Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Germany

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The following is a selection of some important developments in German competition law and policy in 2023. It covers the latest competition law reform, cases under special rules for digital gatekeepers, abuse of dominance, merger control, antitrust (cartels, horizontal cooperation) and damages litigation.

11th Amendment of the ARC

On November 7, 2023, the latest competition law reform in Germany entered into force, only roughly three years after the previous one. The main novelties concern the following:

Introduction of wide-ranging powers for the FCO to adopt measures in markets in which it established a ***significant***, ***ongoing malfunction of competition*** after a prior sector inquiry (Section 32f(3)(4) ARC). The FCO can impose remedies on companies active in such a market even absent any competition law infringement to eliminate the malfunctioning. The provision includes a non-exhaustive list of possible remedies: access obligation (data, interfaces, networks, infrastructure); specifications on business relations, contracts or clauses; obligations to establish transparent, non-discriminatory and open standards; prohibition of unilateral disclosure of information that could facilitate parallel behaviour of companies; financial or organizational separation of company or business units of a given company. In the case of dominant companies or designated digital gatekeepers, the FCO can, as a last resort, also impose the divestiture of company units. The new powers triggered an intense discussion in the legislative process, which led to changes: e.g., the FCO can only impose any remedies under the new rule if other competition law tools would likely not be sufficient (ex-ante view). In selecting the companies concerned, the FCO needs to consider their market positions. German law already contains presumptions of dominance and rules on relative dominance/paramount market power. Arguably, previously the only conceptual gap regarding intervention (outside merger control) concerned tacit collusion. The legislator now enables the FCO to tackle that under the new rule. However, the powers go beyond that, raising concerns the provision could become a short-cut. The FCO rejects that given the numerous safeguards introduced in the provision. It remains to be seen when and how the FCO will use the powers, and which sector it will select for that.

The reform adapted the FCO's existing power to ***skim off economic benefits*** derived from antitrust

law infringements. The provision was rarely used in practice. It now also applies to infringements against decisions under Section 19a ARC (prohibition of or remedies re. certain practices of digital gatekeepers). Most importantly, it includes a presumption that the resulting economic benefits amount to at least 1% of the German turnover of the products/services related to the infringement. The presumption can only be rebutted if the company can demonstrate that neither the immediate participant nor the entire economic entity achieved worldwide profits in that amount during the infringement period.

The reform also expands the scope of ***private enforcement rules*** to cover the self-executing ***DMA*** provisions, i.e., Art. 5, 6 and 7 DMA (Sections 33 et seq. ARC). As a result, claimants can request termination of DMA infringements in the same way as for antitrust rules infringements, as well as claim damages, if the conditions are met. The law facilitates follow-on damages by providing that European Commission decisions finding an infringement of these DMA rules are legally binding for German courts. That also applies to the designation of a gatekeeper by the Commission, i.e., a designation decision can be used for stand-alone claims (that the gatekeeper infringes the DMA and/or for damages).

Special rules for the digital companies – Section 19a ARC

Gatekeeper designation decisions

The FCO has designated more companies as digital gatekeepers subject to the special rules under Section 19a ARC. The test is whether a company active on multi-sided markets has so-called paramount significance for competition across markets. A designation decision has a duration of five years, in which the FCO can bring proceedings into individual practices under Section 19a(2) ARC. In 2023, the FCO designated Apple as gatekeeper and opened designation proceedings into Microsoft (Alphabet/Google, Amazon and Meta/Facebook were already designated as gatekeepers in 2022.)

Microsoft

On March 28, 2023, the FCO has opened proceedings to determine whether Microsoft can be designated as a gatekeeper under Section 19a(1) ARC (see press release here). Next to long-established operating systems (Windows) and office software (Office), the FCO refers to cloud services, video-conferencing services (Teams), gaming (Xbox), career network service (LinkedIn) and search engines (Bing), and to the recent integration of AI application into its services.

Apple

The FCO designated Apple as gatekeeper on April 3, 2023 (see an English convenience translation of the decision here and case summary here). The FCO had already opened proceedings into Apple's tracking rules for third-party apps (see blog on developments in Germany in 2022 here).

The FCO finds that Apple's dominant/strong positions in various hardware markets are the basis

for its vast interrelated and closed ecosystem, which is not sufficiently controlled by competition. Apple is found to have dominant positions (or at least market power) regarding smartphones, tablets and smartwatches, and even monopoly positions in the related proprietary operating systems and the App Store, the only digital distribution platform available for apps and other software products on Apple's devices. Google's Android-based devices and services are not considered to exert meaningful competitive pressure due to barriers for end user switching, and because app developers view the App Store and the Play Store as indispensable complementary platforms.

The FCO refers to Apple's large installed-devices base and its numerous vertically integrated digital services across the value chain, generating network effects, which are self-reinforcing and lock in end users. Apple is found to control access to end users in its ecosystem, and to have the regulatory power to set access conditions for third parties, like app developers. The decision also refers to Apple's hybrid role, i.e., as a vertically integrated platform operator and product/service provider on the same platform, with the potential for self-preferencing. Apple is viewed to have privileged access to competitively sensitive data, derived from app publishers, from end users, and from interactions within the App Store. The decision stresses that Apple could use the data as shareable input to develop new products, optimize existing products and enter new markets, i.e. to strengthen and expand its ecosystem.

The FCO rejects Apple's counter-argument that the designation test under Section 19a(1) ARC would not only require establishing the criteria set out in the provision but also that Apple actually uses its resources, positions and powers to impair either competitors or customers. The FCO says the question of any actual abuse is subject to investigations of individual practices under Section 19a(2) ARC. The decision also rejects Apple's claim that a designation as a gatekeeper under Section 19a ARC would be barred due to Art. 1(5) DMA, explaining that Section 19a ARC falls under the competition law exception in Art.1(6) DMA. Apple has appealed the decision with the Federal State Court. The appeal does not have suspensive effect.

Proceedings into specific practices

Google user data processing

The FCO terminated proceedings against Alphabet into Google's user data processing terms on October 5, 2023, with a commitment decision (see press release here and an English convenience translation of the decision here). The case concerns user data collected and processed across various Google services, and through third-party websites and apps. In the FCO's view, users did not have sufficient choice as to whether to agree to the far-reaching processing of their data. In the commitments, Google agrees to offer users the possibility to give "free, specific, informed and unambiguous consent to the processing of their data across services", and to offer sufficient choice options for the combination of data, while avoiding so-called dark patterns. Google must implement the commitments by September 30, 2024, for a duration of five years.

There are obvious overlaps between the commitments and the obligations on user data consent under Art. 5(2) DMA, which only covers designated core platform services (CPS), however. Google's CPS as designated by the Commission on September 6, 2023 (Search, Shopping, YouTube, etc.), are thus excluded from Google's commitments under Section 19a ARC. The

commitments apply to 25 other digital services, including Gmail, Google News, Assistant, Contacts and Google TV. The decision explicitly says that to avoid conflicts and to allow Google to comply with both laws through uniform technical solutions, the commitments under Section 19a ARC should in substance contain the same obligations as Article 5(2) DMA. The current commitments thus result in a de facto extension of Art. 5(2) DMA obligations to services that fall outside of the DMA's scope.

The FCO sees the case as an example of close coordination with the Commission in this regard. It is presumably the first case of a NCA submitting a draft decision to the Commission under Art. 38(3) DMA (the coordination mechanism when a NCA wants to issue a decision against a DMA gatekeeper under national competition law). Moreover, the FCO's decision deals with the notion of sufficient choice for user consent, which is relevant for complying with Art. 5(2) DMA. While the decision cannot legally bind the Commission in applying the DMA, it may nevertheless serve as a blueprint for or at least have an impact on how to meet the obligations under Art. 5(2) DMA. It is quite extraordinary that a NCA is the first agency to "apply" a substantive obligation of the DMA in practice.

Google Maps/Automotive

On June 21, 2023, the FCO sent a statement of objections to Alphabet re. Google's practices related to infotainment services offered to vehicle manufacturers (see press release here). The FCO raised tying concerns because Google only licenses its automotive services (Google Maps, Google Play and Google Assistant) as a bundle. The FCO also took issue with Google's advertising revenue sharing agreements with some vehicle manufacturers if they don't pre-install other voice assistants next to Google Assistant, that vehicle manufacturers must set Google services as a default or display them prominently, and that Google does not allow interoperability of its Automotive Services with third-party services. Google has offered commitments, and the FCO has announced on December 20, 2023, to market test whether these are generally sufficient for removing the concerns, in particular, whether they result in an unbundled offer of Google's services in the automotive sector (see press release here).

Abuse of dominance

Digital mobility services

The FCO issued an abuse of dominance decision against Deutsche Bahn ("DB") to terminate certain practices and contractual arrangements related to mobility services platforms that offer online solutions for integrated route planning (including combining train tickets e.g., with flights, carsharing, long-distance coach services or rental bikes) (see press release here).

The FCO finds that DB is by far the most dominant rail passenger transport company in Germany. DB is vertically integrated from rail network operator to ticket distributor and also offers its own strong mobility platform services (online platform and app). DB's travel data are considered indispensable input for third-party mobility platforms. The FCO concludes that DB is subject to abuse control and special obligations vis-à-vis competitors. DB was found to have used its position to restrict competition from third-party mobility platforms, through imposing (online)

advertising bans, vertical price specifications and far-reaching discount bans for these platforms when they sell DB tickets (including a ban to share their commission fee), as well as refusing to pay them a commission for carrying out the payment process. The FCO qualifies the conduct as an infringement of Art. 102 TFEU and Section 19 ARC. It orders DB to terminate the infringement, including through offering new contracts with adequate commission.

The FCO also finds that DB refused to grant third-party mobility platforms non-discriminatory real-time access to those DB traffic data required for the third parties' integrated route planning offers (incl. data on delays, train cancellations, etc.). The conduct is qualified as an abuse of dominance under Section 19 ARC. The FCO also considered it as discrimination under Section 19 ARC/Art. 102 TFEU, given that DB granted Google and regional public transport provider RMV access to the data. In addition, the FCO qualifies the conduct as an abuse of relative market power under Section 20(1a) ARC. This seems to be the first time that the FCO has relied on this provision, introduced in 2021, according to which refusing access to data (against adequate remuneration), upon which another company is dependent, can be abusive. The decision orders DB to grant other mobility platforms real-time, non-discriminatory access to the relevant traffic data. The case was brought in administrative proceedings, i.e., without the possibility to imposing fines. This illustrates that the FCO follows a more cautious approach in imposing fines in abuse of dominance cases than the European Commission.

Meta/Facebook

On July 4, 2023, the EU Court of Justice decided that the FCO can consider the rules of data protection law when assessing potential abuse of dominance conduct under national competition law (see a dedicated Kluwer Competition Law Blog here). The case concerns the FCO abuse of dominance decision of 2019, in which the FCO found a lack of sufficient consumer choice regarding the combination and use of their data. Meta's appeal proceedings at national level thus continue. In parallel, Meta offered creating an accounts center allowing users to decide whether their different service accounts be linked, in which case Meta could use the data for advertising across services. After the FCO requested changes to the initial offer to avoid nudges, Meta planned in June 2023 to introduce the revised accounts center (see press release here). The FCO acknowledged this as important step in implementing its 2019 decision. It stressed, however, that other aspects are still unclear, e.g., how to deal with user data collected via plug-ins (Like-buttons, etc.) Moreover, the FCO noted that Meta is now also subject to Section 19a ARC, which may require additional measures.

Merger control

Overall, the number of filings the FCO dealt with remained stable, with ca. 800 filings in 2023. The agency investigated 7 transactions in second phase proceedings. Of these, none was prohibited, four were cleared unconditionally and two were cleared subject to conditions (with one still ongoing in 2024).

Theo Müller/Royal Friesland Campania

On February 2, 2023, the FCO cleared the acquisition of several brands (like Landliebe and Tuffi) and production facilities of dairy company Royal Campania Friesland by dairy company Müller subject to commitments (see press release here). The FCO found that Müller has a strong market position, with a broad dairy products portfolio and popular brands in Germany, dominating the national markets for rice pudding, fresh dairy drinks and fresh basic dairy drinks. For the market definition, the FCO considered demand-side substitutability at the immediate customers level, i.e., groceries, and also consumer preferences, but only if they matched the findings at the groceries' level. The FCO carried out an empirical "event analysis", analyzing data on price changes and discounts for specific products to review consumer reactions and switching. This is interesting, as the FCO is not bound to and does not necessarily apply the SNIPP test.

Müller's shares were above 60% in these markets pre-merger, clearly exceeding the statutory presumption of single dominance of 40%. The increment would have been small, but the FCO noted that combined with the high shares and "the potential" of the acquired brands, the merger would have further strengthened Müller's dominance. The FCO rejected that the groceries could exert sufficient buyer power, despite high concentration on the demand side, as they would lack sufficient alternative suppliers in the three product markets post-merger, also in terms of capacity. The parties offered commitments: to divest the entire Tuffi business and to grant irrevocable, unlimited and exclusive licenses for the sale of Landliebe fresh dairy drinks and rice puddings to a third party (i.e., only the licensee would be able to use the brand), including developing new related Landliebe products. In a rare step, the FCO did not require an up-front buyer but allowed the parties to implement the merger before fulfilling the commitments, which is required within an undisclosed divestiture period. One reason was that for both commitments the FCO was aware of potential buyers, who had expressed their interests.

Fluidra/Meranus

On June 23, 2023, the FCO cleared the acquisition of Meranus, a wholesaler of swimming pool equipment in Germany, by Spanish multinational manufacturer of swimming pool equipment Fluidra, after a second phase investigation without commitments (see press release here). The activities overlap in various swimming pool equipment markets in Germany. The FCO only had serious concerns regarding the market for the manufacture and sale of robotic pool cleaners for private pools in Germany. The product market definition only includes branded products, no private labels sold by wholesalers, which results in a de-minimis market, i.e., total sales in Germany did not exceed € 20 million in the preceding year. Under German merger control rules, the FCO cannot prohibit a merger based on competitive concerns in a de minimis market. Nevertheless, the FCO carried out (and published) a detailed competitive analysis, finding that Fluidra forms a duopoly with third-party Maytronics pre-merger, despite a massive difference in market shares (Fluidra 10-20% and Maytronics 80-90%, respectively). The FCO finds the merger would likely strengthen the duopoly, even though Meranus is only active in private label sales: Fluidra would still secure access to an important sales channel in Germany, and the merger would reduce any competitive constraints from Meranus. The FCO concedes that it cannot prohibit the merger, but explicitly mentions that it may open antitrust proceedings if there were complaints in this market, which is quite an extraordinary statement in a clearance decision.

Burda/Funke JV

On March 17, 2023, the FCO cleared the joint venture after second-phase proceedings without commitments (see press release here). The transaction involved Funke acquiring a share in an existing JV, conferring joint control. Burda and Funke combined their advertising inventory, mainly overlapping in print tabloid and TV program magazines. Most advertising revenues in these magazines come from ads on OTC pharmaceuticals, nutritional supplements and retail mail order. The same applies to ads in TV supplements and pharmacy magazines, which charge similar ad prices. The FCO thus combined print advertising in all of these magazine types into a single market. It did not, however, include other advertising channels for the same products in the market (e.g., Internet, social media, TV/radio, billboards), because they would not effectively reach the target groups or were too expensive.

The parties' combined shares stayed below the 40% single dominance presumption threshold. They met the threshold for collective dominance, however, and in 2014 the FCO had found a duopoly in a (narrower) market for print advertising in TV magazines. The FCO did not uphold this finding: market shares shifted for all players from 2014-2021, and rebates granted to advertising customers were relatively high. It also rejected the creation of an oligopoly through the merger: while some structural elements (high transparency, shrinking market volume) seem prone to the risk of tacit collusion, others speak against it, like heterogenous products (different titles and related ad portfolio) and the asymmetry among the remaining players, with one clear market leader post-merger. The FCO reviewed but rejected unilateral effects because customers said they would shift parts of their ads to other players if the parties were to increase prices. Finally, the FCO investigated the JV as a marketing cooperation under Art. 101 TFEU. (In JV cases, horizontal cooperation review typically takes place in parallel to merger control review in Germany.) The FCO qualified the cost savings as efficiencies but made the parties change some contractual restrictions it considered to go beyond what is necessary to achieve those. The FCO said that it may review the parties' (to some extent already) existing cooperation at the magazines' editorial level in separate Art. 101 TFEU proceedings, while the parties can implement the merger.

Microsoft/Open AI

The FCO concluded on September 25, 2023, that Microsoft's various investments in OpenAI (first in 2019 and recently in 2023) were not subject to German merger control rules (see press release here and case summary here). The FCO contacted Microsoft and OpenAI after press coverage on Microsoft's planned investment of USD 10 billion in January 2023. The FCO reviewed whether the investment would constitute the acquisition of a "competitively significant influence" under Section 37(1) no. 4 ARC – a concentration type unique to German merger control. (It requires acquisition of shares (below 25%), and additional special circumstances that result in the buyer obtaining the same position as a 25%-minority shareholder.) The FCO found that Microsoft's first investment into OpenAI in 2019, once combined with a deeper cooperation in 2021, likely conferred Microsoft a competitively significant influence. However, at that time, neither the general turnover nor the transaction value-based thresholds were met. The latter requires that the target has significant activities in Germany, which was not the case for OpenAI in 2021. After the launch of ChatGPT at the end of 2022, OpenAI had sufficient user numbers in Germany to meet the threshold in January 2023. However, at that time Microsoft already had the competitively significant influence, and the additional investment would not further strengthen that. The FCO

left open whether future investments by Microsoft into OpenAI might be subject to merger control. The FCO also reviewed the parties' cooperation under Art. 101 TFEU, but due to the currently competitively dynamic field of generative AI and other existing or planned cooperations in that sector did not raise concerns.

Antitrust

Cartel enforcement

In 2023, the FCO imposed fines of overall € 2.8 million on 8 companies and five individuals. This is a significant decline from 2022, in which the fines totalled € 24 million (and from 2021, with total fines of € 100 million). The FCO says this is still due to the COVID pandemic. The FCO received 14 leniency applications in 2023 and has carried out 11 inspections. The FCO expresses confidence that its cartel enforcement remains effective, also because of refined investigation methods, including "cutting-edge" screening technology. The FCO established an external reporting unit under the Whistleblower Protection Act, which reportedly provided valuable information, without, however, any statistics available. It is noteworthy that in 2023, the FCO did not fine or otherwise terminate proceedings into vertical price fixing, which has been a focus in previous years.

Cartels

The FCO imposed fines in another cartel in the ***industrial construction*** sector: in several decisions dating from July to November 2023 it fined seven construction companies in total of € 2.3 million for bid-rigging to the detriment of Thyssen Krupp from 2007-2017, as well as five individuals who acted for these companies (see case summary in German here). These decisions terminate the FCO proceedings into three cartels in the industrial construction sector (see press release here). The FCO qualified bid rigging conduct to the detriment of a given customer organizing the bids as a separate cartel and pursued these cartels in separate proceedings. The bid-rigging conduct to the detriment of Thyssen Krupp was qualified as a single continuous infringement, covering 122 projects overall. The case is the first time that the FCO has used the new powers (now Section 81a(1) ARC) to impose a fine on the parent company of a cartel participant because one cartelist ceased operations after the initiation of proceedings and sold its shares for € 1 to another company. The FCO thus fined the parent company that exercised a decisive influence over the cartelist during the infringement period instead.

Beer cartel

The Düsseldorf Court of Appeals imposed a fine on brewery Carlsberg Deutschland Holding GmbH on May 2, 2023, for anti-competitive concerted practice regarding planned beer price increases in Germany for 2008 (see press release in German here). This is the end of a long saga: the FCO had imposed fines on various breweries in Germany for the beer cartel in 2013/14 totalling € 338 million, and against Carlsberg in the amount of € 62 million. Carlsberg had initially successfully appealed the fine with the Düsseldorf Court of Appeals, which found that the statute

of limitations had expired. The Federal State Court had quashed the decision because it found that coordination and implementation of a concerted practice form one and the same infringement, which is not terminated as long as the implementation in the market continues. The Düsseldorf Court of Appeals thus reviewed the case again and imposed a fine. Under German law, the court of appeal does not merely review the legality of FCO's fine, but reviews the entire case anew and determines its own fine amount. The final amount was reduced due to the long duration of the appeal proceedings: almost 10 years.

The FCO achieved termination of anticompetitive price coordination in the field of ***medical aids*** by way of commitments (Section 32b ARC) on November 6, 2023 (see press release here). Medical aid suppliers organized in a working group coordinated their prices vis-à-vis statutory health insurance providers. Statutory provisions allow suppliers to cooperate by forming national associations to collectively negotiate with health insurance companies on the provision of medial aids to patients to ensure that all patients in Germany can be adequately supplied. In the case at hand the working group's members, covering almost 80% of suppliers of technical rehabilitation aids in Germany, had requested uniform price increases within existing supply contracts with health insurers, because of cost increases due to the Covid pandemic. That caused the FCO to open administrative cartel proceedings in 2022. It was disputed whether competition law applied (or sector-specific cooperation rules). The FCO found the conduct crosses a red line at least when all relevant associations cooperate to an extent that almost eliminates any competition. Unexpected cost increases would not justify enforcing general price increases through a supply monopoly. The suppliers agreed to terminate the working group contracts, ceased disputing the application of competition law and offered not engaging in similar conduct again in commitments, which the FCO accepted. Normally, the FCO would qualify this type of conduct as a hardcore cartel. The question of the applicability of competition law seems to have played a major role in the FCO following a more lenient approach in administrative proceedings, i.e., without the possibility to impose fines.

Horizontal cooperation

The FCO dealt with two "sustainability" branch initiatives in the agricultural sector in 2023. It dealt again with the ***initiative for animal welfare***, which it accompanies since 2014. The scheme involves a purchase price surcharge by kg of sold meat, which is set by the initiative, financed by large retailers and payable to producers that raise the animals according to certain animal welfare standards (see on the blog on German developments in 2021 here). The FCO already announced in 2022 that the surcharge agreement would normally be considered as a hardcore restriction of competition and that it would only be tolerated in an initial roll-out phase. The FCO now found that the initiative is well-established in the market. The initiative plans to introduce a non-binding recommendation to its participants on how to fund the additional costs (no more details were available) as of 2024. The FCO also refers to the exemption from competition law for sustainability standards set out in Art. 210a Common Market Organization (CMO), but doubts that the surcharge would meet the requirement of indispensability to achieve any higher sustainability standards than required under EU or national law. The FCO notes that so far, primarily NCAs considered Art. 210a CMO in practice. After the Commission has launched its guidelines on the application of Art. 210a CMO (in December 2023), parties can now also request an opinion from the Commission. The FCO does explicitly not want to preempt any such proceedings.

Forum sustainable cocoa

The FCO found on June 13, 2023, that the joint initiative consisting of public authorities, cocoa and chocolate industry companies, a major part of German groceries and international NGOs, did not raise any concerns to merit a detailed investigation (see press release here). The initiative's goal is to help cocoa farmers in Ghana and Côte d'Ivoire to earn a living income. The members voluntarily commit themselves to minimum prices, quotas and surcharge systems to achieve better prices for farmers. The FCO highlighted the voluntary nature of the scheme, that the system is not based on fixed minimum prices but on reference prices from development aid schemes, and that each participant sets its own individualized minimum price, which will not be visible to or deductible for competitors.

On September 5, 2023, the FCO reported no concerns with respect to a ***standardization project*** in the automotive industry regarding the production of cable sets (***wire harnesses***) (see press release here). Participants come from all levels of the value chain and explore opportunities for more automation in the production of wire harnesses. These parts are complex, currently often produced in a non-automated way depending on the individual combination with other equipment and the vehicle type, and expected to become more important with increasing vehicle digitization. The FCO notes that the initiative is mixed, containing both standardization and R&D elements, which are subject to different and possibly contradictory requirements under antitrust law. In particular, it is not desirable in the context of R&D cooperations that the majority of competitors opt for a single technology route early on. After the FCO's guidance the participants restructured their initiative and separated more clearly the R&D from the standardization process.

Damages litigation

Trucks Cartel III

On December 5, 2023, the Federal Court of Justice ("FCJ") upheld a ruling that indirect customers had likely suffered follow-on damages in the context of the trucks cartel by entering into truck leasing contracts (case KZR 46/21, see decision in German here). The litigation was based on the European Commission's cartel decision of July 2016, finding that participants coordinated gross sales price increases of trucks. The claimant is an indirect customer who leased several trucks, and requested damages for increased lease payments. The FCJ reviewed an interlocutory judgement finding that the claimants had in principle suffered a damage – without any quantification – with the requisite likelihood. The FCJ confirmed the ruling, and thus for first time that an indirect customer may have suffered damages even when only leasing cartelized products. The FCJ stressed that the previous instance could base its finding on the general experience-based/factual presumption that a cartel typically leads to higher prices (which still applies to "old" claims prior to the introduction of the statutory presumption of damages based on the EU's damages directive.) The presumption also applies to lease payments, at least if the leasing contracts are designed to amortize the vehicle's full purchase price, which was the case here. The FCJ said that the previous instance did not commit errors when rejecting the defendants' attempts to refute the factual presumption, because it was not plausible that the lease payments were determined entirely independently from the basis of the coordinated gross prices, or that the leasing companies as

direct customers of the cartelists would have levelled out the entire cartel surcharge (to the detriment of their margins).

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