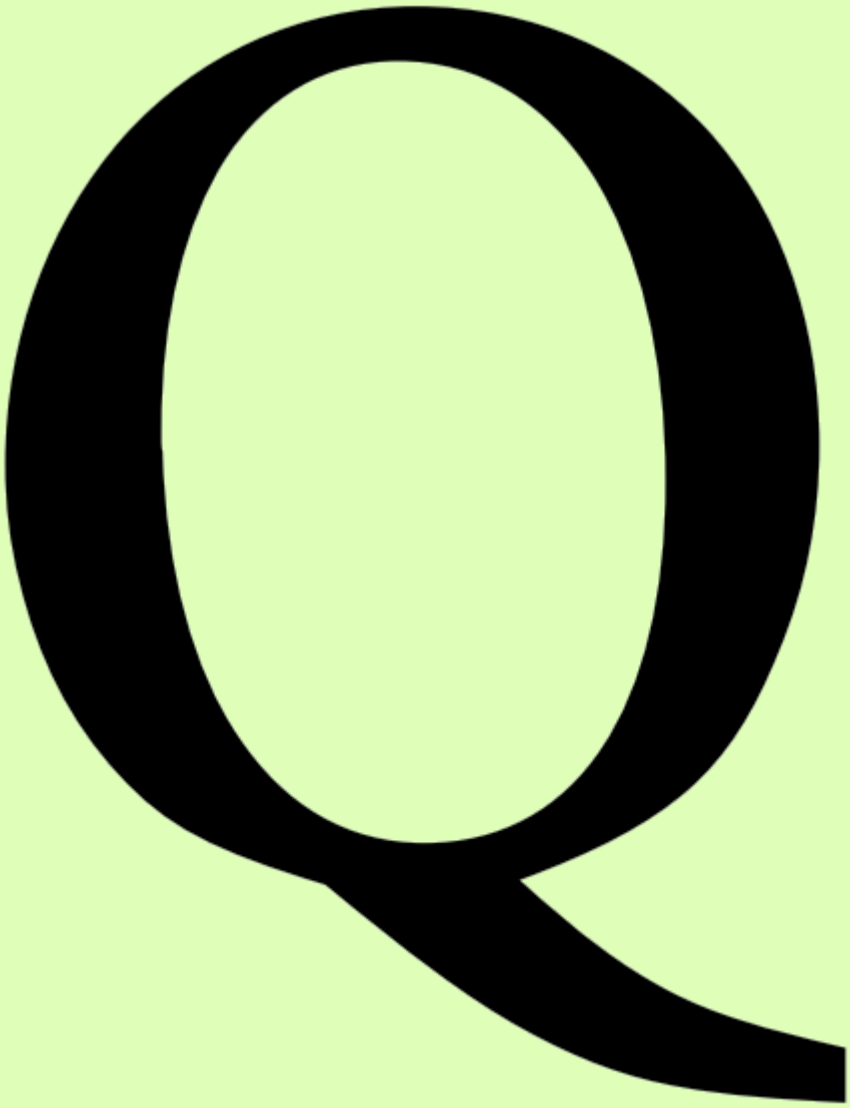
BUREAU BRANDEIS

QUARTERLY COLLECTIVE DAMAGES ACTIONS



Q4 2020

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

Dear Reader,

We are proud to present an entirely revamped Q.

And if we may say so ourselves, Q has been greatly improved.

First, as from this quarter, class actions in the broad sense of that term will take centre stage. There is every reason for that, as class actions are a hot topic across the globe. Particularly so in the Netherlands, where, for example, numerous cases are being initiated pursuant to new legislation. We will monitor the resulting slew of case law for you. We will, of course, continue to focus on developments related to cartel damage.

Second, Q is now presented in website form, not only making it more of a pleasure to read but also enabling readers to consult it as a source of information. Many will find the easily-searchable database useful. We are pleased to contribute in this way to further developments in the class actions' field.

Class actions

One-and-a-half years after its entry into force, the Settlement of Large-scale Losses or Damage (Class Actions) Act (*Wet afwikkeling massaschade in collectieve actie*, "**WAMCA**") is now (tentatively) starting to take shape in practice. The legislature left quite some room for interpretation in practice, with the details now being increasingly fleshed out in case law. A number of judgments rendered in the fourth quarter of 2020 provided further clarification. The judgments offer useful guidance on interpreting the stricter *locus standi* requirements for interest groups in the context of Article 3:305a Dutch Civil Code. The published decisions show that the heightened threshold must certainly not be underestimated, requiring proper substantiation from the interest group in question. For example, several cases fell at the first post because they failed to meet the higher threshold for a right of action.

In Europe, too, there were various developments regarding class actions in the fourth quarter of 2020. The Supreme Court of the United Kingdom, for example, rendered a long-awaited judgment in *Merricks v. Mastercard*, and an opinion of the Advocate General was published in a case in which preliminary questions were put to the European Court of Justice regarding jurisdiction in class actions. In addition, a high-profile action against TikTok was launched on behalf of millions of child users in the United Kingdom and the European Economic Area, and various actions are ongoing in connection with the accounting scandal surrounding the German company Wirecard. Finally, a new Directive on representative actions for the protection of the collective interests of consumers was introduced at European level. This Directive will bring about various (radical) changes to class actions within the European Union. In short, there were new developments in abundance in this fourth quarter.

Cartel Damages
In the cartel case field, never a quarter goes by without further developments. This quarter was no exception. Here is a small selection of the cases discussed.

In Germany, the UK and the Netherlands, there were further developments regarding the trucks cartel. For example, a substantive hearing took place in the Netherlands in the first wave of cases against the truck manufacturers. The German court in Hanover put questions to the ECJ regarding whether garbage and fire trucks are also covered by the cartel. The answer to these questions will be relevant for all jurisdictions.

The jurisdiction of the court in cross-border cases is also a recurring topic. This time around it was relevant in power cable cartel proceedings initiated by a number of Gulf States against power cable manufacturers established in various countries. In the case in question, the Amsterdam District Court ruled on its jurisdiction with regard to foreign defendants and Dutch anchor defendants. The District Court held that the mere fact that a foreign defendant had a Dutch subsidiary was not sufficient to justify use of the Dutch subsidiary as a gateway to the Dutch court. And the CJEU ruled in response to a question put to it by the German *Bundesgerichtshof* that, as the harmful event occurred in the claimant's country, Booking could be sued there for market abuse committed by it.

Louis Berger & Hans Bousie
Partners at **bureau Brandeis**

With contributions from **Louis Berger, Hans Bousie, Frank Peters, Stefan Campmans, Sophie van Everdingen, Michelle Krekels, Nathan van der Raaij** en **Tessel Bossen**

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Amsterdam, 31 August 2021

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Private Case Law

1.1. Collective Actions General

The Netherlands

- In October 2020, on behalf of affiliated IP rightsholders the BREIN foundation instituted an injunction action against ExpatsIPTV, claiming that its streaming services infringe IP rights. In that respect, BREIN asserted that it did not have to comply with the locus standi requirements from Article 3:305a (2) and (5) Dutch Civil Code because it was pursuing an objective of principle and was not seeking damages. ExpatsIPTV had taken its website offline following previously granted preliminary relief. According to BREIN, this class action in the form of proceedings on the merits was necessary because ExpatsIPTV had not provided a sufficient undertaking to the effect that it would cease the services. BREIN is also seeking a great deal of information and substantiation regarding the alleged infringements, the parties involved and the proceeds of the infringements. Such proceeds could prompt subsequent actions for damages.[1]

- 21 October 2020 – MarktOnderzoekAssociatie.nl (MOA), a market researchers' association, is requesting the District Court to declare that regulations and policy rules pertaining to the remit of Statistics Netherlands are non-binding. Not only do MOA members receive data from Statistics Netherlands, they also compete with Statistics Netherlands, particularly in respect of contracts for government authorities. Because the State is providing it with less fixed annual compensation, Statistics Netherlands is focusing more on commercial contracts for government authorities. In MOA's view, according to the legislative history such activities are only permitted on an occasional basis, and the current situation constitutes unfair competition for the MOA members. One of the arguments for conducting this case as a class action is that the members involved would prefer to remain anonymous because they fear the wrath of Statistics Netherlands and the government authorities as the supplier of data and contracts. MOA discusses its *locus standi* requirements relatively extensively, but states that it does not have to comply with the *locus standi* requirements in Article 3:305a(2) and (5) Dutch Civil Code, because it is pursuing an objective of principle.[2]

- in July 2020, the Diesel Emissions Justice Foundation (DEJF), which represents car users, summoned Daimler A.G. et al., manufacturer of, *inter alia*, Mercedes-Benz cars, in response to the diesel engine emissions scandal. At the request of the Car Claim Foundation, the Amsterdam District Court decided in a cause-list decision of 30 September 2020 to extend the (three-month) period for other parties to also issue a summons by two months (pursuant to Article 1018d Dutch Code of Civil Procedure).[3] Despite the District Court's initial impression that the case was complex from both a factual and legal perspective, it did not grant the possible 3-month extension because Car Claim was already aware of DEJF's case. The District Court held that this cause-list decision must be

[1] Summons against ExpatsIPTV (in Dutch).
[2] Summons against the State of the Netherlands (Ministry of Economic Affairs and Climate Policy) (in Dutch)

[3] Cause-list decision of 30 September 2020 (*Daimler*, in Dutch)

added to the central register for class actions, despite the fact that the *WAMCA* does not prescribe this. Car Claim itself had explicitly asked that its request for extension also apply to other representative entities, but the District Court did not decide on that request because it did not see what interest Car Claim had therein. The register now shows that writs of summons have also been issued by Car Claim and the Emission Claim Foundation. This probably means that the District Court will still have to decide whether Emissions Claim can also benefit from the extension request submitted by Car Claim.

- The Stop Online Shaming foundation (SOS) and The Expertise Centre for Online Child Sexual Abuse (EOKM) have filed class actions against vagina.nl for the unauthorised publication of sex videos and photographs. The District Court held in its interlocutory judgement of 28 October 2020 that the case could be substantively adjudicated because the requirements of Article 1018c(5) Dutch Code of Civil Procedure had been met.[4] This is one of the first cases in which this point has been decided under the new WAMCA. In this respect, the District Court held, *inter alia*, that the action was one of principle, which meant that lower requirements applied in determining whether there was a right of action. The District Court did assess, *inter alia*, whether it was sufficiently plausible that a class action would be more efficient and effective than individual actions in this case. The interests could be sufficiently bundled for that purpose. The foundations had also pointed out the diffidence of the parties involved as regards personally initiating proceedings against the website owner. After this decision, the District Court had to designate an exclusive representative (as referred to in Article 1018e Dutch Code of Civil Procedure), but came up against the fact that the claims had been lodged by two legal entities while the law does not regulate a joint request. The District Court dealt with this by designating SOS as the exclusive representative and ruling that EOKM (which focuses on minors) was also permitted to perform procedural acts. In this regard, too, the District Court decided that the decision had to be recorded in the central register, despite this not being prescribed by law.

- By interlocutory judgment of 18 November 2020, the District Court supplemented its judgment of 28 October 2020, the reason being that the District Court should have decided *ex officio* on the provisions of Articles 1018f and 1018g Dutch Code of Civil Procedure, but neglected to do so.[5] Article 1018f of the Dutch Code of Civil Procedure attaches a number of rules to the designation of SOS as exclusive representative, the purport of which is that the persons whose interests are being represented by SOS are informed of that designation and can consider their position ('opt out', paragraph 1, or 'opt in', paragraph 5). The District Court now added that the parties could comment on the practical details of the required notification to the persons whose interests are represented by the foundations, could comment on the necessity and usefulness of setting a time limit for a settlement period and could express any wish they may have to supplement the grounds of the claim. In that context, the District Court directed that advertisements regarding the class action had to be published in a number of national newspapers. The District Court gave the parties the opportunity to comment on the text of the advertisement and on the text that the District Court intended to publish on the rechtspraak.nl website.

- On 9 December 2020, the Amsterdam District Court ruled that it would not substantively adjudicate a case brought by a class action foundation against, *inter alia*, Rabobank. The case concerns a class action against a number of banks in response to the global interest rate manipulation affair.

[4] Amsterdam District Court 28 October 2020, case number C/13/690916 / HA ZA 20-284.

[5] Amsterdam District Court 18 November 2020, case number C/13/690916 / HA ZA 20-284.

Rabobank, Lloyds, UBS and the digital broker ICAP Europe Ltd have been sued by the Dutch Elco Foundation for the damage allegedly suffered by aggrieved professional investors as a result. The District Court held, however, that the Foundation had no *locus standi* because similar interests were lacking and there was a failure to meet the requirement that the interests of the persons on whose behalf the action is brought be sufficiently safeguarded. According to the District Court, nor had it been shown that this class action and the declaratory judgments sought therein could achieve effective and/or efficient legal protection.[6]

- STICHTING BREIN – the object of the Brein foundation is to combat copyright infringements, in particular for its affiliated rightsholders. Brein initiated preliminary relief proceedings, seeking that the defendant be ordered to stop offering hyperlinks or other technical references that allow users access to illegal content.[7] The defendant disputed Brein's right of action, arguing that the requirements of Article 1018c(1) Dutch Code of Civil Procedure had not been met.

First of all, the defendant disputed that Brein had sufficiently described the parties whose interests it is representing. The Preliminary Relief Judge held that in order to comply with Article 1018c(1)(b) Dutch Code of Civil Procedure it was not necessary to list specific names in the summons. The fact that the foundation referred in its summons to its website for the names of its affiliates was sufficient. In so doing, Brein had provided a sufficient description of the persons for whom the class action was instituted.
In addition, the defendant disputed that Brein had sufficiently substantiated the assertion in the summons that repeated infringing acts had taken place. This defence was also rejected by the Preliminary Relief Judge as the summons contained a specifically described claim and the factual assertions on which that claim was based.

Finally, the defendant argued that Brein had no *locus standi* because its summons did not state what had been done to reach a settlement in mutual consultation. According to the defendant, the requirement of Article 3:305a(3) Dutch Civil Code had not been met. This defence was also rejected. The defendant had stated itself that Brein made him a settlement proposal, but that no consensus had been reached on this point. In addition, the Preliminary Relief Judge held that the requirement of Article 3:305a(3) Dutch Civil Code did not go as far as requiring Brein to enter into consultation with the defendant even if that consultation could not reasonably help resolve the dispute. The Preliminary Relief Judge declared Brein to have a right of action.

- STICHTING PLATFORM STORM - In preliminary relief proceedings, the Platform Storm foundation sought the cessation of the construction of a wind farm by three defendants.[8] Various preliminary relief proceedings were conducted under administrative law, in which the appeals (of Platform Storm and others) were declared inadmissible or unfounded.

The Preliminary Relief Judge declared Platform Storm to lack *locus standi* for three reasons. Firstly, the summons did not satisfy the requirements ensuing from Article 1018c(1) Dutch Code of Civil Procedure. Platform Storm had not (sufficiently) elaborated on the requirements of Article 1018c(1) Dutch Code of Civil Procedure in the summons. The limited additional explanation at the hearing was also insufficient.

In addition, Platform Storm did not meet the *locus standi* requirements from Article 3:305a

[6] Amsterdam District Court 9 December 2020, ECLI:NL:RBAMS:2020:6122.
[7] Midden-Nederland District Court 1 July 2020, ECLI:NL:RBMNE:2020:2780.
[8] Noord-Nederland District Court 22 October 2020, ECLI:NL:RBNNE:2020:3583.

Dutch Civil Code, as it did not make any assertions about those requirements in the summons. At the hearing, Platform Storm invoked the exception in Article 3:305a(6) Dutch Civil Code. The Preliminary Relief Judge rejected that reliance and noted that, if Platform Storm had wanted to invoke the exception in Article 3:305a(6) Dutch Civil Code, it should have done so in the summons. The arguments put forward for the defence regarding a lack of *locus standi* were also refuted with insufficient substantiation by Platform Storm at the hearing. The fact that Platform Storm had previously been considered an interested party by the administrative court did not alter the Preliminary Relief Judge's opinion, as Articles 1018c Dutch Code of Civil Procedure and Article 3:305a Dutch Civil Code lay down special requirements for *locus standi* in civil cases that do not apply in administrative law.

Finally, Platform Storm had no *locus standi* because administrative proceedings had already been conducted that offered sufficient legal protection, and these legal proceedings had not led to the revocation of the defendants' licences. Hence, the validity of the decision made had to be assumed (formal legal effect). Moreover, there was still an administrative law option open to request the relevant administrative body to withdraw or suspend the licences for violation of EU law. At the hearing, Platform Storm indicated that it indeed wished to take this route.

- STICHTING MUSIC#METOO – The purpose of the Music#MeToo foundation is to give a voice to victims of insulting behaviour, discrimination, sexualisation and sexual abuse and to combat this undesirable behaviour in the music industry. The Music#MeToo foundation aims to initiate a class action against Warner Music Benelux B.V. ("Warner"). This entails seeking an order for Warner to comply with its own ethical code of conduct and/or an injunction or a declaratory decision with regard to Warner's unlawful conduct. According to the Music#MeToo foundation, there is structural misconduct by artists in the Dutch music industry. Warner is said to facilitate this misconduct and to fail to act against it.

The Music#MeToo foundation submitted a request to the District Court for a preliminary examination of witnesses to be held.[9] The foundation wished to examine directors of Warner and of Spec Entertainment B.V. (an artist management company), together with a few rap artists. As Warner failed to appear before the District Court, the request was granted. On appeal, Warner and six other applicants requested that the decision be set aside and that the request for the holding of a preliminary examination of witnesses be denied after all. According to Warner and three other applicants, the request should be denied because there was no interest on the part of the Music#MeToo foundation. In Warner's view, the foundation intended to institute proceedings on the basis of Article 3:305a Dutch Civil Code, but failed to meet the requirements set for that purpose.

In assessing a request to conduct a preliminary examination of witnesses, the requirements for a class action as referred to in Article 3:305a of the Dutch Civil Code were relevant. The Court of Appeal held that the Music#MeToo foundation had not made a sufficiently plausible case to suggest that it performed any activities to achieve its objects under the articles of association or had a relevant support base. The Music#MeToo foundation did not provide the Court of Appeal with any information to show that it had the support of relevant followers. The Court of Appeal noted that, in the absence of further information about the foundation's support base, it was not possible to assess whether there were similar interests, in the sense that efficient and effective legal protection for the benefit of the

[9] Arnhem-Leeuwarden Court of Appeal 8 December 2020, ECLI:NL:GHARL:2020:10177

interested parties could be served. As it had not been established that the foundation had a collective interest in initiating proceedings against Warner, or an interest of its own in doing so, it had no interest in the preliminary examination of witnesses requested by it. The request for the holding of a preliminary examination of witnesses was denied.

Germany

- Wirecard was a listed German company that facilitated online payments. In June 2020, Wirecard's board announced that EUR 1.9 billion in reported cash was missing or had possibly never existed. Following this announcement, an increasing number of (suspected) accounting irregularities emerged, and the share price collapsed. Wirecard has meanwhile been declared bankrupt and various proceedings have been initiated by aggrieved investors against, among other parties, Wirecard's accountant, Ernst & Young. For example, a class action is ongoing in the United States before the U.S. District Court for the Eastern District of Pennsylvania against Wirecard, Ernst & Young, a number of members of Wirecard's management board and a member of its supervisory board. In Germany, five class actions have been initiated before various District Courts against Wirecard, Ernst & Young and two German regulators, namely the *Bundesanstalt für Finanzdienstleistungsaufsicht* and the *Deutsche Prüfstelle für Rechnungslegung*. With parliamentary and criminal investigations also under way in Germany, this scandal has been called the largest accounting scandal since the Enron affair.

United Kingdom

- On 11 December 2020, the UK Supreme Court rendered its long-awaited judgment in *Merricks v. Mastercard*, rejecting Mastercard's appeal against the judgment of the Court of Appeal of England and Wales of April 2019.[10] The appeal related to the procedure for collective proceedings concerning claims for damages in competition cases. It was the first collective proceedings case of this sort to reach the Supreme Court, and addressed important questions about the correct legal requirements for certification of a claim. The main elements of the Court of Appeal's decision were:

When the Competition Appeal Tribunal (CAT) determines whether claims are "suitable" to be brought in collective proceedings, this entails that they are more suitable for being brought in collective proceedings than as individual claims.

At the certification stage, the applicant is not required to meet a certain threshold for the merits of the case or the evidence, apart from the ordinary tests applicable when the defendant applies to strike out or for a summary judgment.

Collective proceedings may result in the award of aggregate damages that reflect the total loss of the group, which damages can then be divided among the group in a manner that does not have to reflect the actual loss of each individual.

The Supreme Court referred the case back to the CAT.

- On 30 December 2020, a 12-year-old girl took the first step in bringing a representative action pursuant to Civil Procedure Rules, rule 19.6 against TikTok and/or Musical.ly.[11] The legal claim has been brought on behalf of millions of children using TikTok in the UK and European Economic Area who have been impacted by the app's actions. It is alleged that the defendants have misused the claimant's private information and processed her personal data in breach of the duties imposed by the General Data Protection

[10] UK Supreme Court 11 December 2020, [2020] UKSC 51.

[11] UK High Court 30 December 2020, [2020] EWHC 3589 (QB).

Regulation (GDPR) 2016/679/EU and the UK GDPR. The remedies sought are a declaration, damages, injunctions, and orders for erasure of the data in question. The damages claimed are for "loss of control of personal data".

1.2. Cartel Damages

The Netherlands

- On 24, 25 and 26 November 2020, the District Court held a (unique) three-day hearing in a case between various claims vehicles on the one part and truck manufacturers DAF, MAN, Iveco, Volvo-Renault, Daimler and Scania on the other. The District Court dealt with three subjects, one per day: the scope of the European Commission's decision, the trucks manufacturers' defence to the effect that no damage could have been suffered, and the claim for the surrender of documents. In addition, discussion took place on the value that the District Court is entitled to attach to procedural documents and judgments in other (foreign) proceedings. The claimants relied, for instance, on a procedural document from Ryder, a claimant in proceedings in the United Kingdom, in which information from the European Commission's file had been incorporated, and also relied on a decision by the United Kingdom Competition Appeal Tribunal in which the facts laid down in the decision had been adopted despite objections from the truck manufacturers. On 15 May 2021, the District Court rendered judgment on these subjects. We will discuss them in Q(2021-2).

- On 25 November 2020, the Amsterdam District Court rendered an interlocutory judgment in a case between four government bodies in the Gulf States Bahrain, Saudi Arabia, Kuwait and Oman[12] on the one part and fifteen legal entities involved in groups of Prysmian,[13] ABB,[14] Pirelli,[15] Goldman Sachs[16] and Nexans[17] on the other.[18]

The backdrop is the power cable cartel whose existence was established by the European Commission in 2014.[19] The European Commission established that European, Japanese and South Korean manufacturers of underground and submarine power cables had divided power cable projects between themselves from 18 February 1999 to 29 January 2009. The defendants are (indirectly) connected to the addressees of the Commission decision.

The Claimants of the Gulf States are seeking a declaratory judgment that the defendants acted unlawfully because they participated in the cartel, or that the knowledge of the parent companies addressed must be imputed to them. In separate ancillary actions, the defendants are seeking that the District Court decline jurisdiction.

The District Court partially concurred with the defendants in this respect. It held that, although it had jurisdiction to rule with regard to the Dutch defendants, this was not the case for the foreign defendants. Nor could the Dutch defendants serve as anchor defendants. The first requirement of a sufficiently close connection between the claims had not been satisfied. The mere fact that the Dutch defendants are (indirectly) connected with the addressees of the decision did not mean that they were also involved in the infringement under competition law or that parent companies' liability could be imputed to them. The District Court therefore deemed itself to

[12] Electricity & Water Authority of the government of Bahrain (Bahrain), GCC Interconnection Authority (Saudi Arabia), Kuwait Ministry of Electricity and Water (Kuwait) and Oman Electricity Transmission Company SAOC (Oman).
[13] The defendants are Prysmian Netherlands B.V., Draka Holding B.V., and Prysmian Cavi e Sistemi S.R.L.
[14] The defendants are ABB B.V., ABB Holdings B.V., ABB AB, and ABB Ltd.
[15] The defendant is Pirelli & C S.p.A.
[16] The defendant is The Goldman Sachs Group, Inc.
[17] The defendants are Nexans Nederland B.V., Nexans Cabling Solutions B.V., Nexans Participations S.A., Nexans S>A. and Nexans Franse S.A.S.
[18] Amsterdam District Court 25 November 2020, ECLI:NL:RBAMS:2020:5882.
[19] Decision of the European Commission of 2 April 2014 in case AT.39610 ('Power Cables').

lack jurisdiction with regard to the foreign defendants.

Germany

- On 30 September 2020, the Regional Court of Dortmund awarded damages in a claim concerning the train tracks cartel.[20] This decision is interesting because the Regional Court quantified the (cartel) damage on the basis of its own findings. The court did so because it considered the costs of an expert to be disproportionate in relation to the (suspected) damage in question. The defendants had submitted expert advice themselves, but the Regional Court dismissed it as unreliable. In addition, according to the Regional Court, the conventional method of quantifying (cartel) damage did not apply here due to the special nature of the case. There was, for example, no market that could serve as a comparative market. Consequently, the Regional Court arrived at its own estimate. The price increase due to the cartel was estimated at 'at least 15%'. The Regional Court based its quantification on factors that also apply in the determination of a cartel fine, such as the cartel's duration, scope and degree of organisation. The estimated percentage was also felt to be of the same order of magnitude as the percentages to be found in well-known studies on average cartel-related price increases and other decisions of European District Courts. The amount of damages ultimately awarded was approximately EUR 62,000.

- On 14 October 2020, Deutsche Bahn AG (DB) published a press release entailing that it had reached a settlement with ThyssenKrupp GfT Gleistechnik GmbH and ThyssenKrupp Materials Services GmbH on damages for (possible) cartel agreements in the 'private market rail cartel'.[21] The background to the settlement is a fine imposed in 2013 by the German competition authority, the *Bundeskartellamt*, on DB and various construction companies that carried out infrastructure projects for DB. ThyssenKrupp supplied, among other things, the materials for those projects. The details of the settlement have not been disclosed.

- In October 2020, the Regional Court of Hanover decided to ask the European Court of Justice for guidance on the scope of the decision of the European Commission (the "**Commission**") regarding the truck cartel.[22] The Regional Court of Hanover is requesting clarification on the scope of vehicles ('products') covered by the decision and on whether these also include specific types of vehicles such as garbage trucks and fire engines. The answer to that question will enable the court to determine the extent to which the Commission's decision is binding. The decision to refer was published on 14 October 2020 and stems from a damages lawsuit brought before the Regional Court of Hanover by a German municipality. According to the decision to refer, the literal text of the Commission's decision is unclear, leaving room for different interpretations. The court also refers to the content of an information request directed to the truck manufacturers by the Commission in 2015, which seems to exclude information on 'special vehicles'. According to the Regional Court of Hanover, the questions need to be clearly resolved at this stage as the answers will determine the success or failure of the case presently before the court and will also be important in future proceedings.

- On 2 December 2020, Deutsche Bahn announced that its subsidiary DB Barnsdale AG had reached a settlement with British Airways for their role in the air cargo cartel.[23] Of the eleven defendant airlines from which it was seeking damages, this constitutes the seventh

[20] *Landgericht* Dortmund 30 September 2020, 8 O 115/14 (*Kart*).
[21] '*DB schließt Vergleich mit thussenkrupp zu Schadenersatz beim Schinenkartell*', 14 October 2020, Deutsche Bahn's website.
[22] *Landgericht* Hanover 19 October 2020, 13 O 24/19, ECLI:DE:LGHANNO:2020:1019.13O24.19.00.
[23] Deutsche Bahn Press release of 2 December 2020, 'Air Freight Cartel: DB and British Airways reach out of court settlement'.

settlement reached by Deutsche Bahn. The amount of the settlement has not been disclosed.

- Q4 saw the publication of a judgment from 23 September 2020 in which the *Bundesgerichtshof* ruled in favour of members of the German train tracks cartel.[24] The case was between unidentified cartel members and the transport operator for the city of Essen. The highest court referred the case back to appeal because it found that the appeal court had erred in applying the burden of proof, specifically by reversing the burden of proof when establishing whether the claimant had suffered damage. The judges held that there is a (rebuttable) presumption that prices affected by a cartel will be higher than those under normal market conditions, but that the burden of proof when assessing damage should not be reversed. This presumption is only one of the factors to be considered by the court.

This case is important because the highest court referred the case back, supplying detailed guidance on how to quantify damages, as well as helpful instructions and clarification on how to assess the defence that damage was passed on. The judges held that:

A cartel member that wants to invoke the passing-on defence must present tangible evidence to support the contention that the damage was passed on, whereby the level of detail required depends on the specific circumstances of the case, in particular the complexity of the economic context.

If – particularly in cases of scattered damages – there are a relatively small number of damages claims, which are by indirect cartel victims and difficult to quantify, the court should not accept the passing-on defence because that would involve the risk of the defendants being awarded unfair relief.

United Kingdom

- DAF, Iveco and other truck manufacturers have lost their appeal to the Court of Appeal of England and Wales against a judgment that deemed them legally bound by non-essential recitals of a 2016 EU cartel decision. The Court of Appeal ruled that the appeal of the truck manufacturers against an earlier decision by the CAT should be dismissed. The judgment should be seen as a warning to companies combating damages actions arising from the European Commission's antitrust decisions.[25]

- It has emerged from a CAT decision that ABB has reached a settlement in a cartel damage case instituted by the UK National Grid over the power cable cartel. The UK energy network operator's lawsuit followed a 2014 decision by the European Commission to impose a fine on eleven cable manufacturers because they formed a global cartel for almost ten years with effect from 1999. The claim is still being pursued against Prysmian, another cable manufacturer[26].

- MLex has reported[27] that Banks including BNP Paribas, Deutsche Bank, Goldman Sachs and Standard Chartered are being targeted by a new damages claim filed by Allianz Global Investors and 174 other claimants for alleged manipulation of the currency markets. The claimants' complaint is based on two European Commission decisions of May 2019 in the Forex scandal, in which Barclays, Citigroup, Royal Bank of Scotland, JPMorgan and the Japanese MUFG – formerly Bank of Tokyo-Mitsubishi UFJ – were called to account for their behaviour.

[24] BGH 23 September 2020, KZR 4/19 - OLG Düsseldorf LG Dortmund.
[25] DAF, Iveco, other truckmakers lose UK appeal to escape non-core parts of EU cartel decision
[26] ABB settles National Grid's UK antitrust suit over cable cartel
[27] Deutsche Bank, Goldman Sachs, others targeted in new UK forex damages claim

2

Public Case Law

2.1. Collective Actions General

EU

- On 17 December 2020, the Advocate General's opinion was published in case C-709/19, in which the Supreme Court put preliminary questions to the European Court of Justice (ECJ) on jurisdiction in class actions pursuant to the Brussels I Regulation (Recast).[28] The underlying case pertains to a claim by the Dutch Association of Stockholders (VEB) about a decrease in the value of BP shares due to alleged deceit by BP with regard to an oil leak in the Gulf of Mexico. The District Court and the Court of Appeal had held earlier that the Dutch court does not have jurisdiction, as BP has its registered office in the United Kingdom.

The Advocate General's response was that the place where the investment account is held does not provide a sufficient basis for the international jurisdiction of the Member State concerned without additional circumstances. The Advocate General also discussed other circumstances (such as consumers being included within those represented, and a settlement from a third country) which, in his opinion, likewise did not constitute special circumstances.

The Supreme Court had also asked whether the rules of jurisdiction should be applied differently (in other words: less strictly) in cases in which the VEB institutes a class action. According to the Supreme Court, the effectiveness of the class action mechanism would be lost if the VEB had to lodge a claim at every place where damage occurred. In the Advocate General's view, the rules of jurisdiction in Article 7(2) of the Brussels I Regulation (Recast) should not be applied differently even in the case of a class action by the VEB. Although the Advocate General acknowledged the risk identified by the Supreme Court, he took the view that the regime under the Regulation offered no other option. The Advocate General's response on this point is in line with the *CDC* judgment (C-352/13, EU:C:2015:335), in which the Court of Justice did not accept that transfer and bundling of claims could affect the determination of international jurisdiction.

2.2. Cartel Damages

EU

- On 24 November 2020, the ECJ decided that a hotel using the platform Booking.com may, in principle, bring proceedings against Booking.com before a court of the Member State in which that hotel is established in order to bring to an end a possible abuse of a dominant position. The ECJ made this decision in response to questions referred to it by the Highest German Court (the *Bundesgerichtshof*), following an appeal against a judgment of the Higher Regional Court in Schleswig, Germany. The latter court had found that it had no jurisdiction to hear the case against Booking.com by the claimant hotel, Wikingerhof – a company governed by German law – because Booking.com has its seat in the Netherlands. According to the Regional Court,

[28] Opinion of the Advocate General Campos Sanchéz-Bordona 17 December 2020, Case C-709/19.

under the Brussels Regulation there was no general jurisdiction: neither special jurisdiction for performance of a contractual obligation under Article 7(1)(a) nor that of the court for the place where the harmful event occurred in matters relating to tort, under Article 7(2).[29]

The ECJ ruled on the question whether there was jurisdiction under Article 7(2) Brussels Regulation. It answered this in the affirmative, concluding that, subject to verification by the referring court, the action brought by Wikingerhof, in so far as based on the legal obligation to refrain from any abuse of a dominant position, is a matter relating to tort, delict of quasi-delict within the meaning of Article 7(2) Brussels Regulation.[30]

- At an EU General Court hearing on 22 October 2020, Nichicon Corp, a Japanese capacitor manufacturer, argued that the level of the fine imposed on it by the European Commission (EUR 7.29 million euros) was disproportionate, and that sufficient proof of (the extent of) its involvement in the cartel was lacking. The fine stems from a 2018 European Commission decision in which eight companies were fined for their involvement in a cartel between aluminium and tantalum electrolytic capacitors from Japan. The Commission had relied upon a leniency statement of a competitor of Nichicon Corp as proof of its involvement in the cartel. According to Nichicon Corp, such statements cannot be relied upon because competitor companies might be biased against other (suspected) cartel members with a view to the leniency they might receive. The Commission argued that there was no reason to assume that leniency statements would be biased or that a company would lie – that would not be in the company's interest, because, if the Commission were to find out, the leniency might be denied as a result. Nichicon Corp further contested the extent of its involvement, saying that it had been held liable for meetings in which it did not participate and also that (its involvement in) the cartel had no clear link with the EEA. The Commission countered by saying that it was sufficient that it had shown that there was a 'single and continuous infringement' which also covered the production in Europe. As to the level of the fine, Nichicon Corp argued that the fine was disproportionate compared to the level of fines in other jurisdictions for the same conduct, but the Commission took the view that no principle applies in this case to the effect that a person/company should not be fined twice.[31]

- On 6 October 2020, the European Commission disclosed that it had sent a Statement of Objections to Conserve Italia Soc. Coop. Agricola and its subsidiary Conserves France SA for participation in the canned vegetables cartel. In its Statement of Objections, the Commission informed the companies of its preliminary view that they have breached EU antitrust rules by colluding to distort competition by horizontal price fixing, market sharing and allocating customers for the supply of certain types of canned vegetables within the European Economic Area (EEA).[32]

This is the next chapter in the Commission's investigation into the canned food market, which has already resulted in a settlement decision against three other manufacturers, Bonduelle, Coroos and Group CECAB, which admitted their involvement in the cartel and received a total fine of EUR 31.6 million. On 16 December 2020, the Commission published a non-confidential version of this decision.[33]

- On 7 October 2020, the European Commission disclosed that it had accepted

[29] The Brussels Regulation: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[30] Court of Justice of the European Union, Press Release NO 147/20, 24 November 2020.
[31] *Nichicon v. Commission* T-342/18.
[32] Antitrust: Commission sends Statement of Objections to Conserve Italia for participation in canned vegetables cartel, 5 October 2020.
[33] Decision of the European Commission of 27 September 2019, Case AT.40127 – Canned Vegetables.

commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes. Broadcom customarily made agreements containing exclusivity or quasi-exclusivity arrangements and/or leveraging provisions concerning specific technology, so-called Systems-on-a-Chip, for TV set-top boxes and Internet modems. It has now undertaken to suspend all existing agreements and to refrain from entering into new agreements containing such terms. The commitments are binding for seven years vis-à-vis all device manufacturers and include products not covered by the interim measures decision that the Commission adopted in October 2019.[34]

- On 10 November 2020, the European Commission sent a Statement of Objections to Amazon for the use of non-public independent seller data, and opened a second investigation into Amazon's e-commerce business practices. The Commission disclosed the fact that it takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with these third party sellers.[35]

Germany

- In a press release entitled 'Review of 2020', the *Bundeskartellamt* reported that the number of leniency applications was decreasing due to a rise in private damages proceedings. The *Bundeskartellamt* is therefore exploring innovative investigation methods, such as market screening, and will also expand the range of possibilities offered by their digital anonymous whistle-blowing system. In 2020, 13 companies made use of the leniency programme to inform the *Bundeskartellamt* about infringements in their sector.[36]

- Five aluminium forging companies and ten of their employees have been fined by the *Bundeskartellamt* for a total amount of approximately EUR 175 million. The companies were found to be in general agreement that their respective procurement costs and costs increases would be passed on to their customers. The companies which were fined are OTTO FUCHS Beteiligungen KG, Leiter Group GmbH & Co KG, Strojmetal Aluminium Forging GmbH, Presswerk Krefeld GmbH & Co KG and Bharat Forge Aluminiumtechnik GmbH. The company Hirschvogel Aluminium GmbH filed a leniency application which triggered the investigation and was therefore spared a fine.[37]

[34] Antitrust: Commission accepts commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes, 7 October 2020.
[35] Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, 10 November 2020.
[36] Press release of the Bundeskartellamt of 29 December 2020, 'Review of 2020'.
[37] Press release of the Bundeskartellamt of 23 December 2020, 'Fines imposed on aluminium forging companies on account of anti-competitive agreements'.

3

Regulation

- On 24 November 2020, the European Parliament approved the 'Directive on representative actions for the protection of the collective interests of consumers'.[38] The Directive is part of the New Deal for Consumers aimed at strengthening European consumer rights and their enforcement. This covers rights arising from European Regulations and Directives on such matters as unfair commercial practices, tourism, product safety, energy, financial services, telecommunications, product liability and data protection.

Member States have the period from 24 December 2020 until 25 December 2022 at the latest to adapt their legislation insofar as they do not yet comply with the Directive. The new national provisions should then be applied as from 25 June 2023 to representative actions brought on or after 25 June 2023.

Member States must provide for an opt-in or opt-out mechanism, or a combination of the two. They must also ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought are required to explicitly agree to be represented in that representative action. This means that an opt-in mechanism must in any event apply to consumers in this category.

Furthermore, Member States have to designate competent authorities that can institute representative actions. Member States are also required to ensure that representative actions can be brought before their District Courts or administrative authorities by competent authorities designated in another Member State for such representative actions.

[38] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

4

Team

Editors
Hans Bousie
Louis Berger

Authors
Louis Berger
Hans Bousie
Frank Peters
Stefan Campmans
Sophie van Everdingen
Michelle Krekels
Nathan van der Raaij
Tessel Bossen

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

Frank Peters is a seasoned litigator with substantial experience in class actions of all sorts. As a founding partner of bureau Brandeis, he represents companies, institutional investors, NGOs and hedge funds in complex corporate and commercial disputes, as well as strategic litigation in fundamental matters such as climate change.
With regards to class actions, Frank is currently working on, for instance, The Privacy Collective v. Oracle & Salesforce (GDPR), minority shareholders v. Yukos (bankruptcy and corporate governance), the Steinhoff class action for institutional investors, with Grant & Eisenhofer P.A. and Kessler Topaz Meltzer & Check, LLP (securities fraud), and several other matters in respect of in particular climate change.

Stefan Campmans is a senior litigator with 10 years of experience. He has a focus on competition law and civil litigation. Stefan is at his best in complex (international) commercial disputes which require a strategical mind set. He graduated on competition law issues in the EU pharmaceuticals market (and he also graduated on civil law and corporate law) in 2011. Before joining bureau Brandeis, Stefan was a member of the competition law and corporate law department of a full service Dutch law firm. Since 2016 he has focussed further on litigation, including class actions

about competition law and being an editor for Q class actions

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.

Michelle Krekels is a senior associate at bureau Brandeis. She has extensive experience with complex (international) litigation. She advises and litigates on mass damage cases, commercial contracts, financial disputes and (product) liability. For example, she instituted on behalf of South-Africa's civil servants pension fund and other institutional investors legal proceedings against Steinhoff and others following the announcement of fraudulent accounting irregularities. She often works together with other foreign law firms and funders. They appreciate her sharp analyses, critical insights and client focus.

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 ligitation 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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bureau Brandeis

Sophialaan 8 1075 BR Amsterdam Nederland
+31 (0)20 7606505 info@bureaubrandeis.com
bureaubrandeis.com