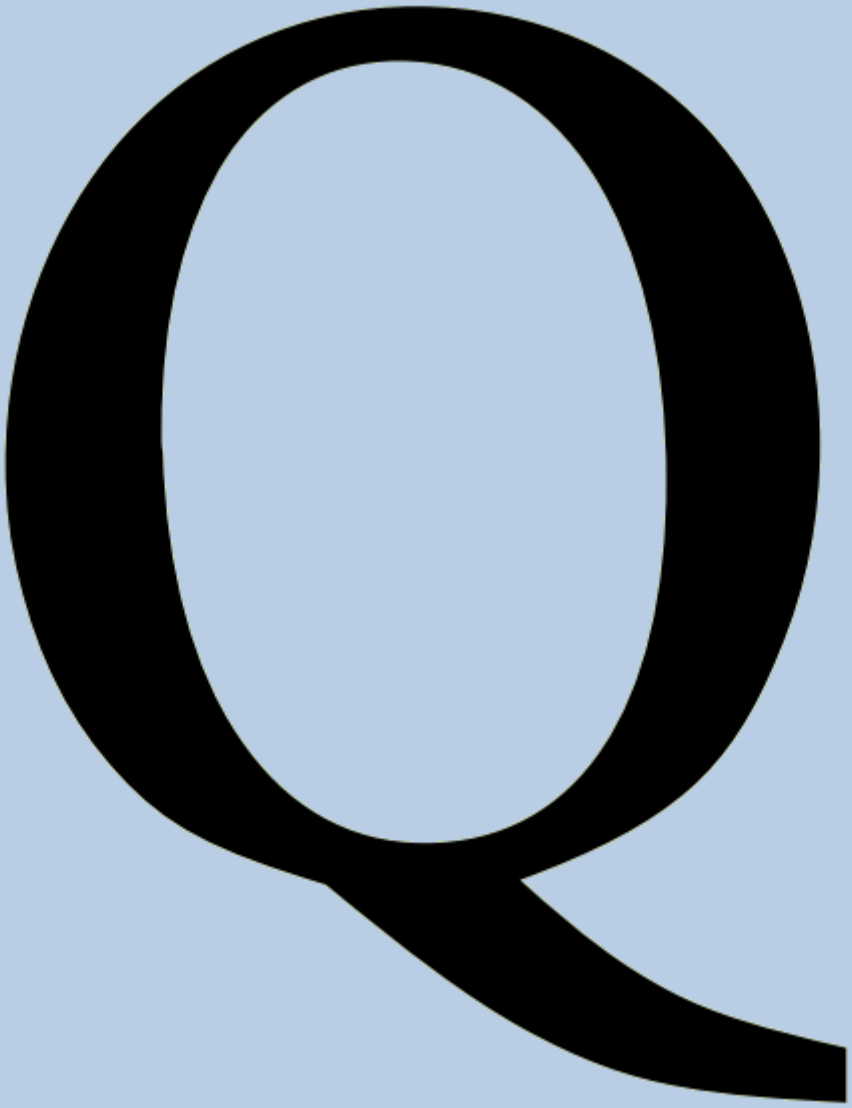
BUREAU BRANDEIS

CARTEL DAMAGES QUARTERLY



Q2 2019

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

We present to you our report for the second quarter of 2019. In this edition of Q it becomes apparent that various cases are picking up speed. Almost every month now something occurs that provides for a clearer picture of cartel damage in general. Which defences have a chance of succeeding and which ones do not? How do courts deal with practical objections? Let us start with the latter question. On 1 May of this year, the District Court of Amsterdam rendered judgment in the Air Cargo case, in which it ruled that the questions at issue are governed by Dutch law. As is known, the Air Cargo case concerns a multitude of claims with a multitude of international connecting factors and the District Court was faced with the question of whether it should then declare the laws of possibly scores of jurisdictions to be applicable to the claims. Referring to *effet utile*, the principle of effectiveness and efficiency, the District Court held that Dutch law should be opted for. On that same day, the District Court of Amsterdam rendered another judgment in which it declared that it had jurisdiction – contrary to Justice Rose on 4 October 2017 in the Emerald proceedings in the UK – to give a ruling on the applicability of Article 101(1) of the TFEU for the period prior to 1 May 2004. However, in order to ensure the uniformity of case law in European proceedings, the District Court decided to refer questions to the European Court of Justice for a preliminary ruling. On 15 May of this year, the District Court of Amsterdam decided that in the truck cartel, the claimants (especially with regard to claim vehicles) had to make clear which parties they represented and which claims are concerned. Simply stating that there is a claim is, in the view of the District Court, insufficient. In the United Kingdom, all eyes are on the Mastercard proceedings. While at an earlier stage the Competition Appeal Tribunal had rejected the eligibility of this claim for a collective lawsuit, the Court of Appeal overturned this decision. This means that things are looking a little brighter, particularly for claimants in cartel damage proceedings, as they believed that even where scattered damages are at stake, as in the Mastercard case, each individual damage would have to be proven, which is obviously more or less impossible.

Kind regards,

In behalf of the team **Hans Bousie**

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

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Amsterdam, 13 December 2019

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Private law aspects of cartel damages claims

The Netherlands

- In follow-on proceedings ensuing from the Air Cargo cartel, the shippers won a victory over the airlines. In its judgment of 1 May 2019, the District Court of Amsterdam declared Dutch law to be applicable to all damages claims brought in that case against (among others) KLM, Air France, Martinair, Lufthansa and British Airways.[1] We have already discussed the Air Cargo cartel in previous editions of Q, including Q(2017-2 and 3) and Q(2018-2).

The damages claims follow from a new European Commission decision of 17 March 2017[2] which concluded that the airlines involved formed an international cartel from December 1999 to 14 February 2006, in which they coordinated fuel and security surcharges with regard to flights from, to and within the European Economic Area and Switzerland. The European Commission imposed fines on the airlines involved for participation in the cartel amounting to € 776,465,000 in total. The airlines involved lodged appeals against this Commission decision. An earlier Commission decision of 9 November 2010 pertaining to the Air Cargo cartel had (largely) been annulled by the General Court of the European Union.

The judgment of the District Court of Amsterdam focused on the question of which law applies to the claims of the shippers assigned to the litigation vehicle Equilib Netherlands B.V.[3] The District Court established that the dispute between the parties relates to the possible civil-law consequences of (alleged) unlawful acts resulting from a single continuous infringement of Article 101 TFEU committed by several companies based in different states, including EU member states, while the numerous parties aggrieved by this infringement are also based in different states, including EU member states. As a result, the causes and effects of the asserted damage caused by these actions can be highly fragmented in terms of geography.

In its findings with regard to the applicable law, the District Court held first and foremost that the law applicable to Equilib's claims must be determined on the basis of Article 4 of the Dutch Unlawful Act (Conflict of Laws) Act (*Wet Conflictenrecht onrechtmatige daad* (WCOD))[4] and that there is no room for anticipatory application of the Rome-II regulation. In its findings, the District Court further notes that it is impossible to determine unequivocally where the actual purchase of the air freight services took place. According to the District Court, the law of the State in which the airlines or the aggrieved parties are based does not offer a relevant connecting factor either, as this would be arbitrary and contrary to the rationale of the Antitrust Damages Directive (Directive 2014/104/EU). Finally, the District Court found that in view of the fact that the unfair competition agreements have affected

[1] District Court of Amsterdam 19 May 2019, ECLI:NL:RBAMS:3393.

[2] Commission Decision of 17 March 2017, Case AT.39258 — Airfreight (2017/C 188/11).

[3] On 1 May 2019, in two similar proceedings instituted by Stichting Cartel Compensation against the airlines, the District Court of Amsterdam rendered a similar ruling on the applicable law (not published). The case numbers of these proceedings are: C/13/562256 / HA ZA 14-348 (SCC I) and C/13/604492 / HA ZA 16-301 (SCC II).

[4] The first paragraph of this Article provides that any obligations based on unfair competition are governed by the law of the State in which territory the anti-competitive acts have affected competition.

conditions of competition in a great many states, Article 4 of the WCOD does not offer a uniform solution and, in the absence of a rule of precedence, a practical solution must be sought, and it concluded by stating that: "*The principles of effectiveness and due process thus sufficiently justify the application of Dutch law to the shippers' damages claims (assigned to Equilib). The decision will be in accordance with this.*"

- On 1 May 2019, the District Court of Amsterdam also rendered another judgment in the shippers' follow-on proceedings concerning the Air Cargo cartel discussed above.[5] This judgment essentially focused on the question of whether the District Court had jurisdiction to determine in civil proceedings between private parties that there had been an infringement of European competition rules, specifically an infringement of the prohibition contained in Article 101 TFEU, and to award damages to injured parties based on infringement of this prohibition, for flights that took place prior to 1 May 2004, being the period during which the transitional regime still applied to these flights.

The District Court then reached the conclusion that, on the basis of case law of the ECJ, it was competent to rule – afterwards – on the agreements made between the airlines in the periods prior to 1 May 2004. According to the District Court, during that period Article 101 TFEU applied to the cartel agreements that were the subject of these proceedings.

In this regard, the ruling of the District Court differs from the ruling by Justice Rose in her judgment of 4 October 2017 in the Emerald proceedings.[6] After all, Justice Rose concluded that domestic courts do not have jurisdiction to apply Article 101(1) TFEU during the transitional regime. In the light of the TFEU's objective of ensuring uniform application of the TFEU, the District Court considered that, under these circumstances, it is necessary to refer questions to the ECJ for a preliminary ruling in order to give its judgment and to give the parties the opportunity to express their views on the questions formulated by the District Court for reference to the ECJ for a preliminary ruling.

If the District Court of Amsterdam's approach is confirmed by the ECJ, instead of that of Justice Rose, this may be good news for the shippers. After all, this will increase the likelihood that they will also be able to claim damages for the period prior to 2004, so that a larger part of the damage can be recovered from the airlines.

- On 15 May 2019, the District Court of Amsterdam rendered an interesting ruling on the extent of the obligation to furnish facts in the context of damages actions in respect of the truck cartel.[7] It dealt with various claims brought by individual claimants and by 'claim vehicles' against one or more truck manufacturers that had been fined by the European Commission in 2016 and 2017 for making prohibited price-fixing agreements. Companies of DAF, MAN, Daimler, Iveco, Volvo-Renault and Scania were involved.

The truck manufacturers argued that the claimants had failed to comply with their obligation to furnish facts, with the result that the summonses were allegedly null and void and that they had not satisfied the burden of proof resting with them.

The District Court did not consider the summonses null and void, as it was clear from the summonses what the claimants demanded and why they believed they were entitled to do so. With regard to the burden of proof, on the other hand, the District Court ruled that not all claimants had (yet) fulfilled their obligation to furnish facts. This applied in particular to the claim vehicles, which, to a greater or lesser extent, had failed to specify who the underlying parties were and which trucks were involved. According to the District Court, since there can only be liability if it is established that the individual claimants actually suffered losses as a result of the cartel, this information may not be omitted.

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[5] District Court of Amsterdam 1 May 2019, ECLI:NL:RBAMS:2019:3394.

[6] We previously discussed this case in Q(2017-4). See also High Court of Justice Chancery Division 4 October 2017, [2017] EWHC 2420 (Ch).

[7] District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:3574.

The District Court did not want to comment on the question of what exactly this information should comprise, but did find as follows in this context: "*the Claimants – and the litigation vehicles of each Underlying Party – will have to, and have to be able to, furnish more facts and substantiate (with or without documents) – in short – that trucks were obtained, and when which trucks (of which brand) were obtained from whom. In any event, it now seems that sufficient facts will have to be furnished to allow an assessment to be made for each owner, lessor, lessee or user of a truck of trucks as to whether they have suffered damage as a result of the Cartel during the Cartel period or the lagging period so as to determine the plausibility of the likelihood of such damage. It is for the Claimants themselves to determine what information they deem necessary – in view of the District Court's earlier finding in this judgment – to substantiate their claims*."[8]

With regard to the claim vehicles, the District Court added that they still had to comply with the obligation to furnish facts with regard to the claims assigned to them as well.[9]

The District Court gave the claimants the opportunity to supplement their assertions, if necessary, and to further substantiate them (with documents, for example) insofar as possible.

Another remarkable feature of these cases is that a great many parties have chosen to summon only one party or just a few parties (always including DAF). It is evident from the published interlocutory judgments that in all instances the party or parties in question proceeded to issue third-party proceedings in order to involve the other addressees of the Commission Decision in the proceedings.

- On 29 May 2019, the District Court of Rotterdam ruled that foundation De Glazen Lift (DGL), a party representing the interests of 41 housing associations (participants), would be given the opportunity to continue its action for damages against elevator and escalator manufacturers Otis B.V. and Kone B.V.[10]

In 2007, the European Commission fined Otis and Kone for their participation in the elevators cartel.[11] DGL's claim is based on the fact that during the cartel period the participants bought elevators and/or escalators from one of the cartelists and had them installed, maintained and/or renovated, whilst having paid too high a price for them due to the illegal price agreements.

The District Court did not concur with the manufacturers' defence that the claims were time-barred and had not been validly transferred to DGL. Furthermore, the District Court held – on the basis of the Commission's decision – that it was highly likely that the infringement had had a price-increasing effect. As a result, Kone and Otis are jointly and severally liable pursuant to Article 6:166 of the Dutch Civil Code, provided that it is established that the participants have suffered loss as a result of the cartel. On the latter point, DGL will be given the opportunity to enter (further) documents into evidence to prove the loss in question.

Finally, Otis and Kone are conducting the defence that the (higher) costs incurred by the housing associations with regard to the elevators were passed on to the tenants. The parties will have the opportunity to submit statements commenting on this in more detail. We reported on the damages lawsuits in relation to the elevators cartel in Q (2019-1) and Q (2016-1 and 3).

- On 3 June 2019, MLex published the fact that it had learned that Dutch brewing company Heineken had filed a claim against truck companies including DAF Trucks and Volvo/Renault before a Dutch Court, for their participation in the truck cartel.[12] Heineken follows Danish brewing companies Carlsberg Deutschland and Carlsberg Deutschland Logistik, two of many claimants that have

[8] District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:3574, para. 3.30.
[9] District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:3574, para. 3.34.
[10] District Court of Rotterdam 29 May 2019, ECLI:NL:RBROT:2019:4441.
[11] Commission Decision of 21 December 2007, Case COMP/E-1/38.823 (*Elevators and Escalators*).
[12] European Commission, Case AT.39824 (*Trucks*).

already filed a private lawsuit in the Netherlands to be heard before the Amsterdam District Court.[13]

Germany

- On 4 April 2019, the Regional Court in Stuttgart ruled in an appeal that an (unnamed) recycling company is entitled to claim damages from DAF Trucks for its participation in the truck cartel. The company claims that, due to the cartel, the purchase prices paid by its subsidiaries for trucks bought in the cartel period were excessive. The amount of damages that DAF has to pay will be decided in separate proceedings. The appeal judgment confirms the judgment at first instance.[14]

UK

- On 16 April 2019, the UK Court of Appeal found in favour of Walter Hugh Merricks CBE, who had challenged a 2017 decision of the Competition Appeal Tribunal (CAT). The Tribunal had rejected Merrick's £14 billion class action against Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe S.P.R.L. on the grounds that it did not satisfy the criteria for a collective lawsuit. In particular, the CAT found that a key criterion – "commonality" between the transactions – had not been met. Further, the CAT applied a stringent approach to the burden of evidence, ruling that Merrick had not sufficiently proven that the alleged card-fee overcharges were passed on to consumers, and that he had not established an applicable method for calculating class-wide losses or allocating damages on an individual basis. Contrary to the CAT, the Court of Appeal found that a claimant's data method should be accepted when it is "capable of, or offers a realistic prospect of, establishing loss to the class". Nor does the claimant have to prove loss suffered by the individual class members when calculating the overall loss for the class. The Court of Appeal thus found that the CAT had erred in its ruling in this regard and remitted the case to CAT for re-hearing. This means that Merrick's class action might revive, and furthermore that future litigants might take advantage of the application of less stringent evidential burdens in preparing claims. Merrick's class action relies on a 2007 European Commission decision fining Mastercard for fixing interchange fees, a case we already reported on in Q (2018-3 and 4).[15]

- In May 2019, UK court documents became available regarding a lawsuit filed by a number of investment management funds against a number of well-known banks including Barclays, Citibank, HSBC and JPMorgan. The claimants, who are all engaged in foreign exchange trading activities, are seeking damages on the grounds that foreign exchange traders at the banks (allegedly) fixed rates, resulting in loss to the claimants. This conduct by the banks has prompted investigations by the European Commission as well as national regulatory authorities. The European Commission investigation is still ongoing. In the meantime, the investors are pursuing claims for their alleged losses in relation to two forms of manipulation: (1) manipulation of certain benchmark rates and (2) fixing of bid/ask spreads (that is to say, the difference or 'spread' between the rate at which the banks would buy currency and the rate at which they would sell it). As regards the scope of the manipulation, the investors claim that it took place from *at least* 2003 to 2013 and that it affected all transactions at the fix rate. They say that they suffered losses because it had "enduring or permanent effects", that there was a "cumulative" impact resulting in difference in the rate at all times, and that there was a "spillover effect" for other currencies as well. The claimants further say that, by reason of the manipulation, they entered into transactions that were less advantageous than they would have been absent the manipulation. The defendants have not yet filed their defences.[16]

- On 1 May 2019, the UK High Court decided that the claims of National Grid Electricity Transmission and Scottish Power against a number of cable manufacturers including Prysmian and ABB Ltd. should be heard jointly. Both claimants are suing the cable manufacturers for damages because of their involvement in the power cable cartel, following a European Commission decision of

[13] MLex 3 June 2019, 'Heineken sues truck cartel for damages in Netherlands'.
[14] Oberlandesgericht Stuttgart 4 April 2019, Case 2 U 101/18.
[15] Court of Appeal 16 April 2019, case no. C3/2017/2778.
[16] High Court of Justice 16 April 2018, Allianz Global Investors GmbH and others and Barclays Bank PLC and others, claim number CL-2018-000840.

2014.[17] The claimants argued that their cases should be heard jointly because their claims were "materially identical". The court agreed that there was a considerable overlap of issues and that the extent of overlap justified hearing the cases jointly. Cross-examination in relation to specific projects might nevertheless be required, according to Mr Justice Barling.[18]

- On 2 May 2019, the London High Court of Justice ruled against a request from subsidiaries of Toshiba Information Systems Ltd and Panasonic Europe Ltd to strike out a damages lawsuit against them. The claim was brought by a group of 360+ companies in the Mediamarkt consumer electronics retail group, including Media-Saturn Holding GmbH. The companies are seeking compensation for losses said to have been incurred as a result of the alleged anti-competitive conduct of the defendants in relation to the TV and Monitor Tubes cartel, as found and fined in a European Commission decision of 2012.[19] The defendants argued that there were no reasonable grounds for bringing the claim against them because the Commission decision was only addressed to their parent companies. They contended that there was no evidence that they participated in, implemented or had any knowledge of the cartel. Furthermore, they argued that any liability of the parent companies could not be validly attributed or imputed down the corporate chain to the subsidiaries. The Court dismissed the applications of Toshiba and Panasonic on the following grounds. In relation to the question whether the subsidiaries had "knowingly implemented" the cartel, the High Court accepted that it was arguable that the subsidiaries had knowledge of the infringement because the parent companies were addressees of the Commission decision and were shadow and/or *de facto* directors of the defendant subsidiaries. Further, that it was at least arguable that, as a matter of law, a subsidiary may be held liable by virtue of being part of the same undertaking as another entity which directly committed the infringement. Since the case against Toshiba and Panasonic was found to be (at least) arguable, the applications of Toshiba and Panasonic to strike out the claims were dismissed.[20]

- On 2 May 2019, a case management conference took place at the Competition Appeal Tribunal in London in the cases of several claimants, including Royal Mail Group Limited, BT Group PLC and Others, and Ryder Limited[21] against truck companies, including DAF Trucks Limited, MAN SE and Fiat Chrysler Automobiles N.V.[22] for their participation in the truck cartel.[23] The Tribunal considered whether some particular matters should be treated as 'preliminary issues' that should be decided before trial. One question that was discussed was whether the recitals of the Commission decision of 2016 must be considered binding on the CAT. The CAT found that this should be a preliminary issue, because it is in the interests of consistency across all cases. The Tribunal further considered whether the truck companies' arguments with regard to the passing-on of costs should be a preliminary issue. In this regard, however, the Tribunal did not (yet) take a view, pending the UK Supreme Court judgment in the ongoing Mastercard interchange-fee dispute, which we reported on in Q (2019-1), and which is expected to shed light on this issue.[24]

- On 3 May 2019, the second day of the case management conference discussed above, the Competition Appeal Tribunal ordered DAF, Iveco and Scania to disclose the minutes of meetings dating back to (at least) 1997.[25] The claimants, Royal Mail Group Limited and Others sought access to a total of 15 sets of minutes pertaining to the so-called Trucks Delivery Database Project (TDDP). The TDDP

[17] European Commission, Case AT.39610 (*Power Cables*).
[18] National Grid Electricity Transmission v. ABB Ltd., case reference HC-2015-000269.
[19] European Commission, Case COMP/39427 (*TV and Monitor Tubes*).
[20] England and Wales High Court 2 May 2019, Case no. HC 2017-001043, [2019] EWHC 1095 (Ch).
[21] Full list of claimants: Royal Mail Group Limited, BT Group PLC and Others, Ryder Limited and Another, Suez Groupe SAS and Others, Veolia Environnement S.A. and Others, Wolseley UK Limited and Others, Dawsongroup plc and Others.
[22] Full list of defendants: DAF Trucks Limited and Others, MAN SE and Others, Fiat Chrysler Automobiles N.V. and Others and DAF Trucks N.V. and Others.
[23] European Commission, Case AT.39824 (*Trucks*).
[24] Case references 1284/5/7/18 (T), 1290/5/7/18 (T) – 1295/5/7/18 (T).
[25] For a full transcript of the second case management conference, see: https://www.catribunal.org.uk/sites/default/files/2019-06/1284-1295_Trucks_Transcript_030519_0.pdf

minutes concerned meetings between (the legal predecessors of) the cartelists, dating back to 1985. However, the CAT did not require the defendants to provide all of these minutes, especially those predating the cartel. The CAT did however find that the minutes from the period 1993-1996 might be of some relevance. In this regard, the CAT instructed the defendants to make a reasonable effort to find the TDDP minutes and to identify the individuals that attended the meetings.

- On 8 May 2019, at a pre-hearing review, the Competition Appeal Tribunal adjourned the main hearings of the collective proceeding order (CPO) applications by UK Trucks Claim Limited and Road Haulage Association Limited in the cases against respectively Fiat Chrysler Automobiles N.V. and MAN SE.[26] According to the CAT, this was warranted because certification of their respective claims should await Mastercard's possible[27] appeal to the Supreme Court against the Court of Appeal's judgment in the *Merricks* interchange-fee case, given the implications that (the outcome of) the appeal might have on the proceedings at hand.

- On 8 May 2019, the Competition Appeal Tribunal struck out an additional claim brought by Daimler AG in Wolseley UK Limited's follow-on action.[28] Wolseley represents a group of in total 153 claimants seeking compensation from truck manufacturers Iveco and DAF for their participation in the truck cartel. In response to Wolseley's action, Iveco and DAF had brought Part 20 claims against, among others, Daimler, claiming indemnity or contribution in the event that they were held liable for the damages sought by Wolseley. In its additional claim, Daimler sought a declaration from the CAT to the effect that Daimler would not be liable for the damages claimed by Wolseley. Wolseley then filed an application with the CAT to strike out Daimler's claim on the grounds that it served no legitimate useful purpose. The CAT agreed with Wolseley, subsequently striking out Daimler's claim.

EU

- On 16 May 2019 a hearing at the European Court of Justice took place following a request for a preliminary ruling by the Oberster Gerichtshof (Austrian Supreme Court)[29]. The reference was made in light of proceedings between the Austrian state of Oberösterreich and elevator companies Otis Gesellschaft m.b.H., Schindler Liegenschaftsverwaltung GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Kone Aktiengesellschaft, ThyssenKrupp Aufzüge Gesellschaft m.b.H. for their role in the elevators and escalators cartel.[30] The state of Oberösterreich had claimed before the Austrian courts that the cartel had had an adverse effect on its loans to construction firms. The Austrian Supreme Court referred the following question to the Court of Justice:

"*Are Article 85 TEC, Article 81 EC and Article 101 TFEU to be interpreted as meaning that, in order to maintain the full effectiveness of those provisions and the practical effectiveness of the prohibition resulting from those provisions, it is necessary that compensation for losses may also be claimed from members of a cartel by persons who are not active as suppliers or customers on the relevant product and geographic market affected by a cartel, but who grant loans to buyers of the products offered on the market affected by the cartel under preferential terms as funding bodies within the scope of statutory provisions, and whose loss lies in the fact that the loan amount granted as a percentage of the product costs was higher than what it would have been without the cartel agreement, which means that they were unable profitably to invest those amounts?*

[26] We discussed these cases in more detail in Q(2018-3 and 4). The CAT's order can be found here: https://www.catribunal.org.uk/sites/default/files/2019-07/1282-1289_Trucks_Order_080519.pdf

[27] Mastercard has since been granted permission to appeal the Court of Appeal's ruling in *Merricks* v *Mastercard*, and has subsequently filed the appeal. This will be further discussed in Q(2018-3 and 4).

[28] Competition Appeal Tribunal 8 May 2019, case no. 1294/5/7/18 (T).

[29] ECJ Case C-435/18, Otis and Others.

[30] Cf. Commission Decision of 21 February 2007, Case COMP/E-1/38.823 — Elevators and Escalators (2008/C 75/10)

2

Public law aspects of cartel damages claims

Germany

- On 17 June 2019, the *Global Private Litigation Event of the American Bar Association took place in Berlin. MLex reported*[31] *that at this event Konrad Ost,* the vice-president of Germany's antitrust watchdog, argued that Germany was an attractive country for claimants filing antitrust damages lawsuits. Ost is said to have pointed out that 640 new claims have been filed in Germany over the last two years and that approximately 300 of those are related to the truck cartel. Although German law does not provide for a class-action system, he stated that it would be pragmatic to allow the bundling of claims in some cases. However, he reportedly stated that Dutch litigation claims vehicles might only be a good model to follow if the claimants' costs are fully covered.

EU

- On 14 May 2019, the *International Chamber of Commerce Pre-ICN Forum* took place in Cartagena, Colombia. MLex reported[32] that Andreas Mundt, International Competition Network Chair and head of the Bundeskartellamt, argued at the Forum that private damages lawsuits might be discouraging companies from coming forward under the leniency programs. The risk of high damages lawsuits could indeed be serving as a deterrent for companies wishing to blow the whistle on the cartel. Therefore, he reportedly argued that EU antitrust watchdogs must make sure that the leniency programs remain attractive so that companies come forward. Mundt reportedly stated that the Bundeskartellamt's own figures show this downwards trend. The leniency applications in Germany have seen a steep decline from 76 in 2015 to just 37 in 2017. He also reportedly stated that legal uncertainty surrounding private cartel damages claims might be another factor dissuading potential applicants from making use of the leniency programs.

[31] Arezki Yaïche, *Truck cartel claims dominate German litigation scene, Ost says*, 17 June 2019

[32] Michael Acton, *Cartel damages lawsuits mean EU antirust watchdogs can't rely on leniency, Mundt warns*, 14 May 2019.

3

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

EC

- On 5 April 2019, the European Commission announced in a press release that it had sent a Statement of Objections to BMW, Daimler and VW for colluding to restrict competition on the development of technology to clean the emissions of petrol and diesel passenger cars (emission cleaning technology). The collusion is alleged to have happened between 2006 and 2014. The Commission has particular concerns that the companies limited the development and roll-out of the following technologies: selective catalytic reduction (SCR) systems and 'otto' particle filters (OPF).[33]

- On 8 April 2019, the Commission published the summary decision and the non-confidential version of the decision in the Euro Interest Rate Derivatives case of 7 December 2016.[34] We reported on claims stemming from this decision in Q (2019-1).

- On 13 May 2019, the Commission announced that it had fined AB InBev, the world's biggest beer company, EUR 200 million for abusing its dominant position on the Belgian beer market. The Commission stated that AB InBev had hindered cheaper imports of its Jupiler beer from the Netherlands into Belgium, as a consequence of which Belgian consumers had to pay more for their beer. Jupiler beer represents approximately 40% of the total Belgian beer market in terms of sales volume.[35]

- On 16 May 2019, the Commission fined Barclays, RBS, Citigroup, JPMorgan and MUFG EUR 1.07 billion for participating in two cartels in the Spot Foreign Exchange market for 11 currencies. UBS was not fined, as it had revealed the existence of the cartels to the Commission. Foreign exchange ("Forex") refers to the trading of currencies and is one of the largest markets in the world. The Commission's investigation revealed that some individual traders in charge of Forex trading on behalf of the relevant banks had exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through various online chatrooms. The first infringement encompasses communications in three different, consecutive chatrooms among traders from UBS, Barclays, RBS, Citigroup and JPMorgan, from December 2007 until January 2013 ("*Three Way Banana Split*"). The second infringement encompasses communications in two chatrooms among traders from UBS, Barclays, RBS and Bank of Tokyo-Mitsubishi (now MUFG Bank), from December 2009, until July 2012 ("*Essex Express*").[36]

[33] Commission, Press release of 5 April 2019, Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology.
[34] Commission decision of 7 December 2016, Case AT.39914 (*Euro Interest Rate Derivatives*).
[35] Commission, Press release of 13 May 2019, Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer.
[36] Commission, Press release of 16 May 2019, Antitrust: Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel.

- On 20 June 2019, the non-confidential version of the decision for information purposes in case 40481 Occupant Safety Systems (II) supplied to the Volkswagen Group and the BMW Group was published.[37]

- On 26 June 2019, the Commission announced that it had opened investigations into Broadcom, the world's largest designer, developer and provider of integrated circuits for wired connection devices. The investigation is to assess whether Broadcom may be restricting competition through exclusivity practices, in breach of article 102 TFEU. The Commission suspects that Broadcom put contractual restrictions in place to exclude its competitors from the market. At the same time, the Commission issued a Statement of Objections seeking to impose interim measures with regard to the TV and modem chipsets markets.[38]

ECJ

- On 12, 13 and 28 June 2019, hearings took place in three cases against the European Commission for imposing fines on amongst others Air France-KLM, British Airways and Cargolux for their participation in the Air Cargo cartel.[39] All of the airlines addressed in the decision, 11 in total, have filed their own appeals against the decision. The cases of Air France-KLM, AirFrance and Cargolux were the first this month to appear before the EU General Court. None of the airlines contest the existence of the cartel, but they are seeking annulment of the decision because of purported procedural and substantive errors made by the Commission. If the airlines succeed, the decision will be annulled for the second time, as the original decision of 2010 was overturned in 2015 due to procedural errors.[40]

[37] Commission decision of 5 March 2019, Case AT.40481 (*Occupant Safety Systems (II)*).
[38] Commission, Press release of 26 June 2019, Antitrust: Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets.
[39] Commission Decision of 17 March 2017, Case AT.39258 (*Airfreight*).
[40] Cases T-337/17 (*Air France-KLM v Commission*), T-338/17 (*Air France v Commission*) and T-334/17 (*Cargolux Airlines v Commission*).

4

Fines and procedural regulations by national competition authorities

The Netherlands

- On 11 April 2019, the Netherlands Authority for Consumers & Markets (ACM) announced that it was launching an investigation into whether Apple is abusing the position it has attained with its App Store. The ACM had already conducted a market study into app stores, from which it emerged that app providers depend on the app stores to reach users on their mobile phones. For numerous apps, no realistic alternatives to the App Store and Google's Play Store exist. App providers stated they did not always have a fair chance against Apple's or Google's own apps. The indications submitted by app providers prompted the ACM to decide to conduct further investigations into Apple.[41]

- On 3 May 2019, the ACM announced that it was investigating possible illegal agreements between various contractors participating in tenders in the municipality of Amsterdam. The tenders in question concern the civil engineering sector. The ACM wants to investigate whether contractors made illegal agreements about prices and who should be awarded the contracts. The tenders were for projects between 100 thousand euros and 2 million euros.[42]

- On 21 June 2019, the District Court of Rotterdam annulled the fine imposed by the ACM on Midac, an importer of traction batteries for forklift trucks. Midac was one of the companies on which the ACM imposed fines totalling €17 million in 2017 for making prohibited price-fixing agreements from 2004 to 2013. According to the ACM, Midac was only involved in the last nine months of the cartel. It fined Midac € 583,000. Midac successfully initiated appeal proceedings. The District Court held that the ACM had not shown that Midac was willing to contribute to the common purpose of the cartel and that consequently there was insufficient evidence that Midac was a cartel participant. The fine was therefore annulled. As the other companies did not appeal, this judgment has no consequences for them. We have already discussed the ACM's fine and Midac's appeal in Q(2017-2, 2017-3 and 2018-2).[43]

Germany

- On 27 June 2019, the President of the Bundeskartellamt presented the 'Activity Report 2017/2018' and the 'Annual Report 2018'. The Activity Report is published every two years and passed on to the German parliament for information and debate. The President's explanation, in which he outlines the authority's focus, is also interesting:

"We have a clear digital agenda. When it comes to major online platforms, we pursue two main objectives: We want to keep markets open for competitors and prevent the abuse of dominant market positions to the

[41] 'ACM launches investigation into abuse of dominance by Apple in its App Store', 11 April 2019, on the ACM website.
[42] 'ACM investigates tender processes for civil engineering in Amsterdam', 3 May 2019, on the ACM website.
[43] District Court of Rotterdam 20 June 2019, ECLI:NL:RBROT:2019:4842. See also the report (in Dutch) on the ACM website: 'uitspraak rechtbank prijsafspraken accu's vorkheftrucs' (District Court decision on price-fixing agreements involving forklift truck batteries), 21 June 2019.

detriment of consumers. Our decision against Facebook which aims to limit the company's collection of personal data is thus an element of our work that is fully in line with this agenda as it directly protects consumers. We are also taking care to ensure that competitors that do not have the same access to data as Facebook will be strengthened in future. In an effort to protect effective competition, we are going ahead with our proceedings against Amazon regarding its business terms for sellers on Amazon Market Place. We are working on a comprehensive paper on "Competition and algorithms" together with the French competition authority to gain a better understanding of digital markets and are also advancing with our sector inquiry on "online advertising". Our three purely consumer-rights oriented sector inquiries into online comparison websites, smart TVs and user reviews on digital portals also clearly focus on the digital economy."

According to the reports, in 2018 the Bundeskartellamt imposed fines totalling € 375 million on 22 companies or trade organisations and 20 individuals. The sectors concerned included special steel manufacturers, potato and onion packaging, newspaper publishers and rolled asphalt production. The authority carried out seven dawn raids at a total of 51 companies.[44]

UK

- On 9 April 2019, the Competition and Markets Authority (CMA) provisionally found that three major suppliers to the construction industry had infringed competition law. The CMA found that these three businesses formed a pricing cartel, involving sharing confidential information on pricing and commercial strategy and coordinating their commercial activities. The CMA's findings are provisional at this stage and will not necessarily lead to a decision that the companies have infringed the law. The suppliers will have the opportunity to consider the CMA's findings and respond to them.[45]

[44] 'Bundeskartellamt presents "Activity Report 2017/2018" and the "Annual report 2018"', 27 June 2019, on the Bundeskartellamt website.

[45] 'Construction suppliers accused of colluding to keep prices up', 9 April 2019 on the UK Government website. See also Case CA98.

5

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