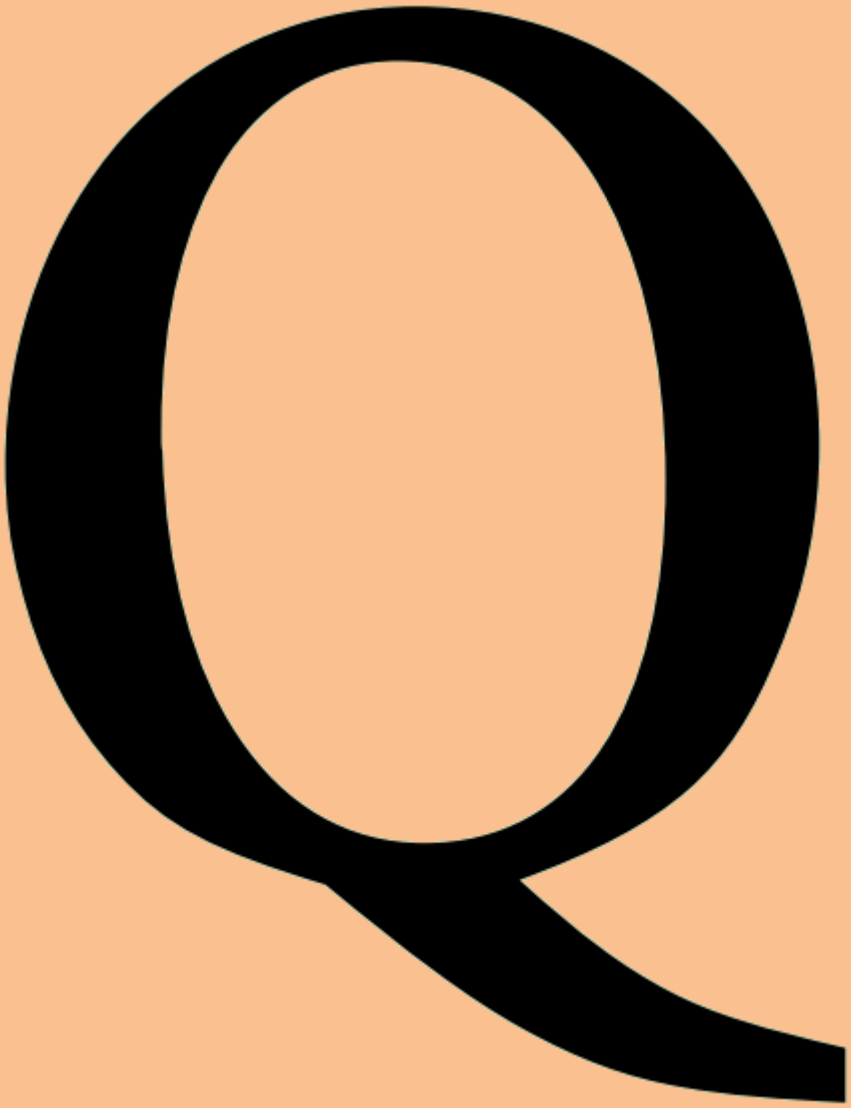
BUREAU BRANDEIS

# CARTEL DAMAGES QUARTERLY



Q3 2019

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

The third quarter was a turbulent quarter for cartel damages. As we have come to expect a lot happened in the three main jurisdictions, but this time the ECJ also joined the fray. In the Tibor-Trans case referred by the Hungarian court, the ECJ gave a broad interpretation to the *Erfolgsort* making it easier for indirect purchasers to litigate in their home jurisdictions.

In the Dutch Air Cargo litigation, the court curtailed the amount of leeway a plaintiff has when substantiating the damages. It seems as if a similar decision could be coming in the ongoing prestressing steel case in Den Bosch, where the question of to what extent a claimant must substantiate its claim also arose at a hearing in November. bureau Brandeis represented alleged cartelist Fapricela in this case. It is also worth noting that the Servier issue will be playing out in the Netherlands (after pending for years in the United Kingdom). Noteworthy in this regard is the fact that it only became clear that a claim is forthcoming because of a notification to the SEC by one of the parties involved. In the meantime, a settlement was reached in Germany between Deutsche Bahn and Lufthansa in the Air Cargo case and between CDC and Heidelbergzement. In the UK, all eyes are on the Supreme Court, which has to rule on the interchange fees case (Mastercard and Visa, which has been discussed as a serial story in successive Qs). But things are exciting even aside from that. The CAT ruled in the trucks cartel case that the defendants must provide just about all the data that the claimants need to substantiate their claim. It remains to be seen whether the United Kingdom and the continent will not diverge too much when it comes to the provision of information. The UK puts the ball in the defendants' court, while the Netherlands and Germany put the onus on the claimants for the time being. Finally, it is worth mentioning that the European Commission has published its guidelines on calculating the passing-on of overcharges. I draw your attention to the now published and very readable opinion of Advocate General Bobek in the interchange fees case before the Court of Justice. With his quote we see the old year out and usher in the new. The team at bureau Brandeis wishes you happy holidays and a prosperous new year.

Kind regards,

In behalf of the team **Hans Bousie**

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

# Q3 2019

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*Amsterdam, 27 December 2019*

# 1

# Private law aspects of cartel damages claims

**The Netherlands**

- On 11 September 2019, the District Court of Amsterdam rendered an interlocutory judgment in a case brought by claim vehicles Equilib and SCC against several airlines, including British Airways, Air France-KLM and Lufthansa.[1] The claim vehicles are claiming compensation from the airlines for their participation in the Air Cargo cartel, for which the European Commission already imposed a substantial fine on these parties in 2010.[2] At this stage of the proceedings, the District Court of Amsterdam issued an interlocutory judgment determining what information must be shared between the parties so that the damage can be estimated. In that context, the District Court ruled that the claimants must provide more insight into the specific transactions on which their claims are based. They must also further substantiate the exact situation with regard to any passing-on by forwarding agents to charterers of the (excessively) high prices that were allegedly the result of the cartel. The airlines had also argued that the court should seek alignment with the parallel proceedings in the UK, in which the claimants were required to provide even more detailed information. The District Court of Amsterdam did not concur, however. The District Court also stated that it had in mind that economic experts from both parties should have to work with one general dataset, in order to create a "level playing field" and to avoid "comparing chalk and cheese". We have already discussed the Air Cargo cartel in previous editions of Q, including Q(2016-2), Q(2017-2 and 3). We also discussed various follow-on proceedings ensuing from the Air Cargo case in Q(2018-1) and Q(2019-2).

- In Q(2019-2) we reported on the case of 15 May 2019 of the District Court of Amsterdam on the extent of the obligation to furnish facts in the context of damages actions in respect of the truck cartel,[3] in which context we also noted that a great many of the defendant parties chose to institute third-party proceedings to involve the other addressees of the Commission Decisions in the proceedings. Many of the interlocutory decisions on these third-party actions have now been published.[4]

- Drugmaker Mylan stated in its filing to the US Securities and Exchange Commission of 29 July 2019,[5] that it had received a notice from an organisation representing health insurers in the Netherlands stating an intention to commence follow-on litigation and asserting damages. The organisation was not named. The case stemmed from a European Commission Decision of 9 July 2014, in which Mylan Laboratories Limited and Mylan, as well as several other companies including Servier, were found to have violated EU competition rules relating to the product Perindopril (a cardiovascular medicine). The companies were found to have prevented entry of cheaper versions of this medicine, in order to protect

[1] See MLex, Air-cargo cartel victims to provide damage-claim data in KLM lawsuit, 12 September 2019.
[2] Case AT.39258 (*Air Freight*).
[3] District court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:3574.
[4] See for instance District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:4944; District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:4934; District Court of Amsterdam 15 May 2019, ECLI:NL:RBAMS:2019:4942; District Court of Amsterdam 31 October 2018, ECLI:NL:RBAMS:2018:10055.
[5] See Mylan's filing to the US Securities and Exchange Commission with file number 333-199861.

Servier's bestselling drug.[6] Mylan Laboratories Limited was fined approximately €17.2 million for its part in the anti-competitive practices, including approximately € 8.0 million jointly and severally with Mylan Inc.

**Germany**

- On 13 August 2019, the German claim vehicle CDC Cartel Damage Claims announced that it settled its damages claim dispute with HeidelbergCement AG in relation to the cement cartel. In April 2003, the German Federal Cartel Office (FCO) imposed fines totalling € 702 million on twelve companies for their participation in the German cement cartels. In June 2009, the appeal court reduced the fines to € 330 million but confirmed the existence of the cartels. CDC instituted damages proceedings in 2005, and filed a second damages action in 2015 against HeidelbergCement AG. The case was brought before the German Federal Court, which confirmed in 2018 that the claims were not time barred. This concluded the court proceedings between these parties. No information was given on the settlement conditions.[7]

- And there is more news on settlements. On 26 August 2019, Lufthansa and Deutsche Bahn announced that they had settled their damages dispute on the Air Cargo cartel. This settlement concludes the proceedings that were instituted by Deutsche Bahn in 2013 before the Regional Court of Cologne in order to receive damages resulting from the cartel as fined by the European Commission in 2010. The settling parties are DB Barnsdale AG, a 100%-owned subsidiary of Deutsche Bahn AG, and three companies of the Lufthansa group, Lufthansa Cargo AG, Swiss International Air Lines and Deutsche Lufthansa AG. Deutsche Bahn published a press release on its website, without giving further details on the settlement.[8] DB Barnsdale AG was previously represented by bureau Brandeis in the Netherlands with regard to a claim against KLM and Air France. This case was also settled.

- Less successful was the attempt of German sugar cartelists Pfeifer & Langen, Südzucker and Nordzucker to reach a court settlement on 11 July 2019 with Lambert, Heristo and a group of other food companies that were suing them for damages resulting from the sugar cartel. In 2014, the Bundeskartellamt fined the three German sugar refiners a total of €280 million for illegal pricing agreements. The cartel involved both sugar used in industrial processes and sugar sold to consumers. The claimants seek damages for a total of € 134 million. According to MLex, the Court of Cologne has now scheduled an interim ruling or possibly a final decision on the antitrust claims for 8 November 2019. We will inform you on the outcome in Q(2019-4).[9]

**UK**

- In an oral ruling on July 2019, Daimler AG won a court order from the England and Wales High Court (Commercial Court) forcing maritime car carrier Mitsui O.S.K. Lines Ltd. and others to disclose certain documents "at one stage or another" in the litigation, MLex reported[10]. The order was issued in damages proceedings brought by Daimler against five maritime car carriers for participating in the Maritime Car Carriers cartel.

According to the EC's settlement decision regarding the cartel[11], Japanese carriers "K" Line, MOL and NYK, Chilean carrier CSAV, and Scandinavian carrier WWL-EUKOR had formed a cartel from October 2006 to September 2012 in the market for deep sea transport of new cars, trucks and other large vehicles on various routes between Europe and other continents. The carriers were involved in conduct that sought to coordinate the prices of certain tenders, allocate the business of certain customers and reduce capacity by coordinating the scrapping of vessels. All companies have

[6] See the press release of the European Commission of 9 July 2014.
[7] See the press release of 13 August 2019 on the website of CDC Cartel Damage Claims.
[8] See 'Air Cargo anti/trust dispute' DB and Lufthansa reach settlement to end legal dispute' on the website of Deutsche Bahn, 26 August 2019.
[9] German sugar cartelists fail to settle with food makers, will face court ruling´, MLex, 12 July 2019.
[10] MLex, Daimler wins disclosure order in UK suit over maritime car-carrier cartel, 26 July 2019.
[11] European Commission Decision of 21 February 2018, Case AT.40009 (Maritime Car Carriers).

acknowledged their participation in the cartel. On 21 February 2018 the EC fined four of the maritime car carriers for a combined total of €395 million. MOL received full immunity for revealing the existence of the cartel.

In the proceedings before the Commercial Court, Daimler had only sought documents from MOL. However, MOL protested and argued that the other parties should also be subject to the disclosure request application. The court agreed, and addressed the decision to all of the defendants.

- On 4 July 2019 credit card company Visa and British retailer WH Smith reached a settlement in their longstanding antitrust dispute over interchange fees. WH Smith had sought over £ 300 million from Visa for the unlawful charging of anti-competitive interchange fees. We have previously reported on the various interchange fees cases against Visa and Mastercard in Q(2019-2, 2019-1, 2018-1, 2017-2, 2017-3 and 2017-4).

- On 17 July 2019, global leader in the supply of building materials LafargeHolcim Ltd and 25 others[12] filed a new damages claim before the UK High Court against the truck makers[13] in the latest episode of damages claims following the EC's decision to fine the participants of the truck cartel. The claim has been registered under number CP-2019-000026.

- On 17 July 2019 three days of hearing ended in the proceedings between BritNed Development Limited and ABB before the Court of Appeal.[14] During the appeal hearing, both parties attacked the High Court's earlier landmark decision where it awarded BritNed (after revision) € 11.7 million in damages. BritNet, which is jointly owned by the UK and Dutch operators of the electricity grid National Grid and TenneT, had sought damages from ABB in follow-on proceedings stemming from the EC decision in the power cable cartel[15]. In 2014, the EC found that ABB and 10 other producers of underground and submarine high-voltage power cables operated a cartel, and imposed fines totalling more than € 300 million.

Both BritNed and ABB appealed the High Court's earlier ruling, which was the first ruling on a follow-on cartel damages claim. ABB's appeal was mostly aimed at the damages that were awarded on the basis of so-called cartel savings.[16] BritNet targeted the High Court's decision to reduce its original damages award from € 13 million to € 11.7 million. The court had done so to prevent the overcompensation of BritNed.

- On 20 September 2019 the Competition Appeal Tribunal (CAT) ordered truck makers DAF, Daimler, Iveco, MAN and Volvo/Renault to provide further information to Ryder Limited on their pricing policy for

[12] According to MLex, the claimants are: LafargeHolcim, Holcim (Belgium), Carrières De Leffe S.A, Geocycle S.A, LafargeHolcim Ciments, LafargeHolcim Betons, LafargeHolcim Granulats, LafargeHolcim Distribution, Granulats Nord Est, Société des Calcaires de Souppes Sur Loing, Carrières de Saint Laurent, Midi Pyrenées Granulats, Granulats Bourgogne Auvergne, Beton Chantiers Oceaniques, Beton Chantiers Charente Limousin, Lafarge Granulats Ouest, Société D'exploitation des Etablissements Ragonneau, Contractor, Kosd Przedsiębiorstwo Produkcyjne, Lafarge Cement, Lafarge Kruszywa, Przedsiębiorstwo Produkcyjne, Holcim (Romania), Aggregate Industries UK, Lafarge Cauldon, Lafarge Ireland.

[13] According to MLex, the defendants are: Daimler, Mercedes-Benz Cars UK, CNH Industrial, Fiat Chrysler Automobiles, Iveco, Iveco Magirus, Aktiebolaget Volvo, Volvo Lastvagnar, Volvo Group Trucks Central Europe, Renault Trucks, Volvo Group UK.

[14] The case references are A3/2018/2802 BritNed Development Limited v ABB AB and anr. Appeal of Claimant from the order of Justice Marcus Smith; and A3/2018/2801 BritNed Development Limited -v- ABB AB and anr. Appeal of Defendants from the order of Mr Justice Marcus Smith.

[15] European Commission Decision of 2 April 2014, Case AT.39610 (Power Cables).

[16] In its judgment of 9 October 2018, the High Court had described these cartel savings as follows: "*The absence of or reduction in competition is, of course, a disbenefit to consumers, in that it may result in overcharges. One benefit to cartelists is the saving that they may incur as a result of not having to compete. To a supplier, competition is expensive, because it means incurring the costs of engaging with competing suppliers, with no assurance that a firm order will be placed. The advantage of a cartel is that such costs may be avoided or reduced. I shall refer to such savings as "cartel savings".*" See: [2018] EWHC 2616 (CH) for the judgment.

individual truck models.[17] The order followed disclosure applications by Ryder Limited, which were heard on 19 and 20 September. Disclosure applications stemming from Wolseley UK[18] and Dawsongroup[19] were simultaneously heard by the CAT at said hearing. The order is part of the ongoing litigation against the truck makers for partaking in the price-fixing truck cartel[20]. The CAT ordered each of the truck makers to provide a statement as to how individual truck models were priced and any increase in price from 1997 up to 2017. They were also ordered to explain which body within the company took the pricing decision and what information was relied on in taking that decision. The truck makers must provide the information by 29 November 2019. MAN was granted a bit more time, and has until 31 December 2019 to comply with the order.

**EU**

- On 29 July 2019, the ECJ answered questions referred to it for a preliminary ruling by the Hungarian court in the Tibor-Trans case on the interpretation of the so-called *Erfolgsort*, a rule laid down in Article 7(2) of the Recast Brussels I Regulation[21] which allows courts to assume jurisdiction in cases of infringements of competition law.[22]

Hungarian transport company Tibor-Trans Fuvarozo es Kereskedelmi Kft (Tibor-Trans) started legal proceedings in Hungary because of damage it claims to have suffered because of the trucks cartel.[23] Tibor-Trans claimed it suffered damage because it bought trucks from several dealers (also based in Hungary), who in turn bought trucks from truck manufacturers who had participated in the cartel.

The Hungarian court asked itself which rule provided it with a basis for jurisdiction to hear the case in these circumstances. This could not, in any event, be on the basis of the main rule[24] (defendant's domicile) or via a so-called "anchor defendant"[25]. Tibor-Trans had only summoned DAF (based in the Netherlands) and none of the other cartelists is based in Hungary.

The jurisdiction rule in Article 7(2) of the Recast Brussels I Regulation[26] did not provide a solution to the extent it pertains to the *Handlungsort* (the place where the anticompetitive conduct took place) and there was a debate on the applicability of the *Erfolgsort* (the place where the harmful effects occurred).

The Court of Justice considered that the *Erfolgsort* is in principle the place where the harmful event had *direct* harmful consequences for the person *directly* injured by it. DAF argued that Tibor-Trans did not suffer any such *direct* damage, because it did not buy trucks directly from the truck manufacturers, but through intermediaries. According to DAF, the damage was only (concretely) incurred by the dealers.

The Court of Justice took a different view. It considered that direct damage was not only the damage suffered by dealers, which consists of a possible decline in sales due to (excessively) high prices. The damage alleged by Tibor-Trans, which consists mainly of the additional costs it incurred as a result of artificially high prices (passed on by the dealers), must also be considered to be the direct result of the trucks cartel.

The ECJ also referred in this context to the flyLAL judgment,[27] which gives rise to the rule that the *Erfolgsort* denotes the place where the market affected by the anti-competitive conduct is located *and* where the injured party (also) claims to have suffered damage. It is

[17] Competition Appeal Tribunal, Case No: 1291/5/7/18 (T).
[18] Competition Appeal Tribunal, Case No: 1294/5/7/18 (T).
[19] Competition Appeal Tribunal, Case No: 1295/5/7/18 (T).
[20] European Commission Decision of 19 July 2016, Case AT.39824 (Trucks).
[21] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdictions and the recognition and enforcement of judgements in civil and commercial matters (recast).
[22] CJEU 29 July 2019, ECLI:EU:C:2019:635 (*Tibor Trans*).
[23] Case AT.39824 (*Trucks*).
[24] Regulation (EU) No 1215/2012, Art. 4.
[25] Regulation (EU) No 1215/2012, Art. 8.
[26] Regulation (EU) No 1215/2012.
[27] Judgment of the Court of Justice of 5 July 2019, *flyLAL-Lithuanian Airlines*, C-27/17, ECLI:EU:C:2018:533.

therefore relevant in this case that the infringement in relation to the trucks cartel covered the whole of the EEA and (therefore) also affected the market of Hungary.

The ECJ ruled that it follows from this that the Hungarian court can assume jurisdiction in this case on the basis of Article 7(2) of the Recast Brussels I Regulation. It added that this is also in line with the consistency requirements of the Rome II Regulation[28], since under Article 6(3)(a) of that regulation the law of the country where the market is affected or is likely to be affected applies to actions for damages relating to an anticompetitive act.

[28] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

# 2

# Public law aspects of cartel damages claims

**EU**

- In the Official Journal of 9 August 2019, the European Commission published new guidelines relevant for cartel damages cases across Europe. These are 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser'. The European Commission discusses, inter alia, the court's power to estimate passing-on, the role of evidence and the different methods of estimating the passing-on of an overcharge. It identifies three elements which courts 'may have to consider' and which they can successively estimate: the estimate of the overcharge (step 1), the estimate of the magnitude of the price effect caused by the passing-on (step 2) and finally the estimate of volume effects linked to the price effect (step 3). The European Commission discusses in detail the various methods of estimating these elements.[29]

These guidelines follow directly from Article 16 of the Cartel Damages Actions Directive, which states that the Commission will provide such guidelines addressed to the courts. The Commission stresses in its introduction that the guidelines are non-binding and do not alter existing rules under EU law or the laws of the member states. Nevertheless, we expect that the guidelines will become a guide in assessing the passing-on defence argued by cartelists or in the event of claims by indirect purchasers in civil damages cases in Europe.

[29] Communication from the Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, 2019/C 2067/07, Official Journal of the European Commission of 9 August 2019.

# 3

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

**European Commission**

- On 18 July 2019, the European Commission imposed a fine of € 242 million on US-based chip group Qualcomm for abuse of its dominant market position between 2009 and 2011. The European Commission determined that the chip maker sold its chips for mobile phones below cost to two major players on the market in order to push the smaller competitor Icera out of the market. The European Commission states that this is contrary to European antitrust rules.[30]

- On 27 September 2019, the European Commission fined two members of the canned vegetables cartel for a total of more than € 31.6 million. The Commission has found that Coroos and Group CECAB, which were fined, formed a cartel together with Bonduelle for more than 13 years. The three companies admitted their involvement in the cartel for the supply of certain types of canned vegetables to retailers and/or food service companies in the entire EEA. Bonduelle was not fined as it revealed the existence of the cartel to the Commission and the other two companies had their fines reduced owing to their cooperation with the Commission investigations.[31]

**ECJ**

- At the end of June and beginning of July, hearings took place before the EU General Court in relation to the Air Cargo cartel. All of the airlines addressed in the European Commission´s decision, 11 in total, have filed their own appeals against the decision. We have previously discussed the hearings of Air France-KLM, British Airways and Cargolux in Q(2019-2)[32] and also the cartel itself in Q(2016-2), Q(2017-2 and 3) and Q(2018-2). In June and July, SAS Air Cargo Croup, Air Canada, KLM, Lufthansa, Cathay Pacific, Latam Airlines, Singapore Airlines and Japan Airlines also pleaded before the court.[33]

None of the airlines contested the existence of the cartel, but they are seeking annulment of the decision for reasons of procedural and substantive errors made by the Commission. It was argued by the airlines, amongst other things, that the Commission did not give them a proper chance to comment on theories, did not treat all cartelists equal and was not competent to fine for activities that took place outside the EEA. If the General Court follows their reasoning, the decision will be annulled for the second time, as the original decision of 2010 was overturned in 2015 due to procedural errors.

[30] Press release of the European Commission ´Antitrust: Commission fines US chipmaker Qualcomm € 242 million for engaging in predatory pricing´, 18 July 2019 on the website of the European Commission.

[31] Press release of the European Commission ´Antitrust: Commission fines Coroos and Groupe CECAB € 31.6 million for participating in canned vegetables cartel´, 27 September 2019.

[32] Cases T-337/17 (*Air France-KLM v Commission*), T-338/17 (*Air France v Commission*) and T-334/17 (*Cargolux Airlines v Commission*).

[33] Cases T-324/17 (*SAS Cargo Croup and others v Commission*), T-325/17 (*Koninklijke Luchtvaart Maatschappij v Commission*), T-326/17 (*Air Canada v Commission*), T-340/17 (*Japan Airlines v Commission*), T-342/17 (*Lufthansa v Commission*), T-343/17 (*Cathay Pacific v Commission*), T-344/17 (*Latam Airlines*) and T-350/17 (*Singapore Airlines v Commission*).

- On 5 September 2019, Advocate General Bobek published his opinion in the case of Budapest Bank, Visa, Mastercard and a number of other banks against a Hungarian antitrust sanction. The case concerns multilateral interchange fees, which are the fees charged by a cardholder's bank to a merchant's bank for each sales transaction made with a payment card. This is one of the several cases throughout Europe on such MIFs.

The opinion in this case is noteworthy, as the Advocate General provides clear guidance on the concept of restriction of competition by object, which concept is based on Article 101 TFEU.

The EU courts have consistently interpreted Article 101 TFEU as meaning that an agreement or a concerted practice between competitors is forbidden if it either (1) reveals a sufficient degree of harm to competition (restriction of competition by object), or, if that is not the case, (2) it could have anti-competitive effects (restriction of competition by effect).

The case brought before the European Court of Justice concerns the question of whether the same conduct could be both a restriction of competition by object and by effect. According to the AG, the questions should be answered in the affirmative . He finds that this follows from the broad wording of Article 101(1) TFEU, the fact that both grounds `are not ontologically different: they both restrict competition´ and that it follows from the case law of EU courts, as they implied that restrictions by object necessarily have anti-competitive effects. Furthermore, he gives a clear overview of the ´object´ assessment by authorities: authorities should first look at the content of the agreement and its objectives and they should secondly assess the agreement in its legal and economic context, taking into account the nature of the goods affected, the real conditions of the functioning and structure of the markets in question and, where relevant, the parties´ intentions. Or, in his words: [34]

*`Simplified to a metaphorical extreme, if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.´*

- On 24 September 2019, the European General Court handed down a second judgment in the case between Spanish Printeos SA and others versus the European Commission concerning the market for standard envelopes and printed envelopes. In 2014, the European Commission had fined the claimants for making prohibited price agreements between 2003 and 2008. In the Commission's view, the purpose of the agreements was to coordinate sales prices, allocate customers and exchange sensitive commercial information in Denmark, Germany, France, Sweden, the United Kingdom and Norway. The total fine was approximately €4.7 million. Following an initial appeal, the General Court annulled the decision in 2014.[35] The Commission then took a second decision, which the applicants have now appealed again, on the ground that the Commission had treated the undertakings concerned unequally without objective justification. The General Court does not follow that argument and has dismissed the appeal. It did, however, order the Commission to pay the costs of the proceedings because the Commission did not exercise sufficient care in imposing and explaining the fines and that this carelessness is all the more regrettable because the original decision had been annulled in 2016 for inadequate statement of reasons.[36]

[34] Opinion of A-G Bobek of 5 September 2019 in case C-228/18 (Gazdasági Versenhyivatal vs Budapest Bank et al.).

[35] European General Court 13 December 2016, case T-95/15 (*Printeos et al v Commission*).

[36] European General Court 24 September 2019, case T-466/17 (*Printeos et al v Commission*).

# 4

# Fines and procedural regulations by national competition authorities

**The Netherlands**

- On 12 September 2019, the District Court of Rotterdam handed down a decision in the appeal of telecom providers CAIW and KPN against the decision of the Netherlands Authority for Consumers & Markets ("ACM") not to further investigate the complaints of CAIW and KPN about the distribution policy of Eredivisie Media & Marketing (FOX Sports).[37] This decision was taken on the basis of the ACM's prioritisation policy. The District Court of Rotterdam firstly ruled that the ACM's criteria in setting priorities are, in and of themselves, not in conflict with the law or the general principles of good governance. In essence, the question then was whether the ACM gave sound reasons and could reasonably have decided not to further investigate the complaints on the basis of the prioritisation criteria. It does not clearly follow from the ACM's initial investigation that EMM has a dominant position or that there are discriminatory or excessive rates or prohibited price fixing. The ACM backed this up with sound reasons, while CAIW and KPN did not provide sufficient information to substantiate their complaints. For this reason, the ACM was allowed to decide that further investigation would be neither efficient nor effective.

- In his first period as chairman of the ACM, Snoep put the emphasis on faster and more efficient action by the ACM and a more social competition policy. With the latter, Snoep refers, among other things, to the protection of self-employed persons without personnel. Snoep also says he is mindful of keeping an eye on the digital economy, where extreme network effects can lead to specific competition problems. In that context, Snoep has shown himself to be an advocate of extending the enforcement instruments to include an ex ante tool which will allow measures to be imposed on platforms that are in danger of becoming dominant. Until such time, Snoep sees good opportunities for using other preventive measures such as warnings and penalties subject to non-compliance so that companies can already be persuaded to adapt their behaviour pending an investigation. Under Snoep, the ACM will - like the competition authorities in neighbouring countries - again focus more on enforcement in relation to vertical price-fixing (the ACM already published a new guideline on agreements between suppliers and buyers at the beginning of 2019). Snoep also makes a suggestion for allowing dual pricing for on and offline distribution channels to ensure the retention of brick-and-mortar stores.[38]

- Following the annulment of the fine decisions in the foreclosure auction cartel by judgment of 3 July 2017, on 2 September 2019 the Trade and Industry Appeals Tribunal partially awarded the claim for damages that had been submitted by foreclosure auction traders.[39] The Trade and Industry Appeals Tribunal found that the ACM had insufficiently substantiated its argument that there was no

[37] District Court of Rotterdam 12 September 2019, ECLI:NL:RBROT:2019:7189 and District Court of Rotterdam 12 September 2019, ECLI:NL:RBROT:2019:7190.

[38] See *mr.* P. Amador Sanchez, *mr.* W.W Geursen and *mr.* B.A. Nijs, "Een kijkje in de keuken van de nieuwe ACM-chef: een vraaggesprek met Martijn Snoep", Tijdschrift Mededingingsrecht in de Praktijk, issue 2/3, July 2019.

[39] Trade and Industry Appeals Tribunal 24 September 2019, ECLI:NL:CBB:2019:452.

causal relationship between the annulled (and therefore unlawful) fine decisions and the traders' damage because the ACM could also have taken a lawful fine decision for part of the conduct which the Trade and Industry Appeals Tribunal had indeed found to be anticompetitive. The Trade and Industry Appeals Tribunal did, however, agree with the ACM's defence that the traders' alleged loss of profit could not be attributed to the ACM because the fact that the traders no longer participated in foreclosure auctions was the result of a decision by the bank to no longer finance the traders. The Trade and Industry Appeals Tribunal ruled that the fine decisions (only) caused damage to the traders' reputations and set the compensation for immaterial damage at €40,000 per trader.

- On 20 August 2019, the Trade and Industry Appeals Tribunal ruled on the appeal of the Magazine Portfolio (*Leesmappen*) cartel.[40] In this ruling, the Trade and Industry Appeals Tribunal confirmed the decision of the District Court of Rotterdam that there were customer-allocation agreements between different suppliers of magazine packages that do not fall under the de minimis provision (as the combined market share of the company concerned was more than 10% according to the ACM's qualitative analysis). However, the Trade and Industry Appeals Tribunal did reduce the fines for (very) small enterprises which had previously been reduced by the Rotterdam District Court. Because the joint and several liability structure applied by the ACM has no legal basis, the Trade and Industry Appeals Tribunal (*ex officio*) also set individual fines for the de facto managers involved. Finally, the Trade and Industry Appeals Tribunal found that the ACM has insufficiently substantiated the defence of inability to pay put forward by some of the appellants and that the fines of all the appellants should be reduced by 15% because an unreasonable period of time has passed.

- On 30 July 2019, the Dutch government launched a round of consultations on the bill to implement the new Directive 2019/1.[41] The directive confers powers on the national competition authorities of the member states in order to ensure more effective enforcement and safeguard the proper functioning of the internal market. The Dutch law is intended to change the way in which the ACM exercises supervision and how it cooperates with foreign competition authorities. According to the government, the law therefore primarily affects these parties. The consequences of the legislative proposal are, for the rest, limited, as the ACM already has ample powers to carry out its tasks properly. What is new, however, is that the ACM can collect fines imposed by other competition authorities. It is therefore possible that companies that (also) operate abroad and violate competition law may also suffer some consequences. The consultation round was closed on 11 September 2019.[42]

**Germany**

- On 9 July 2019, the German Bundesgerichtshof (Federal Court of Justice) annulled a fine that was imposed on the German drugstore chain Dirk Rossmann GmbH for vertical pricing arrangements on filter coffee with coffee maker Melitta. The Bundeskartellamt (Federal Cartel Office) imposed fines on several goods manufacturers in 2014, of which Dirk Rossmann appealed. Where the German authority originally imposed a fine of (only) € 5.25 million, the Oberlandesgericht (Higher Regional Court) of Düsseldorf increased that fine six-fold to approximately € 30 million. Rossmann appealed the judgment and complained that it had received the written version including all grounds later than the maximum period of 11 weeks after the decision had been reached. The Supreme Court agreed and referred the case back to the Oberlandesgericht of Düsseldorf for a complete review of the case.[43]

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[40] Trade and Industry Appeals Tribunal 20 August 2019, ECLI:NL:CBB:2019:357.

[41] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

[42] Website of the Dutch government, 'Implementatie Richtlijn 2019/1', internetconsultatie.nl.

[43] Bundesgerichtshof 9 July 2019, case KRB 37/19.

- On 26 August 2019, the Oberlandesgericht (Higher Regional Court) of Düsseldorf ruled in interim proceedings that were brought by Facebook against a decision of the Bundeskartellamt (Federal Cartel Office). The Bundeskartellamt imposed a penalty on Facebook for its handling of user data and included in its decision that it would wait with the enforcement for the time necessary to appeal in first instance in interim proceedings. Facebook subsequently brought interim proceedings and won. The Oberlandesgericht ruled that it had "serious doubts about the legality" of the Bundeskartellamt's decision, as it had an "apparent lack of reasoning" on key points. Furthermore, it underlined that a breach of data protection rules by Facebook did not, in and of itself, amount to an abuse under competition laws. As a result, Facebook is not required to implement the decision by the Bundeskartellamt's decision pending its full appeal.[44]

- On 3 September 2019, the German Bundesgerichtshof (Federal Court of Justice) published its judgment of 21 May 2019 on the German wallpaper cartel. In 2014, the Bundeskartellamt (Federal Cartel Office) fined wallpaper manufacturers AS Création and Marburger Tapetenfabrik and five individuals for illegal pricing agreements. The fine was initially €17 million, but it was increased by the Oberlandesgericht (Higher Regional Court) in Düsseldorf in 2017 to € 19 million. The cartelists appealed, arguing that the case was partly time-barred. The Bundesgerichtshof has now decided that the case was not time-barred and that the fines will be upheld.[45]

**UK**

- On 25 July 2019 the Competition and Markets Authority (CMA) announced that it had provisionally found that pharmaceutical companies Advanz and Morningside and wholesaler Alliance Healthcare entered into an anti-competitive agreement from 2014 until at least October 2017 to divide the market for antibiotic Nitrofurantoin.[46] In its Statement of Objections, the CMA alleges that the companies agreed that Alliance Healthcare would buy equal volumes of the drug from each of the 2 suppliers so that they would not compete. According to the CMA, the 2 suppliers also committed to supply the drug exclusively to Alliance Healthcare during 2015 and 2016.

- In its Decision of 1 August 2019, the CMA imposed a fine of approx. £3,7 million on Casio Electronics Co. Limited and its Japanese parent company Casio Computer Co., Limited for illegally preventing online price discounts for its digital pianos and keyboards.[47] According to the CMA, Casio had forced retailers to sell digital pianos and keyboards online at or above a minimum price, and used special software to monitor if the retailers complied with the price it had set. This practice is also known as as resale price maintenance (RPM) and is contrary to Article 101 TFEU. Although the fine was reduced by the CMA because Casio had admitted to the conduct, it is still the largest fine that the CMA has ever imposed for this type of offence.

- On 20 September 2019 the Competition and Market Authority (CMA) announced that drug firms King Pharmaceuticals Limited and Alissa Healthcare Research Limited have admitted to colluding by exchanging commercially sensitive information in relation to the supply of the antidepressant nortriptyline.[48] The announcement follows an earlier Statement of Objections[49] in which the CMA accused competitors King Pharmaceutical and Auden Mckenzie (Pharma Division) Limited of dividing the market for the supply of the antidepressant to a large pharmaceutical wholesaler. Together with Accord-UK Limited, Praze Consultants Limited and Lexon (UK) Limited, the companies are also accused of exchanging commercially sensitive information, including information about

44 Oberlandesgericht Düsseldorf 26 August 2019, case VI-Kart 1/19 (V).
45 Bundesgerichtshof 21 May 2019, case KRB 93/18.
46 Competition and Markets Authority press release of 25 July 2019.
47 Competition Market Authority press release of 1 August 2019.
48 Competition and Markets Authority press release of 20 September 2019.
49 Competition and Markets Authority press release of 18 June 2019.

prices, volumes and entry plans, to try to keep nortriptyline prices high.

# 5

# Team

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**Louis Berger** is a founding partner of bureau Brandeis. He is an expert in corporate and commercial litigation with more than 20 years of extensive experience in this field. He is recognized for his legal strategy and his ability to think beyond the law itself. Louis is experienced in (international) litigation and advising in (potentially) litigious situations. He has extensive experience as local counsel in multi-jurisdiction litigation. This part of the practice involves complex and cross-border disputes that are brought to court in multiple jurisdictions. Before joining bureau Brandeis, Louis was a partner at Spigt Litigators, a prominent firm renowned in the Netherlands for its outstanding litigation practice.

**Hans Bousie** is a founding partner of bureau Brandeis. Internationally, Hans specializes in cross border antitrust damage litigation. His excellent skills in combining market economics with legal frameworks beef up his in depth knowledge of antitrust law obtained through 20 years of experience in antitrust litigation before the Dutch Courts, the European Commission, the Dutch competition authority and the European Court of Justice. As we speak, Hans is involved in the main cartel damages cases in the Netherlands: the Air Cargo Case and the Trucks Case. Hans is the founder and editor of the Cartel Damages Quarterly: the world's only journal on cartel damage competition case law. Hans is consequently on top of all new developments in cartel damage case law and regularly speaks at conferences and symposia on this matter.

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

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bureau Brandeis is a Dutch law firm which specializes in complex litigation. bureau Brandeis is a boutique firm, but at the same time also one of the largest firms in the Netherlands with a 100% focus on litigation. We litigate amongst others corporate, commercial, and competition disputes. We represent our clients during all stages of proceedings, before all courts and tribunals. From courts of first instance to the Dutch Supreme Court and the European Court of Justice.

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