(OFFICE TRANSLATION)

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE
JUDGEMENT

KZR 35/19

Proclaimed on:
23 September 2020

Zöller
as the clerk of the court registry

in the litigation

Reference book: yes
BGHZ: yes
BGHR: yes

Truck cartel

GWB [*Gesetz gegen Wettbewerbsbeschränkungen*, Act Against Restraints of Competition] 2005 Section 33(3), (5)

a) If price lists and list price increases have been coordinated by a cartel with a high market coverage over a longer period of time, the empirical principle that the prices achieved within the framework of a cartel are on average higher than those that would have been formed without the restrictive agreement is to be taken into account when examining whether a company has suffered damage due to the purchase of a product of a cartel participant, even if a coordination of the transaction prices has not taken place.

ECLI:DE:BGH:2020:230920UKZR35.19.0

b) In the overall assessment incumbent on the trial judge as to whether the cartel agreement caused damage, this empirical principle is to be given the weight it deserves in the specific case according to the content, scope and duration of the coordination of conduct as well as all other significant circumstances that speak for or against a price effect of the cartel. In doing so, binding findings of the Commission or the cartel authority are to be taken into account comprehensively and exhaustively; the trial judge is not prevented from drawing conclusions from these findings which are not as such covered by the binding effect.

c) The suspension of the limitation period for a claim for damages does not only begin with the formal initiation of proceedings by the European Commission, but already with a measure which is recognisably aimed at investigating the company concerned for a prohibited restriction of competition.

BGH, Judgment of 23 September 2020 – KZR 35/19 – OLG Stuttgart
LG Stuttgart

(OFFICE TRANSLATION)

At the oral hearing on 23 September 2020, the Cartel Senate of the Federal Court of Justice [*Bundesgerichtshof* – BGH] by Presiding Judge Prof Dr Meier-Beck, the Judges Prof Dr Kirchhoff, Dr Berg, Dr Tolkmitt and Dr Picker

Hold:

On further appeal [*Revision*], the judgement of the Higher Regional Court of Stuttgart – 2nd Civil Senate – of 4 April 2019 is annulled.

The case is referred back to the Court of Appeal for a new hearing and decision, including on the costs of the appeal proceedings.

By law

(OFFICE TRANSLATION)

Facts:

1 The Plaintiff is claiming compensation from the Defendant Daimler AG for cartel-related damage in connection with the purchase of several trucks.

2 The Defendant is one of the leading truck manufacturers in the European Economic Area (EEA). By the Decision of 19 July 2016 – based on a settlement with the parties concerned – the European Commission found that the Defendant and at least four other truck manufacturers, namely MAN, Volvo/Renault, Iveco and DAF, which, like Scania, are Interveners on the part of the Defendant, had infringed Article 101 TFEU and Article 53 of the EEA Agreement by agreeing on prices and gross list price increases for medium-duty and heavy-duty trucks and on the timing and passing-on of the costs for the introduction of emission technologies for those vehicles in accordance with the EURO 3 to EURO 6 emission standards. For the infringement, which covered the entire European Economic Area and was committed from 17 January 1997 to 18 January 2011, the Commission imposed a fine of about one billion euros on the Defendant.

3 The Plaintiff is the parent company of two companies operating in the construction sector. In 1998, 2000, 2010 and 2011, these companies purchased eleven individually configured trucks from the Defendant – several articulated lorry chassis, two tipper chassis, a concrete mixer chassis and a platform chassis – at net prices of between approximately 70,000 and approximately 93,000 euros. Both companies assigned their claims for damages against the Defendant to the Plaintiff.

4 The Plaintiff claims that its subsidiaries had to pay inflated prices for the eleven trucks and another vehicle purchased in 1997 as well as increased liability premiums due to the cartel. It applied for an order that the Defendant pays it a total of €285,303.84 and a further €19,399.61, plus interest in each case. The Regional Court declared the action to be justified on the merits. The Court of Appeal dismissed most of the Defendant's appeal against this and only dismissed the action with regard to the compensation amount of € 28,567.66, plus interest, which was attributable to the purchase of the truck in 1997. In its further appeal, which was allowed by the Court of Appeal and supported by the Interveners, the Defendant continued to seek the dismissal of the action in its entirety.

(OFFICE TRANSLATION)

Reasons for decision:

5 I. The Court of Appeal essentially stated in support of its decision:

6 The action was well founded, with the exception of the damages claimed in connection with the 1997 acquisition. The Commission Decision of 19 July 2016 established with binding effect that the Defendant had intentionally infringed the prohibition of cartels under Article 101 TFEU and its predecessors. With the exception of the truck purchase in 1997, the acquisition transactions in dispute were affected by the cartel infringement. In this respect, the standard of proof of Section 286 ZPO did apply.

7 With regard to the acquisition transactions in 2010, the concernment by the cartel was apparent from the findings of the Commission Decision, which stated that the EEA gross price lists exchanged by the Defendant and the other addressees had contained the prices of all medium and heavy truck models and all special equipment offered ex works by the respective manufacturer, and from the fact that the Defendant had used those price lists from 2006 onwards. The Defendant's objection that the exchange had been only selective and not comprehensive was not compatible with this Commission's finding. An exchange on the gross prices of basic models necessarily also covered the configurations in individual cases, as these had been derived from the basic models. In addition, the Commission Decision stated that the cartel participants could have better calculated the approximate current net prices of their competitors through the mutual information on current gross prices and gross price lists in conjunction with further data obtained through market research. The same was true for the acquisitions in 1998 and 2000. Even before 2006, there had been an exchange between the cartel participants which, although it had not taken place via harmonised, Europe-wide gross price lists, had, according to the binding findings of the Commission, affected the entire European Economic Area. In the case of the truck purchase made in 2011, it was to be assumed that the price had been increased as a result of the agreement, because the relevant list price sheet had already been drawn up in 2010 and thus during the ongoing cartel. According to the binding findings of the Commission Decision, the purchase transactions for two tipper chassis and one concrete mixer chassis were also affected by the cartel. Only the purchase transaction from 1997 was not affected by the cartel.

8 The conditions for the Defendant's liability on the merits were met. However, the Plaintiff's calculation did not prove that the Plaintiff suffered damage in any amount, as it disregarded the fact that price formation was not only influenced by the cartel, but also by other factors. The Plaintiff also did not benefit from any prima facie evidence. In the case in dispute, however, there was a factual presumption of the occurrence of damage, which was based on the economic principle of experience that the formation of a cartel generally served to increase the prof-

its of the participants in the cartel and that therefore there was a high probability that the cartel would be formed and maintained because it would produce higher prices than those achievable on the market, which in turn would also make it likely that the customers of the cartel participants would suffer damage as a result. This presumption applied in the same way to cartels which merely serve to exchange information on gross prices. If the Plaintiff could rely on such a presumption, it would have a strong indicative significance in the context of the free assessment of evidence. Indeed, a comprehensive assessment of all circumstances was required. However, the effect of the presumption was that the occurrence of damage had to be regarded as given if the arguments of the cartel participants against this all failed for factual or legal reasons, since in this case the existence of the cartel remained as the only strong indication of damage.

9 The objections raised by the Defendant and its (second-instance) Intervener were not suitable for undermining the presumption. This applied first of all to the argument that the cartel participants had not entered into any binding price agreements. Even mere information about the pricing of competitors could have an effect on their own pricing and thus influence pricing. The fact that in the specific case there was no evidence of a price-increasing effect of the cartel was irrelevant, since the presumption was based on the economic objective of the undertakings participating in the cartel. As far as the Defendant claimed that cartel-related damage was excluded because the net price did not depend on the gross list price and the exchange of information could therefore not have had an effect on the net price formation, this was not convincing for legal and factual reasons. The argument contradicted the Commission's findings that the list prices had been the starting point for pricing and had allowed an estimate of the competitors' net prices. It necessarily followed from this that the list prices had an epistemic value and an influence on the respective net sales price. This conclusion was not excluded by the fact that the latter was also determined by numerous other factors. Furthermore, the Defendant's assertion was inherently contradictory to the objectives of the collusive practices of the Defendant and the other participants in the cartel as described in the Commission Decision, which had consisted solely in distorting pricing and the usual price movements for lorries in the European Economic Area and which had remained unchanged throughout the entire cartel period. They only said something about the intentions of the cartel participants. If the Defendant's assertion were correct, the Defendant would have participated in the cartel for more than 13 years for nothing.

10 The Defendant's objection that the information exchanged had been not detailed enough to allow conclusions to be drawn from the gross list price of the basic model to the actual net prices because of the high degree of individualisation of the lorries was also incorrect. In this respect, too, it was apparent from the Commission's findings that the information exchanged made it possible to compare the offers. Moreover, the Defendant had not shown the contrary

with regard to the vehicles in dispute. The Defendant's further assertion that the timing of the exchange of information had prevented it from influencing the list price fixing was also refuted by the Commission's binding finding that the cartel participants could have taken the exchanged information into account in their internal planning processes and in planning future list price increases for the coming calendar year. In so far as the Defendant denied that the cartel had had an effect on sales prices by arguing that there was considerable competition between the manufacturers with the risk of market share losses, this was likewise not suitable for rebutting the presumption that the cartel had an effect on sales prices. The Commission had bindingly established in the Decision that the common purpose of the cartel had been precisely to partially eliminate this competition.

11 The Defendant's objection – to be taken into account in the context of the offsetting of benefits – that the damage had been passed on (passing-on defence) did not preclude the granting of a basic judgment, since the Defendant had not shown and, in the absence of suitable evidence, had not proved that the Plaintiff had been able to pass on its damage to its customers. The Defendant could not rely on a secondary burden of proof on the Plaintiff in the dispute, since the Plaintiff's subsidiaries did not resell the trucks in dispute, but used them as a means of creating value in the context of their construction activities and could therefore have passed on their cartel-related damage to numerous customers of their construction services over the entire life of the respective truck solely by calculating higher costs. It was therefore only possible to establish that the damage had been passed on if the calculation of the Plaintiff's subsidiaries with regard to all construction sites since the acquisition of the trucks in question had been fully disclosed, which the Plaintiff and its subsidiaries could not reasonably be expected to do in view of the low probability that the damage would be passed on. In addition, the Defendant had not submitted any cartel-related claims by customers of the Plaintiff's subsidiaries due to excessive construction prices or for other reasons.

12 The claims for damages asserted by the Plaintiff – with the exception of the claim based on the purchase of the truck in 1997 – were not time-barred. Before the limitation period had expired, the ten-year limitation period, which is not dependent on knowledge, had initially been suspended by the initiation of the Commission's proceedings pursuant to ex-Section 33(5) GWB, whereby the formal initiation of the proceedings on 20 November 2014 was not to be taken into account, but rather the carrying out of investigative measures against certain companies; these had been carried out in January 2011 in the form of inspections, inter alia, at the premises of the Defendant.

(OFFICE TRANSLATION)

13 II. The appeal is admissible without restriction (Section 543(1) of the Code of Civil Procedure [*Zivilprozessordnung* – ZPO]). The Court of Appeal allowed the appeal without restriction, and such [a restriction] does also not follow from its reasoning that the questions of the binding effect of the Commission Decision, the scope of the presumption and the commencement of the suspension of the limitation period had not yet been decided by the highest courts.

14 Admittedly, a – permissible – restriction of the appeal may follow from the grounds of the judgment if a question of law that is considered relevant for admission is listed there, which only arises for a clearly delimitable independent part of the subject-matter of the dispute, which can be the subject-matter of a partial judgment or of an appeal filed in a restricted manner. However, it presupposes the independence of the part of the subject-matter of the dispute covered by the restriction on admissibility in the sense that it can be assessed independently of the rest of the subject-matter of the dispute from a factual and legal point of view and that it cannot contradict the part of the subject-matter of the dispute that cannot be appealed even in the event of a remittal (settled case-law, cf. only BGH, judgment of 28 January 2020 – KZR 24/17, WuW 2020, 202 para. 15 – Rails Cartel II, inter alia). These requirements would not be met in the case in dispute because the legal questions raised concern all claims asserted. Irrespective of this, neither the operative part nor the reasons of the Decision show with the necessary clarity that the Court of Appeal, by referring to the legal questions that were unresolved at the time of the Decision, even considered a limitation of the appeal to parts of the subject matter of the dispute and did not merely want to state the reason for the – unrestricted – admission of the appeal.

15 III. The appeal is also successful on the merits. The Appeal Judgment does not stand up to legal scrutiny in one decisive point. On the basis of the reasons given by the Court of Appeal, a claim for damages cannot be affirmed on the merits.

16 1. However, the Court of Appeal correctly assumed that the possible basis for the claims is determined by the law applicable at the time of the respective supply (cf. BGH, judgment of 28 June 2011 – KZR 75/10, BGHZ 190, 145 para. 13 – ORWI; judgment of 11 December 2018 – KZR 26/17, NZKart 2019, 101 para. 44 – Rails Cartel I; judgment of 28 January 2020 – KZR 24/17, WuW 2020, 202 para. 18 – Rails Cartel II). The basis for a claim for damages from the four acquisition transactions in question in 1998, on which the Plaintiff bases its action, among other things, is therefore Section 823(2) of the Civil Code [*Bürgerliches Gesetzbuch* – BGB] in conjunction with Art. 85 EC Treaty. The same applies to the damages from the two acquisition transactions in 2000, the compensation of which is also based on Section 33 sentence 1, 2nd half sentence, in conjunction with Section 1 GWB as amended from 1 January 1999 to 30 June 2005. Section 33(3) GWB as amended from 1 July 2005 to 29 June 2013 (GWB 2005) is the

applicable basis for claims for the acquisition transactions in 2010 and 2011. According to all provisions, a person who intentionally or negligently violates a provision of the Act against Restraints of Competition protecting third parties or the provisions of Articles 81, 82 EC (now: Articles 101, 102 TFEU) is obliged to compensate the damage resulting from the violation.

17 2. The Court of Appeal was also right to find that the Defendant had culpably infringed Article 81 EC and Article 101(1) TFEU as well as the corresponding provisions of national antitrust law, assuming that the Defendant had been involved in restrictive agreements over a longer period of time.

18 a) In its Decision of 19 July 2016, the European Commission found that the Defendant, MAN, Volvo/Renault, Iveco and DAF had committed a complex infringement of Article 101(1) TFEU consisting of various acts which are to be classified either as agreements or as concerted practices and by means of which the participants knowingly replaced the risks of competition with practical cooperation between themselves. The Commission has classified the behaviour of the cartel participants as price coordination which, as practised, was one of the most harmful restrictions of competition.

19 Specifically, the infringement of Article 101(1) TFEU consisted, according to the Commission Decision, in “collusive arrangements on pricing and gross price increases” for medium and heavy duty trucks and in the coordination of their market behaviour on the timing and passing on of the costs of introducing emission technologies for such trucks according to the EURO 3 to EURO 6 emission standards. The collusive behaviour included “agreements” and/or “concerted practices” on price setting and list price increases with the aim of aligning gross prices in the EEA, as well as on the timing and passing-on of costs for the introduction of EURO 3 to EURO 6 emission technologies. All cartel participants exchanged price lists and information on gross prices with each other. Each of the participants – with the exception of DAF – had access to at least one computer-based truck configurator of one of the other participants.

20 The infringement, which covered the entire European Economic Area, lasted from 17 January 1997 to 18 January 2011. From 1997 until 2010, the collusive contacts between the Defendant and the other participants took place several times a year in the form of regular meetings at industry association meetings, trade fairs, product presentations by the manufacturers or competitor meetings organised for the purpose of this infringement. They also included regular contacts by e-mail and telephone. Until the end of 2004, the head offices of all companies involved were directly involved in the discussion of prices, price increases and the introduction of new emission standards through senior management. From August 2002 onwards, discussions were conducted through German subsidiaries, which reported to their head offices.

21 At the meetings, the participants discussed, and in some cases agreed on, their respective list price increases. In 1997 and 1998, in addition to the regular detailed discussions on future list price increases, the participants exchanged information on the harmonisation of price lists for the European Economic Area at additional bilateral meetings. Occasionally, net prices for some countries were also discussed with the participation of representatives of the headquarters of all parties. The cartel participants also agreed on the respective timetable for the introduction of the EURO emission standards and the associated price surcharge. In addition to agreeing on the size of the price increases, they regularly informed each other about their planned future list price increases. They also exchanged information on their respective delivery times and country-specific general market forecasts, broken down by country and truck category. The imminent introduction of the Euro was used to discuss the reduction of discounts with all parties involved in the agreement. After the changeover to the Euro, and with the first preparation of pan-European price lists for almost all manufacturers, the companies involved in the agreements began to systematically inform each other about their respective planned list price increases via their German subsidiaries, while in the years 2002 to 2004 secret contacts at the level of the higher management of the headquarters continued in parallel.

22 The agreements at least enabled the companies involved to take the information exchanged into account in their internal planning processes and in planning future list price increases for the coming calendar year. The list prices set by the respective headquarters were again the starting point for pricing for all truck manufacturers involved in the agreements; then the invoice prices for importing the trucks into different markets by own or third party distributors and then the prices to be paid by the dealers on national markets were set. Finally, the retail prices were negotiated and set either by a dealer or, in the case of direct sales to dealers or fleet customers, directly by the manufacturer.

23 b) These findings in the Commission Decision are relevant for the present legal dispute as a follow-on action for damages under Section 33(4) GWB 2005 is binding.

24 aa) As the Federal Court of Justice has already ruled, the extent of the binding effect under Section 33(4) sentence 1 GWB 2005 depends on the factual findings made in the decision of the cartel authority or the European Commission. Accordingly, the decisive factor is the extent to which an infringement of cartel law has been established in the operative part or in the basic grounds of the final decision (BGH, judgement of 12 July 2016 – KZR 25/14, BGHZ 211, 146 paras. 18 et seq. – Lottery II). The binding or declaratory effect [*Feststellungswirkung*] therefore extends to all findings of fact and law with on which the competition authority bases its reasons for the infringement of substantive competition law. However, it does not cover descriptions and

considerations going beyond this (Franck in Immenga/Mestmäcker, Wettbewerbsrecht, 6th ed., §33b GWB para. 26), and questions of the causality of the damage as well as the amount of the damage are not part of it, but are subject to the free assessment of evidence by the court (cf. explanatory memorandum to the Federal Government's draft bill on the Seventh Amendment of the Act against Restraints of Competition, *Bundestag* Printed Matter No. 15/3640, p. 54).

25 bb) Contrary to the view of the Appeal, this binding effect is not excluded or limited in the case at hand because the Commission Decision of 19 July 2016 was issued in the context of settlement proceedings pursuant to Article 10a of Regulation (EC) No. 773/2004 (Regulation (EC) No. 773/2004) in the version of Regulation (EC) No. 622/2008.

26 (1) In this respect, national law does not differentiate according to the type of proceedings on which the penalty notice is based, even in the versions that entered into force after the introduction of the settlement procedure in 2008 (Section 33(4) GWB 2013, and Section 33b GWB in the currently applicable version).

27 (2) The restrictions demanded by the Appeal are not required by higher-ranking national law or overriding EU law. It is not evident that the application of the binding effect in the sense described structurally violates the right of the cartel participants to be heard or their right to a fair trial. The rules of the settlement procedure itself already provide for comprehensive participation of the parties concerned in the form of "settlement discussions" within the framework of the determination of the facts; thus, the granting of the right to be heard is procedurally anchored. In addition, the review of the factual findings by the involved unions is also a procedural requirement. Furthermore, the control of the factual findings by the parties is ensured by the fact that they have to "accept" them in the settlement proceedings (Art. 10a(2) at the end, (3) of Regulation (EC) 773/2004). The fact that the underlying reasons of a subsequent (amicable) decision cannot be challenged in isolation does not constitute a disproportionate restriction of fundamental procedural rights in subsequent civil proceedings.

28 In the case in dispute, a (concrete) impairment of the procedural rights of the Defendant and the other addressees of the Commission Decision is in no way demonstrated or apparent. On the contrary, it expressly follows from paragraph 3 of the Commission Decision of 19 July 2016 that all addressees "accepted" the facts set out in the Decision. The appeal does not explain how these facts should have been described incorrectly.

29 (3) The meaning and purpose of the settlement proceedings also do not oppose the assumption of a binding effect of all factual findings substantiating the cartel infringement. Insofar as the Appeal refers to recitals 4 and 6 of Regulation (EU) No 2015/1348, according to which it

should not be possible to use the information obtained in the context of settlement proceedings in proceedings before national courts if this would unduly impair the effectiveness of the Commission's enforcement of Articles 101 and 102 TFEU, this does not strengthen its position. This is because recital 7 then explains that the response to this problem is not to exclude the binding effect, but to restrict the right of third parties to inspect the confessions made by the parties to the settlement proceedings.

30 3. The Court of Appeal also correctly assumed that the Plaintiff was affected by the cartel agreement and thus entitled to make a claim.

31 a) According to the case-law of the Federal Court of Justice, the precondition for a claim for damages under antitrust law under both Section 33(1) GWB 1999 and Section 33(3) and (1) GWB 2005, as well as under Section 823(2) BGB, is that the opponent of the claim is guilty of conduct restrictive of competition which – by concluding transactions or in another way – is capable of directly or indirectly causing damage to the claimant (BGH, WuW 2020, 202 para. 25 – Rails Cartel II; judgement of 19 May 2020 – KZR 8/18, WuW 2020, 597 para. 25 – Rails Cartel IV). The standard of Section 286 ZPO applies to the determination of this prerequisite. Nothing else applies to a claim based on a violation of Article 101 TFEU or Article 81 EC respectively. However, the further question of whether the cartel agreement actually had an adverse effect on the purchase in question, on which the claimant bases his claim for damages, and whether the transaction was thus "cartel-affected" or "cartel-concerned" in this sense, is not relevant in the context of the examination of the causality giving rise to liability. The requirements for the justification of liability thus take into account the fact that the prohibition of cartels as an endangering act already sanctions the agreement between the competitors, regardless of the direct and indirect effects on the market players resulting from it, which in any case can only be determined with considerable difficulty. Contrary to the Appeal, in view of the special features of the offence under cartel law, which is not directed against individual market participants, but against the market counterpart, it is therefore not necessary to establish a specific-individual concernment.

32 b) In the case at hand, these conditions are fulfilled without further ado because the Plaintiff's subsidiaries acquired goods from the Defendant participating in the cartel, with the eleven trucks still in dispute, which were subject of the exchange on future price lists and list price increases, as well as the further established restrictive practices, and thus subject of the cartel agreement.

33 aa) It is irrelevant in this context whether and to what extent the transaction prices of the specific, individualised vehicles were influenced by the cartel agreement. It is sufficient that the vehicles were based on the basic models ("corner types") whose list prices were the subject of the agreements. The distortion of the market conditions caused by the cartel was thus in any

case capable of affecting the individual transaction prices for vehicles of the truck manufacturers involved in the cartel. At the same time, it follows from this that the Plaintiff's subsidiaries – like other members of the opposite side of the market, who purchased vehicles from the cartel participants – were affected by the cartel infringement in such a way that adverse consequences for their financial situation could occur. Further findings on the effects on individual transactions are not necessary for the causality giving rise to liability.

34 bb) The Court of Appeal did not err in law in affirming such a connection with the cartel agreement, which was sufficient to establish liability, also for the purchase transactions involving a concrete mixer chassis, two tipper chassis and a platform chassis. It rightly found no indication in the Commission's findings that these vehicles were to be classified as "special vehicles" and were not covered by the cartel agreements. According to the facts established in the Commission Decision of 19 July 2016, which are binding for the present legal dispute (see recital 23 et seq. above), trucks between 6 and 16 tonnes ("medium-duty trucks") and those over 16 tonnes ("heavy-duty trucks"), were affected by the infringement, both articulated and solo vehicles. An exclusion concerned (only) trucks for the military sector, the after-sales sector, other services and guarantees for trucks, the sale of used trucks and all other goods sold and services provided by the parties.

35 The Appeal also does not show any submission in the factual instances from which it could be inferred in what way the chassis in question without the superstructures characteristic of a tipper or concrete mixer should have differed from the basic models or "corner types" to which the Defendant and the Interveners refer and which in any case were the subject of the list price agreements and had precisely the function of forming the basis for a large number of individual vehicle configurations. Without such a submission, however, the formulations in the Commission's questionnaire of 30 June 2015 referred to by the Defendant and its Interveners, which was received by the cartel participants more than a year before the decision imposing the fine, and which was itself a means of clarifying the facts at the beginning of the conciliation proceedings, which ultimately led to the Decision of 16 July 2016, are irrelevant.

36 cc) Nothing else applies with regard to the vehicle that was acquired in 2011 and thus after the cartel had ended, as the price lists of this year were the subject of the cartel agreements in the previous year.

37 4. However, the reasoning given by the Court of Appeal does not support the finding that the Plaintiff suffered damage as a result of the cartel agreement between the companies involved – with the probability required for an interlocutory judgment pursuant to Section 304 ZPO (cf. BGH, WuW 2020, 202 para. 28 – Rails Cartel II, with further references).

(OFFICE TRANSLATION)

38 a) However, the Court of Appeal correctly assumed, in accordance with the case law of the Federal Court of Justice, that in the absence of sufficiently typical facts from which it can be concluded with a very high degree of probability that there was a cartel-related price effect, there is no prima facie evidence of damage suffered by the plaintiff (see, for a case of cartel on quota and customer-sharing, BGH, NZKart 2019, 101 para. 57 – Rail Cartel I). In this respect, the Appeal Court correctly assumed that, in the absence of such prima facie evidence, the determination of a loss suffered by the Plaintiff required a comprehensive assessment by the trial court of all circumstances presented and ascertainable which speak for or against a loss caused by the cartel.

39 b) The Court of Appeal's assumption that the Plaintiff could rely on a factual presumption that, as a result of the cartel practised between the Defendant and the Interveners, the price level for the trucks concerned was on average higher than that which would have been formed without the agreement restricting competition is also correct.

40 aa) The Federal Court of Justice has consistently held that, based on the high probability of such an event, there is a factual presumption – within the meaning of a factual principle –– in favour of the customer of an undertaking participating in a cartel agreement that the prices achieved within the framework of the cartel are on average higher than those that would have been achieved without the agreement restricting competition (BGH, judgment of 8 January 1992 – 2 StR 102/91, BGHSt 38, 186, 194; Decision of 2005 – KRB 2/05, WuW/E DE-R 1569, 1569). January 1992 – 2 StR 102/91, BGHSt 38, 186, 194; decision of 28 June 2005 – KRB 2/05, WuW/E DE-R 1567, 1569 – Berlin Ready-mix Concrete I; Order of 26 February 2013 – KRB 20/12, BGHSt 58, 158 para. 76 – Grey Cement Cartel I; Judgment of 12 June 2018 – KZR 56/16, WRP 2018, 941 para. 35 – Grey Cement Cartel II; NZKart 2019, 101 para. 55 – Rails Cartel I; WuW 2020, 202 para. 40 – Rails Cartel II). The basis of this principle is the economic experience that the establishment and implementation of a cartel regularly leads to additional revenue for the participating undertakings. Cartel agreements relieve the participating undertakings, at least to a certain extent, of the need to compete against rival undertakings in order to obtain contracts, and undertakings which do not have to face competition, in particular price competition, on the basis of such agreements will usually see no reason to use existing scope for price reductions (cf. BGH, NZKart 2019, 101 para. 55 – Rails Cartel I; for a summary of the economic evidence see, recently, Coppik/Heimeshoff, WuW 2020, 584).

41 bb) On the basis of the facts established in the Commission Decision of 19 July 2016, the Court of Appeal did not, in sum, err in law in finding that there is an actual presumption that the market price level for lorries is increased and thus that the Plaintiff is damaged.

42 (1) This is not contradicted by the fact that the Court of Appeal may have assumed that the cartel practised by the Defendant and the Interveners merely served to exchange information on list prices. The Senate would not be bound by such an assessment under the law of further appeal, since the Appeal Judgment refers to the entire facts established by the European Commission. However, it cannot be concluded from the findings of the Commission that only an exchange of information on list prices took place between the Defendant and the Interveners.

43 As stated above (recitals 19 et seq.), the cartel participants discussed their future list prices and their increases with each other and coordinated their future pricing both through agreements and through concerted practices. Even if – apart from the determination of the price surcharges for the introduction of the new EURO emission standards – agreements on prices may only have been reached "in some cases", such behaviour is fundamentally different from a mere exchange of information, which the Appeal bases its argument on. Even a coordination of price-setting behaviour that does not lead to an explicit agreement has the consequence that the companies involved have to face price competition to a considerably lesser extent and have less incentive to use existing scope for price reduction. This applies in any case if intensive and frequent coordination of (list) pricing over several years does not make it appear promising in the long term for an individual cartel participant to attempt to achieve a company-specific quantity effect instead of a joint margin effect.

44 Whether, and if so under what further conditions, even in the case of a mere exchange of information on current and future list prices, there is a factual presumption not only that the undertakings participating in the coordination take into account the information exchanged with their competitors when determining their market conduct (cf. BGH, order of 13 July 2020 – KRB 99/19, WuW 2020, 605 para. 40 – Beer Cartel; judgments of 12 July 2016 – KZR 25/14, BGHZ 211, 146 para. 23 f. – Lottery II; of 12 April 2016 – KZR 31/14, NZKart 2016, 371 para. 44 – Community Programmes; order of 14 August 2008 – KVR 54/07, WM 2008, 1983 para. 43 – Lottery I; ECJ, Judgment of 4 June 2009 – C-8/08, ECR 2009, I-4529 para. 52 – T-Mobile Netherlands/NMa; Judgment of 21 January 2016 – C-74/14, WuW 2016, 126 para. 33 – Eturas), but also that there is a high probability of a price effect, does not need to be decided in the dispute at hand.

45 (2) The fact that the cartel participants essentially agreed on list prices does not prevent the assumption of an actual presumption of a price effect.

46 (a) As the Court of Appeal did not fail to recognise, they did not – apart from exceptional cases – exchange information on net prices which the purchasers of lorries had to pay on the market, but on list prices and their increase. They have thus coordinated reference values which are typically considerably higher than the transaction prices paid by the buyers. This does not

mean, however, that the cartel agreements did not also have a high probability of adversely affecting the transaction prices achieved on the market.

47 (b) Contrary to the Appeal, the multi-stage pricing of lorries, in particular the effects of the concrete configuration of the individual vehicle, the widespread coupling of the sale with services to form an "individual overall package", and the lack of knowledge of the purchasers of the list prices, as well as the consequences of the pricing leeway of sales agents in the transaction price, do not exclude a connection between list price and market price. Indeed, the fact that market price formation depends on numerous factors, that the list price is only one of these factors, and that the factors may be weighted differently from case to case may justify the conclusion that the relationship between list price and market price is variable and that there is no "systematic" connection between list price and market price. However, it cannot be concluded from this that a list price increase does not have an influence on the final price attainable on the market.

48 List price increases reflect or precede cost increases in vehicle production and are therefore in any case potentially and to a certain extent capable of having an impact on the – as the Defendant and its Interveners frequently point out – highly complex individual transaction prices which can hardly be coordinated directly at the level of the manufacturers. Accordingly, the Court of Appeal correctly took into account that for all the truck manufacturers involved in the agreements the list prices set by the respective head office, as established by the Commission, typically formed the starting point of the pricing and that their knowledge also made it possible to estimate the market prices better than without knowledge of this variable.

49 Contrary to the Appeal, this is not a non-binding, "overreaching", finding by the Commission on possible cartel damage. The relevance of list price coordination under competition law only arises from an influence of price lists and list price increases on the attainable market prices that is at least possible, even if it fluctuates and is difficult to quantify; the Commission's findings on an increase in market transparency with regard to transaction prices are thus a central component of the characterisation of the specific infringement for which the fine was imposed.

50 (3) The economic expert opinions referred to by the Appeal do not exclude the presumption of a price effect of the agreements in the case in dispute.

51 (a) However, the application of a principle of experience must not contradict established economic knowledge. Although a factual principle is to be treated as a legal principle under the law of further appeal, its validity and scope depend on the extent to which its factual basis is suitable to make the presumed facts more probable than a possible deviating fact.

52 (b) In the case in dispute, however, the expert opinions in question do not show such a contradiction between the application of the above-mentioned principle of experience to the case at hand and established economic findings.

53 (aa) The expert opinion of RBB Economics of 22 October 2019 commissioned by the Intervener Scania states that there was no economic research specifically on an exchange of information on list prices. Statements can be found on the one hand on an exchange of information on transaction prices and on the other hand on agreements on list prices; they provided clear indications that in both cases there is typically no increase in transaction prices. In the case of an exchange of information on list prices, price effects were therefore not to be expected. This does not give any indication of scientific findings that could contradict the application of the experience principle in the case in dispute. As stated above, it is not true that only an exchange of information on list prices is at issue. The expert opinion does not show that the application of the principle of experience to a long-standing coordination of price lists and the raising of list prices, which is also accompanied by at least occasional direct agreements with regard to the passing on of certain cost items – in this case the adaptation of exhaust technology to changed legal standards – contradicts econometric evidence.

54 (bb) The same applies to the Oxera expert opinion of 8 May 2019, which, as stated in the expert opinion at 1.9, is based on the request of the commissioning manufacturers to focus "on the infringement in the form of the exchange of information on gross prices", the expert opinion by E.CA Economics of 14 November 2018, which was prepared for the Defendant, the expert opinion by E.CA Economics of 14 November 2018, which also expressly assumes only an "exchange of information on intended gross list price changes", and the expert opinion of 20 September 2018 commissioned by MAN from Compass Lexecon, which bases the economic assessment on an "exchange of information at list prices".

55 c) However, the Court of Appeal's assessment of the circumstances of the dispute in order to establish that the Plaintiff suffered damage is not free of errors of law.

56 aa) Given that prices and price levels are necessarily hypothetical under non-manipulated market conditions, the trial judge can make a finding on the question of whether the price which an undertaking participating in a cartel agreement agrees with a customer is higher than it would have been without the cartel agreement or, in general, whether the price level arising on a market affected by a cartel agreement is higher than the price level which would have arisen without the cartel agreement, only on the basis of circumstances allowing the conclusion to be drawn as to how the market would probably have developed without the cartel agreement. The court must make this finding freely, taking into account all circumstances, whereby it has the power to esti-

mate damages according to the standards of section 287(1) ZPO, so that a clearly preponderant probability, based on a sound foundation, that damage has occurred is sufficient for the court to form its own opinion (BGH, WuW 2020, 202, paras. 34 et seq. – Rails Cartel II, with further references). In the assessment, all circumstances are to be included which have been established or for which the party relying on a favourable circumstance of indicative relevance for or against a price effect of the cartel has offered evidence.

57 If the court uses a principle of experience in the assessment of the relevant circumstantial facts, it must bear in mind that this – unlike prima facie evidence – does not have an abstractly quantifiable influence on the result of the assessment of all circumstances of the individual case. Rather, its importance depends decisively on the concrete structure of the cartel and its practice and increases the longer and more sustained a cartel has been practised and the greater the likelihood that it has had an impact on the price level that has been established as a result of the elimination or at least severe dampening of competition (BGH, WuW/E DE-R 1567, 1569 – Berlin Ready-mix Concrete I; NZKart 2019, 101 para. 55 – Rails Cartel I; WuW 2020, 202 para. 40 – Rails Cartel II; judgment of 23 September 2020 – KZR 4/19, juris, para. 26 – Rails Cartel V).

58 The circumstantial evidence to be provided accordingly is established when the court, on the basis of an overall assessment of all circumstantial evidence, has reached the conviction of the correctness of the main fact to be proven, which is to be measured according to the standard of Section 287 ZPO. The burden of proof for the circumstantial facts supporting the main fact is on the party who also has to prove the main fact. On the other hand, it is incumbent on the opposing party to present and, if necessary, prove circumstantial facts that are suitable to call into question the conviction of the judge of fact of the main fact to be proven (cf. BGH, judgment of 19 May 2020 – KZR 8/18, WuW 2020, 597 para. 40 – Rails Cartel IV). Circumstantial evidence is unsuccessful if, taking into account all the circumstantial facts established or – in the absence of evidence – to be assumed and the weight to be attached to each of them, at least doubts remain as to whether damage has occurred with the probability required under Section 287 ZPO. It is not necessary that the opponent proves the contrary so that the judge is convinced that no damage has been caused.

59 bb) The Court of Appeal did not meet these requirements. Although it relied on the required overall assessment of all circumstances, it did not sufficiently embed the principle of experience in this. Its assessment of the facts gives rise to concern that, contrary to the Defendant's own statements on the merits, it placed the burden of rebuttal on the Defendant for a damage to be presumed.

60 (1) However, it follows from the above (paras. 47 et seq.) that, contrary to the Appeal, the Court of Appeal did not have to conclude from the fact that market price formation depends on numerous factors that an influence of a list price increase on the final price can reasonably be ruled out.

61 Irrespective of this, there is also nothing to be said against the further consideration of the Court of Appeal that it does not appear plausible that the cartel participants exchanged information on list prices and their increase many times and intensively over years, although these prices were of no significance for the prices that could ultimately be achieved on the market. Contrary to the Appeal, the Court of Appeal thus did not inadmissibly equate the established intentions of the cartel participants with the market results actually achieved, but rather drew a possible and, in itself, legally correct conclusion from the exchange of price lists practised over more than a decade, The Court drew a possible conclusion, which in itself was free of legal error, from the exchange of price lists, planned list price increases and numerous other directly or indirectly price-relevant information practised over a period of more than a decade, which was not only aimed at, but was also capable of, having an effect in the form of higher transaction prices than would have been enforceable without the cartel. The fact that the judge is only bound to the essential facts of the findings of the cartel authority’s decision does not mean that the trial judge is prevented from deriving further conclusions from these findings of which he is convinced.

62 (2) The Appeal's complaint that the Court of Appeal wrongly rejected the objection that the exchange of information could not have had any influence on the gross pricing for reasons of time alone is also unsuccessful.

63 In this regard, the Court of Appeal only briefly referred to the Commission's finding that the exchange had at least enabled the cartel participants to take account of the information exchanged when planning future gross price increases for the coming calendar year. However, in view of the meetings found to have taken place several times a year, at which intended price increases were not only exchanged but also discussed and in some cases even agreed, as well as the further exchange by telephone calls and e-mails, this was sufficient.

64 (3) However, the overall assessment of the Court of Appeal does not prove itself to be free of legal errors.

65 (a) Already the introductory formulation of the Court of Appeal that the objections of the Defendant are "not suitable to shake the presumption" gives rise to concern that the Court of Appeal did not apply the principle of experience – which is in itself free of legal error – in a case-related manner. It points in the same direction when the Court of Appeal considers the objection raised by the Defendant and its Interveners against a price effect of the agreements to be un-

founded that there had been considerable competition between the cartel participants with the risk of actual losses of market share. In this regard, it stated that this competition was "not suitable to rebut the presumption (scil. of a loss caused to the Plaintiff)", since the Commission had bindingly established that the common purpose of the cartel had been precisely the partial elimination of that competition.

66 (b) As can be seen from another passage of the Appeal Judgment, the Court of Appeal apparently assumes that the presumption of cartel damage, once considered relevant, has a strong indicative significance in general and irrespective of the concrete circumstances of the cartel. Thus, it states that the actual presumption has a strong indicative effect in the context of the free weighing of evidence, insofar as the Plaintiff can rely on a presumption that it suffered damage as a result of the formation of the cartel. The Court thus erroneously derived the occurrence of damage to the Plaintiff solely from a "strong" weight of the factual presumption based in the abstract and independent of the concrete circumstances.

67 (c) In formulating these legal propositions, the Court of Appeal did not take into account that the trial judge must and may only take into account a factual presumption when forming his conviction – with the weight to be attributed to it in the individual case, taking into account the overall circumstances – and may therefore, under certain circumstances, already see himself prevented from concluding on the presumed fact in the case of weak circumstantial evidence to the contrary. It also assessed the circumstantial facts put forward by the Defendant and its Interveners only from the viewpoint of a possible rebuttal of the factual presumption and only individually.

68 This is all the more significant as the Court of Appeal – in favour of the Defendant – did not even exhaust the Commission's findings, but consistently treated the list price coordination among the cartel participants only as an exchange of information and also did not consider more far-reaching findings on agreements between the cartel participants on the grounds that it was not established that they affected the German (sub-)market and the acquisition transactions on which the claims were based.

69 (4) Against this background, it cannot be ruled out that the Court of Appeal assumed an incorrect allocation of the burden of proof and that it was incumbent on the Defendants to prove the contrary with regard to the factual presumption of a price effect of the agreements practised and thus of damage to the Plaintiff, and that it might have reached a different result if it had not considered itself bound in such a sense.

70 IV. Since the judgement of the Court of Appeal is not correct on other grounds (Section 561 ZPO), it must be set aside (Section 562 ZPO).

71 V. The Senate cannot decide on the matter itself – not even partially.

72 1. In particular, the Senate cannot make a final decision with regard to a possible limitation of a part of the claims for damages asserted by the Plaintiff. The claims in respect of the lorries acquired by its subsidiaries in 1998 and 2000 are also not time-barred.

73 a) The Court of Appeal assumed, in accordance with the case law of the Federal Court of Justice, that the damages derived from the individual purchases, which the Plaintiff asserts, each constitute independent claims under substantive law, and thus the question of the limitation period for any claims for damages must be assessed separately for each transaction. It further rightly assumed that the claims from the acquisition transactions in 1998 and 2000 arose in any case with the execution of the purchase agreements at increased prices due to the cartel.

74 b) The Court of Appeal correctly concluded that the limitation period for these claims for damages had not expired before 31 December 2011.

75 aa) According to Sections 852(1), ex-198 BGB, the claims were (initially) subject to a three-year limitation period, which, however, only started to run at the time when the injured party became aware of the damage and the person liable for compensation. It has not been established that the Plaintiff or its subsidiaries acquired this knowledge before the European Commission uncovered the cartel in 2011.

76 bb) Since the claims on account of the acquisition transactions in 1998 and 2000 were therefore not yet time-barred on 1 January 2002, the provisions of the statute of limitations in the version applicable since 1 January 2002 apply to them pursuant to Article 229 Section 6(1) sentence 1 of the Introductory Act to the Civil Code [*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB]. Thus, the statute of limitations of ten years under Section 199(3) no. 1 BGB (new), which is shorter than the maximum period of 30 years under the old law (ex-Section 852(1) BGB), which is independent of knowledge, applies to them. According to the transitional provisions in Article 229 Section 6(4) sentence 1 EGBGB, this period began to run on 1 January 2002 and would have ended on 31 December 2011. The regular three-year limitation period according to Section 199(1) BGB, as it also requires knowledge of the circumstances giving rise to the claim, would only have been completed later and therefore does not apply.

77 c) Finally, the Court of Appeal also found that the limitation period for the aforementioned claims had been suspended before its expiry on 31 December 2011.

78 aa) Pursuant to Section 33(5) GWB 2005, the limitation period of a claim for damages for anti-competitive agreements is suspended if the national cartel authority initiates proceedings

for a violation of national or European cartel law or if the European Commission initiates proceedings for a violation of Article 81 or 82 EC Treaty or Article 101 or 102 TFEU. As the Federal Court of Justice has already ruled, Section 33(5) GWB 2005 in conjunction with Section 204(2) BGB applies to such a case with the proviso that the statute of limitations is suspended upon the entry into force of this provision until the expiry of six months after the final decision or other termination of the proceedings on fines (BGH], judgment of 12 June 2018 – KZR 56/16, WuW 2018, 405 paras. 66 et seq. – Grey Cement Cartel II).

79 bb) The Court of Appeal correctly assumed that the initiation of proceedings within the meaning of Section 33(5) GWB 2005 does not require the initiation of formal proceedings even in the event of action by the European Commission, but merely requires the implementation of official measures against an undertaking which are recognisably aimed at investigating that undertaking for a restriction of competition.

80 (1) According to the prevailing opinion in the literature, the suspension of the statute of limitations already begins with the taking of investigative measures directed against certain undertakings (cf. Bornkamm/Tolkmitt in Langen/Bunte, Kartellrecht, Vol. 1, 13th ed., Section 33h GWB, para. 33; Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed., Section 33, para. 79; Seifert, WuW 2017, 474, 479). The opposing opinion, on the other hand, wants to focus on the formal opening of proceedings by the cartel authority (Klöppner/Schmidt, NZKart 2018, 449, 452, with further references).

81 (2) However, the fact that such an act is not relevant under national cartel law – unlike at the European level – already speaks against the use of the formal initiation of proceedings as the relevant point in time for the commencement of the suspension of the limitation period. Rather, the initiation of (fine) proceedings at the Federal Cartel Office [*Bundeskartellamt*] takes place solely through the initiation of investigations. The inhibition effect would therefore be linked to different facts, depending on which competition authority has become active, if one wanted to focus on the formal act in the case of fine proceedings conducted by the European Commission.

82 Moreover, the formal initiation of proceedings has a completely different purpose in the competition law of the European Union. According to Art. 11(6) of Regulation (EC) No. 1/2003 (Antitrust Regulation), the competence of the competition authorities of the Member States to apply Union competition law in the respective case ceases to exist. Article 16(1) Antitrust Regulation also states that the courts of the Member States may not take decisions which are contrary to a decision which the Commission intends to take in proceedings initiated by it. Thus, the formal initiation of proceedings serves, at least primarily, to delimit competences between national cartel authorities acting in the same matter and the European Commission.

83 (3) Apart from that, it would be contrary to the spirit and purpose of the prohibition of the statute of limitations to expect the aggrieved party to file a lawsuit despite ongoing investigative measures – possibly extending over several years – In order to avert a limitation of his claims before the formal opening of proceedings (Seifert, WuW 2017, 474, 479). This is because the provision in Section 33(5) GWB 2005 was intended to ensure that persons individually injured actually benefit from the binding effect on facts [*Tatbestandswirkung*] under Section 33(4) GWB 2005 and that civil claims for damages are not already time-barred after the expiry of lengthy fine proceedings (cf. justification of the Federal Government's draft bill, *Bundestag* Printed Matter No. 15/3640, p. 55).

84 This objective is also evidenced by the amendment of Section 33(5) GWB 2005 by Section 33h GWB. As can be seen from the explanatory memorandum of the Federal Government's draft bill, the wording in Section 33h(6) GWB, according to which the suspension of the statute of limitations occurs if the cartel authority takes "measures with regard to an investigation" or with regard to its proceedings for an infringement within the meaning of Section 33(1) GWB or if the European Commission takes "measures with regard to an investigation" or with regard to its proceedings for an infringement of Art. 101 or 102 TFEU, largely corresponds to the previous Section 33(5) GWB 2005. The legislator of the 9th Amendment to the GWB thus did not assume that Section 33(5) GWB 2005 is based on a formal opening of proceedings.

85 cc) Since the Commission had already carried out searches at the Defendant's premises in January 2011, the expiry of the limitation period was suspended at that time. When the action was filed, the claims asserted from the transactions in 1998 and 2000 were therefore not yet time-barred.

86 2. The case must therefore be referred back to the Court of Appeal for a new hearing and decision (Section 563(1) ZPO).

87 VI. in re-examining whether the collusion in which the Defendant and its Interveners participated caused damage to the Plaintiff's subsidiaries in each case and, if necessary, the subsequent examination of the amount of the respective damage, the Court of Appeal will have to take the following into account:

88 1. As explained above (cf. paras. 56 et seq.), the evidence to be provided by the Plaintiff of the occurrence of a cartel-related damage is to be provided in case of doubt by way of circumstantial evidence. In principle, the trial judge is free to determine the probative value he attaches to the circumstantial evidence in detail and in an overall view of his formation of conviction. However, he must take all circumstances fully into account and may not violate principles of

reasoning or experience. He must also take into account that a single circumstantial fact, which in itself is not convincing to prove the main fact, may nevertheless be convincing when taken together with all the other circumstantial facts (cf. Laumen in Baumgärtel/Laumen/Prütting, Handbuch der Beweislast, 4th ed.)

89 a) On this basis, the Court of Appeal will first have to take into account comprehensively and exhaustively the findings of the European Commission on the agreements and concerted practices of the cartel participants on the market for medium-duty and heavy-duty trucks, which extends over the entire European Economic Area, in order to assess the weight to be attached in the dispute to the principle of experience which is in dispute for a price effect of the cartel. Since the cartel was practised on the entire European market for more than a decade, on which the undertakings concerned have a high market share of around 90%, findings which have no direct connection with acquisition transactions in Germany must in principle also be taken into account, since they can nevertheless provide information about the extent and intensity of the coordination of conduct and about its suitability to have an effect on the conditions and prices for transactions carried out in the individual Member States of the European Union and of the Agreement on the European Economic Area. Accordingly – contrary to what the Court of Appeal held so far –, the established coordination of market conduct in the introduction of new exhaust gas technologies must also be taken into account, which was carried out by the same cartel and may not be disregarded because the Plaintiff has declared that it does not wish to base the claims on this aspect of the uniform factual situation forming the basis of the action.

90 b) If necessary, the Court of Appeal will also have to examine whether, according to the Plaintiff's submissions, further indications in dispute are to be taken into account in favour of the main fact to be proven – the occurrence of a cartel-related damage at the Plaintiff's subsidiaries as a result of a cartel-related increase in the market price level. In the case in dispute, such evidence could, for example, result from the lists of construction workers of the German Construction Industry Association submitted by the Plaintiff or from the contractual terms of the Defendant concerning adjustments of agreed purchase prices in the event of an increase in list prices.

91 c) Likewise, the Court of Appeal will have to take into account counter-indications cited by the Defendant and its Interveners which are to be classified as substantial.

92 To the extent that the Court of First Instance assumed in the contested judgment that continuing competition between the undertakings participating in the cartel, which was also reflected in changes in market shares, did not preclude the assumption that the cartel participants had succeeded in any event in dampening price competition in accordance with the purpose of the cartel by means of the long-standing exchange of information on intended and desirable price in-

creases, this consideration cannot, however, be challenged in itself. Significant shifts in market share may nevertheless not be disregarded in the overall assessment. The weight to be attached to them in the result is a question of the individual case and may depend, in the case of dispute, on the plausibility of the influence on the transaction prices in general and on the specific acquisition transactions at hand in particular .

93 2. Should the Court of Appeal again come to the conclusion that the Plaintiff's subsidiaries suffered damage, its further assumption that the Defendant did not show a passing on of the damage suffered to its customers will not be objectionable.

94 a) The undertaking against which a claim for damages is made on account of a cartel infringement may in principle plead that its customer suffered no or only minor damage because it passed on the increase in its costs caused by the cartel-related price increase in whole or in part to its own customers. However, this is not based on the fact that passing on costs would eliminate the damage in the legal sense. Rather, the damage to the buyer arises (finally) with the conclusion of the contract, which obliges her to pay a purchase price that is higher than it would have been without the cartel-related price effect. If an ascertainable cost pass-on has an adequate causal connection with the cartel-related price surcharge, the additional revenue of the primary injured party can nevertheless be regarded as damage to its customers and thus at the same time as a compensatory advantage on the part of the primary injured party (BGH, judgements of 19 May 2020 – KZR 8/18, WuW 2020, 597 para. 46 – Rails Cartel IV; of 28 June 2011 – KZR 75/10, BGHZ 190, 145 para. 58 – ORWI).

95 However, the offsetting of benefits must not impose an unreasonable burden on the injured party, nor must it lead to an unfair advantage for the injuring party. Since the compensation of cartel-related damages is an integral part of the system for the effective enforcement of cartel law prohibitions and complements the enforcement of these provisions by the authorities, it is necessary, in the context of both the setting-off of benefits and the question of whether an offsetting of the benefits accrued through a passing on of the damage would relieve the injuring party unfairly, to take into account the public interest in guaranteeing undistorted competition. This would be impaired if the duty of the cartel participants to compensate for the damage caused by them were limited or even completely denied because of a merely possible but not ascertainable advantage to be compensated for (BGH, judgement of 23 September 2020 – KZR 4/19, juris, para. 50 – Rails Cartel V).

96 b) Therefore, a setting-off of benefits cannot be considered simply because the primary aggrieved party, like every undertaking, typically has an interest in aligning its price with the cost price and to sell its goods at a profit or to provide its services at a profit. The causality of the car-

tel agreement for the advantage that accrues to the primary aggrieved party in the form of higher proceeds is rather to be assessed in principle according to the same standards as the determination of the cartel-related price increase, because its cartel-related advantage is the mirror image of the cartel-related damage incurred by its customer. Thus, also in this context it has to be assessed on the basis of the economic conditions on the aftermarkets whether and to what extent the price formation on a subsequent market level is caused by the price effect of the cartel (BGH, WuW 2020, 597 para. 46 – Rails Cartel IV; BGHZ 190, 145 para. 59 – ORWI). However, it must be taken into account that a principle of experience which – as in the case in dispute – argues in favour of a price effect of the cartel and thus a damage incurred by the participants of the first market level does not, in any case, also allow statements on the likelihood of a cost pass-on without further ado.

97 c) Since the cartel participant bears the burden of proof for the prerequisites of the setting-off of sharing, the cartel participant has to plausibly argue, on the basis of the general market conditions in the relevant sales market, in particular the elasticity of demand, the price development and the product characteristics, that passing on the cartel-induced price increase is at least a serious possibility (BGH, WuW 2020, 597, para. 51 – Rails Cartel IV; BGHZ 190, 145 para. 64 – ORWI). The required level of detail of the submission must take into account the circumstances of the individual case, in particular the complexity of the economic interrelationships (BGH, judgment of 23 September 2020 – KZR 4/19, juris, para. 38 – Rails Cartel V). If, as in the case at hand, costs are passed on to different sales markets – in this case the market for construction services on the one hand and the market for used trucks on the other – the cartel participant must show separately for each sales market that a cartel-induced price increase has had an effect on this market and in what way.

98 d) The Court of Appeal did not err in law in assuming that the Defendant did not meet these requirements. With its assertion that the Plaintiff's subsidiaries had charged higher prices to their own customers for the construction services they had provided, the Plaintiff has indeed shown that higher costs could in principle be passed on to the customers of the downstream market, as is generally also the case in the dispute, but it has not shown that such a passing-on is seriously possible. This is because its statements do not contain any information on price formation on the construction market and the possible influence of the new prices for lorries on the remuneration achievable by construction companies. Insofar as the Defendant objects to the resale of some of the trucks in question by the Plaintiff's subsidiaries, there is likewise no information whatsoever on the pricing on the market for used trucks.

(OFFICE TRANSLATION)

99 e) Under these circumstances, the Court of Appeal was right to see no room for a secondary burden of proof on the part of the Plaintiff.

Meier-Beck Kirchhoff Berg

Tolkmitt Picker

Lower instance courts:

Regional Court of Stuttgart, decision of 30.04.2018 – 45 O 1/17 –
Higher Regional Court of Stuttgart, decision of 04.04.2019 – 2 U 101/18 –