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Contributing Editor:
Euan Burrows
Ashurst LLP

glg Global Legal Group

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Private Enforcement of EU Competition Law: Recent Developments


Frédéric Louis


Anne Vallery


Cormac O'Daly


Édouard Bruc

Wilmer Cutler Pickering Hale and Dorr LLP

1. Introduction

As already outlined in last year's overview, since the enactment of EU Directive 2014/104 ('**Damages Directive**'), private enforcement of EU competition law in the EU has continued to develop at an impressive pace. Putting aside the United Kingdom, which has since left the EU, an eye-catching occurrence of this growth is perhaps Germany, where the number of damages claims doubled every year between 2011–2018.[1]

This development was assisted by various driving forces. Among other things, these include a claimant-friendly legal framework that notably includes collective redress and presumptions against cartelists, pro-claimant rulings by the European Court of Justice ('**ECJ**' or '**Court**'), new plaintiff-side firms, and a flourishing third-party funding industry. Although some of these features are similar to that of the US model, EU private enforcement, nevertheless, differs in fundamental respects. Unlike on the other side of the Atlantic, most private cases are follow-on cases, by-products of an antitrust authority's investigation. And the EU seems willing to avoid the excesses commonly seen as typical to the US-style model, such as an extremely costly litigious culture incentivising funding and quick settlement of potentially frivolous claims.[2] By way of example, the Damages Directive's primary goal is solely to achieve compensation for victims and treble damages are prohibited.[3] In the same vein, another directive is now proposed to regulate litigation funding and prevent conflicts of interest, abusive litigation and disproportionate allocation of monetary awards to funders.[4]

Between 2023 and 2024, there were fewer landmark EU judgments than in the previous year. The years 2023 to 2024 could be described as a consolidation period, with many judgments yielding expected results. In that regard, the ECJ had the opportunity to further clarify the rules governing time limits (see **2.** below) and the binding effect of non-final Commission decisions (see **3.** below), while putting some limits to forum shopping by claimants (see **4.** below). Meanwhile, some national courts applying EU law have suggested, perhaps controversially, new rules on minimum damages to be awarded to alleged victims (see **5.** below).

2. Further Clarifications on Limitation Periods

In 2020, Heureka, a Czech comparison-shopping services company, brought an action for damages before the Municipal Court of Prague in the Czech Republic. Heureka claimed to have suffered harm because of Google's alleged anticompetitive behaviour, as found in the Commission's 2017 decision on Google Shopping.[5]

In its defence, Google contended, among other things, that, under the four-year limitation rules in the Czech Commercial Code, which essentially begin to run from knowledge of the infringement and infringer, Heureka's claim was partially time-barred from 2013 to 2016. This led the Czech Court to request further clarifications from the ECJ regarding the application of Article 10 of the Damages Directive on limitation periods.

In the meantime, in *Volvo*, the ECJ had made it plain that limitation periods must cumulatively fulfil the (i) 'cessation', and (ii) 'knowledge' requirements.[6] More specifically, the ECJ stated that they cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring an action for damages.[7]

In *Heureka v Google*, the ECJ, sitting as a Grand Chamber, did no more than elaborate on these requirements.[8] To start with, the Court recalled that the time limitation rules contained in the Damages Directive are inherently '*substantive*' and do not apply retroactively.[9] Given that the Czech Republic had only adopted the Damages Directive after the 2016 transposition deadline, the ECJ went on to assess whether the Czech time limit pre-dating the transposition had already elapsed before that date.[10] In doing so, the ECJ applied the EU principles of equivalence and effectiveness.

In assessing the compatibility of the Czech pre-transposition rules with EU law, it first underlined that the right of any individual to claim compensation for a loss stemming from abusive conduct '*strengthens the working of the EU competition rules and discourages abuses of a dominant position*'.[11] As a result, under the auspices of the '*full effectiveness*' of Article 102 TFEU, the Court substantively reiterated the cessation and knowledge requirements set out in *Volvo*, which mirror those contained in Article 10 of the Damages Directive.[12]

As regards the cessation requirement, the Court justified its pro-plaintiff stance on a number of grounds:

- bringing a damages action requires a complex factual and economic analysis;[13]
- given the information asymmetry, it is difficult for the injured party to establish the existence and scope of the infringement, even more so before it comes to an end;[14]
- requiring the injured party to gradually increase the amount of compensation claimed on the basis of the additional harm resulting from that infringement would render the exercise of the right to full compensation practically impossible or excessively difficult;[15]
- a three-year limitation period that cannot be suspended or interrupted during a Commission investigation might lead to a claim being time-barred well before the

adoption of a Commission decision finding an infringement, thereby unduly affecting the injured party's ability to bring an action;[16] and

- starting the limitation period when the infringement has ceased may have a deterrent effect and lead the perpetrator to bring the infringement to an end sooner rather than later.[17]

In light of this, the ECJ held that the Czech limitation period could only have started to run after 2017, when the Commission considered that Google's alleged abuse of dominance had ended.[18]

As regards the knowledge requirement, the Court succinctly underscored that, for the limitation period to begin to run, the victim must know enough information to be able to bring an action for damages.[19] That includes the existence of an infringement, the existence of harm, the causal link between that harm and that infringement, and the identity of the infringer.[20] In principle, according to the Grand Chamber, that moment coincides with the date of publication of the summary of the Commission decision in the EU Official Journal.[21] It is up to the alleged infringer, in this case Google, to rebut this judge-made presumption and prove otherwise.[22]

This wholesale transposition of criteria developed in regard to cartels that are, by definition, secret, sits uneasily with the reality of most abuses of dominance, where the conduct and the identity of the dominant player are generally well known to alleged victims. In fact, one could say that the only significant uncertainty in most abuse contexts (at least in non-pricing related abuses, where the victims do not require access to the dominant firm's cost information) is a legal one, i.e. whether the known conduct constitutes an abuse prohibited under Article 102 TFEU. However, this type of legal uncertainty is not exceptional and normally not considered when applying statutes of limitation to potentially tortious conduct. Particularly in this case, it seems there is an inherent contradiction in holding, on the one hand, that the rather general Article 102 TFEU rules are so clear that they justified billions of euros in fines for Google without infringing legal certainty, and, on the other hand, that alleged victims can only ever be expected to understand that they have been the victims of an abuse after the Commission's decision is published. This therefore feels like yet another example of the ECJ applying a broad notion of effectiveness even though this undermines the traditional protections afforded to defendants.

Additionally, the ECJ found that the principle of effectiveness requires the suspension or interruption of limitation periods during the Commission's investigation, but not until the moment the Commission's decision becomes final, e.g. after final adjudication by the EU Courts.[23] For the ECJ, such a suspension or interruption enables the injured party to assess (i) whether an infringement of competition law has been committed, (ii) its scope, and (iii) its duration, and to rely on those findings in a subsequent action for damages.[24] In those circumstances, the Court in effect ordered the Czech Court to disregard its pre-transposition Czech rules, which did not suspend or interrupt the limitation period during the Commission's investigation.

Finally, the ECJ added that, strictly speaking, national courts are not obliged to stay their domestic proceedings until the Commission's decision has become final.[25]

3. Evidential Weight Conferred to Non-Final Commission Decisions

Putting aside the question of limitations periods, in *Heureka*, the ECJ also held that an injured party could rely on a Commission decision that is subject to appeal to substantiate its claims for damages.[26] The ECJ reasoned that this is because, unlike national competition authorities' decisions,[27] Commission decisions enjoy a presumption of validity and produce legal effects as long as they have not been annulled or withdrawn.[28] Consequently, for as long as such a decision has not been annulled, it has binding effect, and it is for the national court to draw the '*appropriate conclusions from that*' in the proceedings before it.[29] Notwithstanding that the Court does not specify what parts of a decision precisely are deemed binding, this holding arguably extends to the recitals necessarily underpinning the operative part of the Commission decision.[30]

4. Jurisdictional Issues and the Notion of Undertaking

Since the landmark *Skanska* and *Sumal* judgments, the introduction of the notion of undertaking in private enforcement has inspired some ingenuity from practitioners seeking to rely upon this concept at the jurisdictional stage.[31] In 2024, these attempts failed in two procedural preliminary references: (see **4.1** below) in *MOL v Mercedes Benz*, the question was whether the plaintiff parent company could rely on an extensive use of the concept of undertaking to establish jurisdiction,[32] and (see **4.2** below) in *Volvo v Transsaqui*, the question was whether a plaintiff could use this concept liberally for the purposes of service of documents.[33]

4.1 Parent company and jurisdiction: *MOL v Mercedes Benz*

Following the *Trucks* decision, MOL, a Hungarian parent company with subsidiaries in various Member States, brought an action for damages before the Budapest High Court against Mercedes Benz. MOL claimed that it had suffered harm as a result of the overcharges paid by its subsidiaries during the cartel period.[34]

On appeal, the Hungarian Supreme Court referred a preliminary ruling to the ECJ on whether the concept of the '*place where the harmful event occurred*' under Article 7(2) of Regulation 1215/2012 ('**Brussels I bis Regulation**') includes the place of the parent company's registered office in circumstances where the parent was only claiming damages caused to its subsidiaries (and not directly to the parent company).

MOL maintained that this was permissible because its subsidiaries and its parent company were all part of the same undertaking/economic unit and its registered office was the centre of the group's economic and financial interests.[35] In other words, MOL argued that since infringement of competition law triggers joint and several liability of the entire economic unit, a mirror image (or the reverse) of the same principle must apply to claimants seeking compensation.

Siding with the defendant, the ECJ, however, rejected MOL's expansive interpretation of Article 7(2) of the Brussels I bis Regulation.[36] The ECJ clarified that the notion of economic unit is not decisive in the context of jurisdiction under Article 7(2) of the Brussels I bis Regulation. Instead, it ruled that the relevant criterion under this provision is where the direct damage caused by the anticompetitive acts occurred. In line with the *Tibor-Trans*[37] and *Volvo*[38] cases, the ECJ reiterated that '*where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred*'.[39] Therefore, the notion of 'place

where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences of an event, which has already occurred elsewhere, can be felt.[40] Along the same lines, the ECJ ruled that damage to an indirect victim, which is merely the indirect consequence of the harm initially suffered by other persons at a different place, cannot suffice to establish jurisdiction.[41] In this case, since MOL's parent company did not itself acquire any trucks from Mercedes Benz, the direct damage was exclusively suffered by MOL's subsidiaries.[42]

More fundamentally, the ECJ considered that the way in which MOL wished to use the principle of the economic unit/undertaking in the context of the rule of jurisdiction laid down in Article 7(2) of the Brussels I bis Regulation ran counter to the underlying objectives of proximity and predictability.[43] In the ECJ's opinion, the national courts in which the affected market is located are best placed to assess actions for damages and the infringer can reasonably expect to be sued in jurisdictions where the market was distorted.[44] Likewise, it indicated that the consistency between the forum and the applicable law as set forth in Article 6(3)(a) of the Rome II Regulation implies that a claim should be brought on the market affected by the infringement.[45]

In light of the foregoing, the Court concluded that the objectives of proximity and predictability of the rules governing jurisdiction and consistency between the forum and the applicable law precluded a reverse application of the concept of economic unit for the determination of the place where the damage occurred under Article 7(2) of the Brussels I bis Regulation. An unhindered possibility of claiming damages for the harm arising from an infringement of competition law affecting a member of the economic unit was not therefore possible.

4.2 Service of documents on the parent company: *AB Volvo v Transsaqui*

In another *Trucks* case, the ECJ also rejected the application of the undertaking concept for jurisdictional purposes, but this time with regard to the service of documents.[46]

In 2018, Transsaqui brought an action for damages before the Commercial Court of Valencia against the Swedish company AB Volvo, seeking compensation for the overcharges it had allegedly suffered. In the writ of summons to AB Volvo, Transsaqui indicated the address of AB Volvo's Spanish subsidiary, Volvo Group España, in Madrid, as the address for service. AB Volvo's registered office, however, was in Sweden. The Commercial Court of Valencia allowed the action to proceed, although AB Volvo did not appear in the proceedings. On appeal, the Spanish Supreme Court asked the ECJ whether the 'single economic unit' concept could justify serving documents on the parent company at the address where the subsidiary is domiciled, so as to reduce the costs of translation and service of judicial documents.

After recalling its *Sumal* jurisprudence,[47] the ECJ tautologically recalled that, as such, an undertaking has no legal personality.[48] Thus, even if a subsidiary forms a single economic unit with its parent company, that does not imply that the subsidiary has been expressly authorised or designated by the parent company as a person empowered to receive judicial documents on its behalf.[49] Such authority also cannot be presumed, otherwise there is a risk of prejudicing the parent company's rights of defence.[50]

The ECJ determined that neither the right to a fair trial enshrined in Article 47 of the EU Charter nor the *effet utile* of Article 101(1) TFEU could justify a different solution.[51] On the contrary, the right to a fair trial entails that basic procedural guarantees exist, which require that judicial documents are actually and effectively served on the intended person.[52]

In addition, the ECJ considered that the service of documents must be carried out in accordance with Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('**Service Regulation**').[53] It noted that the Service Regulation only requires minimal translation costs, particularly for essential documents.[54] The ECJ therefore continued that it was unnecessary to extend the concept of undertaking to the service of documents to provide claimants with an effective remedy. As noted by the ECJ's Advocate General, it is not overly difficult for parties to comply with the Service Regulation, and Transsaqui had not even attempted to effect such service.[55]

The Court ultimately emphasised that the victim of an anticompetitive practice may bring an action for damages against the parent company to which the Commission decision is addressed or against its subsidiary, the registered office of which is situated in the Member State of the court seised, where both form an economic unit.[56] This enables the claimant to avoid having to bear the costs of translation or service of judicial documents in another Member State.[57]

5. National Judgments on Minimum Damages

Courts in Spain and Germany have developed new practices regarding what can be described as a judicially-fashioned minimum compensation level. In June 2023, in the *Dieselgate* case, the German Federal Court of Justice ruled that, pursuant to the EU principle of effectiveness, a lower limit of 5% of the purchase price paid should apply to damages.[58] Similarly, in the same month, in the context of a mass litigation arising from the *Trucks* case, the Spanish Supreme Court estimated an overcharge of 5%, as conservative minimum damages.[59] The *Dieselgate* judgment, while certainly groundbreaking, deserves less scrutiny, as it does not take place in the context of competition law and the specific rules on compensation and judicial estimation contained in Articles 3 and 17 of the Damages Directive.

Turning back to Spain, in line with *Tráficos Manuel Ferrer* already discussed in last year's chapter, the Supreme Court justified its ability to estimate the quantification of the harm suffered, noting that the economic report's imprecision was not the claimant's fault, and there was a '*practical impossibility of assessing the harm*'.[60] According to the Spanish court, this impossibility arose from the geographical scope of the cartel, which covered the whole of the EU, the duration of the cartel, and the high complexity of the products concerned, which made it very difficult to select an appropriate counterfactual scenario suitable for comparison.[61] As a result of these difficulties, the Spanish Supreme Court concluded that the fact that the claimant relied on an inadequate expert report for its quantification did not amount to a failure to discharge the burden of proof and justified the courts' exercise of their power to quantify the harm.

The Spanish Supreme Court emphasised the full effectiveness of competition law, and the usefulness of private enforcement to that end.[62] Surprisingly, it referred to a foreign *Trucks* damages judgment, the UK Competition Appeal Tribunal's *Royal Mail* case,[63] where the English court estimated a 5% overcharge given the impossibility to quantify the damage accurately on the basis of the economic report. According to the Supreme Court, this broad brush estimation had occurred

even when '*expert reports were produced by prestigious experts, at enormous financial cost*'.[64] The Court continued that since the minimum foreseeable damage had been '*prudently set by most courts at 5% of the cost of the trucks*',[65] it should become the starting point.[66] Trying perhaps to justify this judge-made minimum overcharge, the Supreme Court added that, in theory, this '*does not prevent*' the defendant from proving that the damage was less than the minimum percentage.[67] But in this case, the defendant's expert report was deemed inadequate.

In a subsequent ruling handed down in 2024, after a provincial court had unilaterally estimated the damage at 8%, the Spanish Supreme Court took issue with this different approach and imposed its 5% overcharge, '*unless it is proven that there are extraordinary circumstances, specific to the case in question*'.[68] This time, it noted that this judicial approximation does not require a detailed analysis of the incidence of each of the parameters.[69] Instead, it merely needs to be reasonable and non-arbitrary.

Given the large number of cases brought before numerous Spanish courts, the Supreme Court's position is intended to ensure a degree of legal consistency. However, this pragmatism could lead to judicial arbitrariness with judges and claimants simply relying on the Supreme Court's 5% figure, regardless of the legal and factual arguments. Most importantly, this may not sit well with either the principle of full compensation or the prohibition of overcompensation under Article 3(3) of the Damages Directive. This is particularly so where there does not appear to be any clear basis for the 5% number; the fact that it would be based on similar approximations by judges in Spain and in other countries just leads to the universalisation of an estimate that the original judge may have arrived at without much of an evidentiary basis.

Endnotes

1 Lukas Rengier, Cartel Damages Actions in German Courts: What the Statistics Tell Us, 11(1-2) Journal of European Competition Law & Practice 72–81 (2020).

2 E.g. Joshua P. Davis & Robert H. Lande, Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement, 36 Seattle Univ. L. Rev 1269, 1269-70; see, however, Robert H. Lande, The Proposed Damages Directive: The Real Lessons from the United States, (2) CPI Antitrust Chronicle 2 (2014).

3 Article 3(3) of the Damages Directive.

4 For more details, reference is made to last year's contribution.

5 Commission Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, *Google Search (Shopping)*, 27 June 2017, case AT.39740.

6 Case C-267/20, *Volvo/DAF Trucks Spain*, EU:C:2022:494, paras 51–79.

7 *Ibid.* paras 51–79.

8 Case C-605/21, *Heureka v Google*, EU:C:2024:324, para. 39.

9 Article 22(1) of the Damages Directive.

10 Case C-605/21, *Heureka v Google*, EU:C:2024:324, para. 49.

11 *Ibid.* paras 52–54.

12 *Ibid.* paras 52–55. In effect, this line of legal reasoning results in applying the same set of rules both before and after the transposition of the Damages Directive.

13 *Ibid.* para. 56.

14 *Ibid.* paras 57–58.

15 *Ibid.* para. 60.

16 *Ibid.* para. 62.

17 *Ibid.* para. 63.

18 *Ibid.* para. 86.

19 *Ibid.* para. 64.

20 *Ibid.* para. 64.

21 *Ibid.* para. 67. Citing an Order in C-198/22 and C-199/22, *Deutsche Bank (Cartel – Euro interest rate derivatives)*, EU:C:2023:166, para. 49.

22 *Ibid.* para. 71. More broadly, this rationale raises the question of whether national longstop limitation periods, which start to run irrespective of any knowledge, comply with the EU principle of effectiveness.

23 *Ibid.* para. 80. *See* section **3.** on the evidential weight of non-final Commission decisions.

24 *Ibid.* para. 79.

25 *Ibid.* para. 80.

26 *Ibid.* para. 77.

27 Article 9 of the Damages Directive. Case C-605/21, *Heureka v Google*, EU:C:2024:324, para. 74.

28 *Ibid.* para. 77.

29 *Ibid.* para. 77.

30 E.g., Case C-164/02, *Netherlands v Commission*, EU:C:2004:54, para. 21; *Royal Mail v DAF Trucks* [2020] CAT 7, para. 56

31 Case C-724/17, *Skanska*, EU:C:2019:204; Case C-882/19, *Sumal*, EU:C:2021:800.

32 Case C-425/22, *MOL*, EU:C: 2024:578.

33 Case C-632/22, *Volvo v Transsaqui*, EU:C:2024:31.

34 Case C-425/22, *MOL*, EU:C: 2024:578.

35 *Ibid.* para. 14. It is generally considered that a parent company and its subsidiary form an economic unit when, in essence, the latter is subject to the former's decisive influence and does not act autonomously (see, C-516/15 P, *Akzo Nobel*, EU:C:2017:314, paras 52 and 53).

36 See also, Opinion of AG Emiliou, Case C-425/22, *MOL*, EU:C:2024:131.

37 Case C-451/18, *Tibor-Trans*, EU:C:2019:635, para. 33.

38 Case C-30/20, *Volvo and Others*, EU:C:2021:604, para. 31.

39 Case C-425/22, *MOL*, EU:C: 2024:578, para. 27.

40 Case C-451/18, *Tibor-Trans*, EU:C:2019:635, para. 28.

41 *Ibid.* para. 29.

42 *Ibid.* paras 32 and 36.

43 *Ibid.* para. 37.

44 *Ibid.* para. 38.

45 *Ibid.* para. 40. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31/07/2007, p. 40.

46 Case C-632/22, *Volvo v Transsaqui*, EU:C:2024:31.

47 According to which a subsidiary may be held liable for a competition law infringement for which its parent company is designated in a Commission decision, where those two entities form part of the same undertaking.

48 *Ibid.* paras 48–49, with reference to C-882/19, *Sumal*, EU:C:2021:800, para. 48.

49 *Ibid.* para. 50.

50 *Ibid.* para. 50 (*see also*, C-325/11, *Alder*, EU:C:2012:824, para. 36).

51 *Ibid.* para. 53.

52 *Ibid.* para. 54.

53 *Ibid.* para. 61.

54 *Ibid.* para. 65.

55 Opinion of AG Szpunar, Case C-632/22, *AB Volvo v Transsaqui SL*, EU:C:2024:31, para. 54. *See also*, Case C-632/22, *Volvo v Transsaqui*, EU:C:2024:31, para. 55: '*the Union legislature has adopted a number of acts which apply to cross-border disputes in civil and commercial matters, in particular Regulations No 1215/2012 and No 1393/2007, which aim to facilitate the free movement of judicial decisions and to improve the transmission between Member States of judicial and extrajudicial documents for the purposes of service, thereby promoting access to justice.*'

56 Case C-632/22, *AB Volvo v Transsaqui*, EU:C:2024:31, para. 69 citing C-882/19, *Sumal,* EU:C:2021:800, para. 51.

57 Case C-632/22, *AB Volvo v Transsaqui*, EU:C:2024:31, para. 69.

58 *Bundesgerichtshof, Dieselgate*, 26 June 2023, DE:BGH:2023:260, para. 74: '[f]*or reasons of effectiveness under EU law, the estimated damage cannot be less than 5% of the purchase price paid. Otherwise, the sanctioning of an even merely negligent infringement of [Regulation (EC) No 715/2007] would not be sufficiently effective in the promotion of the objectives of EU law due to its insignificance*'. Conversely, the *Bundesgerichtshof* considered damages of more than 15% to be '*disproportionate*'. For this, it pointed out that the infringement at hand was an '*objectively comparatively minor infringements of the law*'.

59 Spanish Tribunal Supremo, *Trucks*, STS 2475/2023, 12 June 2023, ES:TS:2023:2475.

60 *Ibid.* Legal Basis No. 7, para. 17.

61 *Ibid.* Legal Basis No. 7, para. 21.

62 *Ibid.* Legal Basis No. 7, para. 22.

63 *Royal Mail Group Limited v DAF Trucks Limited and Others* [2023] CAT 6.

64 *Ibid.* Legal Basis No. 7, para. 23.

65 *Ibid.* Legal Basis No. 7, para. 24.

66 *Ibid.* Legal Basis No. 7, para. 24. Conversely, as long as it is not proven that the amount of the damage has exceeded the minimum percentage of 5%, the claimant cannot claim compensation in excess of that percentage.

67 *Ibid.* Legal Basis No. 7, para. 24.

68 Spanish Tribunal Supremo, *Trucks*, STS 1287/2024, 14 March 2024, ES:TS:2024:1287, Legal Basis No. 6, para. 13.

69 *Ibid.* Legal Basis No. 6, para. 13.

Frédéric Louis is a partner at Wilmer Cutler Pickering Hale and Dorr LLP in Brussels. He focuses on all aspects of EU competition law, in particular, behavioural investigations (cartels and abuse of dominance), merger clearances and State Aid. In addition, he has extensive litigation experience, having represented clients in more than 150 proceedings before the European courts in Luxembourg. Mr Louis's litigation experience before the EU courts ranges across a broad array of issues (including freedom of commerce and constitutional issues) with a focus on competition litigation.

Wilmer Cutler Pickering Hale and Dorr LLP
Bastion Tower, Place du Champ de Mars /
Marsveldplein 5, BE 1050 Brussels
Belgium

Tel: +32 2 285 49 53
Email: frederic.louis@wilmerhale.com
LinkedIn: www.linkedin.com/in/frederic-louis

Anne Vallery is a partner at Wilmer Cutler Pickering Hale and Dorr LLP in Brussels. She focuses on EU competition and regulatory law and has practised in Brussels since 1996, with a particular focus on technology, media and telecommunications and the digital economy sector. She has litigated numerous cases before the European Commission, European courts, national competition authorities, Brussels courts and other national courts.

Wilmer Cutler Pickering Hale and Dorr LLP
Bastion Tower, Place du Champ de Mars /
Marsveldplein 5, BE 1050 Brussels
Belgium

Tel: +32 2 285 49 58
Email: anne.vallery@wilmerhale.com
LinkedIn: www.linkedin.com/in/anne-vallery-63a0501

Cormac O'Daly is a partner at Wilmer Cutler Pickering Hale and Dorr LLP in London and Brussels. He advises on a wide range of EU and UK competition law issues. These include merger control, cartels and related litigation (before both EU and UK courts, including in damages actions), licensing and other vertical and horizontal agreements, other potentially restrictive practices and alleged abuses of market power. He regularly advises on areas at the convergence of competition and intellectual property laws.

Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane, London, W1K 1PS, United Kingdom /
Bastion Tower, Place du Champ de Mars / Marsveldplein 5
BE 1050 Brussels, Belgium

Tel: +44 20 7872 1534 / +32 2 285 49 18
Email: cormac.o'daly@wilmerhale.com
LinkedIn: www.linkedin.com/in/cormac-o'daly-06b6591a6

Édouard Bruc is an associate at Wilmer Cutler Pickering Hale and Dorr LLP in London and Brussels. His practice focuses primarily on antitrust and competition law and related regulatory litigation. He is a dual-qualified Solicitor in England and Wales and Paris Bar Avocat à la Cour. Mr Bruc represents clients in abuse of dominance, cartel proceedings and damages actions. He also has significant experience in State Aid, especially in tax ruling cases. He has a deep interest in unilateral conduct cases, class actions, intellectual property rights and due process issues in antitrust enforcement.

Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane, London, W1K 1PS, United Kingdom /
Bastion Tower, Place du Champ de Mars / Marsveldplein 5
BE 1050 Brussels, Belgium

Tel: +44 20 7872 1000 / +32 2 285 49 13
Email: edouard.bruc@wilmerhale.com
LinkedIn: www.linkedin.com/in/edouardbruc

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