BUREAU BRANDEIS

CARTEL DAMAGES

QUARTERLY REPORT III

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

This quarter has seen some remarkable decisions, one of these is an interesting decision rendered by the High Court of England and Wales, on 29 July 2016. Whereas the High Court of Justice had previously ruled that the so-called CRT cartel fell outside its jurisdiction as there was no impact on the European territory, the High Court of England and Wales ruled that this did not prevent follow-on actions. It can be said that the arguments of Iiyama are novel. In this line of reasoning, umbrella pricing would also be crucial for the acceptance of damages caused to those not directly affected.

The fact that umbrella pricing is not just a European phenomenon is clear from the US District Court ruling in Pennsylvania in the so-called Processed Egg products antitrust litigation case. The Libor case in the United States makes it clear that a possible reliance on umbrella pricing does not mean that every claimant may go to court with alleged damages.

In the Elevator cartel case in the Netherlands, the District Court of Midden Nederland ruled on 20 July 2016, in short, that the Commission's opinion on the involvement of companies in a cartel does not suffice as basis for the allegation that the parent companies also bear liability. In fact, by Dutch civil law standards, this is not an unexpected ruling.

A-G Szpunar caused some stir through his opinion in which he indicated that the information from cartel members who had made successful applications for leniency should also be allowed to be included in the Commission's decision, provided that this would not be traceable to individual cartel members.

Finally, we also point out a decision by the US Court of Appeals in New York (Second Circuit) on 20 September 2016, which we find remarkable. A number of Chinese vitamin manufacturers were not held liable for price fixing (which is clearly in breach of US regulations), because the Chinese Government required them to do so. As logical as this may seem from the manufacturer's point of view, this nevertheless seems to be a remarkable choice. It would mean a party would not be remonstrated for an act that is in breach of national rules of competition because the authorities of another country have mandated the act.

We trust this summary is of use for you. We welcome any additions to or comments on this quarterly.

Hans Bousie, **Louis Berger** and **Nammy Vellinga**

Index

Amsterdam, November 2016

1

Private enforcement in cartel damages claims, case-law

In this section we will elaborate on litigation developments regarding international and national private enforcement cases.

United Kingdom

- As touched upon in Q1 Pride Mobility is being sued by a class who purchased a Pride mobility scooter in the UK between 1 February 2010 and 29 February 2012, in an opt-out class action to recover damages for anti-competitive behavior of Pride Mobility. Justice Roth of the Competition Appeal Tribunal lifted confidentiality restrictions on 15 July 2016. The class consists of approximately 30.000 purchasers and the lifting of the restrictions on confidentiality means class members are able to determine their loss.[1]

- As also touched upon in Q2, the Competition Appeal Tribunal ruled on 27 July 2016 jointly in two separate cases between Deutsche Bahn AG & Others versus MasterCard Int. Inc. and MasterCard Europe SPRL and Peugeot Citroën Automobiles UK Ltd and Others versus Pilkington Group Limited and Others that foreign limitation periods apply to damages claims heard before the Competition Appeal Tribunal.[2] With consent of the parties, the proceeding were stayed on 22 August 2016 until there will be a final ruling in a parallel High Court action on the applicability of UK law and limitation period to various parts of the claims.[3]

- Also on the MasterCard case, on 14 July 2016 the Competition Appeal Tribunal issued a decision between Sainsbury's supermarkets and MasterCard.[4] The Competition Appeal Tribunal held MasterCard liable for its restriction of competition by effect. As already mentioned in Q2, MasterCard set a Multilateral Interchange Fee for the UK that Sainsbury's was required to pay on card transactions.[5]

- It did not stop there for MasterCard. Due to the anticompetitive nature of the interchange fees of MasterCard, on 8 September 2016 Walter Merricks (CBE) brought a claim as a class representative of UK consumers that have suffered loss as a result of the anticompetitive illegal conduct of MasterCard it adhered for 16 years.[6] MasterCard is now facing a claim up to GBP 19 billion only for damages in the UK.[7]

- In Q2 we discussed the glass claim and CRT cartel. The High Court of Justice decided on 23 May 2016, that the CRT cartel fell outside of European jurisdiction. However, on 29 July 2016 the High Court of Justice did not immediately strike out the follow-on

1. CAT Dorothy Gibson v Pride Mobility Products Limited – transcript (Direction hearing) 15 July 2016.
2. CAT, Deutsche Bahn AG and Others v MasterCard Incorporated and Others – judgment (Limitation point), 27 July 2016.
3. CAT, Deutsche Bahn AG and Others v MasterCard Incorporated and Others – Order (Stay of proceedings), 22 Augustus 2016.
4. CAT 1241/5/7/15 (T) Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others, 14 July 2016.
5. CAT, Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others - Summary Judgment, 14 July 2016.
6. J. Croft, 'Mastercard faces one of the UK's first class action lawsuits' Cross-border charges claim to be one of the first brought under new consumer law, Financial Times, 6 July 2016.
7. Michael Isaacs, 'MasterCard Class Action Explained: The £19 Billion "opt-out" collective action under the Consumer Rights Act 2015 for breach of competition law', 28 July 2016 *and* Quinn Emanuel trial lawyers, firm news '£14 billion damages claim filed against MasterCard by UK consumers in landmark collective action'.

claim of Iiyama, which alleged to have been harmed by the LCD cartel, because of the so called umbrella pricing argument (i.e. that even parties not involved in the cartel as such will have raised their prices as a result of the cartel agreement):

❝ *If the prices in the EU had not been increased by reason of the cartel, then the Claimants say that they would have been able to buy in the EU without paying the overcharge and that on the balance of probabilities they would have done so," Justice Morgan said. "Accordingly, they suffered loss and damage by buying outside the EU at a price greater than the price that would have been available in the EU if the cartel had not been implemented in the EU."*[8]

The Netherlands

- Based on the Commission's decision of 24 January 2007, from which it appears that ABB Ltd. infringed the cartel prohibition by participating in agreements and concerted practices in the European market for gas insulated switchgear, the Dutch Supreme Court decided the following on 8 July 2016 in the proceedings engaged by TenneT TSO BV and Saranne B.V. (**TenneT et al**) versus ABB B.V. and ABB Ltd. (**ABB et al**).

The question that arises was whether ABB's passing-on defence should be assessed as part of the question as to what extent TenneT et al has suffered damage as a result of the unlawful conduct of ABB et al, or as a question of deduction of collateral benefits. The Dutch Supreme Court considered in its judgment of 8 July 2016 that a choice between the two approaches is irrelevant and that both approaches are possible. However, the Supreme Court did recede from its earlier application of Article 6:100 DCC. In paragraph 4.4.3., the Supreme Court considered:

❝ *Whereas in previous judgments, the Supreme Court set more or different requirements on the 'same event' in deduction of collateral benefits under application of Article 6:100 DCC, the Supreme Court has now receded from this."*[9]

The effect of this Supreme Court judgment is that deduction of collateral benefits will be adopted sooner. The threshold is lowered as the disadvantage and the benefit are no longer required to arise from the same event, the requirement of "the same event" was interpreted strictly in The Netherlands.

- On 20 July 2016, the District Court of Midden Nederland rendered a decision in follow-on compensation proceedings regarding the Elevator cartel case. On 21 February 2007, the European Commission (**Commission**) imposed fines for the Elevator cartel on the Dutch market. Kone Corporation and Kone were fined EUR 79,750,000; Schindler Holding and Schindler Liften were fined EUR 35,169,750; and Mitsubishi was fined EUR 1,841,400. UTC and Otis were not fined for the infringement of the cartel prohibition on the Dutch market because of the application of the Leniency Policy Rule.

The Commission also established violations of the cartel prohibition on the Belgian, German and Luxembourg elevator markets by companies belonging to the Otis Group, the Schindler Group, the Thyssen-Krupp Group, and the Kone Group. The Commission imposed fines totaling about 990 million euros for the infringements of the cartel prohibition on the four elevator markets.

The District Court of Midden Nederland in the case between East West Debt B.V. and the defendants (United Technologies Corporation, Otis B.V., Schindler Holding Ltd., Schindler Liften B.V., Thyssenkrupp A.G., Thyssenkrupp Liften B.V., Kone Corporation, Kone B.V., Mitsubishi Elevator Europe B.V.) ruled as follows. The District Court of Midden Nederland dismissed the argument of parental liability since the claimant had not furnished any facts or circumstances from which the involvement of the parent companies in the infringement of the cartel prohibition could be concluded. The claimant argued that as there were elevator cartels in four EU Member States in which the subsidiaries were involved almost simultaneously, the parent companies must also have been involved.

8. E. Kroh, 'UK Court allows cartel suit against Samsung, LG to proceed' Law 360, 1 August 2016.
9. Supreme Court 8 July 2016 ECLI:NL:HR:2016:1483.

The District Court of Midden Nederland did not agree with this. The mere assertion that the probability that the parent companies were not involved is very small is not sufficient to demonstrate the involvement.[10] Moreover, the District Court of Midden Nederland considered that the fact that there were elevator cartels in four EU Member States almost simultaneously does not mean that the parent companies would be involved.

- In the matter of CDC Project 14 SA (**CDC**) versus Shell Petroleum N.V. Shell Deutschland Schmierstoff GmbH, Esso Société anonyme Francaise, Total Raffinage Marketing S.A. and Total S.A. (**Defendants**) a number of candle manufacturers and a wax paper manufacturer assigned their claims against the Defendants to CDC. CDC brought actions against a number of addressees of a Commission decision of 1 October 2008 based on the paraffin wax cartel from 3 September 1992 to 28 April 2005.

CDC reached a settlement with one of the addressees "Sasol", whereupon CDC reduced its claim in these proceedings. CDC agreed with Sasol that it would reduce its claims against the remaining Defendants by "*the portion of the damage claimed by CDC for which Sasol in its legal relationship with the other cartel participants, in the opinion of the Court in the main action, is obliged to contribute on any legal basis.*"

Shell argued in the proceedings engaged by CDC before District Court of The Hague on 21 August 2016, that disclosing the exact settlement amount is important for the decision within the meaning of Article 21 of the Dutch Code of Civil Procedure (Article 21 entails the "Duty to tell the truth") and that it can be concluded from CDC's silence that it has already been compensated in full. The District Court of The Hague did not agree. The District Court of The Hague ruled that there is not a single piece of evidence that would indicate that CDC's loss had already been compensated in full. If there is a reason to assume that the amount paid by Sasol significantly exceeded the amount of its internal obligation to contribute, then the disclosure of the exact settlement amount could be of importance to the decision within the meaning of Article 21 of the Dutch Code of Civil Procedure.

As regards Shell Deutschland Schmierstoff GmbH, CDC reduced its claim to zero because it had been established in the Commission's decision of 1 October 2008 that Shell Deutschland Schmierstoff GmbH participated in the cartel only from 1 April 2004 to 17 March 2005 and that a submitted report had not found any overcharging. Therefore, Shell Schmierstoff Deutschland GmbH is no longer included among the Defendants in the proceedings.

The Defendants invoked the exceptio plurium litis consortium. The Defendants argued that in a case where debtors are jointly and severally liable for the same damage, it is never possible to rule on the internal obligation to contribute (of one of the debtors) in proceedings in which not all joint and several debtors are involved. The Court rejected the defense because it ruled that it is neither in general nor in the specific circumstances of the case nor in the competition law context of this case, possible to accept this defense as correct.

Total invoked the obligation to produce exhibits to inspect the content of the settlement agreement between CDC and Sasol; the Court rejected this motion because the settlement amount is not relevant for the further assessment in the main action. The Court only considered the settlement with Sasol as the reason for CDC's reduction of claim, and the amount involved in the reduction of claim is that of Sasol's internal obligation to contribute and not the amount that Sasol actually paid.[11]

USA

- On 14 July 2016, in the procedure with regard to the CRT cartel the Washington Supreme Court affirmed that the state of Washington is not bound by the statute of limitations as the state was seeking relief for the benefit of the state by claiming damages. The state is not bound by the statute of limitations as the action for damages is brought for the purpose of protecting the public interest. The Supreme Court held:

10. District Court of Midden Nederland 20 July 2016 ECLI:NL:RBMNE:2016:4284.
11. District Court of The Hague 21 September 2016 ECLI:NL:RBDHA:2016:11305.

❝ *We find that under the specific provision of RCW 4.16.160, in the absence of an express statute to the contrary, the attorney general's suit for injunctive relief and restitution pursuant to RCW 19.86.080 is immune from limitations periods.*"[12]

- Subsequently on 28 July 2016, in the CRT cartel private proceedings the US District Court of the Northern District of California dismissed an indirect purchaser claim of Costco as the Washington State has jurisdiction were Costco originally filed suit. Based on the Washington choice-of-law principles, the claim was dismissed as Washington law does not provide for the possibility of recovery for indirect purchasers.[13]

- On 22 August 2016, in the CRT multidistrict litigation, a US judge of the US District Court of the Northern District of California cut Philips' – one of the defendants – liability. Philips successfully proved not to be part of the cartel from 2001 onwards. The antitrust litigation is based on the CRT-cartel that lasted from March 1995 until November 2007.[14]

- On 7 July 2016, in the LIBOR-based financial instruments antitrust litigation the defendants (16 Libor panel banks) filed a motion at the US District Court of the Southern District of New York to dismiss the LIBOR antitrust claims on the grounds that investors are not the enforcers of antitrust law and therefore lack antitrust standing.[15]

To have antitrust standing means that the plaintiff may not be too remote from the anticompetitive act and needs to be the correct entity to enforce competition law. Under federal law plaintiffs that are indirect purchasers from the defendant lack antitrust standing, whereas under state law indirect purchasers may have antitrust standing.[16]

- On 25 July 2016, Shell & Others have requested the US District Court of the Southern District of New York to dismiss the price fixing of Brent crude oil claim. The defendants stated the dismissal on the ground that claimants lack evidence for the price fixing conspiracy and the US courts lack jurisdiction as the alleged conspiracy took place outside the USA.[17]

- On 5 august 2016, purchasers of containerboards were certified as a class to recover damages before the US Court of Appeals in Chicago. Sellers and producers of containerboards allegedly restricted output and raised prices.[18]

- In Aluminum Warehousing Antitrust litigation the US Court of Appeals (Second Circuit) held on 9 august 2016 that consumers and commercials lack antitrust standing as they did not suffer antitrust injury. The consumers and commercials were not decided to be part of the market in which the defendant operates.[19]

- In a case against AmeriGas and Blue Rhino, who allegedly violated US antitrust rules by increasing wholesale prices, the plaintiffs stated in the Pre-Filled Propane Tank antitrust litigation that the statute of limitations was tolled under a continuing violations theory. On 25 August 2016, the US Court of Appeals (Eighth Circuit) however follows a more narrow view of this continuing violations theory in antitrust litigation and rejects that the statutory period started running again each time the defendants undertook a sale pursuant to their price-fixing conspiracy.[20]

- Sony reached a valid settlement with HannStar. Hansstar pleaded guilty of price fixing of LCD screens. A settlement was reached via e-mail, however Sony was first not able to prove HannStar breached the settlement agreement due to the applicability of Californian law that does not allow the

12. N.K. Geranios, 'Supreme Court says state not bound by statute of limitations' The Washington Times, 14 July 2016 and Washington Supreme Court (State of Washington versus LG & Others) 14 July 2016.
13. D.A. McEvoy and J. Walter-Warner, 'Choice-of-Law rules prevents Costco from suing as indirect purchaser in California' Antitrust update, 3 August 2016.
14. US District Court of the Northern District of California, in the CRT antitrust litigation, 22 Augustus 2016.
15. A. Frankel, 'Global banks try, try again to ditch Libor antitrust claims' Reuters 7 July 2016.
16. 'Indirect purchaser standing in federal court' Law360 28 August 2009.
17. J. Stempel, 'BP, Shell, Morgan Stanley seek end of oil price-fixing lawsuit' Reuters 29 July 2016.
18. J. May, 'Class certification of containerboard purchasers upheld in price fixing suit' Antitrust Law Daily 5 August 2016.
19. US Court of Appeals (Second Circuit), in the Aluminum Warehousing antitrust litigation, 9 August 2016.
20. Proskauer Rose LLP, 'The Eight Circuit extinguishes claims of continuing conduct in propane tank conspiracy' Lexology 27 September 2016 *and* US Court of Appeals (Eight Circuit) in the Pre-Filled Propane Tank antitrust litigation, 25 August 2016.

e-mail to be used as evidence. Therefore a statement of enforceability is necessary. On 1 September 2016, before the US Court of Appeals (Ninth Circuit) the judge considered the federal rules to be applicable, as the settlement was reached before Sony dropped its federal antitrust claims. Therefore the federal law of privilege applies in which case the e-mails are proof of a binding settlement.[21]

- In the case between Maplevale Farms versus Koch Foods, Tyson, Perdue & Others, Maplevale Farms claims damages in an antitrust class action. Allegedly the defendants restricted the supply of broiler chickens in the US to increase prices.[22] The claim is filed in Chicago Federal Court on 2 September 2016.

- On 6 September 2016, in the Processed Egg products antitrust litigation before the US District Court for the Eastern District of Pennsylvania, Judge Pratter granted a motion filed by the defendants as they argued that the plaintiffs in the case are not able to recover damages from those parties that were not part of the alleged conspiracy. The plaintiffs argued on the grounds of the umbrella effect of the conspiracy that they were able to hold companies liable for the harm even though they were not involved in the price-fixing behavior.[23]

- US District Court District of Minnesota granted class certification of grocery retailers in the Wholesale grocery products antitrust litigation against SuperValu and C&S on 7 September 2016. The two wholesale groceries allegedly allocated customers and territory.[24]

- In the Modafinil antitrust litigation, the judge of the Federal District Court in Philadelphia had erred in the numerosity analysis by certifying a class of 22 direct purchasers of the drug Provigil. The judged considered the late stage of the litigation to be an argument for class certification. However, on 13 September 2016, the US Court of Appeals in Philadelphia considered the sunk costs and further delay of the case should not be part of the numerosity analysis as those criteria are inherent to the complexity of the case itself.[25]

- In 2009 Eaton was found by a jury in the US District Court of Delaware to abuse its dominant position in the market for transmissions. Eaton already settled the antitrust litigation with its competitors. However, trucking companies Tauro & Others initiated a claim for damages on behalf of direct purchasers. On 15 September 2016, the US Court of Appeals (Third Circuit) held that Tauro & Others had standing as "*an assignment of a federal antitrust claim need not be supported by bargained-for consideration in order to confer direct purchasers standing on an indirect purchaser; such assignment need only be express, and that requirement is met here.*"[26]

- Chinese manufacturers Hebei Welcome pharmaceutical Co. and North China Pharmaceutical group Corp. were required by their Chinese authority to set prices and reduce quantities of vitamin C. These requirements are at odds with the US antitrust laws. On 20 September 2016, the US Court of Appeals in New York (Second Circuit) held the Chinese manufacturers not to be liable under US antitrust laws as they followed the mandates of their authorities.[27]

The US Circuit Court of Appeals reasoning seems vulnerable. After all, it would mean that in international practice, anyone using practices that are clearly in breach of national law will get away with the defense that it is permitted or even required in the country of origin.

21. R. Borchers, 'Ninth Circuit OKs Sony's emailed settlement' Courthouse news service 1 September 2016. *and* US Court of Appeals (Ninth Circuit) in the TFT-LCD (Flat panel) antitrust litigation, 1 September 2016.
22. L. Bailey, 'Antitrust Lawsuit calls chicken prices rigged' Courthouse news service 8 September 2016.
23. US District Court Eastern District of Pennsylvania, in Processed Egg products antitrust litigation, 6 September 2016.
24. US District Court District of Minnesota Memorandum opinion and order court file no 09-MD-2090 filed 7 September 2016.
25. G. Hammond, 'Provigil 'pay-for-delay' class action remanded for numerosity analysis' Antitrust Law Daily, 13 September 2016.
26. Justia Inc, Justitia US Law 'Justia U.S. 3rd Circuit Court of Appeals Opinion Summaries' 14 September 2016.
27. B. Kendall, 'US Court throws out price-fixing judgment against Chinese vitamin C Makers' The Wall. Street Journal 20 September 2016.

2

Developments regarding public law aspects of cartel damages litigation

European Union

• On 21 July 2016, A-G Szpunar published an opinion in the case Evonik Degussa GmbH v. Commission. In this opinion, the A-G analyzed the leniency program and the extent to which the statement of a person who made the leniency statement may be used in the public version of the Commission's decision. He stated the following about this in recital 203-206:[28]

"Directive 2014/104 distinguishes between the leniency statement and the existing information, which may be disclosed. To my mind, the absolute protection of the leniency statements does not mean that in the context of the publication of the Commission's decision the same level of protection should apply to the factual information contained in that statement about the infringement. [...] To my mind, the information contained in the leniency statement can be used in the public versions of the Commission's decisions on the sole condition that everything from which the source of that information can be concluded should be omitted."

We wonder whether Szpunar's argument will be sustainable and whether the ECJ will concur. It is hard to imagine that everything from which the source of the information can be concluded can be omitted. Many facts can be traced back to a source. Because of this, we foresee an endless struggle between the Commission and those who apply the leniency program. After all, the latter would benefit from the omission of as many facts as possible.

• On 28 July 2016, A-G H. Saugmandsgaard Øe published an opinion on Timab Industries, Cie financière et de participations Roullier (CFPR) (together referred to as Timab & Others)_v Commission. Timab & Others are some of the companies that were fined for having participated in a cartel concerning the trade in phosphates for animal feed. The companies involved were all prepared to participate in a settlement procedure. With regard to the amount of the proposed fines, the Commission informed Timab & Others of the following:

"[...] for a maximum amount of between 41 and 44 million euros for participating in a single continuous infringement from 31 December 1978 until 10 February 2004. [The Commission] has specified that this amount, in addition to a reduction by 10 % for settlement, included a reduction by 35 % on account of extenuating circumstances under the applicable guidelines, and a reduction by 17 % under the leniency notice."

28. Opinion of Advocate General M. Szpunar of 21 July 2016 C-162/15P (Evonik Degussa GmbH versus Commission).

However, Timab & Others withdrew from the settlement procedure. In the fining decision, the Commission imposed a fine of EUR 59,850,000 on Timab & Others for their involvement in the cartel from 16 September 1993 until 10 February 2004. This only included a 5% reduction under the Leniency Notice. Timab & Others appealed against this decision, which appeal was rejected by the General Court on 20 May 2015. After that, Timab & Others brought an appeal to the ECJ with the request to set aside the judgment and refer the case back to the General Court to reduce the fine. Advocate General Saugmandsgaard Øe stated in paragraph 47:

> *Nonetheless, as regards the cartels that are in breach of Union law, the Court has already ruled that the Commission cannot make any specific commitments with regard to the advantage of any reduction in or immunity from a fine in the phase of the procedure prior to taking the final decision, and that, therefore, in that regard the parties in such a cartel cannot harbour any legitimate expectations. After all, based on such expectations, an economic operator cannot claim a specific level of the fine that must be calculated at the time when the economic operator decides to bring his intention to cooperate with the Commission into practice in respect of all circumstances, of fact and of law, existing at that time.*"[29]

The Netherlands – Netherlands Authority for Consumers & Markets (ACM)

- On 14 July 2016, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven* (**CBb**)) ruled in the case between a flour producer and the ACM, for breach of the cartel prohibition. The CBb reduced the fine that was imposed on the flour producer because the ACM exceeded the reasonable period of time to issue a decision, and because the seriousness factor that ACM used for the imposition of the fine was too high. As a result, the fine for the flour product was reduced from EUR 4,673,000 to EUR 3,629,000.[30]

USA

- On 8 August 2016, Barclays had reached a settlement of $ 100 million with 44 states in the USA for its participation in the LIBOR scandal.[31]
- Alpha agreed to plead guilty as part of an anti-competitive auto parts cartel. Alpha agreed to pay a $ 9 million criminal fine. It conspired from 2002 until at least September 2011 to fix prices and rig bids for automotive access mechanisms sold to Nissan Motor Co. Ltd. and certain of its subsidiaries.[32]

29. Opinion of Advocate General H. Saugmandsgaard Øe of 28 July 2016 C-411/15P (Timab Industries, Cie financière et de Participations Roullier (CFPR) v Commission).
30. Trade and Industry Appeals Board 14 July 2016 ECLI:NL:CBB:2016:184, paragraphs 9.3.7. and 10.3.3.
31. S. N. Lynch, 'Barclays reaches $ 100 million US Libor settlement: NY attorney general' Reuters, 8 August 2016.
32. Department of Justice, 'Alpha Corporation Agrees to plead guilty in price-fixing and bid-rigging conspiracy', 15 September 2016.

3

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

• On 14 July 2016, the General Court ruled on an application for the annulment of a final decision by the Commission on a cartel in the market for hoses for maritime applications. The Commission's decision was reversed in so far as the Commission had established that Parker had also participated in the infringement before 1 January 2002. The Commission had held Parker liable for the entire duration of the cartel infringement on the basis of economic continuity. The Commission's decision was partly reversed and Parker's fine reduced. This was also in view of the seriousness and duration of the infringement and the fact that another entity had the leading role in the cartel.[33]

• On 19 July 2016, the Commission imposed a record fine of EUR 2.93 billion on truck producers for participating in a cartel for 14 years. Commissioner for competition, Margrethe Verstager said:

"It is not acceptable that MAN, Volvo/Renault, Daimler, Iveco and DAF, which together account for around 9 out of every 10 medium and heavy trucks produced in Europe, were part of a cartel instead of competing with each other. For 14 years they colluded on the pricing and on passing on the costs for meeting environmental standards to customers. This is also a clear message to companies that cartels are not accepted."[34]

MAN, Volvo/Renault, Daimler, Iveco and DAF had engaged in the cartel from 1997 until 2011. The truck producers coordinated prices at gross list level and agreed upon the timing for the introduction of emission technologies as well as the passing on to consumers of the costs for the emissions technologies. MAN was the leniency applicant and therefore received full immunity. Scania, who had also received a Statement of Objections in 2014, is not covered by this settlement decision. The normal cartel investigation will be continued for Scania.

• On 20 July 2016, the Commission has adopted a decision in which it accepts commitments by ISDA and Markit in its credit default swap investigation. We recently discussed this credit default swap investigation in Q2.[35]

• On 31 May 2006, the Commission issued a decie sion in which it established a cartel infringement in the market of methacrylate. Addressees of the Commis-

33. Case T-146/09 RENV, Parker v Commission, 14 July 2016.
34. European Commission press release, 'Antitrust: Commission fines truck producers EUR 2.93 billion for participating in a cartel' IP/16/2582, 19 July 2016 Brussels.
35. European Commission press release, 'Antitrust: Commission fines truck producers EUR 2.93 billion for participating in a cartel' IP/16/2582, 19 July 2016 Brussels.

sion decision were among others Arkema France SA (**Arkema**) and its parent companies Total SA and Elf Aquitaine SA.[36] All addressees were held jointly and severally liable for the infringement. Arkema paid its fine in time. Arkema noted that it had paid the sum of EUR 219 131 250 "*in its capacity as joint and several debtor and that, since that payment, the Commission [had] received full satisfaction as against Arkema and as against all the other joint and several debtors*". In appeal of the Commission decision, Arkema's fine was reduced. As a result of the appeal, the Commission repaid the difference after the reduction of the fine including interest. As the fine of the parent companies was not reduced, the Commission demanded the now remaining part of the fine from the parent companies. It also demanded late payment interest.

Although the parent companies obeyed with the demands of the Commission, they requested annulment of paid late payment interest. The General Court annulled that part of the decision and reimbursed the companies on the interest for late payment.[37]

A-G Wahl delivered an opinion on the issue above on 21 July 2016 and stated:

❝ *In my view, the joint and several character of the liability of the respondent parent companies and their subsidiaries during the period of the infringement for anticompetitive conduct by those subsidiaries alone confirms, quite regardless of the existence of a 'common payment declaration', that the original payment of the fine by Arkema was made in its own name, but also on behalf of the other joint and several debtors. Where the liability of a parent company is wholly derived from that of its subsidiary, which alone infringed the prohibition of cartels laid down in Article 101(1) TFEU, and where, moreover, those two companies have been held jointly liable for the payment of a fine, the Commission may not order the parent company to pay a fine which is greater than that for which the subsidiary is ultimately liable.*"

In this case, the General Court corrected the Commission for being too administrative in its operations.

On 21 July 2016, the European Court of Justice ruled in the proceedings between Sia VM Remonts and SIA Ausma grupa versus Konkurences padome and in the proceedings of Konkurences padome versus SIA Pārtikas kompanija on the following preliminary question:

❝ *Whether Article 101(1) TFEU must be interpreted as meaning that an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services.*"

The Court considered in this regard in paragraph 33:

❝ *In principle, an undertaking can only be held liable for a concerted practice arising from the actions of an independent service provider carrying out services for them if any of the following conditions are met:*

- *the service provider worked in reality under the control or supervision of the company concerned, or*
- *that company was aware of the anti-competitive objectives of its competitors and the service provider, and intended to contribute to its achievement by its own conduct, or*
- *that company could reasonably foresee the anti-competitive actions of its competitors and the service provider, and was prepared to accept the risk.*"[38]

On 7 September 2016, the ECJ argued the General Court was right to uphold the fine imposed on Pilkington, for its part in the cut glass cartel. The ECJ upheld the EUR 357 million fine.[39]

36. European Commission Decision case no COMP/F/38.645 (Methacrylates), 31 May 2006.
37. Opinion of Advocate-General Wahl on 21 July 2016.
38. ECJ Case C-542/14 21 July 2016 (SIA v Konkurences).
39. ECJ Case C-101/15P, 7 September 2016 (Pilkington v Commission).

4

Commission raids and preliminary investigations

- On 6 July 2016, the Commission confirmed "*[that] on 28 June 2016 its officials carried out unannounced inspections in the sector of rail passenger transport in several Member States*." The Commission worries that the companies are acting in breach of competition law by entering into anti-competitive agreements.[40]

- Container liner shipping companies adopted commitments on price transparency which the Commission accepted on 7 July 2016. The Commission was concerned about the practice of the companies regarding the publishing of their announcements that show the price increase in US Dollars per transported container unit, the affected trade route and the planned date of implementation. The companies committed to stop publishing and communicating these price increases.[41]

40. European Commission statement, 'Antitrust: Commission confirms unannounced inspections in rail passenger transport sector' Statement/16/2438, 6 July 2016 Brussels.
41. European Commission press release, 'Antitrust: Commission accepts commitments by container liner shipping companies on price transparency' IP/16/2446 7 July 2016 Brussels.

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 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.

We are a genuinely independent law firm. We are outspoken about the causes we represent. In order to avoid conflicts of interest, we choose not to represent banks, big accountant firms, (quasi-) governmental bodies and supervising authorities.

bureau Brandeis

Apollolaan 151 1077 AR Amsterdam Nederland
+31 (0)20 7606505 info@bureaubrandeis.com
bureaubrandeis.com