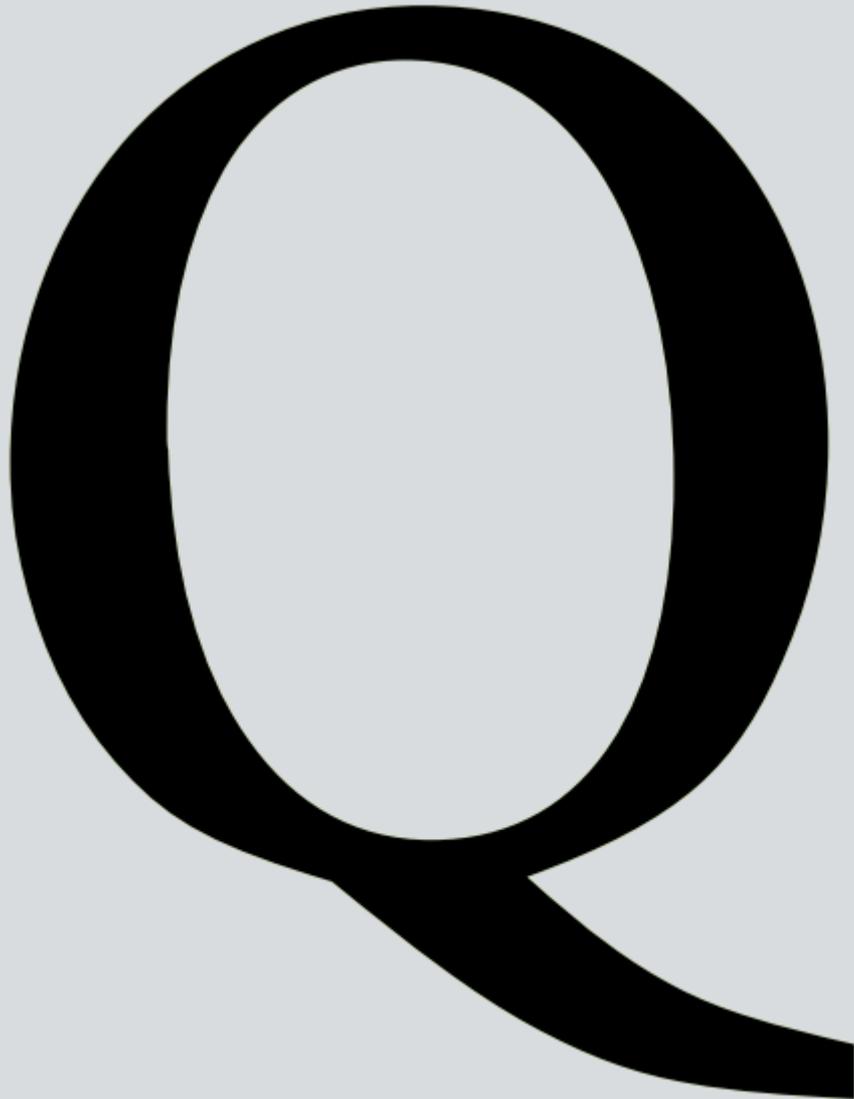


BUREAU BRANDEIS

CARTEL DAMAGES  
QUARTERLY



Q1 2020

## We are pleased to present the first quarterly report on cartel damages litigation of 2020

The first quarter of 2020 saw a large number of developments. With cartel damages cases coming before various courts for consideration, all manner of issues were reviewed, including applicable law, limitation, and validity of assignment, to name but a few. A definite trend emerged in this first quarter in which higher courts in particular seem to want to accommodate claimants in cartel damages cases. While the lower courts are still adhering somewhat strictly to doctrine, the higher courts seem to be ascribing more value to what is known as the *Effet Utile*.

In this issue of Q, we consider the groundbreaking judgment of the Court of Appeal of Amsterdam in the *CDC/Kemira* case (concerning the so-called sodium chlorate cartel). The Court of Appeal ruled that the limitation period for filing claims only starts to run once a ruling at last instance has been rendered by the European bodies (i.e. once the case has reached the Court of Justice of the European Union). Prior to this judgment it had generally been assumed that the crucial moment in this regard was the issuing of the European Commission's decision (with the press release sufficing according to the then prevailing doctrine). That was the point at which the existence of the damage and the identity of the party responsible for it would become clear. The Court of Appeal of Amsterdam is now extending this period considerably. The significance of this judgment for Dutch cartel damages practice cannot be overestimated. It would also preclude alleged cartelists from relying on an important argument in sundry pending cases. The limitation defence seems no longer to be an option in practice. The Court of Appeal of Den Bosch ruled that, under German law, the subjective limitation period would not start to run until the publication of the Commission's decision, thus also extending the time limit,

albeit not as far as the Court of Appeal of Amsterdam.

One month later, in the *Equilib* case, the Court of Appeal of Amsterdam ruled that in respect of 'assignment' it is not necessary for all underlying documents to be submitted in cartel damages cases. The defendants had sought a direction to this effect, and the Court ruled that the assignment would have to be accepted.

In Germany, the highest German court ruled that the so-called *kartellbefangen* requiring claimants to link their claim to a specific transaction should be abandoned, and that a more general reasoning is sufficient.

In the *DRAMS* cartel case, the UK High Court was somewhat less generous than its Dutch and German counterparts. The claimant, Granville, had argued that its claim only became clear upon (the publication of) the decision, adopting a similar position to the Court of Appeal of Den Bosch in the Netherlands, but the High Court ruled that the damage must have been apparent at an earlier stage. This seems to indicate a parting of the ways between continental case law and that of the UK. The English court took a somewhat more lenient approach in the *Ryder* case (concerning the trucks cartel), ruling that common disclosure was appropriate, in which respect the concerns of the defendants could be dealt with by creating certain confidentiality rings.

Kind regards,

In behalf of the team **Hans Bousie**

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

# Index

*Amsterdam, 30 September 2020*

1. Private enforcement in cartel damages claims – case law p. 3
2. Developments regarding public law aspects of cartel damages p. 12
3. Fines and procedural regulations by the Commission and European Court of Justice p. 13
4. Fines and procedural regulations by national competition authorities p. 17
5. Team p. 19

**1****Private enforcement in cartel damages claims – case law****The Netherlands**

- In Q(2019-4) we wrote that Heineken, which initiated proceedings seeking to recover damages for itself and several subsidiaries from several truck manufacturers for their involvement in the truck cartel,<sup>1</sup> had argued against joinder and referral of its case from the District Court of Oost-Brabant to the District Court of Amsterdam with 14 similar cases, including the case of claim foundation CDC. Mlex reported that the District Court of Oost-Brabant decided in a judgment dated 24 December 2019 that the case will be transferred to the District Court of Amsterdam, despite Heinekens arguments against referral. The Court said that referral would be efficient and would prevent the risk of conflicting decisions. It did not concur with Heineken's argument that joinder of the cases would be complex or result in a delay of the pending proceedings, because the judges could take steps to prevent this, according to the Court.

- On 13 January 2020, the District Court of Amsterdam published the full text of its decision of 18 September 2019 in which it specified the questions it would be submitting to the CJEU in the context of the follow-on proceedings in relation to air cargo services against several airlines because of their

participation in the Air Cargo Cartel.<sup>2</sup> We elaborated on (the content of) this decision in Q(2019-2) and Q(2019-4).

- A new damages lawsuit against several truck manufacturers for their participation in the truck cartel<sup>3</sup> was filed at the District Court of Amsterdam on 30 December 2019, including a bundle of claims from consumer goods suppliers Unilever, Danone and Mondelez, paint manufacturer Akzonobel, steel manufacturer ArcelorMittal and stainless steel manufacturer Aperam.<sup>4</sup>

- On 28 January 2020, the Court of Appeal of Den Bosch ruled in an interlocutory judgment on the prescription of the damages claim of Deutsche Bahn et al. ('DB et al.') against several prestressing steel companies because of their participation in the prestressing steel cartel. In an earlier judgment of 16 November 2016, the lower District Court had ruled that (some of) DB's claims were time-barred under the applicable German law, because, in short, they would not have been suspended or interrupted by operation of law, since Article 33(5) of the German Competition Act ('GWB') (as in force effective July 2005) did not apply to them, and earlier versions of the GWB did not provide for interruption/suspension by operation of law.

<sup>1</sup> [European Commission 16 July 2016, Case At.39824 \(Trucks\)](#).

<sup>2</sup> [District Court of Amsterdam 18 September 2019, C/13/562256 / HA ZA 14-348 \(SCCI\) and C/13/604492 / HA ZA 16-301 \(SCCII\); European Commission 17 March 2017, Case AT.39258 \(Airfreight\)](#).

<sup>3</sup> [European Commission 16 July 2016, Case At.39824 \(Trucks\)](#).

<sup>4</sup> According to [Mlex, DAF, other truck cartelists face fresh damage claim from Unilever, Danone, Mondelez, others](#), 4 February 2020.

On appeal, DB et al. disputed the finding that its claims were time-barred.

The relevant limitation periods under German law in this case are as follows:

- (1) the short, subjective limitation period of 3 years, which begins to run at the end of the year in which the creditor became aware, or could have become aware, of both the existence of the damage and the person liable (Article 199(1) *Bürgerliches Gesetzbuch* ('BGB'));
- (2) and the long, objective limitation period of 10 years, commencing on 1 January 2002 for damages claims arising before that date and, for damages claims arising after that date, commencing on the date the claim arose (Article 199(3)(1) BGB).

With regard to the short, subjective limitation period, the parties adopted different positions as to when this period would have commenced. The Court of Appeal ruled that an EC press release from 2010 with respect to the decision on the prestressing steel cartel and the subsequent attention given to the decision in the German media was insufficient for this purpose. That decision refers only to the cartel's total duration and members, and not to the respective periods during which each member actually participated. The Court of Appeal stated that DB et al. also needed the latter information to establish whether there had been or was any damage suffered in the first place and, if so, whether DB et al. was one of the parties affected. As DB et al. could only have acquired this information after publication of the EC decision in November 2011, the subjective limitation period commenced on 1 January 2012 and (thus) has not expired, according to the Court of Appeal.

With regard to the long, objective limitation period, unlike the lower District Court the Court of Appeal ruled that this period was suspended by operation of law pursuant to Article 33 GWB

until six months after the EC decision had become irrevocable vis-à-vis the claimants. Referring to a recent BGH judgment of 12 June 2018 (*Grauzement Cartel II*), the Court of Appeal determined that Article 33 of the GWB also applies to damages claims that are based on infringements of competition law which took place before the entry into force of the GWB Amendment Act and that were not yet time-barred at the time of its entry into force (2005).<sup>5</sup>

This is the first judgment in which a Dutch court has commented so extensively on German limitation periods. Prior to this case, only the District Court of Limburg had ruled on German law on this point in the earlier judgments on the prestressing steel cartel in 2016 and 2015.<sup>6</sup>

- On 10 March 2020, the Court of Appeal of Amsterdam rendered a judgment on appeal in the proceedings in which the claim vehicle Equilib is attempting to enforce claims for damages against various airlines for their participation in the aviation cartel. Equilib asserts that it has acquired the claims of 670 shippers by assignment. The airlines challenged the validity of the assignments, and this judgment concerned the Court of Appeal's determination as to which of the parties bears the obligation to furnish facts and the burden of proof on this point.

The Court of Appeal held that Equilib bears the obligation to furnish facts, and the burden of proof regarding the assertion that the airlines must accept the assignment as being effective against them. The Court of Appeal stated that Equilib will have fulfilled this obligation to furnish facts if the deed was notified to the airlines and an extract of the deed and title was submitted to them. Referring to the parliamentary history and the second and third sentences of Article 3:94(4), the Court of Appeal stated that the debtors had a limited

<sup>5</sup> [Court of Appeal of 's-Hertogenbosch 28 January 2020, ECLI:NL:GHSHE:2020:293.](#)

<sup>6</sup> [District Court of Limburg 16 November 2016, ECLI:NL:RBLIM:2016:9897](#), see also [District Court](#)

[of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791.](#)

right to information and furthermore could not claim additional documents.

It is then up to the airlines to argue, in the context of substantiating their defence, how and why the validity of the assignment should be questioned on reasonable grounds. The mere fact that they do not have all the information needed to establish validity is not sufficient to substantiate such doubts.

As regards other aspects of the airlines' grounds of appeal, the Court of Appeal held the following, put briefly:

- at (this stage of) these proceedings it is not necessary to establish whether or not the assignment of the claims was validly made, since that is not necessarily important in the relationship between assignee and debtor. The important thing is whether the debtor has to accept the effectiveness of the assignment against him;
- Therefore, the fact that it is not (yet) possible to determine what the actual claims are (other than on the basis of the general description thereof in the transfer deed) cannot, at this stage, lead to the conclusion that the claims are not sufficiently precise within the meaning of Article 3:84(2) of the Dutch Civil Code. However, to the extent that Equilib later proves unable to provide the required information, this could indeed have consequences for the award of the claim;
- Nor does Equilib's obligation to furnish facts or its burden of proof extend, in principle, to the obligation of the (alleged) assignors under the assignment documentation signed on their behalf. The airlines are required to state in their defence the facts and circumstances which would indicate that authorised representation is lacking, and they have not done so sufficiently.

The conclusion is that the airlines' grounds of appeal against the contested judgment fail, but that the decision in this case is reserved until a decision has been taken on the question of the law applicable to the claims in the other case pending in these proceedings (since the answer

to that question may affect the present assessment).

This judgment has interesting implications for all cartel damages cases, as it makes it clear that claimants will fulfil their obligation to furnish facts by submitting an extract of the deed of assignment and the title. Cartelists' defences in these – and other – cartel cases, seeking access to all the underlying documents, will thus be brushed aside at first instance. The documents in question may become relevant if there are reasonable grounds to doubt the validity of the assignment, but such discussions often focus on one or a few assignment agreements rather than on all assignment agreements submitted by the claimant.

- On 12 March 2020, a case management hearing took place at the District Court of Amsterdam in connection with the handling of various cases relating to the truck cartel. Due to the large number of damages claims already filed against the truck manufacturers, the District Court's approach to date has been to join the cases insofar as possible. This case management hearing focused on the handling of the second group of cases, the so-called 'second wave', consisting of 18 joined cases. The 'first wave' consisted of 15 cases that were already joined.

Several issues related to the further course of the proceedings were on the agenda, including the time period within which the truck manufacturers would have to respond to the writs of summons and the degree to which a (substantive) defence would already have to be included in those responses.

In this context, the truck manufacturers indicated, briefly put, that (1) the (already ongoing) cases had to remain manageable for the truck manufacturers and that they (2) therefore needed sufficient time to analyse the truck and assignment documents. The truck manufacturers therefore argued for a period of more than a year for submitting their (substantive) Statement of Defence in the

second wave cases, i.e. by 1 July 2021 at the latest.

The claimants argued, in brief, that (1) they should not be confronted with a *fait accompli* in these cases as a result of decisions in the proceedings already ongoing and (2) these cases should not be delayed as a result of the proceedings already ongoing. They therefore argued for a (substantive) Statement in the shorter term, specifically September/October 2020.

The District Court indicated in this regard that it did not wish to receive more documents than prior to the hearings scheduled in the first wave of cases in October 2020. It agreed with the truck manufacturers that the (already ongoing) proceedings, including those before the District Court, must remain manageable. The District Court also indicated that it considered it important for the truck manufacturers to be able to include possible 'take-aways' from decisions related to the first group of cases in their Statement of Defence in the second wave, and that consequently the deadline for the Statement should not be until after the judgment in the scheduled hearings in October 2020. On this basis, the date for the (joint) Statement of Defence was provisionally set by the District Court at 30 June 2021.

The District Court agreed with the claimants that the Statement of Defence in question should then be in full, featuring the broad thrust of all defences, including preliminary defences and ancillary actions. The proceedings should not be delayed by having preliminary defences conducted first (instead of a full Statement of Defence). The District Court indicated that it would decide thereafter on the further (possibly phased) handling of the proceedings.

The District Court also proposed that the attorneys also representing the parties in the first group of cases should consult with the claimants' attorneys in the second group of cases insofar as possible when preparing for the aforementioned hearings in the first group of cases.

## Germany

- BMW has started litigation before the District Court of Munich to claim damages from spark plug manufacturer NGK for its role in the spark plugs cartel, which lasted from 2000 until 2011.<sup>7</sup> The claim was filed on 6 December 2019 and is understood to target NGK for at least EUR 25 million in damages.<sup>8</sup>

- On 28 January 2020, the highest German Court, the Federal Court of Justice, issued an important ruling which will make it easier for possible cartel victims to show that they have a claim.<sup>9</sup> This is because the Federal Court has abandoned a restrictive legal requirement under German law, known as '*kartellbefangen*', according to which damages claimants were required to prove that the cartel agreement related to their specific purchases or transactions in order to show that they had a claim. Now that the Federal Court has abandoned the earlier requirement, it is sufficient that the claimant shows that it has purchased goods subject to the cartel agreement from a company participating in the cartel and (thus) that the anticompetitive practices are in principle capable of causing damage to the claimant.

The proceedings stem from a damages claim by a regional transportation company initiated against an unidentified member of the so-called train tracks cartel,<sup>10</sup> in the context of which eight companies were fined millions of euros by the *Bundekartellamt* back in 2013. These

<sup>7</sup> [European Commission 21 February 2018, Case AT.40113 \(Spark Plugs\).](#)

<sup>8</sup> [Mlex, BMW sues NGK in Germany over spark-plug cartel, 6 January 2020.](#)

<sup>9</sup> [German Federal Court of Justice 28 January 2020, case KZR 24/17.](#)

<sup>10</sup> [Bundeskartellamt press release, 'Bundeskartellamt punishes more agreements between rail manufacturers', 23 July 2013.](#)

proceedings ended up at the Federal Court of Justice, and give rise to further practical implications. For instance, on the subject of expert evidence the Federal Court said that the judge had to review the (different) reports put forward by the parties on the operation of markets and effects on prices and that courts may appoint their own expert but that this was not mandatory. Also, the Federal Court held that judges should avoid separate interim decisions on (first) the existence of claims and (second) the level of damages, which was formerly common practice, in order to avoid unjustified delays and higher legal costs. The decision encourages judges to render unified decisions (on the merits) instead.

The damages claims of the regional transport company were annulled, because the Federal Court did not follow the reasoning and the application of the principles of *prima facie* evidence assumed by the higher court. The case has therefore been referred back, with the provision of detailed guidance by the Federal Court of Justice to the lower court on how to handle this specific case.

- On 7 February 2020, the District Court of Munich dismissed a damages claim that was filed by a road hauler's association (BGL), a company specialised in mass claims against several truck companies for their participation in the truck cartel.<sup>11</sup> The District Court considered the assignment of claims by the customers to the company null and void for violation of the German Legal Services Act (RDG). The RDG is a specific German law that seeks to protect the legal system, parties seeking legal assistance and legal relations from unqualified legal services.<sup>12</sup> The company had claims transferred to them by more than 3000 truck customers and was seeking damages for an amount of approximately EUR 600 million.

<sup>11</sup> [European Commission 16 July 2016, Case At.39824 \(Trucks\)](#).

<sup>12</sup> [Press release of 7 February 2020, District Court of Munich, case Az. 37 O 18934/17](#).

In this case, it was held that there was a violation of the RDG for several reasons. First, the court said that the legal services of the claimant were exclusively directed towards the judicial assertion of the claims, being participation in a class action, and not at extrajudicial activities (out of court). Therefore these legal services could not be regarded as "*debt collection*" within the meaning of the RDG. Second, the court said that, by bundling the claims, the interests of the individual customers might be endangered and a potential conflict of interest might arise in regard to potential settlement agreements, because the settlement amount would be paid to the individual customers on a pro rata basis (according to the claimants terms and conditions), irrespective of the concrete prospect of success of the individual claims. Third, the court said that the claimant's dependence on litigation financing services might give rise to a concrete risk of direct external influence as regards the manner of law enforcement, which might be contrary to the interests of the claimant's customers. In the context of the third point, the court said that it might be a risk in this case that the litigation financing agreements exempted the claimant completely from litigation costs and that this could make the claimant largely indifferent to litigation steps that would trigger cost. The considerations of the financing provider with a view to expediency of the litigation could therefore take the place of the claimant's own considerations, held the court. BGL has announced that it will appeal against the court's decision.<sup>13</sup>

### United Kingdom

- In the first quarter of 2020, several new claims can be added to the growing list of damages actions against various truck manufacturers for their participation in the truck cartel:

<sup>13</sup> [Press release, 'BGL und seine KOoperationspartner vor dem Gang in die Berufung', 7 February 2020](#).

- Three new damages actions were filed in December 2019 by several food-service wholesalers BFS Group Limited, HM Group Limited, 3663 Alba Limited, Pullman Foods and Bidfood Foodservice Limited and AB Foods units and car-rental company Enterprise Rent-A-Car UK Limited;<sup>14</sup>
- a claim filed by Industrial gas company The BOC Group and logistics company GIST followed in February 2020;<sup>15</sup>
- and in March 2020, Irish refrigerated transport company McCulla Limited filed a lawsuit targeting DAF Trucks, MAN and Iveco.<sup>16</sup>

- On 22 January 2020, a hearing took place before the UK High Court in the damages action initiated by Granville Technology's Group against Infineon Technologies and other chipmakers for their participation in the DRAMS cartel involving 10 producers of memory chips or DRAMS who were fined by the EC in 2010.<sup>17,18</sup> The chipmakers argued that Granville Technology's claim was time-barred because the cartel's impact on DRAM prices was known before the (date of the) EC decision. Granville filed its claim in 2016, that is 18 years after the chipmakers started their cartel which lasted between 1998 and 2002. The defendants argued that Granville could and should have filed its suit earlier (2004 at the latest they argue, six years from the start of the infringement as set out in the Limitation Act

1980) because Granville had (or could have) already learned about the cartel by then, in particular because regulators from the US Department of Justice had investigated the cartel by that time, and because press reports and information about an earlier legal claim filed in the UK was already available, as a result of which (the scope of) the cartel could have been known at an earlier stage, the chipmakers said. Granville argued that the US investigation focused on certain (other) aspects and not on the (price) effects of the cartel in Europe, and that it could not have acquired sufficient information to bring a lawsuit earlier, for instance not as a result of the earlier legal claim and/or the chipmaker's subsequent legal document disclosure. It said it had to wait for the EC decision in 2010 in order to acquire knowledge of essential facts needed to plead its claim. This issue, whether and when Granville could or should have learned about (the facts necessary for) the possibility of bringing a claim and (thus) whether its claims were time-barred, was treated as a 'preliminary issue'. The ruling was handed down on 25 February 2020,<sup>19</sup> in favour of the chipmakers. The Judge said that Granville could have been "*in a position to plead a viable claim*" earlier. As regards another claimant, OT Computers (OTC), however, this was not the case, the Judge ruled.

- On 6 February 2020, a pre-trial hearing was scheduled for the damages action initiated

<sup>14</sup> The claim numbers are CP-2019-000035 (the claimants are: BFS Group Limited, HM Group Limited, 3663 Alba Limited, Pullman Foods, and Bidfood Foodservice Limited), CP-2019-000036 (the claimant is Enterprise Rent-A-Car UK Limited) and CP-2019-000037 (the claimants are: ABF Grain Products Limited, AB Agri Limited, Frontier Agriculture Limited, Allied Bakeries Limited, ABNA Feed Company Limited, ABN (Scotland) Limited, Fishers Feeds Limited, Food Investments Limited, Allied Grain Limited, Allied Grain (Scotland) Limited, Allied Grain (South) Limited, Allied Grain (Southern) Limited, Fishers Seeds & Grain Limited, John K. King & Sons Limited, and Agrilines Limited).

<sup>15</sup> The case numbers are CP-2020-000006 for BOC Group and CP-2020-000007 for the GIST claim. The defendants are Fiat Chrysler Automobiles, CNH Industrial, Iveco S.p.A., Iveco Magirus AG, MAN SE, MAN Truck & Bus SE, MAN Truck & Bus Deutschland GmbH, Aktiebolaget Volvo, Volvo

*Lastvaqnar Aktiebolag, Volvo Group Trucks Central Europe GmbH, Renault Trucks SAS, DAF Trucks N.V., DAF Trucks Deutschland GmbH, and Daimler AG.*

<sup>16</sup> CP-2020-000008. The claimant is McCulla (Ireland) Limited. The defendants are Fiat Chrysler Automobiles, CNH Industrial, Iveco S.P.A., Iveco Magirus, MAN SE, MAN Truck & Bus, MAN Truck & Bus Deutschland, PACCAR Inc, DAF Trucks, DAF Trucks Deutschland.

<sup>17</sup> CL-2016-000304 *Granville Technology Group Limited (in liquidation) and others v. Elpida Memory (Europe) GmbH and others*.

<sup>18</sup> [European Commission decision of 19 May 2010, Case 38511 \(DRAMS\)](#).

<sup>19</sup> CL-2016-000304 *Granville Technology Group Limited (in liquidation) and others v. Elpida Memory (Europe) GmbH and others*.

by several claimants, among which Ryder, against several truck manufacturers for their participation in the truck cartel.<sup>20</sup> Mlex reported the following on this hearing. One of the main issues on the agenda was the disclosure of documents by the defendants. Judge Roth said that this is one of the parallel issues across most of the (large number of) claims against the truck manufacturers and that the objective should be to achieve consistent outcomes.

The parties argued about various disclosure applications as well as the access of the claimant's expert advisors to disclosed documents across the various suits, and whether there should be "common disclosure". Ryder said, inter alia, that it would be impractical if, every time there was disclosure, segments of disclosure had to be identified as applicable to the present suit; that would make disclosure very slow and difficult. The truck manufacturers said, inter alia, that they were concerned about future disclosures taking place automatically and that experts might end up talking to one another.

Judge Roth held that disclosure should be common to all the claims and said the concerns of the truck manufacturers could be dealt with by amending the terms of the confidentiality rings insofar that they should only allow experts to discuss documents that are "common" to each other. By legal order of Judge Roth dated 30 March 2020,<sup>21</sup> the truck manufacturers (1) must identify which documents, or categories of documents, have been disclosed to the claimants and (2) must inform the other claimants once they make a disclosure to any

claimant and inform them whether the same disclosure is also being made to a different claimant.

The issue of "pass-on" was also touched upon during the hearing of 6 February, but Roth said that this should be discussed at a later hearing before trial when further guidance on this issue from other cases in the context of, inter alia, the interchange fees cartel is available.

- On 11 February 2020, a hearing took place at the UK Commercial Court in the context of a damages action brought by German car manufacturer Daimler against several deep sea transport companies, including Wallenius Wilhelmsen and Nippon Yusen Kabushiki for their participation in the maritime car carrier cartel concerning intercontinental maritime transport of vehicles as found and fined by the EC in 2018.<sup>22</sup> Mlex reported on this hearing.<sup>23</sup> The defendants applied for a split trial, in order to handle the issue(s) of legal liability and damages separately. The hearing focused mainly on this issue. The defendants tried to convince the court that the case is too complex for a single trial and that a split trial might be beneficial for potential settlement talks, but without success. The Judge said that a split trial would result in increased costs and a delay to the proceedings by three years or more, and this would put an unnecessary burden on the court's time and resources and would result in prejudice to Daimler as well. In the oral ruling, the Judge (thus) rejected the application of the defendants for a split trial. The proceedings will continue in October 2021, when a 10-week trial is scheduled.<sup>24</sup>

<sup>20</sup> 1284/5/7/18 (T) *Royal Mail Group Limited v DAF Trucks Limited and Others*; 1290/5/7/18 (T) *BT Group PLC and Others v DAF Trucks Limited and Others*; 1291/5/7/18 (T) *Ryder Limited and Another v MAN SE and Others*; 1292/5/7/18 (T) *Suez Groupe SAS and Others v Fiat Chrysler Automobiles N.V. and Others*; 1293/5/7/18 (T) *Veolia Environnement S.A. and Others v Fiat Chrysler Automobiles N.V. and Others*; 1294/5/7/18 (T) *Wolseley UK Limited and Others v Fiat Chrysler Automobiles N.V. and Others*;

1295/5/7/18 (T) *Dawson Group plc and Others v DAF Trucks N.V. and Others*.

<sup>21</sup> [Competition Appeal Tribunal 30 March 2020, case no. 1291/5/7/18 \(T\)](#).

<sup>22</sup> [European Commission decision of 21 February 2018, Case 40009 \(Maritime Car Carriers\)](#).

<sup>23</sup> Mlex, '[Cartelist car shippers lose bid to split UK trial over Daimler's damages suit](#)', 11 February 2020.

<sup>24</sup> The case reference is CL-2018-000572 *Daimler AG v. MOL (Europe Africa) Ltd and others*. The defendants in full are: *MOL (Europe Africa)*,

- Last year, two separate mass claims against several banks for their participation in a foreign exchange spot trading cartel,<sup>25</sup> were put forward for approval from the Competition Appeal Tribunal ('CAT'), one by former head of the UK pensions regulator O'Higgins and one by former inquiry chairman of the CAT, Evans. On 13 February 2020, a preliminary issues hearing took place before the Tribunal to consider case management issues in the first case of O'Higgins.<sup>26</sup> The Tribunal also considered case management in relation to the subsequent application filed by Evans, as the two lawsuits are in fact rivals. Both are so-called 'opt-out claims', which seek to represent broadly the same UK class members (among which in this case pension funds, asset managers and hedge funds). The CAT can therefore only select one claim to proceed to trial to represent the class. On this issue, the defending banks argued that the present carriage dispute should be treated as a preliminary issue before the main hearing on the final approval or rejection of the chosen claim, which is scheduled for March 2021. Most banks supported an early decision on certification on one of the claims (all except for Royal Bank of Scotland, who took a neutral stance) for the sake of efficiency. On 6 March 2020, the Tribunal decided that the carriage dispute should be heard at the same time as the application for certification in March 2021.<sup>27</sup> The reasoning underlying the decision was the novelty of the regime and the outstanding question for the test for certification in the Walter Merrick case, on which we reported in Q (2019-2 and 2018-3 and 4). The Merrick lawsuit is, like the present suits, a proposed mass claim in the UK but relating to the interchange fees cartel found and fined by the EC in 2007,<sup>28</sup>

*Mitsui OSK Lines, Wallenius Rederierna, Wallenius Wilhelmsen, Wallenius Logistics, Wallenius Ships Holding Malta, Kawasaki Kisen Kaisha, K Line Holding (Europe), Nippon Yusen Kaisha, NYK Group Europe, Compañía Sud Americana de Vapores.*

<sup>25</sup> [European Commission decision of 16 May 2019, Case 40135 \(FOREX\).](#)

seeking approval by the CAT. The claim was refused by the CAT, but Merrick challenged the refusal effectively and succeeded in having the case sent back for review. The Supreme Court hearing for this case should have taken place in May 2020 and was expected to clarify the requirements for the test of application and approval of collective lawsuits. We will report on this hearing in the next Q(2020-2).

- After a two day pre-trial hearing, the UK Commercial Court rendered an oral order in an antitrust lawsuit filed by funds manager Allianz Global Investors against several banks that were involved in the foreign exchange cartel.<sup>29</sup> The banks that were under investigation by the European Commission for collusion in relation to trading currencies were Barclays, Citigroup, Royal Bank of Scotland, JPMorgan and Japan's MUFG (formerly Bank of Tokyo-Mitsubishi UFJ). They settled the case(s) with the EC in May last year. The key issue that was discussed during the pre-trial hearing was the disclosure of documents by the banks, in particular documents in relation to alleged anticompetitive conduct between 2003 and 2007. This period was not covered by the EC decision, and Allianz' claim is therefore broader. Allianz alleges that in this period that cartel was established and the banks already shared information with each other. Allianz' lawyer argued for "standard disclosure" for this period, which means that all documents relied on by the banks and adversely affecting and/or supporting Allianz' case should be disclosed. The banks argued that this would not be appropriate and that Allianz should (first) provide more detail on their claim. On 26 February 2020, the judge rendered an oral order, predominantly in the banks' favour. The judge said that standard disclosure would be

<sup>26</sup> See for instance the summary of the hearing of O'Higgins:

<https://www.ukfxcartelclaim.com/Home/Progress>  
<sup>27</sup> [Competition Appeal Tribunal 6 March 2020, Case no. 1329/7/7/19, \[2020\]CAT9.](#)

<sup>28</sup> [European Commission decision of 19 December 2007, Case 34579 \(Mastercard I\).](#)

<sup>29</sup> [European Commission decision of 16 May 2019, Case 40135 \(FOREX\).](#)

disproportionate and that Allianz needed to provide more detail on their claim to establish the data relevant to the lawsuit. The banks should, however, provide adverse documents on the early period, meaning documents that support those of Allianz and documents that contradict or damage the banks' contended version of events.<sup>30</sup> It may be inferred from this case that cartelists might be obliged to provide documents outside the scope of the investigation and decision of the competition authority involved.

- At the UK Competition Appeal Tribunal, a claim has been filed to start an "opt out" collective action targeting five shipping companies who were fined in 2018 by the European Commission for their participation in the maritime car carriers cartel.<sup>31</sup> In its ruling, the EC found that the shippers had coordinated rates, allocated tenders, coordinated reductions of capacity in the market and exchanged commercially sensitive information to maintain or increase the prices of their shipping services for cars, trucks and trailers. The class action targets shipping companies MOL, "K" Line, NYK, WWL-EUKOR and CSAV for GBP 150 million. The claim was filed by Mark McLaren under the Consumer Rights Act 2015 on behalf of consumers and businesses who purchased or leased new cars and vans.<sup>32</sup>

- On 4 March 2020, the Competition Appeal Tribunal ('CAT') published a judgment<sup>33</sup> on a preliminary issue ahead of allowing a follow-on damages action initiated against several truck manufacturers for their participation in the trucks cartel to proceed to trial. The preliminary issue the CAT decided on related to the extent to which certain recitals in the EC decision<sup>34</sup> relating to the truck cartel are binding as a matter of EU law and, insofar as

they are not binding under EU law, whether it would be an abuse of process as a matter of English common law for the defendants not to admit them in these proceedings. Some of the truck manufacturers argued that the recitals on their roles in the cartel should not be considered as binding on them in these proceedings. Other truck manufacturers argued that the recitals were binding insofar as they constituted the essential basis of what is stated in the operative part, and that on this basis only a few of the findings in the recitals were binding. The truck manufacturers all submitted that insofar as a recital was not binding as a matter of EU law, it could not be an abuse of process for the defendants to contest it. The CAT determined that certain recitals (in sections 3, 4 and 7 of the EC decision) were binding on the truck manufacturers for the purpose of the present proceedings. The Tribunal reached this conclusion with reference to case law and the explanation of the terms/criterion of whether the recitals were an "essential basis" or the "necessary support" for a determination in the operative part (of the EC decision), or necessary to understand the scope of the operative part for them to be binding. Further, the CAT gave guidance on what principles should apply in order to determine the question of whether it would be an abuse of process for the defendants to contest those (binding) recitals in the present proceedings.<sup>35</sup> The truck manufacturers received permission from the CAT on 26 March 2020 to appeal this ruling insofar as it considers the findings on the application of the principle of abuse of process under English law.<sup>36</sup>

<sup>30</sup> CL-2018-000840 *Allianz Global Investors GmbH and others v. Barclays Bank plc and others*.

<sup>31</sup> [European Commission decision of 21 February 2018, Case 40009 \(Maritime Car Carriers\)](#).

<sup>32</sup> See [Scott + Scott press release of 2 March 2020, 'Car Shipping Cartel Faces GBP150M Class Action'](#).

<sup>33</sup> [Competition Appeal Tribunal 4 March 2020, case no. 1284/5/7/18, \[2020\] CAT 7](#).

<sup>34</sup> European Commission decision of 19 July 2016, case 39824 (*Trucks*).

<sup>35</sup> [Competition Appeal Tribunal 4 March 2020, case no. 1284/5/7/18, \[2020\] CAT 7](#), para. 141.

<sup>36</sup> [Competition Appeal Tribunal 26 March 2020, case no. 1284/5/7/18, \[2020\] CAT 10](#).

## 2

# Public law aspects of cartel damages

### European Union

- The Director of the Cartel Directorate of the European Commission, Eric van Ginderachter, retired at the end of March of this year. His work for DG Competition spanned a total of 30 years, including acting as Director of the Cartel Directorate from 2011 onwards. He has been replaced on an interim basis by Cecilio Madero Villarejo, the Deputy Director-General for mergers.

## 3

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

### European Commission

- During an online event hosted by 'Friends of Europe' on 27 March, European Commission Executive Vice-President Margrethe Vestager outlined the Commission's response to the current COVID-19 health crisis.<sup>37</sup> She noted that some forms of cooperation are allowed in these specific times for specific purposes. For example, cooperation between retailers within the foods supply chain is legal for the purpose of making sure that there is still food in the shops. In general, however, competition law enforcement is continued, she said. Vestager emphasised that the Commission is actively working against 'virus profiteering' through small cartels as well as big tech companies. "*Companies can't expect to dodge antitrust enforcement on the back of the economic upheaval caused by the coronavirus pandemic*", she made clear, "*a crisis is not a shield against competition law enforcement*".

- It is evident from Volkswagen AG's annual report 2019 that the company has filed its reply to the European Commission's statement of objections. The EC's statement of

objections was issued in April 2019 to Volkswagen AG, AUDI AG, and Dr. Ing. h.c.F. Porsche AG in connection with the Commission's antitrust investigation of the automobile industry.<sup>38</sup> The Commission's preliminary view is that the car companies participated in a collusive scheme, in breach of EU competition rules, to limit the development and roll-out of emission cleaning technology for new diesel and petrol passenger cars sold in the European Economic Area, and in doing so, denied consumers the opportunity to buy less polluting cars, despite the technology being available to the manufacturers.

### European Court of Justice

- In Q(2019-4) we reported on the appeal of both HSBC and the EC against the ruling of the General Court of 24 September 2019 concerning HSBC's participation in the Euribor cartel. HSBC's appeal, which was brought on 3 December 2019, has now been published. The appeal can be found here.<sup>39</sup>

<sup>37</sup> Friends of Europe, 'Shaping Europe's digital future: an industry, markets and digital nexus?', 27 March 2020.

<sup>38</sup> European Commission press release, 'Antitrust: Commission sends Statement of Objections to

BMW, Daimler and VW for restricting competition on emission cleaning technology', 5 April 2019.

<sup>39</sup> Appeal brought by HSBC before the Court of Justice Case C-883/19P (HSBC Holdings and Others v Commission), 10.2.2020 EN Official Journal of the European Union C 45/29.

- On 30 January 2020, the CJEU handed down its judgment in the *Generics* case.<sup>40</sup> The case revolved around allegedly unlawful agreements and concerted practices regarding the manufacturing of pharmaceutical drugs. The case originated from the imposition of fines totalling GBP 44.99 million by the Competition and Markets Authority ('CMA') on GlaxoSmithKline ('GSK'), Generics Limited and Merck KGaA (together referred to as 'GUK-Merck') and Alpharma. The CMA found that the undertakings entered into a 'pay for delay' agreement regarding a prescription drug known as Paroxetine. In short, the CMA argued that by means of an out-of-court patent settlement between them, the parties put pending litigation on hold and therefore effectively delayed the entry onto the market of a generic version of the drug Paroxetine. The settlement was structured such that GSK paid the (future) manufacturers for refraining from placing generic versions of Paroxetine on the market, supplying them with stocks of Paroxetine for them to distribute during the period of delay. The CMA considered these practices an infringement of Article 101 TFEU.

GSK and the manufacturers of the future generic product appealed against the CMA's decision. This led to the CMA asking preliminary questions to the CJEU, seeking guidance on the subject of 'pay for delay' agreements. As this case was the first time that the CJEU issued a judgment regarding a 'pay for delay' agreement, the case contains some significant additions to the doctrine. First of all, the CJEU upheld the decision by the CMA and while doing so it issued clarifying statements on the line between 'effect' infringement and 'object' infringement in the market. The CJEU stated that 'pay for delay' agreements may comprise an 'object' infringement depending on two criteria, namely (i) whether the transfer of value is enough incentive for a manufacturer of

generics to refrain from entering; and (ii) the degree of harm to competition and whether there are possible pro-competitive effects. In doing so the CJEU followed the trend set in prior cases, establishing that 'object' infringements should be assessed restrictively and should effectively be reserved for practices involving (potential) harm to competition that outweighs their pro-competitive effects.<sup>41</sup>

- In February of this year, the fundamental notion of what exactly comprises an 'undertaking' in the context of EU competition law became the subject of an appeal before the EU's highest court. In this hearing the definition and scope of the concept of an undertaking was thoroughly discussed, as well as how to adequately impose cartel-related fines upon a parent company and its subsidiaries.<sup>42</sup> The case at hand stems from 2009, when the EC handed down a fine to a German business operating in the plastics industry, GEA Group AG. The EC's lawyers were quoted stating that "*this case provides a useful opportunity to revisit basic concepts of competition law such as the notion of an undertaking and how a fine should be set for legal entities within it*".<sup>43</sup> The European Commission had erroneously applied the notions of equal treatment and the respective concepts of undertakings and joint several liability. GEA's lawyers argued that there were in fact "*two separate groups of undertakings*",<sup>44</sup> disputing the arguments of the EC that GEA had decisive influence over the entities 'CPA' and 'ACW'.

Secondly, the hearing covered aspects of the judgment under appeal, in which it was found that the timeframe in which GEA is obliged to pay its fine should start from the moment of the notification of the previously amended decision. The discussion on this element is mainly focused on the question whether the

<sup>40</sup> [CJEU 30 January 2020, ECLI:EU:C:2020:52, Case C-307/18.](#)

<sup>41</sup> Including *Cartes Bancaires*, *Maxima Latvija*, the AG's Opinion in *Budapest bank* and the General Court cases *Lundbeck* and *Servier*.

<sup>42</sup> According to [Mlex, "Undertakings' in the spotlight as EU regulator appeals GEA's ruling at top court", 5 February 2020.](#)

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

amended decision is to be regarded as a 'new' decision.

- In [Q\(2019-2\)](#) we already reported that the District Court of Amsterdam decided that it would refer questions to the CJEU in the context of a follow-on procedure concerning actions brought by litigation vehicles [Equilib Netherlands B.V.](#) and [Stichting Cartel Compensation](#) against members of the [Air Cargo cartel](#). The questions concern 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. In [Q\(2019-4\)](#) we shared the question(s) submitted by the court to the CJEU. The CJEU has now published a summary of the referral (in English), which can be found [here](#).<sup>45</sup>

- US packaging manufacturer [Silgan Closures GmbH](#) and its parent company [Silgan Holdings Inc.](#) lost their third appeal at the General Court challenging the EC's ongoing investigation into a possible cartel related to [metal packaging](#).<sup>46</sup> The EC decided to take over the probe from the Bundeskartellamt in March 2018. Silgan had already challenged this decision twice since then, but without success. We reported on the two earlier appeals and the lodging of the most recent appeal in [Q\(2019-4\)](#). In its decision on the last appeal on 29 January 2020, the CJEU (also) held that Silgan could not challenge the EC's decision to initiate infringement proceedings. The appeal was therefore rejected. This means that the investigation is still pending with the EC.<sup>47</sup>

- In her recent Opinion, Advocate General Kokott discussed the recent appeal before the CJEU '[Nexans France and Nexans v European Commission](#)' (C-606/18 P), focusing

on the investigative powers of the EC, and argued that Nexans' appeal should be rejected in full. Nexans and Nexans France appealed the judgment of the General Court (T-449/14), which reaffirmed the EC's decision to penalise Nexans as a consequence of cartel proceedings.

The appeal revolves around the legality of data collection by the EC during an inspection pursuant to Article 20 of Regulation 1/2003 without a prior determination of its relevance and the intention to determine its relevance at the EC's premises. Advocate General Kokott argued that the EC should be allowed to do so, "*provided that appears appropriate for the conduct of the relevant inspection, no data are placed in the file which have not been examined beforehand as to their relevance to the subject matter of the relevant inspection and all other data are deleted after the sifting operation*".<sup>48</sup> She added that Nexans' defence and privacy rights were not violated and that the EC took adequate precautions as they placed all copies in sealed envelopes and invited Nexans' lawyer to attend the review by the EC on its premises.

- Ten years later, [Intel](#) is still in the process of trying to overturn a decision of the EC and subsequent CJEU judgment on appeal that led to Intel incurring a EUR 1.06 billion fine back in 2009.<sup>49</sup> Although the case was effectively closed, Intel recently arranged for it to be reheard before the General Court in an effort to overturn the fine in question on the basis of (what they deem to be) errors in the EC's analysis.<sup>50</sup> Mlex reported on the hearing that took place in March 2020 as follows. Intel's lawyer, Daniel Beard was quoted saying that the "*grossly disproportionate*" fine should be

<sup>45</sup> [Summary of the request for a preliminary ruling, Case C/819-19 \(Stichting Cartel Compensation and others\)](#).

<sup>46</sup> [European Commission press release of 3 May 2018, 'Antitrust: Commission confirms unannounced inspections in the metal packaging sector'](#).

<sup>47</sup> [CJEU 29 January 2020, Case 418/19 P \(Silgan v. Commission\)](#).

<sup>48</sup> [CJEU 16 July 2020, ECLI:EU:C:2020:207, Case C-606/18 P](#), para. 67.

<sup>49</sup> [European Commission press release of 13 May 2009, 'Antitrust: Commission imposes fine of EUR 1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices'](#).

<sup>50</sup> Case T-286/09 RENV (pending).

scrapped *"in its entirety"*.<sup>51</sup> Intel is of the opinion that *"the Commission either took a wrong approach in its decision or it carried out an as efficient competitor (AEC) test and it got it wrong"*.<sup>52</sup> The hearing was spread over three consecutive days and focused on the economic analysis that underpinned the EC's decision and, more specifically, the As Efficient Competitor Test ('AEC Test'). This test was used to claim that Intel had abused its dominant position pursuant to article 102 TFEU and acted anticompetitively by issuing allegedly illegal rebates. Over the past decade, this case has caused considerable turmoil and the use of the AEC Test has been heavily criticised by leading scholars and practitioners in the field of competition law.

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<sup>51</sup> [Mlex, 'Intel criticizes 'disproportionate' EUR 1.06 billion fine as EU court hearing closes', 12 March 2020.](#)

<sup>52</sup> <https://www.cnbc.com/2020/03/10/reuters-america-intel-says-flawed-eu-antitrust-decision-underpins-1-point-2-blm-fine.html>.

## 4

# Fines and procedural regulations by national competition authorities

### The Netherlands

- The 'digital economy' and 'energy markets in transition' are central in the oversight activities of the Netherlands Authority for Consumers and Markets ("ACM") in the coming period. *"The major topics of public debate in the Netherlands right now are the digital economy and the energy transition. That is also reflected in the indications that we receive. ACM wants to ensure that markets function well for people and businesses. In 2020, we will do so by paying special attention to access to digital platforms, by taking action against online misleading practices, and by investigating sustainability claims regarding products and services, among other activities"*, said ACM's Chairman of the Board Martijn Snoep.<sup>53</sup>

- On 20 February 2020, the ACM announced that it was investigating a possible buyer cartel involving certain reusable waste products. It conducted raids at the premises of various buyers of these waste products, as it suspects that the buyers secretly made illegal arrangements involving the purchasing price. ACM additionally suspects that the buyers divided suppliers among themselves. As a

consequence, the suppliers' ability to sell has been restricted.<sup>54</sup>

### Germany

- On 13 January 2020, the Bundeskartellamt imposed fines totalling 154.6 million euros on seven wholesalers of plant protection products and employees of theirs who were responsible for agreeing on price lists, discounts and some individual sales prices to retailers and end customers in Germany. The companies fined were AGRAVIS Raiffeisen AG, Hanover/Münster, AGRO Agrargroßhandel GmbH & Co. KG, Holdorf, BayWa AG, Munich, BSL Betriebsmittel Service Logistik GmbH & Co. KG, Kiel, Getreide AG, Hamburg, Raiffeisen Waren GmbH, Kassel and ZG Raiffeisen eG, and Karlsruhe. The companies agreed on price lists in the spring and autumn of each year between 1998 and the dawn raid in March 2015.<sup>55</sup>

- On 27 January 2020, the German Court of Appeal (*Bundesgerichtshof*) issued a decision on the appeal of food producer Wittman, a member of the so-called sausage cartel for which it was fined 6.5 million euros in

<sup>53</sup> [ACM press release 'ACM's focus areas in 2020'](#), 31 January 2020.

<sup>54</sup> [ACM press release, 'ACM conducts investigation into possible buyer cartel involving reusable waste products'](#), 20 February 2020.

<sup>55</sup> [Bundeskartellamt press release, 'Wholesalers of plant protection products fined for anti-competitive agreements on price lists, discounts and individual prices'](#), 13 January 2020.

2018. The *Bundesgerichtshof* found that the legal complaints were unfounded and therefore dismissed the appeal, without giving further reason.<sup>56</sup>

- According to Mlex,<sup>57</sup> steel and mining company Arcelor Mittal has said that an antitrust investigation that was run by the *Bundeskartellamt* into suspicious contact between makers of flat steel, has ended. The companies are said to have been notified in February 2020 of the formal closure of the investigation without action being taken.

- On 25 February 2020, the *Bundeskartellamt* published its comments on the Federal Ministry for Economic Affairs and Energy's draft of the 10<sup>th</sup> amendment to the German Competition Act (GWB). The president of the *Bundeskartellamt*, Andreas Mundt, has said that the draft is welcomed and that it contains important further developments which will, inter alia, "*fulfill the requirements effective cartel enforcement to an even better extent in the future*".<sup>58</sup> The *Bundeskartellamt*'s comments (in German only) are [available here](#).

## United Kingdom

- The UK Competition and Markets Authority has published its decision of December 2019, in which it found four real estate agents to have broken competition law by agreeing to fix and maintain a minimum level of commission fees to be charged for the sale of residential properties over a period of almost 7 years. The CMA fined the estate agents a total of just over GBP 600,000.<sup>59</sup> The addressees of the decision are Michael Hardy & Company (Wokingham) Limited and Geocharbert UK Ltd, Prospect Estate Agency Limited and

Prospect Holdings (Reading) Limited, Richard Worth Limited (in administration) and Richard Worth Holdings Limited and The Romans Group (UK) Limited and Romans 1 Limited. The cartel was in place between at least 1 September 2008 and 19 May 2015, according to the CMA decision.

<sup>56</sup> *Bundesgerichtshof* 27 January 2020, KRB 67/19, ECLI:DE:BGH:2020:270120BKRB67.19.0.

<sup>57</sup> [Mlex, 'ArcelorMittal escapes German probe of flat/steel cartel', 3 March 2020.](#)

<sup>58</sup> [Bundeskartellamt press release, 'Bundeskartellamt welcomes Economic Affairs](#)

[Ministry's plans to modernise competition law', 25 February 2020.](#)

<sup>59</sup> [CMA press release, 'Estate agents fined over GBP 600,000 for illegal price fixing', 25 February 2020.](#)

# 5

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