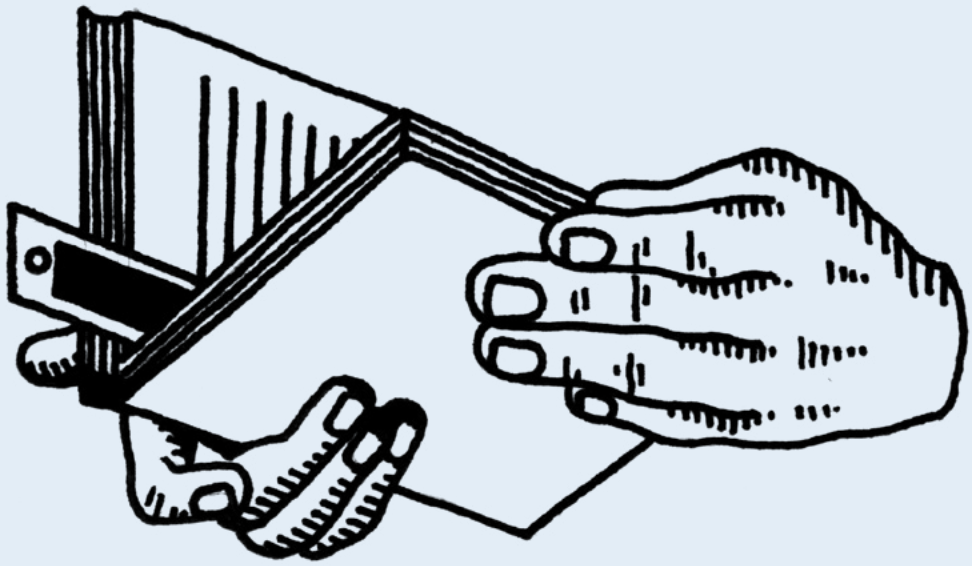
BUREAU BRANDEIS

CARTEL DAMAGES



QUARTERLY REPORT II

Welcome to the second bureau Brandeis quarterly report on cartel damages

This is the second bureau Brandeis quarterly report on the negotiations in the area of cartel damage litigation. In this summary we concentrate on follow-on and stand-alone cases in relation to cartel damage cases as well as damage caused by abuse of dominant position in the market.

We focus mainly on Europe and the United States. Within Europe, the jurisdictions where most of the cases take place (the UK, Netherlands and Germany) receive the most attention. We only touch on negotiations outside Europe and the United States if we deem them to be relevant. For example, if reference is made to European case-law, such as in the case in Israel, which is discussed below under 'Developments regarding public law aspects of cartel damages'. In that case, we see that Israel's Central District Court deviates from the Israeli case law rendered so far, by also considering excessive pricing as a form of abuse of a dominant position in the market.

On the other hand, we mention the case of South Africa's Supreme Court of Appeal under 'Private enforcement in cartel damages claims, case-law' to show that leniency rules are not applied in the same way everywhere in the world. In Europe, parties that use the leniency programme are not immune from follow-on claims, which apparently is the case in South Africa. This is a discussion that is currently also taking place in Europe. The use of the leniency programme is very important for the Commission's policy as it increases the ability to round up cartels. On the other hand, cartel participants have noticed that this may make them more vulnerable to follow-on claims, which significantly reduces their enthusiasm to use such programmes.

South Africa also shows up in another way. At 'Developments regarding public law aspects of cartel damages' we see that President Zuma has promulgated legislation to facilitate the enforcement of the competition legislation. This legislation has introduced the possibility to give de facto persons in charge prison sentences of as much as 10 years.

We trust that this summary is of use to you. We would welcome any additions to or comments on this message.

Hans Bousie, Louis Berger and Nammy Vellinga

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Amsterdam, August 2016

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1

Private enforcement in cartel damages claims, case-law

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

United Kingdom

- On 12 April 2016, in the case between Socrates Training Limited and The Law Society of England and Wales, Socrates Training Limited filed a stand-alone claim for damages against The Law Society of England and Wales before the Competition Appeal Tribunal. The Law Society is the professional body for solicitors in England and Wales. The Law Society has developed a number of accreditation schemes for firms of solicitors, among others the so-called Conveyancing Quality Scheme ('CQS'). Both parties offer online anti-money laundering training for law firms on a commercial basis and also online training which helps property lawyers to avoid mortgage fraud and other financial crime. The Law Society is allegedly abusing its dominant position in the market for the provision of quality certification. Socrates alleges that The Law Society requires firms to buy both their anti-money laundering training and mortgage fraud training to maintain its CQS accreditation.[1]

On 21 June 2016 in a case management conference Mr Justice Roth capped the costs that the party that succeeds in its claim may recover from the other party in this case. Mr Justice Roth considered that the defence's assessment was not proportional. The Law Society changed lawyer, which caused the costs to turn out significantly higher. Mr Justice Roth did not agree with the assessment and considered that it was excessively high, also in view of the other party's low annual turnover.[2]

- The European Court of Justice ('ECJ') confirmed in 2014 that MasterCard violated competition law by using multilateral interchange fees on cross-border payments. In the case between Deutsche Bahn AG & Others and MasterCard Inc., MasterCard Int. Inc. and MasterCard Europe SPRL, Deutsche Bahn is one of the claimants that filed a claim for damages. MasterCard and Deutsche Bahn are parties to an exclusive jurisdiction agreement conferring jurisdiction on the courts and tribunals of England and Wales to hear the follow-on claims arising from the European Commission's (Commission) decision.

In 2012 Deutsche Bahn filed a claim for damages at the High court of England and Wales. In October 2015 Deutsch Bahn also filed a parallel claim for damages at the Competition Appeal Tribunal. MasterCard filed an application at the Competition Appeal Tribunal to decline jurisdiction and have the claim 'struck out as an abuse of process on the basis the claimants have made exactly the same claim in the High Court'.[3] The parallel claim had been brought before the Tribunal for the event the claim filed with the High Court would be time-barred. The Competition Appeal Tribunal dismissed the application for reasons to be set out in a written judgment to be handed down in due course.[4] This topic will be continued in Q3.

1. CAT, notice of a claim for damages under section 47a of the Competition act 1998, Case no. 1249/5/7/16, 12 April 2016.
2. 'Costs capped in CAT Socrates fast-track lawsuit' GCR 21 June 2016.
3. Matthew Cook, 'Transcript of hearing CAT (abuse of process point)' 26 April 2016.
4. CAT, Deutsche Bahn AG and Others v MasterCard incorporated and Others, 26 April 2016.

- On 29 April 2016, Deutsche Bahn and Peugeot argued - in the same case - before the Competition Appeal Tribunal that foreign limitation periods should apply to claims heard before the specialized tribunals. The Competition Appeal Tribunal handed down a judgment in July that allows, if a follow-on claim is governed by foreign law, that the foreign limitation period also applies. We will discuss this judgment in Q3.[5]
As an aside: Directive 2014/104/EU[6] instructs the EU Member States to determine the moment when the limitation period commences, the length of the period, and the circumstances in which the period is interrupted or suspended. The limitation period to claim compensation should be at least five years. After the implementation of the Directive, when the foreign laws of another EU Member State apply to the claim, the regulations governing the foreign limitation periods will need to be brought in line with the time limits as cited in the Directive. This will ensure greater legal certainty as regards the limitation periods for bringing an action for damages.[7, 8]

- In the case between Unwired Planet International Ltd. and Huawei, Samsung & Others Mr Justice Birss (Chancery Division of the High Court (Patents Court)), refused on 29 April 2016 to transfer the case to the Competition Appeal Tribunal. Samsung filed an application and asked that the competition law issues in the non-technical trial be transferred to the Competition Appeal Tribunal. Mr Justice Birss ruled that to split the issues in a contractual and competition aspect would create a division in the handling and decision-making process. He ruled it not to be practical as the tribunal constantly would have to be mindful about the decisions that are made.[9]

On 19th October 2011 the Commission delivered a decision[10] in which it found that certain manufacturers of glass had engaged in a cartel (Glass claim). On 5th December 2012 the Commission delivered another decision[11] in which it determined that there has been a cartel operating in the Cathode Ray Tube Market (CRT cartel). Iiyama is a Japanese manufacturer of computer monitors and has purchased parts from the cartel participants in the aforementioned Commission decisions. Iiyama therefore filed claims for damages at the High Court of Justice regarding both cartels. The ruling of 23 May 2016 in the case between Iiyama Benelux B.V., Iiyama Deutschland GMBH & Others and Schott, Samsung, LG, Philips & Others, struck out both claims at a preliminary stage of the proceedings. As for the Glass claim, Mr Justice Mann ruled that the claim was different from what Iiyama argued in its initial filings and therefore was struck out. As for the CRT cartel, Mr Justice Mann ruled that the CRT cartel's conduct fell outside of European jurisdiction. The sales of the products which ended up in Iiyama products were all made in Asia.[12] Moreover, the cartel relating to cathode ray tubes and the cartel relating to cathode ray tube glasses took place in Asia, and in any case not in the EU. However, the Commission considered that the cartels ultimately did affect consumers in the EU. The reason being that Iiyama sold its monitors in the EU. As regards the private claim, according to Mr. Justice Mann there is no connection with the EU because Iiyama is a Japanese company that purchased parts from cartels that took place in Asia. Iiyama's lawyer cannot agree with this argument and considers that the effect of the agreement is global so that the compensation claim can also be brought in the UK.[13]

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5. CAT, Deutsche Bahn AG and Others v MasterCard Incorporated and Others – transcript of hearing (Limitation), 29 April 2016.
6. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
7. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, article 10.
8. Article 10 sub *2*, *3* and *4* entail:
   2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
      (a) of the behaviour and the fact that it constitutes an infringement of competition law;
      (b) of the fact that the infringement of competition law caused harm to it;
      (c) [and] the identity of the infringer.
   3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
   4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.
9. The High Court of Justice (Patents court), Unwired Planet International Ltd. against Huawei Technologies Co. Ltd. & ors, Approved judgment of 29 April 2016.
10. European Commission, Decision Case Comp/39605-CRT Glass, 19 October 2011.
11. European Commission, Decision Case Comp/39437 – TV and Computer Monitor Tubes, 5 December 2012.
12. The High Court of Justice, Iiyama Benelux BV & Ors v Schott AG & Ors, 23 May 2016.
13. T. Webb, 'Iiyama arguments turn to causation' GCR 26 May 2016.

The Netherlands

- On 29 June 2016, in the case between Vestel et al. and Philips, Samsung, LG, Technicolor et al. & TTD International, the Court of Oost Brabant answered the question as to whether claims against a number of foreign respondent parties were sufficiently consistent with the claims against the Dutch defendant. Earlier, on 5 December 2012, the Commission had found two separate cartel infringements: (i) a cartel relating to Colour Display Tubes (cathode ray tubes for computer monitors (CDT cartel)), and (ii) a cartel relating to Colour Picture Tubes (cathode ray tubes for television screens (CPT cartel)). Vestel considers it has suffered damage by the cartels, and has brought action for damages against Philips, Samsung, LG Electronics, Technicolor, and TTD/TDP.

The legal procedure was brought before the Dutch court, with Philips acting as the anchor defendant. According to Vestel, the Dutch court has jurisdiction to hear the case against Philips established in the Netherlands under Article 2 of Council Regulation (EC) No. 44/2001. Vestel considers that its claims against the other defendants are consistent with claims against Philips, and argues that the Dutch court is therefore entitled to take cognisance of these claims under Article 6 of Council Regulation (EC) No. 44/2001 However, Samsung Hungary, LG Wales, Technicolor USA, and TTD/TDP consider that the Dutch court has no jurisdiction because there is insufficient connexity between Vestel's claims against them and Vestel's claims against Philips.

The parent companies of Samsung Hungary, LG Wales, Technicolor USA, and TTD/TDP are addressees of the Commission's decision. There is no dispute about the existence of the requisite connection between the parent companies and the anchor defendant. The subsidiaries have not demonstrated that they determine their market conduct independently. Proper administration of justice requires simultaneous treatment of the above-mentioned claims, in the course of which the defendant could also have predicted that the defendants would be summoned before the Dutch court. However, this is not the case in Vestel's claims against Technicolor USA. Technicolor USA is neither an addressee in the Commission's decision nor named as an undertaking subject to proceedings in the Commission's decision. Vestel has made insufficient statements to be able to determine whether there is sufficient consistency with the claims against the anchor defendant Philips.[14]

- On 25 May 2016, the Court of Rotterdam ruled on a reliance on an arbitration clause in the case between Stichting De Glazen Lift ('DGL foundation') and Kone & Others ('lift manufacturers'). The Commission had previously established by decision of 21 February 2007 that lift manufacturers had infringed the ban on restrictive agreements.
The DGL foundation has been established to look after the interests of housing corporations. The lift manufacturers consider that the court should decline jurisdiction in DGL's claims because the terms of delivery would include an arbitration clause.
The arbitration clause of the General Terms and Conditions of Sale and Delivery reads:

> *"Any dispute between the contractor and the client shall be settled, with the exclusion of the ordinary courts, by the Arbitration Board for the Metal Industry and Commerce, The Hague."*

According to DGL, the claims are not based on agreements that are subject to an arbitration clause, and, therefore, the claims are not within the scope of the arbitration clause. The parties were made aware in the interim judgment of 6 February 2016 of the judgment of the Court of Justice of the European Union of 21 May 2015 (ECLI:EU:C:2014:140). In that judgment, the Court of Justice held:

> *"68. A choice of forum clause can only apply to disputes that have arisen or which may arise in connection with a particular legal relationship, which means that a choice of forum clause extends only to disputes arising in the legal relationship on the basis of which it was agreed [...].*
> *69. [...] a clause that makes an abstract reference to disputes arising in contractual relations does not apply to a dispute in which a co-contractor becomes involved on the basis of an obligation in tort on the ground that he participated in an illegal competition agreement."*[15]

14. Rechtbank Oost-Brabant 29 juni 2016, ECLI:NL:RBOBR:2016:3484.
15. This is a free translation, Curia.EU does not appear to have published an English version at the time of writing.

Although the arbitration clauses are not choice of forum clauses, the aforementioned arbitration clauses make an abstract reference to disputes arising from contractual relationships. The Court therefore ruled:

> *"[...] that the arbitration clauses can only apply to disputes which at the time of agreeing to these terms, the housing corporations could have predicted, and such only in direct claims - and therefore not in the cross claims in which one or more agreements exist between the disadvantaged housing corporation and the lift manufacturer concerned."*

This leads to the conclusion that the arbitration clauses do not apply and that the Court has jurisdiction to hear the claims.[16]

USA

- In 2013 Judge Naomi Buchwald delivered a ruling that private plaintiffs suing for damages from the rigging of the London Interbank Offered Rated lacked antitrust injury.[17] The US Court of Appeals (Second Circuit) overturned the ruling in the LIBOR-based financial instruments antitrust litigation. Judge Jacobs delivered an opinion in which he stated that (i) horizontal price-fixing constitutes a *per se* antitrust violation; (ii) a plaintiff alleging a per se antitrust violation need not separately plead harm to competition; and (iii) a consumer who pays a higher price on account of horizontal price-fixing suffers antitrust injury.[18]

- In the case between The Boston Retirement System and Bank of America & Others, The Boston Retirement System brought a class action on 18th May 2016 against Bank of America, Credit Agricole, Credit Suisse, Deutsche Bank and Nomura International as well as against those Bank's former employees Hiren Gudka, Amandeep Singh Manku, Shailen Pau and Bhardeep Singh Heer. The plaintiff is concerned that the defendants have colluded and fixed the prices of supranational, sub-sovereign and agency ('SSA') bonds that were sold to and purchased from investors in the secondary market.[19]

- In May 2016 Judge Lucy Kohl certified a class in the animation workers antitrust litigation against DreamWorks, ImageMovers, Lucasfilm, Pixar and Disney. A certified class makes it possible to make a joint claim, resulting in advantages such as efficiency and cost savings. Former employees sued the companies because they accuse the defendants of being engaged in a conspiracy to fix and suppress employee compensation and to restrict employee mobility.[20] The defendants filed a petition for permission to appeal the class certification on 9 June 2016. The defendants alleged that class certification may not be appropriate as the employees became aware of the alleged anticompetitive conduct at different times and their claims do not share a fraudulent concealment.[21]

- On 25 May 2016 a group of indirect purchasers of Korean ramen noodle manufacturers filed for class certification in the Korean ramen antitrust litigation. The ramen noodle manufacturers successfully raised the price of Ramen Products at least 6 times over an 8-year period. The plaintiffs seek to certify, pursuant to rule 23 of the Federal Rules of Civil Procedure the following damages and injunctive classes: damages class, alternative damages classes and an injunctive class.[22]

- The US appeals court for the Second Circuit overturned a $ 7 billion interchange settlement that was reached in the Payment card interchange fee and merchant discount litigation between plaintiffs and Visa and MasterCard. Counsels were assisting plaintiffs with opposing interests in the action. The appeals court states:

> *"the conflict is clear, between the former which would want to maximize damages for past harm,*

16. Rechtbank Rotterdam 25 mei 2016, ECLI:NL:RBROT:2016:4164.
17. P. Guniganti, 'Libor rigging is a per se violation, US appeals court rules' GCR 24 May 2016.
18. US Court of Appeals for the Second Circuit, In Re: LIBOR-Based Financial Instruments Antitrust Litigation, 23 May 2016.
19. United States District Court Southern District of New York, 'Boston retirement system, on behalf of itself and all others similarly situated, Plaintiff, vs. Bank of America & others', 18 May 2016.
20. United States District Court Northern District of California (San Jose Division), Order granting-in-part and denying-in-part plaintiff's motion for class certification, 'Robert A. Nitsch, et al., v Dreamworks Animation KSG INC. et al.' 25 May 2016.
21. United States Court of Appeals for the ninth circuit, In Re: Animation workers antitrust litigation, 6 June 2016.
22. United States District Court Northern District of California (San Francisco division), In Re: Korean Ramen Antitrust litigation, 'Indirect-purchaser plaintiffs' notice of motion and motion for class certification; memorandum of points and authorities in support thereof', 25 May 2016.
23. P. Guniganti, 'US appeals court overturns US $7 billion interchange settlement' GCR, 30 June 2016.

and the latter, which would want to maximize restraints on Visa's and MasterCard's rules to prevent future harm."[23]

- On 4 May 2016 a group of plaintiffs reached a settlement in the ISDAfix antitrust litigation of the amount of $324 million with seven major banks that allegedly manipulated the ISDAfix rate. The seven major banks will also supply the group plaintiffs with transaction data, documents, proffers and witness interviews to back the ongoing litigation of the group of plaintiffs against the remaining banks.[24]

- On 19 May 2016 the final settlement was reached in the Air Cargo Shipping Services antitrust litigation with Air India. Air India has agreed to pay $12.5 million to direct purchasers[25] of air cargo shipping services.[26]

South Africa

- In April 2016 a settlement was reached in the case between South African food manufacturer Premier FMCG ('Premier') and civil society organizations & consumers.[27] Premier allegedly was involved in a bread cartel that ran from late 1990s until 2006. Premier was the successful leniency applicant in 2007 and a lower court decided that Premier therefor was protected from follow-on claims. The settlement has now ended the opportunity for the constitutional court to decide on the status of Premier against follow-on claims.[28]

In the EU a leniency applicant is not immune to private follow-on claims. The documents that the leniency applicant submits in regard to its leniency application are well-protected by the Directive.[29] On 21 July 2016 Advocate General Szpunar delivered a landmark opinion on leniency programmes, which we will discuss thoroughly in Q3.

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24. A. Wilts, 'Group of banks reach settlement in ISDAfix litigation' GCR, 5 May 2016.
25. Plaintiffs consist of Class Representatives Benchmark Export Services, FTS International Express, Inc., R.I.M. Logistics, Ltd., Olarte Transport Service, Inc., S.A.T. Sea & Air Transport, Inc. and Volvo Logistics AB.
26. United States District Court for the Eastern District of New York, In Re: Air Cargo Shipping services antitrust litigation, 19 May 2016.
27. Claimants consist of The Black Sash Trust, the Congress of South African Trade Unions, the Children's Resources Centre, the National Consumer Forum.
28. T. Webb, 'Premier settles South Africa bread cartel claims' GCR, 16 May 2016.
29. Article 6 sub 6 Directive 2014/104/EU: "Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions."

2

Developments regarding public law aspects of cartel damages

European Union

- On 28 April 2016 the Commission announced it is seeking feedback on commitments by ISDA and Markit on credit default swaps.[30]

Chile

- In December 2014 Chile's National Economic Prosecutor launched an investigation into companies that produce tissue products. In March 2015 one of the investigated companies applied for leniency. The Economic Prosecutor has requested full immunity for the leniency applicant. Pending the outcome of the case, the criminal prosecutor has requested the National Economic Prosecutor to provide it with the company's confidential information. On 7 April 2016 the Santiago Court of Appeals stated that the Chile's National Economic Prosecutor may only hand over information obtained from leniency applications to criminal prosecutors when it is in line with the confidentiality standards in Chile's competition laws.[31]

Israël

- In April 2016 an Israeli court has certified the first excessive pricing class action, as dairy producer Tnuva charged excessively high prices for cottage cheese. The court created a broader interpretation of the Israeli's law on abuse of dominance by connecting to the European approach where excessive pricing may be considered abuse of dominance. The usual narrow approach of Israel prohibits unfair pricing. Unfair pricing includes predatory pricing, but excessive pricing was excluded. Two weeks after the Israeli court opened the door for a broader approach the Israeli's antitrust authority said it will reconsider whether or not to enforce against excessive pricing.[32]

South Africa

- On 22 April 2016 President Jacob Zuma of South Africa has approved legislation that criminalizes cartels. From the 1st of May, directors or managers that caused their companies to be in a cartel could be fined up to 500.000 rand (€ 40.000) and face up to 10 years imprisonment.[33]

30. European Commission press release, 'Antitrust: Commission seeks feedback on commitments by ISDA and Markit on credit default swaps', 28 April 2016 Brussels.
31. S. Lalli, 'Chilean court denies criminal prosecutor tissue-paper evidence' GCR, 4 April 2016.
32. T. Madge-Wyld, 'Israel re-examines excessive pricing enforcement' GCR, 21 April 2016.
33. S. Lalli, 'South Africa criminalises cartels' GCR, 22 April 2016.

3

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

• On 6th April 2016, the Commission announced that Spanish canned and fresh vegetable company Riberebro participated in a cartel from 10 September 2010 until 28 February 2012. The company participated in a cartel with Bonduelle, Lutèce and Prochamp. The companies exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers among themselves. The Commission probes Riberebro with a fine of € 5 194 000.[34]

• On 6 April 2016 the Commission amended the fine for Société Générale for participating in the EURIBOR cartel. After the Commission imposed a fine on Société Générale, it appealed the decision of the Commission on the ground that the Commission did not use the correct value of sales data. Hereafter the Commission has reduced the fine from € 445.9 million to € 227.7 million and Société Générale dropped the appeal.[35]

• On 19 April 2016 a summary of the decision, the opinion of the Advisory Committee, the Final Report of the Hearing Officer and a non-confidential version of the decision in cartel case Denso, Melco and Hitachi were published by the Commission. This does not concern a new case, just the publication of existing documents, which now may be consulted through http://ec.europa.eu/competition/cartels/what_is_new/news.html.

• On 2 June 2016 the General Court (GC) upheld a fine imposed on Moreda-Riviere Trefilerías, Trefilerías Quijano, Trenzas y Cables de Acero and Global Steel Wire. The steel makers appealed the decision of the Commission of 30 June 2010[36] as they disagreed with the Commission that found that the companies constituted a single economic unit and should be held responsible for the single and continuous infringement that was the steel cartel. The GC rejected all of the companies' arguments and found that they constituted a single economic entity:

> *" (i) the four companies were united by stable and close structural links during the entire period of the infringement; (ii) the argument that they acted independently on the market is inadequately substantiated; (iii) they were perceived by the other members of the cartel as a single*

34. European Commission – press release, 'Antitrust: Commission fines Riberebro €5.2 million for participation in canned mushrooms cartel', 6 April 2016 Brussels.
35. European Commission press release, 'AMENDED – Antitrust: Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry' 4 December 2013 Brussels (amended 6 April 2016).
36. Commission Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.344 — Pre-stressing steel) ('the initial decision').

competitor; (iv) they had staff in common; and (v) the allocation of tasks between them and the manner in which that allocation developed demonstrate a coherent strategy for optimising resources for the production and sale of pre-stressing steel."[37]

- On 25 May 2016 the Commission fined Pometon S.p.A. for acting in breach of the European cartel prohibition. The Italian abrasives producer allegedly coordinated steel abrasives prices in Europe for four years. The Commission imposed a fine of € 6 197 000.[38]

- On 9 June 2016 the ECJ rejected three asphalt makers' appeals against the fines the Commission imposed on them.[39]

- On 16 June 2016 the ECJ rejected an appeal by Evonik Degussa GmbH and AlzChem AG against the fines the Commission imposed on them. Evonik and AlzChem are being held liable for SKW Stahl-Metallurgies' participation in the calcium carbide cartel.[40] The ECJ ruled that the appellants as a parent company had failed to demonstrate that they did not actually exercise a decisive influence over the commercial policy of SKW.[41]

- In 2009 the Commission fined producers of heat stabilizers for their participation in a cartel. The fines imposed on ACW, Chemson and GEA were amended in 2010. The Commission exceeded the ceiling of 10% by calculating the fine for ACW. In July 2015 the GC annulled the 2010 GEA decision as it found GEA had not had a possibility to submit its views before the Commission adopted its amended decision. On 29 June 2016 the Commission has re-adopted the amending decisions on the heat stabilizers cartel after providing the parties with the possibility to submit their views.[42]

- The Commission requested feedback from interested third parties in its current antitrust proceedings into restrictions that affect cross border provision of pay TV services. Paramount Pictures has offered commitments in order to act in line with article 101 of the Treaty on the Functioning of the European Union.[43]

- On 6 June 2016, the Commission carried out a series of unannounced dawn raids at the premises of natural gas companies in Romania. The Commission suspects that certain companies entered into agreements in breach of European competition law.[44]

37. GC EU press release No. 57/16, 2 June 2016 Luxembourg.
38. European Commission press release, 'Antitrust: Commission fines Pometon € 6.2 million for participation in steel abrasives cartel' IP/16/1907, 25 May 2016 Brussels.
39. ECJ 9 June 2016 Case C-608/13 P.
40. European Commission, 'Antitrust: Commission fines suppliers of calcium carbide and magnesium based reagents over € 61 million for price fixing and market sharing cartel' IP/09/1169, 22 July 2009 Brussels.
41. ECJ 16 June 2016 Case C-155/14 P ECLI:EU:C:2016:446, paragraph 36.
42. European Commission Daily News, 'Antitrust: Commission re-adopts two amending decision on heat stabilisers cartel', 29 June 2016.
43. M. Briggs, 'EU puts Paramount's geoblocking commitments to the market' GCR, 25 April 2016.
44. Reuters, 'Update 2-EU regulators raid Romania's Romgaz, Trransgaz, OMV Petrom', 7 June 2016.

4

Opinion

- US law professor Spencer Weber Waller is a professor at Loyola University Chicago School of Law and Faculty director of the Institute for Consumer Antitrust Studies. In May 2016 he spoke in London and said that opt-in classes have been ineffective and opt-out mechanisms are much more desirable for effectively enforcing small claims.[45]

- Senior US department of Justice official Brent Snyder stated in April 2016 that antitrust advisors should take into account the possibility that a company does not receive immunity as a leniency applicant in a criminal procedure. By acting in breach of antitrust regulation, other regulations may be broken as well. The antitrust immunity cannot always be used by the leniency applicant in criminal matters. Snyder therefore advises to consider the nature of the crime before applying for leniency.[46]

45. T. Webb, 'Weber Waller: opt-out regimes necessary for effective enforcement of small claims' GCR, 6 May 2016.
46. R. Knox, 'Snyder: Leniency applicants should consider the nature of the crime' GCR, 7 April 2016.

5

Final remarks

In some cases the competition authorities or the courts take excessive measures.

United Kingdom & Ireland

- In the Air Cargo procedure before the Court of Appeal of England and Wales, Mr Justice Peter Smith asked to be excused in July 2015. The reason for this was that the judge did not appear to be unbiased. After a flight with British Airways (one of the parties involved in the Air Cargo procedure), Smith's luggage failed to arrive. Following this, he wrote a letter to British Airways in which he mentioned what his role was in the Air Cargo procedure.

- The Irish Competition and Consumer Protection Commission ('CCPC') seized private emails during a dawn raid in 2015 of Irish Cement premises. On 5 April 2016 the High Court of Ireland prevented the CCPC from making use of the documents as the emails could also contain private information and information unrelated to the investigation. By seizing the information the CCPC acted beyond its powers. The CCPC is prevented from using the information until it agrees with Irish Cement on a way to identify and return the unrelated private information.[47]

India

- On 18 April 2016 the Indian Competition Appellate Tribunal stated that the Competition Commission of India has violated the defense rights of IndiGo Airlines, Jet Airways and SpiceJet. The three companies were fined over an alleged fuel surcharge cartel but have not had a chance to respond to the conclusion of India's Competition Commission before it issued the fines. Therefore the fines were thrown out.[48]

47. T. Healy, 'Seized CRH information cannot be used in competition authority probe' Independent.ie, 5 April 2016.
48. T. Webb, 'Indian air cargo fines overturned' GCR, 19 April 2016.

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