

BUREAU BRANDEIS

CARTEL DAMAGES



QUARTERLY REPORT

Welcome to the first bureau Brandeis quarterly report on cartel damages

We have decided to prepare these reports because, though there is quite a supply of information regarding competition law as such, only limited specific information is available on the civil law enforcement of cartel damage claims. At the same time, cartel damages litigation in the Netherlands has shown strong growth in recent years and this deserves the necessary attention. Additionally, these reports allow us to compile relevant information on this field for ourselves.

Given that we are an Amsterdam law firm, the emphasis in these reports will lie on Dutch and international case law regarding cartel damages. We will also be paying specific attention to the procedural law aspects of cartel damages law. Litigation on cartel damages actions regularly involves thorough debates regarding the jurisdiction of the court and the applicable law, such as how to construe the Brussels Ibis Regulation and other successive treaties and regulations.

Our overviews will pay attention to both the case law of the European Court of Justice and of domestic courts. Additionally, we will examine and keep track of relevant decisions of the various competition authorities. It is often the case that decisions by the European Commission or other competition authorities are the precursor to follow on proceedings. And of course we pay attention to the relevant laws and regulations, such as the European cartel damages directive and its implementation in the pending legislative proposal in the Netherlands.

bureau Brandeis is a thoroughbred litigation firm, which makes cartel damages law an excellent fit. We have put together a team of specialists within bureau Brandeis who focus on this area. Moreover, bureau Brandeis has no qualms about showing its colors in this respect: we will only assist parties who have been harmed by cartels. After all, it is in our nature to prefer to side with the challenger.

On behalf of the bB competition law team,

Best regards,

Louis Berger
Hans Bousie
Nammy Vellinga

1 National and international case law on the subject of private enforcement in cartel damages claims

In this section we will elaborate on the litigation developments regarding international and national private enforcement cases.

EU

On 29 February 2016 the General Court of the EU upheld fines imposed by the Commission on members of four freight cartels. In 2012 14 international freight forwarders were fined by the Commission. All freight forwarders appealed for their fines to be reduced or annulled. The only fine reduced by the Court was the fine imposed on UTi Worldwide, as in the calculation by the Commission of the fine the infringement period of UTi's subsidiaries was rounded down. This had not apparently happened in respect of UTi Worldwide, which is why the General Court reduced the fine by € 103.000,-¹

UK

In March 2016 an opt-out class action was launched in the UK. This was the first opt-out class action ever to be launched in the UK. The initiator, a senior citizens association, started the class that seeks compensation from Pride Mobility Products. Pride Mobility Products manufactures mobility products, such as scooters. The Office of Fair Trading ruled that Pride Mobility Products had infringed UK competition rules by prohibiting online retailers from advertising its scooters below a recommended retail price.²

US Supreme Court

On 26 February 2016 Dow Chemical settled the In re Urethane antitrust litigation. The company allegedly was involved in a conspiracy to fix the price of polyether polyol products. In a statement Dow elaborated on the dropping of its appeal:

“ ” *Growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits have changed Dow's risk assessment of the situation. Dow believes this settlement is the right decision for the company and our shareholders.*³

Northern District of California

In the mid-1990s card companies started to issue cards that included EMV chips. EMV chips have a unique signature for each transaction. EMVCo – jointly owned by Visa,

1 Press release of the General Court of the European Union, 'The General Court upholds the fines imposed by the Commission on a number of companies for their participation in cartels in the international air freight forwarding services sector' 29 February 2016 on: < <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160020en.pdf>>.

2 T. Madge-Wyld, 'First opt-out class action launched in the UK' 8 March 2016 on <<http://globalcompetitionreview.com/news/article/40647/first-opt-out-class-action-launched-uk/>>.

3 T. Webb, 'Dow drops US Supreme Court appeal against US \$ 1 billion judgment' 26 February 2016 on <<http://globalcompetitionreview.com/news/article/40582/dow-drops-us-supreme-court-appeal-against-us1-billion-judgment/>>.

MasterCard, UnionPay, JCB, Discover and American Express – managed the compliance standards for chip reading. A class action has been started in the US District Court of the Northern District of California in the San Francisco division on 8 March 2016 by the merchants that adopted the new compliance standards.⁴ The plaintiffs stated that EMVCo declared that merchants would start to have to pay for the transaction rather than the issuing banks if the merchants were unable to reach certain conditions. Among the conditions was the adoption of an EMV chip complaint card reader. The plaintiffs argue that the merchants have paid certain cashbacks that they would not have had to pay if it were not for an illegal agreement between the defendants.⁵ On 8 February 2016 in the US District Court for the Northern District of California San Francisco Division Judge Seeborg awarded the renewed motion by the indirect purchasers for class certification in the optical disk drive antitrust litigation. To secure class certification a two-fold burden needs to be fulfilled. Judge Seeborg states:

“ ” *Indirect-purchaser plaintiffs must demonstrate that defendants overcharged their direct purchasers [...] and that those direct purchasers passed on the overcharges to plaintiffs. In so doing, they must find a way to account for the decision-making of a variety of resellers and manufacturers.*⁶

Eastern District of Pennsylvania

On 2 March 2016 Judge Pratter filed a memorandum in the US District Court for the Eastern District of Pennsylvania that concerned the processed egg products antitrust litigation. In the processed egg products antitrust litigation the parties were asked to express their opinion on the length of their proposed class periods for the shell egg class. Judge Pratter ruled that the cut-off date for purchases by a class would only extend to 2008. The plaintiff had claimed that the conspiracy lasted at least until 2013. In the analysis to extend the proposed class period the plaintiffs failed to account for differences in state regulations of chicken coop sizes between 2008 and 2013. Flock sizes and therefore the number of eggs could have decreased for reasons unrelated to any egg producers' conspiracy.⁷

New York

On 25 January 2016 a motion was filed in the US District court for the Eastern District of New York by a group of 67 claimants in an attempt to receive settlement money. The claimants purchased 'air-shipping services' during the affected period in which the defendants like Korean Air Lines, Singapore Airlines, Cathay Pacific Airways and China

4 United States district court for the northern district of California San Francisco Division on 8 March 2016 on <http://res.cloudinary.com/gcr-usa/image/upload/v1457498042/CreditCardFraudLiabilitycomplaint_cflhfv.pdf>

5 A. Wilts, 'Merchants sue Visa and MasterCard over alleged conspiracy to shift liability' 10 March 2016 on <<http://globalcom-petitionreview.com/usa/article/40662/merchants-sue-visa-mastercard-alleged-conspiracy-shift-liability/>>.

6 US district court for the northern district of California San Francisco In Re optical disk drive antitrust litigation 8 February 2016 on <http://res.cloudinary.com/lbresearch/image/upload/v1455106082/opticaldiskdrive_101116_77.pdf>.

7 US district court for the eastern district of Pennsylvania in Re: Processed egg products antitrust litigation, 3 February 2016 on <http://res.cloudinary.com/lbresearch/image/upload/v1454653236/memoeggs_51116_120.pdf>.

Airlines acted in breach of antitrust laws.⁸ The claimants do not dispute the Air Cargo 4 Settlement Agreement (partial settlement agreements reached with the defendants)⁹ provides compensation for indirect purchasers of air shipping services. Claimants only claim damages regarding those purchases in which they were the consignee and therefore had a direct contractual relationship with the air shippers.¹⁰

Canada

On 16 March 2016 a plaintiffs' firm (Winnipeg firm Boudreau Law) filed a putative class action in Canada against auto parts companies that allegedly are involved in a bid-rigging conspiracy between 2000 and 2010.¹¹

The Supreme Court of British Columbia has ruled in a class proceeding against Microsoft Corporation. The plaintiffs had filed a motion to obtain Canadian Competition Bureau Documents. However, Judge Myers denied access to the documents ruling that the documents are protected by public interest privilege that intends to protect the process of government decision-making. In order to benefit from cooperation, the Canadian Competition Bureau must be able to gather information in confidence.¹²

Australia

On 21 March 2016 the Australian Competition & Consumer Commission appealed a lower court's dismissal in an Air Cargo case. The Full Court of the Federal Court of Australia stated the companies - Air New Zealand and Garuda – acted in breach of the competition laws. The companies had agreed on imposing surcharges on cargo transported from outside Australia to destinations within the country.¹³

2 Developments regarding public law aspects of cartel damages

EU

In its judgment of 10 March 2016 (C-247/14 P) the ECJ annulled a series of information requests the European Commission has sent to cement manufacturers during a cartel probe.¹⁴ The ECJ states in paragraph 39:

8 US District Court for the Eastern District on New York, in Re Air Cargo shipping services antitrust litigation MDL No. 1775 25 January 2016, on <http://res.cloudinary.com/lbresearch/image/upload/v1454081538/air_cargo_payments_290116_1032.pdf>.

9 GCG, 'In re Air Cargo Shipping Services Antitrust Litigation' on: <<http://www.aircargo4settlement.com/main>>.

10 US District Court for the Eastern District on New York, in Re Air Cargo shipping services antitrust litigation MDL No. 1775 25 January 2016, on <http://res.cloudinary.com/lbresearch/image/upload/v1454081538/air_cargo_payments_290116_1032.pdf>.

11 A. Wilts, 'Plaintiffs firm files auto parts cartel suit in Manitoba' 17 March 2016 on <<http://globalcompetitionreview.com/news/article/40720/plaintiffs-firm-files-auto-parts-cartel-suit-manitoba/>>.

12 Supreme court of British Columbia, Pro-Sys Consultants Ltd. v. Microsoft Corporation 2016 BCSC 97, 22 January 2016, on <<https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc97/2016bcsc97.html?searchUrlHash=AAAAAQALIm1pY3Jvc29mcmIAAAAAQ&resultIndex=5>>.

13 Federal Court of Australia, Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd [2016] FCAFC 42 with file numbers NSD 1330 of 2014 NSD 1331 of 2014 on <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2016/2016fcafc0042>>.

14 European Court of Judgment, C-247/14 P, 10 March 2016 on <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d585a2ebado70f457b8ced9ea2a19f7807.e34KaxiLc3qMb40RchoSaxuSbN5o?text=&docid=174928&pageIndex=o&doclang=en&mode=req&dir=&occ=first&part=1&cid=430886>>.

“ ” *[...] an excessively succinct, vague and generic – and in some respects, ambiguous – statement of reasons does not fulfil the requirements of the obligation to state reasons laid down in Article 18(3) of Regulation No 1/2003 in order to justify a request for information which, as in the present case, occurred more than two years after the first inspections, and even though the Commission had already sent a number of requests for information to undertakings suspected of involvement in an infringement and several months after the decision to initiate proceedings. Given those factors, it must be stated that the decision at issue was adopted at a time when the Commission already had information that would have allowed it to present more precisely the suspicions of infringement by the companies involved.*

On 3 March 2016 the Commission was blocked by the ECJ from publishing confidential leniency information provided by the whistleblower in the hydrogen peroxide cartel. The Commission blocked the publication until the ECJ decides on the merits.¹⁵

Australia

On 10 February 2016 the Federal Court of Australia rejected a claim that has been brought by the Australian Competition and Consumer Commission (“ACCC”). The claim entailed an alleged production cartel, however the Federal Court stated the ACCC had failed to prove its case. Judge White stated in paragraph 78:

“ ” *However, in the case of an alleged attempt, what must be established, relevantly, is that the respondents engaged in conduct (took a step towards) inducing others to reach an agreement or understanding that at least one or more would limit their production or supply.*

The ACCC failed to show the existence of such conduct and the claims were dismissed.¹⁶

3 Commission probes

On 27 January 2016 the Commission imposed fines of € 137,789,000 on Melco (Mitsubishi Electric) and Hitachi. These two companies participated with another firm, Denco, in a cartel for alternators and starters, which are two important components of car engines. The companies acted in breach of the EU cartel prohibition. Denco is a leniency applicant and was not fined by the Commission. The three Japanese car parts manufacturers coordinated prices and allocated customers and projects

¹⁵ T. Madge-Wyld, ‘ECJ temporarily prohibits publication of leniency information’ 3 March 2016 on <<http://globalcompetitionreview.com/news/article/40618/ecj-temporarily-prohibits-publication-leniency-information/>>.

¹⁶ Federal Court of Australia, Australian Competition and Consumer Commission v Australian Egg Corporation Limited [2016] FCA 10 February 2016, on <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0069>>.

regarding to alternators and starters. They acted in breach of the cartel prohibition for more than five years, from September 2004 until February 2010.¹⁷

The Netherlands' Authority for Consumers and Markets ('ACM') has probed a cartel as well. On 23 March 2016 the ACM imposed fines of EUR 12,5 million on cold-storage firms. The ACM states that the companies had agreed on pricing arrangements and shared customers. The companies were also engaged in merger talks with each other and exchanged sensitive commercial information.¹⁸ This exchange of information took place between 2006 and 2009.

4 Commission raids and preliminary investigations

On 10 February 2016 the Commission reportedly is considering whether to open a cartel investigation into possible rigging of the government-backed bond market and has sent questionnaires to the industry's main players to gather more information.¹⁹

On 17 March 2016 the Commission announced raids on several companies that operate in the markets for industrial paper sacks and craft paper. The Commission searched premises of several companies but the Commission did not name the companies yet.²⁰

5 Some final notes

In the first quarter 2016 there seemed to be some friction between the European Court of Justice and the European Commission. That is not only visible in the overturning by the General Court of the European Commission decision to fine the airlines in the so called Air Cargo case²¹, but is also apparent from the ECJ criticizing the Commission in the Cement case.²² A similar quarrel between the competition authority and the national court, is found in Australia.²³ It seems that the competition authorities in general are instigated by the courts to substantiate their case to the fullest extent.

17 Press release European Commission, 'Antitrust: Commission fines car parts producers € 137 789 000 in cartel settlement' 27 January 2016 on <http://europa.eu/rapid/press-release_IP-16-173_en.htm>.

18 News ACM, 'ACM imposed fines of EUR 12,5 million on cold-storage firms' 23 March 2016.

19 M. Briggs, 'Fresh financial market probe by the EU' 10 February 2016 on <<http://globalcompetitionreview.com/news/article/40491/fresh-financial-market-probe-eu/>>

20 T. Madge-Wyld, 'DG Comp raids paper companies' 17 March 2016 on <<http://globalcompetitionreview.com/news/article/40717/dg-comp-raids-paper-companies/>>

21 Press release of the General Court of European Union, 'The General Court annuls the decision by which the Commission imposed fines amounting to approximately € 790 million on several airlines for their participation in a cartel on the airfreight market' Luxembourg 16 December 2015 on <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150147en.pdf>>.

22 European Court of Judgment, C-247/14 P, 10 March 2016 on <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d585a2ebado70f457b8ced9ea2a19f7807.e34KaxiLc3qMb40RchoSaxuSbN5o?text=&docid=174928&pageIndex=o&doclang=en&mode=req&dir=&occ=first&part=1&cid=430886>>.

23 Federal court of Australia, Australian Competition and Consumer Commission v Australian Egg Corporation Limited [2016] FCA 10 February 2016, on <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0069>>.