Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.)

Law & Economics | Concurrences N° 1-2019
www.concurrences.com

Jean-François Laborde
jf.laborde@minds-and-hearts.com
Director
Minds & Hearts, Paris
Expert
Paris Court of Appeal

INSTITUT de droit de la concurrence

Jean-François Laborde
jf.laborde@minds-and-hearts.com
Director
Minds & Hearts, Paris
Expert
Paris Court of Appeal

Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.)

ABSTRACT

In its third edition, this study reveals that courts in Europe have handed down judgments in at least 144 cartel damages actions. These cases come from 13 countries, and they follow more than 53 cartels. In these judgments, courts have given many insights on how to assess cartel overcharges.

Pour sa troisième édition, cette étude montre que des jugements ont été rendus, par des juridictions nationales en Europe, dans le cadre d'au moins 144 actions en réparation consécutives à des ententes anticoncurrentielles. Ces affaires ont été jugées dans 13 pays. Elles font suite à plus de 53 ententes. L'analyse des jugements fournit de nombreux enseignements sur les méthodes et les raisonnements employés par les tribunaux pour apprécier les éventuels surcoûts causés par les ententes.

1. This study's primary objective is to analyse how national courts in Europe have assessed cartel overcharges. In addition, it also provides figures on how cartel damages actions are developing (how many cases were judged, in which countries, with which results, etc.). It was completed with the help of lawyers, law professors, experts and economists from 30 European countries. Judgments in cartel damages actions have been systematically identified, compiled, translated and analysed. This article is presenting the results of this research.[1]

2. Section I describes the methodology followed. Section II provides general figures on the cases gathered. Section III analyses the damages awards, and also the reasons for dismissals. Section IV focuses on mitigation and passing-on. And section V presents highlights from some recent cases.

I. Research methodology

3. The research methodology for this year's edition is largely similar to last year's. Readers familiar with this study can go directly to § 9. Other readers will find important explanations on how to interpret the results in the following paragraphs.

4. Scope. In this article, the term "cartel" has the meaning given by the Commission: "(…) *a cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.*"[2] A "case" means a damages action, with one or several plaintiffs alleging that a cartel caused an overcharge, and in which a court handed down a judgment on the merits. This includes three sets of judgments: judgments awarding damages, judgments establishing liability but not valuing the damages,[3] and judgments dismissing actions for lack of merit.

1 For the previous editions of this study, *see* J.-F. Laborde, Cartel damages claims in Europe: How courts have assessed overcharges (2017 ed.), November 2017, *Concurrences Review* No. 4-2017, Art. No. 84981; and J.-F. Laborde, Cartel damages claims in Europe: How courts have assessed overcharges, February 2017, *Concurrences Review* No. 1-2017, Art. No. 83418.

2 *See* http://ec.europa.eu/competition/cartels/overview/index_en.html; cases mentioned in this document fall under this definition with perhaps a small number of exceptions.

3 Including interlocutory and declaratory judgments.

5. Importantly, cases in which an out-of-court settlement was reached before any judgment on the merits fall outside the scope of this study. There are many such cases, but by nature they seldom provide insights on how courts assess cartel damages. Cases dismissed on strictly formal grounds such as jurisdiction or statute of limitations are not included either.[4]

6. Counting cases. Counting cases required setting a rule for this purpose. Sometimes several judgments are similar. For example, on 28 June 2017 the Dortmund Regional Court handed down two judgments on claims that followed the German rail cartel. These two judgments are counted as two cases. When a large number of judgments are similar, however, an exception to this rule had to be made. For instance, on 31 October 2017, the Helsinki District Court gave 32 judgments regarding actions brought by municipalities after the Finnish raw wood cartel. Counting each of these judgments as an individual case would give them excessive weight relative to other cases. For this reason, each large set of similar judgments is considered as a single case.[5]

7. Geographic coverage and research period. This research covers the current 28 EU Member States together with Norway and Switzerland. It was mostly conducted between June and September 2018.[6]

8. Process. The process employed for this research has four steps. The cases were first identified. Copies of judgments were gathered. Using a recent automatic translation service, they were translated into English.[7] Their content was then analysed.

9. Contributors. This year again, contributors have played an essential role at all stages in this research. They were asked whether they were aware of relevant cases in their jurisdictions. Many helped identify such cases, and often assisted with their analysis. Many others provided confirmation that there was no suitable case yet in their country.[8]

Most contributors are lawyers, law professors, experts or economists. This year, for the first time, lists of cases were also reviewed by national competition authorities (NCAs) in some countries.

10. There were at least two contributors in each country covered. As a result, 122 individuals directly contributed to this study.

This research would not have been possible without the invaluable assistance of Lisa Abela, Joëlle Adda, Augustine Almyroudi, Philip Andrews, Tonia Antoniou, Elena Apostolova, Marcos Araujo, Georgiana Bădescu, Zoltán Barakonyi, Daniel Barry, Tamar Bastiaan, Michael Bergmann, Ines Bodenstein, Ellen Braun, Helmut Brokelmann, Rino Caiazzo, Richard Camilleri, Caroline Cauffman, Anastasios Charalampous, Sorin David, Alessandro De Stefano, Audrey Dwyer, Maria Esbensen, Enrico Fabrizi, Pedro Faria, James Flynn QC, Jaime Folguera Crespo, Thomas Funke, Carri Ginter, Karin Gollan, Anna Gulińska, Alfonso Gutierrez, Dieter Hauck, Véronique Hoffeld, Franz Hoffet, Marek Holka, András Horváth, Sarah Houghton, Vilhelmiina Ihamäki, Tomaž Ilešič, Isabelle Innerhofer, Jūlija Jerneva, Marius Juonys, Toni Kalliokoski, Johan Karlsson, Claus Kastberg Nielsen, Jiří Kindl, Mario Krka, Marc Kuijper, Raquel Sofia Lemos, Guy Loesch, Emil Lukaev, Palle Bo Madsen, Martin Mäesalu, Monika Mališauskaitė, Roman Mallmann, Francisco Marcos, Tomas Maretta, Kate McKenna, Liga Merwin, Henri Mizzi, Małgorzata Modzelewska de Raad, Igor Mucalo, Gildas de Muizon, Rob Murray, Annalies Muscat, Martin Nedelka, Robert Neruda, Florian Neumayr, Irmantas Norkus, Suayip Őksűz, Andreea Oprisan, Cristoforo Osti, Raino Paron, Jasminka Pecotić Kaufman, Vladimir Penkov, Pavle Pensa, Javier Pérez Fernández, Stefan Perván Lindeborg, Galina Petkova, Michal Petr, Silvia Pietrini, Richard Pike, Petra Joanna Pipková, Anna Piszcz, Polina Polycarpou, Jolling de Pree, Roman Prekop, Axel Reidlinger, Eszter Ritter, Alexander Romanowicz, Richard Ryan, Anders Ryssdal, Kees Schillemans, Dace Silava-Tomsone, Patrick Sommer, Miguel Sousa Ferro, Orsolya Staniszewski, Agnieszka Stefanowicz-Barańska, Christian Steinle, Ilko Stoyanov, Magnus Strand, Pedro Suárez, Daivis Švirinas, Siri Teigum, João Paulo Teixeira de Matos, Luca Toffoletti, György Tóth, Jon Turner QC, Stefan Tzakov, Lumine van Uden, Raluca Vasilache, Frank Verboven, Weyer VerLoren van Themaat, Diego Vicente Pérez, Péter Vörös, Marion Wyler, Peter Wytinck, Janja Zaplotnik, and Rasa Zaščiurinskaitė; as well as of the Croatian Competition Agency, the Commission for the Protection of Competition of the Republic of Cyprus, the Estonian Competition Authority, the Finnish Competition and Consumer Authority, the Hellenic Competition Commission, the Hungarian Competition Authority, the Lithuanian Competition Council, the Antimonopoly Office of the Slovak Republic and the Swedish Competition Authority.[9]

11. European Commission. I also wish to thank the European Commission for having expressed interest in this study, and for having provided some of this year's research questions.

12. Limitations. This research is subject to four main limitations. First, the list of cases identified is, despite best efforts, unlikely to be completely exhaustive. Many cartel damages actions receive only very limited attention.

4 With a few exceptions; cases in which the harm was not an overcharge also fall outside the scope.

5 Besides the 32 judgments of the Helsinki District Court, many judgments handed down on 31 August 2017 by the same court; 40 judgments handed down by the Helsinki Court of Appeal on 20 October 2016; numerous judgments handed down by Italian courts on claims brought by consumers of motor vehicle insurance; a set of judgments handed down by Italian courts on cases referring to the *Euro Interest Rate Derivatives* decision; and 34 judgments handed down by the Administrative Court of Paris on 13 and 27 March 2009.

6 An important case judged in October 2018 was also included.

7 Except for original judgments written in French.

8 Secondary sources such as online databases, lists of cases, and articles describing the content of some of the judgments were also used. Some contributors helped on other tasks.

9 A few individual contributors and competition authorities have preferred not to be mentioned.

On several occasions, contributors have uncovered judgments that were not publicized, cannot be accessed online, and have so far remained unnoticed. Given the wide scope of this research, however, some cases may not have been identified. I would be grateful to anyone who would bring to my attention any case of which I may not be aware.

13. Secondly, some judgments in the list are not final judgments. Considering the number of cases gathered, taking into account such judgments seems unlikely to affect most of this research's findings. It may, however, affect some observations, for example the ones on levels of overcharges.

14. Third, the variety of languages in Europe constitutes, of course, a difficulty for this research. Most judgments gathered are neither in English nor in French.[10] In order to grasp some of their content, a number of sources were used, including automatic translations, expert advice from contributors and articles describing the content of some of the judgments. As I could not read the original (untranslated) text of many judgments, however, I cannot completely exclude that I may have made some errors.

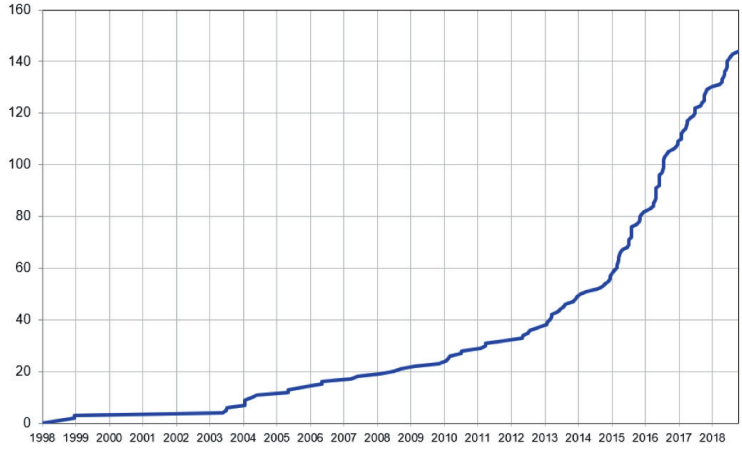
15. Fourth, the figures provided in this study should be considered as indicative. The judgments gathered represent in total nearly 6,000 pages. Dozens of criteria have been screened in each judgment—whether there was any mention of passing-on, of umbrella pricing, of a court-appointed expert, etc. At times, I have probably failed to notice the presence of some criteria in some judgments.[11]

II. General figures

16. Number of cases. In the 30 European countries covered, 144 cartel damages actions have been identified. They include 35 cases in which damages were awarded, 48 cases in which liability was established, and 61 cases that resulted in dismissals.[12]

The number of cases appears to be growing rapidly.

Figure 1. Cumulative number of cases, by date of first judgment



17. Number of judgments. The 144 cases represent in total 242 relevant judgments. As part of this study, 241 of these judgments have been collected, if necessary translated, and analysed.

18. Countries. The cases come from thirteen countries: Germany (59 cases), France (44 cases), Hungary (8 cases), Spain (7 cases), Italy (5 cases), Finland and the Netherlands (4 cases each), Austria and Denmark (3 cases each), Belgium, Poland and the United Kingdom (2 cases each), and Greece (1 case).

19. United Kingdom. Of course, the small number of cases from the UK does not reveal the real size of London as a competition litigation forum.[13] Many cartel damages actions have been brought before the Competition Appeal Tribunal or the High Court of Justice of England and Wales, in particular actions following Commission decisions. Most such actions were, however, settled before any judgment on the merits. Some other important cases cannot be labelled as cartel damages actions, as the infringement was not exactly a cartel. Judgments in such cases may nevertheless provide relevant insights on how to assess overcharges.[14]

20. Infringement decisions. Of the 144 cases, 105 followed an infringement decision made by a NCA (73%), 35 followed a Commission decision, and only 4 were stand-alone actions.[15]

10 The author's working languages.

11 Particularly when the presence or absence of some criteria seemed to make little difference.

12 Claims awarding a token sum of one euro as damages are considered dismissed.

13 For a description of the likely consequences of Brexit on the attractiveness of London as a competition litigation forum, *see* Sir P. Roth, Competition Law and Brexit: The Challenges Ahead, 16(1) *Competition Law Journal* 5 (2017), available at http://www.bclwg.org/wp-content/uploads/2017/03/CLJ_2017_01_Sir_Peter_Roth.pdf.

14 *See* in particular Sainsbury's *Supermarkets Ltd v. MasterCard Incorporated* [2018] EWCA Civ 1536 (on the legal and economic definitions of passing-on); *Merricks v. Mastercard Incorporated* [2017] CAT 16 (on estimating damages with "*a broad axe*"); and *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated* [2016] CAT 11 (on interest); *see also Iiyama (UK) Ltd v. Samsung Electronics Co Ltd* [2018] EWCA Civ 220 (on purchases made outside the EU) and *Peugeot S.A. v. NSK Ltd* [2018] CAT 3 (on prima facie inference of supracompetitive prices).

15 All stand-alone cases correspond to civil actions brought before French criminal courts.

21. Of the 144 cases, 118 involved infringements of Article 101 TFEU[16] (82%). The other cases related to infringements of similar provisions in national competition laws.

22. Claimants. Approximately 90% of the claims were brought by only one claimant.[17]

At the other extreme, a case in the UK allegedly involved 64,697 claimants, all of which were based in China. However, it turned out that many of these claimants had neither authorized the bringing of the claim, nor ever purchased the affected services.[18]

At least 13 claims were brought by indirect purchasers.[19] Four others were brought by sellers that considered themselves the victims of cartels of buyers.

Sectors of claimants. Many claimants come from a broadly defined public sector. Local authorities (40 cases), publicly-owned companies (40 other cases), and central governments (6 cases) initiated in total 57% of the claims. It would be interesting to understand why the number of public sector claimants is relatively high. Are public buyers more likely to be targeted by cartels? More likely to bring a claim? Or less likely to agree to a settlement?

Privately-owned companies initiated 51 claims. They come from a variety of sectors: transportation and logistics (11 cases), retail and wholesale (10 cases), construction and real estate (8 cases), agriculture and agribusiness (7 cases), consumer goods (6 cases), financial services (3 cases), etc.[20]

Finally, 6 cases were brought by end consumers, and 8 were initiated by other types of claimants—including a consumer association, a chamber of commerce, a hospital, a religious association, and special purpose claims vehicles.

23. Tendering. Consistently with the strong presence of the public sector amongst claimants, in nearly two thirds of the claims the allegedly affected purchases resulted from tendering processes.

When a tender was organized, assessing the potential overcharge raises a host of specific issues. For example:

– In the case of a market-sharing cartel, does each particular tender need to be specifically targeted by the cartel in order to be affected?

– Which is the right counterfactual price: the one that the winner of the rigged bid would have offered, absent the cartel? Or any lowest price that would have been proposed?

– In the event that an engineering cost estimate was prepared before the tender, is it possible to use it as a counterfactual price?

– Should prices offered by cartel outsiders be considered as market prices?

– Should the claimant itself be held responsible for the absence of competition, when it only organized a restricted tender—or no tender at all?

These questions have been dealt with in many judgments. The answers that they have received are not always consistent. There is apparently a need for guidelines in this area.

24. Defendants. There was only one defendant in approximately 60% of the cases, and several defendants in the others.

Courts have assessed cartel damages actions that followed 53 infringement decisions.[21] Defendants in follow-on litigation thus belong to a wide range of sectors.

III. Damages awards and reasons for dismissals

25. Damages awards. Cartel damages have been awarded in 35 cases.[22] They come from France (17 cases), Germany (5 cases), Spain (4 cases), Denmark (3 cases), the Netherlands (2 cases), Austria, Finland, Italy, and the UK (1 case each).

Particularly in Germany, the number of damages awards is a bit misleading. It should not lead to the conclusion that German courts are prone to dismiss cartel damages actions. In 35 other cases, German courts have handed down interlocutory or declaratory judgments in which they have affirmed the liability of defendants without quantifying damages.[23] Similarly, in France, 12 cases have so far only resulted in a judgment establishing liability.[24]

16 Or formerly Art. 81, and before that Art. 85.

17 Several claimants belonging to the same group were counted as only one unit (when this information was found).

18 *Bao Xiang International Garment Centre and Others v. British Airways Plc* [2015] EWHC 3071; this claim was struck out.

19 Direct buyers purchase directly from cartel members (or other suppliers of similar goods); other buyers are called indirect.

20 The sector of the claimant is often relevant in cartel damages actions, as it affects in particular the likelihood that all or part of an overcharge was passed on.

21 Sometimes one infringement decision sanctioned several cartels. As a result, the number of cartels resulting in at least one case is slightly higher than 53.

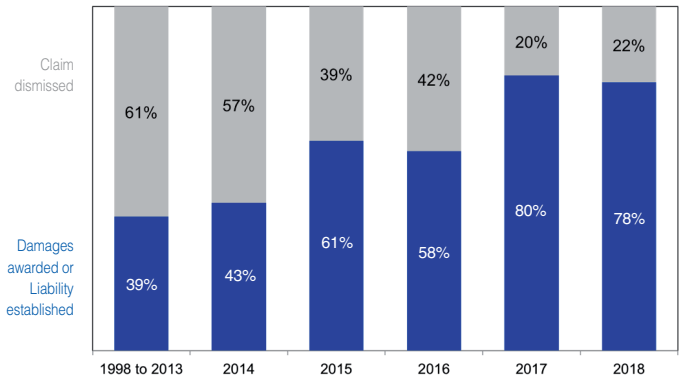
22 This number does not include cases in which a lower court awarded damages and a court of appeal quashed the judgment.

23 It seems that such decisions are often followed by a settlement.

24 In France, such judgments often appoint an expert tasked with estimating damages.

26. Rate of success. The rate of success of cartel damages actions has increased significantly in recent years. For this analysis, an action is considered successful if damages were awarded or liability was established.[25] As shown in figure 2, the proportion of such cases has grown substantially.

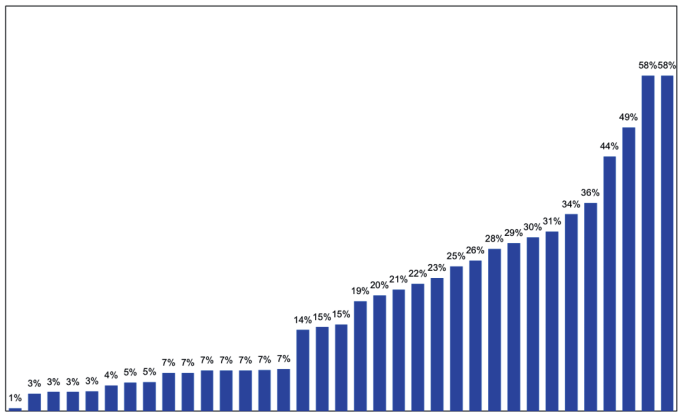
Figure 2. Outcomes of judgments, by year of judgment



There are potentially many reasons behind this trend. Three are apparent in the judgments. First, legal obstacles that claimants used to encounter have been removed.[26] In Germany for example, some courts initially considered that damages could be awarded only under the condition that the claimant was explicitly targeted by the cartel. This is not a requirement any more. Secondly, in Germany again a presumption that market-sharing and price-fixing cartels typically cause harm has been established; and there are not many judgments in which it has been successfully rebutted.[27] Third, in recent years there have been two large waves of cases, one following the road signs cartel in France and the other following the rail cartel in Germany. Actions which have followed these two infringements have often been successful.

27. Figures on overcharges. A rate of overcharge could be calculated or estimated for each of the 35 damages awards.[28] The range of overcharges is shown in figure 3. In accordance with the study prepared for the European Commission in 2009 (Oxera et al.), overcharges are presented as a percentage of affected prices.[29] The lowest overcharge is less than 1%, and the highest reaches 58%.

Figure 3. Cartel overcharges in damages awards



28. The average of the 35 overcharges is 18%, and the median is 15%.[30] In 2009, the study prepared for the European Commission estimated that the average cartel overcharge was around 20%, and the median 18%.[31] Importantly, the sample that was used in this study only included overcharge estimates found in academic articles or published books, leaving aside any figure found in court decisions. So, it seems that two sets of overcharge estimates, coming from two completely different sources, produce converging results. The total value of the damages awards is nearly €210 million. One must bear in mind, however, that this figure does not include the amounts of settlements.

29. Expected degree of precision of overcharge estimates. Courts can estimate overcharges with a limited degree of precision. What do they consider to be an acceptable margin of error? In Germany, a judgment of the Higher Regional Court of Karlsruhe indicates that 3% to 5% of the factual price constitutes a "*slight difference*" that is "*not sufficiently significant*."[32] In the Netherlands, a judgment of the District Court of Gelderland finds that 2.5% of the factual price is "*not significant*."[33]

30. Methods to quantify overcharges. The Commission published in June 2013 the Practical Guide on Quantifying Harm in Actions for Damages. This document is referred to in many judgments. It describes methods found by the Commission to be potentially suitable for assessing damages caused by competition law infringements, in particular overcharges.[34] Judges in Europe have now been exposed to all major types of methods explained in this guide.[35]

25 It is considered unsuccessful when the claim was dismissed.

26 *See* J. Riffault-Silk, Actions for Damages: the Current State of Private Enforcement in the EU and France, conference organized at the Paris Court of Appeal, 29 March 2018, video available at https://www.concurrences.com/fr/auteur/Jacqueline-Riffault-Silk (in French).

27 *See* L. Nicolas-Vullierme, Le 9e amendement de la loi allemande contre les restrictions de concurrence : une réforme à imiter ?, *Contrats Concurrence Consommation* No. 1, January 2018.

28 The data was usually taken directly or indirectly from judgments; sometimes relevant information was found from other sources. Two percentages were determined by reference to a contractual clause.

29 Oxera et al., Quantifying antitrust damages: Towards non-binding guidance for courts, Study prepared for the European Commission, Dec. 2009; other studies sometimes express overcharges as a percentage of the unaffected price.

30 As some of the judgments are not final, these figures could change.

31 Based on a sample of 114 overcharge estimates; *see* Oxera et al. p. 90 for a description of the methodology.

32 Higher Regional Court of Karlsruhe, 31 July 2013, 6 U 51/12; "*Die allenfalls geringfügige Differenz* (…) fällt nicht hinreichend ins Gewicht."

33 District Court of Gelderland, 10 June 2015, ECLI:NL:RBGEL:2014:6118; *see also Mericks v. Mastercard Incorporated* [2017] CAT 16.

34 Commission Staff Working Document, Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU, 16 June 2013.

35 *See also* https://www.justcompetition.eu/online-training/PART-VIII-Quantification-of-damages-35, a video in which Adam Scott, Director of Studies at the Competition Appeal Tribunal, provides training for judges on quantifying damages.

31. In the 35 damages awards, damages were quantified based on the following methods[36]:

– Comparison over time (also called "before-and-after"): 22 cases

– Comparison with an unaffected market (also called "yardstick"): 4 cases

– Cost-based and financial methods: 7 cases

– Regression analysis (also called "econometrics"): 0 cases

– Simulation model: 0 cases

– Other methods: 5 cases[37]

32. The method most frequently accepted by courts consists of comparing prices over time. It was used recently in order to calculate overcharges on paper envelopes or road signs. In one of the road signs cases, for instance, the court accepted an estimate comparing prices in 2003 (during the cartel period) with prices in 2010 (after the end of the cartel).[38]

When a comparison over time is employed, where is the counterfactual price to be found? In over 90% of the cases, it was found after the infringement. In only one or maybe two cases, it was found before the cartel started. And there is also one case in which the unaffected price was found during the cartel, as a price war took place. Useful guidelines on where in time to find a good benchmark have been given by several courts.[39]

33. None of the 35 positive overcharge estimates accepted or calculated by courts were drawn using regression analysis.[40] The results of regression models were, however, used or accepted in two cases in which no overcharge was found. In a case judged in November 2015, the Higher Regional Court of Frankfurt employed but-for prices which had apparently been calculated by a court-appointed expert with a regression model (in the course of other proceedings).[41] In another case judged in June 2018, the Commercial Court of Madrid seems to accept the absence of an overcharge concluded by an econometric model and other pieces of evidence.[42] There are also important developments on regression analysis in a recent judgment of the High Court of Justice of England and Wales.[43]

34. Court-appointed experts. Courts have appointed experts in 28 cases. They come from France (20), Hungary (6), Denmark and the Netherlands (1 each).[44] In nearly all cases, the role of experts consisted of assessing whether the claimant had suffered damages and quantifying their value.[45]

There are also several cases in which courts have refused to appoint experts, typically when they found that the likelihood of damages was not sufficiently proven.

35. Inputs from competition authorities. In the 35 damages awards, at least 15 damages estimates use publicly available data retrieved from the infringement decision (43%).[46] This seems to indicate that courts place particular value on such data, presumably for the reason that they see it as unbiased.[47]

Article 17 of the Directive 2014/104/UE allows courts to request from NCAs assistance with respect to the determination of the quantum of damage. No such intervention was found in any of the cases.[48]

36. Other types of harm. In most cartel damages actions, the only type of damages claimed is an overcharge. In a small number of cases, however, other types of harm have been alleged. A local authority claimed for example that its employees had wasted time renegotiating prices affected by bid-rigging. A buyer of capital goods alleged that the overcharge on such equipment also led to higher insurance costs. Another argued that, in the absence of any overcharge, it would have opted for an installation offering higher capacity, and was therefore deprived of volume and profit.

37. Contributory negligence. In roughly 20 cases, it was argued that the claimant was fully or partly responsible for the overcharge. The claimant could for example have organized an open tender, rather than a restricted one, or procured from a cheaper supplier. Generally, this argument did not convince the courts, with some exceptions.

---

36 For a detailed description of the various methods, *see* J.-F. Laborde, Cartel damages claims in Europe: How courts have assessed overcharges, February 2017, *Concurrences Review* No. 1-2017, Art. No. 83418. The total is greater than 35 because courts have employed in 3 cases both a comparison over time and a comparison with an unaffected market.

37 For a parallel with the methods used in cases of exclusion, *see* L. Prosperetti and I. Tomasi, Damages arising from exclusionary practices: the Commission's Practical Guide and the experience of European national courts, preliminary draft, 15 June 2016.

38 Douai Administrative Court of Appeal (France), 22 February 2018, No. 17DA00595.

39 *See* for example Bundesgerichtshof, 12 June 2018, KZR 56/16; OLG Düsseldorf, 26 June 2009, VI-2a Kart 2, 6/08 OWi; and S. Thomas, The German Federal Supreme Court rules on the methods for quantifying cartel profits (*Paper Wholesale-Cartel*), 19 June 2007, *e-Competitions Bulletin* June 2007, Art. No. 18142.

40 As explained in the Practical Guide, "*regression analysis is a statistical technique which helps to investigate patterns in the relationship between economic variables.*"

41 Higher Regional Court of Frankfurt, 17 November 2015, 11 U 73/11.

42 Commercial Court No. 11 of Madrid, 8 June 2018, ECLI: ES:JMM:2018:1232.

43 *Britned Development Ltd v. ABB AB and ABB Ltd* [2018] EWHC 2616.

44 Several German interlocutory judgments also envisage appointing an expert in the event that a settlement is not reached and damages need to be quantified.

45 In some countries, party-appointed experts are also expected to help the court; *see* Sir P. Roth, Actions for Damages: the Current State of Private Enforcement in the EU and France, conference organized at the Paris Court of Appeal, 29 March 2018, video available at https://www.concurrences.com/en/auteur/peter-roth (in French).

46 Or occasionally from another publicly available document provided by the Competition Authority.

47 *See* D. Bosco, L'accès aux preuves dans le cadre des actions mises en œuvre dans la sphère privée, in *L'intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, M. Béhar-Touchais, D. Bosco et C. Prieto (eds.), IRJS Editions, 2016, No. 38.

48 Such a request was recommended by a consulting judge at the Douai Administrative Court of Appeal, but her advice was not followed by the court.

38. Why claims were dismissed. It was suggested last year that this study should analyse the reasons why some claims were dismissed. In total, 88 such reasons were found.[49] They were grouped in 5 categories[50]:

– Legal reasons[51]: 21

– No wrongdoing: 12

– No harm proven: 29

– No causal link: 10

– Mitigation and passing-on: 16

Each of the above categories includes a number of subgroups. "*No wrongdoing*" includes for example the following situations:

– 5 cases in which the defendant was not an addressee of the infringement decision

– 3 cases in which the infringement decision was not final

– 2 cases in which the goods acquired by the claimant were found by the court to fall outside the product scope of the competition authority's decision

– 1 case in which the defendant was not a member of the cartel at the time of the claimant's purchase

– 1 case in which the cartel was discontinuously in operation

Two conclusions can probably be drawn from this analysis. First, it shows that cartel damages actions can be dismissed for a variety of reasons: 30 different kinds of reasons were found in total. Secondly, it confirms that proving harm is typically the greatest difficulty: this was the reason—or one of the reasons—for 48% of the dismissals.

39. Duration of cases and interest. In the 144 cases, the infringement decision came on average 7.3 years after the date of purchases; and the first civil judgment was handed down 4.5 years later. The total duration from the time the harm potentially occurred to the first judgment is therefore nearly 12 years on average—with however wide variations from one case to another.[52] This long duration explains why calculating prejudgment interest is an important issue in many cases.[53]

IV. Mitigation and passing-on

40. Guidelines on passing-on. The European Commission is writing "*Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser*." It was therefore decided to devote a section of this year's study to the topic of mitigation and passing-on.

41. Types of mitigation. In many cartel damages actions, defendants argued that claimants mitigated damages. Such alleged mitigation typically falls into three categories: mitigation through cost-cutting, mitigation through subsidies received or higher taxes levied, and mitigation through higher prices charged.

In this article, the term "passing-on" will be used exclusively to describe mitigation through higher prices.

42. Mitigation through cost-cutting. A buyer pays an overcharge. It reduces expenses in other domains. Were damages mitigated? Courts have assessed this situation in a small number of cases. Damages were not reduced. The Competition Appeal Tribunal explained for example that it does not "*consider that such costs savings can be regarded as a 'benefit' to be set off against the overcharge*." "*Any costs savings sought and achieved by* [the claimant] *would have been sought and would have been achieved whatever the level of the MIF*."[54]

43. Mitigation through subsidies or higher taxes. In nearly 20% of the cases, it was argued that damages were mitigated through subsidies received or higher taxes levied. The claimants in such cases were typically public transportation companies or local authorities. This argument has generally been unsuccessful.[55]

44. Passing-on. Passing-on was raised in 58 cases, representing 40% of all cartel damages actions covered by this study. This is a high proportion, as some cases are by nature ill-suited for invoking passing-on (for example when the claimant is a local government or an end consumer).

45. Invoked by defendants or by claimants. As explained in the Commission's draft guidelines, passing-on can be invoked by defendants but also by claimants.

The most frequent use of passing-on is the so-called "passing-on defence." A defendant argues in substance that the claimant may have suffered an overcharge, when buying affected goods or services, but reacted by increasing its own prices, thereby transferring the harm down the chain. In this sense, passing-on is invoked "*as a shield*" protecting the defendant.

49 Some actions were dismissed for more than one reason.

50 Sometimes categorizing reasons turned out to be difficult and possibly subjective. Moreover, the author is not a lawyer. The figures are therefore only indicative.

51 For example, statute of limitations, absence of liability of the parent company, improper assignment of claims, etc.

52 From less than two years to more than twenty.

53 *See* S. Carval, Les intérêts compensatoires : La réparation de la dimension temporelle des préjudices économiques, *Recueil Dalloz* 2017 p. 414.

54 *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated* [2016] CAT 11.

55 With a couple of exceptions; leaving aside some Hungarian cases in which public construction projects were structured in a specific manner.

Alternatively, sometimes claimants also argue that passing-on happened. Such claimants are typically indirect buyers. They have generally purchased cartelised goods from an intermediary, which itself procured from a cartel member. In order to prove harm, they need to demonstrate that the intermediary has passed on to them all or part of the overcharge. In this sense, passing-on is invoked by claimants "*as a sword*" against one or several defendants.

46. Passing-on raised by claimants. Passing-on was invoked by claimants in 10 cases.[56] It was accepted in 8 of these cases, for goods such as carbonless paper, cement, lysine, rails and trucks.

47. Passing-on raised by defendants. Passing-on was invoked by defendants in 57 cases.[57]

Proving the existence—or the absence—of passing-on is a challenge. In 34 cases, courts considered that adequate proof was not given. They include 27 cases in which defendants failed to prove that the harm was passed on,[58] and 7 cases in which claimants failed to prove that the harm was not passed on.[59]

In 6 cases, courts found that the overcharge was not passed on.[60] In 4 cases, courts found that it was, fully or partly.[61]

48. Causal link. In July 2016, the Competition Appeal Tribunal explained that proving passing-on required more than proving that the claimant had increased prices. "*The increase in price must be causally connected with the overcharge, and demonstrably so.*"[62]

There was often no evidence of such a causal link. The courts have reached this conclusion in 19 cases, including in two types of situations:

– When the affected goods represented a relatively minor cost for the claimant. In a claim that followed the retail food packaging Commission decision, it was considered for example that the price of packaged fish was more likely to be influenced by the price of fish than by that of foam trays.

– When the affected goods constituted for the claimant a cost amongst many others. In a claim that followed the rail cartel, the Higher Regional Court of Munich found no causal link between any overcharge and the prices charged to railway passengers. "*The pricing of tickets is, unlike the pricing regarding the resale of goods, in no direct relation to the purchase price for certain infrastructure, as a wealth of other factors are relevant—including, for example, personnel and energy costs*."[63]

49. Evidence. When assessing the likelihood of passing-on, courts have used economic theory (15 cases). They have also observed the claimant's price-setting processes (15 cases). Sometimes other means were found. In a judgment handed down on 31 May 2016, the Hanover Regional Court noticed inter alia that two old press releases—retrieved by the claimant—seemed to say that it could not pass on higher input costs.[64]

50. Mark-up. It is envisaged in at least one judgment that passing-on may magnify the initial overcharge, in the event that the direct buyer adds its own margin.

51. Difficulty of evaluating passing-on. The challenges of estimating passing-on have been acknowledged long ago.[65] The cases show that courts are indeed uncertain whether passing-on can really be quantified in some circumstances. German courts have questioned lately whether one could reliably estimate how much of a potential overcharge on trucks was passed on by a transportation and logistics company, a construction company, or other types of businesses. Guidelines from the Commission on what can realistically be estimated in such situations are likely to be useful.

52. Volume effect. As economists have often explained, a buyer of cartelised goods having managed to increase prices and pass on the whole of an overcharge would still suffer harm: due to the increase in prices, it would almost certainly sell lower quantities. This volume effect was invoked in 8 cases. It was found likely by courts in 7.[66]

56 A relatively small sample.

57 Only by defendants in 48 cases, both by claimants and defendants in 9 cases.

58 Many of these cases consist of German interlocutory or declaratory judgments; in these cases, the standard of proof is very high, as one would have to prove with a high degree of certainty that the harm was fully passed on.

59 As long as Article 13 of the directive 2014/104/EU does not come into force, the burden of proving passing-on is on defendants in some countries and on claimants in others.

60 Or was not entirely passed on when the judgment only established liability; sometimes the distinction between no passing-on and no proof of passing-on is not clear-cut.

61 *See* in particular Maritime and Commercial Court (Denmark), 15 January 2015, U-0004-07.

62 *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated* [2016] CAT 11.

63 Higher Regional Court of Munich, 8 March 2018, U 3497/16; "*Die Preisbildung bei Fahrtickets steht, anders als diejenige beim Weiterverkauf von Waren, in keiner unmittelbaren Relation zum Einkaufspreis für bestimmte Infrastruktur, sondern es ist eine Fülle anderer Faktoren - unter anderem Personal- und Energiekosten - dafür maßgeblich*."

64 Hanover Regional Court, 31 May 2016, 18 O 418/14.

65 *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

66 They come from Germany, Denmark, and Spain. In Italy and in the UK, there are also mentions of this effect in cases that are not cartel damages actions; *see* M. Tavassi, Le controversie civili in materia antitrust tra diritto nazionale e indicazioni della Direttiva 104/2014, 20 November 2015.

V. Highlights from recent cases

53. On 22 February 2018, the Douai Administrative Court of Appeal granted damages to a French local authority having acquired road signs.[67] The lower court had rescinded public procurement contracts for fraud,[68] and initially ordered the defendants to reimburse their entire value. The Administrative Court of Appeal found that a complete refund would create unjust enrichment, as the road signs would not be returned to the defendants. Damages were limited to the values of the overcharges, ranging from 20% to 58% of factual prices. Unusually, in this case the court accepted overcharge estimates that were prepared not by external experts, but by members of the claimant's organization.

54. On 27 April 2018, the Nantes Administrative Court of Appeal rejected appeals against another judgment awarding damages to a purchaser of road signs.[69] The judgment confirms that damages suffered by a buyer of cartelised goods correspond to the amount of the overcharge—it was argued by one of the defendants that the buyer had only "*lost a chance to contract at a lower price*." It finds that a cartel can continue to have effects after the end of the infringement, as long as contracts signed during the cartel period are not renegotiated. Finally, it states that an overcharge estimate mentioned in the competition authority's decision is by nature "*general*" and cannot measure the overcharge incurred on specific public procurement markets.

55. Between December 2017 and July 2018, German courts have given judgments in (at least) 8 damages actions following the Commission's decision on trucks. On 30 April 2018, one such judgment was handed down by the Stuttgart Regional Court.[70] The claimant was in this case a group of construction companies that had acquired trucks for their own use. The defendant was found to be liable for damages. Two points in this judgement are particularly interesting. First, the court considered it likely that the price of a truck acquired 9 months after the end of the cartel would still be affected. "*In the present case, the acquisition of the 12th vehicle took place approximately 9 months after the end of the infringement. However, it is to be assumed that the overcharged prices continued even to the time of this acquisition, since the present cartel was maintained for over 14 years, extending to the whole European Economic Area as well as to the leading European truck manufacturers, which suggests that a period of 9 months was required for the price level of the gross list prices to fall back to the market level.*"[71]

Secondly, when assessing passing-on, the court employed inter alia an unusual logic: it considered that the absence of claims from indirect buyers was by itself "*a strong indication that a passing-on of damages has not occurred to a relevant extent*."[72]

56. On 17 May 2018, the Austrian Supreme Court requested another preliminary ruling[73] from the Court of Justice of the European Union.[74] A public entity had granted subsidized loans for construction projects, some of which included elevators. It pleaded that without the cartel, it would have granted lower loans and invested this money elsewhere, and had therefore suffered loss caused by the cartel. The Supreme Court found that Austrian competition laws aim to protect direct market participants such as customers and suppliers, but not indirect stakeholders such as providers of loans and subsidies. As a result, it submitted to the CJEU the following question: "*Whether Article 85 EC, Article 81 EC or Article 101 TFEU are to be interpreted as meaning that in order to maintain the full effectiveness of these provisions and the practical effectiveness of the prohibition arising from these provisions, it is necessary that those who are not active on the relevant product and geographic market affected by a cartel as supplier or buyer, but grant loans to buyers of the products offered on the market affected by the cartel on favourable terms under the legal provisions as subsidizing bodies, and whose damage is that the loan amount granted in a percentage of the product costs was higher than it would have been without the cartel agreement, which is why they could not invest these amounts profitably, may still claim damages from the cartelists.*"[75]

57. On 21 May 2018, the Helsinki Court of Appeal dismissed an action brought by a large supplier of raw wood.[76] The claimant argued that, due to illegal exchanges of information amongst raw wood buyers, the prices that it received were below market prices.[77] Multiple econo-

---

67 Douai Administrative Court of Appeal, 22 February 2018 (3 judgments), No. 17DA00595, No. 17DA00507-17DA00509-17DA00511 and No. 17DA00561-17DA00562-17DA00563; appeals possibly lodged; case analysed with Joëlle Adda and Rafael Amaro; *see* J. Adda, R. Amaro and J.-F. Laborde, La réparation du dommage causé par les ententes horizontales devant le juge administratif, forthcoming.

68 In French "*dol*."

69 Nantes Administrative Court of Appeal, 27 April 2018, No. 17NT01719, 17NT01740, 17NT01741 and 17NT01770; appeals possibly lodged; case analysed with J. Adda and R. Amaro.

70 Stuttgart Regional Court, 30 April 2018, 45 O 1/17; appeal possibly lodged; *see* PaRR, German courts find truck makers liable for cartel damages, 20 June 2018.

71 "*Vorliegend fand der Erwerb des 12. Fahrzeugs ca. 9 Monate nach Beendigung der Zuwiderhandlung statt. Gleichwohl ist von einer Fortwirkung der Preisüberhöhung auch zum Zeitpunkt dieses Erwerbs auszugehen, denn das vorliegende Kartell wurde über 14 Jahre aufrechterhalten, bezog sich auf den gesamten Europäischen Wirtschaftsraum und die führenden europäischen Lkw-Hersteller, weshalb es nahe liegt, dass ein Zeitraum von mehr als 9 Monaten erforderlich war, um das Preisniveau der Bruttolistenpreise wieder auf Marktniveau sinken zu lassen.*"

72 "*Die Kläger bezüglich des Lkw-Kartells sind typischerweise direkte Abnehmer der Lkw, im Wesentlichen Spediteure oder, wie im vorliegenden Fall, Bauunternehmen. Klagen von den Abnehmern anderer Marktstufen, im vorliegenden Fall also von Bauherren, treten nicht oder jedenfalls nicht im nennenswerten Umfang auf. Bereits dies ist ein starkes Indiz, dass eine Weiterwälzung des Schadens nicht in relevantem Umfang erfolgt ist.*"

73 The CJEU *Kone* ruling on umbrella pricing also followed a request from the Austrian Supreme Court.

74 Oberster Gerichtshof, 17 May 2018, 9 Ob 44/17m; judgment analysed with Isabelle Innerhofer.

75 For the original text in German, *see* https://www.ris.bka.gv.at.

76 Helsinki Court of Appeal, 21 May 2018, S 16/2275; judgment analysed with Vilhelmiina Ihamäki and Toni Kalliokoski; a request for leave to appeal was made.

77 Market Court decision, 3 Dec. 2009, MAO:614/09, register No. 407/06/KR.

metric models were presented to the court, which went deep in assessing their content. Two figures illustrate the amount of evidence presented on the case. The main hearing organized by the court, during which the expert witnesses were heard, lasted more than 34 days. And the legal costs of defendants, which the claimant was asked to compensate, exceeded €12 million in total.[78]

58. On 29 May 2018, the Arnhem-Leeuwarden Court of Appeal stated that it intends to appoint three experts to give advice on damages suffered by an electricity grid operator having acquired gas-insulated switchgears.[79]

The claimant and the defendant disagreed on which type of method to use in order to estimate the overcharge. This turned into a disagreement on which profile the envisaged court-appointed expert should have. The defendant recommended selecting one with an accounting background; the claimant considered that an economic background would be more appropriate. The court decided to appoint experts with both profiles. For fear that the two could possibly fail to reach a shared conclusion, the court opted to add a third expert, choosing for this purpose a professor of corporate finance.

The court gave the experts two main tasks. First, they will have to assess whether an overcharge was incurred, and in which amount. Secondly, they will have to determine which method should be used in order to establish whether part of the overcharge was passed on in the past, and whether another part might also (very uncommonly) be passed on in the future.

59. On 6 June 2018, the Commercial Court No. 3 of Barcelona handed down judgment in one of the claims that followed the Spanish paper envelopes cartel.[80] When in cartel damages actions experts instructed by defendants present calculations of overcharges, the amount that they find is typically equal to zero. Not in this case: an expert report submitted by one of the defendants mentioned an overcharge on prices charged to large customers "*between 6.1% and 9.4%*."[81]

60. On 12 June 2018, the Federal Court of Justice handed down a judgment in a claim that followed the German cement cartel.[82] This judgment has attracted comments for some of its legal content, in particular on statute of limitations. It also provides or confirms important guidelines on how to assess cartel overcharges, in particular the ones that follow.

- "*As the Federal Court of Justice has already stated, it is an economic principle of experience that companies form cartels to increase their profits. Therefore, is it very likely that a cartel is formed and maintained because it results in higher prices than would be the case in the* [undistorted] *market*."[83]
- "*By this standard, a damage is also sufficiently likely with regard to transactions which occurred after the cartel had ended—at an unknown point in time in early 2002—until the end of that year. It can remain open whether the view of the Court of Appeal is correct, that the effects of a cartel generally only cease after one year*."[84]
- "*If the price level in a certain market is influenced to a large extent by a cartel, this can lead cartel outsiders to adapt their prices to the increased level. Such an effect is known as umbrella pricing and forms part of the damage caused by the cartel.*"[85]

61. On 27 June 2018, the Dortmund Regional Court returned another judgment following the trucks cartel.[86] In this case, the trucks had been acquired not directly from the defendant, but from an authorized dealer. According to the court, "*much seemed to say*" that an acquisition made from such a dealer should be treated "*like a direct acquisition from a cartel member*."[87] An authorized dealer was viewed by the court as being economically heavily dependent upon the manufacturer. It did not act with this manufacturer as a normal customer would. It could therefore essentially be considered "*a sales channel*."[88]

Interestingly, reference is made in this judgment to two foreign decisions, one from the Hoge Raad (the Netherlands) and the other from the Competition Appeal Tribunal (UK).

---

78 €8.5 million for the judgment of the Helsinki District Court, and €4 million for the judgment of the Helsinki Court of Appeal.

79 Arnhem-Leeuwarden Court of Appeal, 29 May 2018, ECLI:NL:GHARL:2018:4876.

80 Commercial Court No. 3 of Barcelona, 6 June 2018, ECLI: ES:JMB:2018:228; an appeal was lodged.

81 Perhaps this follows from an important judgment handed down in 2013 by the Spanish Supreme Court, in which it ruled: "(...) *it is not sufficient that the expert report submitted by the responsible party limits its content to question the accuracy of the quantification made by the expert report carried out at the request of the damaged party.*" It is "*necessary to provide a better-founded alternative quantification.*" *See* M. Pedraz Calvo and D. Ordóñez Solís, *El Derecho europeo de la competencia y su aplicación en España: liber amicorum en homenaje a Santiago Martínez Lage*, October 2014, Fundación Wolters Kluwer.

82 Federal Court of Justice (Bundesgerichtshof), 12 June 2018, KZR 56/16; judgment analysed with Thomas Funke and Alexander Romanowicz. On other important decisions of the Bundesgerichtshof, see *Wolfgang Kirchhoff, Der Beitrag des BGH zum private enforcement im Kartellrecht*, WuW 2017, 487–492.

83 "*Wie der Bundesgerichtshof bereits früher ausgesprochen hat, entspricht es einem wirtschaftlichen Erfahrungssatz, dass die Gründung eines Kartells grundsätzlich der Steigerung des Gewinns der am Kartell beteiligten Unternehmen dient. Deshalb spricht eine hohe Wahrscheinlichkeit dafür, dass das Kartell gebildet und erhalten wird, weil es höhere als am Markt erzielbare Preise erbring.*"

84 "*Nach dieser Maßgabe ist auch hinsichtlich der Erwerbsvorgänge, die im Zeitraum nach der Beendigung des Kartells zu einem nicht genau bekannten Zeitpunkt Anfang 2002 bis zum Ende dieses Jahres stattfanden, der Eintritt eines Schadens hinreichend wahrscheinlich. Ob die Auffassung des Berufungsgerichts zutrifft, die Nachwirkungen eines Kartells entfielen in der Regel erst nach einem Jahr, kann offen bleiben.*"

85 "*Wird das Preisniveau auf einem bestimmten Markt in erheblichem Umfang durch ein Kartell beeinflusst, kann dies dazu führen, dass auch Kartell-außenseiter ihre Preise dem erhöhten Niveau anpassen. Eine solche Wirkung wird als Preisschirmeffekt (umbrella pricing) bezeichnet und stellt ebenfalls einen kartellbedingten Schaden dar.*"

86 Dortmund Regional Court, 27 June 2018, 8 O 13/17; appeal possibly lodged; judgment analysed with Karin Gollan.

87 "*Aus Sicht der Kammer spricht zunächst einmal vieles dafür, den Erwerb von einem Vertragshändler unabhängig von dessen ggfs. fehlender gesellschaftsrechtlicher Verflechtung mit dem Kartellanten wie einen unmittelbaren Erwerb vom Kartellanten selber zu behandeln.*"

88 "*Ein Vertriebskanal.*"

62. On 10 August 2018, the Frankfurt-am-Main Regional Court dismissed a claim brought by the insolvency administrator of a German drugstore retail group.[89] Particularly interesting in this case is the issue of intra-group passing-on, and what it entails in terms of disclosure. The insolvency administrator represented the group's central purchasing unit. This unit, however, had resold goods to other group companies—and these companies were not parties to the claim.

– "*Damages have been shifted to an indeterminable extent to the other* [group] *companies.*"[90]

– "*The burden of proof for the offset of benefits* [passing-on] *lies with the cartel members. However, in accordance with the principles of the secondary burden of proof it was the responsibility of the plaintiff to present determinable facts. Since the specifics of the central sourcing and reselling within the group lies outside the defendants' sphere, the plaintiff can reasonably be expected to provide such evidence.*"[91]

– "*The chamber cannot decisively infer from the plaintiff's submission to what extent any cartel damages have remained with* [the central purchasing unit]*, or whether they have instead been passed on intra-group to other* [group] *companies.*"[92]

63. On 9 October 2018, the High Court of Justice handed down a much-awaited judgment—the first decision awarding damages in a cartel damages actions in the UK.[93] With 198 pages, the judgment provides many insights. It has an important section on regression analysis. It quantifies for the first time efficiencies and inefficiencies caused by a cartel. And it provides a number of guidelines to experts and economists, for example:

– "*Quantification of loss is not a question of mathematical calculation (although mathematical calculations will, no doubt, have their place), but turns on developing a robust understanding of what would have happened in the counterfactual case.*"

– "[The claimant's expert witness]*'s approach was clearly significantly more complicated than that of* [the defendant's expert witness] *and so inherently more prone to error.*"

– "*In my judgment, where there is a choice between using actual data and a proxy for that data, the former ought to be preferred.*"

There is also a short yet important section on interest. In this case, the claimant was exclusively financed by equity provided by its shareholders. Could such financing justify interest?

– "*Had BritNed incurred additional costs by reason of the overcharge—had it, for instance, been required to borrow additional money from a bank—that would have been a cost recoverable in these proceedings.*"

– "*The cost of the equity injection is one borne by the shareholders, and one which, in principle, ought to be recoverable by them. But they are not party to these proceedings.*"

64. This case was judged by Mr. Justice Marcus Smith. At a conference held a few days before the judgment, Sir Marcus Smith gave experts and economists an important piece of advice, which seems worth echoing in conclusion of this article: "*I fear that in competition cases we have lost sight of the critical distinction between fact and opinion.*" "*A rather strict evidential approach ought to be taken so as to make everyone appreciate, including the judge, that fact is different from expert opinion.*"[94] ■

89 Frankfurt am Main Regional Court, 10 August 2018, 2-03 O 239/16; an appeal was envisaged.

90 "*Vor diesem Hintergrund ist es zu einer Schadensverlagerung in nicht näher bestimmten Umfang auf andere X-Gesellschaften gekommen.*"

91 "*Die Darlegungslast für eine Vorteilsanrechnung trifft den Kartellanten. Nach den Grundsätzen der sekundären Darlegungslast oblag es vorliegend jedoch dem Kläger, insofern einen abgrenzbaren Sachverhalt vorzutragen. Denn während die Details zum gruppeninternen Warenbezug außerhalb der Wahrnehmungssphäre der Beklagten liegen, sind dem Kläger Angaben hierzu zumutbar.*"

92 "*Somit kann die Kammer dem Vortrag des Klägers nicht entnehmen, in welchem Umfang ein etwaiger Kartellschaden bei X verblieben oder nicht vielmehr intern an andere X-Gesellschaften weitergereicht worden ist.*"

93 *Britned Development Ltd v. ABB AB and ABB Ltd* [2018] EWHC 2616; the High Court gave BritNed and ABB permission to appeal.

94 GCR, Mr. Justice Marcus Smith calls for disclosure hearings for experts, 4 October 2018.

Concurrences

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

Editoriaux

Jacques Attali, Elie Cohen, Claus-Dieter Ehlermann, Jean Pisani Ferry, Ian Forrester, Eleanor Fox, Douglas H. Ginsburg, Laurence Idot, Frédéric Jenny, Arnaud Montebourg, Mario Monti, Gilbert Parleani, Jacques Steenbergen, Margrethe Vestager, Bo Vesterdorf, Denis Waelbroeck, Marc van der Woude...

Interviews

Sir Christopher Bellamy, Lord David Currie, Thierry Dahan, Jean-Louis Debré, Isabelle de Silva, François Fillon, John Fingleton, Renata B. Hesse, François Hollande, William Kovacic, Neelie Kroes, Christine Lagarde, Johannes Laitenberger, Emmanuel Macron, Robert Mahnke, Ségolène Royal, Nicolas Sarkozy, Marie-Laure Sauty de Chalon, Tommaso Valletti, Christine Varney...

Dossiers

Jacques Barrot, Jean-François Bellis, David Bosco, Murielle Chagny, John Connor, Damien Géradin, Assimakis Komninos, Christophe Lemaire, Ioannis Lianos, Pierre Moscovici, Jorge Padilla, Emil Paulis, Robert Saint-Esteben, Jacques Steenbergen, Florian Wagner-von Papp, Richard Whish...

Articles

Guy Canivet, Emmanuelle Claudel, Emmanuel Combe, Thierry Dahan, Luc Gyselen, Daniel Fasquelle, Barry Hawk, Nathalie Homobono, Laurence Idot, Frédéric Jenny, Bruno Lasserre, Luc Peeperkorn, Anne Perrot, Nicolas Petit, Catherine Prieto, Patrick Rey, Joseph Vogel, Wouter Wils...

Pratiques

Tableaux jurisprudentiels : Actualité des enquêtes de concurrence, Contentieux indemnitaire des pratiques anticoncurrencielles, Bilan de la pratique des engagements, Droit pénal et concurrence, Legal privilege, Cartel Profiles in the EU...

International

Belgium, Brésil, Canada, China, Germany, Hong-Kong, India, Japan, Luxembourg, Switzerland, Sweden, USA...

Droit & économie

Emmanuel Combe, Philippe Choné, Laurent Flochel, Frédéric Jenny, Gildas de Muizon, Jorge Padilla, Penelope Papandropoulos, Anne Perrot, Nicolas Petit, Etienne Pfister, Francesco Rosati, David Sevy, David Spector...

Chroniques

Ententes

Ludovic Bernardeau, Anne-Sophie Choné Grimaldi, Michel Debroux, Etienne Thomas

Pratiques unilatérales

Laurent Binet, Frédéric Marty, Anne Wachsmann

Pratiques commerciales déloyales

Frédéric Buy, Valérie Durand, Jean-Louis Fourgoux, Rodolphe Mesa, Marie-Claude Mitchell

Distribution

Nicolas Ereseo, Dominique Ferré, Didier Ferrier, Anne-Cécile Martin

Concentrations

Jean-François Bellis, Olivier Billard, Jean-Mathieu Cot, Ianis Girgenson, Sergio Sorinas, David Tayar

Aides d'État

Jacques Derenne, Bruno Stromsky, Raphaël Vuitton

Procédures

Pascal Cardonnel, Alexandre Lacresse, Christophe Lemaire

Régulations

Orion Berg, Hubert Delzangles, Emmanuel Guillaume

Mise en concurrence

Bertrand du Marais, Arnaud Sée

Actions publiques

Jean-Philippe Kovar, Francesco Martucci, Stéphane Rodrigues

Droits européens et étrangers

Walid Chaiehloudj, Sophie-Anne Descoubes, Marianne Faessel, Pierre Kobel, Silvia Pietrini, Jean-Christophe Roda, François Souty, Stéphanie Yon-Courtin

Livres

Sous la direction de Stéphane Rodrigues

Revues

Christelle Adjémian, Mathilde Brabant, Emmanuel Frot, Alain Ronzano, Bastien Thomas

Tarifs 2019

Abonnement Concurrences +

Devis sur demande
Quote upon request

Revue et Bulletin : Versions imprimée (Revue) et électroniques (Revue et Bulletin) (avec accès multipostes pendant 1 an aux archives)
Review and Bulletin: Print (Review) and electronic versions (Review and Bulletin)
(unlimited users access for 1 year to archives)

Conférences : Accès aux documents et supports (Concurrences et universités partenaires)
Conferences: Access to all documents and recording (Concurrences and partner universities)

Livres : Accès à tous les e-Books
Books: Access to all e-Books

Abonnements Basic

	HT Without tax	TTC Tax included
e-Bulletin e-Competitions | **e-Bulletin** e-Competitions		
☐ Version électronique (accès monoposte au dernier N° en ligne pendant 1 an, pas d'accès aux archives) *Electronic version (single user access to the latest online issue for 1 year, no access to archives)*	785,00 €	942,00 €
Revue Concurrences | **Review** Concurrences		
☐ Version électronique (accès monoposte au dernier N° en ligne pendant 1 an, pas d'accès aux archives) *Electronic version (single user access to the latest online issue for 1 year, no access to archives)*	565,00 €	678,00 €
☐ Version imprimée (4 N° pendant un an, pas d'accès aux archives) *Print version (4 issues for 1 year, no access to archives)*	615,00 €	627,91 €

Renseignements | Subscriber details

Prénom - Nom | *First name - Name* . . . . . .
Courriel | *e-mail* . . . . . .
Institution | *Institution* . . . . . .
Rue | *Street* . . . . . .
Ville | *City* . . . . . .
Code postal | *Zip Code* . . . . . Pays | *Country* . . . . . .
N° TVA intracommunautaire | *VAT number (EU)* . . . . . .

Formulaire à retourner à | Send your order to:

Institut de droit de la concurrence
68 rue Amelot - 75 011 Paris - France | webmaster@concurrences.com

Conditions générales (extrait) | *Subscription information*
Les commandes sont fermes. L'envoi de la Revue et/ou du Bulletin ont lieu dès réception du paiement complet. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of the Review and on-line access to the Review and/or the Bulletin require full prepayment. For "Terms of use", see www.concurrences.com.

Frais d'expédition Revue hors France 30 € | *30 € extra charge for shipping Review outside France*