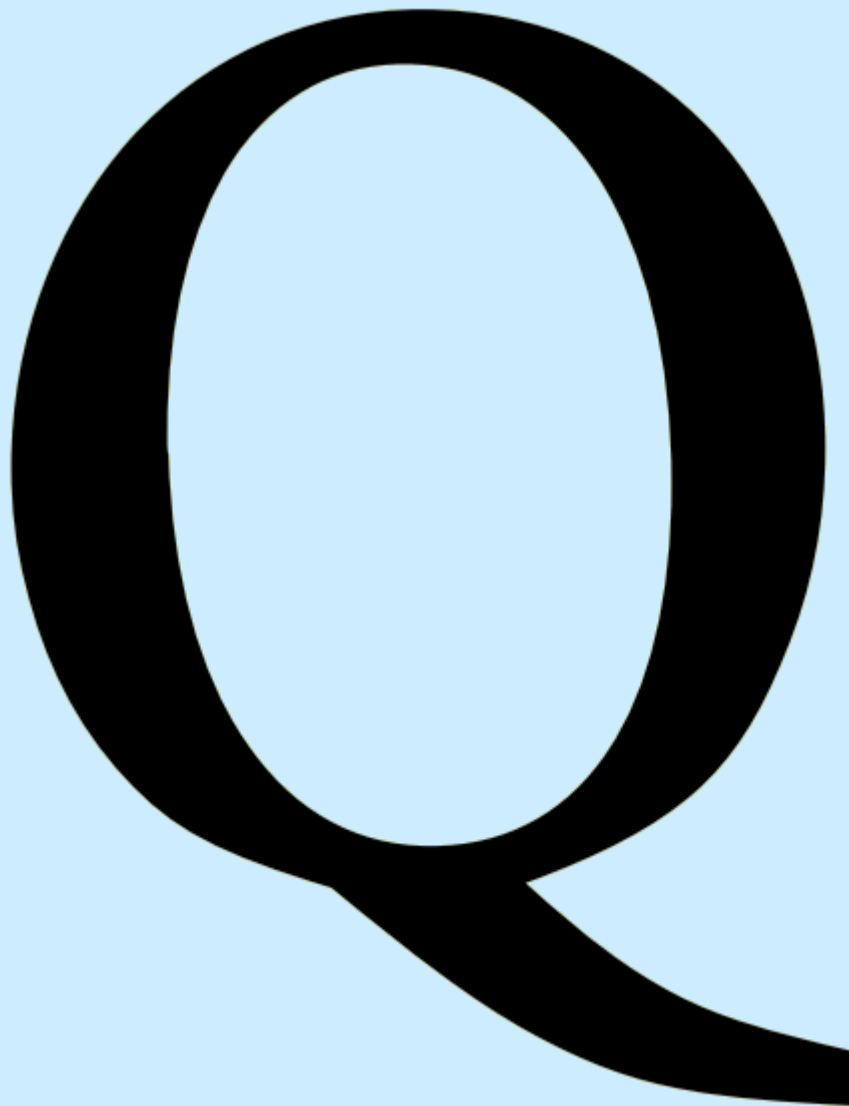


BUREAU BRANDEIS

CARTEL DAMAGES
QUARTERLY



Q3 2020

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

This edition of Q will focus on a new directive. On 20 July 2020, the European Commission published its ‘*Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law*’ (“**Communication**”).¹ The Communication purports to offer national courts leads in the assessment of requests for the disclosure of confidential documents within antitrust damages actions. The reason why this directive is so important is that, traditionally, there have been substantial differences in the possibilities for discovery among the various European Member States. Varying from relatively easy in the UK, through difficult in the Netherlands, to very difficult in Germany. In the coming period, we will closely monitor the effect that this directive will have. I would expect the continental courts to gradually shift towards the Anglo-Saxon practice. In practice, we can already see the practical consequences of the substantial differences in, for example, the trucks cartel case. In the UK, claimants have access to much more information than elsewhere in the EU; the question has already arisen whether, *inter alia*, the Dutch proceedings or the Dutch courts (in Amsterdam) should not be just as generous as their colleagues in the United Kingdom.

The European Commission has used the summer period to finally publish a number of decisions, including the CRT decision.

Following on from the Skanska decision, the Regional Court of Dortmund has also held that parent companies, even if they are not the addressees of a decision rendered by a competition authority, may still be held liable for the acts performed by their subsidiaries. Also in Germany, financed by Burford Capital,

proceedings have been initiated against the German Federal State of Hessen, which allegedly upheld a round timber cartel in cooperation with, among others, local authorities.

Finally, we will address the developments in Germany in the Booking.com case. Although this matter is decided on a national level, it will certainly have international implications. Many competition authorities in the various Member States have been scrutinizing the conduct of Booking.com. The discussion now focuses on whether, in addition to the broad parity clauses, the narrow parity clauses should be deemed to be anticompetitive as well.

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**

¹ [Communication from the Commission on the protection of confidential information by national courts in](#)

[proceedings for the private enforcements of EU competition law, 2020/C 242/01.](#)

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Amsterdam, 1 April 2021

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1

Private enforcement in cartel damages claims – case law

Germany

- On 8 July 2020, the Regional Court of Dortmund contributed to the debate that has been going on since the Skanska judgment² of the EU CJ on the question as to group liability in case of competition law violations. For a discussion of the Skanska case, please refer to Q(2019-1). The case before the Regional Court of Dortmund related to an action for damages brought by a manufacturer of sanitary and heating systems.³ The action for damages was based on a fining decision imposed by the *Bundeskartellamt*, the German competition authority, in 2016, on wholesale businesses in sanitary, heating and air-conditioning systems.⁴ The action for damages was directed against two group companies who were not addressees of the decision themselves. This raised the question whether or not these group companies could be held liable for the infringement established. The Regional Court of Dortmund found in favour of group liability. It held that the competition law violation of the individual group company, against the background of the economic entity of which it formed part, also constituted 'own acts' from a liability law perspective on the part of all the other companies forming part of the group. This was the first time that a German court ruled on group liability in this way. The action for damages was, however, still rejected. According to the court, the claim had been

insufficiently substantiated and the alleged damage insufficiently demonstrated.

- Court proceedings were initiated on behalf of 21 sawmills against the Hessian Ministry of the Environment, seeking damages exceeding 49 million euros. The German federal state of Hessen is accused of having upheld a 'round timber cartel' in cooperation with local and private forest owners for decades. The sawmills allege that, due to the cartel, they have been overpaying for the purchase of round timber for years. The proceedings are funded by the Burford Capital, a US company for litigation funding. In a press release dated 8 September 2020,⁵ the Minister for the Environment Priska Hinz stated that the Ministry would resolutely oppose this action. Similar proceedings have been initiated in other federal states as well, including Rhineland-Palatinate, North Rhine-Westphalia, and Baden-Württemberg.

United Kingdom

- In Q(2019-1) we reported on the antitrust damages lawsuit filed by Fiat Chrysler Automobiles over the cartel in the market for automotive bearings against JTEKT Europe bearings B.V., KOYO France SA, KOYO Deutschland GmbH, NTN Corporation, NTN Walzlager (Europa) GmbH and NTN-SNR Roulements SA. In this case a hearing was scheduled on 10 July 2020, during which the

² ECJ 14 March 2019, case C-724/17 (*Skanska*).

³ Regional Court of Dortmund, judgment of 08.07.2020, 8 O 75/19 Kart.

⁴ Bundeskartellamt press release of 22 March 2016, Bundeskartellamt imposes fines in cartel in sanitary sector.

⁵ Agar Presseportal Press release of 8 September 2020, Klage gegen Hessen wegen angeblichem Holzkartell.

scheduling of the trial was discussed and whether the case should be transferred to the Competition Appeal Tribunal (“CAT”). The representing lawyer on behalf of Fiat Chrysler made it clear that it opposed to a transfer of the case.⁶ He argued this case did not require the expertise of the CAT. The defendants argued the opposite, and noted that the CAT has access to expertise on key economic analyses that would be necessary in this case and therefore the CAT is the best fit for trial. According to the order of the CAT,⁷ the Judge ruled in favour of the defendants by saying that the transfer of the case would be appropriate in light of the complex economic evidence involved. The order further contains the procedural timeline and states that a trial shall be scheduled to commence on the first available date in January 2022.

- In July and September 2020, Volvo Car AB and Volvo Personvagnar AB withdrew part of the claim they brought against various car-shipping companies over their participation in the car-shipping cartel. On 13 July 2020, the CAT issued an order stating that Volvo withdrew its claim against defendant Kawasaki Kisen Kaisha LTD.⁸ And according to an order of 14 September 2020, Volvo also withdrew its claim against all entities of Wallenius Wilhelmsen.⁹ The case continues against defendant Compania Sudamericana De Vapores SA.

- On 29 and 30 July 2020, a two day pre-trial review took place in the context of the antitrust damages lawsuit filed by network provider National Grid Electricity Transmission plc, joint in litigation by Scottish Power, against several power cable suppliers,

including Prysmian SPA, ABB Ltd, Safran SA and NKT Cables.¹⁰ We reported on this lawsuit and its background in Q(2019-2). The topics on the agenda were expert evidence and the question whether experts should be heard concurrently or by individual cross-examination, the impact of COVID-19 on the upcoming trial, and the scheduling of the further pre-trial affairs. As regards the expert evidence, National Grid argued for concurrent evidence. It argued that this method is faster and more efficient due to, inter alia, the possibility of interaction between the experts. The defendants all disagreed and argued for individual cross-examination. The arguments that were brought forward on their behalf included that the concurrent method is not customary, not well-tested and not appropriate for dealing with expert economic evidence. There would have to be an exceptional reason to depart from the usual approach of cross-examination, which would not be present here. It turned out, however, that the Judge sided with National Grid. After the second day of the hearings, he decided on an initial process of concurrent expert evidence. The Judge explained that, in the view of the court, it was justified in this case to depart from the conventional method of cross-examination as long as the lawyers have an appropriate opportunity to ensure that the case they want to bring forward is adequately explored during the concurrent hearing of evidence. It was noted however, that there may be an opportunity for cross-examination for purposes of clarification, after hearing the evidence concurrently. Various parties in these proceedings have settled the case shortly after the hearings. Claimant Scottish Power settled with

⁶ According to Mlex, Insight of 10 July 2020, 'NSK and other ball-bearing cartelists get early 2022 date for Fiat Chrysler damages trial'.

⁷ CAT order of 10 July 2020, CL-2019-000173.

⁸ CAT order of 13 July 2020, Case no. 1346/5/7/20.

⁹ CAT order of 14 September 2020, Case no. 1346/5/7/20. The case was withdrawn against Wallenius Wilhelmsen ASA, Walleniusrederierna AB, Wallenius Wilhelmsen Ocean AS, Wallenius Logistics AB, Wilhelmsen Ships Holding Malta Ltd, EUKOR Car Carriers Inc.

¹⁰ Case no 1340/5/7/20 (T). The full list of defendants consists of (1) ABB Ltd; (2) ABB Power T&D Limited; (3)

ABB Limited; (4) ABB Holdings Limited; (5) ABB AB; (6) ABB Asea Brown Boveri Ltd; (7) ABB Norden Holding AB; (8) ABB AG; (9) ABB Beteiligungs- und verwaltungsgesellschaft mbh; (10) NKT Holdings A/S; (11) NKT Cables Limited; (12) NKT Cables A/S; (13) NKT Cables Group A/S; (14) nkt cables GmbH; (15) Prysmian SpA; (16) Prysmian Construction Company Limited; (17) Prysmian Cables (2000) Limited; (18) Prysmian Cables & Systems Limited; (19) Prysmian Cable Sistemi S.r.l.; and (20) Safran SA.

Prysmian¹¹ and claimant National Grid Electricity settled with NKT.¹²

- On 5 August 2020, a hearing was scheduled before the London High Court in the case of Allianz Global and others against a number of well-known banks including Barclays, Citibank, HSBC and JPMorgan in relation to the foreign exchange cartel.¹³ Allianz requested the court to vary a court order of February of this year. We reported on that order in Q(2020-1) and on the background of the case in Q(2019-2). The February order included that Allianz should provide more detail on their claim and that requested documents in support of their claim were to be released in stages, to begin with documents in support of the alleged 'early period' of the cartel falling outside of the scope of the Commission decision. Since then, there has been an important development in the proceedings against the banks over the same cartel in the US. In the US proceedings, the banks have been ordered to release documents mid-October of this year. This disclosure order has had a material impact on the UK litigation, in the view of Allianz Global and other claimants. Therefore, they requested the London High Court to re-plead the lawsuit in January next year in one go. That would be instead of re-pleading the UK case in two phases according to the staged release of documents by the banks, previously ordered. The Judge sided on this with the claimants. He agreed this would be more efficient and moved the re-pleading of the case to January.¹⁴

- In September 2020, Telefonica UK Limited, O2 Holdings Limited and O2 (UK) Limited, a British telecommunications services provider and network, lodged a competition claim against Renesas. Renesas is one of the world's largest semiconductor manufacturers and one of the companies fined by the European Commission ("**Commission**") for their role in the smart card chips cartel in 2014.¹⁵ Telefonica UK's damages claim stems from that decision.

¹¹ [Order of the CAT of 30 July 2020, Case no. 1341/5/7/20 \(T\)](#). The settling parties are: Scottish Power UK Plc, SP Power Systems Limited, Scottish Power Energy Networks Holdings Limited, SP Manweb Plc and SP Transmission plc (on the claimant side) and Prysmian S.P.A., Prysmian Construction Company Limited, Prysmian Cables & Systems Limited and Prysmian Cavie Sistemi SRL, Prysmian Cables (2000) Limited (on the defendant side).

¹² [Order of the CAT of 16 September 2020, case no. 1340/5/7/20 \(T\)](#). The settling parties are: National Grid Electricity Transmission PLC (on the claimant side) and NKT A/S, NKT (U.K.) LTD, NKT (Denmark) A/S, NKT

Cables Group A/S and NKT Verwaltungs GMBH (on the defendant side).

¹³ High Court of Justice 16 April 2018, Allianz Global Investors GmbH and others and Barclays Bank PLC and others, claim number CL-2018-000840.

¹⁴ Mlex report of 5 August 2020, '[Allianz can re-plead for ex claim against banks in one go next year, UK judge says](#)'.

¹⁵ [EC decision of 3 September 2014, Case 39574 \(Smart card chips\)](#).

2

Public law aspects of cartel damages

European Commission

• On 20 July 2020, the European Commission published its 'Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law' ("**Communication**").¹⁶ The Communication purports to offer national courts leads in the assessment of requests for the disclosure of confidential documents within antitrust damages actions. It is not binding but merely serves to support Member States. After all, the cartel damages directive requires Member States to ensure that national courts have the possibility to order disclosure of evidence. This order is worked out differently from one Member State to the next.

In the Communication, the European Commission indicates that national courts may allow disclosure only if the claim for damages is plausible. The request for disclosure must regard relevant information and must be proportional, and the evidence must be described "as precisely and narrowly" as possible. This also holds true for information in the possession of a competition authority, in which case the documents that are in the file must also clearly be described.

The European Commission also provides a definition of confidential information, namely: information (1) that is known only to a limited number of persons; and (2) the disclosure of which is liable to cause serious harm to the

person who provided it or to third parties; and (iii) the interests liable to be harmed by the disclosure of which are, objectively, worthy of protection. The European Commission thereby follows the case law of the EU CJ and the Trade Secrets Directive.

Finally, the Commission works out three different measures that the national courts may apply in order to keep the information confidential, it being up to the courts to determine which measure is appropriate. Firstly, documents may be redacted. Secondly, 'confidentiality rings' may be used, the information is made available only to defined categories of individuals. And, finally, national courts may decide to have an external expert disclose the confidential information.

The Commission's Communication is not binding. National courts and litigants may, of course, be inspired by it.

¹⁶ [Communication from the Commission on the protection of confidential information by national courts in](#)

[proceedings for the private enforcements of EU competition law, 2020/C 242/01.](#)

3

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

European Commission

- On 3 July 2020 and 9 July 2020 the European Commission published two summary versions of the decision in the Foreign Exchange spot trading cartel. In the first decision, the Commission fined Barclays, Royal Bank of Scotland, and MUFG Bank (formerly Bank of Tokyo-Mitsubishi) for their role in this cartel.¹⁷ In the second decision, the Commission fined UBS AG, Royal Bank of Scotland, Barclays, Citibank and J.P. Morgan.¹⁸

Foreign Exchange (“Forex”) refers to the trading of currencies and is one of the largest markets in the world. The Commission’s investigation revealed that some individual traders in charge of Forex trading on behalf of the relevant banks had exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through various online chatrooms. The Commission concluded that this was done with the object to restrict and/or distort competition. We discussed this decision earlier in [Q \(2019-2\)](#).

- On 7 July 2020, the European Commission published the final text of its 2012 decision in the sector of cathode ray tubes

(“CRT”). In December 2012, the Commission concluded that the international companies of Chunghwa, LG Electronics, Philips, Samsung SDI, Panasonic, Toshiba, MTPD, and Technicolor had taken part in two global CRT cartels between 1996 and 2006. CRTs are used in television sets and computer monitors. The Commission had imposed fines on the companies totalling nearly EUR 1.5 billion. The Court of First Instance had upheld the decision in 2015.¹⁹ It would be another 8 years before the final text was finally published.

- On 14 July 2020 the Commission revealed in a press release that it fined Orbia, Clariant and Celanese EUR 260 million for having colluded and exchanged data to buy ethylene at the lowest possible price. Also Westlake took part in the cartel, but was not fined as it was a whistleblower. All four companies acknowledged their involvement in the cartel and agreed to settle the case.²⁰

- On 27 September 2020, the Commission announced that it fined Coroos and Groupe CECAB, suppliers of certain types of canned vegetables, EUR 31.6 million for

¹⁷ [Summary of Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, case AT.40135 – Forex-Essex Express, OJ 3 July 2020, C 219/8.](#)

¹⁸ [Summary of Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of](#)

[the EEA Agreement, case AT.40135 – Forex-Three Way Banana Split, OJ 9 July 2020, C 226/5.](#)

¹⁹ [Commission Decision of 5 December 2012 in case AT.39427 – TV and computer monitor tubes, C\(2012\) 8839.](#)

²⁰ [‘Antitrust: Commission fines ethylene purchasers € 260 million in cartel settlement’, 14 July 2020, website of the Commission.](#)

participating in a cartel.²¹ The Commission found that Bonduelle, Coroos and Groupe CECAB participated in a cartel for more than 13 years, from 19 January 2000 to 11 June 2013 for Bonduelle and 1 October 2013 for Coroos and Groupe CECAB. According to the press release, the Commission investigation revealed the existence of a single continuous infringement comprising three separate agreements. Bonduelle was not fined because it had revealed the existence of the cartel to the Commission.²²

- On 29 September 2020, the Commission published a press release stating that the Commission fined car parts suppliers a total of EUR 18 million for taking part in two cartels concerning supplies of closure systems for cars in the European Economic Area (EEA).²³ The addressees of the fine are suppliers Brose and Kiekert.²⁴ Both companies entered into separate bilateral cartels with Canada-based company Magna. Brose for supplies concerning door modules and window regulators for a certain car model of Daimler Group. Kiekert for supplies of latches and strikers to BMW group and Daimler group. Magna was not fined because it revealed both cartels to the Commission for which it received full immunity.

CJEU

- On 8 July 2020, the EU General Court decided on the case between Infineon Technologies AG against the European Commission in the smart card chip cartel case. The Commission decided to fine Infineon in 2014 for illegal conduct in the European Economic Area from 2003 to 2005. According to the decision, Infineon alongside with Philips,

Samsung and Renesas, had coordinated its pricing policy through a network of bilateral contacts and exchanges of commercially sensitive information. The EU General Court however reduced Infineon's fine by 20%, from approximately EUR 83 million to approximately EUR 77 million, as the Commission had not demonstrated that Infineon had been aware of the anticompetitive contacts between other cartel participants apart from the contact it had had itself with Renesas and Samsung.²⁵

- On 16 July and 24 September 2020, the EU CJ rendered two judgments that put an end to the discussion that had been going on for years between the European Commission and the underground and submarine power-cable producers Nexans France SAS and Nexans SA and Prysmian SpA and Prysmian Cavi e Sistemi Srl over the European power-cable cartel. In 2009, the European Commission had initiated an investigation into this cartel of underground and submarine power-cable producers, concluding that some twenty producers around the world had been making prohibited market and customer allocation agreements since as early as 1999. For that reason, in 2014, it fined them for a total exceeding EUR 300 million. Nexans was fined EUR 70.7 million, and the Prysmian companies were fined approximately EUR 104 million for their participation in the cartel.

Both the Nexans and the Prysmian companies appealed because they felt that their defence and privacy rights had been violated. One of their objections was that, during the audits of their offices in 2009, the European

²¹ [‘Antitrust: Commission fines Coroos and Groupe CECAB €31.6 million for participating in canned vegetables cartel’, 27 September 2020, website of the European Commission.](#)

²² The full list of addressees of the decision is: Bonduelle Europe Long Life SAS, Bonduelle SA, Bonduelle SCA, Centrale Cooperative Agricole Bretonne SAS, Compagnie generale de Conserve SAS, Coroos Beheer BV, Coroos Conservern BV, Coroos International NV, GIE Groupe d’aucy.

²³ [‘Antitrust: Commission fines car parts suppliers of €18 million in cartel settlement’, 29 September 2020, website of the European Commission.](#)

²⁴ The full list of addressees of the decision is: Brose Beteiligungs-Komanditgesellschaft II, Brose Beteiligungs-Komanditgesellschaft, Brose Fahrzeugteile SE & Co KG Bamberg, Brose Fahrzeugteile SE & Co KG Coburg, Brose Verwaltung SE, Kiekert AG, Magna Closures S.p.A., Magna International Europe GmbH, Magna International Inc., Magna Mirrors Holding GmbH.

²⁵ [Judgment of the General Court 8 July 2020, case T-75/14 RENV \(Infineon Technologies AG/European Commission\).](#)

Commission should not have made copies of the contents of the computer of one of the employees and should not have taken those copies back to Brussels for review. The EU CJ did not award their objections but rather concurred with the Advocate-General Kokott, who had previously given her view that this method was permitted. None of the objections of Nexans or Prysmian were awarded, and their request to mitigate the fine was rejected as well.²⁶ The EU CJ thus upheld the previous judgment of the General Court 12 July 2018.²⁷

We discussed these cases and those of other cartelists in this cartel earlier in [Q\(2018-3 and 2018-4\)](#) and [Q\(2020-2\)](#).

- On 16 July 2020, the European Court of Justice approved [Crédit Agricole](#) and [JP Morgan Chase](#) to intervene in the appeal proceedings of three companies of [HSBC](#) against the fine it received for its involvement in the [Euribor and/or Eonia benchmark cartel](#). The European Commission fined all companies in 2016 for colluding in order to influence the Euribor and Eonia value. All companies appealed against the fines they received, together more than EUR 485 million. As the outcome of the appeals started by HSBC before the EU Court of Justice would be highly relevant to the outcome of the appeals of [Crédit Agricole](#) and [JP Morgan Chase](#) at the General Court, they wanted to intervene in HSBC's case. The approval of this intervention may open the door to similar interventions in other cartel cases.²⁸

²⁶ [Judgment of the EU Court of Justice of 16 July 2020, case C-606/18 P \(Nexans France SAS and Nexans SA / European Commission\); judgment of the EU Court of Justice of 24 September 2020, case C-601/18 P \(Prysmian SpA and Prysmian Cavi e Sistemi Srl / European Commission\)](#).

²⁷ ['ACM opens up more opportunities for businesses to collaborate to achieve climate goals', 9 July 2020, ACM website](#).

²⁸ [Orders of the President of the Court of the European Union, 16 July 2020, ECLI:EU:C:2020:601 and ECLI:EU:C:2020:561, case C-883/19 P \(HSBC / European Commission\)](#).

4

Fines and procedural regulations by national competition authorities

The Netherlands

- On 9 July 2020, the Authority for Consumers and Markets (“ACM”), the Dutch competition authority, communicated that it wanted to expand the possibilities for cooperation among competing businesses in the field of sustainability. To that end, it published the draft Guidelines on 'Sustainability Agreements', in which ACM outlines examples of opportunities for collaboration. ACM says it will now submit the guidelines for consultation to national and international interest groups, businesses, scientists, interested parties, and government authorities.²⁹ The guidelines appear to be a prime focus of ACM's, for two months later, the chairman of ACM, Martijn Snoep, gave a speech on the guidelines during the IBA Annual Competition Conference.³⁰

- On 18 August 2020, the Dutch Trade and Industry Appeals Tribunal (“CBB”) drastically mitigated an antitrust fine on appeal because the company involved had to wait for a final decision for too long and risked bankruptcy, possibly as a result of, *inter alia*, the impact of the COVID-19 crisis. ACM had proposed to mitigate the fine from EUR 1 million to EUR 10,000, and CBB concurred.³¹

²⁹ ‘ACM opens up more opportunities for businesses to collaborate to achieve climate goals’, 9 July 2020, ACM website.

³⁰ ‘IBA Annual Competition Conference Keynote Martijn Snoep’, 9 September 2020, ACM website.

ACM communicates that the name of the company is not disclosed because several legal proceedings are still pending, including proceedings against publication of the sanction decisions of another company.³² CBB is the highest Dutch economic administrative law court.

- A press release by ACM of 18 September 2020 shows that ACM is investigating a possible cartel in the home interiors sector.³³ ACM suspects a number of suppliers of imposing prices that retailers may charge consumers. In addition, ACM also suspects suppliers of mutually making prohibited agreements on the sales prices that they charge retailers.

- On 29 September 2020, the Dutch Authority for Consumers and Markets communicated that it fined four cigarette manufacturers that had been distorting competition, namely British American Tobacco International (Holdings) B.V. (BAT), JT International Company Netherlands B.V. (JTI), Philip Morris Benelux BV, and Van Nelle Tabak Nederland B.V. Unlike nearly all other consumer products, cigarette manufacturers, rather than retailers, determine the retail prices

³¹ Dutch Trade and Industry Appeals Board, 18 August 2020, ECLI:NL:CBB:2020:559.

³² ‘CBB decision on mitigation of antitrust fine’, 19 August 2020, ACM website.

³³ ‘ACM investigating possible home interiors sector cartel’, 18 September 2020, ACM website.

of cigarettes. All the manufacturers send new prices weeks before the effective date of a price change to wholesale traders and other buyers. ACM has now established that some buyers also directly forwarded those pricelists to competing manufacturers before the effective date of the new retail prices. According to ACM, cigarette manufacturers knowingly requested, received, and accepted such information, thus violating competition law. ACM has imposed a total of EUR 82 million in fines.³⁴

Germany

- In August 2020, there was an important development in the Booking.com proceedings. These proceedings stem from a decision of the Bundeskartellamt of 2015 in which it fined Booking.com for using contractual clauses, so-called price parity or most favoured nation (MFN) clauses, with hotels that prevent them from offering lower prices on their own websites and rival platforms. The Dusseldorf High Regional Court reversed this decision (in part) in first instance in June 2019 and now, in the beginning of August 2020, the Federal Court of Justice has allowed the Bundeskartellamt to appeal that decision on points of law.³⁵ The question whether Booking.com infringed competition law, therefore remains open.

A distinction is made between “wide” price clauses, used to restrict hotels from offering better prices on any other platform or (their own) website, and “narrow” price clauses, restricting hotels (only) to offer better prices on their own websites. The “narrow” price clauses were introduced by Booking.com in response to the Bundeskartellamt decision as an alternative to the original clause, and the Dusseldorf High Regional Court found that the narrow clause was not anticompetitive. The Bundeskartellamt considers both anticompetitive.

³⁴ [‘83 million euros in fines for four cigarette manufacturers distorting competition’, ACM 29 September 2020.](#)

³⁵ According to Mlex [report of 6 August 2020, ‘Booking.com to see German regulator's fight over pricing clauses aired at top court’.](#)

- Also in the context of the Booking.com proceedings, on 28 August 2020 the Bundeskartellamt published a paper on “The effects of narrow price parity clauses on online sales - Investigation results from the Bundeskartellamt’s Booking proceeding”.³⁶ The publication is exclusively based on the Bundeskartellamt’s perspective on the investigation results of the (ongoing) Booking.com proceedings and the conclusions and assessments it has based thereon. According to the Bundeskartellamt, the findings give an invaluable insight into the quantitative significance of potential “free-riding effects”, which are often used as a justification for such clauses.

- The German competition authority *Bundeskartellamt* presented its brochure ‘2019 Annual Report’ on 2 September 2020. The report includes an overview of the authority’s activities in 2019 and the first few months of 2020. It appears from this overview that the Bundeskartellamt focuses on digital economy, with inter alia interventions in Amazon’s business terms for sellers and proceedings against Facebook before the German Federal Court of Justice. Also, the report shows that the Bundeskartellamt imposed fines of around 848 million euros on a total of 23 companies or trade associations and 12 natural persons in 2019. In 2020, fines amounting to around 158 million euros were imposed on a total of 8 companies and 8 natural persons by the month of August. The President also states that the authority continues merger control despite the COVID-19 crisis and that the prosecution of cartels remains one of the Bundeskartellamt’s key tasks, but notes at the same time that it is “*an entirely different situation if companies would like to cooperate with another because of special circumstances,*

³⁶ [Press release of the Bundeskartellamt, The effects of narrow price parity clauses on online sales of online hotel platforms – Investigation results from the Bundeskartellamt’s Booking proceeding, 28 August 2020.](#)

such as the crisis caused by the COVID-19 pandemic. In such cases we are always open to discussion.”³⁷

United Kingdom

- On 1 July 2020, the UK Competition & Markets Authority (“CMA”) issued a press release stating that the CMA imposed a fine of GBP 1.2 million for a cartel in the private eye care sector.³⁸ The CMA has found that private hospital group Spire Healthcare Group plc (Spire) and seven consultant ophthalmologists fixed fees for initial private consultations for self-pay patients. Ophthalmology is a branch of medicine specializing in the treatment of eye disorders like cataracts or glaucoma.
- On 30 July 2020, the CMA published a draft Addendum to the CMA’s Leniency Guidance in relation to resale price maintenance cases and started consultation proceedings.³⁹ The CMA proposed to reduce immunity from 100% to 50% fine reduction for first companies providing evidence of a cartel that the CMA is already investigating. As the consultation ended in August, the CMA could publish a summary of the responses on 23 September 2020⁴⁰ and the final version of the Addendum alongside its Leniency Guidance on 24 September 2020.⁴¹ The final addendum includes this lower maximum fine reduction.

³⁷ [Press release of the Bundeskartellamt – 2019/2020 Annual Report, 2 September 2020.](#)

³⁸ [‘CMA imposes GBP1.2m in fines for price-fixing in private eye care’, 1 July 2020, website of CMA.](#)

³⁹ [‘Type B leniency in RPM cases – draft Addendum to OFT1495 – Consultation’, 30 July 2020, website of CMA.](#)

⁴⁰ [Consultation outcome of Type B leniency in RPM cases – Draft Addendum to OFT 1495.](#)

⁴¹ [Addendum to OFT 1495 on the website of the CMA.](#)

5

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

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

journal on cartel damage competition caselaw. Hans is consequently on top of all new developments in cartel damage case law and regularly speaks at conferences and symposia on this matter.

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.

Nathan van der Raaij is an associate at bureau Brandeis. He specializes in both the corporate litigation practice and competition law. Nathan is part of the cartel damages litigation team of bureau Brandeis.

Tessel Bossen is an associate at bureau Brandeis. She specializes in the commercial litigation practice and she is also involved in the cartel damages litigation team of bureau Brandeis.

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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