Summary:

EU-Kartellbußen und Managerhaftung – Eine rechtliche und ökonomische Analyse

Der Aufsatz beschäftigt sich mit der Frage, ob Unternehmen, gegen die wegen Verstößen gegen das EU-Kartellrecht Geldbußen verhängt wurden, die Möglichkeit haben sollten, diese Geldbußen von ihren (ehemaligen) Geschäftsführern oder Mitarbeitern zurückzufordern. Auf der Grundlage einer Analyse der Bestimmungen des EU-Vertrags, der Rechtsvorschriften und der Rechtsprechung zu Kartellgeldbußen sowie des ökonomischen Charakters von Kartellrechtsverstößen und der ökonomischen Begründung für Geldbußen gegen Unternehmen argumentiert der Autor, dass eine Regressmöglichkeit gegen EU-Recht verstoßen könnte, da eine solche Rückforderung die volle Wirksamkeit der Geldbußen erheblich beeinträchtigen könnte.

Redaktionelle Hinweise:

- Vgl. auch Heyers, „Organhaftung für Kartellschäden– Regressierbarkeit von Kartellbußen und Möglichkeit einer unmittelbaren Außenhaftung von Geschäftsleitern", WuW 2022, 413 = WUW1409189;
- Vgl. schon Thelen „Geschäftsleiterhaftung für Kartellrechtsverstöße – Besprechung von BAG, Urteil vom 29.06.2017 – 8 AZR 189/15, WuW 2018, 17 = WUW1257258.

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First Rulings of the Spanish Supreme Court in the Trucks Damages Litigation

In 15 judgments delivered in June 2023, the Spanish Supreme Court has become the first in the EU to rule on damages claims following the European Commission's Trucks decision. The Court upheld the rulings of various appeal courts which had granted judicially estimated damages of 5% of the purchase price to individual buyers of cartelised trucks. The Court basically applies the case-law of the CJEU to rule on the content and scope of the Commission's Decision, legal standing, limitation periods, and the accrual of interest. However, the Court's findings relating to the presumption of the loss and its causation, as well as the quantification and judicial estimation of the loss appear to deviate from the case-law of the CJEU.

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I. Introduction

In 15 nearly identical judgments handed down on 12 and 14 June 2023,[1] the Spanish Supreme Court (SC) has become the first in the EU to rule on damages claims following the European Commission's Decision in the *Trucks* cartel[2]. The Court upheld the rulings of various appeal courts which had granted damages by judicially estimating a cartel overcharge of 5%. The judgments address several legal issues raised in the appeals brought both by defendants in the lower instances and plaintiffs dissatisfied with the quantifications of the damages obtained. The Court basically applies the case-law of the CJEU to rule on legal issues relating to the content and scope of the Commission's Decision, legal standing, limitation periods, the accrual of interest, and the passing-on defence. However, the Court's findings relating to the presumption of the harm and its causation, as well as to the quantification and judicial

1 See, e.g., Spanish Supreme Court (SC), Judgment of 12.06.2023, 923/2023, ECLI:ES:TS:2023:2492.
2 Commission Decision of 19.07.2016, Case AT.39824 — Trucks.

estimation of the damage appear to deviate from the case-law of the CJEU.

While the supreme courts of other Member States, such as the *Bundesgerichtshof,*[3] the *Corte Suprema di Cassazione,*[4] and the *Cour de Cassation*[5], as well as the *Court of Appeal for England and Wales* (acting in last instance)[6] have been quite active in creating case-law on competition-related damages claims and the provisions of the EU Damages Directive (Damages Directive),[7] the SC had remained silent in this field since its famous *Sugar* cartel rulings delivered 10 years ago.[8] From the Spanish perspective, it is thus the first time that our SC rules on various issues related to the Damages Directive and the provisions of the Spanish Competition Act (SCA) and the Civil Procedure Act (CPA) which transpose it into national law.[9]

II. Temporal Applicability of the Rules of the Damages Directive

Determining which rules are applicable *ratione temporis* to a specific damages claim, whether the provisions of the Damages Directive —which not only codifies rights previously recognised by the case-law of the CJEU, but also creates new rules— or the domestic provisions of the Member States —in the case at hand the tort regime of the Spanish Civil Code (CC)—, is of great relevance and entails a certain degree of complexity. Article 22 Damages Directive and Royal Decree 9/2017 which transposes it into national law distinguish between substantive and procedural rules governing damages actions. While the retroactive application of the substantive rules is prohibited,[10] Member States may provide that the procedural rules apply to damages claims brought after 26 December 2014, the date of entry into force of the Directive.[11]

Notwithstanding these clarifications regarding the temporal scope of application of the Directive's rules, the CJEU's interpretative guidance has been necessary to determine whether a specific provision is substantive or procedural in nature within the meaning of Article 22 and applicable *ratione temporis* to a specific dispute. This can be seen in judgments like *Cogeco*, *Volvo and DAF Trucks*, *Tráficos Manuel Ferrer* and *Repsol Comercial de Productos Petrolíferos,*[12] which examine the temporal applicability of Articles 9(1), 10, 17(1) and 17(2) in conjunction with Article 22 of the Damages Directive. In its judgments on the *Trucks* cartel, the SC applies the criteria established by the CJEU in the *Volvo* and *Tráficos Manuel Ferrer* rulings to clarify whether various provisions of the Directive are applicable to the claims at issue.

1. Temporal Applicability of Article 10 Damages Directive

As regards the statute of limitations provided for in Article 10 Damages Directive, a substantive rule according to *Volvo*, and Article 74 SCA[13] which transposes it into national law, the SC establishes that these provisions are applicable to the actions for damages brought against the defendants, since the one-year limitation period for tort actions in the Spanish Civil Code had not been exhausted before the transposition deadline of the Directive expired on 27 December 2016. Therefore, the legal situation continued to produce effects after the expiry of that time limit within the meaning of *Volvo*. Consequently, the SC applies Articles 10 Damages Directive and 74 SCA to determine both the *dies a quo* of the limitation period and the five-year duration of the time-limitation period. As regards the *dies a quo*, it is important to note, given the contradictory judgments that have been delivered by Spanish lower courts even after the *Volvo* and *Deutsche Bank* rulings,[14] that the SC applies the criterion set out in *Volvo* that the *dies a quo* should be that of the publication of the summary of the Commission's Decision in the Official Journal (OJEU), which is the time at which any potential injured party had all the elements necessary to bring an action. This would seem to contradict judgments from Spanish appeal and first-instance courts which held that the time limitation period can only run once a decision of the Spanish competition authority had become final, i.e., had definitively been confirmed by the administrative courts. In her recent Opinion in the *Heureka/Google*[15] case, Advocate General Kokott confirmed that also in the case of decisions of a national competition authority the time limitation period starts to run with the publication of the decision, even in cases where the Damages Directive was not yet temporarily applicable.

2. Temporal Applicability of Article 17 Damages Directive

With regard to the provisions of the Damages Directive relevant to the establishment of the damage and its quantification, the SC applies the criterion established in *Volvo* to conclude that Article 17(2) Damages Directive —a substantive rule within the meaning of Article 22(1) which establishes a *rebuttable* presumption that cartels cause harm[16]— and Article 76(3) SCA which transposes it, are not applicable to the *Trucks* cartel, since the infringement ended in 2011, before the deadline for transposition of the Directive expired and therefore the relevant legal situation was already "consolidated" (the

3 See, e.g., BGH, Judgment of 04.04.2023, KZR 20/21, ECLI:DE:BGH:2023:040423UKZR20.21.0 – Vertriebskooperation im SPNV, applying Article 5 Damages Directive and BGH, Judgment of 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, WuW 2020, 209 – Trassenentgelte, applying Article 9 Damages Directive.

4 See, e.g., Italian Corte Suprema di Cassazione, Civile Sent. Sez. 1 of 06.02.2020, Num. 7677, 2020, ECLI:IT:CASS:2020:7677CIV, declaring Article 10 Damages Directive inapplicable.

5 French Cour de Cassation, Pourvoi of 19.10.2022, No 21-19.197, ECLI:FR:CCASS:2022:C000599, declares the Damages Directive inapplicable to the facts and confirms that the Court of Appeal was correct in refusing to interpret the rules of French law in conformity with the Directive.

6 EWCA, Judgment of 31.10.2019, [2019] EWCA Civ 1840, – BritNed Development Ltd v ABB AB and ABB Ltd.: https://fmos.link/20841.

7 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2009 L 349/1.

8 SC, Judgment of 08.06.2012, 2163/2009, ECLI:ES:TS:2012:5462 and SC, Judgment of 07.11.2013, 2472/2011, ECLI:ES:TS:2013:5819; see also Suderow, Private Enforcement in Spanien: Der Rechtsstreit zwischen Schokoladenherstellern und dem spanischen Zuckerkartell, WuW 2014, 142.

9 Royal Decree-Law 9/2017, of 26 May, transposed the Directive into national law, BOE 126, of 27.05.2017, pp. 42820-42872.

10 Article 22(1) Damages Directive and First Transitional Provision of RDL 9/2017.

11 Article 22(2) Damages Directive. The Spanish legislator has opted for the procedural rules, transposed in Article 283bis CPA, to be applicable to proceedings initiated after the entry into force of RDL 9/2017 on 27.05.2017.

12 CJEU, Judgment of 28.03.2019, C-637/17, ECLI:EU:C:2019:263, WuW 2019, 258 – Cogeco; CJEU, Judgment of 22.06.2022, C-267/20, ECLI:EU:C:2022:494, WuW 2022, 487 – Volvo and DAF Trucks; CJEU, Judgment of 16.02.2023, C-312/21, ECLI:EU:C:2023:99, WuW 2023, 212 – Tráficos Manuel Ferrer and CJEU, Judgment of 20.04.2023, C-25/21, ECLI:EU:C:2023:298, WuW 2023, 424 – Repsol.

13 Competition Act 15/2007 of 3rd July, BOE 159, 04.07.2007, p. 28848 -8872.

14 CJEU, Judgment of 22.06.2022 (Fn. 12) – Volvo and CJEU, Order of 06.03.2023, C-198 and 199/22, ECLI:EU:C:2023:166 – Deutsche Bank.

15 CJEU, AG Opinion of 21.09.2023, C-605/21, ECLI:EU:C:2023:695, point 128.

16 CJEU, Judgment of 22.06.2022 (Fn. 12), para. 98 – Volvo.

term used in the Spanish version of *Volvo*; "abgeschlossen" in the German version) on that date.

Although the judgments are not entirely clear, the SC seems to understand that Articles 17(1) Damages Directive and 76(2) SCA are not applicable *ratione temporis* either. Article 17(1) —a provision which, according to *Volvo,* is of a procedural nature[17]— provides that judges and courts may estimate the amount of the claim for damages. The SC, however, seems to conceive the nature of Article 17(1) Damages Directive as substantive rather than procedural, perhaps because it has been, in our view mistakenly, transposed in the SCA instead of the CPA. The SC also refuses to interpret Spanish law in conformity with the Damages Directive, since the *Trucks* cartel ended prior to the enactment of the Directive. Nonetheless, in the section on quantification of the damage, the SC judgments eventually apply Article 17(1) Damages Directive and the *Tráficos Manuel Ferrer* judgment.

III. Content and Scope of the European Commission's Decision

The defendants in the follow-on actions examined by the SC claimed that the conduct sanctioned in the Commission's *Trucks* Decision consisted solely of an exchange of information on the gross prices of the trucks and in no case of price-fixing, contrary to the findings of several appeal courts.

The material scope of the infringement found in the Decision must be subject, as the SC rightly recalls, to the rules on the binding nature of Commission decisions in competition matters. These rules derive from the CJEU's *Masterfoods* case-law,[18] in the meantime codified in Article 16 of Regulation 1/2003[19], which prohibits national courts from issuing rulings that are incompatible with a decision adopted by the Commission under Articles 101 or 102 TFEU.

The binding effect of a Commission decision is, however, limited to its operative part, which declares the existence of the infringement and identifies the parties responsible for it, and to the statement of reasons supporting that operative part. This is because, in accordance with the *Pergan* case-law of the General Court, "[...] *the assessments made in the grounds of a decision are not in themselves capable of forming the subject of an application for annulment*".[20] Consequently, binding the civil courts on other grounds would leave the party concerned defenceless. In its previous case-law, the SC had also limited the scope of the binding effect of administrative decisions from the Spanish competition authority (CNMC) to the declaration of the unlawfulness of the conduct.[21]

The SC interprets the Commission's *Trucks* decision as establishing the existence of an infringement consisting not only in the exchange of information on prices, but also in the fixing and raising of gross prices in the European Economic Area (EEA) for medium and heavy trucks. It adds that this interpretation of the material scope of the practice sanctioned by the Decision is in line with the *Volvo* and *Tráficos Manuel Ferrer* judgments.

We consider the SC's analysis of the binding scope of the Decision to be correct, as it respects the *Masterfoods*, *Otis I* and *Pergan* case law of the European Courts. Spanish lower courts should take note of this interpretation and refrain from extending the binding effects of decisions, both from the Commission and the CNMC, to other parts, such as the effects of the infringement or assessments, frequently made in CNMC decisions, of the amount of the overcharge. As established in the *Sugar* case-law of the SC and the *Otis I* judgment of the CJEU, and as developed further below, it is for the civil courts to determine, based on the evidence produced in the civil proceedings, the existence of harm, the causality link, and its quantification. Founding this analysis on the findings of the competition authority not only infringes the defendant's rights of defence in the civil proceedings, but eventually also undermines the attractiveness of leniency programmes, which are already in marked recess.

IV. Existence of Harm and Causal Link between Infringement and Harm

Proof of the existence of harm and of the causal link between the infringement of the competition rules and the damage are, together with the quantification of damages, two of the most controversial aspects of damages actions in Spain's jurisdictional practice. In *Otis I* the CJEU established that "*the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court*". Moreover, "*even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages*".[22]

1. Judicial Presumption of Harm

The SC denies that the appeal courts considered the existence of the harm to be proven by virtue of Articles 17(2) Damages Directive and 76(3) SCA, which were inapplicable *ratione temporis* to the cases at hand. The SC believes it is debatable, although it limits itself to expressing doubts, that the appeal courts considered the proof of harm in application of the so-called *ex re ipsa* damages doctrine, which allows to presume harm in cases of patent and unfair competition infringements. The Court considers that the appeal courts acted correctly in presuming the existence of the damage by virtue of Article 386 CPA, a provision that allows judges and courts to apply judicial presumptions.

The Court then identifies the proven facts from which the harm caused by the *Trucks* cartel could be presumed. These are, according to the Court, "*the long duration of the cartel, which lasted for 14 years; it involved the largest truck manufacturers in the EEA, with a market share of approximately 90%; and its object was the discussion and adoption of agreements on, inter alia, price fixing and gross price increases*". Taking these basic points established in the Decision as a starting point, with support in the economic rationality of the existence of a cartel of the characteristics of the *Trucks* cartel and applying

17 CJEU, Judgment of 22.06.2022 (Fn. 12), para. 85 – Volvo.

18 CJEU, Judgment of 14.12.2000, C-344/98, ECLI:EU:C:2000:689, WuW/E EU-R 389 = WuW 2001, 207 – Masterfoods.

19 Council Regulation 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

20 GC, Judgment of 12.10.2007, T-474/04, ECLI:EU:T:2007:306, para. 73, WuW/E EU-R 1345 = WuW 2008, 107 – Pergan.

21 SC, Judgment of 07.11.2013 (Fn. 8) and SC, Judgment of 09.01.2015, 220/2013, ECLI:ES:TS:2015:191 – Mediapro.

22 CJEU, Judgment of 06.11.2012, C-199/11, ECLI:EU:C:2012:684, paras. 65 and 66, WuW/E EU-R 2566 = WuW 2013, 49 – Otis I.

the rules of human reasoning and the maxims of experience, the SC considers the harm to be presumable pursuant to Article 386 CPA. The SC argues that the high exposure to a risk of huge fines would not be logical in the absence of benefits for the undertakings participating in the cartel. The Court concludes that the defendants did not succeed in rebutting this presumption, since it considers that the hypotheses put forward by the defendants are either incorrect (that the infringement did not consist of price fixing), not plausible (that the defendants sought to fix a lower price than that resulting from undistorted competition), or based on facts which the appeal courts considered not proven (the existence of passing-on).

Furthermore, the defendants unsuccessfully argued that the existence of discounts in the final price paid by truck purchasers and the heterogeneity of the products affected by the cartel would exclude the existence of harm. The SC acknowledges that the heterogeneity of the products concerned made it difficult to quantify the harm but did not make it impossible. As regards the discounts, the Court denies that the defendants proved that they arose as a result of the cartel and, relying on the concept of the "tidal effect" coined in the judgment of the Amsterdam District Court of 12 May 2021,[23] concludes that any hypothetical discounts would have applied to a higher gross price level compared to the counterfactual non-cartelised scenario, so that the resulting net prices would also have been higher.

2. Critical Assessment

The judgments of the SC do not address the loss individually suffered by the claimants. This analysis, however, would seem indispensable since typically not everybody who has standing to bring a damages claim —"anyone" according to the *Courage/Crehan* case-law of the CJEU, be it direct or indirect purchasers, undertakings that have not purchased from the cartel members (umbrella damages), final consumers or even third parties outside the cartelised market (*Otis II*)— will actually have paid an overcharge.[24] In this respect, competition law infringements fundamentally differ from other infringements, such as infringements of IP rights or unfair competition to which the above-mentioned damages *in re ipsa* doctrine applies. In the latter, the infringement is typically committed against a particular undertaking, whereas restrictions of competition affect competition in the entire relevant market, without it being the task of the competition authorities to identify those purchasers of the cartel who may have been overcharged.

Thus, actions for damages for infringements of competition law seek to redress actual individual harm, as the EU legislator recalls in Article 3(3) Damages Directive which prohibits overcompensation, and not to impose additional penalties for non-compliance with the competition rules. The general and specific deterrence of any competition infringement in follow-on actions is covered by the administrative fine imposed by the competition authority within the 10% limit of Article 23 of Regulation 1/2003 and its equivalents in the laws of the Member States. The judgments of the SC, however, ignore the particularities of the individual case and seem to be influenced by the conception of private enforcement developed in the case law of the CJEU, which sees such enforcement as a supplementary tool to guarantee the *effet utile* of Articles 101 and 102 TFEU and deter infringements.[25]

The extension of the deterrence objective from the sphere of public enforcement to that of private enforcement distorts the genuine purpose of damages actions — to redress actually suffered harm — and paves the way to an extensive interpretation by the CJEU of concepts that govern the civil tort laws of the Member States.[26] The application of civil law for deterrence purposes also raises constitutional questions of compatibility with the *ne bis in idem* principle, since the companies sued in *follow-on* actions have already paid large fines for the infringements committed.

Lastly, the SC considers that the judicial presumption of loss "*establishe*[s] *that a claimant suffered harm*", a requirement that must be fulfilled for the courts to be subsequently able to estimate the damages if "*it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available*" (Art. 17(1) Damages Directive). This leads to a circular reasoning: the loss is presumed and based on its existence, the judge may also estimate its amount, which results in a notable reduction of the evidentiary effort required of the claimant, who must neither prove the specific and concrete damage suffered nor quantify its amount.

This case-law from the appeal courts, now upheld by the SC, probably explains why to-date more than 5,000 first instance and 2,500 second instance judgments have been handed down in Spain in the *Trucks* cartel, which simply presume the damage and estimate the amount of the overcharge, whereas in the rest of Europe there is, to our knowledge, to-date only one judgment resolving such a claim in the British *Royal Mail* case.[27] Not the speed of the Spanish courts but rather this case-law is the distinctive feature of damages actions brought before Spanish courts, which is also starting to attract forum shopping as the recent announcement of a follow-on action before the Spanish courts in an Italian cartel shows.[28]

In this respect it is worth recalling the judgment of the High Court of England and Wales of 9 October 2018,[29] which rejected BritNed's claim for damages against the submarine cable

23 Amsterdam District Court, Judgment of 12.05.2021, ECLI:NL:RBAMS:2021:2391.

24 CJEU, Judgment of 20.09.2001, C-453/99, ECLI:EU:C:2001:465, WuW/E EU-R 479 = WuW 2001, 1121 – Courage; CJEU, Judgment of 13.07.2006, C-295/04, ECLI:EU:C:2006:461, WuW/E EU-R 1108 = WuW 2006, 1070 – Manfredi and CJEU, Judgment of 12.12.2019, C-435/18, ECLI:EU:C:2019:1069, WUW 2020, 83 – Otis II.

25 In Courage, the CJEU noted that "the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community" (para. 27). This reasoning was reiterated and further developed by the CJEU in Kone (CJEU, Judgment of 05.06.2014, C-557/12, ECLI:EU:C:2014:1317, para. 23, WuW/E EU-R 3031 = WuW 2014, 783 – Kone), Skanska (CJEU, Judgment of 14.03.2019 (Fn. 26), paras. 25 and 43), and Sumal (CJEU, Judgment of 06.10.2021 (Fn. 26), para. 35). In Tráficos Manuel Ferrer the Court explained that "the EU legislature relied on the finding that combating anticompetitive conduct on an initiative taken by the public sphere, that is to say, the Commission and the national competition authorities, was not sufficient to ensure full compliance with Articles 101 and 102 TFEU and that it was important to facilitate the possibility, for the private sphere, of helping to achieve that objective (see, to that effect CJEU, judgment of 10.11.2022, C-163/21, EU:C:2022:863, para. 55, WuW 2023, 28 – PACCAR and Others)" (para. 41).

26 Cf. the CJEU, Judgment of 14.03.2019, C-724/17, ECLI:EU:C:2019:204, WuW 2019, 253 – Skanska and CJEU, Judgment of 06.10.2021, C-882/19, ECLI:EU:C:2021:800, WuW 2021, 637 – Sumal.

27 British Competition Appeal Tribunal, Judgment of 07.02.2023, Cases 1284/5/7/18 (T) and 1290/5/7/18 (T), [2023] CAT 6 – Royal Mail.

28 CCS Abogados, https://fmos.link/20842 (last viewed on 05.10.2023); ALI, https://fmos.link/20843 (last viewed on 05.10.2023).

29 EWHC, Judgment of 09.10.2018, [2018] EWHC 2616 (Ch) – BritNed, available at: https://fmos.link/20844.

manufacturer ABB based on the Commission's *Power Cable* Decision of 2014. Justice Smith explained that "*I do not consider that a presumption of harm particularly assists in the assessment of damages in cartel cases, and I certainly do not consider that it is appropriate for me to pre-empt legislation specifically introducing into future cases this presumption*".[30] Moreover, he pointed out that if the expert report and the facts prove to be as convincing as the claimant alleges, then the claimant will have succeeded in establishing the existence of overcharging without the need to resort to a presumption, whereas if, on the contrary, the economic analysis and the facts are less convincing, he fails to see why, in the absence of legislation imposing it, the judge should support an otherwise weak claim by resorting to a presumption that such damage has occurred. The judgment rejected BritNed's € 180 million claim and only awarded € 13 million for cartel inefficiencies and cartel savings. BritNed's appeal was rejected on 31 October 2019 by the Court of Appeal which also annulled the amount awarded at first instance for cartel savings.[31] The Court of Appeal recalled that "[t]*he burden of proof lies on the claimant to establish that he has suffered loss and the quantum of that loss*".[32]

In the same vein, the *Bundesgerichtshof* in a series of judgments on the Railway Cartel, starting with the judgment of 11 December 2018,[33] ruled that the rules on *prima facie* evidence (*Anscheinsbeweis*, § 286 ZPO, the German Civil Procedure Act) for the existence of a loss in a cartel (to which the presumption of the Damages Directive did not apply either) were not applicable because it did not correspond to the typical course of events. This case law has been reiterated in other judgments of the *Bundesgerichtshof* concerning the same cartel.

In contrast, the SC states in response to the defendants' allegations on the infringement of the rules on burden of proof, that "*the problem that has arisen in the litigation is not one of absolute insufficiency of evidence and therefore the Appeal Court has not infringed the rules of the burden of proof*".

V. Quantification and Judicial Estimation of the Harm

Regarding the quantification of the overcharge claimed by the plaintiffs —in the cases before the SC generally 20.7% based on identical expert opinions used in hundreds of claims—, the SC examines the suitability of the parties' expert reports to prove the amount of the overcharge. According to the Court, this aptness must be analysed taking account of the difficulties inherent in cartel damages actions to determine the price of the product in the counterfactual scenario of absence of cartelisation. The SC considers the decision of the appeal courts to deny evidentiary effectiveness to the plaintiffs' expert reports to be reasonable, since they did not comply with the requirement formulated in its *Sugar* case-law that "*what is required of the expert report provided by the injured party is that it formulates a reasonable and technically founded hypothesis based on verifiable and non-erroneous data*".[34] This is because the plaintiffs' reports were built around statistics contained in academic studies (such as the 2009 Oxera Report commissioned by the European Commission) carried out with "*a purpose unrelated to the specific quantification of the damage, without their conclusions being able to be extrapolated as such to any case (regardless of the characteristics of the cartel and the products affected) by reference to a weighted average*", as the SC rightly points out.

1. Judicial Estimation of the Quantity

The SC's finding that the claimants' expert reports had not succeeded in quantifying the loss did not preclude the Court from upholding, at least in part, their claims. The SC seems to reduce the dispute over the quantification of the overcharge to the existence of difficulties which must be overcome by having recourse to the possibility of judicial estimation of the amount of the damage pursuant to the principle of full compensation deriving from Articles 101 TFEU and 1902 CC (the equivalent to § 823 BGB). Otherwise, in the Court's view, Article 101 TFEU would not be able to display its *effet utile*.

The SC examines whether the appeal courts' recourse to the power of judicial estimation of the loss was correct. To do so, it relies on the interpretation of Article 17(1) Damages Directive made in *Tráficos Manuel Ferrer* (even though it previously had seemed to consider this provision to be temporarily inapplicable, as mentioned above) and in particular on paragraph 57 of the CJEU's judgment: "*If the practical impossibility of assessing the harm is the result of inaction on the part of the claimant, it is not for the national court to take the place of the latter or to remedy its shortcomings.*"

The SC then examines whether the practical impossibility of quantifying the overcharge is due to the fact that the plaintiffs had not made a sufficient evidentiary effort to satisfy their burden of proof. It considers that such effort must be analysed with reference to the time when the claim was brought. The SC refers to the actions examined as belonging to the "first wave" of damages claims in the *Trucks* cartel, at a time when it was unknown, according to the Court, that the expert reports, which were merely based on academic studies compiling statistics on cartels, did not meet the standard of proof required under the *Sugar* case-law. The specific features of the *Trucks* cartel — long duration and wide geographic coverage of the conduct, high market share affected and seriousness of the conduct — would, according to the Court, make it difficult to successfully apply the various methods of quantification set out in the Commission's Practical Guide.[35]

The SC interprets *Tráficos Manuel Ferrer* as meaning that the fact that the plaintiffs did not request access to evidence as provided for in Article 5 Damages Directive and the corresponding provisions of the CPA does not mean that the plaintiffs fell short of the evidentiary effort required of them. Moreover, in the hypothetical case that the plaintiffs had requested disclosure of evidence from the defendants under the new CPA rules, the Court considers that they would have had a short period of only 20 days to file the claim following the disclosure and that, in addition, the disclosure could generate an economic cost disproportionate to the amount claimed, which would make the claim "*clearly uneconomical*". It should be noted that the cases before the SC turned on individual claims

30 EWHC, Judgment of 09.10.2018 (Fn. 29), para. 23(3) – BritNed.

31 EWCA, Judgment of 31.10.2019 (Fn. 6) – BritNed Development Ltd v ABB AB and ABB Ltd.

32 EWCA, Judgment of 31.10.2019 (Fn. 6), para. 244 – BritNed Development Ltd v ABB AB and ABB Ltd.

33 BGH, Judgment of 12.11.2018, KZR 26/17, ECLI:DE:BGH:2018:111218UKZR26.17.0, para. 62, WuW 2019, 91 – Schienenkartell, with commentary from Ritz and Marx.

34 SC, Judgment of 07.11.2013 (Fn. 8), Ground 7.

35 Practical Guide Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU, OJ 2013 C 167/19, 21.

for one or two trucks purchased by the respective claimant during the infringement period, not to bundled claims as we know them from other EU jurisdictions. Furthermore, the SC points out that at the time the claims of this "first wave" were brought, there was a general consensus that the limitation period applicable to these claims was one year, a period which the SC considers "*left little room for more elaborate expert reports*". The Court concludes that these circumstances would make it difficult to quantify the overcharge.

Because of the above obstacles to submitting an expert report that meets the evidentiary standard established by the SC's *Sugar* judgments, the Court rejects that there has been "*an evidentiary inactivity on the part of the plaintiff that prevents the use of the powers of estimation*" of the harm within the meaning of *Tráficos Manuel Ferrer*. Consequently, it considers the recourse to the judicial estimation of the loss by the appeal courts to be appropriate.

As regards the defendants' expert reports, the Court held that "*nor can it be maintained that an expert report on the assessment of damages arising from anti-competitive infringements is deprived of evidential effects because most of the data used come from internal sources of the defendant (as the party responsible for the collusive practices). What does seriously compromise the evidentiary effectiveness of the expert opinion provided in this case by the defendants is the fact that the data it submits to its comparative and econometric analysis cannot be considered sufficient to reach reliable and plausible conclusions in view of the limited time period it covers*".

Finally, the SC rules on the specific percentage of the overcharge that can be estimated in actions belonging to the "first wave" of claims for the Trucks cartel, establishing that, as long as there is no proof that the amount of the damage has been higher or lower than 5% of the price of the cartelised truck, a percentage that "*a generality of courts have prudently fixed*" in the *Trucks* cartel, the plaintiff cannot claim compensation above 5% and the defendant cannot claim that the overcharge was lower.

2. Critical Assessment

The judgments of the SC base the recourse to the power of judicial estimation on the principle of full compensation derived from Articles 101 TFEU and 1902 CC, arguably in contradiction to the *Tráficos Manuel Ferrer* ruling from the CJEU, to which the judgments also make reference. In that judgment, the CJEU clearly established that "*the mere existence of those uncertainties, inherent in proceedings concerning liability and which arise, in actual fact, from the confrontation of arguments and expert reports in the exchange of arguments, does not correspond to the degree of complexity in the assessment of damages required to allow the application of the judicial estimation provided for in Article 17(1) of that directive*".[36] The CJEU makes recourse to the power of judicial estimation under Article 17(1) Damages Directive conditional upon the claimant proving the existence of the damage and that it is practically impossible or excessively difficult to quantify it precisely. This implies, according to the CJEU, "*taking into consideration all the parameters leading to such a finding and, in particular, the unsuccessful nature of steps such as the request to disclose evidence laid down in Article 5 of that directive*".[37]

The SC's rulings, by contrast, dwell on the difficulties inherent in competition damages actions in general and to those belonging to the "first wave" of claims in the *Trucks* cartel in particular. They also disregard the relevance of the newly established disclosure rules in transposition of Article 5 Damages Directive to overcome any obstacles that may arise in quantifying the overcharge due to the information asymmetry between the parties.

It can therefore be argued that the SC's rulings do not comply with *Tráficos Manuel Ferrer*. It may be recalled that when a national court of last instance wishes to depart from the established case-law of the CJEU or interprets, as would be the case here, a provision of the Treaty (Article 101) differently from how the CJEU has interpreted secondary law in the same area (the judicial power to estimate damages in Article 17(1) Damages Directive), it is obliged, under Article 267(3) TFEU, to refer a question to the CJEU for a preliminary ruling on the resulting doubt of interpretation.[38]

It is particularly concerning that the SC rulings dispense the lower courts from examining the damage individually suffered by each plaintiff. As mentioned above, although a cartel causes harm, it does not cause harm to all those having standing to bring a damages action under *Courage/Crehan* but only to those who can actually prove that they have suffered a concrete damage.[39] That abstract academic and statistical studies are manifestly insufficient to meet the claimants' burden of proof should be out of the question, as was already clear from the SC's *Sugar* case-law as well as from numerous appeal court rulings in the Spanish *Envelopes* cartel.[40] Such evidence is therefore tantamount to "*an evidentiary inactivity on the part of the plaintiff that prevents the use of the powers of estimation*" pursuant to *Tráficos Manuel Ferrer*, the consequence of which should be none other than the dismissal of the claims for failure to quantify the damage, as the rules on the burden of proof in the CPA attribute the consequences of this lack of evidence to the plaintiff. A recent ruling from the Lisbon Appeal Court rejects to presume and estimate damages in such circumstances.[41]

The deficient expert reports produced in the *Trucks* cases before the SC have nothing to do with the expert evidence in the *Royal Mail case,*[42] referred to by the SC in its judgments, or with the claimant's expert report in *BritNed*, which still did not prevent the claim from being dismissed on the grounds of inadequate quantification. Courts should not, because of the inherent difficulties in quantifying the damage, completely disregard the plaintiff's burden of proof. What insurmountable difficulty is there in making a diachronic comparison between the prices of cartelised trucks during and after the infringement period, or in comparing prices with those of other categories of non-cartelised trucks, to give just two examples of possible counterfactuals? The requirements of the burden

36 SC, Judgment of 16.02.2023 (Fn. 12), para. 52 – Tráficos Manuel Ferrer.

37 SC, Judgment of 16.02.2023 (Fn. 12), para. 65 – Tráficos Manuel Ferrer.

38 CJEU, Judgment of 06.10.2021, C-561/19, ECLI:EU:C:2021:799, paras. 32, 33, 47 and 51 – Consorzio Italian Management and CJEU, Judgment of 22.12.2022, C-83/21, ECLI:EU:C:2022:1018, para. 80 – Airbnb Ireland UC and Airbnb Payments UK.

39 See CJEU, Judgment of 06.11.2012 (Fn. 22) – Otis I.

40 Spanish CNMC, Resolution of 25.03.2013, Case S/0316/10 – Paper Envelopes.

41 Lisbon Appeal Court, Judgment of 12.09.2023, Case 12/19.0YQSTR.L1.

42 UK Competition Appeal Tribunal, Judgment of 07.02.2023, (Fn. 27) – Royal Mail.

of proof in antitrust damages actions should not be different from those governing actions for civil liability in general.[43]

One of the difficulties for quantifying the harm relied upon by the SC deserves particular attention: the Court's argument that disclosure would generate an economic cost disproportionate to the amount claimed, which would make the claim "*clearly uneconomical*". While true, this is particularly due to the fact that the Spanish legal system does currently not provide a collective redress regime, since collective actions are only foreseen for consumers but not for undertakings which have purchased cartelised goods,[44] as is the case of the self-employed and SMEs that purchased cartelised trucks in the cases before the SC. This circumstance, however, should neither benefit the plaintiffs nor harm the defendants but rather advocates for a legislative amendment of the Spanish CPA to clearly admit the massive accumulation of individual damages claims or other alternative constructions, such as the creation of special purpose vehicles known from other EU jurisdictions, to channel the claims of injured purchasers into one or only a few lawsuits. The legal systems of other Member States already provide for the joinder or assignment of actions to bundle damages claims, which allows claimants to pool their economic resources to present one expert report suitable for proving the damage and quantifying its amount. The above-mentioned rulings in *BritNed* and *Schienenkartell* speak for themselves, and we have no doubt that claims based on purely academic and statistical expert reports without any relation to the actual facts of the case would be dismissed in other EU jurisdictions. We are currently awaiting the decision of the *Landgericht Munich* on a damages action covering thousands of trucks in which the court has commissioned an expert report on the possible harm from the prestigious *Frauenhofer Institut*, which was given one year to prepare its report. The contrast with the Spanish situation could not be starker and it may be recalled here that one of the objectives of the Damages Directive is to create a level playing field within the EU (recitals 7-9 Damages Directive).

The SC judgments raise further doubts since it is not clear whether the overcharge of 5% of the price of a cartelised truck endorsed by the Court should be understood as a maximum percentage of the overcharge that may be judicially estimated or whether it is simply the amount which arose from the rulings of the lower courts in the cases heard by the SC. Should the lower courts apply this 5% overcharge, in the absence of proof of greater or lesser harm, in pending cartel litigation? Will the SC conclude that the overcharge is different in successive "waves" of *Trucks* and other claims? There are already examples of appeal court judgments which interpret the SC rulings as limiting the judicial estimation of the cartel overcharge to a maximum of 5%. What would the SC have ruled if it had admitted the appeals in the first wave of claims related to the Spanish *Envelopes* cartel in which the Appeal Court of Barcelona judicially estimated an overcharge of 20%?[45]

VI. Standing

The SC also ruled on the standing of CNHI and MAN Iberia in the actions for damages brought against them, since they both denied that they were jointly and severally liable for the infringement since they did not personally participate in it. Regarding CNHI, the Court found that, between 1 and 18 January 2011, the company was jointly and severally liable for the infringement as the parent company of Iveco SpA and Iveco Magirus AG with decisive influence over the latter. Prior to 1 January 2011, the SC applied the CJEU judgments in *Sumal* (same economic unit) and *Skanska* (succession of liability) to hold CNHI jointly and severally liable for having succeeded Fiat SpA, which disappeared as a result of the structural modifications which gave birth to CNHI.[46] As for MAN Iberia, the SC also applied the *Sumal* case-law to declare the company jointly and severally liable for the infringement as it belonged to the same economic unit as MAN AG, which participated in the cartel.

VII. Statute of Limitations

The SC declared the appeal courts' application of the one-year limitation period of the Spanish Civil Code to be incorrect. It then correctly applied the interpretation of Article 10 in relation to Article 22(1) Damages Directive made in the CJEU's *Volvo* judgment to declare the statute of limitations provided for in Article 10 Damages Directive applicable *ratione temporis*. That regime refers both to the *dies a quo* of the limitation period, which the SC sets, in accordance with *Volvo,* at the date of publication in the OJEU of the summary of the Commission's decision, and to the limitation period itself, which is five years. Accordingly, it declares that the actions for damages were not time-barred at the time when the claims were brought.

VIII. Accrual of Interest

The SC's findings on the right of the injured party to obtain legal interest as part of the compensation is brief, since it only examines the beginning of the accrual of this interest, which is the moment of payment of the purchase price for a cartelised truck. The judgments do not, however, address other disputed issues currently pending before the lower courts, such as the application of the CPI instead of legal interest to update the damage or whether interest should be compounded or not. It is to be expected that the SC will rule on these issues when deciding on appeals related to other damages actions currently pending admission.

IX. Passing-on Defence

In one of the 15 judgments handed down in June 2023,[47] the SC briefly examines the passing-on defence invoked by the plaintiff,[48] although it dismisses the plaintiff's claim that the reduced 5% overcharge had resulted from an application of the passing-on defence by the court of appeal. Rather, the lower court deducted from the truck purchase price the amount

43 CJEU, Judgment of 16.02.2023 (Fn. 12), para. 52 – Tráficos Manuel Ferrer.

44 See Article 11 CPA.

45 For example, Appeal Court of Barcelona, Judgment of 07.02.2022, 2112/2021, ECLI:ES:APB:2022:1182 and Judgment of 27.07.2022, 1282/2022, ECLI:ES:APB:2022:9428. The appeals (casación/Revision) against these judgments were not admitted by the SC.

46 CJEU, Judgment of 14.03.2019 (Fn. 26) – Skanska and CJEU, Judgment of 06.10.2021 (Fn. 26) – Sumal.

47 SC, Judgment of 14.06.2023, 947/2023, ECLI:ES:TS:2023:2480.

48 The passing-on defence has been recognised by the case-law prior to the entry into force of the Damages Directive. The SC established in its Sugar Judgment of 07.11.2013, (Fn. 8), that "for direct purchasers not to be entitled to be compensated for this overcharge, it would be necessary to prove that this damage was passed on to third parties, specifically to their customers (what in competition law terminology is usually referred to as "downstream" markets)".

obtained by the plaintiff when reselling the truck on the second-hand market, which has little to do with the passing-on defence. The judgments do not assess the possibility that a defence may be based on the fact that the direct purchasers of the cartelised trucks who provided transport services had been able to pass on the overcharge to their own customers, as a means of completely excluding the damage or at least reducing its amount. The SC will thus have to rule on this issue on another occasion.

X. Conclusion

The SC's judgments of June 2023 in the *Trucks* cartel entail a risk that the law of damages for infringements of the competition rules will differ from the principles and requirements governing civil liability actions in general. This divergence would arguably be justified by the objective of deterrence attributed to damages actions in the case-law of the CJEU, irrespective of whether such deterrence has already been achieved by the administrative fine typically imposed on defendants in follow-on actions. This developing divergence between "ordinary" tort actions and antitrust follow-on actions raises concerns, since it is due to policy objectives (deterrence also via private enforcement) that have little or nothing to do with the rules governing civil liability actions in general.

The SC's reasoning to justify recourse to the power of judicially estimating the amount of the damage — that disclosure would have been "clearly uneconomic" for the plaintiffs to overcome the information asymmetry inherent to cartel damages actions — is unconvincing since it takes for granted that such claims should be pursued individually in thousands of separate actions instead of incentivising collective actions with solid expert opinions funded by a group of plaintiffs in bundled claims.

It is striking that the SC has endorsed, even for a cartel to which the presumption of Article 17(2) Damages Directive was not yet applicable, that the lower courts may presume the existence of harm and then judicially estimate its amount in situations where the expert evidence produced by the plaintiffs was manifestly inadequate and recourse to the new disclosure mechanism was obviated by the plaintiffs. This sets the SC's judgments in contradiction to the *Tráficos Manuel Ferrer* and *Otis I* rulings of the CJEU and thus would have merited a preliminary reference of these questions to the CJEU under Article 267(3) TFEU, which is mandatory for a court of last instance.

The SC judgments at least capped the maximum cartel overcharge that may be judicially estimated to 5% of the purchase price, thus limiting the negative consequences of the excessive scope of judicial estimation of the amount of the damage. Nonetheless, the overcharge set at 5% is a "Solomonic", not legal, criterion to resolve these damages actions, a solution which the Supreme Court had expressly rejected in its *Sugar* cartel judgments 10 years ago.[49]

The case-law of the appeal courts now endorsed by the SC is already producing a "call effect" among purchasers of cartelised goods, also from other Member States, who often individually seize the courts without a minimally suitable economic expert report to prove the harm, the causal link and its quantification. The result is prejudicial for the functioning of the courts themselves, which are swamped by thousands of atomised damages claims for minor amounts, as could already be seen in the *Trucks* follow-up litigation and is now looming in other cartels such as the *Car* and *Milk* cartels. It is also detrimental to the quality of the justice dispensed, which sometimes resembles a summary justice, especially if we compare our damages lawsuits with the degree of sophistication with which such cases are heard in other European jurisdictions, where, as far as we know and with the exception of the recent *Royal Mail* judgment of the UK *Competition Appeal Tribunal*, no final first instance judgment has yet been handed down in damages claims for the *Trucks* cartel.

The confirmation of this development in the *Trucks* judgments of the SC will certainly not act as a catalyst for the changes that the Spanish legal system requires to improve the functioning of damages actions for competition law infringements.

Summary:

Spaniens Tribunal Supremo urteilt zum Lkw-Kartell

Der spanische Tribunal Supremo hat in 15 im Juni 2023 ergangenen Revisionsurteilen als erster oberster Gerichtshof in Europa über Schadensersatzklagen im Lkw-Kartell geurteilt. Der Gerichtshof bestätigte, dass die Instanzgerichte auch vor Anwendbarkeit der EU-Schadensersatzrichtline befugt sind, einen Schaden zu vermuten und richterlich mit 5 % zu schätzen. Die Urteile wenden i. W. die einschlägige Rechtsprechung des EuGH an, um über Rechtsfragen wie Inhalt und Tragweite der Lkw-Entscheidung der Europäischen Kommission, Klagebefugnis, Verjährungsfristen und Zinsen zu entscheiden. Die Feststellungen zur Schadensvermutung und dessen gerichtlichen Schätzung scheinen hingegen nur schwerlich mit der Rechtsprechung des EuGH, insbesondere Otis I und Tráficos Manuel Ferrer, in Einklang zu bringen.

Redaktionelle Hinweise:

- Vgl. Jäger/Morlin, „Die Kartellschadensersatzrichtlinie im Praxistest ‚Lkw-Kartell'" , WuW 2020, 643 = WUW1342422;
- Petrasincu/Rigod, „Erstes Urteil in Sachen Lkw-Kartell", WuW 2018, 126 = WUW1261852 zu LG Hannover, Urt. v. 18.12.2017, 18 O 8/17, WuW 2018, 101;
- Suderow, „Private Enforcement in Spanien: Der Rechtsstreit zwischen Schokoladenherstellern und dem spanischen Zuckerkartell", WuW 2014, 142 = WUW0632583.

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49 The SC did not consider the solution adopted by the lower court to award 50% of the compensation requested to be correct: "the fact that the calculation of compensation must be based on hypotheses of factual situations that have not actually occurred may justify greater flexibility in the judge's estimation of damages. But this greater flexibility cannot be confused with "Solomonic" solutions lacking the necessary justification" (SC, Judgment of 07.11.2013 (Fn. 8), Ground 7).