

## Survey

# Actions for Damages in the Netherlands, the United Kingdom, and Germany

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## I. Introduction

The European Commission ('EC') has stated that 'the vast majority' of large antitrust damages actions are currently being brought in the Netherlands, Germany, and the United Kingdom.<sup>1</sup> This survey will discuss developments in the case law with regard to claims for damages based on (alleged) competition law infringements for these three jurisdictions in the period July 2013–July 2014.

A distinction will be made between claims for damages based on antitrust decisions by the EC or national competition authorities ('follow-on damages claims') and claims that are not based on decisions from competition authorities ('standalone damages claims'). The larger actions for damages are mostly follow-on damages claims. Examples of large pending follow-on damages claims include: the air cargo, elevator, and sodium chlorate claims in the Netherlands; the carbonless paper, hydrogen peroxide, and car glass claims in Germany; and the gas-insulated switchgear, copper tubes, and candle wax claims in the United Kingdom.

This survey does not intend to provide an exhaustive overview, but instead describes the main developments in the three jurisdictions.

## II. The EU Directive on actions for damages for competition law infringements

After the EC presented its proposal for a Directive on the rules governing actions for damages under national

## Key Points

- According to the European Commission, the vast majority of large antitrust damages actions are currently being brought in three Member States—the Netherlands, Germany, and the United Kingdom.
- These actions are mostly follow-on damages claims and almost exclusively relate to cartel infringements.
- They are still in the early stages and the judgments that have been issued thus far tend to relate to procedural questions like jurisdiction, a stay of the legal proceedings and document exhibition.

law for infringements of competition law on 11 June 2013,<sup>2</sup> various meetings have taken place between representatives from the European Parliament, the EC, and the EU Council. A Directive was ultimately adopted by the European Parliament on 17 April 2014 and by the EU Council of Ministers on 10 November 2014.<sup>3</sup>

The Directive describes a wide range of topics that should facilitate parties to claim damages resulting from EU competition law infringements.<sup>4</sup> For example, the Directive contains rules on the disclosure of evidence,<sup>5</sup>

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1 For example, Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD (2013) 203 final, nr. 52.

2 Press Release European Commission 11 June 2013: 'Antitrust: Commission proposes legislation to facilitate damage claims by victims of antitrust violations' - IP/13/525.

3 Press Release European Commission 10 November 2014: 'Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions'—IP/14/1580.

4 See on the question whether regulatory intervention to facilitate antitrust damage claims is actually necessary JS Kortmann and R Wesseling, 'Two Concerns Regarding the European Draft Directive On Antitrust Damage Actions' (2013) 8 CPI Antitrust Chronicle 1.

5 Some authors argue that the Directive is on this point, granting absolute protection to leniency corporate statements and settlement submissions, not in line with the ECJ's interpretation of primary EU law in *Donau Chemie*, see eg R Gamble, 'Whether Neap or Spring, the Tide Turns for Private Enforcement: the EU Proposal for a Directive on Damages

joint and several liability,<sup>6</sup> passing-on, limitation periods, consensual dispute resolution,<sup>7</sup> and establishes a rebuttable presumption that cartel infringements cause harm. Member States will have two years to implement the Directive after it has been published in the EU Official Journal.

However, the Directive is already having an effect on pending damages claims. In a recent decision, the Dutch Court of Appeal referred a case to a lower court to determine the damages resulting from a competition law infringement. In this decision, the Court of Appeal indicated that the Directive provisions on the burden of proof for the passing-on defence should be taken into account.<sup>8</sup>

As the Directive is yet to be implemented, and because this survey focuses on recent developments, we will not discuss the Directive any further but instead refer to contributions from other authors.<sup>9</sup>

### III. Follow-on damage claims

The vast majority of the larger antitrust civil damages claims are initiated after competition authorities have issued a decision. In recent years,<sup>10</sup> professional litigation vehicles have increasingly become involved in these kinds of cases by actively collecting claims from injured parties and subsequently initiating legal proceedings in one or more jurisdictions.

#### A. The Netherlands

In the Netherlands, most cases are still in the preliminary phase.

Defendants have been challenging the jurisdiction of the Dutch Courts, which has resulted in judgments on the interpretation of Article 6(1) of the Brussels I Regulation<sup>11</sup> and the scope of arbitration clauses. Another

preliminary question that was raised concerned whether the civil damage proceedings should be stayed awaiting the outcome of the appeals before the EU courts against the relevant EC Decision (the so-called *Masterfoods* defence). In a recent case, the first Court of Appeal decision was issued on the passing-on of damage.

#### 1. Article 6(1) Brussels I regulation

On 4 June 2014, the Amsterdam District Court held that it had jurisdiction to decide a case brought by a litigation vehicle against various producers of sodium chlorate.<sup>12</sup> The defending producers were (some of the) addressees in an earlier EC cartel infringement decision and were based in France, Sweden, and Finland. None of the alleged infringements had taken place in the Netherlands, and none of the relevant sales took place in the Netherlands. The single defendant—the so-called ‘anchor defendant’—based in the Netherlands was not a direct participant in any of the cartel infringements, but was the parent company of the Swedish defendant.

The claimant argued that the Amsterdam District Court had jurisdiction as the anchor defendant was domiciled in the Netherlands and the claims against the other defendants were so closely connected that it was expedient to hear them together to avoid the risk of irreconcilable judgments (see Article 6(1) Brussels I Regulation). These ‘other defendants’ subsequently challenged the jurisdiction of the Dutch Court. In its judgment, the Amsterdam District Court considered that a risk of irreconcilable judgments can only arise in the context of the same situation of law and fact.<sup>13</sup> Since the claimant alleged that each of the defendants wrongly manipulated the markets for sodium chlorate, the District Court found that the same situation of fact existed. The fact that the anchor defendant, as a parent company, had not supplied sodium

Examined’ (2013) 34:12 European Competition Law Review 611–20. Others point out that the ECJ in *Pfleiderer* actually invited the legislator to establish rules that strike the right balance between disclosure and confidentiality, see eg Vollrath, ‘Das Massnahmepaket der Kommission zum wettbewerbsrechtlichen Schadenersatzrecht’ (2013) Neue Zeitschrift für Kartellrecht 434, 446.

6 The Directive prescribes that infringers can be held jointly and severally liable for the harm suffered with the exception of immunity recipients that are only liable towards their own direct and indirect purchasers, unless they are the debtor of last resort. Possibly the Commission actually intended to limit liability of the immunity recipients to losses caused by its sales to its direct and indirect customers. As Wisking and Dietzel note, the difference between the losses caused to direct and indirect customers and the losses caused by the sales to direct and indirect customers can be significant in multi-sourcing contexts, S Wisking and K Dietzel, ‘European Commission Finally Publishes Measures to Facilitate Competition Law Private Actions in the European Union’ (2014) 35:4 European Competition Law Review 185–93.

7 See for a critical note on this aspect in the draft of the Directive: Kortmann and Wesseling (2013) (n 4 above).

8 Arnhem-Leeuwarden Court of Appeal 2 September 2014, ECLI:NL:GHARL:2014:6766 (*TenneT/ABB*).

9 See eg Kortmann and Wesseling (2013) (n 4 above); A Howard, ‘Too Little, Too Late? The European Commission’s Legislative Proposals on Anti-trust Damages Actions’ (2013) JECLAP, pp 2–10; Wisking and Dietzel (2014) (n 6 above) and CF Weidt, ‘The Directive on Actions for Antitrust Damages after Passing the European Parliament (2014) 35:9 European Competition Law Review 438–44.

10 See for a description of developments in antitrust litigation in the Netherlands before the reference period of this article J Kortmann and C Swaak, ‘Private Antitrust Enforcement – Status Quo in the Netherlands’ (2012) 23 EuZW 770–5.

11 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16. January 2001, p 1.

12 Amsterdam District Court 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC / AkzoNobel c.s.*).

13 See i.a. ECJ 13 July 2006, C-539/-3 *Roche Nederland/Primus*; ECJ 11 oktober 2007, C-98/06—*Freeport/Arnoldsson*; ECJ 1 December 2011, C-145/10—*Painer / Standard Verlags GmbH*.

chlorate itself, did not alter the court's position. According to the District Court, the same situation of law also existed since it would have to determine the civil law consequences of the cartel infringements as established in the EC Decision. The—acknowledged—fact that the position of a parent company may differ from the direct participants and that the laws of multiple jurisdictions may have to be taken into account (to determine the amount of damages), did not result in a different conclusion by the court. The District Court considered that if multiple courts in various jurisdictions were to hear the respective claims brought by the claimant, each court would have to assess the damages incurred by each direct purchaser of sodium chlorate and reach a decision on the same preliminary questions. The Amsterdam District Court concluded that the risk of irreconcilable judgments existed and it therefore had jurisdiction pursuant to Article 6(1) of the Brussels I regulation.

A similar decision was issued by the Utrecht District Court in a case against elevator and escalator manufacturers.<sup>14</sup>

The Rotterdam District Court came to a different conclusion in a case initiated by another claim vehicle against subsidiaries and elevator manufacturers and their parent companies.<sup>15</sup> In short, the Rotterdam District Court concluded from the relevant EC Decision that separate legal entities of the elevator manufacturers had participated in separate cartels in four different countries and that no, or at least not sufficient, evidence existed for any cross-border infringements or coordination between the four separate cartel infringements. Differences existed in relation to the conduct of each of the national cartels, the duration, and the products and services involved. Therefore, the Rotterdam District Court concluded that the same situation of fact did not exist. The court also concluded that the same situation of law only partially existed. The primary claim against each of the defendants was based on EU principles and the alternative claim on national law. The court considered that each (alternative) claim would be governed by different national laws. Although the court assumed in its judgment that none of the national laws involved would allow cartel infringements, it acknowledged that differences could exist in relation to joint and several liability, group liability, and the assessment of damages, including passing-on. Consequently, the Rotterdam District Court held that the risk of irreconcilable judgments was insufficient to base its juris-

diction on Article 6(1) of the Brussels I Regulation. The Rotterdam District Court therefore accepted jurisdiction for the claims brought against the Dutch subsidiaries but not for the non-Dutch subsidiaries. For the parent companies, jurisdiction was only accepted to the extent of their alleged 'parental liability' for the Dutch subsidiaries. Whether civil liability of a parent company of a direct participant in a cartel infringement can be assumed is something that needs to be determined at a later stage in the legal proceedings.

## 2. Arbitration clauses

In follow-on damages claims pending in the Netherlands, defendants have also invoked arbitration clauses and choice of forum clauses in supply agreements. In a claim initiated by a litigation vehicle against elevator and escalator manufacturers, the defendants argued that arbitration and choice of forum clauses were standard practice in their industry.<sup>16</sup> The defendants submitted examples of such contracts and stated that they could not trace all of the relevant contracts because the claimant had yet not made it clear which specific projects it was claiming damages for. The Utrecht District Court rejected this defence because the burden of proof rests with the party invoking the arbitration or choice of forum clauses. The District Court therefore accepted jurisdiction.

A similar defence was raised by some of the defendants in the sodium chlorate case.<sup>17</sup> In this case, the relevant arbitration clauses and choice of forum clauses had been submitted to the Amsterdam District Court by the defendants and the District Court assumed that the litigation vehicle was also bound by these clauses after it acquired the claims from the direct purchasers. The Amsterdam District Court considered that, pursuant to Article 23 of the Brussels I Regulation, the relevant clauses must relate to a particular legal relationship. With reference to Case 10 March 1992 C-214/89—*Powell Duffryn* of the European Court of Justice ('ECJ'), the Amsterdam District Court subsequently considered that the scope of arbitration clauses and choice of forum clauses is limited to disputes which arise from the legal relationship in connection with which the agreement was entered into. The claimant argued that it was claiming damages resulting from the market manipulation by the defendants and that even if the direct purchasers had not bought the sodium chlorate from the defendants but from different suppliers

14 Utrecht District Court 27 November 2013, ECLI:NL:RBMNE:2013:5978 (*East West Debt / United Technologies Corporation c.s.*).

15 Rotterdam District Court 17 July 2013, ECLI:NL:RBROT:2013:5504 (*Stichting Elevator Cartel Claim / Kone c.s.*).

16 *East West Debt / United Technologies Corporation c.s.* (no 12).

17 *CDC / AkzoNobel c.s.* (no 10). On this topic, a preliminary reference from the Dortmund regional court is pending before the ECJ in case C-352/13 on the application of both Article 6(1) Brussels I Regulation and arbitration clauses in antitrust damage cases.

(even from outside of the cartel), they would have paid an overcharge that resulted from this market manipulation. In the claimant's view, the identity of the supplier is therefore irrelevant. On this basis, the Amsterdam District Court reasoned that the claim initiated by the claimant was not connected to the supply agreements and therefore the arbitration clauses and choice of forum clauses contained in (some of) these supply agreements were not applicable. The Amsterdam District Court accepted jurisdiction in this case.

### 3. Masterfoods

In 2012, the Amsterdam District Court decided that the civil damages proceedings initiated by a litigation vehicle against several airlines following the EC's air cargo Decision should be stayed awaiting the outcome of the appeals by the airlines against the EC Decision.<sup>18</sup> This decision was based on the *Masterfoods* judgment of the ECJ codified in Article 16 of EC Regulation 1/2003 and principles of due process.

This decision was subsequently appealed. The Amsterdam Court of Appeal decided that when a party relies on an EC Decision in support of its civil damage claims, it is for the other party disputing the validity of that EC Decision and requesting a stay of the civil proceedings to: (i) demonstrate that it timely appealed the EC Decision; (ii) substantiate that it reasonably opposes the EC Decision before the European Courts; and (iii) specify which defences it wishes to raise before the European Courts to challenge the EC Decision, which enables the national court to assess to what extent the assessment of those defences depends on the validity of the EC Decision. Accordingly, the Court of Appeal found that the airlines had not sufficiently substantiated their request to stay the civil proceedings before the Dutch courts. Therefore, the Court of Appeal annulled the decision of the Amsterdam District Court. The case was referred back to the Amsterdam District Court to be further litigated between the parties and for a new decision as to whether and to what extent the civil damage proceedings should be stayed.

The Court of Appeal of Amsterdam confirmed this decision in two other cases, which also related to claims based on the EC's air cargo decision.<sup>19</sup>

18 Amsterdam District Court 7 March 2013, ECLI:NL:RBAMS:2012:BV8444, (*Equilib / KLM c.s.*).

19 Amsterdam Court of Appeal 7 January 2014, ECLI:NL:GHAMS:2014:27 (*EWD / KLM c.s.*) and Amsterdam Court of Appeal 4 February 2014, ECLI:NL:GHAMS:2014:244 (*KLM c.s. / Lufthansa c.s.*).

20 Remarkably, both the District Court and the Court of Appeal held the subsidiary ABB B.V. liable, even though only the parent company ABB Ltd. was found to be participant to the cartel infringement by the EC and not

### 4. Passing-on

Recently, the first Court of Appeal judgment has been handed down relating to passing-on: can defendants in cartel damages claims argue that direct purchasers suffered no or less damage because they 'passed-on' (part of) the alleged damages (ie the overcharge) to the next party in the distribution chain; ie the indirect purchasers?

TenneT—the manager of the Dutch national grid—claimed damages from ABB Ltd. and its Dutch subsidiary, ABB B.V., as the suppliers of gas-insulated switchgear ('GIS'). This claim was based on the relevant 2007 EC Decision. ABB Ltd. was an addressee of this EC Decision. The Arnhem District Court concluded that ABB Ltd. and ABB B.V.<sup>20</sup> were to be held liable for damages that had yet to be determined. Before determining the exact amount of damages, the District Court concluded—in essence—that Dutch law barred ABB from raising the passing-on defence.<sup>21</sup> Both sides appealed.

The Court of Appeal held that, as a starting point, the amount of damages had to be assessed according to the date that the damages were actually incurred (ie the moment the overcharge was paid).<sup>22</sup> However, this does not mean that any circumstances occurring at a later date should be disregarded. If the claimant (ie the direct purchaser) passed-on its damages to its customers (ie the indirect purchasers), the damages should be reduced accordingly. The Court of Appeal noted that indirect purchasers may also bring claims. It further recognised that if the indirect purchasers choose not to bring such claims, the participants in the cartel might not be entirely stripped of the cartel profits. However, in the Court of Appeal's view, the nature of civil damages claims is to compensate for the actual damages incurred. Moreover, this approach also prevents awarding the same damages twice: once to the direct purchaser and once to the indirect purchaser.

### B. The United Kingdom

There continues to be a significant volume of follow-on damages actions, particularly arising out of cartel decisions, brought in the United Kingdom both in the High Court and in the specialist Competition Appeal Tribunal (the 'CAT'). The vast majority of cases have not reached

ABB B.V. See for a critical case note (in Dutch): BM Katan and JS Kortmann, JOR 2014/265.

21 Arnhem District Court 16 January 2013, ECLI:NL:GHAMS:2013:BZ0403 (*TenneT/ABB*).

22 Arnhem-Leeuwarden Court of Appeal 2 September 2014, ECLI:NL:GHARL:2014:6766. In an interim judgment the Court of Appeal had already lifted the immediate effect of the District Court judgment: see Arnhem-Leeuwarden Court of Appeal 10 September 2013, ECLI:NL:GHARL:2013:6653.

a full judgment, particularly in follow-on cartel cases, and they remain either pending in a preliminary phase or have been settled. Consequently, there are a number of key issues on which there is as yet no case law, including calculation of any overcharge due to cartel conduct. Notwithstanding this, there have been a number of legal and procedural developments in these cases over the past few years which will shape the competition litigation landscape in the United Kingdom going forward.

### 1. Limitation issues

The long-running issue of whether a cartel decision is a single decision against the combined set of addressees or a series of decisions against individual addressees was finally settled by the Supreme Court in April 2014, which concluded that each addressee was the subject of a separate decision.<sup>23</sup> The Supreme Court's judgment has important implications in relation to the application of limitation periods in follow-on actions before the CAT (where the limitation period can run from date of the infringement decision if there is no appeal); particularly when only some of the addressees appeal the substance of the underlying decision. However, the judgment will also be relevant in light of the Directive.<sup>24</sup>

The issue arose in the context of follow-on damages appeals brought by Deutsche Bahn before the CAT relating to the Commission's electrical and mechanical carbon graphite Decision. A follow-on claim was brought by Deutsche Bahn against four sets of addressees of the Commission decision. All of these addressees, apart from one, Morgan Advanced Materials, had appealed the Commission's Decision. Deutsche Bahn brought its claim in the CAT within two years of the date of judgment of these appeals (the CAT limitation period being two years from the 'relevant date', which is generally either the date on which the period for appealing a decision expires, where no appeal is made; or, if there is an appeal, the date on which any appeal is finally determined).<sup>25</sup> Morgan subsequently applied for the claim against it to be struck out on the basis that it had been brought out of time under the CAT limitation rules as it was more than two years after the date on which the proceedings against it closed. Morgan contended that the lodging of appeals by the other addressees did not extend the limitation period against it.

The CAT agreed with Morgan, but this decision was reversed by the Court of Appeal. However, the Supreme Court (which had also received an *amicus curiae* letter from the Commission in respect of its views) subsequently reinstated the CAT's decision, finding that the appropriate interpretation is that a Commission decision establishing an infringement under Article 101 of the TFEU constitutes in law a series of individual decisions addressed against individual addressees. Consequently, the only relevant decision establishing an infringement against an addressee who does not appeal is the original Commission decision; an appeal by another addressee is irrelevant. As such, the claim against Morgan was out of time and therefore struck out.

It is not yet known whether this ruling will have an impact on the timing of when claims are brought in practice. Given that addressees of a decision are jointly and severally liable for any infringement, a claimant, even where it is time barred in respect of one addressee of the decision, can seek to recover its full loss from any one or more of the remaining addressees. Whether a contribution claim could then be brought by those co-defendants against the addressee in respect of whom the limitation period has expired, although this would seem to be the correct position in law, remains to be seen.

### 2. Disclosure

Issues regarding the scope and extent of disclosure and access to the Commission file in follow-on damages claims in the United Kingdom have continued to come before the courts.

The Court of Appeal has confirmed that the High Court can use its discretion to order disclosure/the provision of further information even where that order might run contrary to a French statute, known as the 'French Blocking Statute', which purports to prohibit any French party from disclosing commercial information in foreign litigation.<sup>26</sup> The Court of Appeal's judgment further bolsters the position of the CAT and High Court to order disclosure that they deem appropriate.

The French defendants in both *National Grid Electricity Transmission plc v ABB Limited and others* and the *Secretary of State for Health and others v Servier Laboratories Limited and others* argued that they were bound by the French Blocking Statute, which prohibited disclosure

23 *Deutsche Bahn AG and others v Morgan Advanced Materials plc*, [2014] UKSC 24, judgment of 9 April 2014.

24 Article 10(4) of the text of the Directive adopted at the European Parliament's plenary session on 21 October 2014 provides for suspension of the limitation period in circumstances where a competition investigation begins in relation to the conduct in question, until at least one year after the infringement decision has become final or after the proceedings are otherwise terminated.

25 Alternatively, where the cause of action does not accrue until after the date of the decision or the date of final determination of any appeals process, the limitation period will run from accrual of the action.

26 *Secretary of State for Health and others v Servier Laboratories Ltd and others and National Grid Electricity Transmission plc v ABB Limited and others*, [2013] EWCA Civ 1234, judgment of 22 October 2013.

and carried criminal sanctions for non-compliance. At first instance, the High Court was not persuaded that this was sufficient to excuse them from their obligations and, in the National Grid case, Mr Justice Roth took the view that the risk of prosecution for cooperating with English Court proceedings was ‘virtually inconceivable’.

The Court of Appeal upheld this view, noting that the High Court Judges’ exercise of discretion was unimpeachable and that there was no evidence of any prosecutions in France under this statute (apart from in one exceptional case). Despite exposing the parties, in theory, to a risk of prosecution in France, the English courts were still entitled to use their discretion to make disclosure orders, subject to the particular circumstances of the case.

The Court of Appeal also rejected arguments that it was mandatory for the High Court to obtain evidence via a lengthy court-to-court procedure under Council Regulation (EC) No 1206/2001 of 28 May 2001, noting that a direct order was ‘plainly the more appropriate course’, despite the potential risk of prosecution to which it exposed the French defendants.

### 3. Access to file

Access to the Commission file has continued to be a contested issue in the United Kingdom follow-on damages actions, raising important questions as to the courts’ duties of sincere cooperation with the Commission. Following a request for clarification from the High Court as to whether the principles established by the Court of Justice in *Pfleiderer*<sup>27</sup> extend to disclosure of other materials, the Commission issued an opinion on the matter in 2014.<sup>28</sup>

The opinion reiterated the Court of Justice’s view in *Pfleiderer* that it is for the national court to determine whether disclosure should be ordered and that, in making this decision, courts must balance up the benefits of disclosure against the risks of harmful consequences, including whether it might undermine parties’ incentives to cooperate with the Commission. The Commission also emphasised that courts must ensure that adequate protection is given in respect of confidential information.

In terms of specific guidance, the Opinion noted that:

- In respect of documents voluntarily provided to the Commission, the national court must assess whether there are overriding reasons for refusing disclosure. However, the disclosure of replies to a Statement of

Objections is not likely to jeopardise parties from cooperating with the Commission;

- National courts are asked not to order disclosure where it could undermine an ongoing investigation regarding a suspected competition infringement;
- A confidential version of the disclosure can be supplied to claimants provided that appropriate confidentiality regimes are put in place to protect business secrets and other confidential information, eg via a confidentiality ring or redactions to the decision; and
- The national court should ensure that any third-party confidentiality is protected; a confidentiality ring including the claimants may not go far enough to protect this type of information.

Following this opinion, the CAT and High Court have subsequently ordered disclosure of the confidential Commission decision and other documents from the Commission file in a number of cases. This is often done on a redacted basis to remove confidential and leniency information. However, the High Court has recently ordered that a version of the Commission’s decision in *Air Cargo* should be disclosed into a confidentiality ring in the ongoing *Air Cargo* damages action without removing confidential information.<sup>29</sup> This judgment has been appealed by the defendant addressees of the decision and also by third-party airlines to whom the decision apparently makes reference, but who were not able to appeal the decision as they were not addressees. These third-party airlines argue that disclosing such references would run counter to the principles recognised in *Pergan Hilfsstoffe Fur Industrielle Prozesse GmbH v Commission*,<sup>30</sup> which stated that information should be regarded as confidential if it implies a company was involved in a cartel but the company did not have the chance to challenge the accusation in court. The Judge had sought to address these issues when ordering disclosure of the confidential parts of the decision by making disclosure conditional upon the claimants not using this version of the decision to commence further proceedings without the permission of the Courts. The Court of Appeal will now need to determine whether this was sufficient protection.

### 4. Requests for further information

The High Court has also recently had cause to consider the timing and scope of requests by parties for further information.<sup>31</sup> The High Court orders on this topic are

<sup>27</sup> Case C-360/09 *Pfleiderer AG v Bundeskartellamt*.

<sup>28</sup> *Opinion of the European Commission in application of Article 15(1) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, C(2014) 3066.

<sup>29</sup> *Emerald Supplies Ltd and others v British Airways Plc* [2014] EWHC 3513 (Ch), judgment of 28 October 2014 (subject to appeal).

<sup>30</sup> *Pergan Hilfsstoffe Fur Industrielle Prozesse GmbH v Commission* [2007] ECR II-4225.

<sup>31</sup> *National Grid Electricity Transmission plc v ABB Limited and others*, [2014] EWHC 1555 (Ch), judgment of 6 May 2014.

likely to be of wider application in follow-on damages actions in the future.

In the *National Grid* case, the claimants had sought various additional pieces of information from the defendants at an early stage of the proceedings. The defendants contested the provision of certain requested information regarding the operation of the cartel in the United Kingdom and the amount of any price increase, pending exchange of witness statements. The High Court accepted that it would be premature and disproportionate for the defendants to provide this information prior to exchange of witness statements.<sup>32</sup>

Following exchange of witness statements, the claimants renewed their requests for information on the basis that the witness statements did not address many of the documents which appeared to indicate how the cartel may have operated in the United Kingdom. Two of the defendants objected in principle, leading to another application for further information under Part 18 of the Civil Procedure Rules. Whilst the order deals with a range of issues, there are two particularly interesting points of relevance for other follow-on claims:

- One of the defendants sought to resist the requests for information as to the operation of the cartel on the basis that the Court could not compel a defendant to provide information that a claimant believes may help it make its case. The Court rejected this, noting that a request for information under Part 18 can be made in respect of any matter in dispute, and that the purpose of Part 18 is to enable access to potentially relevant information relating to that matter which is solely within the knowledge of one party. This principle would equally apply to cartel damages claims.
- The Court acknowledged that a Commission decision is almost always concerned with establishing the infringement, and is not concerned with ‘*an elaboration of the consequences*’. The Court accepted that any claim for loss in the UK by the cartel will therefore involve, as a part of the determination of causation, an assessment of how the cartel found by the Commission operated in the UK. Allegations that are a development of findings in the Decision as to how the cartel was implemented in practice would not amount to putting forward a case that was inconsistent with the Commission decision, and it would be possible to issue Part 18 requests for further informa-

tion on these points, provided they are within the scope of the party’s pleaded case.

## C. Germany

In 2013/2014 German courts ruled on a number of follow-on actions and on various issues of antitrust litigation. The main challenges for claimants are how to establish that the transactions for which damages are sought were affected by the competition law infringement (liability) and what the damage is. German courts have tools available to deal with these questions efficiently (rules on *prima facie* evidence, estimation of causation and damages/lost profit), but have not yet established consistent standards. This is also true for handling complex economic evidence such as expert reports introduced by the parties presenting statistical/econometric evidence.

### 1. Disclosure and access to file

The Higher Regional Court of Hamm added an interesting twist to the issue of access to file in antitrust damages claims, ruling that public prosecutors must refer their files to the civil courts requesting them.<sup>33</sup> In an application by a claimant seeking damages in connection with the elevators and escalators cartel from several of the alleged former cartelists, the Regional Court of Berlin asked the public prosecution office in Düsseldorf for its file in connection with the said cartel. The prosecutor had investigated whether the cartel included criminal bid rigging but ultimately closed the file. The file includes the confidential version of the Commission decision. The Düsseldorf prosecutor wanted to refer the file to the Berlin court but the defendants sought a court decision as to the legality of the application. The Higher Regional Court of Hamm ruled that the prosecutor did not have discretion in this matter and that there were no legal grounds to reject a request to refer the files to the civil courts. It is for the civil court to decide to what extent the claimants receive access to the file and which information can be used in the civil proceedings. All the arguments raised by the defendants as to the necessity to protect information disclosed under the Commission’s leniency notice and the balance of interests required by the ECJ in its *Donau Chemie*-ruling<sup>34</sup> must be brought to the attention of the civil court but not the prosecutor. The defendants filed constitutional complaints against the court’s ruling, arguing that it infringed the defendants’ basic rights of professional freedom and their right of informational self-determination (part of the

32 *National Grid Electricity Transmission plc v ABB Limited and others*, [2012] EWHC 869 (Ch), judgment of 4 April 2012.

33 Higher Regional Court of Hamm, 26 November 2013, III-1 Vas 116–120/13 et al.

34 ECJ 6 June 2013, C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG and Others*.

basic right to privacy). The German Constitutional Court rejected the complaints holding that access to business secrets can generally be justified, although it stressed that the civil court must ensure that all relevant aspects and interests are taken into account and balanced accordingly, in a transparent manner.<sup>35</sup>

## 2. 'Collective redress'

The Regional Court of Düsseldorf ruled on the merits of a EUR 130 million follow-on damages action against a number of cement producers. The claim was lodged by a Belgian claims vehicle which had acquired damages claims from more than 30 cement customers, accrued during cartel activity between 1988 and 2002. The claims were bought for EUR 100 plus a variable component consisting of a share in payments of between 65 and 80 per cent to be received from the defendants. The court rejected the claim in its entirety holding that the assignments of the damages claims to the claims vehicle were legally void.<sup>36</sup> According to the case law of the German Federal Supreme Court, a party violates public policy when it deprives the defendant of its right to recover the statutory attorney's fees from the claimant in case the claim is rejected by assigning the claim to a person lacking sufficient funds. Yet, even according to its own submissions, at the time of the assignments the claims vehicle lacked the monetary means to pay court fees and attorney's fees if it lost the case. The case is currently on appeal before the Higher Regional Court of Düsseldorf.

## 3. Proving that the claimant was affected by the cartel

After the German Federal Cartel Office fined a number of fire service equipment providers for maintaining a quota cartel and rigging bids, the Higher Regional Court of Karlsruhe upheld an award for damages granted by a lower court in civil proceedings initiated by a German municipality which had bought fire service equipment in public procurement proceedings during the cartel period prior to 2005.<sup>37</sup> The court held that the claimant could rely on a provision introduced in 2005, which stated that courts are bound by decisions of competition authorities establishing a competition law infringement, because the relevant provision was introduced prior to the enactment of the Federal Cartel Office's decision. Moreover, the court held that there is *prima facie* evidence that the quota cartel had caused an increase in prices. *Prima facie* evidence does not change the burden of proof. It means that the fact to be proven (higher prices) can be assumed based on other facts (existence of cartel agreement) in connection with settled experience (quota cartels in

general cause rising prices). In this case, the other party has to establish facts indicating that the particular case does not follow the general rule but is atypical. If it succeeds, the claimant must prove its case and eventually bear the burden of proof. The court went on to state that in the case in question there is also *prima facie* evidence that the related procurement proceedings were affected by the cartel. The court deemed it sufficient that the relevant transaction was within the time frame and geographic and substantive scope of the cartel agreement. The appeal on points of law to the Federal Supreme Court was eventually withdrawn by the defendant.

Roughly the same standard was applied by the Regional Court of Berlin in a preliminary ruling on the issue of liability. It held several suppliers of elevators and escalators jointly and severally liable for damages suffered by the German rail operator when procuring escalators for a subway station during the period of cartel behaviour fined by the European Commission in its 2007 decision. The court has yet to decide on the amount of damages. The parties mainly argued about whether the claimant had sufficiently established that the project in question was indeed affected by the cartel. The claimant relied on the Commission decision, whereas the defendants argued, *inter alia*, that according to the findings of the Commission not all procurement projects were affected by the anticompetitive agreements and not all such agreements were put into practice. The court held that the claimant can indeed rely on the Commission decision, as the court is bound by the determinations of the Commission if not by the relevant German law provision introduced in 2005, at least by Article 16 Reg. 1/2003 regarding the competition law infringement.<sup>38</sup> The court concluded that there is *prima facie* evidence that the project in question was affected by the cartel agreement, because it was within the time period and geographic and substantive scope of the anticompetitive agreements found by the Commission. The court relied on the settled experience that cartel agreements are, in general, implemented. Therefore, the defendants would have had to substantiate that the particular procurement procedure was unaffected. The court highlighted that this can be expected from them as—unlike the claimant—they have particular knowledge of the details of the implementation of the cartel agreements.

## 4. Proving the amount of damages

In the fire service equipment case the appellate court in Karlsruhe upheld a lower court's judgment awarding damages in the amount of 15 per cent of the price paid.

35 Germany Constitutional Court, 6 March 2014, 1 BvR 3541/13 *et al.*

36 Regional Court of Düsseldorf, 17 December 2013, 37 O 200/09 (Kart).

37 Higher Regional Court of Karlsruhe, 31 July 2013, 6 U 51/12 (Kart).

38 Regional Court of Berlin, 6 August 2013, 16 O 193/11 (Kart).

The procurement contract contained a clause according to which the successful bidder has to pay 15 per cent of the purchase price as damages if the procurement procedure is affected by an anticompetitive agreement, unless damages in a different amount are proven. Such clauses have become standard in public procurement procedures in Germany. The court considered the clause to be general terms and conditions and therefore valid. Under German law on general terms and conditions, lump sum damages claims agreed therein can be void if the lump sum exceeds the damage expected under normal circumstances. Of course, there can be deviating views on whether a particular form of cartel agreement can be expected to cause price increases of around 15 per cent under the circumstances of the case. The court concluded that the clause did not unreasonably disadvantage the defendant, *inter alia*, because the amount of 15 per cent was apparently within the range of typical damage to be expected, based on the decision of the Federal Cartel Office. The court found that the clause establishes a rebuttable presumption, meaning that the defendant had to bear the burden of proving that in fact no or lower damages were caused. The defendant relied on economic expertise to assess potential cartel effects on the basis of weighted average prices in numerous transactions over time. The court simply rejected this approach as too unspecific in this particular case, because the different bidding processes related to highly specialised products in each transaction. The text of the judgement does however not show that the court itself had the expertise to evaluate the quality and restrictions of the expert opinion presented by the defendant. If the court lacked such expertise, it was obliged by law to appoint a neutral expert to evaluate the data and draw its own conclusions.

In the Berlin escalators case, the court found that it can be assumed that damages have indeed resulted from the anticompetitive behaviour, although their exact appraisal was left to a later stage. To that extent, the claimant cannot, however, rely on the binding force of the Commission decision since it only extends to the existence of the competition law infringement and not to damage and causation. Instead, the court employs a presumption that cartel agreements typically lead to price increases as a consequence of the suppression of competitive forces. Such view is grounded in the case law of the Federal Supreme Court and appellate courts. The amount of the damage increases with the duration of the infringement and the intensity of the agreements. The longer and the more intensively the cartel was practiced the higher is the burden to substantiate that economic benefits have not accrued from such behaviour. In the

court's view the defendants had not satisfied this burden. As it stands, the presumption of damages accepted by German courts only helps claimants to establish liability. Yet, it is of no direct particular help in substantiating the amount of damages.

The Higher Regional Court of Düsseldorf decided in favour of a private lottery agent seeking damages in the amount of EUR 11 million from a state lottery as a consequence of a boycott agreed between the German lotteries. The latter had agreed not to accept lottery business solicited by private agents in brick and mortar shops in order to protect their own distribution systems. The anticompetitive agreement between the German lotteries was very well documented in a decision of the Federal Cartel Office. The original case ultimately went before the Federal Supreme Court. The claimant asked for lost profits he could not realise because his business model of innovative offline lottery retailing failed as a consequence of the lotteries' boycott. To prove lost profits the claimant provided his business plan and two market analyses from an investment bank and a market research company that had been prepared prior to when the boycott had become public. The lower court appointed an expert and rejected the claim in its entirety. However, the appellate court overturned the judgment and decided in favour of the claimant, analysing in detail the claimant's business model and the details and assumptions of the anticipated profits.<sup>39</sup> The court assumed a causal link between the boycott and the failure of the claimant's business model concluding, *inter alia*, that the business model was viable and that the lotteries, without the boycott, would have had economic incentives to cooperate with the claimant and pay commissions. The court relied on two provisions lifting to some extent the burden of proof. First, under German procedural law the court can apply a balance of probabilities for both the causal link between the tortious act and the damage and the exact amount of damages (Sec. 287 Code of Civil Procedure). Damages can be estimated based on verifiable facts. Secondly, according to German damages law profits are considered lost that in the normal course of events or in special circumstances, particularly due to the measures and precautions taken, could probably be expected (Sec. 252 German Civil Code). If lost profits are established to this standard, the defendant is free to substantiate facts allowing the conclusion that the profits would not have occurred or would have been lower. It is generally agreed and accepted that the result of the estimation of damages does not necessarily resemble the but-for scenario. Yet, if the strict rules of evidential burden were applied this would leave claimants

39 Higher Regional Court of Düsseldorf, 9 April 2014, VI-U (Kart) 10/12.

in many cases without a remedy, even though it is overwhelmingly likely that they have suffered some damage.

The Regional Court of Cologne, on the other hand, dismissed a claim for lost profits brought by a telephone directories' enquiries company against Deutsche Telekom. The defendant had allegedly charged excessive prices for data deliveries required for the claimant's business. The claimant argued that because of the overcharge it was not in a position to raise its advertising budget in order to increase its market share and to make more profit. In order to establish causation, here too, the court required the claimant to demonstrate both (a) a specific ex-ante business plan which' conditions were undermined by the damaging act and (b) a reproducible business judgment of the chances to financially and technically implement the business plan.<sup>40</sup> The claimant's expert report only showed that more advertising could have led to a higher market share. However, there was also evidence that the claimant never intended to raise its advertising budget during the relevant period of time and therefore there was no ex-ante business plan.

## 5. Passing-on

In 2011 the Federal Supreme Court ruled that indirect purchasers can claim damages from cartellists and that defendants can, in general, raise a passing-on defence.<sup>41</sup> Whereas the indirect purchaser has to prove that the direct purchasers passed on cartel-induced price increases to it, the defendant bears the burden of proof where it argues that the claimant—be it either a direct or indirect purchaser—passed on price increases to its buyers. However, the details are still unclear.

In the Berlin escalators case the court rejected the passing-on defence due to the particularities of the case. The claimant was the owner of the subway station and had bought the escalators in question. It leased the station to the subway operator. The court held that there was in fact no downstream market for leasing the railway station to the rail operator. Moreover, since the escalators were just one small part of the cost basis, it was unlikely that there was a causal link between the high prices for escalators and the rent agreed with the subway operator. In this case, the defendants had not established any link. Finally, the court considered it inconceivable that there could have been room for passing on higher prices within the calculation of prices charged to subway customers.

40 Regional Court of Cologne, 28 May 2013, 87 O (Kart) 7/06.

41 Federal Supreme Court, 28 June 2011, KZR 75/10.

42 ECJ 20 September 2011, C-453/99 *Courage v Crehan*.

43 Dutch Supreme Court 21 December 2012, ECLI:NL:HR:2012:BX0345 (*IATA*).

## 6. Parental liability?

In the escalators case, the claimant's action against one of the defendants was rejected in its entirety because the claimant had not established that the defendant had actually taken part in anticompetitive behaviour. To that extent, the claimant could not rely on the Commission decision because the respective defendant was only fined by the Commission based on the principle of parental liability. The court held that this EU competition law principle is not applicable in German tort and corporate law. The court explicitly states that strict parental liability is not required by the ECJ case law on the *effet utile* of European competition law since, according to the ECJ's *Courage* ruling,<sup>42</sup> the procedural modalities of implementing the right to damages for European competition law infringements are within the procedural autonomy of the Member States.

## IV. Standalone damages claims

Naturally, parties may also initiate standalone damages claims in cases where there is no decision from any competition authority. Standalone damages claims can be further divided into cases relating to the abuse of a dominant position, horizontal agreements and vertical agreements.

### A. The Netherlands

In practice, it seems that follow-on claims are mostly initiated by litigation vehicles and relate to 'hard-core' cartel cases. Standalone claims tend to relate more to (non-covert) agreements and are initiated by individual claimants.

#### 1. Abuse of dominance

Standalone cases based on abuse of a dominant position are relatively scarce in the Netherlands. In a case relating to an alleged abuse of a dominant position, the Supreme Court decided in 2012 that the burden of proof in principle rests with the party invoking an infringement of competition law.<sup>43</sup> In the absence of a decision from a competition authority, a claimant cannot rely on general statements in support of a claim that competition law has been infringed. The claimant needs to substantiate its claim with relevant—economic—facts and circumstances, such as a market analysis.

A successful standalone case for the claimant was that brought by European Merchant Services ('EMS') against Equens.<sup>44</sup> EMS is active in the market of processing credit

44 Midden Nederland District Court 10 July 2013, ECLI:NL:RBMNE:2013:3245 (interim judgment) and 30 December 2013, ECLI:NL:RBMNE:2013:7536 (*EMS/Equens*).

card transactions and contracts with merchants using payment terminals. The credit card payment data from such payment terminals are transferred to the processing companies, such as EMS, through a specific network. Equens is the owner of such a network and was found by the Midden Nederland District Court to have a dominant position in the market of these networks. One of Equens' subsidiaries, PaySquare, was, like EMS, also active in the market of processing credit card transactions. By introducing a so-called 'queue procedure' that made transferring from one processing company to another (eg from PaySquare to EMS) more difficult, Equens provided its subsidiary PaySquare with an unfair advantage and was found to be abusing its dominant position. Although the claimant was thus successful in substantiating its claim that competition law had been infringed, the District Court subsequently ruled that merely showing that fewer merchants were acquired by EMS since the queue period had been introduced was not sufficient to prove that a sufficient causal link existed between this queue procedure and the alleged damages. This case therefore demonstrates that a claimant in a standalone case has to substantiate the infringement of competition law as well as a sufficient causal link between such an infringement and the damages allegedly incurred.

## 2. Horizontal and vertical agreements

Damage claims can also be based on agreements between suppliers and distributors or retailers as already demonstrated in the famous *Courage/Crehan* case of the European Court of Justice. A recent example in the Dutch jurisdiction is the long-lasting dispute between an operator of one of BP's petrol stations—Benschop—and petrol company BP. Operator Benschop claimed damage that allegedly resulted from an exclusive purchasing clause in the operating contract. The relevant clause stipulated that Benschop was only allowed to buy petrol from BP. The operating contract had a duration of 20 years. Benschop claimed that this exclusive purchasing clause infringed competition law and the resulting damages amounted to EUR 0.06 per litre petrol purchased from BP. BP argued, *inter alia*, that if the exclusive purchasing clause would indeed infringe competition law, the relevant clause would automatically be converted into a clause that would not infringe competition law (eg a clause with a shorter duration), pursuant to Article 3:42 of the Dutch Civil Code. The Dutch Supreme Court decided that the Court of Appeal had rightly concluded

that the relevant clause infringed competition law and that the aforementioned conversion provision in the Dutch Civil Code was not applicable to clauses that have the object or effect of restricting competition. Furthermore, the Supreme Court decided not to render the entire operating contract null and void as a result of the infringement, but only the exclusive purchasing clause. In the Supreme Court's view the operating contract as a whole was not inextricably linked to the relevant exclusive purchasing clause.<sup>45</sup>

The operator may now start separate damages proceedings before the Court of Appeal of Amsterdam. Earlier, this Court awarded Benschop an advance payment on damages of EUR 0.02 per litre of petrol purchased from BP. The Supreme Court, however, noted in an *obiter dictum* that if a party is to a considerable extent responsible for the restriction of competition, the damages to be awarded can be reduced on the basis of the contributory negligence ('*eigen schuld*') doctrine, as referred to in Article 6:101 of the Dutch Civil Code.

## B. The United Kingdom

### 1. Abuse of dominance

In the United Kingdom, there has been a steady stream of standalone claims for abuse of dominance over the last few years, although on the whole they remain less common than cartel follow-on claims. Relief sought in these claims is not limited to damages, and recently there have been a number of claims in which the claimants have been seeking injunctions to prevent the abusive conduct continuing. For example, in *Chemistree Homecare Limited v Abbvie Limited*, Chemistree unsuccessfully sought an interim injunction to ensure a continued supply of a particular pharmaceutical product.<sup>46</sup> In contrast, in *Dahabshiil Transfer Services Limited v Barclays Bank plc* and *Harada Limited and Berkeley Credit and Guarantee Limited v Barclays Bank plc* the High Court found that there was a serious issue to be tried as to whether Barclays had abused a dominant position by withdrawing banking services from the claimants and granted an interim injunction against Barclays, requiring it to reinstate those services.<sup>47</sup>

Claims with a standalone element can only be brought in the High Court, rather than the specialist CAT, although this is due to change once the Consumer Rights Bill comes into effect in the United Kingdom.<sup>48</sup> Given the complexity and volume of evidence required to assess whether a stan-

<sup>45</sup> Supreme Court 20 December 2013, ECLI:NL:HR:2013:2123 (*BP/Benschop*).

<sup>46</sup> *Chemistree Homecare Limited v Abbvie Limited* [2013] EWHC 264 (Ch), judgment of 11 February 2013 and [2013] EWCA (Civ) 1338, judgment of 7 November 2013.

<sup>47</sup> *Dahabshiil Transfer Services Limited v Barclays Bank plc* and *Harada Limited and Berkeley Credit and Guarantee Limited v Barclays Bank plc* [2013] EWHC 3379 (Ch), judgment of 5 November 2013.

<sup>48</sup> Expected to be in late 2015/early 2016.

dalone abuse of dominance has occurred, judges have been using their case management powers to reduce the burden which the courts and the parties are facing. There has been a spate of cases in which judgments have been handed down on whether the conduct in question is abusive, but which do not deal with other key factors in establishing an abuse, such as market definition and dominance. This allows the court to postpone what may be a complex analysis of market definition, which would require significant resources from both the court and the parties, until it has determined whether there is a need to answer these questions. This approach may also be viewed by the court as laying the ground for settlement discussions between the parties where abusive conduct has taken place.

For example, in *Arriva the Shires Limited v London Luton Airport Operations Limited*,<sup>49</sup> the High Court of England and Wales decided, as a preliminary issue, that the grant of a seven-year exclusivity period to National Express to run a coach service between Luton Airport and central London, giving National Express a right of first refusal on services to new destinations in London (save for a service operated by easyBus), was abusive as it foreclosed other coach service operators and could not be objectively justified. The question whether London Luton Airport Operations was in a dominant position was not considered and has not come to trial.

Recently, there have been a number of private action claims for abuse of dominance brought at the same time as an ongoing regulatory investigation.<sup>50</sup> These claims continue to raise questions about how far the case can proceed pending the outcome of the regulatory investigation and any appeals and how to balance this against the interest of claimants who may have suffered loss (such issues have more commonly been considered in follow-on or hybrid cases relating to cartels and anticompetitive agreements.<sup>51</sup>)

One example of such a case is the damages claim for abuse of dominance currently being pursued in the High Court against Google by Infederation Limited (also known as Foundem), at the same time as the Commission's ongoing investigation into Google. The judge has already had to rule on an interim basis on a number of issues regarding case management of the claims, such as the extent of disclosure and appropriateness of a stay. However, interestingly, the judge has also indicated his

intention to write to the Commission to clarify whether the allegations made by Foundem (and by Streetmap in separate claim which is being case managed together with the Foundem claim) are within the scope of the Commission's investigation.<sup>52</sup>

This is an unusual step and is likely to reflect the relatively novel circumstances of these claims which make decisions about the future timetable and case management of the proceedings particularly challenging. In this matter, case management is complicated as the claimant is also a complainant in the ongoing Commission investigation and has raised the same allegations in the two processes. However, it appears that the Commission is considering accepting commitments (rather than reaching a settled view on whether an infringement has taken place, meaning that a commitments decision will not bar a standalone private action), but covering only part of the claimant's allegations. Further, uncertainty remains over whether the commitments will be accepted and how the Commission will deal with the other allegations.

In addition to pure standalone cases, the courts in the United Kingdom have also seen a number of 'hybrid' abuse of dominance cases in recent years, ie cases encompassing a mix of standalone and follow-on elements. For example, claims brought by the Secretary of State for Health for England and Wales against Reckitt Benckiser arising out of the Office of Fair Trading's ('OFT') Gaviscon decision, covered conduct which the OFT had determined amounted to an abuse of dominance, conduct investigated by the OFT but on which no decision was taken as well as conduct not considered at all, as part of the investigation.<sup>53</sup>

## 2. Horizontal and vertical agreements

On the whole, standalone damages claims for anticompetitive agreements have been pursued relatively infrequently in the United Kingdom, with recent standalone claims in the United Kingdom relating to horizontal and vertical agreements primarily arising out of contractual disputes, demonstrating an increasing willingness on the part of litigants to use competition law as both a shield and a sword in commercial situations. For example, competition law arguments have been raised as defences in several disputes regarding breaches of contract or franchise agreements.<sup>54</sup>

49 *Arriva the Shires Limited v London Luton Airport Operations Limited*, [2014] EWHC 64 (Ch), judgment of 28 January 2014.

50 See *the Secretary of State for Health and others v Reckitt Benckiser Group plc and others*; *the Secretary of State for Health and others v Servier Laboratories Limited and others*, *Infederation Limited v Google Incorporation and others* and *Streetmap.eu Limited v Google Incorporation and others*.

51 See *National Grid Electricity Transmission plc v ABB Limited and others* and *WM Morrison Supermarkets PLC and others v Mastercard Incorporated and others*.

52 *Infederation Limited v Google Inc and Others*.

53 *Secretary for State for Health and Others v Reckitt Benckiser Group plc and others*.

54 *Carewatch Case Services Limited v Focus Caring Services Limited* [2014] EWHC 2313 (Ch), judgment of 11 July 2014, *A Nelson & Co Limited and Bach Flower Remedies Limited v Guna SPA* [2011] EWHC 1202, judgment of 16 May 2011.

There have been no recent damages claims that have come to final judgment. However, there has been a wave of pending multi-million pound damages claims brought by various supermarkets and other retailers in the English Courts against Mastercard relating to the Commission's *Mastercard*<sup>55</sup> decision and against Visa relating to its settlement with the Commission on interchange fees.<sup>56</sup> The scope of these claims vary: in the most part, the Mastercard claims include both follow-on damages in respect of the Commission's findings in relation to cross-border multi-lateral interchange fees within the EU, and quasi-standalone claims in respect of domestic interchange fees in the United Kingdom (where the claimants seek to read-across the Commission's findings to the domestic UK market). However, the most recent claim against Mastercard, brought by the retailer Dixon, also seeks damages in respect of fees applied to foreign payment cards. The claims against Visa are all standalone claims as the Commission never issued an infringement decision against Visa. Mastercard and Visa have each separately indicated that, across the respective claims against them, the Claimants are seeking 'billions of pounds'.

Nearly all the claims were brought prior to judgment being given by the Court of Justice on the Mastercard appeal.

The actions have not yet reached the stage of a full trial. However, a preliminary hearing on issues of limitation in the claim against Mastercard by *WM Morrisons and others* is scheduled to be held in January 2015. This hearing will largely deal with whether the limitation period should be extended in this case on the basis that the defendants had concealed their conduct. This is a matter vigorously contested by the defendants on the basis that they had originally notified their arrangements to the regulators in order to seek an exemption. The outcome of this hearing will be significant both in terms of the period for which the claimants can seek damages (which will impact on the quantum of any award), and for the other pending related claims.<sup>57</sup>

Although outside the reference period, there has recently been an important development in this area. A precedent judgment in the Visa proceedings on a similar preliminary issue was handed down in October 2014 in which the Court agreed with the claimants that there was already sufficient information in the public domain for the limitation period to have started. This judgment makes clear that it is not enough to demonstrate that

there are facts unknown to a claimant unless those facts are required to complete the cause of action. If a claimant is in possession of facts that enable a cause of action to be pleaded (and the claim cannot be struck out for insufficient pleading), then the limitation period will not be suspended for concealment. In consequence, all claims against Visa relating to the period prior to the start of the limitation period were struck out (which is estimated to reduce the claim by around £500 m).

## C. Germany

### 1. Abuse of dominance

There is a rich history of litigation in Germany based on the provisions on relative market power in the German Act Against Restrictions of Competition dealing, *inter alia*, with claims of dealers seeking access to distribution systems. However, in the reference period, no such cases were reported that justify discussion in this article.

### 2. Horizontal and vertical agreements

In a number of standalone civil cases, retailers opposed restrictions imposed on them by suppliers regarding online sales. A recent case before the Regional Court of Frankfurt involved a supplier of backpacks and a multi-channel retailer. The former had introduced a selective distribution system prohibiting sales via internet and auction platforms (ebay, Amazon) and participation in price comparison systems where the retailer has to actively supply price data. The retailer sought injunctive relief prohibiting the supplier from insisting on the restrictive clauses and declaratory judgment that the supplier is liable to pay damages having accrued from the supplier's conduct so far. German courts have assessed restrictions of sales via internet platforms differently in the past. The Frankfurt court followed the preliminary assessment by the Federal Cartel Office in other cases, finding that a full ban of sales via internet platforms is a hard-core restriction of competition, because it is not necessary to cater to the legitimate interests of the supplier.<sup>58</sup> The court acknowledged that the supplier can impose quality criteria on the retailers for online sales, but these have to be proportionate. The court considered the European Commission's 'logo clause' contained in its guidelines on vertical restrictions to be outdated after the *Pierre Fabre* ruling

55 See *WM Morrison Supermarkets PLC and others v Mastercard Incorporated and others*, *DSG Retails Limited and others v Mastercard Incorporated and others*, *Dobbies Garden Centres Limited v Mastercard Incorporated and others*.

56 See *Arcadia Group Brands Limited and others v Visa Inc and others*.

57 Very recently (October 2014) and outside the review period a judgment in the Visa proceedings on a similar preliminary issue was handed down in which the Court agreed with the claimants that there was already sufficient information in the public domain for the limitation period to have started.

58 Regional Court of Frankfurt, 18 June 2014, 2–03 O 158/13.

by the ECJ.<sup>59</sup> Moreover, the court did not consider itself bound by the Commission's guidelines.

In a widely recognised case, a retailer of sanitary equipment selling considerable proportions over the internet partly succeeded on appeal with the damages claim against a supplier of sanitary appliances. The Federal Cartel Office had originally dealt with the defendant's distribution system that openly discriminated against online sales mainly through a pricing system foreseeing lower rebates for online sales and, in the case of wholesalers, lower rebates for sales to online retailers instead of sanitary craftsmen. The Federal Cartel Office, without issuing a formal decision, dropped the case after the defendant had agreed to abstain from using certain clauses in its distribution contracts. However, it published a case note containing its preliminary assessment of the case. The lower court had rejected the EUR 2.4 million claim based on an alleged damage suffered as a result of lower rebates during the period of the competition law infringement and lost profits from sales not realized because wholesalers limited their sales to the claimant.<sup>60</sup> It found too many gaps in the calculation of the alleged damage. On appeal, the Higher Regional Court of Düsseldorf held the defendant liable to pay EUR 800.000 as compensation for the claimant's higher input costs during the period of the infringement.<sup>61</sup> The court compared undisputed data on rebates which the claimant received from its suppliers before, during and after the infringement. Based on the difference, the damage could be calculated since the claimant had not changed its own retail prices. The court relied on the possibility to estimate the exact amount of damages (Sec. 287 Code of Civil Procedure) and the provision on lost profits cited above (Sec. 252 German Civil Code), relaxing the burden of proof to a probability judgment. Moreover, the court again employed Sec. 287 Code of Civil Procedure when ruling on causation, holding that the competition law infringement had most probably caused the claimant's lower rebates because this was exactly the object of the defendant's distribution system and, shortly after its implementation had been stopped, the claimant's input prices decreased again.

In this case the civil courts could not rely on a formal decision of a competition authority and therefore had to make their own assessment on whether the defendant's distribution system indeed violated European competition law. However, since the facts were generally known through the publication of the Federal Cartel Office, the courts had no difficulty in finding an infringement of Article 101 TFEU, concluding that the defendant had not satisfied the burden of proving the applicability of the

Vertical Block Exemption Regulation or the conditions of individual exemption under Article 101 (3) TFEU.

The court not only held the supplier liable but also its sales director, jointly and severally, because he had taken part in the infringement by inducing the defendant's employees to conclude the incriminating distribution contracts, and he had endorsed these contracts repeatedly in public.

A case decided by the Regional Court of Düsseldorf reveals the difficulties claimants face in standalone damages actions to establish a breach of competition law. The claimant alleged the damages accrued from a factual boycott imposed on him after he sold consumer electronics products over the internet and cross-border. The court held that simply establishing a competition law infringement in the form of a factual boycott was not sufficient to show that the rebates/prices offered to the claimant (a distributor) dropped over time. It must also show that it was systematically discriminated against in comparison to other comparable distributors, something that can prove extremely difficult.<sup>62</sup> The defendant had argued that the deteriorating prices/rebates were a consequence of a general change in its distribution policy.

## V. Conclusion

The larger actions for damages based on competition law infringements pending before the civil courts in the Netherlands, Germany, and the United Kingdom are mostly follow-on damages claims and almost exclusively relate to cartel infringements.

The majority of these cases are still in the early stages. Judgments that have been issued tend to relate to procedural questions like jurisdiction, a stay of the legal proceedings and document exhibition. Case law on important matters like the passing-on of damages and access to documents is very much in the developing phase and will undoubtedly continue to evolve in the coming years. It will be interesting to observe the impact of the Directive on this area of law.

Standalone and 'hybrid' damages claims seem to be relatively scarce in all three jurisdictions, but cases that are being litigated cover a wider range of topics, such as abuse of dominance, exclusive purchasing and online sales prohibitions. As may be expected, an important challenge for claimants in these cases appears to be the standard of proof in the absence of a decision from the competition authorities to rely upon.

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59 ECJ 13 October 2011, C-439/09 *Pierre Fabre*.

60 Regional Court of Cologne, 15 February 2013, 90 O 57/12.

61 Higher Regional Court of Düsseldorf, 13 November 2013, VI-U (Kart) 11/13.

62 Regional Court of Düsseldorf, 16 January 2014, 14c O 226/12.