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## Cartel damages claims in Europe: How courts have assessed overcharges (2017 ed.)

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## ABSTRACT

*In its second edition, this study reveals that courts in Europe have handed down judgments in at least 98 cartel damages claims. These cases come from 12 countries, and they relate to more than 45 cartels. Courts have given in these judgments a wealth of insights on how to assess cartel overcharges.*

Pour sa deuxième édition, cette étude montre que des jugements ont été rendus, en Europe, dans le cadre d'au moins 98 actions en réparation consécutives à des ententes anticoncurrentielles. Ces affaires ont été jugées dans 12 pays. Elles font suite à plus de 45 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.

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# Cartel damages claims in Europe: How courts have assessed overcharges (2017 ed.)

1. A comprehensive review of judgments handed down by national courts on cartel damages claims was carried out for the first time last year.<sup>1</sup> With the assistance of lawyers and law professors in thirty European countries, this research has been updated and extended in the summer 2017. This article is presenting the results of this second edition.

2. In the early days of private enforcement in Europe, claimants and defendants were confronted with a high level of uncertainty. There were few judgments that they could refer to. How courts would assess cartel damages was largely unknown. This study is showing that the situation has changed. Courts in Europe have handed down judgments on the merits in at least 98 cartel damages claims. More than 40 such judgments have been rendered since January 2016. Courts have given many insights and potential guidelines in these judgments.

3. Section I describes the methodology of this research. Section II provides general observations on the cases identified. Section III focuses on the damages awards, and section IV presents highlights on some of the recent cases.

## I. Research methodology

4. **Scope.** The research methodology for this year's edition is for a large part similar to last year's. 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."<sup>2</sup> A "case" means a damages claim, 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 setting no amount of damages,<sup>3</sup> and judgments dismissing claims for lack of merit.

1 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.

2 See [http://ec.europa.eu/competition/cartels/overview/index\\_en.html](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 rarely provide insights on how courts approach the assessment of cartel damages. Cases dismissed on strictly formal grounds such as jurisdiction or limitation are not included either.<sup>4</sup>

6. **Counting cases.** Counting cases required setting a rule for this purpose. Sometimes several judgments are relatively similar. For example, on 30 March 2016, the Regional Court of Frankfurt 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 20 October 2016, the Helsinki Court of Appeal handed down 40 judgments in actions following the Finnish asphalt cartel.<sup>5</sup> Counting each of these judgments as an individual case would give them excessive weight relative to other cases. Each large set of similar judgments is for this reason regarded as a single case.<sup>6</sup>

7. **Geographic coverage and contributors.** This research covers the 28 EU Member States together with Norway and Switzerland. Depending upon location, two research methodologies were used. In France, I identified the cases, gathered copies of the judgments and analysed this material. Professor Suzanne Carval was consulted on matters of civil liability, and Rafael Amaro on matters of competition law.<sup>7</sup> In other countries, lawyers and law professors were asked whether they were aware of relevant cases in their jurisdictions, and when such cases were identified to assist with the analysis. Secondary sources listing cases or providing case descriptions in English or French were also used. For cases of particular interest, experts involved in the quantification of damages were contacted.

8. There were at least two contributors in each country covered. As a result, 110 individuals directly contributed to this study. Their names are given on the first page of this article. This research would not have been possible without their invaluable assistance.<sup>8</sup>

4 With a few exceptions; cases in which the nature of the damage was not an increase or a decrease in price also fall outside the scope.

5 Appeals ongoing; on the lower court judgment in this case, see K. Havu, The Helsinki District Court awards significant damages against asphalt cartel ("Asphalt cartel damages claims"), *e-Competitions Bulletin* November 2013, No. 62284; see also J. Connor and T. Kalliokoski, The Finnish Asphalt Cartel Court Decision on Damages: An Important EU Precedent and Victory for Plaintiffs, *CPI Antitrust Chronicle*, February 2014.

6 Besides the 40 judgments of the Helsinki Court of Appeal, numerous judgments handed down by many Italian courts on claims brought by consumers of automotive insurance; 34 judgments handed down by the Administrative Court of Paris on 13 and 27 March 2009; 5 judgments handed down by courts in Italy on *Euribor* cases in 2016 and 2017; 7 judgments handed down by the Administrative Court of Rouen (France) on 31 January 2017; and 8 judgments handed down by the Helsinki District Court on 31 August 2017.

7 I am indebted to Professor Carval for her essential role at the start of this research and for her constant support ever since; see S. Carval and J.-F. Laborde, L'évaluation du surcoût causé par une entente anticoncurrentielle : l'expérience française, *Gaz. Pal.* 4 Oct. 2016, p. 11.

8 A small number of contributors cannot be mentioned for confidentiality reasons. I am also grateful to the courts that kindly provided copies of many judgments.

9. **Limitations.** This research is subject to three main limitations. First, the list of cases identified is despite best efforts unlikely to be exhaustive. Many cartel damages claims receive very limited attention. On many occasions, contributors have uncovered judgments that were not publicized, cannot be accessed online, and have so far stayed unnoticed. Given the wide scope of this research, however, some cases may not have been identified. I should be grateful to anyone who would bring to my attention any case I may not be aware of.

10. Second, some judgments in the list are not final. In particular, appeals are believed to be ongoing in 11 cases in which damages were awarded. Having in mind the number of cases gathered, taking into account judgments that are not final seems unlikely to affect most of this research's findings. It may, however, affect some observations, for example the ones on levels of overcharges.

11. Third, this research was faced with the language barrier on multiple occasions. Most judgments identified are neither in English nor in French.<sup>9</sup> In order to grasp some of the contents of these judgments, secondary sources have been used, together with expert advice from contributors. However, as I could not read the original judgments, I cannot completely exclude the potential for me to have made an error.

## II. General observations

12. **Figures.** In the 30 European countries covered, 98 cartel damages claims have been identified. They include 28 cases in which damages were awarded, 19 cases in which liability was established, and 50 cases that resulted in dismissals.<sup>10</sup> There is also one case in which public procurement contracts were made void and the court ordered defendants to refund their entire value.

13. The cases come from 12 countries: Germany (38 cases), France (27 cases), Hungary (7 cases), Italy (6 cases), the Netherlands (4 cases), Austria, Denmark and Finland (3 cases each), Belgium, Poland and Spain (2 cases each), and Greece (1 case).<sup>11</sup>

14. Of the 98 cases, 71 follow an infringement sanctioned by a National Competition Authority (NCA), 23 follow a Commission decision, and only 4 are stand-alone actions.<sup>12</sup>

9 The author's working languages.

10 Claims awarding a symbolic euro as damages are considered dismissed.

11 Courts in Malta, Portugal and the United Kingdom have assessed cases that cannot exactly be considered as cartel damages claims, but nevertheless deal with overcharges.

12 All stand-alone cases correspond to civil actions brought before French criminal courts; on the challenges of stand-alone actions, see I. Luc, Les actions privées sans action publique : Une voie inutile, September 2014, *Concurrences Review* No. 3-2014, Art. No. 67933.

15. Of the 98 cases, 72 follow an infringement of Article 101 TFEU.<sup>13</sup> They come from Germany (31 cases), France (19 cases), Italy (5 cases), the Netherlands (4 cases), Finland (3 cases), Austria, Belgium, Poland and Spain (2 cases each), Denmark and Greece (1 case each). The other cases follow infringements of similar provisions in national competition laws.

16. **Jurisdictions of origin of the cases.** Some jurisdictions of origin of the cases are possibly unexpected. Although English courts have been a popular forum for cartel damages claims, to date it appears that they have not provided any judgment on the merits.<sup>14</sup> In particular, all successful cases so far in the UK have been settled before judgment.<sup>15</sup> On the other hand, the number of cases in Germany and France is perhaps a surprise. According to European Competition Network statistics, however, the French Autorité de la Concurrence and the German Bundeskartellamt have been the most active NCAs in Europe.<sup>16</sup> Private enforcement in these two countries was for a large part fuelled by their NCAs' infringement decisions.

17. Of the 98 cases, 40 have been assessed by a court of appeal, and 18 by a supreme court. The total number of judgments is approximately 160.

18. **Sectors.** Courts have assessed cartel damages claims that followed 45 infringement decisions.<sup>17</sup> Defendants in follow-on litigation thus belong to a wide range of sectors. Plaintiffs include construction companies, governments, industrial companies of many kinds, milk and poultry producers, railways and other transportation companies, retailers, utilities, individual customers and others. A large category of claimants is made of local authorities. Six claims at least were brought by indirect purchasers. Three were initiated by the alleged victims of cartels of buyers.

19. **Issues addressed.** Leaving figures aside, two additional comments can be made on the contents of the cases. First, it appears that courts have already dealt with a large number of complex and sometimes very interesting questions. A Dutch court has assessed whether the prices offered by one supplier can be used to quantify the overcharge on a contract with another supplier.<sup>18</sup>

A Belgian court has evaluated in which conditions anticompetitive agreements in the same industry, but in different countries, seemed likely or not to cause similar damages. A Danish court has studied whether damages should be reduced in the event a cartel generated a negative overcharge during part of the infringement period. A Polish court has defined circumstances in which a claimant could be held partly responsible for the overcharge suffered. Several courts in Germany have analysed for how long prices after the end of a cartel are likely to remain affected. A large number of courts throughout Europe have assessed whether passing-on was likely or not in many different industries and in many different circumstances; and so on.

20. Analyses developed by courts in Europe also appear to be frequently converging. For example, courts in Austria, France, Germany and the Netherlands have stated that claimants are expected to provide reliable evidence on transactions. Courts in Finland, France and Spain have observed that economic or econometric modelling, which concluded that a long-lasting cartel had not caused any overcharge, simply went against common sense. Courts in Germany and Italy have considered that the content of press releases from competition authorities has limited probative value in civil proceedings. Courts in many countries have rejected the idea that the average overcharge for all cartels could possibly be used as an approximation of the harm caused by one particular anticompetitive agreement.

### III. Damages awards

21. **Geographic location.** Cartel damages have been awarded in 28 cases.<sup>19</sup> They come from France (13 cases<sup>20</sup>), Germany (5 cases), Denmark (3 cases), the Netherlands and Spain (2 cases each), Austria, Finland and Italy (1 case each). The number of damages awards in Germany may seem disproportionately low, but on 17 other cases German courts have handed down interlocutory or declaratory judgments<sup>21</sup> in which they have not quantified damages.

22. **Quantification of overcharges: figures.** Each of the 28 damages awards contained data allowing calculation or estimation of the overcharge.<sup>22</sup> The range of overcharges is shown in figure 1. In accordance with the study prepared for the European Commission in 2009, overcharges are presented as a percentage of affected

13 Or formerly Article 81, and before that 85.

14 On the competition between national legal systems, see L. Idot, The international aspects of private enforcement after the Directive 2014/104/EU: Gaps in the EU system and competition between national laws?, May 2017, *Concurrences Review* No. 2-2017, Art. No. 83833; see also Implementation of the EU Damages Directive into Member State law, transcript of the conference held in Würzburg, *Concurrences Review* No. 3-2017.

15 *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated et al.* is not considered to be a cartel damages claim, as the Competition Appeal Tribunal itself observed that price-fixing cartels are "almost invariably secret" while the Mastercard Scheme Rules were not. For a description of recent damages actions in England, see P. Roth, A British perspective: EU antitrust law and international damages actions, February 2017, *Concurrences Review* No. 1-2017, Art. No. 83482, pp. 243–248.

16 See <http://ec.europa.eu/competition/ecn/statistics.html>.

17 As some infringement decisions sanctioned several cartels, the number of cartels followed by a case is slightly higher.

18 There is also a French case on this matter.

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

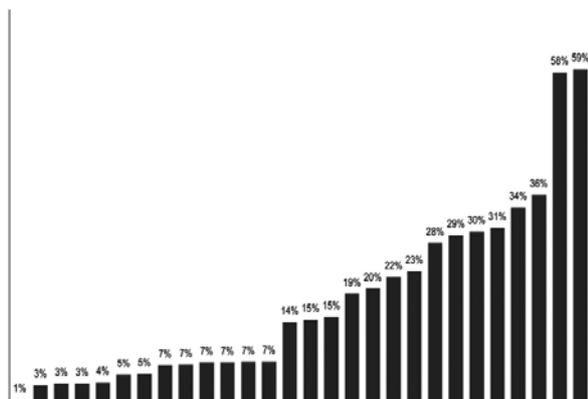
20 Leaving aside the set of judgments handed down by the Administrative Court of Rouen on 31 January 2017.

21 "Grundurteil" or "Feststellungsausspruch."

22 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.

prices.<sup>23</sup> The lowest overcharge is less than 1%, and the highest is close to 59%.

**Figure 1. Range of overcharges**



23. The study undertaken for the Commission in 2009 estimated that the average cartel overcharge was around 20%.<sup>24</sup> The average of the 28 overcharges obtained from the cases is 18%. This figure should, however, be interpreted with caution, bearing in mind that judgments in at least 11 cases are believed not to be final yet.<sup>25</sup>

24. **Quantification of overcharges: methods.** Published in 2013, the Practical Guide on Quantifying Harm in Actions for Damages described methods considered by the Commission to be potentially suitable for assessing damages caused by competition law infringements, in particular overcharges.<sup>26</sup> To date, judges in Europe have been exposed to all major types of methods. In the 28 damages awards, damages were quantified based on the following ones:

- Comparison over time (also called “before-and-after”): 14 cases
- Comparison with an unaffected market (also called “yardstick”): 4 cases
- Cost-based and financial methods: 5 cases
- Regression analysis (also called “econometrics”): 0 cases
- Simulation model: 0 cases
- Other methods: 5 cases

23 Oxera/A. Komninos 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 unaffected prices.

24 This average is based on a sample of 114 cartel overcharges obtained from peer-reviewed academic articles and chapters in published books; it does not include any overcharge estimate taken from court decisions (see Oxera/A. Komninos et al. p. 90 for a description of the full methodology).

25 The average overcharge on judgments believed not to be final is 26%; it is 13% for the others.

26 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.

25. The method most frequently accepted by courts consists of comparing prices over time. It was used recently in order to calculate overcharges on road signs<sup>27</sup> and gas-insulated switchgears.<sup>28</sup> In this case, for instance, the court compared a price in 1999 (during the cartel period) with a price in 2005 (after the end of the cartel).

26. Last year’s edition of this study revealed the courts’ reluctance to accept quantifications of damages based on regression analysis (“econometrics”). In a judgment handed down on 31 August 2017, the Helsinki District Court expressed its view on this method.<sup>29</sup> By way of background, the court received in this case two sets of econometric evidence. Reports presented by the claimants’ experts found harm<sup>30</sup>; reports presented by defendants’ advisors found no statistically significant damage. The court wrote: “(...) *econometric models that combine economic theory and statistical methods can be used as a tool to estimate whether a competition restriction had an effect on prices and how large the possible price effect may have been. However, there is no reason to overemphasize the significance of economic models by themselves in a damages trial, since their weight as evidence depends on whether the results they provide are logical and consistent with other evidence.*”<sup>31</sup>

27. On the subject of quantification methods, many findings presented in the first edition of this study remain valid and will not be repeated here. Readers interested in this particular topic should refer to last year’s article, which describes the various methods and illustrates their uses.<sup>32</sup>

28. **Quantification of passing-on.** In theory at least, damages awarded in cartel damages claims should not necessarily be equal to the overcharge. Defendants frequently argue that claimants faced with an overcharge have mitigated their losses by raising their own prices, thereby passing-on all or part of the overcharge down the chain of customers.<sup>33</sup> Estimating which fraction of an overcharge was transferred in this manner is particularly difficult.<sup>34</sup> It was done in only one case: in a judgment

27 Administrative Court of Rouen (France), 14 February 2017, No. 1402021; appeal believed to be ongoing.

28 District Court of Gelderland (the Netherlands), 29 March 2017, ECLI:NL:RBGEL:2017:1724; appeal ongoing.

29 Helsinki District Court, 31 August 2017, L 11/53753; case analysed with Toni Kalliokoski; on the public enforcement decision, see European Competition Network Brief, The Finnish Market Court upholds Competition Authority decision on fines for timber cartel (*Stora Enso, Metsäliitto, UPM-Kymmene*), 3 December 2009, *e-Competitions Bulletin* December 2009, Art. No. 33440; on a related case, see K. Havu, The Helsinki District Court dismisses several damages actions against wood industry actors due to prescription (*Laatikala Oy, Metsäliitto Osuuskunta Stora Enso Oyj, and UPM-Kymmene*), 28 March 2014, *e-Competitions Bulletin* March 2014, Art. No. 68483.

30 In this case lower prices allegedly caused by a cartel of buyers.

31 See also G. de Muizon, EU damages Directive: what consequences for litigation, Paris, 18 May 2015. Half-day conference organised by *Concurrences* with the support of Burford Capital, Fréget-Tasso de Panafieu, Hausfeld, Microeconomix and Oxera.

32 Already cited note 1.

33 There are also cases in which passing-on allegedly happened through other means, for example subsidies.

34 See RBB Economics and Cuatrecasas, Gonçalves Pereira, Study on the Passing-on of Overcharges, 2016.

handed down on 15 January 2015, the Maritime and Commercial Court of Copenhagen followed the opinion of the court-appointed expert and ruled that 50% of the overcharge had been shifted to the claimant's customers.<sup>35</sup>

**29. Duration of cases and impact on interest.** Directive 2014/104<sup>36</sup> specifies that the payment of interest “*should be due from the time when the harm occurred until the time when compensation is paid.*” In the 28 reference cases, this period of time lasted on average 14 years.<sup>37</sup> This duration explains why calculating prejudgment interest is in many cases an important issue.<sup>38</sup>

## IV. Highlights on recent cases

**30.** On 27 May 2016, the Supreme Court of Greece handed down judgment in what seems to be the first cartel damages claim assessed by Greek courts.<sup>39</sup> In 2007, the Hellenic Competition Commission sanctioned dairy manufacturers for collusion in milk procurement. A follow-on claim was brought by nine milk producers. Claimants submitted that the damage caused by the cartel consisted of the difference between the prices they received on the one hand, and a price allowing “*a reasonable profit*” on the other hand. The court dismissed the claim. It considered *inter alia* that claimants should have adduced additional evidence as to how the alleged “reasonable profit” was calculated. The court also regretted that the quantities of milk were sometimes expressed in kilograms and sometimes in litres: as the weight of one litre of milk is 1.0285 kg, switching from one unit to another was found to be a source of confusion.

**31.** On 7 June 2016, the Hungarian Supreme Court upheld a lower court judgment dismissing a cartel damages claim in the road construction sector.<sup>40</sup> The claimant was a state-owned infrastructure development company. It had brought a claim against companies that had been fined for bid-rigging, in connection with a tender that it had published. The court considered that the claimant itself could not have suffered damage for several converging reasons: it had acted in its own name but on behalf of the Hungarian State; it had received funding from the Hungarian State in order to finance over 99%

of the road construction works; and the roads ultimately became State property. This logic echoes a number of past Hungarian cases, all related to public infrastructure projects.<sup>41</sup>

**32.** On 19 July 2016, the Higher Regional Court of Nuremberg (Germany) dismissed a claim after an assessment of market definitions and an analysis of the accurate scope of the relevant infringement decision.<sup>42</sup> The case followed a Bundeskartellamt's fining decision in the sector of fire engines with turntable ladders.<sup>43</sup> The plaintiff had acquired a fire engine equipped with a new type of articulated turntable ladder (a ladder in which the upper segment can be bent towards hard-to-reach areas). The defendant argued that fire engines with standard turntable ladders constitute one market, while fire engines with articulated turntable ladder constitute another. This point was supported by the observation that market structures differed. Fire engines with standard turntable ladders were offered by at least two distinct manufacturers, one of which was the defendant; fire engines with articulated turntable ladders were supplied at the time of the infringement only by the defendant. The court agreed that fire engines with articulated turntable ladders constitute a distinct market. Following the defendant's argument, it found that they fell outside the scope of the Bundeskartellamt's decision.

**33.** On 4 November 2016, the Maritime and Commercial Court of Copenhagen awarded damages on a follow-on claim brought by a Danish municipality.<sup>44</sup> The infringement consisted of bid-rigging. The defendant had participated in a tender, and had received a payment of DKK 248,900 from the bid winner. According to the court, “*it must be presumed that the transfer of the payment of DKK 248,900 has resulted in a corresponding increase of the price at which (the bid winner) offered to carry out the work.*” Damages were set at this level.

**34.** On 9 November 2016, the Higher Regional Court of Karlsruhe (Germany) handed down judgment on a claim brought against a cement producer.<sup>45</sup> Two considerations in this judgment are particularly important. First, the court pointed out that the passing-on of a cartel overcharge does not necessarily mean the absence of cartel damages: the claimant may subsequently have

35 Maritime and Commercial Court (Denmark), 15 January 2015, U-0004-07.

36 Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

37 As several judgments have been appealed, this figure is probably understated.

38 See S. Carval, Les intérêts compensatoires – La réparation de la dimension temporelle des préjudices économiques, *Recueil Dalloz* 2017 p. 414; see also Competition Appeal Tribunal, 4 July 2016, *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated et al.*

39 Supreme Court of Greece, 27 May 2016, decision No. 403/2016; case analysed with Emmanuel Dryllerakis.

40 Curia of Hungary, 7 June 2016, Gf.VII.30.248/2016/7; case analysed with Péter Vörös and Orsolya Staniszewski.

41 See <http://www.kinstellar.com/insights/detail/359/private-enforcement-litigation-environment-in-hungary>; see also Z. Németh, The Hungarian High Court of Appeal rules that the tenderer to the agreement that was concluded on the basis of the outcome of a tender which was influenced by bid rigging is not entitled to damages (*Bartók Béla tender*), 16 December 2010, *e-Competitions Bulletin* December 2010, Art. No. 35154.

42 Oberlandesgericht Nürnberg, 19 July 2016, 3 U 116/16; case analysed with Christian Steinle and Ines Bodenstein.

43 See J. Baier, The German Federal Cartel Office imposes fines on manufacturers of firefighting vehicles and turntable ladders, 27 February 2011, *e-Competitions Bulletin* February 2011, Art. No. 38360.

44 Maritime and Commercial Court, 4 November 2016, U-5-15; case analysed with Daniel Barry; on the public enforcement decision, see Danish Competition Authority, The Danish Public Prosecutor settles charges on a violation of cartel law by allocation of costs and bid rigging in the construction industry (*Hansen & Søn*), 14 July 2014, *e-Competitions Bulletin* July 2014, Art. No. 68231.

45 Oberlandesgericht Karlsruhe, 9 November 2016, 6 U 204/15 Kart.; case analysed with Thomas Funke and Alexander Romanowicz; appeal ongoing.

suffered a reduction in quantities sold.<sup>46</sup> Second, the court defined conditions affecting the likelihood of the so-called “umbrella effect.” If a particular cartel lasted for a long period of time, if the combined market share of cartel members was high, and if prices on the market were transparent, then it seemed reasonable to assume that the existence of the cartel had potentially allowed non-cartel members to raise their prices.

**35.** On 31 January 2017, the Administrative Court of Rouen (France) annulled for fraud<sup>47</sup> a number of public procurement contracts.<sup>48</sup> Defendants were asked to refund not only a cartel overcharge, but the entire value of the void contracts. The claimant was, however, not required to return to the defendants the goods purchased, as these consisted of road signs that could allegedly not be moved.<sup>49</sup> It remains to be seen whether the administrative court of appeal will agree with the lower court’s reasoning.

**36.** On 29 March 2017, the District Court of Gelderland (the Netherlands) awarded as damages €23.1 million plus interest.<sup>50</sup> The claim was brought by an electricity grid operator having acquired gas-insulated switchgears.<sup>51</sup> Three points in the judgment appear to be of particular interest.

**37.** The defendant’s advisors argued that the cartel overcharge, if any, could be measured by comparing the defendant’s margins during and after the infringement. The court unequivocally rejected this method: “*in the opinion of the court, the defendant’s internal earnings figures are not relevant for the estimate of the claimant’s loss.*” “*It can be assumed that without the cartel other parties would also have made serious bids, that operators in the market (including the defendant) would have been incentivized to reduce their costs in good time so that they could offer competitive prices and, therefore, that the claimant would in all likelihood have received much more favourable bids.*”<sup>52</sup>

**38.** The defendant argued that, in the event of any overcharge, the claimant had benefited from subsequent tax savings. In the opinion of the defendant, such savings should reduce the amount of damages. The court did

not reject this argument in principle, but it found that the defendant’s plea was insufficiently substantiated and concretized. The court elaborated on some difficulties that taking into account the tax impacts would raise. As the claimant had purchased capital equipment, the court noted that “*the overcharge was not deducted from the claimants’ profits in one go in 1993 (...), this is still ongoing and is far from being settled.*” Moreover, the court observed that damages and statutory interest granted to the claimant would be taxed as well; a proper assessment of tax consequences would therefore need to take into account tax gains but also additional tax payments. The court considered that the defendant had not provided “*a clear and detailed calculation*” of these multiple tax impacts.

**39.** Finally, the judgment provides important considerations on passing-on. Some deal with legal issues such as the articulation of the passing-on defence with the principle of effectiveness.<sup>53</sup> Others provide guidelines on two topics: passing-on through amortization, and passing-on in regulated industries.

**40.** On 16 May 2017, the Tribunal of Palermo (Italy) acting as court of appeal dismissed one of the first cartel damages claim in the European healthcare sector.<sup>54</sup> The tribunal considered that the causal link was in this case not established.

**41.** On 30 May 2017, the Austrian Supreme Court refused to rule on a case that followed a Commission decision on LIBOR.<sup>55</sup> The claim was brought by an individual alleging that the manipulation of LIBOR had caused an increase in interests paid. The court observed that the claimant could not “*state the extent to which the LIBOR had been increased by the defendants’ manipulation in comparison to a not unlawfully influenced price development.*”

**42.** The number of judgments on cartel damages claims is growing rapidly. In the first semester of 2017, for example, courts in Europe have handed down more than three such judgments per month. If this trend continues, another edition of this study will be completed next year. ■

46 For a similar point see Tribunal Supremo, 651/2013, 7 November 2013; see also F. Marcos, Damages claims in the Spanish sugar cartel, *Journal of Antitrust Enforcement* 2015-3, pp. 205–225.

47 In French “*dol*.”

48 Tribunal administratif de Rouen, 31 January 2017, No. 1500940 to No. 1500946; appeal believed to be ongoing; see R. Amaro, Anticompetitive practices private enforcement in France (January 2017 – July 2017), December 2017, *Concurrences Review* No. 4-2017.

49 On the public enforcement decision, see M. Pujdak, The French Competition Authority fines 52.7 million euros for 10-years cartel (*Road signs cartel*), 22 December 2010, *e-Competitions Bulletin* December 2010, Art. No. 34055.

50 Rechtbank Gelderland, 29 March 2017, ECLI:NL:RBGEL:2017:1724; judgment analysed with Lumine van Uden and Weyer VerLoren van Themaat; this judgment followed five other court decisions in the same case (three of the district court, one on appeal, and one on an appeal to the Supreme Court); an appeal was lodged.

51 Heavy electrical equipment used to control energy flows in electricity grids.

52 For a different point of view on comparing margins, see Hungarian Metropolitan Court (F városi Törvényszék), 24 October 2012, 15.G.41.037/2009/69.

53 See M. Favart, The Dutch District Court of Gelderland dismisses a company’s passing-on defence in private enforcement litigation (*ABB/TenneT*), 29 March 2017, *e-Competitions Bulletin* March 2017, Art. No. 83826

54 Tribunale di Palermo, 16 May 2017, Sentenza No. 2587/2017; case analysed with Silvia Pietrini; see S. Pietrini, Le Tribunal de Palerme rejette une demande en réparation consécutive à la condamnation d’une entente illicite à défaut de preuve du lien causal entre la pratique anticoncurrentielle et le préjudice invoqué, December 2017, *Concurrences Review* No. 4-2017.

55 Oberste Gerichtshof, 30 May 2017, 4 Ob 86/17a; case analysed with Isabelle Innerhofer; on the public enforcement decision, see G. Olsen and D. Schwarz, Financial services and competition law: An overview of EU and national case law, 18 October 2016, *e-Competitions Bulletin Financial services*, Art. No. 81337.

# Appendix

**Table of cases**

France	Tribunal administratif de Paris	27 March 2009	9708002/6-1	Civil engineering
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Denmark	Maritime and Commercial Court	15 January 2015	U-0004-07	Monochloroacetic Acid
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Hungary	Curia of Hungary	7 June 2016	Gfv.VII.30.248/2016/7	Construction
Germany	Oberlandesgericht Nürnberg	19 July 2016	3 U 116/16	Fire engines with turntable ladders
Finland*	Helsinki Court of Appeal	20 octobre 2016	S 14/1368	Asphalt
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Germany*	Oberlandesgericht Karlsruhe	9 November 2016	6 U 204/15 Kart	Cement
France*	Tribunal Administratif de Rouen	31 January 2017	N° 1500940-1500946	Road signs
France*	Tribunal administratif de Rouen	14 February 2017	N° 1402021	Road signs
The Netherlands *	Rechtbank Gelderland	29 March 2017	ECLI:NL:RBGEL:2017:1724	Gas-insulated switchgears
Italy	Tribunale di Palermo	16 May 2017	N° 2587/2017	Healthcare
Austria	Oberster Gerichtshof	30 May 2017	4 Ob 86/17 a	LIBOR
Finland*	Helsinki District Court	31 August 2017	L 11/53753 et autres	Raw wood procurement

\* appeal believed to be ongoing or likely.

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