ROLL NO. 000577/2022 M J

JUDGMENT NO: 185/2023

Your Excellencies
MAGISTRATES
DOÑA ROSA MARÍA ANDRÉS CUENCA
DOÑA PURIFICACIÓN MARTORELL ZULUETA
DON JOSE RAMÓN DE BLAS JAVALOYAS

At Valencia on the twenty-third day of February two thousand twenty-three.

Having been heard by the Ninth Section of the Valencia Provincial Court, with the Honourable Mrs. PURIFICACIÓN MARTORELL ZULUETA, Judge. Magistrate **DOÑA PURIFICACIÓN MARTORELL ZULUETA,** the present appeal number 000577/2022, arising from the proceedings of Ordinary Proceedings nº 1211/2019 , promoted before the COMMERCIAL COURT Nº 2 OF VALENCIA, between parties, on the one hand, as appellant DAIMLER AG, represented by the Court Attorney, and on the other hand, as appellee V represented by the Court Attorney, by virtue of the appeal lodged by DAIMLER AG.

FACTUAL BACKGROUND

FIRST. The Judgment under appeal pronounced by the Honourable Magistrate of the COMMERCIAL COURT No. 2 OF VALENCIA on 28 April 2022, contains the following RULING: *"THAT IT IS ADJUDGED and AGREED to partially uphold the claim brought against DAIMLER AG, and consequently the latter is ordered to pay to the plaintiff the sum of 4.344.72, with interest in accordance with point (34) of this decision, all of the above without imposition of costs".*

SECOND.- DAIMLER AG lodged an appeal against the decision in due time and form, and the proceedings were sent to this Provincial Court, and the appeal was processed with the result that is recorded in the proceedings.

THIRD - The legal formalities and prescriptions have been observed.

LEGAL BASIS

FIRST - Judgment, appeal and opposition.

The judgment of Commercial Court 2 of Valencia of 28 April 2022 partially upholds the claim brought by the representation against Daimler and orders Daimler to compensate the claimant for the damages arising from the cartel sanctioned by the European Commission's decision of 19 July 2016, in the amount of 5% of the purchase price of the MAN truck, model 18/480 4x2 BLS, chassis number WMAH06ZZ97W095661 (86.894,40 € VAT not included), which makes a total of 4.344,72 €.

After ruling on the lack of standing and referring to the applicable law and the content and scope of the decision, it states that the expert evidence provided by the parties should be assessed:

1.- The **plaintiff's expert:**

"(25) The plaintiff's expert report (Document No 8 of the complaint) uses the comparative method, analysing the investment in fixed assets made by a sample of companies (29 companies) in the freight transport sector during the years before and after the cartel (page 29 Document No 8 of the complaint); and the non-comparative method, which uses a study frequently used by the CNMC carried out by J.M Connor, where more than 700 cartels and their overpricing (page 29 Document No 8 of the complaint). For the calculation of excess fuel, the delay in the introduction of EURO standard technologies is estimated and the evolution of engine efficiency will be calculated, calculating the diesel consumption per 100 km (l/100km), and this ratio is compared during and after the cartel, as well as its long-term trend using the regression line, calculating the annual percentage of excess consumption (page 29 Document No. 8 of the demand). The comparison of fixed asset investment starts from the years 2008 to 2010 during the cartel, and the years 2011 to 2016 after the cartel (page 30 Claim Document No. 8). In the non-comparative analysis using J.M. Connor's method, the sample of 39 cases with similarities to the truck cartel, which have been studied in Connor's report, is used, indicating that although the market structure is different in each country, the average results of a global study can be extrapolated to make estimates (page 33 Document No. 8 of the complaint). For this Court, the method used raises doubts as to its reliability due to the fact that: a) It is generic, as it does not specify or use any specific data from DAIMLER (defendant) beyond the ratio of sales by continent, turnover or the period of participation in the cartel (17 January 1997 to 20 September 2011); b) It does not refer in any case to Spain, but uses third countries for the preparation of its indices; and c) It is not understood why it starts from the year 2008, discarding the previous period from 1997 to 2007. Nor does this Court understand the way in which the percentage of 19.31% is obtained as a conservative estimate, when 37% of the cost overrun is mentioned in the analysis of the investment in fixed assets and 19.50% in the historical analysis of Connor's posters, particularly in the Canadian automobile poster (pages 34 and 35 of Document No. 8 of the complaint). Nor do we understand the calculations used to derive the injury from the lack of

implementation of Euro emission technologies, considering that there is no evidence for the cost overrun caused by the implementation of Euro emission technologies".

2.- Defendant's expert opinion:

"(26) The conclusions offered by the defendant's expert report drawn up by the defendant company (Document provided on 12 March 2021) do not convince this Court, because without prejudice to the criticism of the plaintiff's expert report, it is not clear to this Court from where the data and information for its preparation is obtained, as it does not appear in the file, although it is said to be provided by DAIMLER, which is most likely."

DAIMLER AG appeals against that decision and raises the following grounds of appeal at length:

a) The Judgment misinterprets the Decision and its effects in civil proceedings, because, in reality, the Decision does not prove or determine the existence of the damage claimed by the Claimant (Ground One).

b) The Judgment incorrectly identifies the legal framework it applies to resolve the lorry case, in relation to the presumptions it considers applicable to the case (Ground 2).

c) Incorrect assessment of the evidence by the Judgment, because it failed to appreciate that the expert opinion provided by Daimler demonstrates by an alternative quantification that the Claimant has not suffered any damage (Ground 3).

d) Incorrect assessment of the evidence by the Judgment in failing to appreciate that the expert opinion provided by Daimler empirically demonstrates the non-existence of a causal link between the conduct and the alleged damage claimed by the Claimant (Fourth Ground).

e) Challenge to the Judgment quantifying the alleged damage suffered by the Claimant, by way of judicial assessment, at 5% of the purchase price of the Vehicles (Ground 5).

f) In the alternative, challenge the error committed by the Judgment for failing to take into account the factual circumstances of the present proceedings which would require, where appropriate, a reduction of the sentence (Ground Six).

The appellant's representatives opposed the appeal, seeking its dismissal, the confirmation of the judgment under appeal and the imposition on the appellant of the costs of the appeal.

SECOND - Preliminary considerations.

Before proceeding to an assessment of the various grounds of appeal raised by Daimler Ag's representatives, it should be noted that:

1.- The plaintiff did not lodge an appeal or challenge the judgment of 28 April 2022, but limited itself to opposing the various pleas raised adversarially and to setting out the reasons why, in its opinion, the defendant's arguments could not be accepted in the appeal.

As we have indicated on other occasions in which, as now, the plaintiff consents to the pronouncements of the judgment under appeal, the question is not idle given that, in accordance with the content of article 465.5 of the LEC in relation to article 218 of the same legal body, the debate on appeal must be limited to the aspects debated (not consented to by the parties), which excludes any consideration by the court with regard to those points that harm the plaintiff and which the latter has complied with.

In particular, this affects the assessment of his expert evidence made by the magistrate "a quo" (to which we have already referred when describing the judgment of first instance), and the rejection of the amount initially claimed, given that 5% of the net price of the truck acquired by Mr. (through leasing) on 21 December 2007 has been granted, which has led to a conviction for an amount significantly lower than that set out in paragraph d) of the plea of the claim.

Nor will we analyse (218 and 465.5 LEC) the aspects consented to by Daimler AG, i.e. those which, being contrary to its interests, have not been raised in this appeal, in such a way that the question relating to the lack of necessary passive litisconsortium (as the vehicle in question was manufactured by MAN), which was rejected at first instance, remains outside the object of the appeal, in a context in which the solidarity between infringers has been taken into account to reject the provoked intervention that was postulated prior to the pleading of the exception. However, we will now simply point out that the Judgment of the CJEU of 16 February 2023, in its paragraph 60, recognises that the party bringing a claim for damages based on the existence of harm caused by anti-competitive conduct, may direct its claim only against one of the perpetrators of such conduct (principle of joint and several liability).

2. - Without prejudice to the analysis of each of the aspects subject to review, it is worth making a very brief note on the jurisprudential criteria for the assessment of expert evidence based on the content of article 348 of the Civil Procedure Act. It should now be noted that: a) the assessment of the expert reports is not subject to the system of assessed evidence, but to the principle of free appreciation (rules of sound criticism) without the judge being bound by the content of the expert evidence (for reasons of strict logic, the judge cannot be bound to one thesis and the opposite when the parties provide reports with conclusions as diverse as those that arise in these lawsuits); b) as a consequence of the above and in order to enable a review of the appraisal of the evidence carried out by the court of first instance, it is required that the judge, when rejecting in whole or in part the expert opinion, should state the reasons why he departs from the conclusions issued by the expert (a requirement fulfilled in the judgment under appeal).

This is clear, among others, from the judgments of the Supreme Court of 18 May 2012, which states that the court is not bound by the expert's opinion -, 30 June 2011 - on the

possibility of disregarding the expert's opinion when the arguments of the report are not convincing -, or that of 10 October 2011 - on the scope of conclusions different from those issued in the report using the rules of logic.

3.- Finally, and due to the content of the grounds of appeal raised by Daimler AG regarding the legal and jurisprudential framework applicable to the case, similar to those raised in the numerous proceedings brought before the Spanish Courts as a result of the Decision of 19 July 2016, we will begin by recalling the criteria that this Provincial Court has been maintaining in relation to the aspects common to all these proceedings, without prejudice to going on to the details and particular elements of the case before us, in accordance with the line we maintain of giving individualised treatment to each of the actions brought by those who consider themselves harmed by the truck manufacturers' cartel.

THIRD - Summary of the criteria of the 9th Section of the Provincial Court of Valencia applicable to the consecutive claims arising from the European Commission's Decision of 19 July 2016 regarding the truck manufacturers' cartel, in relation to the doctrine emanating from the decisions of the Court of Justice of the European Union in its rulings.

With regard to the various aspects that constitute the subject matter of the present action, we will recall in this ground the criteria that we have been upholding in our decisions, common to the plurality of proceedings brought before the courts for the commencement of actions arising from the Commission Decision of 19 July 2016.

The grounds for our position are summarised in the Judgment of 16 November 2021, delivered in Appeal Case 806/2021, and subsequently in the Judgment of 14 December 2021 (Appeal Case 783/2021, with Iveco as defendant), in connection with those handed down on 23 November 2021 in Appeals 574/21, 704/21, 718/21, 718/21, 730/21 and 734/21 (defendant Renault), or in Appeal 1070/21 in which Judgment 26/2022 of 25 January 2022 was handed down (defendant Man), among many others along the same lines. Also, recently, in Rollo de Apelación 503/2022 in judgment of 17 January 2023.

And as regards proceedings in which the claim has been directed against Daimler AG, we will cite the judgments of 25 January 2022 (Rollo 200/21) and 22 February 2022 (Rollo 640/21), among others.

3.1. Regulatory regime.

We have repeatedly stated that Directive 2014/104 is not applicable to the case, nor, consequently, the transposition of the same into the Law on the Defence of Competition.

Since our first pronouncements [Judgments of 16 December 2019 ECLI:ES:APV:2019:4151 and ECLI:ES:APV:2019:4152, followed by, among others, those of 20 December 2019, ECLI:ES:APV:2019:5941, 20 January 2020 ECLI:ES:APV:2020:267, 17 November 2020 in rolls 456/20 and 514/20, that of 9 December in appeal roll 716/20, Judgment 1330/2020 of 24 November 2020 in appeal roll 526/2020, 42/2021 of 19 January, 90/2021 of 26 January, or that of 16 February 2021, in Roll 809/2020], we mark our position on the legal framework in which the facts fall. In the judgment of 23 January 2020

(ECLI:ES:APV:2020:292), we gave a full description of the applicable Community and national case law, and we have reiterated our conclusion in successive decisions, without prejudice to the nuances that are a natural consequence of the passage of time, variations in arguments in appeals or the impact of preliminary rulings that have arisen in the evolution of the numerous proceedings since we handed down our first judgment on the truck manufacturers' cartel in 2019.

The consequence of the above is the application of the previous national legislation on non-contractual liability actions, in connection with Article 101 of the TFEU, the case law of the CJEU which served as the basis for Directive 2014/104 cited above, and the case law of the First Chamber of the Supreme Court.

This Chamber does not interpret the Directive in accordance with the Directive, as it has repeatedly stated, without prejudice to respecting the principles of effectiveness and equivalence of Community law and the decisions of the Court of Justice of the European Union, citing now, and in particular, the judgment of the First Chamber of the CJEU of 22 June 2022 in Case C 267/20, to which we will refer throughout this decision with regard to Article 17.1 of the aforementioned Damages Directive, and the recent judgment of 16 February 2023 (Case C-312/21).

3.2. Scope of the Decision.

The analysis of the scope of the Commission Decision of 19 July 2016 results from our first decisions, as indicated in the Judgment of 23 January 2020 (ECLI:ES:APV:2020:292):

"The Commission penalises the continued conduct of the addressees of the Decision consisting in the exchange of information with the aim of altering, distorting or falsifying the process of independent price-fixing and its normal evolution in the European economic area, eliminating uncertainties "and ultimately the reaction of customers on the market" (paragraphs 71 and 74). / And even if it is true that in paragraph 82 - citing CJEU case law - it states that it is not necessary "to take into consideration the actual effects of the agreement" or, for the purposes of its qualification, "to show that the conduct has had anti-competitive effects, in so far as its anti-competitive object has been proved", this does not mean that we can accept the defendant's argument that the conduct has no effect on the market. The fact that it was not necessary to examine the actual effect in order to classify the conduct and impose the penalty does not mean that the effects have been ruled out. Quite the contrary: having said that, in paragraph 85 it is the Commission itself that establishes the presumption that the sanctioned conduct "has an appreciable effect on trade". And so much so, that in the press release published on the same date, it contains a final paragraph relating to actions for damages addressed to those possibly affected by the conduct described in the case (document 5 at folio 210 et seq. of the first volume)".

We have maintained this thesis since then and have assessed [bearing in mind the judgment of the CJEU of 16 September 2013 confirmed by the judgment of the CJEU of 3 July 2018 (T-379/10 and T-381/10) and paragraph 27 of the Decision] that, even if it is an infringement by object, the existence of effects on the market, and in particular of the causal link between the sanctioned conduct and its impact on the price of the trucks purchased, can be considered to exist.

The causal link is mostly found in the judgments of the Spanish courts, among others, by the Pontevedra Court of Appeal in its judgment of 28 February 2001.

2020 (ECLI:EN:APPO:2020:471), Barcelona in the judgment of 17 April 2020, the Court of First Instance of
Bilbao (4 June 2020), Zaragoza (27 July 2020), Cáceres (12 November 2020), Oviedo (23 November 2020), Gipuzkoa (15 January 2021 ECLI:ES:APSS:2021:1), A Coruña (8 February 2021), Jaén in Judgment 156/21 of 22 February, when analysing the effects of the Decision and its impact on the determination of sales prices to the final recipient or the Malaga Court of 1 July 2021 (ECLI:ES:APMA:2021:1238) which devotes a specific ground to the presumption of harm and its proof. Again, the Court of Oviedo reiterates the issue in its judgment of 7 October 2021 (ECLI:ES:APO:2021:2713). And even the Audiencia Provincial de Alicante, in its judgment of 15 October 2020, goes further by reference to the Decision of 27 September 17 on the participation of various entities of the Scania group in the truck manufacturers' cartel - published in the OJEU on 30 June 2020. Also in the Judgment of 10 December 2021, Section 28 of the Madrid Provincial Court, in Rollo 736/2019, even though it dismissed the appeal filed by the plaintiffs, refutes the arguments put forward by the defendant by citing the Judgment of the Court of Justice of the European Union of 6 October 2021 (C 882/2019) regarding the scope of the Decision, stating that "*neither could we admit that a cartel relating to the exchange of information on prices does not produce harm that is projected onto prices*."

Throughout the year 2022, the various Provincial Courts have ruled on the assessment of the causal relationship between the conduct sanctioned by the Commission and the damages claimed by the purchasers of trucks, a good example of this being - without being exhaustive - the volume of judgments handed down from October 2022, among which we will cite by way of example those handed down by the Court of Palencia on 24 October (ECLI:ES:APP:2022:506), or those of Cáceres on 25 October (ECLI:ES:APCC:2022:982), Segovia on 26 October (ECLI:ES:APSG:2022:425), Murcia on 27 October (ECLI:ES:APMU:2022:2608), Guadalajara on 3 November (ECLI:ES:APMU:2022:2608), and the Spanish Court of Appeal of Cáceres on 3 October (ECLI:ES:APCC:2022:982).
(ECLI:ES:APGU:2022:637), Girona 4 November (ECLI:ES:APGI:2022:1373), Burgos
4 November (ECLI:ES:APBU:2022:922), A Coruña 11 November
(ECLI:ES:APC:2022:2846), Ourense 16 November (ECLI:ES:APOU:2022:1057), Ávila
18 November (ECLI:ES:APAV:2022:438) Zamora of 21 November (ECLI:ES:APZA:2022:522) or that of Ourense of 23 December 2022 (ECLI:ES:APOU:2022:1251), among many others. And already in 2023, that of the Audiencia de Tarragona of 11 January (ECLI:ES:APT:2023:7).

Having set out the foregoing, we now turn to the aspects relating to the specific case before us, which arose out of the action brought against Daimler AG, in which the first and second pleas in law raised by the defendant concerning the 'erroneous' interpretation of 'the Decision and its effects in civil proceedings' and the incorrect identification of the legal framework applied to resolve the lorry case have already been ruled on.

FOURTH - Third and fourth pleas in law in the appeal brought by Daimler's representatives: 'Incorrect assessment of the evidence by the Judgment, because it failed to appreciate that the expert opinion provided by Daimler demonstrates by means of an alternative quantification that the Claimant has not suffered any damage (third plea in law)'. And "incorrect assessment of the evidence by the Judgment in failing to appreciate that the expert opinion provided by Daimler empirically demonstrates the non-existence of the causal link between the conduct and the alleged damage claimed by the Claimant (Fourth Ground)".

4.1. - The appellant's arguments.

With regard to the two grounds of appeal, which - because of their connection - are analysed together, it should be noted that the appellant bases its claim for annulment on the following arguments:

1.- The Judgment has not assessed in any way the content of the E.CA Report, thereby infringing article 348 of the LEC.

2.- The E.CA Report incorporates around a thousand pages of documents that are convenient for its timely understanding and assessment, so it is not an expert opinion devoid of all documentary evidence. What is not attached is the confidential documentation (transactional data) that has been used for its analysis, without prejudice to offering it in the data room to safeguard confidentiality, in compliance with the provisions of article 336.2 of the LEC.

3.- The Section of the E.CA Report entitled "Calculation of the cost overrun" contains the alternative quantification consisting of a quantification of the impact of the Conduct on the net prices of trucks, for which a scientifically recognised, precise and appropriate method has been followed, and its results prove to be robust.

E.CA chooses a temporal (diachronic) comparative method of net prices of Daimler trucks during and after the infringement. This is the most commonly used comparative method in these cases and is recognised as such by the Commission in its Practical Guide.

5.- From the analyses resulting from E.CA's opinion it appears that the Conduct did not give rise to cost overruns.

6.- The results of the report are robust. The regression model has a very high explanatory power: its variables explain 95.1% of the price variations.

The evidence provided by the E.CA report on the lack of alignment of gross prices has been completely omitted by the judgment.

8.- Your report demonstrates that any increase in gross prices would not have automatically led to an equivalent increase in the net prices paid by customers.

It concludes that "*the Judgment's assessment of the E.CA Report is illogical, unreasonable and arbitrary, because E.CA's empirical analysis constitutes sufficient evidence of the non-existence of the damage claimed by the Claimant and of the causal link between it and the Conduct*".

4.3.- Assessment by the Selection Board.

4.3.1. On the assertion of a total lack of assessment.

It is true that the judgement under appeal does not contain a description of the content and development of E.CA's report, nor of the statements made by E.CA on the occasion of his intervention at the hearing, for the purposes of article 347 of the Procedural Law. However, this does not mean that it has not been assessed (which it has been briefly), in a context in which, unlike in other proceedings, the intervention of the experts in the trial was agreed in the Preliminary Hearing, having respected judicial immediacy in accordance with article 137.1 of the LEC. Paragraph 26 of the decision states that: "*The conclusions offered by the defendant's expert report drawn up by the defendant company (Document provided on 12 March 2021) do not convince this Court, as without prejudice to the criticism of the plaintiff's expert report, it is not clear to this Court where the data and information for its preparation is obtained, as it does not appear in the case file, although it is said that it is provided by DAIMLER, which is most likely the case*".

This Court has had the opportunity to assess the E.CA's report (and the defence made of it by the) in other previous proceedings, when deciding appeals in which, as defendant DAIMLER AG has been brought in the context of the massive litigation generated by the truck manufacturers' cartel (Judgment of 28 September 2020 (ECLI:ES:APV:2020:3473), in 2021 the judgments of 26 January (ECLI:ES:APV:2021:170), 20 April (ECLI:ES:APV:2021:1209), 28 September (ECLI:ES:APV:2021:3436) and 19 October (ECLI:ES:APV:2021:3733); in 2022 those of 4 January (ECLI:ES:APV:2022:95), 25 January (ECLI:ES:APV:2022:94), 22 February (ECLI:ES:APV:2022:394) and 7 December (ECLI:ES:APV:2022:3705), among others of the same Section].

4.3.2. On the lack of identification of the origin of the data.

The assessment of the defendant's expert in the judgment is sparing in its considerations in view of the paragraph transcribed above, as it limits itself to rejecting the report - beyond the criticism of the adverse opinion - based on the lack of identification of the data and the assumption that the data used were those provided by the defendant itself. This motivates the appellant's criticism, which is set out in her appeal from page 34 onwards, to highlight that her client complied with the burden of identifying and providing the data used to draw up her report, invoking article 336.2 of the LEC.

In interpreting this provision, we said in our judgment of 23 January 2020 (ECLI:ES:APV:2020:29):

"The judge "a quo" rejects the arguments put forward in the defendant's opinion (which he considers to be incoherent and detached from the content of the Decision) and emphasises that the conclusions are unfounded insofar as it is based on information and data not provided to the proceedings, supplied by the defendant, and therefore, as it is based on elements outside the file to which only he has had access, he considers that it is not genuine expert evidence, [...].

The report does not cause our conviction (we will explain the reasons) but we disagree with the consideration described in the previous section, insofar as it is based on an erroneous interpretation of the content of article 336.2 of the Civil Procedure Act, which, in relation to the inclusion in the written report of documents, instruments or materials suitable for presenting the expert's opinion on the object of the expert opinion, states: "If it is not possible or convenient to provide these materials and instruments, the written report shall contain sufficient information on them. The report may also be accompanied by such documents as are deemed appropriate for a more accurate assessment".

In an interpretation of the rule, the 7th Section (Gijón) of the Provincial Court of Oviedo, in its Judgment of 5 February 2004 (ROJ: SAP O 439/2004 - ECLI:ES:APO:2004:439) declared that the provision of such documents is not an imperative requirement given "that the precept itself contemplates the possibility that it would not be possible to provide these materials and instruments" and consequently, "the omission of such documents does not invalidate the evidence without prejudice to the assessment that the Court makes of its result". [Along the same lines, the 16th Section of the Barcelona High Court, in its Judgment of 7 February 2012 (ROJ: SAP B 1137/2012 - ECLI:ES:APB:2012:1137) considered the rule to be fulfilled in a case in which the expert explained in court that the data he handled were obtained through the handling of the company's computer equipment by the company's personnel but in his presence, so that the court did not see "what kind of additional credibility would be attributed to the repeated expert opinion by the fact that each piece of factual data collected therein was accompanied by a certificate from the operator itself that confirmed the correspondence of those data with its files".

In the case before us, the opinion issued at the request of the defendant is expert evidence (and as such it was provided and admitted at the preliminary hearing) which meets the requirements of article 336.2 of the LEC, given that although it is true that the documentary support relating to the observations on which it is based is not attached to it, not only is the source of the information on which it is based not concealed, but in each section it indicates the source of the information it uses.360 observations on which it is based, not only is the source of the information on which the method it applies is not concealed, but in each section it deals with, the source of the information it uses is indicated, whether it be data from the Ministry of Development of the Spanish Government, the Bank of Spain, the European Commission, data supplied by Volvo/Renault, including an indication of their origin (sales of prototype vehicles, sales to public bodies and entities, sales of vehicles for public services, ...), annual reports and the date on which they were published....) annual reports and their date for both Renault and Scania, Company specifications for each model, etc.

There is no record that any of these documents were requested by the adverse party at the Preliminary Hearing, nor that they were expressly requested to be provided for the purposes of the intervention of the expert witness at the trial to specify the type of intervention expected of him (art. 347 LEC), nor was the convenience of their use expressed in this act to obtain a complete presentation of the report (art. 347.1. 1º LEC).

And we add to the above that the expert did not evade the answer to the question posed by the magistrate "a quo" to explain the reasons why he had not incorporated the documentation in the annex to the observations made, but that the database that he had handled with the information "is composed of a query (which the appellant specifies contains the management control information of Renault), a database that the client has given me in a format that I have treated, not even in Excel, they are a large amount of information to which I have added part of my knowledge in terms of having to transform them and treat them properly, and I understand that this is information that is the property of the client, confidential information, and therefore taking into account that my report is already circulating around because I receive messages, I understand that there is a commercial prudence that these data (nobody has asked me for them either) are ... I have not provided them as such." [...]

It is a different matter how we assess the conclusions of the report".

And later, in the decision of 17 November 2020 (ECLI:ES:APV:2020:4230) - which refers to the decision cited ut supra - we indicated:

"Article 336.2 of the LEC obliges - when it is not possible or convenient to provide the materials to expose the object of the expertise for reasons of volume, confidentiality, etc. - to express sufficient indications in the

report, without the correlative duty to incorporate those identified materials, in accordance with the judicial citations we made in that judgement. We then considered that the expert had complied with the duty to report on these materials, and therefore the judicial conclusion that they did not meet the requirements for their consideration as an expert opinion could not be accepted.

The purpose of this information is for the adverse party to be able to request what is appropriate with regard to the subsequent intervention of the expert in the trial for clarifications, explanations or rectifications of the report. It does not mean that he is obliged to ask for it, and what we said in Rollo 1147/2019 is that the plaintiff did not ask for it (as neither in these proceedings), without any recrimination being inferred from this."

That said, we have noted that, as on previous occasions, the E. CA report (issued on 18 June 2021, and not on 12 March as stated in the judgment, when identifying it) refers to the origin of the data used to carry out its analysis and draw its conclusions, with a chapter devoted entirely to the '*Sources consulted*' (pages 5 to 8) and an appendix containing a specific section on the '*Daimler data sources used in the cost overrun analysis*' (pages 130 to 151), and those relating to the public (and Daimler's private) gross price data examined (pages 188 to 205), which shows that the report amply complies with the duty to identify the elements taken into consideration in its preparation, so as to enable the opposing party to request them for comparison or assessment.

And in footnote 5, it states: '*Due to the volume and the sensitive and confidential nature of the data analysed during the preparation of this report, these data are not attached to this report. However, E.CA Economics provides access to such data to the courts and other parties' advisors and experts for the purpose of verifying, where appropriate, the analyses and conclusions of this report, provided that such access is under conditions that ensure adequate protection of confidentiality, are in accordance with best practice and prohibit the use of the data in any other legal proceedings*".

Finally, we cannot ignore the fact that the defendant offered the plaintiff the possibility of accessing its database, as can be seen from the note of evidence presented at the Preliminary Hearing, which literally states: "*Likewise, by virtue of the provisions of Article 336.2 of the LEC in relation to Article 283 bis "b", paragraph 5, of the LEC, as well as Articles 299.2 and 384 of the same regulation, and as indicated in footnote no. 4 of the expert's report issued by E.CA, as we announced in our submission of the expert's report, we place at the disposal of the plaintiff and the Court the econometric models used by E.CA, as we have already announced in our submission of the expert's report. 4 of the expert report issued by E.CA, as already announced in our written submission of the expert report, we provide the plaintiff and the Court with the econometric models used by E.CA for the preparation of its report in Stata software (this is a standard software used by economists for the management of large data sets) in the terms indicated in the aforementioned written submission. These models contain the data, commands and econometric formulae, and allow them to be processed, so that the opposing expert and, where appropriate, the Court can verify and contrast the accuracy of the data and calculations that have given rise to the conclusions reached by E.CA*".

From this perspective, we must accept the appellant's argument when it challenges in its appeal the statement in the judgment under appeal concerning the lack of identification of the data and the assumption that the data used were those provided by the defendant itself, since they are identified, the origin of those used is recorded and they have been made available to the plaintiff, which determines the error of evidential assessment made by the judgment in that regard (including the mention of a date which does not correspond to the date of the report provided), and the inadequacy of the court's reasoning with regard to the expert opinion provided by E.CA.

It is a different matter whether we should conclude from this that the report issued by E.CA should be accepted by the Board in order to consider as proven - contrary to what we have

been finding in other similar proceedings - the lack of effects of the conduct sanctioned by the Commission's decision on the prices paid by those who bought trucks from the sanctioned manufacturers during the period of cartelisation, and in this case, the fact that the Commission has not found any effect on the prices paid by those who bought trucks from the sanctioned manufacturers.

In particular, with respect to the truck acquired through financing on 21 December 2007, with access to ownership in December 2014 after paying the remainder of the value attributed to the vehicle at the date of signing the finance lease contract.

4.3.3. On the E.CA report and the conclusions reached therein.

The report incorporated in these proceedings does not differ, in essence, from those provided by Daimler, in other similar proceedings (without prejudice to the particular criticism of the adverse report, in this case, issued by Mr. Martins de Lima) in which it concludes - with the appropriate explanations and development - "*that there has been no increase in the net prices of HDT and MDT trucks sold in Spain as a consequence of the infringement and, therefore, the claimant has not suffered any damage*".

Daimler's analysis is carried out at the level of dealer prices and considers - inter alia - that '*if the infringement is not found to have affected the dealer's net price, there is no need to assess whether the infringement had an effect on the customer's net prices*', without prejudice to the fact that if the infringement had affected the dealer's price this would not automatically imply that harm would have been caused to customers. It argues - with appropriate explanations of the graphs it incorporates in its 'during and after' approach - that: '*On average, truck prices during the period of the infringement were lower than during the reference period. It should be added that there is no drastic decrease in truck prices after the end of the infringement. Thus, the graph shows that a simple comparison of average prices during and after the infringement does not indicate, prima facie, that there was any cost overrun".* It further adds: "*The absence of cost overruns in the sales of trucks in Spain is the fundamental conclusion of this expert report*. We *then confirm this finding with an empirical analysis of the evolution of manufacturers' gross prices in Spain, the relationship between gross and net prices of Daimler's trucks in six core European countries and the specific conditions of the truck markets in Spain, including the pricing process. These empirical and qualitative analyses support the outcome of the overpricing analysis, i.e. the absence of a substantial cost overcharge (i.e. higher net prices) as a consequence of the infringement*".

In the Judgment of 20 April 2021 (ECLI:ES:APV:2021:1209), as on other occasions, we set out the reasons why we did not accept the conclusion expressed in the report issued by E.CA on the absence of effects of the sanctioned conduct on truck prices in Spain during the period of cartelisation and the non-existence of the harm it predicated.

We took into account, then, with respect to the report issued on 25 January 2019: 1) The analytical and argumentative effort deployed to justify the absence of effects (and consequently damages) arising from the sanctioned conduct, notwithstanding which, we considered that despite the description of the truck market (multiplicity of factors that

influence the determination of the price) and the fact that it is a scenario of enormous complexity, the report's findings did not make it possible to deny "*the existence of effects arising from a (sanctioned) conduct which has been going on for 14 years and which affects the entire European economic area, even if the various factors described in the report have had an impact over 14 years. Factors which, likewise*

(2) With regard to the relationship between gross prices and net prices (paragraph 3.4, from page 45 to 67 of that opinion, which coincides with the one we are now examining). 2) As regards the relationship between gross prices and net prices (paragraph 3.4, from page 45 to page 67 of that opinion, which coincides with the one we are now examining under paragraph 5.2, from page 78 onwards, with practically coinciding paragraphs) we said: *"...the report contains an extensive analysis in order to determine whether or not there was an alignment of gross prices (which it rules out) and on the possible relationship between changes in gross prices and changes in net prices, [...]. / This analysis is based, in many of its reflections, on considerations and hypotheses (in terms of probability) from which, however, it draws conclusions in terms of certainty, when it says, for example, on page 46 "the evidence shows that there were neither coordinated changes in gross prices nor a foreseeable relationship between changes in gross prices and changes in net prices. Thus, it can be concluded that it is not plausible that the infringement of competition law in relation to future price changes would lead to systematic increases in net prices greater than they would have been in the absence of the infringement". [...]. These conclusions start from the premise that there are no effects of the conduct on the market when the Commission's decision admits them...."*(3) And finally, we assess the impact of the agreements on gross prices on net prices, which is assessed in the judgment of the General Court of 16 September 2013, paragraphs 60 to 67 of which contain assessments of the influence on the selling prices to consumers of the annual coordination of the prices of the manufacturers' lists (with an impact, firstly, on the level set for wholesalers and, secondly, on the level set for wholesalers and, thirdly, on the level set for wholesalers), on the level set for wholesalers, and then for the final recipient of the product), appreciating the possibility that coordinated increases in list prices may have an impact on the prices paid by wholesalers and final consumers.

Having noted, essentially, the coincidence of the report then assessed with the current one (regardless of the evolution it has undergone in some aspects since the first proceedings were initiated, and without prejudice to the contrast existing in each case with the particular report provided by the plaintiff as injured party), there are no reasons to change our criterion regarding the assessment of the conclusions issued then by E. CA and those contained in these proceedings, as there are no differences between them.

Consequently, even on grounds different from those put forward at first instance, the judgment under appeal must be upheld in so far as it denies the effectiveness of the conclusions of the opinion issued by E.CA on the absence of any effect of the conduct penalised on the prices to be paid by purchasers of trucks during the period of cartelisation.

However, we anticipate that the brevity of the assessment of the opinion justifies the lodging of the appeal with the consequent impact on the costs of the proceedings, given the fact that the court has positively assessed some of the arguments put forward by the appellant with regard to what constituted the reason for the rejection of her expert opinion, particularly with regard to the identification of the data and its origin.

FIFTH - On the consequences of the lack of conviction derived from the expert reports and criteria for the judicial estimation of the damage.

We have repeatedly stated that the court's decision requires a prior positive assessment of the evidentiary effort of the party claiming, the finding of the existence of the damage and the impossibility or manifest difficulty for the party to prove the actual damage suffered, and that it must be carried out with the criteria of prudence resulting from the doctrine of the First Chamber of the Supreme Court and the principle of effectiveness developed by the CJEU. We will now summarise our arguments [resulting, among others, from our judgments of 18 February (Rollo 1611/19), 24 February 2020 (Rollo 1311/19), 9 December 2020 (Appeal Rollo 716/2020), 271/2021 of 9 March 2021 (Rollo 834/2020), 552/21 of 11 May 2021 (Rollo 1204/2020), that of 10 November 2021 (Rollo 733/2021), or among the most recent, Judgment 791/22 of 4 October 2022 (Rollo 259/22) or that handed down on 17 January 2023 (Rollo 503/22)] in the following terms:

1.- The judicial estimation of the damage does not always and in all cases, because it is necessary to take into account the particularities of each litigant and the circumstances of each judicial process in which this type of action is articulated. In this sense, we ruled in Judgment 946/2022 of 22 November 2022 (Rollo 284/2022), in which we dismissed the claim in its entirety and said *"... the Court of Valencia insists that the judicial assessment of damages is not always appropriate, as the appellant seems to claim, nor is it possible to award any amount simply because it has been upheld in other proceedings brought by those harmed by the cartel. In fact, we have rejected on several occasions the claims made by those claiming to have suffered harm, and we have done so precisely because of the failure to comply with the burden of proof incumbent on the plaintiff. Thus, in Appeal Case 815/2020, Judgment 366/2021 of 30 March 2021, it was indicated that in the case of the specific claimant there had not been a reasonable and serious effort to try to meet the burden of proof of the harm he was claiming, or in Judgment 1236/21 of 28 October 2021 (Case 493/21), because the acquisition of the disputed trucks by the claimant had not been accredited*". Criterion reiterated in Judgement 974/22 of 29 November (Rollo 434/22) in a case in which the amount claimed by the plaintiff was unrelated to her expert report, provided "*only to comply with a sort of evidentiary procedure*", given that she disregarded the percentage set by the expert in the claim and directly requested 5% of the purchase price, referring to the "case law" on the issue. We ruled that the plaintiff's claim should be rejected because compensation is not automatic, and the judicial assessment requires an evidentiary effort effectively considered as such by the court, a circumstance that was not present (the third legal basis reasoned that the report provided in those proceedings did not meet the minimum requirements, assessing a situation comparable to the total lack of proof of the damage caused). And along the same lines, in the Judgment of 31 January 2023 (Rollo 686/22), in which a judgement of acquittal was handed down.

It requires the necessary reasoning in accordance with the elements available in the process, and without prejudice to the application of the consolidated criteria of the section,

with respect for the principles of legal certainty and constitutional doctrine in interpretation of Article 14 of the EC.

In Judgment 552/2021 of 11 May 2021 (Rollo 1204/2020), in support of our decision, we took into account (citing the judgment of 16 December 2019, ECLI:ES:APV:2019:4152) the Supreme Court's judgment of 7 November 2013, which rejected "Solomonic" decisions as a criterion for quantification, requiring the court of first instance to justify its decision.

3.- In particular, for such justification, we have assessed (among other less relevant elements and factors): (a) the nature of the cartel, in which the sanctioned conduct is not the fixing of net prices, but the exchange of information in relation to gross price lists, (b) the characteristics of the truck market (highly cyclical) (c) the heterogeneity of the final product (d) the very policy of discounts applied to truck buyers in the selling prices on the initial gross list price (described in paragraph 27 of the Decision); (e) the late manifestation of the damage resulting from the lack of knowledge of such a cartel; (f) the difficulty of proof; (g) the possible incidence of economic crises and the absence of data to assess their effects over the long period of cartelisation.

In some of our decisions and when responding to the arguments made by the parties, we have even assessed the enormous percentage differences between the various expert reports provided in the numerous proceedings initiated after the Commission Decision of 19 July 2016. Thus, recently, in Judgment 944/2022 of 15 November 2022 (Rollo de Apelación 405/22) we stated that:

"This Section has had the opportunity to examine expert reports submitted by various expert teams in defence of the interests of those harmed by the conduct sanctioned by the Commission's Decision, and to read judgments of other Courts in which different assessments are made from those we have had the opportunity to examine. From the content of the judgments we have handed down over the last few years, it can be seen - as far as the averages and median percentages are concerned, but also in the annual breakdowns from the beginning to the end of the cartel - a range of cost overruns ranging - for the time being - from 12.1% in the most conservative reports to 37.28% in those which estimate a higher cost overrun borne by the purchasers of these vehicles during the cartelisation period (from the lowest to the highest: 12.1 - 12.97 - 14.39 - 16.35 - 16.68 - 17.15 before correction of 20.70 20.08 and 37.28). Percentages referring to the same market - that of medium and heavy lorries in Spain
- As we said in the Judgment of 19 April 2022 (Rollo de apelación 1373/21): "This makes it possible to state, as some economic-legal studies (including work by German judges) affirm, that expert opinions do not always lead to the quantification of the damage, particularly when numerous opinions, in identical cases, provide drastically different results, as is the case in the litigation arising from the truck manufacturer cartel".

4.- We also cited, in support of our thesis, the rulings handed down by other Provincial Courts (including with reference to the percentages they respectively apply, whether or not they coincide with this Section). Among them, we have taken into consideration the guiding criteria of the Judgment of the Barcelona Provincial Court of 10 January 2020 (ECLI:ES:APB:2020:58) regarding the paper envelope poster, which recognises the

difficulties involved in the proper assessment of the damage (paragraphs 57 to 59) and the fact that, "*in the last resort*", the courts are empowered to quantify it by estimation, without this implying "*the elimination of any requirement of reasonable evidentiary effort on the part of the parties*" (paragraph 60). And the judgments of the Supreme Court of 27 July 2006 (ECLI:ES:TS: 2006:5866) and 21 June 2007 (ECLI:ES:TS:2007:4479) in which it is stated that the quantification of compensation is the exclusive competence of the courts of first instance, assessing the evidence on a case-by-case basis.

With regard to the cartel which is the subject of this litigation, among many others and merely for descriptive purposes, we have taken into account the judgments of the Pontevedra Court of Appeal of 28 February, 12 and 14 May, 5 June, 15 October and 23 December 2020; of the Barcelona Court of Appeal of 17 April 2020, Zaragoza Court of Appeal of 27 July 2020 and 10 February 2021 (ECLI:ES:APZ:2021:268), Zamora of 29 December 2020 (ECLI:ES:APZA:2020:648), Soria of 29 March 2021 (ECLI:ES:APSO:2021:98), Jaén of 22 February 2021 (ECLI:ES:APJ:2021:313), Murcia of 25 March 2021, La Rioja of 12 March 2021 (ECLI:ES:APLO:2021:121), or Girona of 5 March 2021 (ECLI:ES:APGI:2021:228).

We now add that, according to the judgment of the First Chamber of the CJEU of 22 June last: "*Article 17(1) of Directive 2014/104 must be interpreted as meaning that it constitutes a procedural provision within the meaning of Article 22(2) of that directive and that its temporal scope includes an action for damages which, although arising from an infringement of competition law which ended before the entry into force of that directive, was brought after 26 December 2014 and after the entry into force of the provisions transposing that directive into national law*." In the same vein, in its judgment of 16 February 2023 (Case C-312/21) the Court of Justice, in paragraph 51, states that *"...it should be recalled that Article 17(1) of Directive 2014/104 constitutes a procedural provision within the meaning of Article 22(2) of that Directive (judgment of 22 June 2022, Volvo and Daf Trucks, C-267/20, EU:C:2022:494, paragraph 85), so that the national measures transposing that Article 17(1) are applicable, pursuant to that Article 22(2), to actions for damages brought after 26 December 2014."*

On the other hand, this Court has been declaring, in interpretation of article 283 bis a) and successive articles of the Civil Procedure Act, that for the judicial estimation of the damage referred to in article 17.1 of the Directive (and its transposition rule), the request for the production of evidence that the adverse party has in its possession is not a sine qua non condition, but an additional element to be considered when assessing whether or not to make such an estimation. We appreciate this in view of the additional cost that may represent for the injured party to resort to this legal instrument in certain circumstances, in which, far from overcoming the asymmetry of positions between the parties, it may represent for the injured parties an additional obstacle (expenses incurred by the practice of the measures under 283 bis c 1, provision of security under 283 bis c 2, delays inherent to the adverse opposition and system of appeals under 283 bis f, ...) for the exercise of the action.

These particular circumstances have been assessed by the Chamber, inter alia (and in the context of the offer of data in the "data room", during the ordinary trial proceedings) in the judgments of 17 November 2020 (ECLI:ES:APV:2020:4230), 26 January 2021 (ECLI:ES:APV:2021:170), 22 February 2021 (ECLI:ES:APV:2021:585; Pte.
De la Rúa), 20 April 2021 (ECLI:ES:APV:2021:1209), 20 July 2021 (ECLI:ES:APV:2021:3123; Pte. Mr Pedreira), 22 June 2021 (ECLI:ES:APV:2021:2523), 26 October 2021

(ECLI:ES:APV:2021:3814: Pte. Ms Ballesteros Palazón) 11 November 2021 (ECLI:ES:APV:2021:4186, Pte. Ms Ballesteros Palazón), among others.

Having said that, some clarifications should be made in the light of the Judgment of the CJEU of 16 February 2023 (Case C-312/21, cited above) and its paragraphs 50 to 65, drafted in response to the second and third questions referred for a preliminary ruling. The following relevant statements can be drawn from their reading:

i.- As we have already noted, paragraph 17.1 of the Directive is applicable to actions for damages brought after 26 December 2014 (para. 51).

ii.- Actions for damages aim to repair a damage as accurately as possible, once its existence and imputability have been demonstrated, without excluding the possibility of uncertainties remaining at the time of the judicial decision to determine the amount (para. 52).

iii.- The judicial estimation of the damage is limited, legally, "*to situations in which, once the existence of this damage has been accredited with respect to the plaintiff, it is practically impossible or excessively difficult to quantify it*" (para.53).

iv.- The uncertainty inherent in the confrontation of claims and experts cannot be equated with the "*complexity of the assessment of harm*" referred to in Article 17(1) of the Directive (para. 52).

v. - The concept of asymmetry of information plays no role in the application of Article 17.1 because "*even if the parties are on an equal footing as regards the information available, difficulties may arise in the concrete quantification of the injury*" (para. 54). (para. 54)

vi.- The national judge must verify, before proceeding to estimate the damage, whether the claimant has made use of the measure to request the production of evidence, so that if the practical impossibility of assessing the damage is due to the inactivity of the claimant "*it shall not be for the national judge to replace this party or to make up for his lack of action*". (Parr.57).

vii. It follows from paragraph 65 (following an examination of the specific circumstances of the case which gave rise to the question referred for a preliminary ruling, which disregards the defendant's offer of information and the fact that the applicant is challenging only one of the perpetrators of the infringement) that a judicial assessment of the damage "*presupposes, on the one hand, that the existence of the damage has been established and, on the other hand, that it is practically impossible or excessively difficult to quantify it precisely, that the existence of the damage has been established and, on the other hand, that it is practically impossible or excessively difficult to quantify it precisely, which* ***implies***

taking into account <u>all the</u> parameters *leading to such a conclusion, in* ***particular the fruitlessness of formalities such as the request for evidence provided for in Article 5 of the Directive***'. (Emphasis added).

SIXTH - On the "Challenge to the ruling of the Judgment quantifying the alleged damage that the Claimant would have suffered, by way of judicial assessment, at 5% of the purchase price of the Vehicles (Ground Five)".

6.1. - Arguments of the appellant.

Daimler relies on the following grounds in support of its claim for revocation:

1.- The Judgment calculates the alleged damage on the basis of the price of the vehicle contained in the expert opinion provided with the claim, despite the fact that, in its opinion, the price of lorry 2584FZK has not been accredited and there is no basis for quantifying the alleged damage suffered, and the claim must therefore be rejected.

2.- The necessary requirements to resort to the judicial estimation of damages are not fulfilled, namely: a) "*As a first requirement, the claimant must make use of all possible means of proof within its reach, among which the request for documentary evidence and access to the sources of proof of article 283 bis of the LEC specifically stand out*". And he refers to the passivity of the claimant in this respect, despite the offer of data made by his represented party. b) The second requirement is the provision of an expert opinion that meets rigorous technical requirements, in accordance with the content of the Practical Guide and the parameters referred to in the Supreme Court Judgment of Sugar; c) In conclusion, he states the "*need to reject the claim due to the lack of an adequate evidential effort on the part of the Claimant or difficulty in quantifying the damage*".

6.2. - Assessment by the selection board.

The starting point of our decision is to indicate that he has consented to the judgement handed down at first instance with regard to the assessment made therein of his expert report, given that he did not lodge an appeal and has not challenged the court's decision. Therefore, he accepts the considerations regarding his report that we have transcribed in the first of the grounds of this judgment.

That said, we turn to the questions raised by Daimler's representatives in their appeal.

1. The purchase price of the 2584FZK lorry. The representation of the applicant provided with the statement of claim the leasing contract signed on 21 December 2007, for a period of 60 months, which was subsequently novated, with the transfer taking place in December 2014, after payment of the residual value, as can be seen from documents 3 to 5. Document 3 is the leasing contract of 21 December 2007 (with notarial intervention), which shows that the price of the truck was 86,894.40 euros, of which the plaintiff made an initial payment of 9,000 euros, as can be seen from its content. Document 5 is the invoice issued by MAN Financial Services España S.L. in favour of the plaintiff, on 4 December 2014, on the occasion of the payment of the residual value of the financed truck (9,248.11 euros plus VAT at 21%).

Consequently, we cannot accept the arguments put forward by the appellant that the documentation provided by the claimant is insufficient to prove his status as an injured party and the price of the property in respect of which the claim is based. As we have stated on several occasions (assessing the time that has elapsed since the transaction was formalised and the time from which the eventual injured parties were able to exercise the consecutive actions arising from the Commission Decision in connection with the documentation available to them), we consider that the contract provided, together with the extension of the same (document 4), the invoice referred to and the additional administrative documentation, are sufficient and allow quantification on the basis of their content, as can be seen in the judgment under appeal and confirmed by this Court.

In support of our conclusion, we shall confine ourselves to quoting from the Audiencia Court's Judgement
Provincial de Pontevedra of 31 July 2020 (ECLI:ES:APPO:2020:1438) when it states that *'....the thesis sustained in previous decisions is fully valid, according to which, in a context of evidentiary difficulty, to which the plaintiff entity was completely alien, it is not admissible for the company that has participated in a cartel for 14 years, shielding itself in a situation created by it, to simply reject standing on the basis of an alleged lack of documentary proof of payment of the price, when the legal title by which the vehicles were acquired is fully accredited, and when there are peripheral facts that reinforce the plaintiff's position, ...", and among the many decisions handed down by the Audiencia Provincial de Valencia [Valencia Court of Appeal] [ECLI:ES:APPO:2020:2020:2020:38]....",*
and among the many decisions handed down by the Valencia Court of Appeal [121/21 of 2 February 2021 (Rollo 705/20), 16 February 2021 (ECLI:ES:APV:2021:595), 4 May 2021 (Rollo 1173/20), 782/21 of 15 June 2021 (Rollo 1203/20) and 1236/21,
1192/21 of 19 October 2021 (Rollo 703/21) or 1236/21 of 28 October 2021 (Rollo 493/21)], we refer to that delivered on 21 December 2021 (ECLI:ES:APV:2021:4762)], in which we affirm:

"We have been recognising that the purchasers of trucks within the cartelisation period have standing as injured parties, regardless of the way in which the price has been paid, i.e. directly or through the corresponding financing. This is what we expressed, among others, in Ruling 784/2020, of 15 June (ECLI:ES:APV:2020:3568) and 64/21 (Rollo 504/20) of 26 January 2021 "recognising the quality of injured party - from a broad perspective of the concept - to those who, within the cartelisation period, paid more in the acquisition of ownership or the right to exploit the cartelised goods regardless of the formula of payment of the price (in cash, in instalments, through financial leasing, or renting)".

In application of the aforementioned principles of effectiveness and equivalence, in a scenario in which the cartel has lasted 14 years, with the difficulties that may be involved in keeping the documentation accrediting the acquisition and payment of the cartelised goods (and in line with other Provincial Courts), we have accepted as proof of standing the commercial documents which, in legal transactions, are usually used by economic operators (invoices, leasing and renting contracts, etc.), alone or with certifications from the DGT, or other entities, without prejudice to denying the injured party the status of those who do not provide the minimum sufficient elements to accredit the fact from which the action arises, or who provide documentation accrediting the fact from which the action arises.... in isolation or with certifications from the DGT, or other entities), without prejudice to denying the status of injured party to those who do not provide the minimum sufficient elements to accredit the fact from which the action arises, or provide documentation corresponding to natural or legal persons other than the claimant. It is in the examination of the particular case that the sufficiency or insufficiency of the documentation provided must be assessed".

2. On the plaintiff's passivity and the insufficient evidentiary effort invoked by DAIMLER as an argument for revocation of the 5% of the truck price fixed in the judgment under appeal.

The appellant argues that the claimant's passivity in not making use of 283 bis of the LEC and not requesting the information that the defendant made available to it does not justify a judicial assessment of the damage, and that this should therefore lead to the dismissal of the claim on the grounds of insufficient evidential effort.

The absence of any mention of the content and scope of the report provided by the plaintiff exempts us, in principle, from making any consideration of its content beyond what is reported in the judgment under appeal (which we have outlined in Ground 1) and what occurred in the trial proceedings in which the expert witnesses Mr Martins de Lima - for the

plaintiff - and Dr Martins de Lima - for the defendant - defended their respective reports in the turns to speak granted by the judge "a quo".

In the present case, and in accordance with the content of the recent Judgment of the Court of Justice of 16 February 2023, we have found that the plaintiff has not made use of the evidence referred to in Article 283 bis a) and subsequent articles of the LEC, and likewise - as the defendant claims - the information offered has not been used.

This was explained by the expert Rafael Martins de Lima Ferreira at the trial when, after explaining the methodology he used to calculate the damage suffered by the claimant (estimated at 19.39% in his most conservative alternative), he stated that he had not requested the information because he considered his method to be simpler and more reliable, using - as he indicated - the methodology covered by the Commission's Guide.

On pages 23 and 24 of its opinion (confirmed at trial), it indicates the use of cost-based and financial methods for the calculation of the cost overrun (37% for the whole cartelisation period, resulting from the analysis of fixed asset investment during the cartel and post-cartel), the time series-based comparison for the calculation of the damage due to delay in making the latest technologies available, and finally, the comparison with cartels in similar industries in other parts of the world, which is the one that yields a result of 19.31%, very close to the 19.50% of the car cartel in Canada.

In this context, taking into account the specific arguments of the appeal, and the content of paragraph 57 of the Court of Justice's Judgment, assessing "the set of parameters" required for the judicial estimation of the damage (paragraph 65), we consider that:

a) The requirements of the action for damages relating to the wrongful act (punishable conduct) and the harmful result of the extra cost incurred in the purchase of the truck in question are established in the file.

b) We resort to the judicial estimation of the damage in the "last resort" and in the conviction of the existence of a scenario of effective difficulty in the quantification of the damage suffered by the acquisition of the disputed truck (a single truck) within the period of cartelisation, and in a context in which the plaintiff has tried to comply with the required burden of proof, by providing evidence to prove its status as the injured party and by bearing the cost of an expert's report aimed at quantifying the damage (although it did not lead to judicial conviction as to the percentage applied therein), which has been submitted to contradiction.

c) The complexity of the quantification of the damage in the truck manufacturers' cartel does not lie in the plaintiff's inactivity in not requesting access to the opposing party's data, nor does it necessarily depend on the result which could have been obtained by the exhibition referred to in Article 5(1) of the Directive in conjunction with Article 283a, in its various paragraphs, if it had been carried out. The complexity can be seen in the range of

results obtained for the same cartel, the same time period, the same geographical area, depending on the methods used and the multiple variables to be taken into account and taken into consideration due to the heterogeneity of the cartelised product, not only by reference to the various reports of which this Section has been informed, but also with regard to the methods used by the plaintiff's expert in these proceedings (37% and 19.39%). Therefore, in the set of elements considered by the Chamber, the fact that in this particular case the instrument designed by the European legislator and transposed into Spanish law has not been used is not a determining factor in the dismissal of the claim.

d) According to the wording of the Court's judgment itself, the exhibition referred to in Article 5(1) is not the sole and decisive instrument for assessing the party's activity or inactivity, since it refers to that instrument in particular and

as an example when referring to the *"**fruitlessness of formalities*** - in the plural - ***such as the request for evidence set out in Article 5 of the Directive"***.

We conclude by highlighting the fact that Daimler, which denies that the Martins de Lima Ferreira report is relevant to the plaintiff's failure to comply with the procedural burden incumbent on it in order to obtain a judicial review, invokes this same report in other legal proceedings regarding the transfer of the downstream cost overrun, as can be seen in the Zaragoza Court of Appeal's judgment of 19 May 2022.
(ECLI:ES:APZ:2022:798) or the Judgment of the Audiencia de Murcia of 16 December 2021 (ECLI:ES:APMU:2021:3171). Interestingly, it has not been invoked in the present case, despite the allegation of the passing on defence to which we will refer below.

3.- On the judicial estimate of the damage at 5% of the purchase price of the lorry.

The appellant finally and extensively questions the 5% percentage granted in the judgment under appeal. After commenting on the court decisions on which the judgment under appeal is based (including those of this Court) in order to make the appropriate criticism of their contents, it concludes by stating that the parameters used in the judgment under appeal are not appropriate either with regard to the Oxera report referred to in the aforementioned judgment of Commercial Court 3, or to the German decisions cited in the first decisions of this Court. It ends with the following sentence: "*the 5% judicial estimate of the Judgment is excessive and disproportionate, as it should be reduced as a consequence of the lack of a 1:1 or 100% ratio between the changes in gross prices and the changes in net prices that we have accredited when analysing the Report E.CA."*

The ground of appeal cannot be upheld.

The appellant reproduces arguments on which we have already ruled on several occasions, as in the judgments of 20 April 2021 (ECLI:ES:APV:2021:1209), 19 October 2021 (ECLI:ES:APV:2021:3733), and 4 January 2022 (ECLI:ES:APV:2022:95), and we do not see any reason to reduce the percentage applied by this Section of the Court of Valencia, when confirming the rulings handed down at first instance, nor to modify downwards the percentage that we have been confirming, given the discretionary power of the Courts of First Instance and the absence of arbitrariness or disproportionality in its determination.

We refer to what we have set out in the fifth legal basis, while noting that other Provincial Courts, at the time of the judicial estimation of the damage, award amounts significantly higher than 5%, as is the case of the Court of Burgos in Judgment of 23 December 2022 (ECLI:ES:APBU:2022:1116), which set 7.30%, that of the Court of Oviedo of 21 December 2022 (ECLI:ES:APBU:2022:1116) and that of the Court of Oviedo of 21 December 2022 (ECLI:ES:APBU:2022:1116).
(ECLI:ES:APO:2022:4335) considering 8% to be more appropriate, the Audiencia de Lérida in Sentencia de 11 de enero de 2023 (ECLI:ES:APL:2023:47) fixing 10%, or the Audiencia de

León in Sentencia de 23 de diciembre de 2022 (ECLI:ES:APLE:2022:1717) 15%, to cite just a few examples.

SEVENTH - 'challenge to the error committed by the judgment in failing to take account of the factual circumstances in the present proceedings which would require, where appropriate, a reduction in the sentence'.

The circumstances relied on by the appellant are as follows: (1) the partial pass-on of the alleged pass-on through the price of the services provided by the applicant 2. the resale of the vehicle at issue by reference to document 5 of the application.

In its judgment of 7 December 2022 (ECLI:ES:APV:2022:3705) we said with regard to the defence of passing on:

"For this question, linked to the assessment of the expert reports provided by the parties, we refer to the judgments of 20 December 2019 (ECLI:ES:APV:2019:5941), 23 January 2020 (ECLI:ES:APV:2020:292) and 29 June 2020 (ECLI:ES:APV:2020:3516) in which we take up the criteria resulting from the judgment of the First Chamber of the Supreme Court of 7 November 2013 (ECLI:ES:TS:2013:5819) when it says: "If those harmed by anti-competitive conduct exercise the relevant actions to enforce their right to be compensated for the damages suffered as a result of that unlawful conduct, the burden of proof of the facts that hinder the success of the action lies with the defendant who alleges them." And it adds further on: "in the case of a claim for compensation for the damage caused by the cartel's action consisting of concerted price increases, it is not sufficient to prove that the direct purchaser has also increased the price of its products. It is necessary to prove that with this increase in the price charged to its customers it has managed to pass on the damage suffered by the price increase as a result of the cartel's action. (...)".

On the other hand, from our judgments of 18 February 2020 (Rollo 1611/2019), 15 June 2020 (ECLI:ES:APV:2020:3568), of 9 March 2021 (ECLI:ES:APV:2021:970), 22 June 2021 (ECLI:ES:APV:2021:2523) or, 989/21 of 20 July 2021 (Rollo 1402/20) - among others - it follows: 1) that the passing-on defence cannot succeed on the basis of a mere hypothesis of passing on the additional cost in connection with the services provided to the customers. (2) account must be taken of the relevant activity of the party to whom the passing on of any overcharge suffered by the injured party is imputed, (3) it must be shown how it may have been passed on and by what percentage, (4) the fiscal repercussions arising from taxation in accordance with corporation tax are circumstances which are extraneous to the quantification of the loss, since to understand otherwise would also involve taking into account: (i) the excess VAT that was paid at the time by the claimant; (ii) or the taxation that will be due for the reparation set as extraordinary income.

With regard to the resale of vehicles, and its impact on the quantification of the damage, we have dealt with this aspect, among others, in Judgments of 17 November 2020 (ECLI:ES:APV:2020:4230), or in Judgment 1192/21 of 19 October 2021. In the first one, we referred to the result of the expert evidence that the second-hand truck market is not cartelised. We said: "at the trial, both experts (...) indicated in reference to the sales of the vehicles on the second-hand markets, the differences between the cartelised market in which the acquisition by Mr. ... took place and the non-cartelised second-hand market, so that even if one wanted to, de facto the extra cost is not passed on (the second-hand market was defined as very competitive and affected by a number of variables), which determines that the price of the sale should not be discounted. This is different from the case of resales to the original manufacturer, as indicated.

And in the second, we echoed the rulings of other courts on the issue, along the same lines, as in the case of the Murcia Court of Appeal of 10 June 2021 (ECLI:ES:APMU:2021:1397), the Pontevedra Court of Appeal of 22

July 2021 (ECLI:ES:APPO:2021:1684), or the Cáceres Court of Appeal of 20 July 2021 (ECLI:ES:APCC:2021:832), among others".

It is not appropriate to uphold the ground of appeal that, as regards the impact on the transport service, the argument of the appeal is based on a mere 'likelihood' because it

Because of the time that has elapsed, and as far as document 5 of the claim is concerned, it is not a resale invoice, but - as we have already explained above - it is the invoice issued by the financier to the plaintiff as a consequence of the crediting of the residual value of the truck at the end of the leasing contract.

EIGHTH - Decision on costs and appeal deposit.

Pursuant to Article 398.1 of the LEC "*when all the claims in an appeal are dismissed ... the provisions of Article 394 shall apply with regard to the costs of the appeal*". And this rule provides for the general rule of the principle of expiry (paragraph 1) in such a way that the costs are imposed on whoever has had all their claims rejected, unless there are serious doubts of fact or law.

We consider that the complexity of the issues raised and the existence of different rulings on the judicial quantification of the damage justify the absence of a ruling on the costs of the proceedings, with each of the parties having to bear those arising from their actions in the proceedings and the common ones in half, especially when - as we have pointed out above - and even without significance in the ruling, we have accepted some of the arguments put forward by DAIMLER in its appeal, specifically with regard to the assessment of its expert evidence.

The dismissal of an appeal entails, however, the loss of the amount of the Deposit constituted to appeal referred to in Additional Provision 15 of the LOPJ, so that the deposits respectively constituted will have to be given the corresponding legal destination.

Having regard to the relevant applicable legal precepts and others of general and pertinent application.

FAILURE

WE DISMISS the appeal lodged by the representation of DAIMLER AG against the Judgment of the Commercial Court 2 of Valencia of 28 April 2022, which we uphold.

As regards the costs of the appeal, each party shall bear the costs of its own proceedings.

The deposit lodged for the purpose of the appeal is forfeited and will be used in accordance with the law.

An appeal against this judgment may be lodged before this Court within twenty days of its notification, and the sum of 50 euros (for each appeal lodged) must be deposited for its admission in accordance with the provisions of Additional Provision 15 of the LOPJ, and, where applicable, the fee provided for in Law 10/2012.

Thus, by this our judgement, a certificate of which shall be attached to the roll, we pronounce, order and sign it.