FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

KZR 19/20

Truck Cartel II

ARC 2005 Section 33 (3), (5)

a) The principle of experience that market prices achieved within the framework of a cartel are on average prices achieved within the framework of a cartel are on average higher than those which would have been formed in the absence of the agreement restricting competition, is also to be observed in the case of the coordination of list prices of a product by manufacturers if the list prices form the basis of pricing at the manufacturer's level and list price increases for the distributors not participating in the cartel the manufacturers or their independent distributors selling products who dealers, who agree the transaction prices with the buyers, indicate cost increases in production.

b) The six-month period of § 204 (2) of the German Civil Code shall commence in the case of claims for damages for cartel infringements, the limitation period of which shall commence due to the initiation of proceedings by the European Commission on account of a cartel infringement pursuant to § Section 33 (5) ARC 2005, does not begin with the notification of the penalty notice, but with the expiry of the time limit for bringing an action for annulment pursuant to Article 263 (4) TFEU.

BGH, Judgment of 13 April 2021 - KZR 19/20 - OLG Schleswig
Kiel Regional Court

The Cartel Senate of the Federal Court of Justice ruled on the oral proceedings of 13 April 2021 by the presiding judge Prof. Dr. Meier-Beck, the judge Dr. Tolkmitt and the judges Dr. Picker, Dr. Rombach and Dr. Allgayer, Dr. Tolkmitt and the Judges Dr. Picker, Dr. Rombach and Dr. Allgayer

found in favour of the law:

On appeal, the judgment of the Cartel Senate of the Schleswig-Holstein Higher Regional Court of 17 February 2020 is set aside.

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

Facts

Paragraph 1
The plaintiff claims compensation for cartel-related damages from the defendant Daimler AG in connection with the acquisition of several trucks.

Paragraph 2
The defendant is one of the leading truck manufacturers in the European Economic Area (EEA). By decision of 19 July 2016 - based on a settlement with the parties concerned - the European Commission found that the cartel had been infringed. By 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 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 and heavy-duty trucks and on the timing and passing-on of the costs for the introduction of emission technologies for these vehicles in accordance with the EURO 3 to EURO 6 emission standards. For the infringement, which covered the entire European Economic Area and lasted from 17 January 1997 to 18 January 2011, the Commission imposed a fine of just over one billion euros on the defendant.

Paragraph 3
The applicant operates a freight forwarding company. In March 2001 it purchased from the defendant ex works a lorry of the make Mercedes-Benz, type 1828 L 4x2 5100 ATEGO. In November 2003, two further lorries of this type were purchased from the defendant under the plaintiff's address and invoiced to a company "W. ". Furthermore, in the period between September 2004 and August 2006, the plaintiff acquired three trucks of the type DAF FA LF45 and three further trucks of the type DAF FA XT95 from independent DAF authorised dealers.

Paragraph 4
The plaintiff, who, by its application received on 28 February 2018 and served on the defendant on 20 March 2018, first sought a declaration that the defendant had to compensate it for the damage caused by the acquisition of, inter alia, the aforementioned trucks on the basis of cartel agreements, seeks payment of damages in the amount of just over €50,000 in respect of the aforementioned nine acquisition transactions. It calculates its damages on the basis of an overcharge - determined on the basis of a comparative market analysis based on general market data - for the defendant's and the interveners' products in the amount of €7,007.49 for trucks sold until the end of 2003 and €5,231.76 for trucks sold from 2004 onwards.

Paragraph 5
The Regional Court declared the action to be justified on the merits. The Court of Appeal dismissed the defendant's appeal against this. In its appeal, which was allowed by the Court of Appeal and supported by the interveners, the defendant continues to seek the dismissal of the action in its entirety.

Reasons for decision

Paragraph 6
I. The Court of Appeal essentially stated in support of its decision:

Paragraph 7
The defendant and the interveners had, as bindingly established by the European Commission's decision of 19 July 2016, intentionally infringed the prohibition of cartels under Article 101 TFEU and its predecessor standards by, inter alia, agreeing on gross list price increases or, in any event, coordinating them with each other. In view of the allegation of collusion and the finding that the participants had knowingly substituted practical cooperation for the risks of competition, so that the effect on interstate trade had become appreciable, a mere exchange of information had not been established. The acquisition transactions at issue were affected by the cartel infringement because they fell objectively, temporally and geographically within the scope of the agreements identified in the Commission decision. By their agreements, the cartelists had distorted the pricing and the usual price movements for lorries in the European Economic Area in their favour. Gross list prices were the starting point for the pricing of lorry producers and determined the price level from which the prices at the downstream market levels were formed; they were therefore necessarily also reflected in the market prices to be paid by the end customers on a pro rata basis. The coordination of gross list prices made it possible to eliminate the uncertainty that existed under market conditions about the competitors' control behaviour with regard to the passing-on of cost increases; it therefore resulted in a considerable probability that the coordinated percentage price increases would be cumulatively higher over time than they would be under market conditions. The objections raised by the defendant and the interveners against the effectiveness of the agreement mechanism were not upheld. They were partly based on incorrect or implausible factual premises, in that they assumed a mere exchange of information and other purposes of the exchange, questioned the material, spatial and temporal scope of the cartel and assumed an exclusively "bottom up" price formation. Moreover, they did not take into account the functioning of the specific cartel and remained abstract and theoretical; they also partly contradicted the Commission's findings.

Paragraph 8
The applicant is entitled to damages on the merits, since, after a comprehensive assessment of all the circumstances, it must be assumed that, as a result of the agreements between the participants in the cartel, the market prices for lorries to be paid by the end customers increased, and that, without the infringement of competition, corresponding transactions could therefore have been concluded on more favourable terms in each case, and that the applicant therefore suffered damage of some kind as a result of the handling of the purchase transactions in dispute. The economic expert opinions submitted by the defendant and the interveners did not lead to a different assessment, as they had incorrectly assumed a mere exchange of information. The requisite probability of the occurrence of damage also existed in the case of the indirect acquisition transactions concerning the DAF trucks which the plaintiff had acquired from independent dealers; there was no evidence that, at the intermediate stage, price increases could have taken place autonomously and independently of the cartel-related price increases on account of an independent special market position of the dealers.

Paragraph 9
The defendant's objection that the plaintiff had passed on its possible damage to its customers via its prices was not valid. In the case in dispute, according to the principles of commercial reasonableness, there was prima facie evidence that the plaintiff had passed on the costs it had incurred in acquiring the lorries, in their entirety and thus including the additional costs caused by the cartel, to its customers via its prices. However, this effect could not be taken into account by way of benefit sharing, because the cartel infringement would then remain practically inconsequential for the injurers and they would thereby be unfairly favoured. Neither the plaintiff was claimed by its customers for reimbursement of excessive price shares, nor were the defendant or the interveners claimed against to any significant extent by undertakings downstream of the vehicle purchasers in the value chain.

Paragraph 10
Finally, the claims asserted were not time-barred.

Paragraph 11
II This does not stand up to review by the court of appeal on one decisive point. On the basis of the grounds given by the Court of Appeal, a claim for damages cannot be affirmed on the merits.

Paragraph 12
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 (case law, cf. most recently BGH, Judgment of 23 September 2020 - KZR 35/19, BGHZ 227, 84 marginal no. 16 - LKW-Kartell) and that the basis for the claims for the damages from the acquisition transactions in the years 2001 to 2004 is Section 33 sentence 1, second half sentence in conjunction with Section 1 ARC in the version applicable from 1 January 1999 to 30 June 2005 and for the acquisition transactions in 2005 and 2006 Section 33 subsection 3 ARC in the version applicable from 1 July 2005 to 29 June 2005. § Section 1 of the ARC in the version applicable from 1 January 1999 to 30 June 2005 and Section 33 (3) of the ARC in the version applicable from 1 July 2005 to 29 June 2013 (ARC 2005) for the acquisitions in 2005 and 2006. According to this provision, 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 of the EC Treaty (now: Articles 101, 102 TFEU) is obliged to compensate the damage resulting from the violation.

Paragraph 13
(2) The Court of Appeal was also correct in finding that the defendant had culpably infringed Article 81 EC and Article 101(1) TFEU as well as the corresponding standards in national antitrust law and in doing so assumed that the defendant had been involved in restrictive agreements over a longer period of time.

Paragraph 14
(a) In the Decision of 19 July 2016, the European Commission found that the Respondent and its interveners 1 to 3 and 7 to 10 committed a continuing complex infringement of Article 101(1) TFEU in the period from 17 January 1997 to 18 January 2011, consisting of various acts which are to be classified either as agreements or concerted practices and by means of which the cartel participants knowingly substituted practical cooperation for the risks of competition. The Commission has classified the conduct of the cartel participants as price coordination which, as practised, was one of the most harmful restrictions of

competition. The infringement of Article 101(1) TFEU consisted, according to the findings in the Commission Decision, in collusive arrangements on pricing and gross price increases for medium and heavy duty trucks as well as in the coordination of the market behaviour of the cartel participants on the timing and passing-on of the costs for the introduction of emission technologies for such trucks according to the EURO 3 to 6 emission standards. The collusive behaviour included agreements and/or concerted practices on price fixing and list price increases with the aim of aligning gross prices in the European Economic Area, as well as on the timing and passing-on of costs for the introduction of emission technologies according to the EURO 3 to 6 emission standards.

Paragraph 15
The cartel participants exchanged price lists and information on gross prices among themselves, they discussed in detail their respective future list price increases and in some cases they agreed on them. Occasionally, net prices for some countries were also discussed with the participation of representatives from the headquarters of all parties. In addition to agreeing on the level of price increases, the parties regularly informed each other of their planned gross list price increases. They also agreed on the respective timetable for the introduction of the EURO emission standards and the associated price surcharge. They also exchanged information on their respective delivery deadlines 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 the involvement of all parties. 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 systematically exchanged information on their respective planned list price increases.

Paragraph 16
The agreements at least enabled the companies to take the exchanged information 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 head office were again the starting point for pricing at all participating truck manufacturers; then the transfer 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, 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.

Paragraph 17
(b) These findings are binding on the present dispute pursuant to Section 33(4) ARC 2005.

Paragraph 18
aa) The extent of the binding effect under Section 33 (4) first sentence ARC 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 main reasons of the final decision. The binding or declaratory effect thus extends to all findings of fact and law with which the competition authority substantiates an infringement of substantive competition law (settled case law, cf. most recently BGHZ 227, 84 marginal no. 24 - LKW-Kartell). In contrast, it does not cover descriptions and considerations that go beyond this, and questions of causality of damage as well as the amount of damage do not participate in 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, BT-Drucks. 15/3640, S. 54).

Paragraph 19
bb) As the Senate has already decided, the binding effect is not excluded or limited in the case at issue 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) 773/2004) as amended by Regulation (EC) No 622/2008 (see BGHZ 227, 84 marginal nos. 25 et seq. - LKW-Kartell).

Paragraph 20
The Court of Appeal also correctly considered the plaintiff to be affected by the cartel agreement and thus entitled to make a claim.

Paragraph 21
a) According to the case law of the Federal Court of Justice, the prerequisite for a claim for damages under cartel law under both Section 33 sentence 1 ARC 1999 and Section 33 (3), (1) ARC 2005 is that the opponent of the claim is guilty of conduct restricting competition which - mediated by the conclusion of turnover transactions or in another way - is capable of directly or indirectly causing damage to the claimant. The standard of § 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 procurement transaction in question, on which the claimant bases his claim for damages, and whether the transaction was thus "cartel-involved" or "cartel-affected" in this sense, is not relevant in the context of the examination of the causality giving rise to liability. The requirements for establishing liability thus take into account the fact that the prohibition of cartels as an element of endangerment already sanctions the agreement between competitors because of the associated interference with the freedom of the competitive process and the resulting disruption, in particular, of the competitive price formation mechanism, without taking into account the direct and indirect effects on the market players resulting from it, which in any case can only be determined with considerable difficulty. In view of the special features of the offence under cartel law, which is not directed against individual market participants, but against the opposite side of the market, it is therefore not necessary to establish that a specific individual is affected (established case law, cf. most recently BGHZ 227, 84 marginal no. 31 - LKW-Kartell; BGH, judgment of 10 February 2021 - KZR 63/18, WRP 2021, 920 marginal nos. 15, 41 - Schienenkartell VI).

Paragraph 22
b) In the case in dispute, these requirements are fulfilled without further ado because the plaintiff, with the nine trucks in dispute, directly or indirectly acquired goods from the defendant and its intervener DAF and thus from undertakings participating in the cartel, which were the subject of the exchange on future price lists and list price increases as well as the further established restrictive practices and thus the subject of the cartel agreement. In doing so, the Court of Appeal also convinced itself, without any legal or procedural error, of an acquisition by the plaintiff with regard to the two trucks that were invoiced to a company "W. ".

Paragraph 23
c) As the Senate has already decided in parallel proceedings with regard to the cartel in question, it is irrelevant for the affectedness whether and to what extent the transaction prices of the vehicles acquired by the respective claimant - here the plaintiff - were influenced by the cartel agreement. It is sufficient that these vehicles were based on the basic models ("corner types") whose list prices were the subject of the agreements, since the distortion of the conditions of market activity brought about by the cartel was thus in any case capable of having an effect on the individual transaction prices for vehicles of the truck manufacturers participating in the cartel. At the same time, it follows from this that members of the opposite side of the market who, like the plaintiff, purchased vehicles of 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 establishing liability (see BGHZ 227, 84 marginal no. 33 - LKW-Kartell).

Paragraph 24
However, the reasons given by the Court of Appeal do not support the finding that the plaintiff suffered damage due to the cartel agreement between the companies involved - with the probability required for an interlocutory judgment pursuant to § 304 ZPO (cf. BGH, Judgment of 28 January 2020 - KZR 24/17, BGHZ 224, 281 marginal no. 28 - Schienenkartell II).

Paragraph 25
a) However, the appeal's complaint that the Court of Appeal was not entitled to apply the principle of experience in its assessment that price coordination between manufacturers of a product leads on average to transaction prices for this product that are higher than the prices that would have been formed in competition without the agreement restricting competition remains unsuccessful.

Paragraph 26
aa) The Court of Appeal assumed, in accordance with the case-law of the Federal Court of Justice, that there is a factual presumption in favour of the customer of an undertaking participating in a cartel agreement, based on the high probability of such an occurrence - in the sense of a principle of experience - that the prices achieved within the framework of the cartel are on average higher than those which would have been formed without the agreement restricting competition. The basis of this principle of experience is the economic experience that the formation and implementation of a cartel regularly results in additional revenue for the participating companies. Cartel agreements relieve the participating undertakings, at least to a certain extent, of the necessity to compete against competing undertakings in order to obtain orders, and undertakings which do not have to face competition, in particular price competition, due to such agreements, will usually see no reason to use existing price reduction leeway (cf. most recently BGHZ 227, 84 marginal no. 40 - LKW-Kartell mwN).

Paragraph 27
bb) The Court of Appeal was not correct in finding that that presumption of fact was not excluded in the present case because the defendant and its interveners claimed that the agreements between them merely constituted an exchange of information.

Paragraph 28
(1) The Court of Appeal stated that, on the basis of the EU Commission's decision, it was bindingly established that the cartelists had agreed, or at least coordinated, inter alia, gross list price increases. Contrary to the understanding of the defendant and the interveners, it did not follow from the decision that the cartelists had merely inadmissibly "exchanged" information on their gross list prices. The accusation - accepted by the cartelists - was rather "collusion", i.e. "collusion", "collusion" or "collusion". Furthermore, the classification of the established conduct by the defendant as a mere exchange of information without any synchronisation was not compatible with the Commission's legal assessment that the conduct was to be subsumed either under the concept of agreements or that of concerted practices. Deliberate and deliberate coordination was also apparent from the Commission's further factual findings, according to which communication had always focused on gross list prices and detailed discussions, e-mail contacts and telephone conversations had regularly taken place during the year. It follows from this that the parties not only informed each other in advance or subsequently of their individual intentions, which had already been determined, but that they systematically discussed and synchronised their future planned gross list price changes with each other in advance.

Paragraph 29
(2) These statements do not reveal any errors of law. They are in line with the legal assessment of the conduct of the defendant and its interveners established in the Commission's decision of 19 July 2016 - binding - already made by the Senate in another legal dispute, from which there is no reason to deviate. According to this, the agreements reached between the defendant and the interveners differ fundamentally from a mere exchange of information and rather constitute a coordination of future list prices and their increase by means of agreements and concerted practices (see BGHZ 227, 84 para. 43 - LKW-Kartell).

Paragraph 30
cc) The Court of Appeal also assumed, free of errors of law, that the application of the principle of experience is not excluded in the case at issue because the cartel participants essentially did not agree on the prices to be paid by the end customers, but on list prices and their increase.

Paragraph 31
(1) The Court of Appeal stated that the coordination of gross list prices was a particularly effective instrument for influencing market prices because gross list prices were the starting point for the pricing of the truck producers and determined the initial level from which the prices at the downstream market levels were formed. For this reason alone, it was not clear that these prices were merely an "internal reference value" or a "benchmark for controlling purposes", as the defendant claimed. Rather, they guided the price negotiations with the national sales unit and the sales agents and were thus, as the defendant itself explained, the basic level from which the dealer purchase price to be negotiated was calculated by means of a percentage dealer discount. The dealer purchase price determined in this way then helped to determine which prices and which discounts the dealer could reasonably grant to the end customer, taking into account his own interests. This applied not only to tied dealers but also to independent dealers. Therefore, the gross list price is an essential instrument for the price calculation of all cartel participants and is also reflected as a corresponding fraction in the net prices to be paid by the final customer.

Paragraph 32
The gross list price played a role in the individual price negotiations between dealer and customer even if the customer did not know it. Such negotiations were not only influenced by the customer's willingness to pay, but also by the dealer's calculatory leeway, which in the case in dispute was influenced by the dealer's purchase price, which was infected by the cartel agreements. The fact that in individual cases a customer with corresponding market power could achieve that the dealer "passed on his margin in whole or in part to him" was already irrelevant because the assumption of such market power was remote in the case of the plaintiff, which had taken delivery of a total of 16 lorries over a period of 10 years, including the seven leased vehicles. Agreements on the consensual control of gross list prices made it possible to eliminate the uncertainty that existed in market conditions about the control behaviour of competitors, of whom it could not be known for certain whether and to what extent they would allow cost increases due to inflation, production costs, technical improvements and other factors to flow into their pricing. It therefore follows that there is a considerable probability that the concerted price increases will in any event tend to be cumulatively higher over time than they would have been under conditions of competition.

Paragraph 33
In addition, the fact that the proportion of market coverage, including the intervener Scania, was very high at at least 92% and that the exchange of information necessary for the implementation of the agreements was possible without restriction in view of the small number of undertakings involved and their communication skills as large groups, speaks in favour of a cartel effect in the dispute. There was also no conclusive evidence of a lack of cartel discipline; there was no evidence of any deviation from the jointly agreed specifications. The fact that dealers had considerable leeway in pricing and could pass on their margin in whole or in part to the customer in view of expected revenues from maintenance, repair or service did not prevent the assumption of a probable price effect either, since it could not be assumed that dealers regularly misled in this way. The defendant and its interveners did not prove that they had behaved in that way in the applicant's purchase transactions at issue.

Paragraph 34
The special features of the multifaceted truck market did not prevent a price increase effect. The fact that the market prices were determined not only by the prices of the basic models communicated alone at the outset, but also by the different and differently priced bodies and other equipment, did not alter the fact that the increased price level of the basic models due to the cartel was reflected in the final prices. The fact that the agreements did not completely eliminate competition, but that there had been certain fluctuations in the market shares of the cartel participants during the duration of the cartel, did not argue against a serious impairment of competition. In view of the way in which the cartel in question here operated, which consisted in influencing the final price level in a concerted manner and thus making it possible for each individual lorry sale and for each cartel participant to tend towards a higher return, it was not necessary to eliminate competition for market shares in order to achieve the objective of higher profits.

Paragraph 35
(2) This stands up to legal scrutiny.

Paragraph 36
(a) The Federal Court of Justice has already ruled that the principle of experience that prices achieved in the context of a cartel are on average higher than those that would have been formed in the absence of the agreement restricting competition must also be observed in the case of the cartel at issue and must therefore be taken into account in the examination by the court of fact as to whether the collusive conduct of the defendant and its interveners harmed an undertaking that purchased a vehicle manufactured by the cartel participants from one of the cartel participants during the cartel period (BGHZ 227, 84 para. 40 et seq. - truck cartel). For on the basis of the conduct bindingly established in the Commission decision of 19. July 2016, the cartel participants exchanged information on gross list prices over a period of 14 years, discussed these prices and their future increase and coordinated their future list price setting both through agreements and concerted practices and, in addition, jointly determined the timing and scope of the price surcharges for the introduction of the new EURO emission standards, they had to face price competition to a significantly lesser extent and had less incentive to use existing price reduction leeway (BGHZ 227, 84 marginal no. 43 - LKW-Kartell). The fact that the likelihood of an increase in market prices is to be affirmed even if the coordination of the cartel participants, as in the case at issue, essentially concerns "only" list prices is due to the fact that list price increases indicate cost increases in vehicle production when competition is functioning and are therefore at least potentially and to a certain extent capable of having an impact on the - highly complex and therefore hardly coordinatable directly at the level of the manufacturers - individual transaction prices (BGHZ 227, 84 marginal no. 48 - LKW-Kartell).

Paragraph 37
(b) The objection raised against this by the appeal with reference to economic expert opinions submitted in this regard, that there is no connection between the list prices, which formed the object of the agreements, and the transaction prices paid by the customers, is not valid. The findings made do not justify the assumption that the application of the principle of experience in the case in dispute is precluded by the fact that an influence of coordinated list price increases on the transaction prices is not economically plausible in principle.

Paragraph 38
(aa) According to the Commission's - binding - findings, the list prices set by the respective head office typically formed the starting point for pricing at the truck manufacturers participating in the cartel, which necessarily means that they had an effect - in some way - on the transaction prices to be paid by the customers. From the fact, emphasised by the defendant, that market pricing depends on numerous factors and that the list price, which is typically significantly higher than the transaction prices paid by the customers, is only one of these factors, which, moreover, may be weighted differently from case to case, it can at most be concluded that the relationship between list and market price is variable and that there is no "systematic" or fixed connection. However, it does not prevent the assumption that the cartel agreement was highly likely to have adversely affected the transaction prices achieved on the market.

Paragraph 39
(bb) The fact that there was also a corresponding connection between list and market prices for the products sold by the defendant and its interveners is apparent from the submission of the defendant and its intervener DAF, as discussed at the oral hearing. According to the

presentation in the expert opinion of E.CA Economics GmbH of 14 November 2018 entitled "Plausibility of net price increases due to gross list price-related infringements of competition law" (Annex GL 27 - hereinafter: E. CA Opinion I), since the introduction of the "European List Price" (ELP) in 2006, these gross list prices were determined by Daimler headquarters through a Steering Committee Pricing (SCP), which decided on both inflationary and technical gross list price changes. The first category was used to reflect expected rising purchase costs in the pricing system, while the second category - implemented together with the first where possible - reflected technical changes to the product that altered manufacturing costs or customer benefit or appreciation of the product by the customer. On the basis of these "European List Prices", the prices of the first distribution level were negotiated between the head office and the national subsidiaries of the defendant (Market Performance Centres, hereinafter: MPC or wholesale level) or, in some European markets, the general agents of the defendant as "National List Prices" (NLP) applicable to the national submarket concerned. The decisions of the head office were first passed on to the MPC level as "planning premises" and then negotiated with them, which led to specific price list adjustments taking into account the respective market, sales and turnover situation. These adjustments referred to average discounts granted by the MPC level to the dealers as the second distribution level, which were usually defined as a percentage of the gross list price. A maximum discount per sale was also set. All agreements were subject to approval by the defendant's divisional board. The wholesale level then negotiated the prices with the individual (dependent) dealers. As a rule, it decided for itself how the discounts agreed with Daimler headquarters were to be divided up into basic discounts, campaign discounts or individual transactions, as long as the average discount did not exceed the corresponding target agreement and no individual discount exceeded the maximum value. Only with the approval of the head office - for example in the case of a large fleet deal - was the maximum value allowed to be exceeded. The pre-2006 pricing steps are described as 'relatively similar', and similarly the setting of a European list price and the derivation of (country-specific) dealer net prices through discounting mechanisms is also described in the Compass Lexecon Belgium S.p.r.l. expert report (Annex DAF 7 - henceforth: CL expert report) for DAF.

Paragraph 40
The defendant's own submission thus confirms that list price increases of a truck manufacturer reflected (expected) cost increases in vehicle production and were already capable of being passed on to the transaction prices because of the connection between the costs of providing the service and the price that could be achieved for it, which is in principle compelling in the case of functioning competition, unless the manufacturer (completely) "took back" the list price increase through a higher discount compared to the first distribution level - which would have robbed the list price increase of its meaning - or a distribution level (completely) "took the indicated cost increase on its own margin". Neither the wholesale level nor subsequent trade and distribution levels, however, had knowledge that would have enabled them to distinguish increases in (discounted) gross list prices derived from increased input costs of the manufacturers from such supra-competitive increases that could only be set by the manufacturers because of the coordination of gross list price increases among them and the high market coverage of the cartel. Effects of gross list price increases on transaction prices would therefore only be unlikely if the connection between the costs of producing a product and the price that can be obtained for this product on the market were questionable in principle or due to the special conditions of the market in question. However, as stated, nothing has been found or shown to support this.

Paragraph 41
(cc) In the case in dispute, the coordination of gross list price increases was furthermore strengthened by the fact that the introduction of vehicles which complied with the respective next EURO exhaust emission standard and thus had to realise technical solutions for the further reduction of pollutant emissions, which had an impact on both manufacturing costs and customer benefits, was also coordinated. In this way, a synchronisation of expected cost and price development was achieved both for the vehicles that still complied with the old emission class and for those that already met the requirements of the new emission standard.

Paragraph 42
In this context, the appeal complains unsuccessfully that the Commission only found an agreement on the introduction of the EURO 3 exhaust emission standard with regard to its timing and the range of the price surcharge. Rather, in the basic description of the cartel infringements that took place in Paragraph 50, the Commission stated that the gross list price coordination involved agreements or concerted practices by the cartel participants to align the timing and the passing on of costs for the introduction of the emission reduction technologies required by the EURO 3 to 6 emission standards ("in order to align ... the timing and the passing on of costs for the introduction ...").

Paragraph 43
(c) Against this background, there is also no reason for the Senate to deviate from the assessment that the objection of the defendant, based on various economic expert opinions, against the use of the empirical principle that the coordination of gross list prices and their increase does not fulfil any of the prerequisites that are required according to economic knowledge for a successful coordination of transaction prices, is not valid. This objection ignores the mechanism of the cartel.

Paragraph 44
The transaction price, i.e. the price which a purchaser of a truck agrees with the dealer from whom he buys the vehicle, cannot be directly coordinated by the manufacturers. This is because, according to the defendant's and its interveners' own submissions and the findings of the Court of Appeal, they have no direct influence on this price. The dealer, in turn, has no influence on its cost price, which is essentially determined by the cost price of the wholesale level, which the latter has agreed with the manufacturer's head office. For both the dealer and the wholesaler it may, as the Court of Appeal rightly assumed, appear sensible in individual cases to (partly) "take an increase in his cost price on his margin". However, this cannot be considered as a regular "strategy" for the individual trader, as this would not be sufficient for him in the long run, and it can certainly not be considered obvious, as the Court of Appeal assumed without any error of law, that all traders regularly seduce in this way.

Paragraph 45
For the trader as well as for the wholesaler there is no reason to do so. In particular, he is not in a position of interest that could lead a cartel participant to deviate from an agreed price increase in favour of an expansion of his own turnover in breach of cartel discipline. For in the absence of knowledge of the cartel agreements and in view of the almost complete market coverage by the cartel, the (wholesaler) trader cannot recognise the price he has to pay himself as a price above the competitive price. In particular, he cannot distinguish between price increases resulting from the inflationary or technical gross list

price changes described and those which, as a result of the coordination of the gross list price changes, exceed those list prices which the manufacturers would have set in the absence of the restrictive agreements and practices.

Paragraph 46
dd) Accordingly, there is also no legal error in the appraisal of the facts by the Court of Appeal in applying the factual presumption that the market prices to be paid by the purchasers of the lorries produced by the cartel participants were higher than those which would have been formed in the absence of the agreement restricting competition also in those cases in which the - new - vehicles were not purchased directly from the manufacturer but from a legally independent dealer.

Paragraph 47
(1) The Court of Appeal did not make any findings on the exact circumstances of the plaintiff's purchases of the six DAF trucks, which took place between September 2004 and August 2006. For the benefit of the defendant, the review under the law of review must therefore be based on the fact that the vehicles acquired by the plaintiff were sold in a first step by the first or second intervener or another group company of the DAF group to a legally independent truck dealer and then in a second step by the latter to the plaintiff, these acquisition transactions therefore do not constitute direct acquisitions, but indirect or consequential acquisitions by cartel participants, where damage to the plaintiff presupposes that the damage has been passed on by the dealer to the final purchaser.

Paragraph 48
(2) However, the Court of Appeal was entitled to regard such a passing-on of an increase in the dealer's purchase costs by the dealer as highly probable according to the mechanism of the cartel on which it had based itself without any error of law.

Paragraph 49
(a) According to the case-law of the Federal Court of Justice, the causality of a cartel agreement for the price formation at subsequent market levels is to be determined on the basis of the price level which would have been reached there without the cartel-induced overcharging. Since price formation is usually influenced by numerous factors of the market structure and the respective commercial strategy and since it is possible that the price-setting scope of the buyer at the upstream market level is not based on the market situation created by the cartel, but on a special market position independent of it or other circumstances of the aftermarket, the necessary causal connection generally requires a finding that an established price increase is precisely due to the cartel and not to other price-forming factors (BGH, judgement of 28 June 2011 - KZR 75/10/10. June 2011 - KZR 75/10, BGHZ 190, 145 marginal no. 46 - ORWI). In this context, it is an argument in favour of cost passing-on if most of the customers acting as suppliers on the next market level have to pay the cartel price and competition on the aftermarket is otherwise functional.

Paragraph 50
(b) In the case in dispute, the described clear separation of different market levels is already not present. Unlike in the facts underlying the ORWI decision, the independent truck dealers do not represent a continuous market level between the manufacturer and the "final purchaser". Rather, they are integrated into the distribution structure of the manufacturers, who themselves distribute their products partly directly or indirectly via dependent dealers. This is because the vehicle purchase by the final customers is partly directly from the

manufacturer, whereby these direct sales are partly mediated via sales agents, i.e. dealers acting as representatives of the manufacturers, and partly from independent dealers who sell the vehicles on their own account. In both cases, the "national list price" used at the wholesale level forms the basis for the price agreement, in which the given leeway for granting discounts - either to the dealer or directly to the end customer - could be used. If the end customer purchased from the dealer, the latter could grant further discounts. However, as explained in recital 44, this does not justify the assumption that cartel-related increases in purchase costs were therefore not passed on.

Paragraph 51
(c) Accordingly, the Court of Appeal did not err in law in considering the conditions formulated in the ORWI decision for an expected passing-on of damage to be fulfilled, also irrespective of whether the independent truck dealers were to be classified as a "real" market level between manufacturers and end customers, primarily because the extremely high market coverage of the cartel meant that the dealers were almost without exception customers of the cartelists and the opposite side of the market had practically no alternative. Under such conditions, it would be completely implausible to assume that price increases caused by the manufacturers would regularly and completely "stick" at the level of the (independent) dealers.

Paragraph 52
b) The Court of Appeal also based its finding that the plaintiff was likely to have suffered damage, in accordance with the case-law of the Federal Court of Justice, on an overall assessment of the circumstances that militate in favour of or against damage caused by the cartel and, in doing so, did not give incorrect weight to the factual presumption.

Paragraph 53
aa) The Court of Appeal correctly assumed, in principle, that the determination 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, the price level which arises on a market affected by a cartel agreement is higher than the price level which would have arisen without the agreement, must be made by the judge of the facts in his free conviction, taking into account all the circumstances, and that, since prices and price levels are necessarily hypothetical under non-manipulated market conditions, he must take into account all the circumstances that may have significance for the assessment of how the market would probably have developed in the absence of the cartel agreement (cf. most recently BGHZ 227, 84 marginal no. 56 - LKW-Kartell; BGHZ 224, 281 marginal no. 34 et seq. - Rail Cartel II, both with citation).

Paragraph 54
bb) Within the framework of the weighing of the circumstances speaking for and against a probable occurrence of damage, the Court of Appeal also did not attach an inappropriately high weight to the actual presumption of an increase in the market price level for trucks and thus of damage to the plaintiff, contrary to the complaint of the appeal.

Paragraph 55
(1) The assessment, based on findings on the nature, extent and duration of the gross price list coordination in connection with the concerted conduct in the introduction of new exhaust emission standards and the passing on of the costs thereof, that the actual presumption of a price effect of the agreements has considerable weight in the case in

dispute is not legally objectionable. The Court of Appeal did not draw the conclusion from this assessment that the presumption was entitled to a fixed share, for example in the amount of a certain percentage, among the indications to be weighed, nor did it conclude from this that higher requirements were to be placed on counter-indications submitted by the defendant and the interveners or that these were even not to be taken into account at all. Rather, it expressed its assessment without any error of law that the weight of the principle of experience 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 arisen as a result of the elimination or at least strong dampening of competition and that therefore, in the case in dispute, there are weighty indications of a detrimental effect of the infringement of Article 101 TFEU. 101 TFEU on the market price level.

Paragraph 56
(2) Contrary to the complaint of the appeal, the Court of Appeal also did not examine the indications put forward by the defendant which speak against the occurrence of damage merely as objections against the - established - presumption of causal damage. Rather, it expressly drew the conclusion that a price effect of the cartel agreement was probable from the overall view of the circumstances speaking for and against the occurrence of damage, including the principle of experience. The fact that the Court of Appeal, in the context of its overall assessment, first examined the indications put forward by the defendant as to their substance and viability is a necessary part of the assessment process to be undertaken by the trial judge. In this respect, the fact that the court of appeal considered some of the circumstantial evidence presented by the defendant and its interveners to be irrelevant - partly against the background of the principle of experience - is not objectionable under the law of review.

Paragraph 57
This applies in particular to the defendant's objection that competition between the cartel participants was not completely eliminated even during the cartel period, which the Court of Appeal considered irrelevant on the grounds that the (complete) elimination of competition for market shares was neither a necessary nor a sufficient condition for the functioning of the mechanism implemented by the participating undertakings and that, accordingly, the continued existence of a certain degree of competition below the price increase agreements, which are useful to all, does not decisively call into question a cartel effect. The Senate has already approved such an assessment in another context (BGHZ 227, 84 marginal no. 92 - LKW-Kartell). This is also to be adhered to. It was precisely in line with the cartel's mode of operation, which could neither achieve nor even aim at the direct coordination of transaction prices by coordinating gross list price increases, that competition between the producers was not completely eliminated but only dampened and, from the point of view of the cartel participants, ideally jointly raised to a supra-competitive "cost price level" reflected in the gross price lists, which would not have been enforceable without the coordination of conduct.

Paragraph 58
The Court of Appeal also did not err in law in attributing decisive importance to the fact that the coordination referred to gross list prices for "corner types" as basic models of trucks. It rightly assumed that, in the absence of any submission by the defendant and its intervener as to the extent to which this circumstance should have significantly impaired the coordination of the list price specifications for the wholesale level sought by the cartel,

there was nothing to prevent the intended coordination from being achieved also and precisely by using corner types as a structural specification for the exchange of information, by discussing them and by coordinating price increases based on them.

Paragraph 59
(3) Finally, an error of law also does not result from the fact that the Court of Appeal, in the context of its overall assessment, by taking into account the overall picture of the infringement of the cartel prohibition established in the Commission's decision of 19 July 2016, came to the conclusion that it was suitable for an effective coordination of gross price list increases over the entire cartel period and saw in this a strong indication of transaction prices that were above the hypothetical competitive prices. Provided that he does not fail to recognise the limits of the binding effect, the trial judge is not prevented from drawing further conclusions from the binding findings of the cartel authority or the Commission (BGHZ 227, 84 marginal no. 89 - LKW-Kartell). He is also not prevented from adopting non-binding findings as long as they have not been contested or not sufficiently contested by the cartel participants, and from taking into account in his conclusions from binding findings whether and to what extent the cartel participants have specifically admitted to individual manifestations of their collusive behaviour established in a rather general form.

Paragraph 60
c) The Court of Appeal's overall assessment of the circumstances speaking for or against damage caused by the cartel, on the basis of which it reached the conclusion that the plaintiff had probably suffered damage, nevertheless shows a - far-reaching - error of law. The appeal rightly complains that the Court of Appeal did not take into account the expert opinions submitted by the intervener DAF with the CL expert opinion and by the defendant with the further expert opinion of E.CA Economics GmbH of 26 September 2019 entitled "Estimation of possible price mark-ups as a result of infringements of competition law" (Annex GL 39 - henceforth: E. CA Expert Report II), in which it was shown that there was no economic evidence for a deviation of the transaction prices paid during the cartel period from the hypothetical market price for the prices for heavy and medium-duty trucks of Daimler and DAF.

Paragraph 61
aa) The Court of Appeal stated that the private expert opinions submitted by the defendant and the interveners did not contradict the assumption of damage. All of the expert opinions assumed incorrectly that there had only been an exchange of information between the cartelists. This also applied to the CL expert report and the E.CA expert report II.

Paragraph 62
bb) This assessment is based on a misunderstanding of the subject matter of these expert opinions. The first part of the CL expert opinion submitted by DAF, entitled "Plausibility analysis", describes an economic analysis of the mode of operation of the lorry cartel and a discussion of possible damage theories, which essentially assume a (pure) exchange of information for the case in dispute. The second part, however, is devoted to an econometric analysis of the transaction prices during the cartel period and after the cartel period and is aimed at determining whether a systematic difference in transaction prices can be identified between the two periods. For this purpose, the transaction prices of 272,508 DAF trucks ordered between 2004 and 2017 and delivered to five different countries were compared

by means of a regression analysis. The E.CA expert opinion II submitted by the defendant also contains - in contrast to the E.CA expert opinion I - a regression analysis based on data from 540,042 heavy and medium-duty Daimler trucks sold in the period from 1997 to 2016. The subject of both private expert reports is thus a comparative market analysis, which contains an empirical analysis of the prices within and outside the cartel period and is thus in principle independent of the mode of operation of the specific agreements.

Paragraph 63
cc) The Court of Appeal would have had to deal with the comparative market analyses submitted by the defendant as part of the overall assessment of all the indications speaking for and against the occurrence of damage.

Paragraph 64
(1) According to the case-law of the Federal Court of Justice, the trial judge may determine 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 which arises on a market affected by a cartel agreement is higher than the price level which would have arisen without the agreement, in accordance with the standards of § 287 para. 1 of the Code of Civil Procedure (ZPO), so that a clearly predominant probability based on a sound foundation that damage has occurred is sufficient for the court to form a conviction (BGHZ 224, 281 marginal nos. 34 f. - Schienenkartell II with further references). However, the court must include in the assessment any circumstance of circumstantial importance for or against a price effect of the cartel, provided that it has been established or proven by the party relying on it.

Paragraph 65
(2) The comparative market analyses submitted by the defendant and the intervener DAF, which come to the conclusion that an increase in revenue due to the cartel could not be established in the dispute, constitute such a circumstance with indicative significance to be taken into account.

Paragraph 66
(a) The Federal Court of Justice has consistently held that a cartel-related surplus and the corresponding damage to the buyer can be determined on the basis of the price development on cartel-free - temporal, spatial or factual - comparative markets. It recognises the comparative market approach and, for its operationalisation, the regression analysis as one of several methods based on a recognised economic theory for estimating the additional revenue within the framework of Section 19 and Section 81 ARC (cf. BGH, order of 9 October 2018 - KRB 51/16, WuW 2019, 146 marginal no. 66 et seq. - Flüssiggas I mwN). It is true that the regression analysis - in addition to other permissibly considered methods - is primarily used in practice to determine the amount of damage, because it enables the formation of the difference between the prices on the market influenced by the cartel and the prices on the cartel-free comparative market. However, since every difference above zero implies that a cartel-related price increase has occurred and, conversely, a difference equal to or below zero excludes such a price increase, it is equally suitable for determining the "whether" of a damage. Thus, at the same time - if it has been carried out methodically correct and with significant results on a sufficiently reliable data basis - it represents a relevant indication for or against the circumstance to be determined in the context of a basic judgment that the plaintiff has probably suffered damage in any amount due to the cartel infringement.

Paragraph 67
(b) The (possible) indicative significance of the expert opinions submitted by the defendant is not ruled out from the outset because the regression analyses for the temporal comparative market analysis primarily use company-specific data material which originates from the defendant and the intervener DAF itself. The validity and informative value of a comparative market analysis on this basis must rather be assessed by the court of facts.

Paragraph 68
(c) The discussion of the regression analyses submitted by the defendant and its intervener in the context of the overall weighing of all circumstances arguing for or against the occurrence of damage was also not dispensable because these were to a certain extent outweighed by the expert opinion submitted by the plaintiff.

Paragraph 69
The expert opinion prepared by Hamburg Economics GmbH (Annex K 17, hereinafter: HE expert opinion), on which the plaintiff decisively bases its claims against the defendant, also contains a regression analysis with reference to the truck market and - in contrast to the expert opinions submitted by the cartelists - determined a cartel-related price premium for trucks. It is based on a database of 5,893 trucks procured by 253 different companies during and after the cartel period from all cartel participants and shows a cartel effect amounting to an average of 7,007.49 euros (9.59% of the relevant turnover) for the period 1997 to 2003 and a cartel effect amounting to an average of 5,231.76 euros (6.61% of the turnover) per heavy truck for the period 2004 until the end of the cartel. Apart from the different periods considered and the different data basis with regard to the acquisition transactions covered, the HE expert opinion differs from the CL expert opinion and the E.CA expert opinion II in its basic principles in that the latter expert opinion takes into account the general cost development in the market as well as fluctuations in demand in aggregate via a variable for which the EUROSTAT producer price index for the manufacture of bodies, superstructures and trailers of heavy goods vehicles is used. In contrast, the expert reports of the defendant and the intervener DAF use different, partly aggregated cost data of the respective manufacturer.

Paragraph 70
However, the expert report submitted by the Claimant does not, without more, call into question the findings of the expert reports submitted by the Defendant and the intervenor DAF. On the contrary, the defendant, for its part, has criticised the methodological approach of the plaintiff's expert opinion. The lack of an assessment by the court of facts of the different data material used and the different methodological approaches, which also include different periods considered both during the practice of the cartel and afterwards, cannot be replaced in the appeal proceedings by an assessment by the appeal court.

Paragraph 71
(3) In view of these findings, the Court of Appeal was not allowed to deny the suitability of the observations of a comparative market over time submitted by the defendant and DAF to speak indicatively against a price effect of the truck cartel without a closer examination of the data basis, methodology and result of the regression analyses, and it was accordingly not allowed to disregard them within the framework of its overall assessment of all indications speaking for and against an occurrence of damage without a sustainable justification.

Paragraph 72
III As the judgment of the Court of Appeal is not correct on other grounds (§ 561 ZPO), it must be set aside (§ 562 ZPO).

Paragraph 73
IV. The Senate cannot decide on the matter itself - not even in part.

Paragraph 74
(1) The senate cannot make a final decision in particular with regard to a possible limitation of the claims for damages asserted by the plaintiff. Rather, the Court of Appeal assumed without error of law that the claims for damages asserted by the plaintiff are all statute-barred.

Paragraph 75
a) To the extent that the appeal challenges the Court of Appeal's assumption that the initiation of proceedings by the European Commission, which is decisive for the suspension of the statute of limitations pursuant to Section 33 (5) ARC 2005, already took place when the investigative measures directed against the cartelists were taken on 18 January 2011, since the Commission carried out initial inspections at the cartelists' premises on that day, and instead takes the view that only the initiation of formal investigative proceedings has the effect of suspending the statute of limitations according to the law, its complaint is unsuccessful. The Court of Appeal did not err in law in determining the commencement of the suspension of the limitation period. As the Federal Court of Justice ruled after delivery of the appeal judgment, the initiation of proceedings within the meaning of Section 33 (5) ARC 2005 does not require the initiation of formal proceedings even if the European Commission takes action, but merely requires the implementation of official measures against an undertaking which are recognisably aimed at investigating that undertaking for a restriction of competition (BGHZ 227, 84 nos. 79-85 - LKW-Kartell).

Paragraph 76
b) The Court of Appeal also calculated the point in time - relevant only for the possible claim for damages resulting from the acquisition transaction in March 2001 - of the end of the suspension of the limitation period as a result of the initiation of the investigation proceedings by the European Commission without any error of law. It correctly assumed that the period of suspension under Section 33 (5) ARC 2005 pursuant to Section 204 (2) of the German Civil Code only expires six months after the expiry of the two-month period under Article 263 (4) TFEU for bringing an action against the Commission's decision of 19 July 2016 and that, thus, in the case in dispute, the suspension of the limitation period did not end before 20 March 2017.

Paragraph 77
aa) Section 33 (5) sentence 2 ARC 2005 refers for the duration of the suspension of the limitation period to Section 204 (2) BGB, according to the first sentence of which the suspension ends six months after the final decision or other termination of the initiated proceedings. Neither the German Civil Code nor the Act against Restraints of Competition as amended in 2005 specify which is the relevant point in time for the commencement of the six-month period if the suspension is caused by the initiation of proceedings by the Commission of the European Union for a cartel infringement which ends with the issuance of a decision imposing a fine.

Paragraph 78
bb) If the addressee(s) challenge a Commission decision imposing a fine with an action for annulment pursuant to Article 263 (4) TFEU, the relevant point in time for the beginning of the six-month period, after the expiry of which the suspension of the statute of limitations pursuant to Section 33 (5) ARC 2005 ends, is determined in accordance with the provisions of the German Civil Code. 5 GWB 2005 ends, according to the prevailing opinion, not the notification of the decision, but rather the final decision in the court proceedings or its termination elsewhere (see Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed, § Section 33, marginal no. 78; Bechtold/Bosch in Bechtold/Bosch, GWB (Kartellgesetz), 9th ed., Section 33, marginal no. 42 (on Section 33 GWB 2005); for the currently applicable Section 33h, subsection 4 GWB, this is explicitly taken as a basis in the explanatory memorandum of the draft bill, cf. BT-Drucks. 18/10207, S. 66). However, if no action for annulment is filed, the relevant point in time is, on the one hand, the day on which the decision imposing the fine is announced, because the proceedings have thus ended, and, on the other hand, the day on which the decision imposing the fine can no longer be challenged by the addressee, i.e. the two-month period for bringing an action provided for in Article 263 (4) TFEU has expired. The Stuttgart Higher Regional Court also referred to the latter point in time (judgment of 4 April 2019 - 2 U 101/18, juris para. 205). Furthermore, as far as can be seen, the question has not yet been dealt with in the case law of the higher courts.

Paragraph 79
cc) According to the correct understanding, the six-month time limit of Section 204 (2) of the German Civil Code for cartel damages claims, the limitation of which is suspended due to the initiation of proceedings by the European Commission for a cartel infringement pursuant to Section 33 (5) of the ARC 2005, does not begin with the notification of the penalty notice, but with the expiry of the time limit for filing the action for annulment pursuant to Article 263 (4) TFEU.

Paragraph 80
(1) Under national law, an order imposing a fine becomes (formally) final and enforceable if the person concerned does not make use of the possibility to object and thus submits to the decision of the administrative authority (cf. Kurz in Karlsruher Kommentar zum OWiG, 5th ed., § 65 marginal no. 30; Sackreuther in BeckOK OWiG, § 65 marginal no. 1 et seq. [as of 1.4.2021]; Krenberger/Krumm in Bohnert/Krenberger/Krumm, OWiG, 6th ed., § 67 marginal no. 1). The effect of "res judicata" regulated in section 84 (1) OWiG therefore only occurs - if no court challenge is made - with the expiry of the objection period. This also applies without restriction to cartel fine notices, since the Act against Restraints of Competition only contains special procedural provisions with regard to the competent authority and courts. Accordingly, in the case of a penalty notice issued by the Federal Cartel Office, the suspension effect of Section 33 (5) ARC does not end until six months after the expiry of the two-week objection period under Section 67 (1) OWiG.

Paragraph 81
(2) The application of these standards to the legal treatment of a decision of the European Commission imposing a fine with regard to its effect of suspending the statute of limitations is not precluded by the fact that such a decision already becomes effective and can be enforced upon its notification (cf. Lübbig in Münchener Kommentar Europäisches und

Deutsches Wettbewerbsrecht, 2nd edition, Section 33 no. 108) and that it is binding for the national cartel authorities and courts pursuant to Article 16 (1) of Regulation (EC) No. 1/2003. For the suspension of the statute of limitations, the only relevant factor is that a final decision imposing a fine can also be set aside or amended in court proceedings, as is the case in national proceedings. In this respect, there is also the possibility that the content of the decision will not be upheld until the expiry of the time limit for appeal and thus does not provide a suitable basis for an action for damages. In this respect, the facts established in the decision as a basis for claims by plaintiffs for damages affected by the cartel infringement are also established at the level of Union law only when the decision can no longer be challenged in court. This also applies to fine proceedings that end with a settlement, because even in such a case the filing of an action for annulment by the addressees of the decision is not excluded.

Paragraph 82
(3) Accordingly, the purpose pursued by the legislator with the introduction of the inhibition provision of Section 33 (5) ARC 2005 speaks in favour of taking the time limit for filing an action into account. According to the Federal Government's draft bill, the aim was to ensure that individually aggrieved parties could actually benefit from the effect of Section 33 (4) ARC 2005 and that claims for damages under civil law would not already be time-barred after the expiry of a lengthy administrative fine procedure (cf. BT-Drucks. 15/3640, p. 55). This aspect is specified in the Federal Government's draft bill on the 9th amendment of the ARC from 2016, where it is explained with regard to the newly introduced Section 33h para. 6 GWB, it is explained that it should be ensured that the aggrieved party has enough time after the conclusion of an official or judicial procedure due to a cartel infringement to obtain the necessary information for claiming damages, for which knowledge of the judicial or official decision will often be the starting point (cf. BT-Drucks. 18/10207, p. 66).

Paragraph 83
This legislative purpose of granting the aggrieved party a period of at least six months for the examination of its own claims on a sufficient and binding factual basis would not be missed if the two-month period for bringing an action under Article 263 (4) TFEU were disregarded when determining the beginning of the six-month period under Section 204 (2) of the Civil Code within the scope of application of Section 33 (5) ARC 2005, but it would be fulfilled to a lesser extent. This is because the aggrieved party, who - for example in order to avoid legal costs - first waited to see whether the penalty notice would be challenged in court by the addressee(s), would then only have four months of continued suspension of the limitation period in which to examine (or have examined) the assertion of his claims and to specify them to the extent necessary for bringing an action.

Paragraph 84
2 The Senate is also unable to make a final decision - dismissing the action - with regard to the claims for damages because of the acquisition of the DAF vehicles. The complaint of the appeal that the Court of Appeal erred in assuming that the plaintiff had already asserted these claims in the statement of claim is not valid. The Senate agrees with the Court of Appeal's interpretation of the original statement of claim, which is correct in the light of the statement of grounds.

Paragraph 85
The case must therefore be referred back to the Court of Appeal for a new hearing and decision (§ 563 (1) ZPO).

Paragraph 86
V. When re-examining whether the plaintiff suffered damage as a result of the agreements in which the defendant and its interveners participated and, if necessary, subsequently examining the amount of the damage that occurred, the Court of Appeal will have to take the following into account:

Paragraph 87
1. before a possible renewed overall weighing of all indications relevant for the determination of an occurrence of damage, it will have to examine - if necessary with expert assistance - the resilience of the regression analyses submitted by the parties. When dealing with the expert opinions, it will have to investigate the objections raised by the respective opposing party against the data basis used in each case. Insofar as the data used in the CL expert opinion and the E.CA expert opinion II cannot be verified from the outset due to the lack of further explanation by the defendant and the interveners, it will also have to consider the use of expert support in this respect.

Paragraph 88
(2) In view of this, the Court of Appeal will also have to examine whether, according to the state of the facts and the dispute reached, a renewed decision only on the cause of action can be procedurally economical. It will therefore have to consider - taking into account the amount proceedings pending before the Regional Court - to turn directly to the determination of the hypothetical market price and thus to the reason for and the amount of any damage suffered by the plaintiff (cf. in this respect already BGHZ 224, 281 marginal no. 51 et seq. - Schienenkartell II with the remainder). Within the scope of the power of estimation to which it is entitled in this respect, the trial judge and thus also the court of appeal are entitled to considerable methodological leeway, so that it may also use a method other than the one chosen by the parties and other comparative data, as long as it thereby meets the specified objective of coming as close as possible to reality by means of probability considerations with an effort appropriate to the matter (cf. BGH, WuW 2019, 146 marginal no. 67 - Flüssiggas I mwN).

Paragraph 89
3) If the plaintiff suffers damage, the court of appeal will not be able to reject the defendant's objection of passing-on defence with the reasoning given in the contested judgment.

Paragraph 90
a) In this regard, it stated that in the case in dispute, according to the principles of commercial reasonableness, there were prima facie indications that the plaintiff had passed on the costs it had incurred through the acquisition of the lorries, including the additional costs caused by the cartel, to its customers through its prices. It was also possible "in the unclear case of a resale" that part of the excessive purchase price could have been financed with the resale price. Nevertheless, there could be no equalisation of benefits, because the defendant and the interveners would thereby be unfairly favoured. In such a case, the cartel infringement would remain practically inconsequential for them, because neither the plaintiff would be claimed by its customers nor the cartel participants to a significant extent by persons or undertakings ranking behind the vehicle purchasers in the value chain for reimbursement of excessive price shares. The defendant could only refer to a single case in which it was sued by a producer of wood-based materials for compensation for the damage

it had suffered as a result of the truck cartel. This does not justify its objection and the general exclusion of its liability for damages.

Paragraph 91
b) These statements are not entirely consistent with the case-law of the Federal Court of Justice.

Paragraph 92
aa) It is settled case-law of the highest courts that an undertaking against which a claim for damages has been made on account of a cartel infringement can in principle rely on the fact that its customers 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. If there is an ascertainable cost pass-on in an adequate causal connection with the cartel-induced price surcharge, the additional revenue of the primary injured party can be regarded as damage to its customers and thus at the same time as an advantage on the part of the primary injured party which must be compensated (BGHZ 227, 84 marginal no. 94 - LKW-Kartell; BGHZ 227, 84 marginal no. 94 - LKW-Kartell; BGHZ 227, 84 marginal no. 94 - LKW-Kartell). 94 - LKW-Kartell; BGH, Judgment of 23 September 2020 - KZR 4/19, WuW 2021, 37 marginal no. 36 - Schienenkartell V; Judgment of 19 May 2020 - KZR 8/18, WuW 2020, 597 marginal no. 46 - Schienenkartell IV; BGHZ 190, 145 marginal no. 58 - ORWI). As the Senate has already explained, these principles are consistent with the requirements of Articles 12 to 14 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain provisions relating to actions for damages under national law for infringements of the laws of the Member States and of the European Union relating to competition (OJ 2014 L 349, p. 1). EU 2014, No. L 349, p. 1) (cf. BGH, WuW 2021, 37 marginal no. 36 - Schienenkartell V mwN), which, however, do not apply to the dispute from a temporal point of view (Art. 22 of the Directive).

Paragraph 93
bb) In recent decisions, the Senate has repeatedly stated that the ability to take into account a passing-on of damage in the context of cartel damages is subject to increased requirements and can also be completely excluded for normative considerations. However, it has only recognised a complete exclusion of benefit sharing for certain case constellations and has not extended it to all cases in which a claim against the cartel participants by the downstream market level does not occur at the time of the decision or only to an insignificant extent.

Paragraph 94
(1) The starting point of the - normative - restriction of benefit sharing in cartel damages is the general principle of damages law that the offsetting of benefits that accrued to the injured party due to the damaging event must not unreasonably burden the injured party and, in particular, must not unfairly favour the damaging party. Furthermore, it must be taken into account that the compensation of cartel-related damages is an integral part of the system for the effective enforcement of cartel law prohibitions and complements the official enforcement of these provisions. Therefore, the public interest in ensuring undistorted competition, which would be impaired if the cartel participants' liability for the damages caused by them were limited or even completely denied due to a merely possible but not ascertainable advantage, must also be taken into account in the examination of benefit sharing (BGHZ 227, 84 marginal no. 95 - LKW-Kartell; BGH, WuW 2021, 37 marginal no. 50 - Schienenkartell V, both with citation).

Paragraph 95
(2) According to the case-law of the Federal Court of Justice, it follows first of all that the requirements to prove that the damage was actually passed on by the claimed undertaking participating in the agreement must not be too low.

Paragraph 96
(a) Thus, benefit-sharing cannot be considered simply because the primary injured party, like every undertaking, typically has an interest in aligning its price with the cost price and selling its goods at a profit or providing its service at a profit. The causality of the cartel agreement for the advantage that accrues to the primary injured 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. In this context, it must therefore also 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. In this context, 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 does not, at least not without further ado, also allow statements on the probability of a cost pass-on, in particular if this possible cost pass-on concerns a market that is to be delimited in a different way (BGHZ 227, 84 marginal no. 96 - LKW-Kartell mwN).

Paragraph 97
(b) The cartel participant, who bears the burden of presentation and proof for the prerequisites of benefit sharing, must therefore plausibly argue, on the basis of the general market conditions on the relevant sales market, in particular the elasticity of demand, the price development and the product characteristics, that a passing-on of the cartel-induced price increase is at least a serious possibility. 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. If a passing on of costs to different sales markets is possible - in the case in dispute, according to the findings of the court of appeal, this would primarily be the market for freight forwarding services, possibly also only a certain area of this overall market, and, on the basis of the resale of some of the acquired lorries alleged by the defendant, the market for used lorries - the cartel participant must show separately for each sales market that and in what way a cartel-related increase in the purchase costs of the injured parties on the upstream market may have had an effect on the competitive prices on the downstream market.

Paragraph 98
(c) Insofar as, after the cartelists against whom a claim has been made have submitted detailed factual information, difficulties remain in presenting and proving their case, which result from the lack of knowledge of the specific use of the respective cartel good by the acquirer, a secondary burden of proof on the part of the acquirer may be considered. Furthermore, they may be entitled to information pursuant to Section 33g (2) and (10) ARC in conjunction with Section 89b ARC. § Section 89b GWB. The legislator has in the meantime expressly clarified that these standards are applicable to all legal disputes regarding cartel damages in which an action was filed after 26 December 2016, i.e. also in the case in dispute (Section 186 (4) ARC).

Paragraph 99
(3) In accordance with the purpose of the claim for damages and the private-law enforcement of cartel-law prohibitions, a set-off of the benefits accruing to the injured party as a result of a passing-on of damages against the damage suffered by him as a result of a cartel infringement may also be completely excluded for legal reasons.

Paragraph 100
(a) The Senate has considered this in particular for case constellations in which the indirect customers at downstream distribution or value creation levels can only with difficulty grasp the damage caused to them by the cartel infringement and are unlikely to assert it against the cartel participants, such as in particular in the case of scattered damage, where only a relatively small claim can be considered for the individual indirectly injured party. In view of the fact that in such a case a multiple claim against the cartel participants is not to be worried about and instead their at least partial exemption from liability for the consequences of the distortion of the price level on the cartelised market is threatening, in such a case the careful weighing of all circumstances may lead to the result that the application of the principles of benefit sharing would result in an unfair relief of the cartel participants. Therefore, it has to be taken into account in particular whether, to what extent and for what reasons the assertion of claims by indirect customers against the cartel participants is to be expected or, conversely, is remote (cf. BGH, WuW 2021, 37 marginal no. 51 - Schienenkartell V). The lower the incentives for the indirectly injured customers to file claims against the cartel participants, the higher the probability that offsetting benefits from the downstream transactions against the damages of the primary injured party will lead to a de facto exemption from liability for the cartel participants, and the closer it is to exclude benefit sharing for reasons of value (cf. BGH, WuW 2021, 37 marginal no. 58 - Schienenkartell V; on the compatibility of a restriction of the principle of benefit sharing for normative reasons with European Union law ibid. marginal no. 52 et seqq).

Paragraph 101
(b) On the basis of these considerations, the Federal Court of Justice classified the passing on of cartel-induced increased prices for track superstructure materials to the customers of the acquiring local public transport undertakings through increased fares as a result of higher depreciation for infrastructure costs as advantages not to be taken into account in the assessment of damages because this would lead to an unfair relief of the injurers. In doing so, it did not only take into account the fact that the charges on the downstream market of local public passenger transport are subject to a highly complex pricing mechanism in which the investment costs for the track superstructure in dispute represent only one of numerous cost factors for the price of the service offered, so that the question of whether and to what extent the cartel agreement had an impact on the prices of the downstream market - the fares - could at best be answered with the help of complex and costly econometric calculations. Moreover, in view of the large number of potentially injured parties, there was only a very low probability that the downstream market level would liquidate the stray damages occurring there vis-à-vis the cartel participants (BGH, WuW 2021, 37, margin no. 55-58 - Schienenkartell V).

Paragraph 102
cc) The Court of Appeal's opinion that there was no benefit sharing in the case in dispute because the defendant or the interveners would not be claimed from the next market levels to any significant extent and would therefore be unfairly favoured by taking into account

any passing on of damages by the plaintiff in the context of the assessment of its claim for damages is not fully consistent with these principles. Without findings on the concrete use of the acquired lorries by the plaintiff and thus the sales market(s) relevant for it, the court of appeal was not allowed to exclude a benefit sharing from the outset for normative reasons. This is because the sales markets provide information both on the likelihood and extent of a passing-on of damage and on the number of possibly indirectly injured parties and the potential amount of damage for the individual indirectly injured party and thus for determining the likelihood of a claim being made against the cartel participants by a subsequent market level.

Paragraph 103
c) The Court of Appeal will therefore have to examine in the reopened appeal proceedings whether there are sufficiently concrete indications from the submissions of the defendant or its interveners that, within the legal limits indicated, a - possibly partial - passing-on of damages to the plaintiff's customers has taken place and that the plaintiff has thus received advantages that can be offset against damages. In this respect, however, the defendant's submission, referred to by the appeal, that it is not only being sued before the Munich I Regional Court, but also before the Cologne Regional Court, the Rechtbank Amsterdam and in the United Kingdom in further proceedings also by participants of the next market level, namely by persons who have used transport services by the purchasers of vehicles of the cartel participants, will not be able to replace the necessary explanations of the sales markets on which the plaintiff is active. In addition, against the background of the special purposes of the claim for damages under civil cartel law, the court of appeal may have to examine whether - in relation to their total sales - only a minor claim of the cartel participants by injured parties of downstream market levels requires that an ascertained passing on of damages to the primary injured parties be taken into account in order to reduce the damages. In this context, it will have to be taken into account whether there are factual indications that a claim against the cartelists substantially exceeding the total damage caused by the cartel is to be expected.

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WM, 716/16, 22.09.2021