# Claiming Cartel Damages against the Economic Unit: One for All and All for One?

Hans-Markus Wagener, Düsseldorf[*]

*With its decision in the Skanska case last year, the European Court of Justice (ECJ) clarified that civil liability is determined directly through primary law.[1] For the case at issue at that time, and in view of economic continuity, the civil liability of the companies by which the cartel members had been absorbed following corporate restructuring was therefore confirmed. Since this judgment at the latest, it has been established that undertakings within the meaning of Artt. 101, 102 TFEU are generally obliged to compensate third parties for damage caused by cartels in which the economic unit participated. Nevertheless, the case law of national civil courts on compensation for damages caused by cartels does not present a uniform picture. Differences as to the abstract liability of companies belonging to the same economic unit do not only occur between the member states but also within the national justice systems. In the face of this legal uncertainty, a Spanish court has now decided to again submit questions on the scope of the civil liability for cartel damages to the ECJ.[2]*

## I. Factual background of the underlying Spanish case

Currently, the 15th Chamber of the *Audiencia Provincial de Barcelona* ("APB") is deciding as court of second instance on the civil liability of a group company. The underlying facts concern the complex of the trucks cartel which, according to the findings of the European Commission (the "Commission"), was active in the market for trucks between 1977 and 2011. By decision of July 16, 2016, the Commission imposed fines on the parties involved in the cartel totalling approximately EUR 2.93 billion. According to the fine notice, German *Daimler AG* (Daimler) was one of the companies sanctioned at that time.[3]

Specifically, the Spanish company *Sumal, S.L.* (Sumal) is claiming damages for additional costs allegedly incurred as a result of the cartel. Sumal during the period the cartel was active purchased two trucks manufactured by the *Mercedes Benz AG* which is a group brand of Daimler. However, the applicant did not direct its action for damages against Daimler as the German parent that was explicitly

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* Hans-Markus Wagener is a research fellow with the Chair of Civil Law, German and International Corporate, Commercial and Antitrust Law of Prof. Dr. Christian Kersting, LL.M. (Yale) at the Heinrich Heine University in Düsseldorf, Germany. The article is an English version of the German original that is published in *Neue Zeitschrift für Kartellrecht* (NZKart 5/20) under the title "Die wirtschaftliche Einheit im Zivilprozess – Eine für Alle und Alle für Eine?". Links to online resources were last accessed on 13 April 2020.

1 ECJ, Judgment of 14 March 2019, C-724/17, ECLI:EU:C:2019:204, Tz. 28 ff. – *Skanska*. See also AG Wahl, Opinion of 6 February 2019, C-724/17, ECLI:EU:C:2019:100, Tz. 40 f. – *Skanska*; AG Kokott, Opinion of 29 July 2019, C-435/18, ECLI:EU:C:2019:651, Tz. 45 f. – *Otis*.

2 Audiencia Provincial de Barcelona Sec. 15ª, Decision of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A. The ECJ assigned the file reference C-882/19 to this case.

3 COMM., decision of 19 July 2016, COMP/A.39.824 – *Trucks*. See also the official press release of the same date, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582.



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fined by the Commission, but exclusively against its Spanish subsidiary, *Mercedes Benz Trucks España, S.L.*[4]

## II. To sue or not to sue, that is the question

At first glance, the claim against the Spanish subsidiary seems remarkable in that there usually is a strong case for targeting the parent company as the defendant of choice. Thus, injured parties regularly turn to the parent company even if that itself was not one of the cartelists identified by the authorities. A decisive motivation for this is the fact that the parent company's assets are regularly more attractive than those of the subsidiaries under its control.

This is made possible by the functional concept of the "undertaking" as established by the Articles 101 and 102 TFEU. They refer to a unit purely which is defined by purely economic considerations. The form of the European antitrust subject is therefore not determined in dependence on its legal form or boundaries implied thereby. Any outlines of a market player resulting from its corporate constitution are irrelevant in this regard. On the contrary, EU law in order to effectively protect free competition assigns the same identity to several (legal) persons under the common roof of the undertaking, provided that they prove to be one single economic unit competing as a whole on the market. As norm addressee, an undertaking and thus the economic unit has to answer for its violations of competition law according to the principle of individual responsibility.[5]

Nevertheless, in certain circumstances, it may be preferable from the plaintiff's point of view to file the claim for cartel damages against a certain subsidiary, e.g. if it is the domestic offshoot of a parent company located abroad. This is particularly true in the underlying proceedings: Since both parties are each legal entities under the same Spanish legal form, the *sociedad de responsabilidad limitada* (S.L.), this is formally a purely domestic dispute.

In particular, if a domestic subsidiary is equally eligible as a reliable debtor due to its financial circumstances, the assertion of claims against it is in the best interest of the plaintiff. This is because any legal action against a foreign person always entails a higher risk potential. Such international civil lawsuits involve additional expenditure of not only time and but also money. Just the official service of procedural documents may take considerably longer and therefore slows down the entire proceedings. The delays are even more serious if all documents need to be translated. Obviously, in this case costs will also be significantly higher than in a dispute between two nationals of the same country with the same language capacities.

Whenever, on the other hand, there is the possibility of bringing an action for damages against a domestic person, both the additional expenditure of time and money that would otherwise be incurred through the

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4 A more detailed summary of the case's facts can be found in the judgment of the court of first instance: Juzgado de lo Mercantíl No. 7 de Barcelona, Judgment of 23 January 2019, ECLI:ES:JMB:2019:981 – S*umal SL v. Mercedes Benz Trucks España SL*.

5 Settled case law, see only ECJ, Judgment of 10 September 2009, C-97/08 P, ECLI:EU:C: 2009:536, para. 55 f. – *Akzo Nobel*.



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involvement of foreign parties can be avoided from the outset. In this way, the individual claimant can thus significantly minimize his or her individual litigation risk. As a result, it is to be expected that a larger proportion of those affected by cartels would consider and finally decide to take legal action to claim their damages. This would also strengthen private enforcement as a tool of competition policy to combat violations of cartel law. Because the lower the threshold to effective legal protection is set, the higher the economic risk that an infringement entails for the undertakings involved in it.

## III. Overcome formalism as primary means of defence

The Spanish court of first instance dismissed the action because it found the defendant subsidiary not to be liable for cartel damages, since itself had not (officially) participated in the infringement.[6] This defence strategy is the absolute standard argument in fighting off cartel damages claims when the defendant is a group company which was not individually fined as result of the official decision issued by the investigating competition authority. Dogmatically, the corresponding line of argumentation is based on the principle of separation under corporate law on the one hand, as well as on the concept of personal liability on the other. Put into a simplified scheme, it looks as follows:

(i) The Commission has found a behaviour to be an infringement of Article 101(1) TFEU and issued a corresponding decision. Explicitly, it addresses only the parent company of the group.

(ii) The defendant subsidiary, on the other hand, is neither an addressee of the official notice nor does it appear by name in the Commission's findings. Since it is legally independent from the parent company, they are unidentical and therefore two different legal persons. Against this background, the infringing behaviour by the parent constitutes third-party conduct from its subsidiary's perspective out of which, generally, no liability arises under the principle of personal responsibility.

(iii) In the absence of a controlling position in the sense of decisive influence vis-à-vis the parent company, the infringement is also not imputable to the subsidiary. Hence, it remains the case that the defendant subsidiary is not liable.

At first glance, this line of argumentation seems conclusive, at least in the isolated context of national liability law. The conduct giving rise to liability necessarily needs to be imputable insofar as the infringement in question does not constitute very own conduct by the defendant. If, in accordance with the corporate separability doctrine, the parent and its subsidiary are considered as separate legal entities, the criterion of control (decisive influence) would be the obvious benchmark of imputability. The liability of a subsidiary which, by its nature, never has control over its parent company would then be effectively excluded. Similarly, a sister company belonging to the same economic unit as the fined

[6] Juzgado de lo Mercantíl No. 7 de Barcelona, Judgment of 23 January 2019, ECLI:ES:JMB:2019:981, Rn. 8 ff. – S*umal SL v. Mercedes Benz Trucks España SL.*



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company would not be liable for cartel damages due to the lack of imputability via the criterion of decisive influence.[7]

## IV. The infringement is the economic unit's very own behaviour

The fact that the anticompetitive behaviour by one group company could have different legal effects for other companies of the same undertaking than for itself appears highly doubtful against the background of the doctrine of economic unity.[8] This is also noted by the APB in its order for reference when it points out the inconsistent handling of such case constellations by Spanish courts. While the abstract liability of subsidiaries for antitrust violations by the parent company is partly rejected as described above, there are equally contradictory decisions which, on the other hand, provide for an extension of civil liability responsibility to subsidiaries and even sister companies.[9] As far as the liability of the subsidiary for the parent company is recognized in the latter sense, this can be justified conclusively with the original concept of economic unity under EU law.[10]

In addressing the "undertaking", the EU competition law refers to a legal entity whose personnel contours - in deviation from the separation principle under company law - are determined solely by economic circumstances. The consistent application of this doctrine ultimately leads inevitably to the liability of all companies for competition law infringements committed by the economic unit they form part of. Since according to Art. 101, 102 TFEU it is not the legal entity constituted under corporate law but rather the undertaking which commits the infringement, the primary law legislator also assigned the resulting burden - through sanctions under the law on fines as well as through civil liability for cartel damages - to the economic unit and not to a single corporate entity.[11]

## V. Questions on the relationship between the principle of separation under corporate law, individual responsibility and effective protection of competition

The conflict between the two approaches described above has now prompted the APB to suspend its own proceedings for the time being in order to refer the following specific questions to the ECJ for a preliminary ruling:[12]

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7 In this sense e.g. Regional Court Mannheim, Judgment of 24 April 2019, 14 O 117/18 Kart – *Trucks*; Regional Court Munich I, Judgment of 7 June 2019, 37 O 6039/18 = NZKart 2019, 392 f. – *Fire Trucks*.

8 If one takes the economic unit seriously, then in consistent application of its principles there can be no differences within the same undertaking with regard to participation in the cartel infringement, *Wagener*, NZKart 2019, 535, English version available at https://ssrn.com/abstract=3455993; in this sense also *Kersting*, ECLR 2020, 125, 128.

9 Audiencia Provincial de Barcelona Sec. 15ª, Beschl. v. 24.10.2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, Rn. 11.

10 This also applies accordingly to the liability responsibility of sister companies, cf. *Kersting*, ECLR 2020, 125 ff.; *Wagener*, NZKart 2019, 535 ff., English version available at https://ssrn.com/abstract=3455993.

11 See only *Kersting*, ECLR 2020, 125, 127 f. including further references.

12 Audiencia Provincial de Barcelona Sec. 15ª, order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 16; cited as translated and published in the Official Journal of the European Union No. C 87/7 of 16 March 2020 (ECJ, C-882/19 – *Sumal*).



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*„(A) Does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?*

*(B) In the context of intra-group relationships, should the concept of single economic unit be extended solely on the basis of issues of control, or can it also be extended on the basis of other criteria, including the possibility that the subsidiary may have benefited from the infringing acts?*

*(C) If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?*

*(D) If the answers to the earlier questions support the extension of subsidiaries' liability to cover acts of the parent company, would a provision of national law such as Article 71(2) of the Ley de Defensa de la Competencia (Law on the Protection of Competition), which provides only for liability incurred by the subsidiary to be extended to the parent company, and then only where the parent company exercises control over the subsidiary, be compatible with that Community doctrine?"*

The APB states in its decision that it deems possible to identify the economic unit not exclusively on the basis of structural relationships between companies.[13] Particularly the ECJ's ruling in the Skanska case suggests that the relevant doctrine has much wider relevance.[14] After its consistent application, an infringement by an individual company also constitutes very own conduct in the sense of liability law for all other parts of the undertaking. As a consequence, each individual company would be liable for a breach by another which belongs to the same economic unit - without the need to impute the infringement based on any further criteria such as decisive influence.

## VI. Economic unity for better and for worse

The fundamental legal principle of individual responsibility does not preclude this, provided that it is borne in mind that each member of the economic unit de facto participates in the benefits arising from the infringement precisely because it belongs to it.[15] Whether the role of the individual company corresponds to that of an actively contributing offender or rather to that of a passive beneficiary is irrelevant for the civil law obligation to pay damages in view of the economic unity of the company. After all, liability responsibility is no more and no less than the flip side of affiliation with the undertaking.[16] The civil law claims arising from a violation of European competition law should

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13 Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 24

14 ECJ, Judgment of 14 March 2019, C-724/17, ECLI:EU:C:2019:204, para. 17, 24 – *Skanska*.

15 As correctly pointed out at Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 25. Similarly, another Spanish court stressed that the mere fact that the official notice does not include one or more subsidiaries of the same undertaking does not vice versa mean that the sanctioned infringement was found to have had no effect on their market behaviour, see Juzgado de lo Mercantíl No. 3 de Valencia, Judgment of 20 February 2019, ECLI:ES:JMV:2019:34, para. 48 – *MAN*. For a closer look on this decision cf. *Wagener*, NZKart 2019, 535, 537 f., English version available at https://ssrn.com/abstract=3455993.

16 *Wagener*, NZKart 2019, 535, 537, English version available at https://ssrn.com/abstract=3455993. In that sense also *Kersting*, ECLR 2020,125, 135 („joint action triggers joint liability"); AG Wahl, Opinion of 6 February 2019, C-724/17, ECLI:EU:C:2019:100, para. 60 ff. – *Skanska*.



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conceptually affect precisely the economic unit,[17] since only then can private enforcement achieve the behaviour-controlling effects it is meant to have as a means to protect free competition.[18]

The (civil) liability of a group company would therefore not depend further on whether, as a legal entity, it participated (directly or indirectly) in the infringement as long as it was in any case part of the acting economic unit that violated competition law. This is because, in economic terms - the only relevant perspective in EU competition law - it was in any case one of the (silent) beneficiaries of the infringement.[19] Ultimately, the mere fact that it belonged to the undertaking involved in the cartel - i.e. the acting economic unit - would be sufficient to establish the abstract liability of each individual legal entity [20]

## VII. Economic Unit plus X – Liability only in specific circumstances?

The order for reference also raises the question whether further circumstances - for example, exceptional hardship due to the participation of foreign persons in the national court proceedings - must occur in addition to the simple existence of an economic unit so that, only exceptionally, an action against group companies other than those involved in the administrative proceedings would be admissible. Thus, the judges think that the admissibility of actions such as the present one could be limited to those cases in which it is extraordinarily difficult or even virtually impossible for the plaintiff to take action against the company involved in the administrative proceedings. However, the fact that the APB brings up that the risk of delays or additional financial expenditure due to the participation of foreign parties in the legal dispute could constitute such extraordinary difficulties, shows that it does not have too high of a hurdle in mind.

One can only guess from the comments in the order, how (little) the referring judges themselves trust such a requirement to be a useful criterion. For example they highlight, that the additional expenditure in terms of time and money which civil proceedings against foreign parties inevitably entail for all parties involved (including the judiciary) is usually "pointless",[21] especially in cartel damages proceedings. This is because the defence in all proceedings, both in domestic and foreign courts, is ultimately coordinated centrally by the same lawyers in accordance with the interests of the entire network. In view of this circumstance, the additional expense does not create any added value.[22] The rejection of cartel damages actions based on the abovementioned arguments would therefore be impossible to reconcile with the principle of procedural economy.

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[17] German Monopolies Commission, Main Report XXI, 2016, para. 101; *Bauermeister*, NZKart 2019, 252, 253 ff.; *Kersting*, WuW 2019, 290, 295 ff.

[18] As to the function of private enforcement, specifically cartel damages claims within the framework of EU competition law cf. AG Wahl, Opinion of 6 February 2019, C-724/17, ECLI:EU:C:2019:100, para. 28 ff. – *Skanska*.

[19] Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 17.

[20] For that already *Kersting.*, ECLR 2020, 125, 128 u. 135; *Wagener*, NZKart 2019, 535, 537 f., English version available at https://ssrn.com/abstract=3455993.

[21] Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 27 (orig.: „gastos que son además *inútiles*").

[22] See to the whole Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 26 f.



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## VIII. Binding character of the fine notice and burden of proof

To the extent that the APB's comments imply that generally only those companies mentioned by name in the fine notice are liable for cartel damages, this must be countered irrespective of the answers given by the ECJ to the questions referred for a preliminary ruling. This is because either way liability depends neither on the status of a person in the administrative proceedings nor an express reference in the final administrative decision, but rather the commission of acts which constitute a violation of competition law.[23] This becomes particularly clear in the distinction of the type of cartel damages actions between follow on and stand alone.

What the judges had actually in mind was probably the facilitation of proof plaintiffs can take advantage of if they can base their claims on the official findings.[24] Against the background of the functional concept of an undertaking, the binding effect under Art. 9 Cartel Damages Directive on all companies could be derived already *de lege lata*. This is because for every person who forms an economic unit with an addressee of the official decision, the corresponding infringement constitutes individual conduct in tort in view of their common identity under competition law.[25] As a result, the findings of the administrative decision on the factual acts of an individual person simultaneously have binding effect in civil proceedings within the meaning of Art. 9 Cartel Damages Directive vis-à-vis every other legal entity within the same economic unit.[26]

However, even if in rejection of that argument a plaintiff would not be able to benefit from the associated easing of the burden of proof, this remains simply irrelevant to the question of the subsidiaries' abstract liability. Rather than by any competition authority, the issue of a person's civil liability is to be determined solely by the courts. In any case, official decisions of the Commission or other competition authorities do not have any binding effect in a way that would pre-empt the judiciary by definitively deciding on the group of persons liable. Nevertheless, the burden of proof for the affiliation of the legal entity claimed to belong to an economic unit participating in a cartel always rests with the plaintiff. Wherever such evidence is not sufficiently produced, the claim for damages is to be rejected by the adjudicating court.

Apart from this, the court of referral correctly recognises that small and medium-sized enterprises would be hit particularly hard if they were forced into a legal dispute with foreign persons on purely formal grounds. For it is precisely in the case of smaller amounts in dispute that the increased risks associated with this can in fact act as a "barrier to entry" with regard to the assertion of their rights.[27] Under the

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23 See *Kersting*, WuW 2019, 290, 294 f. including further references.

24 Cf. Art. 9 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 No. L 349/1 of 5 December 2014 (hereinafter only „Cartel Damages Directive").

25 *Wagener*, NZKart 2019, 535, 537, English version available at https://ssrn.com/abstract=3455993.

26 In that sense already Juzgado de lo Mercantíl No. 3 de Valencia, Judgment of 20 February 2019, ECLI:ES:JMV:2019:34, para. 33 ff. – *MAN*.

27 Audiencia Provincial de Barcelona Sec. 15ª, Order of 24 October 2019, Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para. 27.



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erroneous recourse to the separation principle under corporate law, which in reality remains untouched, private enforcement would be seriously weakened without necessity. Thus, EU competition law would be deprived of a large part of its ability to control behaviour for purely formal legal reasons.

## IX. Private enforcement at a crossroads (again)

Whatever answers which the ECJ will send back to Barcelona are thus likely to have a trend-setting character for the future of European antitrust practice as a whole. Given the contradictory legal assessments of the civil liability of group companies for cartel damages, private enforcement finds itself at a crossroads. The current jurisdictional practice of the competent civil courts varies not only from one member state to the next, but also within the respective national jurisdictions.

### 1. Effective deterrence through private enforcement

In this sense, the judges with their assessments in this matter become the decisive switchmen. With their judgment in this case they could once and for all get the competition policy instrument that private enforcement is supposed to be cocked and loaded. This solution would fit in seamlessly with the tradition of the ECJ's case-law on economic unity without - as apparently assumed by the referring court and contrary to the view of some commentators[28] - evoking a contradiction with the principle of separation or the principle of individual responsibility.[29]

Similarly, this whole matter concerning the civil liability of the economic unit, does in no way concern an increase in sanctions. A larger group of liable persons has no effect on the monetary amount of the damaging potential which an undertaking faces as a result of its participation in anticompetitive behaviour. The legal obligation to compensate those damages that have been caused by the infringement remains unchanged - no more, but also no less. Plaintiffs who cannot prove damages in court will always fail with their claims, regardless of whether it is asserted against the parent company, its subsidiaries or sister companies.[30] Hence, while the scope of damages remains exactly the same, a wider circle of liable persons would only simplify the private enforcement of compensation rights which already exist anyway *de lege lata*.

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[28] To this end e.g. *Heinichen/Schmidt*, DB 2019, 2337, 2340 as well as in any event previously to the ECJ's Skanska decision *Brettel/Thomas*, WuW 2016, 336, 337 ff.; *Mäger/von Schreiter*, DB 2016, 2159, 2161 f.; *Seeliger/Gürer*, BB 2017, 195 f.; *Suchsland/Rossmann*, NZKart 2016, 342 f.

[29] The ECJ has already expressly clarified this in the case of a legal succession in economic continuity, ECJ, Judgment of 14 March 2019, C-724/17, ECLI:EU:C:2019:204, para. 39 - *Skanska*. In consistent continuation of the economic unity doctrine, nothing else can apply to the civil law liability for damages of all parts of the company, see under VI. and corresponding references.

[30] In this sense also *Kühne/Woitz*, DB 2015, 1028; *Stauber/Schaper*, NZKart 2014, 346, 347.



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## 2. Or effectively deterrence from private enforcement?

Conversely, a restriction of the economic unit's civil liability could seriously devalue private enforcement by calling into question the role of cartel damages actions play as "an integral part of the system for enforcement of those [competition law] rules".[31] In view of such an exception, the doctrine of economic unity, which was specially developed and carefully differentiated by the ECJ, would run the risk of losing its manageability, at least in the area of private enforcement. Cartel victims would then inevitably be exposed to higher litigation risks if the official notice expressly addressed only foreign companies.

The far-reaching consequences of such a development are already becoming clear at present, insofar as the alleged lack of general liability of the defendant legal entity of an economic unit participating in a cartel is the most frequent reason for the rejection of cartel damages actions. Only recently, for example, an analysis of Spanish case law in connection with the trucks cartel showed that 44% of the lawsuits that have failed to date have been rejected precisely because of this formal legal assessment making it the primary reason for dismissal.[32] As a consequence, despite the fact that the defendant company belonged to one of the fined undertakings, the courts did not in any way evaluate the question of possible individual damages the plaintiff may have suffered due to the anticompetitive behaviour of the defendant's economic unit.

In such a scenario, it would be feared that fewer injured parties would decide to assert their rights against the undertakings concerned. At the end of the day, this would inevitably lead to a lasting reduction in the protection level of free competition. Other than consumers, the victims thereof would particularly be small and medium-sized enterprises, which are likely to be even more deterred by an already complex compensation procedure if, on top of that, it had to be conducted against a foreign company.

[31] ECJ, Judgment of 14 March 2019, C-724/17, ECLI:EU:C:2019:204, para. 45 – *Skanska*.

[32] Cf. taking into account court decisions issued by 16 March 2020, *Marcos*, Aportación de sentencias como prueba en los litigios de daños causados por el cártel de los fabricantes de camiones (I), abrufbar unter https://almacendederecho.org/aportacion-de-sentencias-como-prueba-en-los-litigios-de-danos-causados-por-el-cartel-de-los-fabricantes-de-camiones-i/.



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