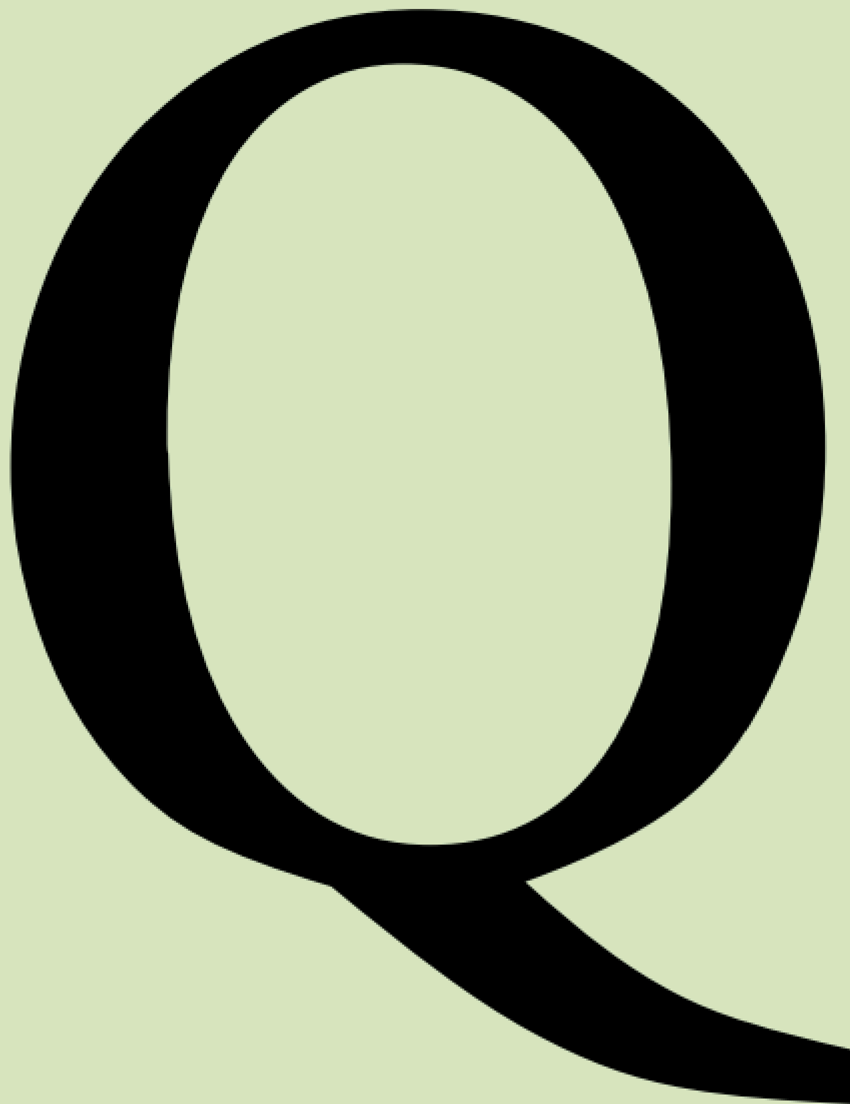
CARTEL DAMAGES QUARTERLY



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

We are not allowing ourselves to be distracted by the Covid-19 virus and are working away on our reporting on cartel damages cases. What has been striking in the fourth quarter of 2019?

First of all, we point out a decision by the District Court of Amsterdam to refer preliminary questions to the Court of Justice of the European Union (CJEU) concerning the direct effect of Article 101 TFEU. Even if Justice Rose had decided in the Emerald case that there was no such direct effect, the District Court of Amsterdam did not agree. But to prevent different lines of case law arising, it decided to refer this question to the CJEU for a ruling.

In the TenneT case, the Court of Appeal of Arnhem-Leeuwarden applied the doctrine of the Skanska judgment for the first time. In this judgment, the CJEU stated that the concept of an 'undertaking' as it applies in traditional competition law can also be extended to civil (liability) law. Thus, the Dutch Court of Appeal ruled that group company Cogelex was liable in this case. In our opinion, the Dutch Court of Appeal is stretching the Skanska judgment somewhat, since that case involved the so-called doctrine of economic continuity, which was not an issue in the TenneT case. The Court of Appeal also concluded here that the concept of undertaking had to be brought into alignment in the public and private law context, which, in my opinion, goes yet another step beyond the CJEU in Skanska.

In its ruling in relation to the lift cartel, the District Court of Rotterdam confirmed the Dutch line that an arbitration clause in an agreement is in principle not decisive when it comes to a prohibited (and unforeseeable) cartel agreement. This deviates from English and German case law, in which the courts seem to attach more value to arbitration clauses in this context by giving them a broader interpretation.[1]

Meanwhile in Germany a new case has been started in the cartel-ravaged car industry. BMW summoned Valeo and Denseo on 26 November 2019 because of their price fixing in air conditioning components, claiming over EUR 141 million plus interest.

In England, litigation in relation to the so-called truck cartel has now entered a new phase. DAF mounted a defence there before the Competition Appeal Tribunal (CAT) against Royal Mail's assertion that the so-called recitals in the Commission Decision also have a binding effect. A case that is particularly important for all other cases currently being litigated in Europe. We will report more on this in Q1 2020. In another truck case before the CAT, the defendants' argument that so-called litigation funding agreements should be declared unlawful was rejected.

Litigation is taking place in relation to the truck cartel in France as well. The Paris Court of

[1] See for example High Court of Justice 28 February 2017, [2017] EWHC 374 (Ch) and Landgericht Dortmund 13 September 2017, 8 O 30/16 [Kart].

Appeal ordered Renault to disclose several important documents to the claimants.

On the eve of the new year, the CJEU ruled that indirect damage (even further removed than passing-on damage) could also qualify for compensation, with a reference to the argument of 'Useful effect'. This concerned an overpayment of subsidies by a government body.

Finally, after a period of relative silence, we see that both the European Commission (EC) and, in particular, the national competition authorities have reached fining decisions in relation to cartels. It appears that these cases will also lead to a new round of cartel damages cases. So, you haven't seen the last in this series quite yet.

Kind regards,

On 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**

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Amsterdam, 30 March 2020

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1

Private law aspects of cartel damages claims

The Netherlands

- On 18 September 2019, the District Court of Amsterdam decided what question it would submit to the CJEU in the context of the follow-on procedure in relation to air cargo services against several airlines because of their participation in the Air Cargo Cartel.[2]

In Q(2019-2) we wrote about the earlier interlocutory judgment in this case from 1 May 2019.[3] In that judgment, the district court decided that it would refer questions to the CJEU for a preliminary ruling on the direct horizontal scope of application of Article 101 TFEU to flights in the period during which the transitional regime of Articles 104 and 105 TFEU applied. The district court deemed it necessary to refer preliminary questions for a ruling because its opinion differed from that of Justice Rose in the Emerald proceedings.[4]

In its interlocutory judgment of 1 May 2019, the district court decided that the parties could express their opinions on the questions it intended to submit. Based on the parties' opinions, the district court decided to submit the following question:

In a dispute between aggrieved parties (in this case shippers, purchasers of air cargo services) and airlines, does the national court have jurisdiction - either because of the direct effect of Article 101 TFEU or at least Article 53 of the EEA Agreement, or because of (the immediate effect of) Article 6 of Regulation 1/2003 - to apply Article 101 TFEU or at least Article 53 of the EEA Agreement in full in respect of agreements/concerted practices engaged in by airlines in relation to cargo services on flights operated before 1 May 2004 on routes between airports within the EU and airports outside the EEA, or before 19 May 2005 on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or on flights operated before 1 June 2002 between airports within the EU and Switzerland, including for the period during which the transitional regime provided for in Articles 104 and 105 TFEU applied, or does the transitional scheme stand in the way of that?

The district court stayed any further decision.

- On 23 October 2019, the Rotterdam District Court handed down a decision in proceedings between Stichting Elevator Cartel Claim (SECC) and lift manufacturers Kone B.V., Kone OYJ, Thyssenkrupp Liften B.V. and Thussenkrupp AG, in which the SECC holds the manufacturers liable for the damage it has suffered as a result of the lift cartel.[5] In a decision of 21 February 2007, the EC fined the defendants for their participation in the lift cartel.[6]

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[2] District Court of Amsterdam 18 September 2019, C/13/562256 / HA ZA 14-348 (SCC I) and C/13/604492 / HA ZA 16-301 (SCC II); European Commission 17 March 2017, Case AT.39258 (*Airfreight*).

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

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

[5] District Court of Rotterdam 23 October 2019, ECLI:NL:RBROT:2019:8230.

[6] European Commission decision of 21 February 2007, Case COMP/E-1/38,823 (*Elevators and Escalators*).

The defendants are presenting a defence on several fronts. They argue, for instance, that the district court has no jurisdiction because the agreements (general terms and conditions) they concluded with the claim holders reportedly contain arbitration clauses. Despite the applicability of these terms and conditions to (some of) the agreements, the district court deemed that it had jurisdiction.

In this context, the district court refers to EU case law from which it follows that a *choice of forum* clause cannot apply if, at the time the purchasing party consented to the validity of the clause, it was not foreseeable that this clause would also apply for a claim on grounds of an unlawful cartel involving the other party which was not known about at that time.[7] According to the district court, this consideration can be applied by analogy to the present case, where it concerns an arbitration clause. It is also of the opinion that the dispute in question was not reasonably foreseeable for the purchasing parties, in view of the content of the applicable arbitration clauses. The district court also considers that a different opinion would moreover be contrary to the principle of effectiveness of EU law.

The lift manufacturers also invoke the prescription of the claims. This defence is (also) unsuccessful because some of the claims were interrupted on time. According to the district court, the prescription period (in this case) only started to run from the date of the EC's Decision.

The other claims are not prescribed to the extent they were legally assigned to the SECC before the current prescription period expired. This also applies for claims from claim holders who do not appear on the attached list(s) of names enclosed with the letters of interruption if these claims had been assigned to the SECC on time and the cartelists were notified of this on time. In that case, the SECC could bring the claims in its own name and (thus) also interrupt the prescription in its own name.

The defendants further dispute the validity of the assignments to the SECC but, in the district court's view, it does not follow from this that the SECC's claims in these proceedings (in which a declaratory judgment is sought) would be inadmissible because the defences do not in any event succeed in relation to all the claims.

- On 26 November 2019, the Court of Appeal of Arnhem-Leeuwarden handed down a decision in the TenneT-Alstom case.[8] This case has been running for some time and we already reported on it in Q(2018-3+4).

- The proceedings were initiated by TenneT TSO B.V. and Saranne B.V. They are holding French companies Alstom, Grid Solutions SAS, Cogelex and Alstom Holdings liable for the damage they suffered because of the gas insulated switchgear cartel.[9] The EC had fined Alstom et al. in 2007 for participating in prohibited cartel agreements in tenders.[10] Cogelex was the only one of the sued parties not subject to a fine.

In an interlocutory judgment dated 28 August 2018[11] the court of appeal ruled that three of the four companies are jointly and severally liable, but it stayed the decision with respect to Cogelex. The parties were given the opportunity to comment further on this matter. We reported on this interlocutory judgment in Q(2018-3+4).

TenneT had based Cogelex's liability on, among other things, the economic unity principle of EU law. In this context, the district court raised the recent Skanska case on its own initiative and gave the parties the opportunity to comment on the scope of this judgment and its significance for Cogelex's liability. The Skanska judgment was handed down by the CJEU on 14 March 2019. For the content of the judgment,

[7] CJEU 21 May 2015, C-352/13, ECLI:EU:C:2015:335.
[8] Court of Appeal Arnhem-Leeuwarden 26 November 2019, ECLI:NL:GHARL:2019:10165.
[9] Court of Appeal Arnhem-Leeuwarden 28 August 2018, ECLI:NL:GHARL:2018:7753.
[10] European Commission decision of 24 January 2017, case COMP/38.899 (*Gas* Insulated Switchgear).
[11] Court of Appeal Arnhem-Leeuwarden 28 August 2018, ECLI:NL:GHARL:2018:7753.

see Q(2019-1), in which we reported on the case.

The court of appeal considered that it followed from the Skanska judgment that:

- EU law, and not national law, determines which entity or entities can be held liable for damage arising from an infringement of EU competition law;
- The concept of an 'undertaking', which according to the CJEU is an autonomous concept under EU law, is key in assessing which entity or entities are liable;
- The doctrine of 'economic continuity' has been extended by the CJEU from public law to private law enforcement by means of a damages claim (as in the present case);
- In this case there is no room to apply the doctrine of economic continuity. Indeed, in this case, there was (with respect to Cogelex) no change in the company law situation during the infringement or since the EC's fine.
- However, the rest of the provisions of the Skanska case are indeed relevant to the present case.

The court of appeal then made a factual assessment as to whether Cogelex belonged to the same undertaking as (the fined) company GEC Alsthom S.A. and as such is liable on grounds of EU case law. In that context, the court of appeal considered that even though it had a minority shareholding of 48%, due to Cogelex's structure GEC Alsthom S.A. had, or at least could exercise, decisive influence on Cogelex's strategy and market behaviour.

According to the court of appeal, this prompted the opinion that Cogelex and GEC Alsthom et al. constituted a single undertaking for the purposes of Article 101 TFEU. Against the background of the Skanska judgment, the court of appeal concluded that Cogelex was therefore liable, alongside the other companies, for the damage suffered by TenneT et al.

The court of appeal also considered that the matter of designating the liable entity or entities no longer allows for any assessment of bases under national law, since the Skanska judgment held that this matter is directly governed by EU law, and that the concept of 'undertaking' is an autonomous concept of EU law that is key in this assessment and must be interpreted in the same way in the public and private enforcement of competition law.

- On 27 November 2019, Heineken and the truck manufacturers explained their views at a hearing on whether or not to refer the Heineken case to the District Court of Amsterdam and/or join it to the case of claim foundation CDC. In these proceedings, Heineken is seeking to recover damages for itself and its subsidiaries from several truck manufacturers because of their participation in the truck cartel.[12] Heineken has made it clear that it opposes the joinder or referral of its case. According to Heineken, its case differs from the CDC's case because Heineken is a single party with subsidiaries, and joinder and/or referral would create unnecessary complexity and furthermore delay the case. The truck manufacturers have argued that the two cases are in fact almost identical and that referral and/or joinder would be advantageous to efficient handling. This would prevent duplication of work, as well as inconsistent judgments from different courts. The district court's decision is expected on 8 January 2020.

Germany

- BMW is seeking redress from its suppliers over price fixing for air conditioning components.[13] In March 2017 the EC imposed fines totalling EUR 155 million on several companies for involvement in cartels relating to car part production. The EC found that BMW had been the victim of a conspiracy from November 2005 to December 2009. Two of the participating companies were Valeo and Denso, who formed a cartel in relation to air conditioning components. BMW consequently filed a claim at the District Court in Munich on 26 November 2019 seeking damages for the Valeo and Denso cartel. BMW is reportedly

[12] European Commission 16 July 2016, Case At.39824 (*Trucks*).

[13] According to Mlex, see BMW seeks damages from Valeo, Denso for air-conditioning cartel, 3 December 2019.

claiming damages for a total of EUR 141 million plus interest.

UK

- On 28 October 2019 in follow-on proceedings between UK Trucks Claim Limited[14] and the Road Haulage Association Limited[15] against the truck manufacturers, the CAT ruled against the truck manufacturers in a preliminary issue.[16] Truck manufacturer DAF, supported by MAN and Iveco, had argued that the applicants' litigation funding agreements constituted damages-based agreements for the purpose of the relevant statutory regulation and were therefore unenforceable and unlawful. The CAT found otherwise, however. The truck manufacturers had also advanced arguments as to the nature and adequacy of the funding arrangements, contending that the CAT should refuse to authorise either the UK Trucks Claim Limited or the Road Haulage Association Limited as class representative. However, the CAT unanimously concluded – in summary – that the funding agreements do not (at this time) provide grounds for refusing the applicants as class representative.

- On 6 November 2019 the CAT ordered[17] JPMorgan, UBS, Cititgroup and Royal Bank of Scotland to provide up to 100 contracts to Michael O'Higgins' UK FX Cartel Claim. The class action against the banks stems from their participation in the Foreign Exchange Spot Trading cartels. It concerns contracts the banks entered into with customers for spot and/or outright forward foreign exchange transactions concluded through an office in the EU or Switzerland in the period from 18 December 2007 to 31 January 2013.

- On 15 November 2019 Nippon Yusen Kabushiki Kasha, Wallenius Wilhelmsen Logistics SA and Compañía Sudamericana de Vapores S.A. filed an application with the England and Wales High Court (Commercial Court) to strike out, or have summarily dismissed, a part of Daimler AG's claim for compensation following their participation in the Maritime Car Carriers cartel.[18] In light of a recent UK appeal court ruling[19] in the Air Cargo cartel, the applicants argued that the part of the claim which is based on international maritime services provided by the applicants exclusively between ports located outside the EEC/EC/EEA during the period prior to 18 October 2006 should be struck out. In Q(2019-3) we already reported on the follow-on proceedings stemming from the EC Decision in the Maritime Car Carriers cartel.

- On 6 December 2019 the third day of the preliminary issues hearing at the CAT in the joined cases[20] between Royal Mail Group Limited, BT Group PLC and Others, and Ryder Limited against the truck companies, including DAF Trucks Limited, MAN SE and Fiat Chrysler Automobiles N.V. for their participation in the truck cartel, the parties continued to debate whether the recitals containing the background findings of the EC Decision in the truck cartel[21] are legally binding. During the second hearing[22], DAF had argued: '*It should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it penalises. In principle, as regards the scope and nature of the infringements penalised, it is the operative part, and not the statement of reasons, which is important*' and went on to argue that only the operative part of the EC Decision, containing the ruling, is legally binding on the truck manufacturers. In this regard, DAF made a comparison to EU case law on the non-binding effect of the recitals (the preamble) in EU directives.

- On 11 December 2019 an application to commence an opt-out collective action, 'FX Claim UK', was launched against Barclays, Citibank, The Royal Bank of Scotland,

[14] Case No: 1282/7/7/18.
[15] Case No: 1289/7/7/18.
[16] Competition Appeal Tribunal, [2019] CAT 26.
[17] Case: 1329/7/7/19.
[18] Case AT.40009 – Maritime Car Carriers
[19] Case No: A3/2017/3424.
[20] Case No.: 1284/5/7/18 (T); 1290/5/7/18 (T); 1291/5/7/18 (T); 1292/5/7/18 (T); 1293/5/7/18 (T); 1294/5/7/18 (T); 1295/5/7/18 (T).
[21] European Commission, Case AT.39824 (*Trucks*).
[22] Transcript of the preliminary issues hearing (Day 2)

JPMorgan, UBS and MUFG Bank over their participation in unlawful Foreign Exchange Spot Trading cartels between 2007 and 2013. The collective action follows the two EC Decisions of 16 May 2019[23], which found that certain entities forming part of the Barclays, Citigroup, JPMorgan, MUFG Bank (formerly Bank of Tokyo-Mitsubishi), RBS/NatWest and UBS banking groups had each participated in one or both of two foreign exchange (FX) spot trading cartels. In its two settlement decisions, the EC had fined the banks EUR 1.07 billion for participating in the cartels.

France

- In a lawsuit[24] brought by French claimants against Renault Trucks for its participation in the truck cartel, the Paris Court of Appeal ordered Renault to disclose the EC's Statement of Objections sent to the company as well as specific documents referred to in the (non-confidential) EC Decision, Mlex reported.[25]

[23] EC 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.*

[24] Case no: 19/05356

[25] Arezki Yaïche, 30 October 2019, *Renault Trucks should disclose docs related to EU truck-cartel probe, French court says,* Mlex.

2

Public law aspects of cartel damages claims

EU

- On 12 December 2019 the CJEU handed down a preliminary ruling in which it interpreted Article 101 TFEU as meaning that a public body – not being a purchaser of cartel products – may request compensation for loss caused by a cartel.[26] The state of Oberösterreich launched an action for damages against five members of the lift cartel because it had granted subsidies (promotional loans) to construction projects affected by the cartel. As the construction costs were higher due to the cartel, the amount in subsidy granted was higher than in the absence of the cartel. The state of Oberösterreich claimed it could have invested that difference more profitably. With reference to the direct effect of Article 101 TFEU and the 'useful effect' doctrine, the CJEU considered that a national law that restricts the right to compensation to suppliers and customers on the market affected by the cartel would seriously undermine the effective protection against the negative consequences of an infringement of EU competition rules.

[26] ECJ 12 December 2019, case C-435/18 (*Otis and Others v Land Oberösterreich and Others*)

3

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

EC

- On 4 November 2019 the EC launched a formal investigation into the potentially anticompetitive behaviour of two French groups of retailers, Casino Guichard-Perrachon and Les Mousquetaires (known as 'Intermarché'). Casino and Intermarché are two of the largest supermarket chains in France. In November 2014, they set up a joint venture for the purpose of joint procurement of their branded products. The Commission is, however, investigating whether Casino and Intermarché illegally coordinated their behaviour (beyond joint procurement), for instance in relation to consumer prices.[27]

- On 8 November 2019 the EC published its cartel statistics including the preliminary figures for 2019. With fines totalling almost EUR 1.5 billion (five cartel cases), 2019 has (so far) been a relatively average year compared to fines totalling EUR 800 million (four cartel cases) in 2018 and almost EUR 2 billion (seven cartel cases) in 2017. The fine imposed on the forex cartel last year is among the highest cartel fines (EUR 1.07 billion) imposed by the EC.[28]

- On 25 November 2019 the EC published the non-confidential version of its cartel Decision relating to cathode ray tubes (CRT). In 2012 the Commission fined seven European and Asian producers of TV and computer monitor tubes for their participation in a price-fixing and customer-allocating cartel that lasted for two decades.[29]

- In its prohibition Decision of 27 June 2017 the EC found that Google abused its dominant position by giving its own price comparison website (Google Shopping) an advantage over competing price comparison websites. Google was required to remedy its illegal conduct by applying the same processes and methods to its own service as to rival comparison shopping services (equal treatment). While the Commission noticed that the market has since been slowly opening up, there is still little traffic to rival shopping comparison services (such as Kelkoo, KuantoKusta, Vergelijk.nl, Foundem and Idealo). Margrethe Vestager, Commissioner for Competition, stated that if the remedy does not work, '*we'll have to rethink*'.[30]

- The EC has announced it will revise its notice on market definition to ensure it is fit for the age of globalisation and digitalisation. The Commission noticed that both the definition of product market and the definition of geographical market may require adjustments to deal with, for instance, global industrial markets and digital services which are provided free of costs, but in return for data.[31]

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[27] See EC press release of 4 November 2019, *Antitrust: Commission opens investigation into possible collusion by two French retailers in a purchasing alliance.*

[28] See the updated cartel statistics here.

[29] European Commission 5 december 2012, CASE AT.39437 (*TV and computer monitor tubes*).

[30] In an interview with Mlex, see Mlex, 27 November 2019, *Google's shopping remedy providing 'very little' traffic to rivals, EU's Vestager says*.

[31] See speech of Margrethe Vestager, Defining markets in a new age, Chillin' Competition Conference, Brussels, 9 December 2019.

CJEU

- On 30 September 2019 four Italian steel bar makers filed appeals against fines totalling EUR 16 million for a price-fixing cartel for concrete reinforcing bars in Italy. The EC's earlier decisions of 2002 and 2009 were both annulled on procedural grounds. In its re-adopted Decision of 2019, the Commission applied a fine reduction of 50% to compensate for the long duration of the proceedings. The appellants claim *inter alia* that the Commission infringed their rights of defence and the principle of *non bis in idem*.[32]

- During a conference on 9 December 2019 the General Court's newly elected president, Marc van der Woude, shared his views on procedural, legal and systemic challenges the court is facing, in particular in relation to competition law. Van der Woude suggested, for instance, that the General Court instead of the CJEU should respond to preliminary questions on matters involving competition law, as it is primarily the General Court that reviews the legality of EC decisions. Van der Woude also argued in favour of documents (such as statements made in the context of the leniency programme) becoming declassified after five years, unless there are good reasons to keep these confidential.[33]

- On 19 December 2019 Fujikura, Furukawa and Viscas lost their appeals against the fines imposed in 2014 by the EC for their participation in the power cables cartel. The three Japanese companies stated that the EC was wrong to apply the same fining criteria to them as to European companies who played a bigger role in the cartel. The CJEU rejected the argument and found that the Commission calculated the fines in accordance with the principle of equal treatment. With this final court ruling, all the fines imposed on European and Asian manufacturers of underground and undersea power cables were upheld by the highest European court.[34]

- HSBC and the EC both appealed the ruling of the General Court of 24 September 2019 concerning HSBC's participation in the Euribor cartel. In its judgment the General Court largely upheld the Commission's finding that HSBC took part in the Euribor cartel, but it overturned the fine of EUR 33.6 million because of insufficient reasoning with respect to the discount factor applied in calculating the fine. Whereas HSBC appealed the judgment to contest the finding that it had infringed competition law, the Commission's appeal focused on the assessment of the fine calculation method.[35]

- US packaging manufacturer Silgan has filed its third appeal at the General Court to challenge the EC's ongoing investigation into a possible cartel related to metal packaging. In March 2019 Silgan lost an appeal before the General Court in which it contested the Commission's Decision to take over the case from the Bundeskartellamt. In 2018 Silgan launched another appeal claiming that the Commission violated its defence rights during dawn raids (still pending). The new appeal is apparently related to a request for information.[36]

[32] Appeal brought on 30 September 2019 before the Court of Justice, Case T-657/19 (*Cinkciarz.pl v EUIPO*).
[33] *'Chillin' Competition Conference,' Brussels, 9 December 2019.*

[34] ECJ 19 December 2019, Judgment C-582/18 (*Viscas v Commission*), Judgment C-589/18 (*Furukawa Electric v Commission*), Judgment C-590/18 (*Fujikura v Commission*).

[35] Appeal brought by HSBC before the Court of Justice Case C-883/19 P (*HSBC Holdings and Others v Commission*); *Appeal brought by the Commission, Case C-806/19 P (Commission v HSBC Holdings and Others*).
[36] According to Mlex, see Mlex 27 November 2019, *Silgan files fresh challenge against EU metal-packaging probe*.

4

Fines and procedural regulations by national competition authorities

The Netherlands

- In November 2019, Martijn Snoep (head of the Netherlands Authority for Consumers & Markets (ACM)) said at a conference [37] that he believes that competition authorities should not only take price into account when making their analyses, but that other social aspects may also be important.[38] He cited examples such as the PostNL-Sandd merger which would result in higher prices but also in better working conditions for post-delivery workers. He also saw a role for the ACM to support companies in working together to achieve sustainability goals. The Lithuanian authorities did not follow this view and found that given the expertise and independence of the authorities, a restrictive interpretation would be more appropriate.

- On 28 November 2019 the CBb (the Dutch Trade and Industry Appeals Tribunal) ruled that the ACM could not attribute the fine in the Flour cartel to the partnership and to the managing partners, as had been decided in the interlocutory ruling of 19 March 2019.[39] In that ruling, the ACM had held for the first time that investment companies could also be fined for participation in a cartel by the company over which they had decisive influence. The CBb found, however, that in this case the fine could only be collected from the company. The flour cartel consisted of 14 flour producers who concluded prohibited cartel agreements between 2001 and 2007.

- 'Parallel investigations into Apple's App Store by the Dutch antitrust regulator and the EC should continue because of small but important differences between them,' Snoep said in December 2019. An interview Mlex [40] conducted with Snoep indicates that the two authorities spoke with each other and decided that the two investigations could be conducted alongside each other. The investigations are similar, yet they each approach it from a different angle, Snoep claims. The ACM focuses more on complaints submitted by providers of other news media applications in the Netherlands, while the European investigation is more focused on a complaint from Spotify regarding music streaming services that Apple reportedly restricts in favour of Apple Music. We also reported on this in Q(2019-2).

- On 18 December 2019 the French competition authority fined seven food companies a total of EUR 58.3 million for engaging in anti-competitive agreements in the sale of applesauce. The companies fined are S.A. Materne, Andros, Conserves France, Délis S.A. / S.A.S.Vergers de Châteaubourg, S.A.S. Charles Faraud/Charles&Alice, Valade and Coroos. They made secret cartel agreements and divided the market between them from October 2010 to January 2014. The Dutch

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[37] 'Competition and non-competition concerns: rethinking the distinction', Autumn Competition Law Conference, UCL and White & Case, Brussels, 21 November 2019.

[38] See Mlex, Competition authorities should support broader public policy, Netherlands' Snoep says, 21 November 2019.

[39] Trade and Industry Appeals Tribunal 28 November 2019, ECLI:NL:CBB:2019:651.

[40] See Mlex, Apple's App Store should remain under parallel Dutch and EU probes, Snoep says, 16 December 2019.

company Coroos, which submitted a request for leniency to the French authority, was granted a total exemption from the fine. The Dutch and French authorities cooperated in this case. The ACM helped carry out the company visit to Coroos, for instance.[41]

Germany

- On 6 November 2019 the Bundeskartellamt decided to close its investigation into the potato and onion packaging cartel between Hans-Willi Böhmer Verpackung & Vertrieb and Kartoffel-Kuhn after the companies appealed the initial decision from 2018.[42] After an interim procedure the German competition authority re-evaluated the case and closed proceedings. In 2018, the two were fined for fixing prices in their supplies to the Metro group. Hence, the companies escaped a fine of EUR 13.2 million.

- In November 2019 a report from the German ministry for economic affairs on improving the climate for European industrial businesses[43] set out Germany's ambition to reform EU competition law in order to counter industrial threats and abuses of dominance by Big Tech. Starting from July 2020 Germany will hold the presidency of the Council of the EU for six months, giving it the opportunity to set the legislative agenda. The idea of implementing an industrial strategy for European industrial companies is part of the ongoing debate on modernising EU competition law.

- In November 2019 a Bundeskartellamt official said at a conference[44] that according to a draft revision of Germany's competition law, dominant tech platforms could be considered as having 'permanent significance to competition' and face specific orders to stop abusive behaviour.[45] The proposal, which is targeted at dominant platforms or networks, is in line with a more expansive approach to market dominance. The draft legislation sets out a new role for the Bunderskartellamt, enabling it to identify companies with a position of paramount significance for competition and impose additional behavioural obligations. It is difficult at present to judge the feasibility of turning it into law since the proposal has not yet been debated by business associations and stakeholders.

- On 12 December 2019 the Bundelskartellamt imposed fines of around EUR 646 million on Ilsenburger Grobblech GmbH, thyssenkrupp Steel Europe AG and voestalpine Grobblech GmbH and three individuals.[46] From mid-2002 until June 2016 they had exchanged information and made agreements on certain price supplements and surcharges for quarto plates in Germany. Dillinger Hüttenwerke also participated in the agreements. However, because the company was the first to cooperate with the Bundeskartellam, it was granted full immunity from fines.

- On 19 December 2019 the Bundelskartellamt imposed fines totalling approximately EUR 195,000 on the companies BHG Agrarhandelsgesellschaft mbH & Co. KG, H&H Flüssiggas GmbH, OSTSEE und MV GAS Flüssiggasvertrieb GmbH and Top Gas Flüssiggas Handel GmbH.[47] The competition authority found that they had concluded illegal territorial agreements between November 2006 and July 2016. The cartel was brought to the attention of the Bundelskartellamt after a

[41] Netherlands Authority for Consumers & Markets, press release of 18 December 2019, 'Samenwerking ACM en Franse mededingingsautoriteit draagt bij aan beboeting Frans kartel'.
[42] Bundeskartellamt, Bußgeldverfahren gegen Abpackunternehmen für Kartoffeln und Zwiebeln, B11-21/15, 6 November 2019.
[43] Federal Ministry of Economics and Technology, Industriestrategie 2030, *Leitlinien fur eine deutsche und europaische Undustriepolitik*, November 2019.
[44] Advanced EU Competition Law Brussels, KNect265, Brussels, 25-27 November 2019.
[45] See Mlex, Dominant tech platforms a specific German antitrust law reform, official says, 27 November 2019.
[46] Bundeskartellamt, press release of 12 December 2019, 'Steel manufacturers fined approx. 646 million euros for agreeing on prices of quarto plates'.
[47] Bundeskartellamt, press release of 19 December 2019, 'Cartel proceedings against independent suppliers of liquefied gas concluded with imposition of further fines'.

leniency application filed by Dr. Ulrich Fuchs GmbH & Co. KG (Fuchsgas) in March 2016.

- On 23 December 2019 the Bundelskartellamt imposed a total fine of approx. EUR 8 million on several plate embossing companies that were involved in anticompetitive practices in the sale of vehicle registration plates to end customers in Germany from 2000 until early 2015.[48] The companies involved are Christoph Kroschke GmbH, EHA Autoschilder GmbH, Astorga Fritz Lange GmbH & Co. Schilder und Stempelfabriken KG and Tönjes Holding AG and five individuals. All of them agreed to a settlement. The fining decision can still be appealed to the Dusseldorf Higher Regional Court.

UK

- After the victory of the Conservative Party on 12 December 2019, the way is open for a reform of the UK's state aid rules and digital regulations. The party wants to take advantage of Brexit to also revise a substantial part of the domestic law. During the campaign, Prime Minister Boris Johnson pledged to adopt a more 'permissive' state aid regime and make a 'fundamental change' to the UK's procurement regime.

- On 18 December 2019 the UK's Competition and Markets Authority published an interim report in its market study on online platforms and digital advertising. Among other topics, it analysed the possibility of implementing a new law that would enable it to force Google and Facebook to share users' information with independent data managers. The authority claims that the measure would enhance effective enforcement of data protection legislation. It hopes this could rebalance the advantages Facebook and Google have over advertising platforms.[49]

[48] Bundeskartellamt, press release of 23 December 2019, 'German plate embossing companies fined for anticompetitive practices in the sale of number plates'.

[49] CMA press release 18 December 2019, *CMA lifts the lid on digital giants*.

5

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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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