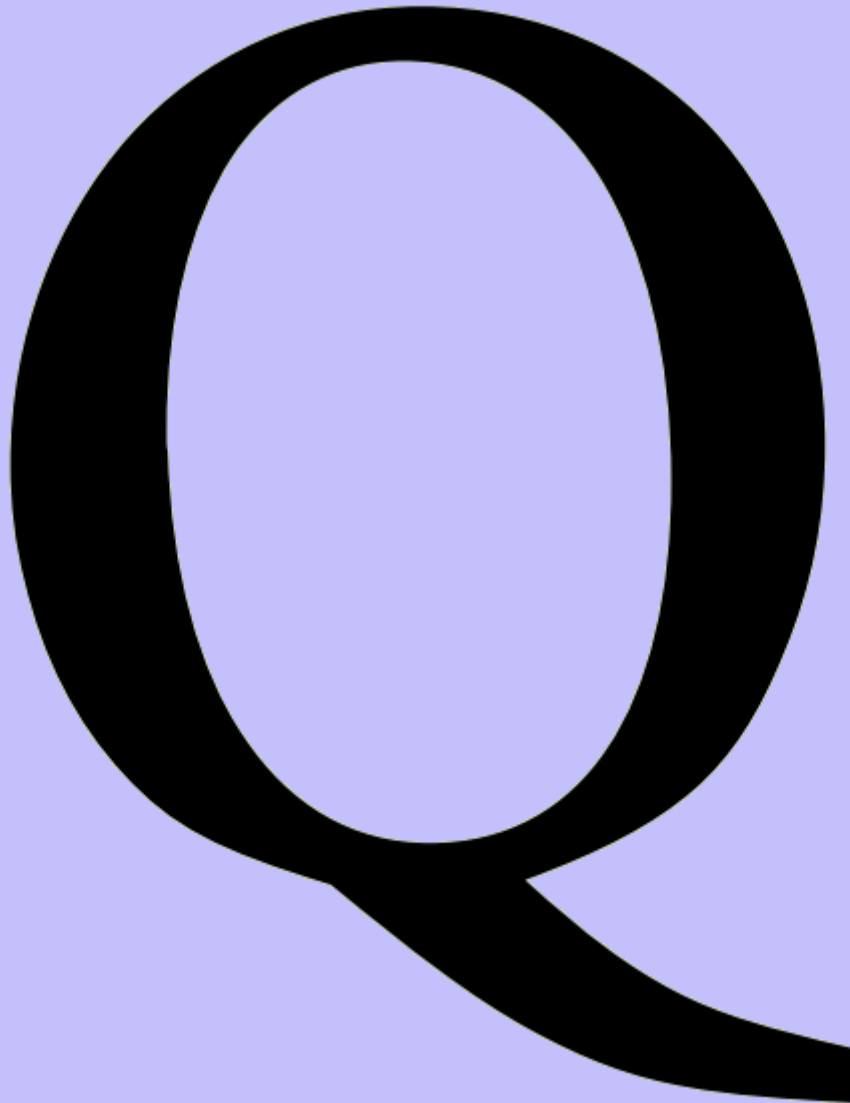


BUREAU BRANDEIS

CARTEL DAMAGES
QUARTERLY



Q2 2020

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

In the second quarter of 2020, the world, including the legal, was hit by lockdowns. In most of the jurisdictions we monitor, this resulted in delays, resulting in a limited number of developments and rulings regarding cartel damages. You will find the poor harvest enclosed.

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**

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Amsterdam, 25 November 2020

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1**Private enforcement in cartel damages claims – case law****Germany**

- On 12 May 2020, the Higher Regional Court (Oberlandesgericht) in Frankfurt am Main rejected the antitrust damages lawsuit brought by the insolvency administrator for German drugstore chain Schlecker. The administrator claimed EUR 212 million from makers of personal care products, cleaning products and detergents, for illegal information exchange. According to the administrator, Schlecker had suffered the damage because prices had been kept artificially high as a result of the illegal exchange of information between the makers. The court of first instance (LG Frankfurt) dismissed the claim and the Higher Court also held that the damage had not been proven, in part because the supporting report did not meet the requirements.¹

- On 29 May 2020, the German supreme court (Bundesgerichtshof) published two 3 December 2019 judgments pertaining to a train track cartel. Two transport companies from Karlsruhe claimed damages from the legal successor of SHW Weichenbau GmbH following the fine imposed by the German competition authority for participation in the 'Train Track Friends' cartel. The claimants asserted that the prices they had paid were too high because of that cartel. Their claims were upheld by the Higher Regional Court (the

Oberlandesgericht) of Karlsruhe, but the Bundesgerichtshof has now found that the ORL wrongly relied on the evidence submitted. It is referring the cases back to the ORL for further assessment of the claims.²

United Kingdom

- Mlex reported³ on 20 April 2020 that LG Display had declared that it settled an antitrust claim in 2019 with the Japanese screen maker Iiyama in the aftermath of the liquid-crystal displays cartel. In 2010, the European Commission imposed a fine of EUR 649 million on LG Display, AU Optronics, Chimei Innolux, and others for having engaged in LCD display price-fixing from 2001 to 2006.

- According to Mlex, on 5 May 2020, Daimler A.G. argued before the UK High Court in London that Wallenius Wilhelmsen's data on the operation of the maritime car carriers cartel amounted to a "smoking gun".⁴ In those proceedings,⁵ Daimler is claiming damages from various shipping companies for their role in the cartel⁶ that we wrote about earlier in [Q\(2020-1\)](#). In its decision of 21 February 2018, the European Commission fined the shipping companies Mitsui O.S.K. Lines, Ltd, MOL (Europe Africa) Ltd, Nissan Motor Car Carrier Co., Ltd, Kawasaki Kisen Kaisha, Ltd, Nippon Yusen Kabushiki Kaisha and various companies

¹ [Decision of OLG Frankfurt of 12 May 2020, 11 U 98/18 \(Schlecker\)](#).

² [Decision of Bundesgerichtshof of 3 December 2019, KZR 23/17](#) and [decision of Bundesgerichtshof of 3 December 2019, KZR 25/17](#).

³ Mlex, LG Display settles with Iiyama over LCD cartel claim, 30 April 2020.

⁴ Mlex, Wallenius Wilhelmsen data provides 'smoking gun' in car-shipper operations, Daimler tells UK judge

⁵ The case is CL-2018-000572 Daimler AG v MOL (Europe Africa) Ltd and others.

⁶ Commission Decision of 21 February 2018, Case AT.40009 – Maritime Car Carriers, 2018/C 314/09.

affiliated with Wallenius Wilhelmsen Logistics AS, including EUKOR Car Carriers, inc. for € 395 million for their role in the cartel. The maritime car carriers are also under fire from UK car manufacturers in other procedures. For example, Jaguar Land Rover⁷ and Volvo⁸ have initiated separate proceedings against the members of the cartel pursuant to the European Commission's decision.

- On 19 June 2020, in the proceedings between Wolseley UK Limited and others v. Fiat Chrysler Automobiles N.V., CNH Industrial N.V., DAF Trucks N.V. and Daimler A.G.⁹ in the aftermath of the truck cartel, the Competition Appeal Tribunal ordered Daimler A.G. to provide "explanatory guidance" about the Daimler database it had provided to Wolseley in the context of disclosure. This explanatory guidance is furthermore meant to consist of Daimler releasing additional information to make it easier to understand the Daimler database, including the guidance that Daimler has already had to provide to claimants in other truck cartel proceedings.

CJEU

- On 17 June 2020, the court of appeal of the Spanish region of León (Audiencia Provincial de León) referred questions to the Court of Justice for a preliminary ruling concerning the truck cartel.¹⁰ The questions pertain to the interpretation of the Cartel Damages Directive¹¹ and the relationship with national Spanish law under which the Cartel Damages Directive was implemented. Under old Spanish law, the limitation period is 1 year in the event of non-contractual liability. However, the lower court had applied the five-year time limit from the Cartel Damages

Directive, given that this time limit had already been implemented in Spanish law by the time the action was brought (i.e. 1 April 2018). The court had also made use of the possibility to estimate the damage, in accordance with the Spanish version of Article 17 of the Cartel Damages Directive.

- The truck manufacturers AB Volvo and DAF Trucks N.V. have appealed, claiming that the Spanish courts should apply the applicable law of 18 January 2011, the date on which the Commission considers the infringement to have ended, or 19 July 2016, the date of the press release of the European Commission's decision. They argue that the (implemented) Cartel Damages Directive should not be applied retroactively. The claimants believe that the filing date of the claim should be conclusive.

- The referring court explains that there is uncertainty about the transitional provision in the Cartel Damages Directive and the implemented Spanish equivalent thereof, which states that the Directive lacks retroactive effect.¹² The court's question is therefore (inter alia) to which moment does the provision refer: the date on which the infringement took place, the date of the Commission's sanction or the date on which the claim for damages was brought?

⁷ Volvo Car AB and Volvo Personvagnar AB v MOL (Europe Africa) Ltd and Others, Case no 1346/5/7/20

⁸ Jaguar Land Rover Ltd and Others v MOL (Europe Africa) Ltd and Others, Case no 1347/5/7/20

⁹ Neutral citation [2020] CAT 15, Case No: 1294/5/7/18 (T)

¹⁰ [Request by the Audiencia Provincial de León of 12 June 2020, case number C-267/20 at the EU Court of Justice.](#)

¹¹ [Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.](#)

¹² [Articles 21 and 22 of the Cartel Damages Directive.](#)

2

Public law aspects of cartel damages

United Kingdom

• MLex has reported on a webinar devoted to cartel damages by Peter Roth, the president of the Competition Authority Tribunal (CAT). Roth seems to be advocating a more restrictive approach to disclosure requests in cartel damages claims. As disclosure is an essential aspect of common law procedure, UK courts have considerable experience with it. "But", said the CAT president, "that doesn't mean we have found the right way of handling it". He reportedly noted that managing disclosure disputes in antitrust damages claims has become increasingly problematic, and that courts must stand firm when handling mounting data requests. Roth warned that judges must be mindful of the fact that there is a "certain tension" between economic experts and courts or tribunals when faced with such data requests from competition authorities. In respect of the truck cartel, Mlex noted:¹³

"The trucks cartel was not only long-lasting" in covering a period of 14 years, it also "started in 1997," Roth noted. Claimants seeking information from before the cartel, as well as during the cartel, will likely request data from around 1995. That brings to the fore the difficulties of retrieving information from that time.

"How does one balance [the] cost and benefit in these cases?" Roth asked, around the decision

of whether to authorize data disclosure following requests. "Courts have to be quite firm and robust in exercising judgment when faced with demands for more and more data."

¹³ ['Disclosure demands in cartel damages lawsuits are 'troublesome', CAT president says', Mlex 22 June 2020.](#)

3

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

CJEU

- On 2 April 2020, the Austrian competition authority Bundeswettbewerbsbehörde (BWB) announced that in the case of the sugar cartel, the higher cartel court had submitted preliminary questions to the European Court of Justice on 27 March 2020.¹⁴ The 'Kartellobergericht' had to rule on whether sugar producers such as Nordzucker and Südzucker could be fined by the Austrian authority for prohibited practices for which a fine had already been imposed by the German competition authorities. The (lower) Kartellgericht previously ruled that this was contrary to the ne bis in idem principle, the prohibition against imposing double penalties for the same offence. The Kartellobergericht is now asking the Court of Justice to clarify this principle for the situation that competition authorities of several Member States have the authority to apply the same European rules of law (in this case Article 101 TFEU) for the same facts and with regard to the same persons, in addition to the national rules of law.¹⁵

- On 14 May 2020, the Court of Justice ruled on the involvement of NKT Verwaltungs GmbH (NKT) in the power cable cartel. In 2014,

the European Commission had fined NKT for its role in the market-sharing cartel with regard to power cables. NKT appealed, first to the Court of First Instance and then to the Court of Justice, and requested annulment of the decision, or at least a reduction of the fine because (inter alia) the European Commission allegedly assessed the infringement incorrectly and NKT's right to a defence was allegedly violated. The Court of First Instance rejected that appeal in 2018,¹⁶ but the Court of Justice partly concurred with the objections and reduced the fine by EUR 200,000. The majority of the decision was upheld, resulting in a fine of EUR 3,687,000.¹⁷

- There have been developments in the truck cartel with regard to Scania's appeal against the European Commission's decision. Scania was the only truck manufacturer that did not settle with the European Commission for its share in the cartel, like MAN, Daimler, Iveco, Volvo-Renault and DAF did indeed do in 2016. As a result, the Commission imposed a fine of EUR 880 million on it in a separate decision. The European Commission published a provisional non-confidential version of the decision of 27 September 2017 almost three years later, on 30 June 2020.¹⁸

¹⁴ ['Kartellobericht legte dem Gerichtsgerichtshof der Europäischen Union Fragen im Rekursverfahren zu Gebietsabsprachen im Vertrieb von Industriezucker vor', website of the Bundeswettbewerbsbehörde.](#)

¹⁵ [At the Court of Justice, the request of the Oberster Gerichtshof has case number C-151/20 - Nordzucker and Others.](#)

¹⁶ [Judgment of the Court of First Instance of 12 July 2018, T-447/14 \(NKT Verwaltungs GmbH v European Commission\).](#)

¹⁷ [Judgment of the Court of Justice of 14 May 2020, C-607/18 \(NKT Verwaltungs GmbH v European Commission\).](#)

¹⁸ [Decision of the European Commission of 29 September 2017 in case AT 39824.](#)

- In the meantime, Scania appealed to the Court of First Instance. On 18 June 2020, a hearing took place behind closed doors, reportedly at the request of the other truck manufacturers who do not want details about Scania's role in the cartel to become public.¹⁹ A public version of the report for the hearing has now been disclosed via law firm Hausfeld.²⁰

¹⁹ ['Scania's truck cartel hearing at EU court to be behind closed doors'](#), Mlex 15 June 2020.

²⁰ [Report for the hearing of 18 June 2020 in case T-799/17 between Scania AB et al. and European Commission.](#)

4

Fines and procedural regulations by national competition authorities

The Netherlands

- The COVID crisis also forced the Dutch competition authority, the Netherlands Authority for Consumers and Markets (ACM) to temporarily adjust its working methods and refrain for a brief period from conducting any external investigation. On 24 June 2020, the ACM published an update on its supervision,²¹ stating that its work would simply continue. Unannounced dawn raids and interrogations as part of investigations into possible violations committed by companies have resumed since 12 June 2020, and public hearings are also being organised once again.²² The ACM also emphasises that the crisis situation does not give companies leave to do anything that they would not be allowed to do under normal circumstances, such as concluding price-fixing agreements or abusing a dominant position to charge extortionate prices or to exclude competitors.

Germany

- On 7 April 2020, the German Bundesgerichtshof ruled that the standard banking terms and conditions drawn up by the Deutschen Kreditwirtschaft, an organisation to which several banks belong, are contrary to competition law. The German Court thus

upheld the decision of the national competition authority and the decision of the Oberlandesgericht in Düsseldorf. The conditions included, among other things, that German financial institutions could prohibit their customers from transferring PIN and TAN data to innovative third parties within the financial market, such as Klarna. The German Bundesgerichtshof ruled that this wrongly restricts competition. The decision has not yet been made public, but the German competition authority has published about the decision.²³ Klarna naturally responded to the report with satisfaction.²⁴

United Kingdom

- On 12 June 2020, the UK Competition and Markets Authority (CMA) published that two of the UK's largest suppliers of rolled lead had admitted taking part in anti-competitive arrangements and could face fines of more than 11 million pounds.²⁵

- On 29 June 2020, the CMA published that it had fined guitar manufacturer Fender for its use of illegal resale price maintenance. According to the CMA, Fender set minimum prices for their guitars and told resellers to sell

²¹ ['ACM's oversight during the coronavirus crisis', website of the ACM 24 June 2020.](#)

²² ['ACM resumes dawn raids, interrogations, and public hearings', website of the ACM, 12 June 2020.](#)

²³ ['Entscheidung gegen die Deutsche Kreditwirtschaft Rechtskräftig – BGH weist](#)

[Beschwerden der DK zurück', website of the Bundeskartellamt, 8 May 2020.](#)

²⁴ ['Klarna erzielt wichtigen Erfolg vor Bundesgerichtshof', website of Klarna, 11 May 2020.](#)

²⁵ ['Two UK roofing lead firms admit to illegal cartel', website of the CMA, 12 June 2020.](#)

at, or above, this price between January 2013 and April 2018. In addition, Fender threatened sanctions against those who advertised and sold at lower prices. Fender's threats included, for example, that orders would be delayed or not sent, that the amount of stock that could be ordered on credit would be reduced and that financial 'marketing' support for promotions would be removed.²⁶

²⁶ ['£ 4.5 million fine for Fender for illegally preventing online price discounts', website of CMA, 29 June 2020.](#)

5

Team

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

Hans Bousie is a founding partner of bureau Brandeis. Internationally, Hans specializes in cross border antitrust damage litigation. His excellent skills in combining market economics with legal frameworks beef up his in depth knowledge of antitrust law obtained through 20 years of experience in antitrust litigation before the Dutch Courts, the European Commission, the Dutch competition authority and the European Court of Justice. As we speak, Hans is involved in the main cartel damages cases in the Netherlands: the Air Cargo Case and the

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Sophie van Everdingen is an experienced litigator with a focus on competition law. Before joining bureau Brandeis in September 2016, Sophie worked at the competition law department at an international law firm in Brussels, where she advised manufacturers and dealers in the automotive sector and litigated several times against the Belgian competition authority (BMA) and the Dutch competition authority (ACM). At bureau Brandeis, Sophie is involved in civil litigation on the plaintiff's side against the members of the truck cartel. In addition, she advises several national and international clients on competition issues.

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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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