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Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.)

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ABSTRACT

In its fourth edition, this study shows that national courts in Europe have handed down judgments in at least 239 cartel damages actions. These cases come from 13 countries, and they relate to more than 63 cartels. In these judgments, courts have given many insights on how to assess cartel overcharges.

Pour sa quatrième édition, cette étude montre que des jugements ont été rendus, par des juridictions nationales en Europe, dans le cadre d'au moins 239 actions en réparation consécutives à des ententes anticoncurrentielles. Ces affaires ont été jugées dans 13 pays. Elles font suite à plus de 63 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 the development of cartel damages actions in Europe (how many cases were judged, in which countries, with which outcomes, etc.). It was completed with the help of lawyers, law professors, economists, national competition authorities and national judges 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.

2. Section I describes the methodology followed. Section II provides general figures on the cases gathered. Section III analyses the award of damages and the reasons for dismissals. Section IV focuses on how courts have assessed cartel overcharges, and also passing-on. Finally, 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, except for one important addition. 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 European 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."¹ A "case" means an action for damages, with one or several plaintiffs alleging that a cartel caused an overcharge, and in which a court handed down at least one judgment on the merits. This includes three sets of judgments: judgments awarding damages, judgments establishing liability but not valuing the damages,² and judgments dismissing actions for lack of merit.

1 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.

2 Including interlocutory and declaratory judgments.

Some of the judgments analysed are not final. Sometimes this article refers also to judgments in cases other than cartel damages actions, or to judgments which are not judgments on the merits, when a specific part of their content is particularly interesting.

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. Cases dismissed on strictly formal grounds such as jurisdiction or statute of limitations are not included either.³

6. Counting cases. Counting cases required setting a rule for this purpose. Sometimes several judgments are similar. For example, on 5 September 2018 the Commercial Court of Barcelona handed down two judgments on actions that followed the Spanish paper envelopes cartel.⁴ These two judgments are counted as two distinct cases. When a large number of judgments are similar, however, an exception to this rule is made. For instance, on 20 October 2016, the Helsinki Court of Appeal gave 40 judgments in actions related to the Finnish asphalt 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 to represent a single case.⁵

7. Geographic coverage and research period. This research covers the pre-Brexit EU comprising 28 Member States, plus Norway and Switzerland. It was conducted for the most part between June and September 2019.⁶

8. Research process. The process employed for this research has four steps. The cases were 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 a critical role at all stages in this research. They are often lawyers, law professors and economists. 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 indicated that there had not yet been a suitable case in their

country.⁸ This year for the first time, lists of cases were also reviewed by national judges, and they were checked by national competition authorities (NCAs) on a broad scale.

In total, 140 lawyers, law professors and economists, 26 NCAs and 44 judges directly contributed to this study.

This research would not have been possible without the invaluable assistance of Lisa Abela, Philip Andrews, Tonia Antoniou, Anastasios A. Antoniou, Elena Apostolova, Rasmus Asbjørnsen, Ján Augustín, Georgiana Bădescu, Gergely Barabás, Daniel Barry, Matteo Bay, Hakim Boularbah, Helmut Brokelmann, Rino Caiazzo, Richard Camilleri, Danielle Carter, Antoine Choffel, Alessandro Comino, Georgeta Dinu, Aleksandra Dziurkowska, Pedro Faria, Marc Felix, James Flynn QC, Jaime Folguera Crespo, Rafael Fuentes Castro, Thomas Funke, Elizabeth Gautier, Macarena Geli Ramiro, Wessel Geursen, Carri Ginter, Anna Gulińska, Alfonso Gutiérrez, Dieter Hauck, Marco Hickey, Marwin Hildenbrand, Franz Hoffet, Helena Hofmann, Marek Holka, András Horváth, Sarah Houghton, Pavel Hristov, Marios Iacovides, Vilhelmiina Ihämäki, Tomáš Ilešič, Isabelle Innerhofer, Marius Juonys, Christoph Jürgens, Toni Kalliokoski, Johan Karlsson, Claus Kastberg Nielsen, Matej Kavčič, Jiří Kindl, Margarita Kontogeorgou, Mario Krka, Constantinos Lambadarios, Raquel Sofia Lemos, Guy Loesch, Moritz Lorenz, Palle Bo Madsen, Martin Mäesalu, Monika Mališauskaitė, David Mamane, Francisco Marcos, Tomas Maretta, Manos Mastromanolis, Paul McGarry SC, Kate McKenna, Liga Merwin, Henri Mizzi, Miguel Moura e Silva, Igor Mucalo, Gildas de Muizon, Rob Murray, Annalies Muscat, Martin Nedelka, Robert Neruda, Florian Neumayr, Irmantas Norkus, Andreea Opreșan, Peter Oravec, Raino Paron, Jasminka Pecotić Kaufman, Vladimir Penkov, Pavle Pensa, Javier Pérez Fernández, Peter Petrov, Richard Pike, Petra Joanna Pipková, Anna Piszcz, Tamás Polauf, Polina Polycarpou, Jolling de Pree, Roman Prekop, Laura Elena Radu, Jennifer Reeves, Francesca Richmond, Eszter Ritter, Alexandre Rouhette, Risto Rüütel, Richard Ryan, Anders Ryssdal, Marc Sansom, Marta Sendrowicz, Saadi Siddiky, Dace Silava-Tomsone, Mario Siragusa, Patrick Sommer, Miguel Sousa Ferro, Aleksander Stawicki, Dragomir Stefanov, Agnieszka Stefanowicz-Barańska, Christian Steinle, Valeriu Stoica, Magnus Strand, Pedro Suárez, Daivis Švirinas, Siri Teigum, Stefan Thomas, Ines Tomasi, György Tóth, Fabio Trevisan, Jon Turner QC, Stefan Tzakov, Dimitris Tzouganatos, Lumine van Uden, Raluca Vasilache, Weyer VerLoren van Themaat, Georg Weidenbach, Dirk Wiegandt, Frank Wijckmans, Iestyn Williams, Hanno Wollmann, Peter Wytinck, Janja Zaplotnik and Rasa Zaščiurinskaitė.

I am very thankful to the competition authorities who have reviewed and enriched lists of cases, including the Commission on Protection of Competition of Bulgaria,

³ With a few exceptions; cases in which the harm was not an overcharge also fall outside the scope.

⁴ Commercial Court of Barcelona, 5 September 2018, ECLI:ES:JMB:2018:2726 and ECLI:ES:JMB:2018:2725. See R. Allendesalazar, P. Martínez-Lage Sobredo, Spain: The Commercial Court of Barcelona grants damages to three entities in several follow-on claims based on a 2013 cartel decision from the Spanish Competition Authority, *Conurrences Review* No. 1-2019, Art. No. 89427, pp. 210–212.

⁵ Besides the 40 judgments of the Helsinki Court of Appeal, many judgments handed down on 31 August 2017 and later by the Helsinki District Court; 32 judgments handed down by the same court on 31 October 2017; 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 Judgments given after 31 August 2019 are not included.

⁷ Except for original judgments written in French.

⁸ Other sources such as online databases, competition law journals and news services were also used. Some contributors helped on other tasks.

the Croatian Competition Agency, the Commission for the Protection of Competition of the Republic of Cyprus, the Office for the Protection of Competition of the Czech Republic, the Estonian Competition Authority, the Finnish Competition and Consumer Authority, the French Autorité de la Concurrence, the German Bundeskartellamt, the Hellenic Competition Commission, the Irish Competition and Consumer Protection Commission, the Competition Council of Latvia, the Lithuanian Competition Council, the Luxembourg Competition Council, the Office for Competition of Malta, the Norwegian Competition Authority, the Romanian Competition Council, the Antimonopoly Office of the Slovak Republic, the Spanish National Commission on Markets and Competition and the Swedish Competition Authority.⁹

I would like to express my deep gratitude to the judges who have kindly contributed to this research, including Joëlle Adda, Santa Bernharde, Elske Boerwinkel, Marta Borges Campos, Marc Bosmans, Mads Bundgaard Larsen, Mark Chetcuti, Guido De Croock, Nathalie Dostert, Jovita Einikienė, Anthony Ellul, Karin Fløistad, Amélie Fort-Besnard, Théa Harles-Walch, Petra Hočevar, Wolfgang Kirchhoff, Marek Krzysztof Kolasinski, Nina Korjus, Villem Lapimaa, Irène Luc, Andrzej Maciejewski, Liam McKechnie, Krasimira Milachkova, Polona Mlakar Adam, Tibor Tamás Molnár, Andrea Moravčíková, Maria Mercedes Francisca Pedraz Calvo, Igor Periša, Ágnes Kovács Pethőné, Maja Praljak, Mira Raycheva, Derek Ridyrd, Tomáš Rychlý, Adam Scott, Ingeborg Simonsson, Ewa Stefańska, Michèle Stoffel, Iannis Symplis, Diana Ungureanu, Rudite Vīduša and Sabine Voelkl-Torggler. Other judges have also contributed to this study and are not named here.

10. European Commission and Association of European Competition Law Judges (AECLJ). Finally, I am grateful to the European Commission for having expressed interest in this study and for our fruitful exchanges. I am further indebted to the Association of European Competition Law Judges (AECLJ), and to its past and current Presidents Jacqueline Riffault-Silk and Marina Tavassi, for their encouragements and for the Association's non-financial support.

11. Limitations. This research is subject to three 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. 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 could bring to my attention any case of which I may not be aware.

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

12. Secondly, errors in interpreting the content of some judgments have possibly been made. 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 substance, a number of sources were used, including automatic translations, expert analysis from contributors or articles describing the content of some of the judgments. But as I could not read the original (untranslated) text of many judgments, I cannot completely exclude the possibility that I may have misunderstood part of their content.

13. Third, the figures provided in this study should be considered only as indicative. The judgments analysed represent in total approximately 9,000 pages. Dozens of criteria have been screened in each judgment—whether there was any mention of umbrella pricing, of passing-on, of econometrics, etc. At times, I have probably failed to notice the presence of some criteria in some judgments.¹¹

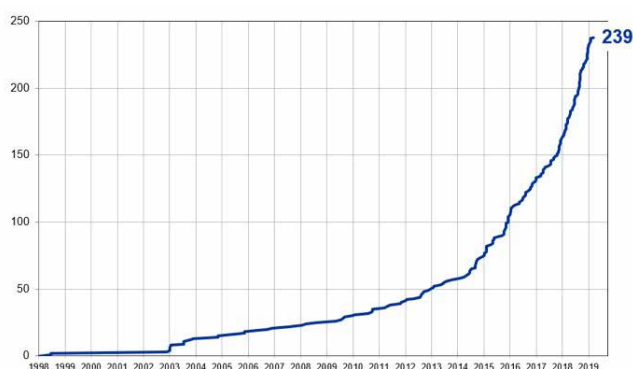
14. Observations made last year. Finally, a number of observations reported in last year's edition of this study are still valid. They are often not repeated in this article.

II. General figures

15. Number of cases. In the 30 European countries covered, 239 cartel damages actions have been identified. They include 59 cases in which damages were awarded, 86 cases in which liability was established, and 93 cases that resulted in dismissals.¹²

The number of cases is growing rapidly. There were for example 52 cases judged for the first time in 2018, compared with 24 in 2017.

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



¹⁰ The author's working languages.

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

¹² One case is also pending after a judgment was quashed. Claims awarding a token sum of one euro are considered dismissed. The total number of cases is possibly understated: there are indications of 23 additional recent Spanish cases for which copies of judgments could not be obtained.

16. Number of judgments. The 239 cases represent in total 368 relevant judgments. As part of this study, 359 of these judgments have been collected, translated if necessary, and analysed. Half of these judgments have been given since January 2017.

17. Countries. The cases come from thirteen countries: Germany (122 cases), France (46 cases),¹³ Spain (33 cases),¹⁴ Hungary (7 cases), the Netherlands (6 cases), Italy (5 cases), Belgium and Finland (4 cases each), Austria and Denmark (3 cases each), Greece, Poland and the United Kingdom (2 cases each).

18. United Kingdom. The small number of cases from the UK does not reveal the true size of London as a competition litigation forum. 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 European Commission decisions. Most such actions were, however, settled before any judgment on the merits. Nevertheless, important insights on how to assess overcharges can be found in various documents provided by British courts, including the judgments accounted for in this study, judgments in cases in which the infringement was not a cartel,¹⁵ and transcripts of some case management conferences.¹⁶

19. Other countries. In a number of other countries, national courts have not yet judged on the merits any cartel damages action, but related developments have been noticed.

- In Lithuania, on 20 December 2018, the Vilnius Regional Court stayed proceedings in a follow-on action.¹⁷
- In Malta, on 27 June 2019, the First Hall Civil Court rejected several actions.¹⁸
- In Norway, on 4 December 2018, the Borgarting Court of Appeal ruled on a matter of jurisdiction.¹⁹
- In Slovakia, on 15 October 2018, another ruling on jurisdiction was given by the Supreme Court of the Slovak Republic.²⁰

13 For an overview of French cases, see R. Amaro, J.-F. Laborde, *La réparation des préjudices causés par les pratiques anticoncurrentielles*, Concurrences, March 2019. See also R. Amaro's biannual articles on *Private enforcement of antitrust law in France*, Concurrences Review.

14 The number of cases in Spain is possibly understated: there are indications of 23 additional recent Spanish cases for which copies of judgments could not be obtained.

15 For example, *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others* [2016] CAT 11.

16 For example, *Royal Mail Group Limited v. DAF Trucks Limited and Others*, 21 November 2018, available at <https://www.catribunal.org.uk>, or *Emerald Supplies Limited & Others v. British Airways PLC*, 13 October 2015.

17 Civil case No. e2-3410-803/2018. This judgment was upheld by the Court of Appeal of Lithuania, 18 April 2019, civil case No. e2-436-302/2019.

18 Cases 609 to 612/2017. The Maltese Office for Competition submitted to the court a report as to whether there was an infringement. The court found that defendants were part of the same economic unit, and for this reason fell outside the scope of legal provisions against collusive agreements. Cases analysed with Richard Camilleri and Annalies Muscat.

19 Reference LB-2018-136341. The case was apparently taken to the Supreme Court.

20 Reference number 3Ndob/6/2018. There were also two other actions before the District Court of Bratislava II, 16 October 2018, 42CbHs/1/2018, and 5 November 2018, 51CbHs/1/2018.

– In Sweden, on 8 March 2019, the Swedish Patent and Market Court ruled on a case whereby companies related to the same group asked for a negative declaratory judgment.²¹

– Finally, in Switzerland, on 14 June 2019, the canton of Graubünden announced in a press release that it had settled damages with road construction companies that were subject to an investigation by the Competition Commission.²²

20. Infringement decisions. Of the 239 cases, 57% followed an infringement decision made by a national competition authority, 40% followed a European Commission decision, and only 2% were stand-alone actions.²³ There is also one case in which the infringement decision came from a regional competition authority.

Courts have decided on cartel damages actions that followed at least 63 infringement decisions.²⁴

21. Claimants: direct and indirect purchasers. About 75% of the actions were brought by direct purchasers.²⁵ However, the proportion of cases brought by indirect purchasers is now 20%, and this number is growing. This trend is fuelled by actions brought by purchasers of trucks, as trucks were often procured from independent dealers or leasing companies.

Sectors of claimants. Many claimants come from a broadly defined public sector. Publicly owned companies (53 cases), local authorities (49 cases), and central governments (8 cases) initiated in total 45% of the claims.

Privately owned companies initiated 115 claims. They come from a variety of sectors: transportation and logistics (at least 34 cases), retail and wholesale (18 cases), construction and real estate (12 cases), agriculture and agribusiness (10 cases), consumer goods and consumer durables (9 cases), etc.²⁶

Finally, 6 cases were brought by end consumers, 5 by claims vehicles, and 10 by other types of claimants.

22. Tendering. As already highlighted last year, in a relatively high proportion of cases (47%), the allegedly affected purchases resulted from tendering processes.

21 Case PMT 10900-18. The judgment was upheld by the Patent and Market Appeal Court, 14 June 2019, case PMÖ 3481-19.

22 As a consequence of the settlement, the companies will be allowed to participate in future tender proceedings organized by the Canton. See PaRR, Swiss region settles road repair cartel damages amid ongoing probe, 17 June 2019.

23 Most stand-alone cases correspond to civil actions brought before French criminal courts.

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

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

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

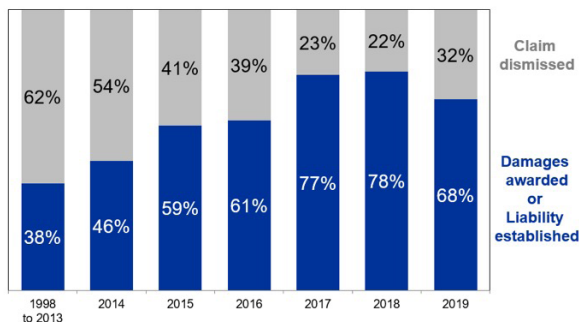
III. Damages awards and reasons for dismissals

23. Damages awards. Cartel damages have been awarded in 59 cases.²⁷ They come from France (23 cases), Spain (21 cases), Germany (8 cases), Denmark (3 cases), Austria, Finland, Italy and the UK (1 case each).²⁸

Particularly in Germany, the number of damages awards is slightly misleading. It should not lead to the conclusion that German courts are prone to dismiss actions for cartel damages. In 70 other cases, German courts have handed down interlocutory or declaratory judgments in which they have affirmed the liability of defendants without quantifying damages.²⁹

24. Rate of success. The rate of success of cartel damages actions has evolved significantly in recent years. For this analysis, an action is considered successful if damages were awarded or liability was established.³⁰ As shown in figure 2, the proportion of such cases has grown substantially from 2013 to 2018. In 2019, it has decreased slightly.

Figure 2. Outcomes of judgments, by year of judgmenta



Changes in the rate of success appear to be determined, at least partially, by the nature of the cases judged. Between 2015 and 2018, there were two large waves of cases, one following the road signs cartel in France and the other following the rail cartel in Germany. Actions belonging to these two waves have often been successful.

²⁷ This number does not include cases in which a lower court awarded damages and a court of appeal quashed the judgment.

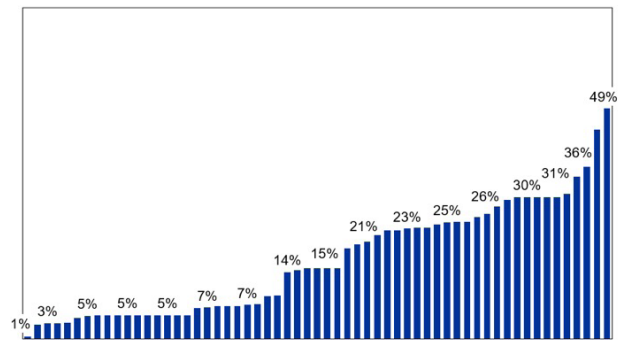
²⁸ Leaving aside two Dutch cases in which damages were awarded by a lower court and experts were appointed by a court of appeal.

²⁹ It seems that such decisions are often followed by a settlement.

³⁰ It is considered unsuccessful when the claim was dismissed.

25. Figures on overcharges. A rate of overcharge could be calculated or estimated for each of the 59 awards of damages.³¹ 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.³² The lowest overcharge is less than 1%, and the highest reaches 49%.³³

Figure 3. Cartel overcharges in damages awards



The average of the 59 overcharges is 17%, and the median is 15%.³⁴

The total value of the damages awards is nearly €180 million. In 2018, courts awarded €32 million in 23 judgments.³⁵

26. Why actions were dismissed. In total, 93 actions were dismissed. As an action can be dismissed for several reasons, a total of 131 reasons were found. They were grouped into 5 categories:³⁶

- Legal reasons:³⁷ 32
- No wrongdoing: 21
- No harm proven: 44
- No causal link: 12
- Mitigation and passing-on: 22

Each of the above categories includes a number of subgroups. “No harm proven” includes for example the following situations:

³¹ The data was usually taken directly or indirectly from judgments; sometimes relevant information was found from other sources. Four percentages were determined by reference to a contractual clause.

³² 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.

³³ The previous editions of this study reported overcharges of 58%. As appeals are ongoing in the related cases and experts were appointed by the court, these percentages are not mentioned in this edition.

³⁴ As some of the judgments are not final, these figures could change.

³⁵ This amount varies greatly from one year to another.

³⁶ Sometimes categorizing reasons turned out to be difficult and possibly subjective. Moreover, the author is not a lawyer. These figures are therefore particularly approximative.

³⁷ Leaving aside actions rejected exclusively on jurisdiction or statute of limitation. For example, absence of liability of the parent company, improper assignment of claims, declaratory action found to be inadmissible, etc.

- 30 instances in which no overcharge was proven
- 9 instances in which the alleged purchases were not proven
- 2 instances in which the court found that there was no overcharge
- 3 instances with other reasons³⁸

Three reasons for dismissals have been more frequently noticed this year:

- No wrongdoing: the defendant was not an addressee of the infringement decision
- No harm: the alleged purchases were not proven
- Passing-on: an indirect buyer, the claimant failed to prove that the alleged overcharge was passed on to him or her

IV. Assessments of overcharges and passing-on

27. Practical Guide. The European Commission published in June 2013 the Practical Guide on Quantifying Harm in Actions for Damages. This document describes methods considered by the Commission to be potentially suitable for assessing damages caused by competition law infringements.³⁹ It is referred to in many judgments. In some instances, judges have rejected quantifications of damages for the reason that these quantifications employed methods that were not listed in the Practical Guide.⁴⁰

28. Methods accepted by courts. Courts have now been exposed to all major types of methods described in the Practical Guide. In the 59 damages awards, damages were quantified with the following methods:⁴¹

- Comparison over time (also called “before-and-after”): 31 cases
- Comparison with an unaffected market (also called “yardstick”): 4 cases
- Cost-based and financial methods: 9 cases
- Regression analysis (also called “econometrics”): 0 cases
- Simulation model: 0 cases
- Other methods: 19 cases⁴²

³⁸ No amount of overcharge claimed, purchases made before the infringement, no profit lost.

³⁹ 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.

⁴⁰ See for example Bundesgerichtshof, 9 October 2018, KRB 10/17, or Commercial Court of Valencia, 20 February 2019, ECLI:ES:JMV:2019:34.

⁴¹ 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, pp. 36–42. The total is greater than 59 because courts have employed in 4 cases a combination of two methods.

⁴² 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.

29. The method most frequently accepted by courts consists of comparing prices over time. This approach was found in particular in Austrian, French, German, Italian and Spanish judgments. For example, in November 2018, when appointing an expert, the Ghent Commercial Court requested that he would compare prices during the infringement period with prices from both before and after.⁴³ In February 2019, in an action that followed the Animal Feed Phosphates cartel, the Paris Court of Appeal also tasked an expert with comparing prices during and after the infringement.⁴⁴

When a comparison over time is employed, where is the counterfactual price to be found? In over 90% of cases, it was found after the infringement. There appears to be two reasons for this choice. First, it is in general relatively clear when an infringement ceased, but it is sometimes less certain when it precisely started. Secondly, when the infringement lasted a long time, finding data on prices which prevailed before it began can be a challenge.

30. Comparisons with unaffected markets. Comparisons with unaffected markets are rarely employed in cartel damages actions. In a small number of cases, claimants found a counterfactual scenario in a different country. But courts often challenged whether the choice of that particular country was truly appropriate. Recently for example, the Commercial Court of Pontevedra questioned the suitability of a counterfactual found in Mexico, considering that the US or Japanese markets appeared to have more in common with those in Europe. In practice, most comparisons with unaffected markets that have been accepted have compared prices from different regions of the same country.

31. Regression analysis. None of the 59 positive overcharge estimates accepted or calculated by courts were drawn using regression analysis.⁴⁵ However, the results of regression models were used in a case in which no overcharge was found.⁴⁶ In another recent judgment, the Paris Administrative Court of Appeal took into consideration an econometric study in order to reach the conclusion that there was harm, and appointed an expert to determine its amount with precision.⁴⁷

32. Other methods. In ten Spanish cases, courts have estimated a percentage of overcharge, often by reference to statistics found in the Practical Guide. In four German cases, they have accepted the use of a predefined

⁴³ Ghent Commercial Court, 22 November 2018, A/17/01498.

⁴⁴ Paris Court of Appeal, 6 February 2019, RG 17/04101. See R. Amaro, Le contentieux de la réparation des pratiques anticoncurrentielles (sept. 2018 – juin 2019), September 2019, *Concurrences Review* No. 3-2019, Art. No. 91222, pp. 230–246. See also A. Ronzano, Prescription: The Paris Court of Appeal disregards the prescription period and recognizes the existence of an injury arising from the anti-competitive practice of the cartel of phosphates for animal food, 6 February 2019, *Concurrences Review* N° 2-2019, Art. N° 89554.

⁴⁵ As explained in the Practical Guide, “regression analysis is a statistical technique which helps to investigate patterns in the relationship between economic variables.”

⁴⁶ Higher Regional Court of Frankfurt, 17 November 2015, 11 U 73/11.

⁴⁷ Paris Administrative Court of Appeal, 13 June 2019, No. 14PA02419. The author was involved in the case.

percentage stipulated in a contractual clause.⁴⁸ There are also cases in which courts have referred to figures found in witness statements, to the profit made by the infringer, or to the amount paid by the winner of a rigged bid to another participant in the tender.

33. Proof of purchases. In cartel damages actions, evaluating damages often requires multiplying an amount of affected purchases by a percentage of overcharge. Most of the literature on quantifying harm deals with the second parameter—namely, the rate of overcharge. However, in many recent cases, defining and proving the amount of affected purchases were also important issues. The Arnhem-Leeuwarden Court of Appeal recently confirmed for example an earlier judgment dismissing a claim because proper information on purchases had not been provided. “[The claimant] *should have provided specific information—already requested at first instance by the defendants—regarding the question which healthcare institution had purchased which goods or services, when, from which [product] manufacturer, for which amount, and [the claimant] should have submitted data to the proceedings, preferably together with copies of the agreements underlying the alleged expenditure of the healthcare institutions to (continue to) comply with its duty to state reasons.*”⁴⁹

In another recent judgment, the Regional Court of Stuttgart considered that a claimant should not have destroyed evidence on purchases after the end of the legal retention period. When this period ended, the claimant was or should have been aware of the infringement, the competition authority’s decision having been published.

34. Passing-on. Passing-on was a central theme in last year’s edition of this study.⁵⁰ Many of last year’s findings are unchanged and are not restated in this edition.

35. Passing-on invoked by defendants.⁵¹ Passing-on was raised as a defence in 126 cases, representing 53% of all cartel damages actions covered by this study. This is a high proportion, having in mind that some cases are by nature ill-suited for invoking passing-on (for example when the claimant is a local government or an end consumer).

48 Such clauses typically specify that, in the event of anticompetitive practices, the amount of harm would be presumed to be a certain percentage of purchases. There are many references to such clauses in actions brought by members of the German public sector.

49 Arnhem-Leeuwarden Court of Appeal, 5 February 2019, ECLI:NL:GHARL:2019:1060. “Zoals volgt uit hetgeen hiervoor is overwogen, diende [the claimant] haar stelling dat ieder van de achterliggende partijen daadwerkelijk is geschaad als gevolg van het kartel, gegeven ook de bewijzing daarvan door geïntimeerden, in ieder geval (alsnog) te onderbouwen met - door geïntimeerden reeds in eerste aanleg verzochte - concrete informatie met betrekking tot de vraag welke zorginstelling wanneer welke zaken of diensten van welke [product]fabrikant voor welk bedrag heeft afgenomen, en had [the claimant] deze gegevens in het geding moeten brengen, bij voorkeur tezamen met kopieën van de overeenkomsten die aan de beweerde bestellingen van de zorginstellingen ten grondslag liggen om aan haar motiveringsplicht te (blijven) voldoen.”

50 J.-F. Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.), February 2019, *Concurrences Review* No. 1-2019, Art. No. 88877.

51 In this article, the term “passing-on” describes exclusively the situation in which a buyer of cartelized goods or services reacts to an overcharge by increasing its own prices, thereby “passing on” all or part of the overcharge to its customers.

36. Last year’s study showed that proving the existence—or the absence—of passing-on is typically a challenge. Recent observations confirm this finding. Of all the cases, there seems to be only four in which courts have found that all or part of an overcharge was passed on by claimants to their customers.⁵² It will be interesting to observe whether the publication of the European Commission’s *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* will affect the number of future cases in which courts consider passing-on to be proven.⁵³

37. Passing-on and trucks. In actions brought by purchasers or users of trucks, two specific issues on passing-on were found:

- In the event that the trucks were procured by the claimant from an independent dealer, or from a leasing company, should it be presumed that such intermediaries passed on the alleged overcharge to the claimant, or should it be proven?
- In the event that the claimant resold one or several trucks second-hand, should it be considered that all or part of the alleged overcharge was possibly passed on through this transaction?

38. How the intensity of competition affects passing-on. Claimants often argue that intense competition prevented them from passing on any overcharge. The logic is intuitive: they explain that, if they were to decide to pass on all or part of the cost increase, they would lose business to competitors who would decide otherwise. Economists typically disagree with this logic: they observe that firms operating in highly competitive markets only earn very small returns, and are compelled to pass on cost increases if they want to survive. Are we to trust claimants or economists? Some answers are to be found in empirical research published in July 2019 and titled “Competition and Pass-Through: Evidence from Isolated Markets” (C. Genakos and M. Pagliero).⁵⁴

39. Duration of cases and interest. In the 239 cases, the infringement decision came on average 8.4 years after the date of purchases; and the first civil judgment was handed down 4.2 years later. The total duration from the time the harm potentially occurred to the first judgment is therefore 12.6 years on average—variations range, however, from less than 3 years to more than 20. This long duration explains why prejudgment interest is often an important topic.⁵⁵

52 Leaving aside cases in which courts found that part of an overcharge on a truck was passed on when this truck was resold second-hand; also leaving aside many (sometimes old) cases in which claimants failed to prove that they had not passed on an overcharge. The passing-on defence seems particularly difficult to employ in German interlocutory or declaratory judgments, as one would apparently have to prove that the harm was entirely passed on.

53 *Official Journal of the European Union*, C 267, 9 August 2019.

54 Centre for Economic Performance, discussion paper n° 1638, accessible at <http://cep.lse.ac.uk/pubs/download/dp1638.pdf>.

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

On prejudgment interest, two judgments deserve particular attention. In *BritNed Development Ltd v. ABB AB and ABB Ltd*, the court analysed whether damages should be awarded for the cost of equity, and to whom.⁵⁶ In *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others*, the court defined the circumstances in which the weighted average cost of capital (WACC) may or may not be an appropriate rate of interest.⁵⁷

40. Handling of confidential information. During the summer 2019, the European Commission held a public consultation on the protection of confidential information in private enforcement cases. Issues related to the confidentiality of information were found on several occasions in recent judgments. On 12 July 2018, for example, the Lyon Administrative Court observed that a report provided by a court-appointed expert was partially based on information which had not been properly communicated to the defendant.⁵⁸ On 13 March 2019, the Commercial Court of Valencia also noticed that data employed by one of the defendants' advisors was not made available to the claimant or to the court.⁵⁹

V. Highlights from recent cases

41. In total, 104 judgments handed down between July 2018 and August 2019 have been compiled and analysed. Of course, this section can only provide a limited overview of this rich material.

Appeals were possibly lodged against some of the decisions mentioned below.

42. On 11 October 2018, the Nürnberg-Fürth Regional Court gave judgment in an action brought by a purchaser of colour picture tubes (CPTs).⁶⁰ The judgment deals in particular with umbrella effects. In actions that followed for example the rail cartel, German courts have often considered such effects likely. Contrastingly, in this case the court found umbrella effects unproven. It was uncertain in particular whether the market coverage of the cartel was sufficient for such effects to take place. Limited price transparency in the market for CPTs also made umbrella effects less likely. Additionally, the judgment includes an interesting section on the conditions under which a claimant should obtain compensation for the costs of an expert opinion.

⁵⁶ *BritNed Development Ltd v. ABB AB and ABB Ltd* [2018] EWHC 2616 (Ch).

⁵⁷ *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others* [2016] CAT 11.

⁵⁸ Lyon Administrative Court, 12 July 2018, No. 1307012.

⁵⁹ Commercial Court of Valencia, 13 March 2019, ECLI:ES:JMV:2019:187.

⁶⁰ Nürnberg-Fürth Regional Court, 11 October 2018, 19 O 8786/15.

43. On 20 November 2018, The Pécs Court of Appeal dismissed a claim brought by alleged purchasers of trucks.⁶¹ The claimants referred to the Hungarian rebuttable presumption that cartels cause a 10% overcharge. The court found that the claimants failed to provide proper proof of purchases, including for example purchase agreements, invoices or vehicle registration documents.

44. On 21 November 2018, the Competition Appeal Tribunal held a case management conference on actions brought by alleged victims of the trucks cartel. The transcript of this conference describes extensively what kind of information on alleged purchases is likely to be relevant in these actions. It also provides thoughts on passing-on, both upstream and downstream.⁶²

45. On 11 December 2018, the German Federal Court of Justice handed down judgment in an action that followed the German rail cartel.⁶³ This judgment has attracted comments on some of its legal content and in particular on what it says about presumptions. It also provides criteria which German courts are likely to use in the future in order to assess the existence and the level of cartel overcharges. “*Whether and to what extent cartel collusion has an effect on prices is influenced by a variety of factors: the number of market participants, the number of undertakings participating in the collusion, their ability to exchange the information necessary for the implementation of the collusion, the share of market coverage, the degree of cartel discipline and the ability of the other side of the market to meet its needs otherwise or to take other countermeasures. The influence of these factors can be subject to significant changes, especially when collusion is practiced over a longer period. In particular, it should not be overlooked that the agreements are entered into by undertakings which in principle pursue their own interests and do not always want to comply with cartel discipline.*”⁶⁴

Importantly, the Federal Court of Justice seemed to encourage courts to recognize that one cartel may not create one but several levels of overcharges. “*Cartel agreements which have existed for a long period and are meant to cover a large geographic area are likely to be of varying intensity over time and space.*”⁶⁵

⁶¹ Pécs Court of Appeal, 20 November 2018, Gpkf.IV.45.156/2018/2.

⁶² The transcript of the CMC is available at <https://www.catribunal.org.uk/cases/12845718-t-royal-mail-group-limited>.

⁶³ Federal Court of Justice (Bundesgerichtshof), 11 December 2018, KZR 26/17. Judgment analysed with Thomas Funke and Christoph Jürgens.

⁶⁴ “*Ob und gegebenenfalls in welchem Umfang wettbewerbsbeschränkende Absprachen einen Preiseffekt haben, wird von einer Vielzahl von Faktoren beeinflusst, etwa der Anzahl der Marktteilnehmer, der Zahl der an den Absprachen beteiligten Unternehmen, ihren Möglichkeiten, die für die Umsetzung der Absprachen erforderlichen Informationen auszutauschen, dem Anteil der Marktdeckung, dem Grad der Kartelldisziplin und den Möglichkeiten der Marktgegenseite, ihren Bedarf anderweitig zu decken oder sonstige Gegenmaßnahmen zu ergreifen. Der Einfluss dieser Faktoren kann, gerade wenn es - wie hier - um wettbewerbsbeschränkende Absprachen geht, die sich über einen längeren Zeitraum erstrecken, erheblichen Veränderungen unterliegen. Insbesondere darf nicht aus dem Blick geraten, dass die Absprachen von Unternehmen getroffen werden, die grundsätzlich jeweils ihre eigenen Interessen verfolgen und nicht durchweg bereit sein müssen, sich der Kartelldisziplin zu fügen.*”

⁶⁵ “*Gerade bei Kartellabsprachen, die sich über einen längeren Zeitraum erstrecken und ein großes Gebiet abdecken sollen, ist zudem damit zu rechnen, dass sie zeitlich und räumlich unterschiedliche Intensität aufweisen.*”

46. On 28 January 2019, the Paris Commercial Court ruled on disclosure in an action brought by a food retailer. The judgment clarifies how the burden of proving passing-on was modified in France by the Directive 2014/104/EU. It also seems to indicate that the court will consider this matter important. “*Quantifying pass-on constitutes a critical element to appreciate whether [the claimant] has suffered harm as a result of the infringement.*”⁶⁶

47. On 6 March 2019, The Higher Regional Court of Düsseldorf confirmed the dismissal of an action brought by a transportation and logistics company.⁶⁷ Echoing the observation of the Federal Court of Justice quoted above, the judgment suggests that a cartel spanning across the European Economic Area (EEA) potentially had different effects in different countries.

48. On 4 April 2019, the Higher Regional Court of Stuttgart handed down a rich judgment in a case initiated by a purchaser of trucks.⁶⁸ This judgment deals in particular with the following issues:

- Whether, when the infringement started, its potential effects began immediately or with a delay
- Correspondingly, whether such effects stopped on the day the infringement ceased or continued for a period of time afterwards
- In which circumstances requiring disclosure from a claimant would be considered by the court to be proportionate
- Whether claims brought by indirect purchasers provide an indication of the likelihood of passing-on

49. On 10 April 2019, the Higher Regional Court of Karlsruhe handed down judgment in an action that followed agreements on dishwasher detergents.⁶⁹ Referring to the Study on the Passing-on of Overcharges, the judgment includes a rich section on passing-on.⁷⁰ It also touches briefly upon the interesting question of whether an agreement to reduce pack sizes causes harm similarly or not to an agreement on prices.

50. On 7 May 2019, the Arnhem-Leeuwarden Court of Appeal handed down an interim judgment in an action that followed the cartel for gas-insulated switchgear

projects.⁷¹ Ensuring consistency across judgments given in parallel actions has often been considered an important topic in cartel damages actions. Various means have been employed in various countries, including for example the specialization of courts or the grouping of cases. In this instance the Arnhem-Leeuwarden Court of Appeal intends to explore a different option: it will attempt to use in one action the content of expert advice mandated previously by the court in another parallel action.⁷²

51. On 7 May 2019, the Commercial Court of Valencia handed down judgment in an action brought by the purchaser of a truck.⁷³ Analysing passing-on, the judgment refers to a list of cases judged by foreign courts, including the Dortmund and the Hannover Regional Courts, the Federal Court of Justice, the Competition Appeal Tribunal and Dutch courts.

52. On 15 May 2019, the Amsterdam District Court described in an interim judgment the kind of purchase information that the court will expect from claimants having allegedly suffered overcharges on trucks—including “when, how and from whom” the trucks were purchased, rented or leased.⁷⁴ When setting its own requirements, the Dutch court referred explicitly to comparable ones described a few months earlier in a German judgment.⁷⁵

53. On 18 June 2019, The Commercial Court of Alicante awarded damages to a purchaser of trucks.⁷⁶ There are not many judgments in which several rates of overcharges are employed. In this one, two different levels of overcharges were estimated, depending on whether the purchases were made before or during the financial and economic crisis which started in September 2008.

54. On 22 July 2019, the Lyon Administrative Court awarded damages to a toll-road operator having acquired road signs.⁷⁷ Based on the report submitted by a court-appointed expert, the court found in this case that the overcharge was partly passed on. The extent of passing-on was determined by reference to the regulated price-setting mechanism for French toll roads.

55. To conclude, I would like to thank once again every person and every institution who offered their time and insights to this research. ■

66 “*La quantification du pass-on est un élément déterminant pour apprécier si [la demanderesse] a subi un préjudice du fait de l’entente.*” Paris Commercial Court, 28 January 2019, RG 2017025084.

67 Higher Regional Court of Düsseldorf, 6 March 2019, U (Kart) 15/18.

68 Higher Regional Court of Stuttgart, 4 April 2019, 2 U 101/18.

69 Karlsruhe Court of Appeal, 10 April 2019, 6 U 126/17.

70 European Commission, Study on the Passing-on of Overcharges, written by RBB Economics and Cuatrecasas, Gonçalves Pereira, 2016.

71 Arnhem-Leeuwarden Court of Appeal, 7 May 2019, ECLI:NL:GHARL:2019:3990. See PaRR, Dutch appeal court awaits expert advice, 23 May 2019.

72 The two parallel cases seem to involve the same claimants but different defendants.

73 Commercial Court of Valencia, 7 May 2019, ECLI:ES:JMV:2019:222.

74 Amsterdam District Court, 15 May 2019, ECLI:NL:RBAMS:2019:3574. “*Wanneer, hoe en van wie de vrachtauto’s zijn gekocht, gehuurd, geleased.*”

75 Dortmund District Court, 1 August 2019, 8 O 24/17.

76 Commercial Court of Alicante, 18 June 2019.

77 Lyon Administrative Court, 22 July 2019, No. 1307012.

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