advertisements from the 'ad-block' process of Eyeo's ad-block programs, which can be integrated into web browsers. The whitelisting contract between Google and Eyeo included additional clauses which, in the Bundeskartellamt's view, restricted Eyeo's possibilities to further develop its products, expand and invest in the market. The amendments that were made by the parties enabled the competition authorities to close the proceedings.

- On 29 January 2019, the Bundeskartellamt imposed fines totalling around EUR 13.4 million on bicycle wholesaler ZEG Zweirad-Einkaufs-Genossenschaft eG (ZEG) and its representatives for fixing prices with 47 bicycle retailers.[52] ZEG has a strong market position in Germany. It is a purchasing cooperative consisting of approximately 960 independent bicycle retailers in Europe, around 670 which are in Germany alone. The price fixing agreements consisted of agreements between ZEG and retailers to the effect that the retailers were not to undercut the minimum sales prices set by ZEG for seasonal bikes. The retailers were not fined because of their secondary role in the cartel in comparison to ZEG.

- On 13 February 2019, the Bundeskartellamt imposed fines on eight magazine lending service providers for concluding allocation of customer agreements.[53] Magazine lending services rent out magazines to customers such as doctors' practices, hairdressers or restaurants which put the rented magazine on display for their customers. The allocation practice of the lending service providers prevented price competition between the services, according to the Bundeskartellamt. The fines amount to approximately three million euros.

United Kingdom

- On 18 March 2019, the UK's Competition and Markets Authority (the "CMA") published a guidance on the functions of the CMA after a 'no deal' Brexit.[54] The guidance describes how a no-deal Brexit will affect the CMA's powers and processes for antitrust and cartel enforcement, merger control and consumer law enforcement. The guidance also provides explanation on how it will treat cases still under review by the European Commission or the CMA in the event of a no-deal Brexit. The guidance will not come into effect unless a no-deal Brexit takes place.

- On 21 February 2019, the UK's Financial Conduct Authority (the "FCA") issued its 'maiden' antitrust infringement decision and accordingly imposed a fine on the companies involved. In its decision, the FCA found that three competing asset management firms, Hargreave Hale Ltd (fined for an amount of £306,300), Newton Investment Management Limited (granted immunity under the competition leniency programme) and River

[51] Bundeskartellamt, Press release of 21 January 2019, "Proceeding against whitelisting contract between Google and Eyeo terminated after amendments to the contract".

[52] Bundeskartellamt, Press release of 29 January 2019, "Fine imposed on bicycle wholesaler ZEG for vertical price-fixing.

[53] Bundeskartellamt, Press release of 13 February 2019, "Eight providers of magazine lending services fined on account of unlawful customer allocation agreements".

[54] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf

and Mercantile Asset Management LLP (fined for £108,600) had breached competition law by sharing strategic information with each other during an initial public offering (IPO) and a placing process. The FCA stated that, by disclosing their respective bidding intentions, the companies were able to adjust their plans accordingly, thereby undermining the process by which prices are set, ultimately having to pay less than they would have if they had actually been competing for the shares. Such behaviour was found to be detrimental to a company seeking an investment through an IPO.

- On 1 March 2019, Fourfront, Loop, Coriolis, ThirdWay and Oakley were fined a combined amount of £7 million by the CMA after admitting being involved in cartel behaviour.[55] The individual fines imposed on the five office refurbishment companies ranged between £4,143,304 (Fourfront) and £7,735 (Coriolis). A sixth company, JLL[56], did not receive a fine for bringing the anti-competitive conduct to the CMA's attention. Following the CMA's investigation the companies admitted having resorted to so-called "cover bidding" in competitive tenders by disclosing the prices they would bid for certain contracts to each other before the bidding took place. A total of 14 contracts had been affected by the collusive bidding according the CMA.

- On 27 March 2019 the CMA announced that it had provisionally found that Associated Lead Mills Ltd, Jamestown Metals Limited, BLM British Lead (H.J. Enthoven Ltd) and Calder Industrial Materials Ltd were in breach of competition law.[57] The CMA has been investigating the alleged cartel since July 2017. In its statement of objections, the CMA alleges that the companies, which together account for about 90% of UK rolled lead supplies, entered into a cartel in order to divide the market amongst themselves. According to the CMA, the cartel did so by colluding on prices, exchanging commercially sensitive information, allocating certain customers and collectively refusing to supply a company whose business could disrupt the market sharing arrangement.

[55] The decision is addressed to all of the following companies: Coriolis Projects Limited, Area Sq Limited, Cube Interior Solutions Limited, Fourfront Group Limited, Fourfront Holdings Limited, Loop Interiors London LLP, Loop Interiors Limited, Oakley Interiors Limited, ThirdWay Interiors Limited and The ThirdWay Group Limited.

[56] Consisting of: Bluu Solutions Limited, Bluuco Limited, Tetris Projects Limited and Jones Lang LaSalle Incorporated.

[57] See the CMA's press release of 27 March 2019.

5

Team

Editors
Hans Bousie
Louis Berger

Authors
Louis Berger
Hans Bousie
Bas Braeken
Sophie van Everdingen
Nathan van der Raaij
Tessel Bossen

Louis Berger is a founding partner of bureau Brandeis. He is an expert in 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 (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 a 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 beef up 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.

Bas Braeken is partner at bureau Brandeis. He is an experienced lawyer in the field of EU competition law and is also a recognised specialist in the field of regulated markets (such as TMT, fintech and mobility). Bas has represented clients in more than a hundred (both administrative law and civil) cases in the field of competition law, both before the (EU) courts and regulators. Bas also often acts as counsel's counsel for specific matters of EU competition law, for example in the context of M&A, for regulatory questions or in contractual disputes. Bas has been recommended by prestigious guides such as Legal500, Chambers & Partners and Who's Who for many years

Sophie van Everdingen is an experienced litigator with a focus on competition law. Before joining bureau Brandeis in September 2016, Sophie worked at the competition law department at 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.

Nathan van der Raaij is associate at bureau Brandeis. He specializes in both the corporate litigation practice and competition law. Nathan is part of the cartel damages litigation team of bureau Brandeis.

Tessel Bossen is associate at bureau Brandeis. She specializes in the commercial

ligitation practice and she is also involved in the cartel damages litigation team of bureau Brandeis.

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.

We are a genuinely independent law firm. We are outspoken about the causes we represent. In order to avoid conflict of interest, we choose not to represent banks, big accountant firms, governmental bodies and supervising authorities.

bureau Brandeis

Sophialaan 8 1075 BR Amsterdam Nederland
+31 (0)20 7606505 info@bureaubrandeis.com
bureaubrandeis.com