Commercial Court No. 3 of Valencia

Ordinary proceedings 1017/19

JUDGMENT NO. /2023

In Valencia, 10 March 2023.

Eduardo Pastor Martínez.

FACTUAL BACKGROUND

First.- The procedural representation of Tráficos Manuel Ferrer, S.L., ("Tráficos Manuel Ferrer") and others filed, on 11 October 2019 (computer register), an ordinary lawsuit against Daimler AG ("Daimler"), in an action for damages for infringement of Competition Law in article 101 TFEU, with adjacent basis in article 1902 CC. It concluded by requesting: *"(...) that a judgment be given in due course by which: FIRST: Declare that the defendant commercial entity is jointly and severally liable for the damages suffered by my/my client(s) as a result of the infringement of Competition Law declared by the European Commission Decision of 19 July 2016, case AT.39824. 1.- To pay TRAFICOS MANUEL FERRER SL 253,392.54 euros for damages suffered, corresponding to 188,785.82 euros for the overcharge paid and 64,606.72 euros for the updating - at the date of the expert's report - of the said amount, by application of the legal interest rate, plus the interest accrued from that date until full payment. 2.- Payment to Juan Antonio of 26,813.31 euros for damages suffered, of which 17,862.49 euros corresponds to the excess price paid and 8,950.82 euros to the updating - as of the date of the expert's report - of the said amount by application of the legal interest rate, plus interest accrued from that date until full payment. THIRD: Order the defendant to pay the costs of these proceedings, on the ground that its conduct is contrary to the law.* The applicants' allegations can be summarised as follows: 1. During the period 1997-2011, the defendant coordinated with other European truck manufacturers to set sales prices and delay the market introduction of new technologies, as an anti-competitive infringement found by the European Commission ('the Commission') by decision of 19 July 2016 ('the Decision'). The infringement consisted of fixing and increasing the gross

prices of trucks, affecting their net prices and passing on the costs for the introduction of new pollutant emission control technologies. The products affected by the conduct were trucks weighing between 6-16 tonnes (medium trucks) and trucks weighing more than 16 tonnes, both rigids and tractor units. During the period of duration of the cartel, the parties acquired various trucks of the "Mercedes", "Renault" and "Iveco" brands, with the same technical characteristics as those affected by the conduct penalised. Daimler is a manufacturer of Mercedes trucks. As a result of that conduct attributable to the defendant, the applicants claim to have suffered damage in the form of additional costs for the vehicles purchased. The plaintiffs submit an expert's report quantifying the damage suffered by developing a synchronous model. The model is based on the gross price lists of the manufacturers of medium and heavy trucks, taken from information supplied directly by the manufacturers to specialist magazines published in Spain during the years of the cartel. On the other hand, for the reconstruction of the analogue market, a list of gross prices of light trucks from the same source is used, as well as a list of gross prices of vans. The control variables chosen are those considered appropriate for the development of the model (power, mass, make, euro standard, time, discarding the remaining possible variables as they are not considered significant). After expressing the formulas used to recreate the factual and counterfactual markets, the technical bases of the econometric estimates are explained, justifying the finding of an average price overcharge in the cartelised market of 16.35%, and the keys to the model which allow these average results to be disaggregated to express the quantification of the cost overruns in each financial year of the cartel's duration are set out.

Secondly, the claim was admitted for processing by decree of 17 June 2020, which agreed to the transfer of the claim and the accompanying documents, with summons to reply to the claim.

Thirdly, on 11 August 2020, Daimler's legal representatives applied for the intervention in the proceedings of Renault Trucks SAS and Iveco SPA, invoking Article 14 LEC. Daimler pointed out that some of the vehicles referred to in the application were not manufactured by Daimler but by other addressees of the decision, with the result that, if the proceedings were to be conducted in the absence of those manufacturers, their rights of defence and Daimler's own rights of defence would be infringed, in so far as the determination of the price paid by customers such as the applicants for the purchase of trucks is a process involving a multitude of factors which are different for each manufacturer and which are therefore alien to Daimler in relation to vehicles which have been manufactured and marketed by others.

Fourth - By order of 22 September 2020, I rejected this request, given that the mechanism contemplated in article 14 LEC only allows the provoked intervention of third parties not initially sued in the proceedings in cases of express legal authorisation, which in this case was not the case under Spanish law. By order of 23 October 2020, following an appeal for reconsideration lodged by Daimler, I confirmed the previous decision. Thus, the proceedings continued as normal with Daimler's participation as defendant.

Fifth, Daimler replied to the application on 12 November 2020, seeking its dismissal and an order for costs. The defendant's arguments can be summarised as follows: 1.- These proceedings must be resolved by the sole application of national law. 2.- The plaintiff does not submit any document that could prove the acquisition of the vehicles with registration number ....MAQ and ....HER. Nor does it duly prove the price of the vehicles with registration numbers ....QWG, ...MAQ, ...HER, 8173GJB, ...EYI and 8215GJB. The same applies to the payment of instalments and/or the exercise of the purchase option for vehicles with registration numbers ....MAQ, ...HER, ...EYI and 8215GJB, acquired under a leasing contract. The infringement found by the Commission is not such as to give rise to a presumption of damage, and that damage is not established by the expert report submitted by the applicant. The applicant has not satisfied the burden of proof inherent in proving the damage and its proper quantification. On the contrary, on 26 January and 6 March 2021, Daimler submitted its own expert report, refuting the expert report submitted by the plaintiff by means of an intensive critique of its rationale, assumptions and methodology, as well as a diachronic study seeking a comparison between Daimler's net prices during the infringement and the net prices charged after the infringement had ceased, considering the differences in terms of demand, costs and product variations that occurred during that time. The expert team claimed to have been in possession of the prices of Daimler trucks since 1999. In particular, the analysis had been carried out considering the level of dealer prices, since Daimler would not have systematic access to the prices charged by these dealers to end customers, this being the usual channel for marketing Daimler vehicles in Spain. 5.- The judicial estimation of the damage should not be accessible in those cases of insufficient evidential activity of the alleged injured party or when his strategy increases the degree of uncertainty of the process (with reproduction of the order of this court of 7 February 2020). In the alternative, any hypothetical damage suffered by the plaintiffs would have been passed on to third parties, through an increase in the price of their professional services or through the resale of the vehicle affected by the Decision. The vehicles with registration numbers ....ECD, ...BBH, ...SQJ, ...QWG, 8173GJB, 1881HBK, 5347CXF, ...MAQ, ...HER and 8215GJB were resold. 7.- The interest paid by the plaintiff is not applicable.

Sixth: The parties were summoned to the preliminary hearing, which took place on 28 January 2021, the content of which was recorded by digital support and a memorandum of organisation of the same day. During the hearing, following Daimler's express offer and the plaintiff's acceptance thereof, it was decided to grant the plaintiffs access to the data taken into consideration in the expert report submitted by Daimler, with the dual purpose of allowing a more in-depth critique of that expert report and the possible reformulation of the expert report previously submitted by the plaintiff. Access would be provided through a data room, the logistics of which were organised as follows: The data room would be located at Daimler's legal department for one week during working hours and would be accessible to the experts and lawyers on both sides. All the data used in Daimler's expert's report, together with the commands and processing methods also used, would be made available on a computer owned by Daimler and equipped with the appropriate software for analysing the data and recreating its models, the plaintiff being

entitled to reproduce and extract from the room a sufficient sample of data to fulfil the purpose of the access measure, allowing the subsequent reprocessing of its expert opinion prior to the main hearing of the trial, which was scheduled for 25 March 2021.

Seventh, on 18 March 2021, the plaintiff submitted a technical report on the results obtained through the conclusion of the measure of access to sources of evidence.

Eighth: On the day of the main hearing of the trial, its objectives were exhausted. In particular, the oral critique of the expert opinions presented by both parties was carried out. After the conclusions of both parties and before declaring the case to be ready for judgement, I announced the pronouncement of an order suspending this last period.

Ninth: In effect, by order of 25 March 2021, I agreed to suspend the deadline for the delivery of the judgment and, in accordance with the provisions of Articles 267 TFEU and 4 bis.2 LOPJ, I sought the opinion of the parties on the advisability of referring a question to the Court of Justice for a preliminary ruling. In particular, I proposed to them to inquire into the compatibility of the right to full compensation in Article 101 TFEU with the regime of objective time-limits and procedural costs in Article 394.2 LEC, the possible existence of informational asymmetries or evidentiary difficulties as a basis for the judicial exercise of the estimation of the damages suffered by the plaintiff after his access to the data on which the defendant based his own expert report and the possible existence of informational asymmetries or evidentiary difficulties with the same functionality in the event that the claim for compensation is directed against a recipient of the infringement who did not market the product or service purchased by the injured party and on whose acquisition he bases the damage he is claiming in the proceedings. Both parties made submissions on the appropriateness and content of the question.

Tenth - By order of 10 May 2021, I referred the following questions to the Court of Justice for a preliminary ruling By order of 10 May 2021, I justified and proposed to the Court of Justice the following questions for preliminary rulings: *"11.- From the summary of the relevant facts and in order to give judgment in this case, I consider that a prior decision of the Court is necessary on the interpretation of EU law, with the scope of Article 267 TFEU, on the compatibility of the Spanish system of distribution of legal costs and the right to full compensation of the injured party for an infringement of competition law and on the interpretation of the notion of impossibility or undue difficulty in the development of the evidential activity of that injured party, as a prerequisite for the judicial and alternative quantification of the damage possibly suffered, in its relation to the defendant's capacity to contradict and defend himself and the limits which, for that reason, must be imposed on judicial discretion. (...) (reference for a preliminary ruling) I agree to refer the following questions to the Court of Justice*

of the European Union for a preliminary ruling: (i) Is the regime provided for in Article 394.2 LEC and which allows that injured party to bear part of the costs of the proceedings according to the amount of the sums unduly paid as a surcharge and which are reimbursed to him following the partial upholding of his claim for damages, which, as a declaratory condition, assumes the existence of an anti-competitive infringement and its causal link with the production of damage, which is certainly recognised, quantified and awarded as a result of the proceedings? (ii) Does the power of the national court to assess the amount of damages allow for the quantification of those damages in a subsidiary and autonomous manner, on the ground that there is a situation of asymmetry of information or irresolvable difficulties of quantification which must not impede the right to full compensation of the person injured by an anti-competitive practice under Article 101 TFEU and in its relationship with Article 47 of the Charter? even where the injured party to an anti-competitive infringement in the form of an overchargeable cartel has had access in the course of the proceedings to the data on which the defendant itself bases its expert study in order to exclude the existence of compensable damage? (iii) Does the power of the national court to assess the amount of damages allow for the quantification of those damages in a subsidiary and autonomous manner, on the ground that there is a situation of asymmetry of information or irresolvable difficulties of quantification which must not impede the right to full compensation of the person injured by an anti-competitive practice under Article 101 TFEU and in conjunction with Article 47 of the Charter? even in the case where an injured party to an anti-competitive infringement consisting of a price-generating cartel directs his claim for compensation against one of the addressees of the administrative decision, who is jointly and severally liable for that damage, but who did not market the product or service purchased by the injured party in question?".

Eleventh - By the Second CJEU of 16 February 2023, Case C-312/21, the Court answered the questions referred as follows: *"(i)n view of the foregoing, the Court (Second Chamber) hereby rules: '(1) Article 101 TFEU and Article 3(1) and (2) of 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 competition law of the Member States and of the European Union, must be interpreted as not precluding a rule of national civil procedure under which, in the event of a partial success, each party is to pay its own costs and half of the common costs, except in the case of reckless litigation. Article 17(1) of Directive 2014/104 must be interpreted as meaning that neither the fact that the defendant in an action falling within the scope of that directive has made available to the plaintiff the information on which it relied in order to refute the latter's expert's report nor the fact that the plaintiff has directed its claim against only one of the perpetrators of that infringement is relevant, in itself, for the purposes of assessing whether the national courts are entitled to assess the damage, since such an assessment presupposes, first, that the existence of the damage has been established and, second, that it is practically impossible or excessively difficult to quantify it precisely, which implies taking into account all the parameters leading to such a conclusion, in particular the unsuccessful nature of formalities such as the request for production of evidence provided for in Article 5 of that directive.*

Twelfth - By order of 21 February 2023, I granted the parties a new procedure for supplementary pleadings, possible practice of final proceedings and conclusions.

Thirteenth: Daimler submitted its observations on 1 March 2023. In addition to a review of the facts relevant to the outcome of the case and an assessment of the evidence adduced, it wished to offer a particular analysis of the Court's ruling. In summary, Daimler considers that the Court's answer clearly distances competition and consumer rights, points out that it is the plaintiff's obligation to prove the existence and the amount of the damage claimed, emphasises that the judge has no power to dilute or soften this burden, states that Community and national legislation offer specific remedies to overcome the evidential difficulties in the process and, finally, that it is only when these remedies are available that the plaintiff has to prove the existence and amount of the damage claimed, finally, that only when these specific remedies have been used appropriately can the judge examine whether the necessary requirements for a judicial assessment of the damage have been met, but that this power cannot be used to prevent the proper assessment of the evidence adduced in the case.

Fourteenth - The plaintiff made submissions on 2 March 2023, with the same scope and purpose as the previous ones. With regard to the decision of the Court of Justice, it considers that the provision of data for the quantification of the damage by the defendant and its possible use by the plaintiff are not relevant for the use of the power of judicial assessment of the damage, nor is the fact that the plaintiff brings his action against an infringer other than the one with whom he had a contractual relationship. It also considers that the judicial assessment of damages can only be barred in the event of the plaintiff's failure to provide evidence, which is not the case here. With regard to the costs of the proceedings, it is emphasised that the Court's reply accepts the compatibility with Community law of the national case-law on the substantial assessment of the claim.

THE LEGAL BASIS

First, estimation of the claim.

1.- I must uphold the claim brought by the plaintiff, considering that, on the basis of the evidence resulting from the Decision which gave rise to the filing of the claim and the presumptions which this allows to be developed in the case, its activity of postulation and proof is sufficient for the quantification of the damage suffered as a result of the infringement described therein. All for the standards of evidential assessment that must be specifically used in a *follow on* process and while the defendant has not refuted the presumption of the existence of the damage derived from the infringement, it has not offered an alternative quantification of the damage to that proposed by the plaintiff that is acceptable and, finally, it has not adequately articulated the defence for possible repercussion of additional costs.

Thus, I will reach this result for the instance, essentially, on the basis of the following assumptions: (i) That the Decision, which is the origin of this case, describes an infringement consisting of a price-generating cartel. (ii) That, until the defendant and cartelist proves otherwise, price-generating cartels cause damage liable to be compensated to customers of the kind of those of the plaintiff. (iii) That, for the private application of competition law, the attempt at quantification that the injured party is called upon to make is content with the recreation of a hypothetical but reasonable scenario of the extent of the damage suffered, which does not mean that this scenario must always be based on the actual occurrence of the damage, (iii) The expert's report that is then provided to quantify the damage is irrefutable, as such an extraordinary piece of evidence that it is not necessary for the solution of the case. (iv) Therefore, I will also consider that, for the final solution of the case, nothing happens if the quantification attempt made by the plaintiff presents some contradictions or weaknesses, because economic science is subject to its own controversies and what is at stake is that the proposed scenario is sufficiently plausible and reasonable. Thus, in my conviction process, the expert report submitted by the plaintiff will sufficiently meet these characteristics. (v) At least as long as the defendant has not proved either that the quantification model used by the plaintiff is absolutely unusable, or that the data on which it is based are absolutely wrong, and insofar as it has not offered an alternative quantification of the compensable damage that is more reasonable, plausible and justified than that offered by the plaintiff, or a prudent basis for moderating its expert's report, which it is content to refute in absolute terms. On the contrary, I consider that the Defendant is determined to seek the dismissal of the claim, which is the only position it has held since the first time it had occasion to litigate before this court. To that end, it denies the economic evidence demonstrating that the cartel sanctioned by the Commission generated effects on the market and that those effects must be quantifiable in some way, suggesting an interpretation of the procedural institutions applicable to burden-sharing and the threshold of evidentiary requirements in the form of an exhausting labyrinth, which I do not agree with. Finally, I will not accept that the solution of the case must be reached by means of a sort of econometric challenge to which the judge must be forced, although I will accept, for the most part, the interpretation offered by the Court of Justice on the assumptions of application and purpose of the power of judicial assessment of damages. (vi) The foregoing will not prevent reproaching, as unfair, the conduct of the plaintiff, its lawyers and experts, when they have unjustifiably disregarded the opportunities granted by the court to make the solution of the case more accessible and transparent, through a more intense and collaborative evidentiary activity. That will be the reason why I will note that the resolution of the case is doubtful.

3.- In order to achieve this result, I will address, in the following grounds and in accordance with the systematic treatment that I will now set out, these questions: (i) I will set out the substratum of minor case law applicable to the solution of similar cases, as a precursor to the need to raise the question for a preliminary ruling. (ii) I will offer a consistent interpretation of the ruling of the Court of Justice. (iii) I will abandon the position of the Audiencia Provincial de Valencia on the previous point. (iv) I will assess the standing of the parties and the validity of the action brought. (v) I will analyse the expert opinions provided to the proceedings, to recognise that the plaintiff offers a reasonable and plausible quantification of the damage suffered, which meets the requirements that should be applicable for the solution of the case, while the defendant has focused on a work of intense criticism of the previous examination, does not offer a

legally and economically acceptable account of the infringement and its evidentiary activity does not allow for an alternative quantification of the damage. (vi) I will exclude the application to the case of the defence based on the pass-on of cost overruns, on the grounds that it has not been adequately articulated and proved. (vii) I will assess that the resolution of the case is doubtful in factual terms, in order to exclude the imposition of legal costs.

Second: The lesser rule of case law applicable to the solution of this case until the pronouncement of the STJUE, 2nd , of 16 February 2023, case C-312/21.

4.- At the time the question was referred for a preliminary ruling and up to the pronouncement of the judgment that resolved it, this court and the Provincial Court immediately above it have had repeated opportunities to resolve *follow-on* proceedings with identical subject matter to the present one, followed as a result of the same Decision and in which the same controversial issues are being aired as those at issue here. By consistent application of the case law of the Audiencia Provincial de Valencia, all these proceedings have been resolved in a substantially homogeneous and recurrent manner as regards the points at issue in both instances.

5.- During that time, for that reason, for the solution of these groups of cases, I have declined the opportunity to offer a thorough and detailed rationale for the resolution of each of these issues.

6.- I considered that this did not constitute an infringement of the burden of motivation that weighs on the judge (arts. 24 and 120.3 CE and 218 LEC). It was sufficient to reproduce the jurisprudential doctrine of the Provincial Court of Valencia, which has been fundamentally based on the correctness of the criteria offered by this court, all by means of a respectful dialogue and circumscribed to the relationship of functional competences that informs the jurisdictional performance of each court. At this point, I would like to begin here once again by emphatically expressing my intellectual recognition of the jurisdictional work of the Provincial Court of Valencia.

In terms of determining the regime applicable to the solution of the case, since the pronouncement of the SJM no. 3 of Valencia of 20 February 2019, I have maintained that the general rule of Article 1902 CC was applicable here, qualified by the compliant interpretation of the Damages Directive and the normative germ of Article 101 TFEU. This entailed the problem of the possible non-retroactivity of the Damages Directive, even by way of its application by means of a conforming interpretation. However, the SAP Valencia, 9th, of 16 December 2019, rapporteur Purificación Martorell Zulueta wanted to overcome this discussion, by expressing that, for the solution of these cases, there should not be an interpretation in accordance with the rule of article 1902 CC with the Directive on damages, but that it was sufficient to do so with respect to the jurisprudential doctrine applicable to the unlawful acts *follow on*, as a solution that causes a homogeneous framework for the solution of these disputes in one or the other case, thus in the 7th FJ: *"As is apparent from the judgment under appeal and the STJUE of 28/3/19 (Cogeco Case C-637/17) it is not possible to interpret national law in accordance with the Directive, when the facts being prosecuted predate the Directive, in view of the incorporation of an express particular rule on the temporal scope of its*

provisions (Article 22(1) and (2)). However, it is not possible to ignore the previous case law of the CJEU according to which our law must be interpreted and in particular Art. 1902 CC (in connection with Art. 1106 of the same body of law) when the action brought is for damages for infringement of the competition rules".

8.- I believe that this view is not perfectly in line with what was decided in STJUE of 22 June 2022, case C-267/20, Volvo AB and Daf Trucks NV v. RM. But I consider that the nuances between that minor body of case law and the latest ruling of the Court of Justice do not impose any conclusions relevant to the outcome of the case. I therefore decline the opportunity to offer a detailed exegesis of that ruling.

9.- In the matter of legal standing to prove the reality of the payment of the purchase price of the vehicle, a prerequisite for the damage for which compensation is claimed, I have accepted as sufficient evidence to establish the existence of this prerequisite the presentation of documents justifying the conclusion of contracts of sale, without the need for additional justification of the payment of the contract price, in the context of a transaction governed by the rules of good faith and according to the sufficient nature of the bill of sale, as the usual document in the transaction to prove the consummation of the contract. I have also accepted the presentation of documents proving the exhaustion of leasing or renting contracts (letter of payment, notes from the Register of Movable Property proving the absence of charges relating to the leasing contract or resale invoices proving full ownership of the vehicle transferred to a third party). In short, I argued that the mere presentation of the policies of granting such contracts, or administrative certificates, is not sufficient. The difference in the two cases seemed to me to be obvious. Except in a sale with deferred price, the invoice reasonably documents the consummation of the transaction. But I consider that the mere provision of the leasing contract policy or certain additional administrative documentation does not justify the partial or total payment of the instalments and purchase option associated with these contracts. However, the doctrine of the Provincial Court of Valencia has corrected this personal position, opting for a more lax evidential requirement criterion and giving greater importance to the evidence present in the case in question (SAP, 9th, of 15 June 2020, rapporteur Purificación Martorell Zulueta).

With regard to passive standing, SAP Valencia, 9th , no. 1614/19, of 5 December 2019, rapporteur Purificación Martorell Zulueta, revoking SJM no. 3 of Valencia of 20 February 2019, excluded the possibility of bringing a *follow-on* action against a subsidiary company that was not the addressee of the Decision. This last position has been superseded, as is well known, by the development of Community case law (CJEU, Grand Chamber, 6 October 2021, Sumal).

11.- In turn, in the same matter, since the pronouncement of the SJM no. 3 of Valencia, of 15 May 2019, I have appreciated the passive standing of any company to which the Decision is addressed, with respect to claims brought by any vehicle acquired by the business group of which it forms part as addressee or of another infringing economic unit, in any space and time of affectation of the cartelised conduct. I have pointed out that this should be given by an interpretation of the jurisprudential rule on improper joint and several liability with the new developments of Article 11 of the Damages Directive. Where I would point out that this view is not compatible with the aforementioned CJEU of 22 June 2022, Case C-267/20, Volvo AB and Daf Trucks NV v. RM, the direct and sufficient application of this theory of imputation of national and non-

contractual development would still remain. That is the conclusion that follows from the unique and continuous nature of the infringement sanctioned. In reality, this criterion has never been called into question in terms of imputation of liability, although it has given rise to an additional discussion which, in my opinion, justified the reference for a preliminary ruling in its relation to the appropriate bases for an exercise of judicial assessment of the damage.

12.- In matters of prescription, the applicability of the annual period referred to in article 1968 CC has been accepted and the *dies a quo* of the computation of the period has been set at the time of publication of the non-confidential version of the Decision. Indeed, my personal view on the matter was compatible with that expressed by the SAP Valencia, 9th , of 16 December 2019, FJ 6, when it ruled that: *"(...) The publication of an informative note of two or three pages (regarding the extent of the non-confidential version of the Decision) does not allow the start of the commencement of the action to be placed at that moment, in a complex scenario such as the one we are dealing with. Generic knowledge of the facts in an area in which the asymmetry of information between the parties is patent is not sufficient. It is therefore necessary to know the content of the Decision, with all its geographical connotations, the identification of the conduct of parent companies and subsidiaries and of any persons liable. At the time of the press release, the potential injured parties were not in a position to effectively exercise their rights and achieve their full effect, especially if one takes into account the difficulties inherent in quantifying the damage. In our view, the initial time limit for calculating the time limit should be (...) the date of publication of the non-confidential version of the Decision in the OJEU on 6 April 2017. It was from that date that the infringement became more adequately known"*.

13.- But I believe that both opinions are not compatible with Community doctrine, due to the extension of the applicable limitation period, as in the recent STJUE, 1st , of 22 June 2022, case C-267/20, Volvo AB and Daf Trucks NV v. RM.

14.- In turn, the interruptive validity of out-of-court claims directed against subsidiary companies that are not addressees of the Decision was excluded in relation to actions subsequently brought against the addressee and parent company, as in SAP Valencia, 9th , no. 1335/20, of 24 November 2020, rapporteur Purificación Martorell Zulueta. This was a corollary of the joint treatment of passive standing and the statute of limitations for actions in relation to the subsidiary companies that are not addressees of the Decision. I believe that the Sumal judgment also disavows this position of the Provincial Court of Valencia.

15.- With regard to the interpretation of the Decision's ruling, I have repeatedly found that the facts it incorporates describe the existence of a cartel that generates overcharging, even though formally an infringement by object was found to exist. I will elaborate on this later. This view has been accepted by the aforementioned SAP Valencia, 9th, of 16 December 2019, rapporteur Purificación Martorell Zulueta, when she pointed out that, FJ 9º: *"The impact of gross prices towards net prices was assessed in the TCEU Judgment of 16 September 2013 (collusive practices in the field of the market for medical devices, on coordination of price increases and exchange of sensitive information) invoked by the plaintiff; in respect of which, the CJEU Judgment of 3 July 2018 (T-379/10 and T-381/10) dismisses the appeal lodged against it. Paragraphs 60 to 67 of the 2013 Judgment contain findings on the influence of the annual coordination of manufacturers'*

list prices (with an impact first on the level set for wholesalers and then for the final recipient of the product) on sales prices to consumers, and note the possibility that coordinated increases in list prices may have an impact on the prices paid by end-user wholesalers. Paragraph 27 of the Commission's decision describes the pricing process in the truck sector. Its starting point is the initial gross list price set at headquarters (the subject of the conduct at issue), followed by transfer pricing through the distribution subsidiaries, subsequent pricing to dealers, if any, and finally net sales prices to customers, which, it states, 'reflect substantial discounts on the initial gross list price'. On this basis, the Board agrees with the conclusion reached by the judge 'a quo' and does so bearing in mind the content of recitals 50 and 51 of the Decision (transcribed in the judgment under appeal) and the wording of recital 85, which states that: 'In the present case, in view of the market shares and turnover of the addressees of the Decision in the EEA, it can be presumed that the conduct has an appreciable effect on trade. In turn, the geographic dimension of the infringement, which affected several Member States, and the cross-border nature of the products confirm that the effects on trade are appreciable'.

In the contrast of this interpretation with the conclusions imposed by the legal framework applicable to the solution of the case, I have understood the *ex re ipsa* rule to be equally applicable, in order to presume the existence of damage susceptible to compensation following a cartel infringement. Prior to and overcoming this discussion, the same SAP Valencia, 9th , of 16 December 2019, rapporteur Purificación Martorell Zulueta, has recognised the validity of the *ex re ipsa* rule in *follow on* litigation, thus in its 7th FJ: *"6) We add, finally, that our Supreme Court, in various cases (industrial property, unfair competition...) has also considered the presumption of the existence of damage susceptible to compensation to be correct....) has considered the presumption of the existence of damage to be correct when a situation arises in which its existence "is necessarily and fatally deduced from the unlawful act or breach, or are a forced, natural and inevitable consequence, or incontrovertible, evident or patent damage, according to the different dictionaries used. A situation arises in which "the thing itself speaks" ("ex re ipsa"), so that there is no need for proof, because reality acts incontestably for it". This is the result, among others, of the Judgment of the First Chamber of 17 July 2008 (...) or more recently, of that of 21 October 2014"*.

17.- In turn, the use of evidence of presumptions or presumption as an intellectual activity assimilated to evidence is recognised in the 1st CJEU of 22 June 2022, case C-267/20, Volvo AB and Daf Trucks NV v. RM, even where the Damages Directive and its substantive provisions are not applicable, if this type of presumption is available in national law.

18.- From all this it has followed that, in proceedings of this kind in which the presumption of damage is applicable, the plaintiff is obliged to present a reasonable attempt to quantify the damage, the defendant is obliged to prove that the damage did not exist and that, in a scenario of evidentiary difficulty, it is possible to make a judicial estimate of the damage suffered by the plaintiff. For my part, I have always maintained that the main manifestation of the difficulties of proof regarding the quantification of the damage is the asymmetry of information existing between the parties. To this end, I have disciplined measures of access to sources of evidence to correct that situation and, when the plaintiff has unjustifiably disregarded them while relying on a blatantly insufficient expert report to support his claim, I have dismissed those claims (for the

first time, in the judgment of 10 December 2019). This last statement and jurisprudential rule was corrected by SAP Valencia, 9th, no. 1284/20, of 17 November 2020, rapporteur Purificación Martorell Zulueta, when she considered that the situation of asymmetry presupposed for the exercise of a power of judicial estimation of the damage is not saved by the fact that an addressee of the Decision and defendant in the proceedings has offered access to its databases on invoicing used in the expert report presented in the proceedings. On the contrary, the Audiencia Provincial considered that the prerequisite for the exercise of the power of assessment is the evidentiary effort, questioned the usefulness of a measure of access to sources of evidence, its fit in our national law and criticised its reliability, considering it to be a tricky measure.

19.- For an additional reason, I thought it doubtful that the system of judicial assessment of the damage based on the evidential difficulties and asymmetry of information existing between the parties would allow recourse to this assessment function when it is the plaintiff who provokes a situation of evidential opacity. This is what happens if, as I have considered, by invoking the rule of solidarity, he sues the infringer who did not intervene in the production or marketing of the cartelised product to which the claim refers. Due to the absence of prejudicial effects with respect to the other proceedings before this court, the fear of paralysing the processing of these cases and the opportunity for the Provincial Court of Valencia to establish its own case law on this point, I also ruled against equivalent situations, as in SJM no. 3 of Valencia, of 14 June 2021, in ordinary proceedings no. 347/20. That judgment is not final and I have no formal record of the position taken by the Audiencia Provincial de Valencia on the matter at the time of this ruling, before or after the ruling of the Court of Justice in response to the question referred for a preliminary ruling.

With regard to the valuation of expert opinions provided by the plaintiffs, the Provincial Court of Valencia has rejected the convincing power of those based on various types of approximations, such as statistics (*Rodríguez report*, SAP Valencia, 9th , no. 1679/2019, 16 December 2019, rapporteur Purificación Martorell Zulueta, nullified price indices (Zunzunegui report, SAP Valencia, 9th , no. 552, rapporteur Purificación Martorell Zulueta). 1679/2019, of 16 December 2019, rapporteur Purificación Martorell Zulueta), nested price indices (*Zunzunegui report*, SAP Valencia, 9th, no. 552/21, of 11 May 2021, rapporteur Purificación Martorell Zulueta), price projection after infringement with recourse to official indices (*Naider report*, SAP Valencia, 9th, no. 1384/20, of 9 December 2021, rapporteur Purificación Martorell Zulueta), price projection after infringement with recourse to official indices (*Naider report*, SAP Valencia, 9th, no. 1384/20, of 9 December 2020, rapporteur Purificación Martorell Zulueta), analysis of accounting data and evolution of cost depreciation (*report University of Granada*, SAP Valencia, 9th, no. 67/2021, of 26 January 2021, rapporteur Purificación Martorell Zulueta) or the synchronic and diachronic method (*Caballer report*, SAP Valencia, 9th, no. 90/2021, of 26 January 2021, rapporteur Purificación Martorell Zulueta) or the synchronic and diachronic method (*Caballer report*, SAP Valencia, 9th, no. 90/2021, of 26 January 2021, rapporteur Purificación Martorell Zulueta). 90/2021, 26 January 2021, rapporteur Purificación Martorell Zulueta), in order to redirect both cases to the same quantification result, using for this purpose the powers of judicial estimation of the damage: five percent of the net price paid for the acquisition of the truck on which the claim for compensation is based.

With regard to the assessment of expert opinions provided by the defendants, expert

reports on the quantification of "merely formal" damage have been subjected to the same judgement of evidential disvalue (thus in SAP Valencia, 9th , 23rd January 2020, rapporteur Purificación Martorell Zulueta).

22.- Finally, with regard to the possible absence of damage susceptible to compensation for the passing on of additional costs to third parties, I have rejected the application of the *pass-on* defence by way of automatism by the mere resale of the truck that is the object of the proceedings, as it is not a question of the injured party passing on the truck but the damage suffered and this does not follow, in itself, from the mere knowledge of the fact of the resale, even in a temporal plane immediate to the moment of acquisition. In turn, I have rejected the application of the defence in merely hypothetical terms with regard to the repercussion of the damage on the injured party's own customers, without an econometric study based on the particular circumstances of the case and the cost structure of the actor in question. This is a view also shared by the Provincial Court of Valencia. Prior to that, as is well known, the concept of the relevant causal nexus, as assessed by STJUE, 5th , of 12 December 2019, case C-435/18, Otis II, was incompatible with my previous position on the exclusion of the defence mechanism for passing on cost overruns between distant markets, which I asserted prior to the ruling of the Court of Justice in the first rulings of this court on the matter (AJM no. 3 of Valencia, of 17 December 2018).

23.- The ruling of the judgment of this court of 21 October 2022, for the dismissal of a consecutive action based on a different cartel infringement (cars), represented an intermediate point in the dialogue held with the Provincial Court of Valencia, still prior to the solution of the preliminary ruling question raised in this case. Thus, on the occasion of that decision and with the distance that the specific facts to which it responded determined, I wanted to point out some circumstances that I consider relevant for a purpose that has not yet been fulfilled: the construction of a solid jurisprudential criterion for the prosecution of an action following a cartel infringement. On the one hand, the inadequate recourse to the judicial estimation of the damage as an indiscriminate solution to a process of this kind, precipitates us into a scenario where judicial discretionality becomes dispersion and arbitrariness, for the promotion of speculative litigation. It is not a minor indicator to consider that, openly and visibly, private litigation in this judicial district has deteriorated since the massive recourse to the judicial estimation of the damage as a resolution criterion: there are no incentives for good litigation and sanctions for bad litigation if all processes are resolved equally, but only a stimulus to the *mass litigation industry*. On the other hand, that for an orderly application of the judicial assessment of the damage as an extraordinary solution to a process of this kind and which, among other reasons, avoids opportunistic litigation, it was still necessary to establish with greater precision the assumptions that allow recourse to this figure. In particular, that it was inadequate to construct these requirements taking into consideration the evidential effort or sufficiency of the attempts at quantification of the potential injured parties, at least in absolute terms, but only on the evidential difficulty in quantifying the damage, giving prominence to the notion of information asymmetry and the measures of access to sources of evidence that vainly tried to be carried out during the processing of this process. Finally, before that, the intellectual challenge for this case law lay in the delimitation of a threshold of evidentiary requirements compatible with the effectiveness of the right to full compensation of the injured party for an anti-competitive infringement and that assumed the limitations inherent to any attempt to quantify the damage. In this sense, I pointed out that the measures of access to sources

of evidence not only intervene as a remedy to the situation of information asymmetry existing between the parties or to alleviate the difficulty of proof of the harm affecting the injured party, but also as a promotion of a different, more intense and more transparent model of litigation, which facilitates the judge's assessment.

24.- In turn, by means of SAP Valencia, 9th , no. 974/2022, 29 November 2022, rapporteur Rosa María Andrés Cuenca. 974/2022, of 29 November 2022, rapporteur Rosa María Andrés Cuenca, again in the truck case, but in apparent response to that judgment, a damage quantification report submitted by one of the parties to the proceedings (AB Volvo-Kpmg) was accepted, for the first time as far as I am aware, in the following terms: *"Without wishing to be repetitive, the purpose of this second instance is to determine whether (i) the existence of a 5% overcharge on the price of the vehicle should be judicially estimated without the Claimant having made any effort to propose a "reasonable and technically founded hypothesis" of the damage; or (ii) the Claimant's claims should be dismissed, given that it does not make any type of evidentiary effort and relies on a sort of automatism, which turns our Courts into ATMs that give away a 5% overcharge. Without prejudice to the foregoing, he points out that the Azucarera Judgment established the burden of proof required of the Claimant in this type of proceedings. But it also established the burden of proof required of the Respondent: it cannot simply criticise the expert report provided by the Claimant, but must propose a better-founded alternative quantification of the damage caused. And this is precisely what the Respondent did, providing for this purpose an expert report prepared by KPMG, which in Part I of the expert report carried out a diachronic temporal comparison with the aim of scientifically and quantitatively contrasting the hypothesis of whether an increase in the price paid by the purchasers of trucks in Spain as a result of the infringement can be assessed, in accordance with the methodology referred to therein, leading to the conclusion that the infringement had no effect on the prices analysed since it only justifies the evolution of prices by an absolutely marginal percentage of 0,69% price increase for Volvo trucks in the "long distance" segment and -0.27% price increase for Volvo trucks in the "inter-regional distribution" segment, -0.76% for Renault's "regional distribution" segment, and 2.46% for Renault's "standard transport" segment, This means that, in addition to being insignificant or insignificant, not even the result reached is statistically plausible or, if you prefer, plausible. And in such a case, it would not be appropriate to consider that there is overcharging, since it is a Volvo vehicle. (...).) And, as we have already anticipated, we have repeatedly stated that a judicial assessment requires a prior positive evaluation of the evidential effort of the party claiming, the finding of the existence of the damage and the impossibility, or manifest difficulty for the party, of proving the actual damage suffered, and that this must be carried out with the criteria of prudence resulting from the doctrine of the First Chamber of the Court of Justice and the principle of effectiveness developed by the CJEU. We will now summarise our criteria [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, or, among the most recent, that of 10 November 2021 (Rollo 733/2021)] in the following terms: (...) From this perspective, it is necessary to consider that it is necessary to take into account the principle of effectiveness of the principle of effectiveness....) From this perspective, it is the defendant itself that refers us to its opinion, alluding that it is indeed the only one that contains an assessment of the overpricing in the strict sense (...) It is true that, from the opinion issued at the defendant's request, and in respect of these specific vehicles (VOLVO), the damage is*

considered non-existent, but it is no less true that the defendant invokes a decision which takes into account that maximum amount derived from its report, even if it is another vehicle, which, without further qualification, leads us to understand that this is the percentage which, in the best of cases, it considers to be applicable". We must clearly point out that it cannot be interpreted that this Chamber has changed its criterion, but rather that we understand that the plaintiff, in this specific case, has not provided sufficiently well-founded proof of the compensation she is claiming, which, moreover, is unrelated to her expert report, so that what the defendant itself argues in its opposition is accepted as the maximum amount, so as not to be inconsistent in the sense expressed".

25.- And so, I resolved the request for a preliminary ruling in a case where (i) extensive expert opinions have been presented, (ii) whereas I have accepted the power of conviction of the one presented by the plaintiff - judgment of this court of 30 December 2019, the only opinion of quantification of the damage presented in these proceedings with the development of an econometric method of quantification-, (iii) which has been expressly corrected by the Provincial Court of Valencia, (iv) given that I have rejected the convincing power of the expert opinion provided by the defendant -since the pronouncement of the judgment of 7 May 2019 and for its subsequent variations-, (v) given that the Provincial Court of Valencia has usually accepted this position, (vi) but it should be emphasised that only one expert opinion of this kind has been the only one that, in isolation, has managed to gain its conviction and (vii) when the solution of the process seems to be doomed to the well-known application of an alternative estimate of the damage inspired, explicitly by the Provincial Court of Valencia, in criteria of equality and where the assessment of the evidential effort never takes into consideration the availability and result of a measure of access to sources of evidence. Because only the clarifying intervention of the Court of Justice in the interpretation of the conditions for recourse to judicial assessment could relocate the solution of this case to the place that, in my opinion, it should never have left: a suitable framework for the assessment of the available expert evidence.

26.- Because the Tráficos Manuel Ferrer case is not a suitable candidate for the application of the power of judicial assessment of the damage referred to in Article 17.1 of the Damages Directive. On the contrary, it is a case for intense evidentiary discussion, based on the assumption of the qualitative and specific criteria for this law that should inspire this assessment. Therefore, it is a case for the total or partial estimation of the claim or for its rejection, based on the analysis of these expert opinions according to the rules of sound criticism and in application, despite the complexity of the object of the evidence, of the statute of evidential assessment referred to in article 348 LEC. Let us look at it.

Third: A consistent interpretation of the Court's ruling.

27.- As is well known, the raising of a question for a preliminary ruling before the Court of Justice does not displace to that body the solution of the specific case in which the uncertainty about the interpretation of Community Law that justifies the raising of the question is rooted. That is not all. In addition, and always compatible with the principle of autonomy reserved to the courts of the Member States, the Court's answer then leaves

a margin of discretion to the national court as to its interpretation and application in resolving the specific case.

28.- The only limit to the autonomy of the national court that raises the question is that its interpretation be consistent with the Court's reply. I will anticipate now that my position is very close to that offered by Daimler in its brief of 1 March 2023 on the assumptions for the judicial assessment of the damage, when it analyses the Court's answer and critically links it to the current state of the question for the most widespread Spanish case law and praxis. In this, I substantially share Daimler's view.

29.- For a procedural system such as the Spanish one, where in the ordinary trial the possibility of lodging an appeal against the decision of the judge of first instance is admitted and this appeal being of a full nature, this task of consistent interpretation does not only correspond to me, but also to the Provincial Court of Valencia and to the extent that this judgement can be appealed. The particularity of this case lies in the fact that it is part of a phenomenon of mass litigation. The question referred for a preliminary ruling and which conditions the solution of this instance reproduces, as I have explained at length in the previous ground, legal issues which are controversial in this type of litigation on a regular basis. That is why the work of consistent interpretation that I am undertaking at the time of this ruling has already been preceded, in fact, by an immediate response from the Provincial Court of Valencia, which I must also expressly take into consideration. In turn, to a greater or lesser extent, other judges of first instance and the rest of the Spanish Provincial Courts will offer their own interpretation of the Court's ruling.

30.- In the experience gained in the handling of this case, that work of consistent interpretation is conditioned by the multiple nature of a question referred for a preliminary ruling: one thing is what the national court asks on the basis of what it thinks it knows, another what the parties to the proceedings would like the national court to have asked, another what the Advocate General suggests inquiring into and, finally, what the Court proposes to draw attention to. It is only this last point that gives qualitative value to the mechanism that has been activated in these proceedings. And that is what we must accept. But this does not exclude the possibility that the work of consistent interpretation, which is reserved for the national judge, may still be subject to a critical analysis that makes explicit some of the remaining uncertainties.

A) On the answer to the first question

In reply to the first question referred for a preliminary ruling, the Court of Justice accepted the full compatibility of Article 394 LEC with the principles of effectiveness and equivalence of Article 101 TFEU (in a very accessible manner in paragraph 48 and in the first reply) and of the only provisions of the Damages Directive that have an impact on the question (paragraph 38).

32.- Therefore, the Court accepts that (i) only the full award of a claim for compensation will normally lead to the defendant being ordered to pay costs, (ii) that the normal outcome of a partial award of a claim for compensation will be that no costs are imposed, (iii) that the dismissal of the claim may lead to the imposition of costs on the plaintiff and (iv) that it is also admissible for the literal wording of the provision to be qualified in accordance with national case-law on the substantial award of a claim for

compensation. But I would also like to insist on three additional qualifications.

33.- First of all, the Court makes a decidedly separate argument for competition and consumer rights (paragraphs 45-46). It does so by reformulating the approach with which the question was posed: the rule of indemnity of the injured party. And he links, I think obscurely, this rule of indemnity with the availability in favour of the injured party of measures such as access to sources of evidence whose purpose, as he describes it, is to rebalance the strength of the parties in the process (paragraphs 43-46). I do not see the connection between the one and the other. It remains to be seen whether, in the mind of the Court of Justice, the concurrent subjective condition of the injured party to an anti-competitive infringement and consumer would lead to a different interpretation of Article 394 LEC. But none of the actors in these proceedings is a consumer. Personally, I was trying to point out how the complexity of this type of proceedings will usually lead to the granting of partial estimations of the claim and how this may reduce the effectiveness of the injured party's right to compensation, by incurring costs for which he will not be compensated and which will undermine the net compensation of his loss, not even due to the possible availability of a national jurisprudential doctrine correcting the excesses to which the wording of article 394 LEC may lead, due to its limitations. But the Court seems more concerned with conveying the strong idea that the injured party must prepare his claim in an appropriate manner, perhaps so that what is requested is in line with what has been granted or so that recourse to this national case law doctrine does not encounter obstacles. For, although the first question was completely detached from the other questions in the approach to the question, this is the common thread running through the Court's reasoning.

34.- It is therefore compatible with the doctrine of the Court of Justice that the result of the partial upholding of an action for damages following a cartel infringement, as a result of recourse to a judicial assessment of the damage and for the award of compensation at a qualitatively and quantitatively lower threshold than that claimed, does not determine an order for the defendant infringer to pay the costs.

35. Secondly, in no case does the Court of Justice accept that, if that is the outcome of the proceedings, the plaintiff and beneficiary of that conviction may be required to pay the defendant's legal costs in any way whatsoever. For when the Court of Justice analyses the rule of procedural unreasonableness, it does so on the basis of its obligation to interpret exhaustively and completely the national provision whose compatibility with Community law is challenged (which is reproduced in part in paragraph 19 of the decision). In other words, the Court of Justice accepts that a rule such as Article 394 LEC is compatible with Community law when, in a scenario of dismissal of the claim, it is still possible to assess the recklessness with which the plaintiff has litigated and to aggravate his obligation to pay the costs of the proceedings. In the Court's dialogue with the Advocate General (paragraph 47), I find no room to understand anything else. And that rule is equally applicable in the case of a full allowance of the claim, where it can be established that it is the defendant who has litigated recklessly.

36.- Thirdly and in the same way, a precept such as Article 394 LEC is also compatible with Community Law, when it exempts any of the parties from a possible sentence in costs and despite the complete rejection of their position and procedural strategy, if the solution of the case is doubtful in terms of fact or law.

B) On the answer to the second question

In answer to the second question referred for a preliminary ruling, the Court of Justice clarifies that the power of judicial assessment of the damage is available even if the plaintiff has had access to the extensive commercial information on which the expert opinion submitted by the defendant is based to justify the absence of compensable damage, because that provision of Article 17(1) of the Damages Directive only presupposes that the existence of damage is established and that it is impossible or excessively difficult to quantify it precisely.

38.- The Court of Justice's answer in this case responds to the main interest in the question referred for a preliminary ruling, which does not seem to require any further explanation: it is the question which most strongly affects the solution of the case and, also, the case-law criterion which I have set out at length. The answer is based on a reformulation of the terms of my question and, unlike the first and third questions, the Court's reasoning requires a more attentive interpretation, because its analysis is open and plural.

39.- At the time the question was posed and in the wording used for the purpose, I wanted to express my own assumption about the meaning of the literal wording of Article 17.1 of the Damages Directive and its recitals, for the communication of meanings between the category of "information asymmetry", which is not present in the precept but is expressly present in those recitals - also in the lengthy pre-legislative work of which the Directive is the result - and the qualifying condition for judicial assessment: the persistence of irresolvable difficulties of quantification, as a factual assumption incorporated in the rule (as reproduced in paragraph 15) and as a concept also incorporated in the wording of my question. I think I was right to express myself in terms that could be understood by the Court (paragraph 50, in fine).

40.- But the Court of Justice has expressly rejected this construction in such a categorical manner (paragraph 54) as, in my opinion, not very effective from a practical point of view and for the solution of this case, according to the procedural route that justified the raising of the question, in the link with the rest of the contributions of the same judgment and on which I must dwell below.

41.- Indeed, in the expression of EU law involved in the resolution of the case (paragraphs 3-16), the Court expressly cites recitals 15, 46 and 47 of the Damages Directive, which refer to the situation of asymmetry of information between the injured party to an anti-competitive infringement and the infringer as a characteristic element of private antitrust litigation and, in addition to what is further explained in recitals 11, 14 and 45 of the regulation, which are also analysed, as an element that explains the difficulty of proving the damage and its correct quantification, together with the inherent complexity of drawing up an expert's report on an economic basis.

42.- In turn, the Court of Justice recognises that the situation of information asymmetry, which manifests itself in the unavailability of adequate evidence for the quantification of the damage, is the precursor element that has justified the positivisation of the power of judicial assessment of the damage in Article 17(1) of the Directive (paragraphs 43 and 54).

43.- However, the Court of Justice states that the possible situation of information asymmetry and, in an unspecified manner, the rebalancing of forces that is also possible for this law precisely for that reason (in the precedents in paragraphs 13, 41, 45-46), plays no role in granting a judicial estimate of the damage and in assessing whether it is easy or difficult, possible or impossible (again in paragraph 54) to quantify it adequately for the injured party.

44.- The Court's reasoning does not stop there in order, I believe, to explain the paradox of this theoretical construction on the assumptions for the judicial assessment of the damage, the specific circumstances of the case where the question to which it responds has been raised and the recommendations on the appropriate way to conduct private litigation.

45.- Before doing so, I must once again recall that the singular characteristic of this case, as I explained at the time of formulating the preliminary ruling question, is that its solution is faced with a jurisprudential criterion that has deprived the expert opinions presented by both parties of any convincing power and, also, of the usefulness of the measures of access to sources of evidence implemented by consensus by the parties, in the face of the warning of insufficient evidence from the judge and for the homogeneous solution of these groups of cases through recourse to the judicial estimation of the damage.

46.- Well then, perhaps the importance of the Court pointing out that, where the asymmetry of information does not play a role in the judicial assessment of the damage, the potential availability of the mechanisms of access to sources of evidence in Article 5 of the Damages Directive must be taken into consideration, their contingent application during the proceedings and the usefulness that the plaintiff has been able to draw from those measures, noting their suitability for the evidentiary activity aimed at proving the reality of the damage suffered by the plaintiff and its correct quantification (paragraphs 55-58).

47.- In the realm of euphemisms, this prejudicial question was reduced for a certain imaginary person to one on the use of "data rooms". For that was the instrument in which the measure of access to sources of evidence agreed in the case was embodied. It was not about that, but about the importance of the asymmetry of information as a manifestation of the evidentiary difficulty enabling judicial estimation and, only afterwards, about the suitability of a "data room" measure recommended by the judge as adequate to remedy it. Also for an unspoken purpose: to put estimation in the place where estimation belongs and to recover the lost ground for an ordinary evidentiary assessment exercise, where measures of access to sources of evidence are common practice to be observed in the future. In any case, I have insistently maintained that a mere perfectible instrument, the data room, could not be confused with the need for a transcendent and useful application of the main procedural remedy incorporated into our system for this specific litigation, Article 283 bis LEC in its correspondence with Article 5 of the Damages Directive. Well, in the same place and to make the work of interpretation of the Court of Justice's ruling a powerful image, it can be said that its response can also be explained in this way: when the "information asymmetry" goes out the door of the process as a decisive criterion, the "data rooms" as an appropriate measure to focus the evidential work of the parties go in through the window. In reality, the whole of the resolutionary meaning that I have given to the treatment of information asymmetry is

embedded in the Court's response on the necessary distinction between the uncertainties of the evidence provided in the process and the remaining evidential difficulty as a presupposition for the estimation, together with the recommendable dissemination of the mechanisms of access to sources of evidence, considering those provided in this case to be suitable for this purpose. The existence of an evidentiary difficulty enabling the estimation must be questioned where the plaintiff has unjustifiably rejected a measure of access to sources of evidence, because the judicial estimation of the damage is not a remedy for his passivity.

48.- Of course, as the Court also emphasises, no element defining the possible application of a major institution can condition it in absolute terms (paragraph 59). The Court's judgment does not authorise it to hold that access to sources of evidence produced before or during the proceedings is an absolute requirement for a claim to be upheld directly, as a result of the evidentiary assessment, or alternatively, with recourse to judicial assessment of the damage.

49.- However, since the ruling of the judgment of 16 March 2023, Spanish judges should never again grant a judicial assessment of the damage without a relevant and specific assessment of the availability, content and usefulness of a measure of access to sources of evidence provided for in Article 5 of the Directive on damages, the mention of which has been expressly incorporated into the Court's answer and when the wording of the question did not offer its citation. Especially in those cases where the measure has been offered by the defendant, because the Court values very positively such an offer, among other things because it considers it an appropriate milestone for the plaintiff to seek more and better information with which to conduct his quantification attempt (paragraph 58). Information asymmetry may not be relevant in formal terms when awarding a judicial estimate of damages, but the availability of adequate information and the active search for it is relevant in material terms. In other words, if it is not relevant to consider the existence of informational asymmetries between the parties but rather a potential - and I fear abstract- situation of evidential difficulty, it cannot be affirmed that such an evidential situation exists in the case without analysing what use has been made of a measure of access to sources of evidence such as the one granted here. And the usefulness of the measure cannot be rejected on the sole ground that the plaintiff or the court questions its suitability, all on the basis of an evidentiary scruple that is completely removed from the standard of litigation that the Court of Justice recommends as acceptable, because of its direct and precise link with the most important procedural provisions of the Damages Directive. From the background relevant to the resolution of the case, the practical situation to which the Court's answer leads is exactly the same as that suggested at the time the question to which it answers was formulated.

50.- The relevance of the Court's response is even greater and, also for practical purposes, consistent with the jurisprudential rule constructed by this court on the occasion of the judgments of 20 February 2019 (judicial estimation of the damage with a minimum vocation and in view of the defendant's evidential passivity), 10 November 2019 (dismissal of the claim due to the plaintiff's evidential passivity following the unjustified rejection of the data offered by the defendant), 30 December 2019 (dismissal of the claim due to the plaintiff's evidential passivity following the unjustified rejection of the data offered by the defendant), 30 December 2019 (dismissal of the claim in its entirety on the grounds of preservation of the presumption of harm and assumption of the only econometric report submitted in the proceedings) and 21 October 2022 (again,

dismissal of the claim on the grounds of the defendant's inactivity and rejection of a measure of access to sources of evidence): claims that are upheld, claims that are dismissed, because of the evidence in the case, because of the plaintiff's evidentiary inactivity, because of the defendant's evidentiary inactivity, because of the granting of a judicial and alternative estimate of the damage. All this because of two main findings in the Court's reasoning, which I have partially anticipated.

51.- The first of these findings is that the power of judicial assessment of damages is not the appropriate remedy to replace the evidential activity of the plaintiff, not only in those cases in which that activity is not correct or adequate, but especially in scenarios of evidential passivity and all in relation to the availability and effective use of mechanisms of access to sources of evidence (in paragraph 57). Therefore, it is not compatible with the doctrine of the Court of Justice for national case law, based on the principle of equality or any similar construction, whose practical outcome is that all proceedings whose starting point is the same infringement sanctioned by the competition authority are resolved in the same way, without taking into account the singularity and characteristics of the evidentiary activity carried out in each case and, most especially, whether or not there has been an opportunity to practice measures of access to sources of evidence and what the outcome has been.

52.- The second of these findings is that the power of judicial assessment of damages has nothing to do with the difficulties inherent in the contradiction of the parties, the intensity and complexity of their evidence and the confrontation of contradictory expert opinions (paragraph 52). It is therefore an excess to turn the abnormal, i.e. the recourse to judicial assessment of damages, into the normal solution of a private enforcement procedure where contradictory expert opinions are pitted against each other.

53.- Thus, the evidential difficulty that enables recourse to the judicial estimation of the damage is one of which the victim is not the judge who must resolve the instance, but the party who must benefit from the judge's pronouncement and whose evidential activity is interfered with, perhaps in an insurmountable manner, by these difficulties. It must therefore be assessed whether a measure of access to sources of evidence has been used and with what result.

54.- Thus, the judicial estimation of the damage does not allow the judge to evade his duty to state reasons, that is to say, to assess the evidence presented in the case. Prior to that, neither does his duty to construct a standard of evidential assessment compatible with the principles of effectiveness and equivalence.

55.- Thus, the aim is to define a statute of evidential assessment permeable to the specificity of this law, which is also expressly addressed by the Court of Justice, when it admits that the solution of the case may arise in terms of evidential uncertainty (again in paragraph 52). For this is a normal scenario for the outcome of an action for damages, as assumed by the Community legislator and in order to guarantee the effectiveness of the right to full compensation of the injured party for an anti-competitive infringement (again in recitals 11, 45 and 46, which the judgment reproduces).

56.- And it should be noted that the power of judicial estimation of damages has absolutely nothing to do with the normal outcome of a normal institution for the normal prosecution of a normal civil trial: the critical assessment of expert opinions, for their

eventual moderation by accepting the contributions of one or another expert and in a coherent manner with the balance of the rest of the evidence in the trial, at least where this is possible and when the parties collaborate to this end. Otherwise, if by judicial estimation of the damage is understood the simple reformulation of the expert opinions of the parties, such an estimation judgement, in terms of legal institution, will mean absolutely nothing for the Spanish legal system. Therefore, because the judicial assessment of damages does seem, at least formally, to be a new legal institution for us, it should be attributed a different meaning, function and assumptions. I believe that the judicial estimation of damages is an alternative and extraordinary measure for the solution of the process, which allows the judge to place himself outside the process, which is enabled when the judge is not convinced by the evidence in the case in a way that is not reprehensible to the plaintiff or the defendant when it comes to estimating the extent of the repercussion of the extra costs, due to the difficulty of quantifying one or the other magnitude, which invites us to first consider what information was available and could have been available during the process. Precisely for the latter reason, it should be explicitly assessed whether and with what result measures of access to sources of evidence have been used.

57.- I must admit that one of the most singular contributions of this court and in the solution of similar cases, as is well known, is more difficult to reconcile with the Court's answer and argumentation and I cannot hide it: that the presumption of damage in Article 17.2 of the Damages Directive incorporates an economic facet in the form of minimum damage and in favour of the injured party for an anti-competitive infringement. Because the Court's decision is content with a literal reproduction of recitals 45 and 47 of the Directive (paragraphs 9 and 11) and attaches great qualitative importance in its reasoning to the evidential passivity of the plaintiff, without considering what might happen in those cases in which the evidential passivity is attributable to the defendant, which is the recipient of the first burden of proof required in this type of litigation: to rebut the presumption of harm after the cartel.

58.- And I must confess that this is the reason why, until now, I have wanted to emphasise that the situation of information asymmetry existing between the parties is the main type of evidentiary difficulty and which conditions in a more intense way the judicial estimation of the damage: because I have tried to preserve a remedy favourable to the injured party by an anti-competitive infringement and which guarantees his compensation in those cases in which the defendant does not collaborate with the good end of the process, his conduct is obstructionist, his allegations are evasive and his evidentiary activity is inconclusive and opaque. Giving importance, as a decisive criterion, by enabling the judicial estimation, to the persistence of a situation of information asymmetry in the process, is the useful mechanism that I have used a sensu contrario to sanction the evidential inactivity of the defendant. Later, when he collaborates with the clarification of the case by means of an intense and transparent evidential activity, the criterion of information asymmetry is no longer useful in this sense and has led me, on the contrary, to sanction the evidential inactivity of the actors who litigate in a speculative manner, in order to prevent the proceeding of the judicial estimation of the damage for not appreciating invincible difficulties of quantification. For the latter scenario, i.e. to reproduce the same usefulness of my previous decisions, it will suffice to recall hereafter that the judge cannot make up for the evidentiary inactivity of the plaintiff. For the first, i.e. the case of the denialist and obstructionist infringer, is my approach to the judicial assessment of the damage as a mechanism for giving

minimum economic content to the presumption of damage following a cartel still compatible with the Court's reply? 59.- In this way, the response of the Court of Justice puts at risk, due to its possible incompatibility, the recourse to the judicial assessment of damage as a jurisprudential tool for the configuration of minimum damage in cases of evidential passivity of the defendant and which, as a precursor jurisprudential germ, could be positivised by the Spanish legislator. All this is already on the table of our Supreme Court. 60.- But I believe that my initial approach, i.e. that of the series of judgments from 20 February 2019 to 10 December 2019, is still compatible with the response of the Court of Justice, as I have said. If there are such doubts, it is earlier because of the terms of the case in which the question was referred for a preliminary ruling, because they were too far removed from that scenario. I did not propose that the Court should enquire into this aspect of the presumption of harm, nor into its relationship with the national procedural rules on the distribution of the burden of proof, nor into the possible use of the power of judicial assessment of harm with this minimal and not fully compensatory vocation, when the defendant does not cooperate with the success of the proceedings and proves less than what the plaintiff proves. And if the Court explicitly states that the evidential passivity of the plaintiff deserves a judicial reproach translated into the impossibility of access to the judicial estimation of the damage, it is also reasonable to maintain that in its position, the evidential passivity of the defendant to refute the content of the presumption of damage, as an element to be considered in the development of the estimation trial where, in a not reproachable way, the evidential activity of the plaintiff does not manage to win the conviction of the Court, would have been equally reprehensible.

C) On the answer to the third question

61.- The Court of Justice reformulates the systematic approach to the second and third questions in order to resolve them in a communicated manner. They certainly were.

62.- Thus, because the asymmetry of information is not a noteworthy type of evidential difficulty for the development of the assessment, the Court also rejects my suggestion as to the relevance of the injured party in an anti-competitive infringement suing an infringer to whom it was not contractually bound. This is the precise link in the Court's reply between the joint and several liability of a cartelist, which was never at issue, and the conditions for the award of alternative compensation to that sought by recourse to the power of judicial assessment of the damage (paragraphs 61-62 and 64-65).

63.- However, the answer to this question is also a further indication of the importance that the Court of Justice wishes to attach to access to sources of evidence as a procedural tool that must henceforth characterise the private application of competition law.

64.- Because the Court emphasises that this situation highlights the importance of the institution, being that, in such cases, it is to be expected that the defendant infringer makes use of the mechanism of access to sources of evidence provided for in Article 5 of the Damages Directive in order to properly prepare its defence (paragraph 63).

65.- As with some of the nuances that I note in the Court's previous answers, as I suggested when formulating this question for a preliminary ruling and in the allusions to the effectiveness of the defendant's rights of defence in relation to Article 47 ECHR, the Court of Justice's position requires a different discipline on the content of Spanish civil

proceedings, to ensure that the abstract availability of access to sources of evidence is a concrete one. And that will clearly determine a new interpretation of the duties, content and preclusive limits of the defendant's activity of postulation and evidence in a process of these characteristics, because they are unduly pressing in contrast to the opportunities enjoyed by the plaintiffs.

Fourth: Abandonment of the jurisprudential doctrine of the Provincial Court of Valencia.

66.- As I have pointed out above, the Provincial Court of Valencia has already had the opportunity to expressly offer its own interpretation of the Court's ruling in SAP Valencia, 9th , no. 185/2023, 23rd February 2023, rapporteur Purificación Martorell Zulueta. To date, as I have already pointed out, I have tried to adjust my rulings in cases identical to the present one to the successive jurisprudential developments of the Provincial Court of Valencia. Not for reasons of a non-existent hierarchy or to avoid responsibility for my own decisions, but to contribute to the creation of a safe litigation framework. However, a careful study of this pronouncement leads me to maintain that the interpretation assumed by the Provincial Court of Valencia, when it apparently intends to preserve its own previous jurisprudential doctrine intact and without admitting even a slight nuance in this one, is not consistent with the response offered by the Court of Justice. And it is at this point that I must, with reasons, expressly abandon the case law of the Audiencia Provincial de Valencia in all that I consider to be incompatible with the ruling of the Court of Justice.

67.- Indeed, by its judgment of 23 February 2023, the Valencia Provincial Court dismissed the appeal brought by Daimler against the decision handed down by another commercial court in that city, which agreed to partially uphold an action consecutive to the same decision that gave rise to the formation of these proceedings, granting compensation with recourse to the power of judicial assessment of the damage, following the rejection of the convincing power of the expert opinions presented by both parties. The Valencia Provincial Court has the opportunity to recall its criteria for granting this judicial assessment, emphasising that this is not always appropriate, but rather considering the particular circumstances of each case, which requires a specific reasoning that takes into account consolidated criteria respectful of the principles of legal certainty and equality, taking into account qualitative criteria on the characteristics of the infringement penalised and other judicial precedents to fill with economic content this judgment estimating the compensable surcharge, which is set at 5% of the net price of the vehicles referred to in the claim.

68.- The Provincial Court of Valencia rejects Daimler's argument that it is not appropriate to grant the judicial estimation of the damage in favour of the plaintiff who has conducted himself with evidential passivity. It also notes that in the case in question, the plaintiff did not make use of access to sources of evidence even when it was specifically offered to him by the defendant. He notes that the judicial estimation of the damage is a *"last resort"* for the solution of the case and that it is reached in the *"conviction of the existence of a scenario of effective difficulty in the quantification of the damage suffered"* by the plaintiff. It points out that the complexity of the quantification of the damage in the truck manufacturers' cartel is in no way linked to the conduct of the plaintiff, nor

does it depend on the result that access to sources of evidence might have yielded if it had been carried out. On the contrary, it considers that *"it 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*".

69.- In other words, after the Court of Justice's ruling, the Provincial Court of Valencia insists (i) on maintaining a threshold of evidential requirements that determines that no expert report will ever be able to form its conviction, (ii) refuses to attach the slightest importance to the availability of access to sources of evidence or the effective use that the parties have made of it in the proceedings, (iii) warns that the evidential difficulty presupposed for the judicial estimation of the damage is that of the complexity and dispersion of the means of evidence available, without taking into consideration the perspective of the parties instead of that of the judge who must evaluate these means of evidence and (iv) grants a judicial estimation devoid of economic motivation, because it is inspired by a criterion of equality.

70.- I believe I have finally understood the reasons for our disagreement. In short, the Provincial Court of Valencia has a framework of minor case law that is always inclined to make the judicial assessment of the damage the normal solution in a process of private application of Competition Law, for two reasons that I do not agree with. The first reason is to claim that the compensation to be awarded must not only be effective and exact, but also authentic, because it is incontrovertible. And it is true that in the jurisprudential and legislative genesis of this law there has always been a tension between indemnity and overcompensation, which in terms of Community policy can be summed up in the renunciation of inducing a culture of private litigation, the admissibility of the defence based on the repercussion of overcharges, the prohibition of the imposition of punitive damages, the omission of any provision on litigation funding or class actions and, in the latest ruling of the Court of Justice, the emphasis on the need to intensively implement mechanisms of access to sources of evidence for a proper approach to litigation. But, in the study of the effects of the same infringement and, for example, when different groups of claimants use different approaches, with different methods, on different data and for the expression of different results, none of this is a faithful reflection of the complexity of the solution of the case, but a living testimony that the quantification of the damage is indeed possible, i.e. easy, and that the degree of dispersion between all these proposals is an inevitable consequence of the technical limitations for the hypothetical recreation of a counterfactual scenario, which is the only way to observe the compensable antitrust damage. Thus, some expert reports will deserve to win the judges' conviction and others will not. The Provincial Court of Valencia assumes that access to sources of evidence is not a sine qua non condition for the judicial estimation because the sources of useful information are plural, which I can agree with and the Court of Justice seems to endorse. But it does not accept the dispersion of results in expert studies. And I cannot agree with that. The second reason is, perhaps, to believe that the judge is the painful recipient of a sort of legal mandate which obliges him to imprint on his decisions not only an economic perspective, which is desirable, but also the recreation of a whole language which, obviously for an organic configuration such as the Spanish one, is lacking. The judge is not a substitute for an expert called upon to offer a motivation of effective, exact, authentic and incontrovertible economic significance, capable of explaining each report presented to him. But, if that were the case, the judicial estimation of the damage is certainly not the remedy available to the

judge to relax the need for economic motivation of his decisions. Paradoxically, as I have already pointed out, the renunciation of the dissemination of measures of access to sources of evidence, which are also suitable for the most intense and transparent contradiction of the expert opinions presented by the parties, these data rooms, exacerbates the Spanish judge's shortcomings in better understanding the meaning of the available evidence and the differences between the experts' quantification proposals. Because it prevents the parties' experts from working at the same time on the same data and for the same purpose. And this does not hinder the quantification of the compensable damage, which remains easy when the data are suitable and abundant, but it does hinder the Spanish judge's ability to better understand and correctly analyse the quantification proposals of each of the parties.

71.- In the contrast of the interpretation that I have assumed of the decision of the Court of Justice with the synthesis set out in the previous paragraph, I fear that my vision and that of the Provincial Court of Valencia are now irremediably distant, pending a unifying pronouncement by the First Chamber of the Supreme Court, with the authentic value of jurisprudential doctrine.

72.- In this scenario, if I must abide by all that in the doctrine of minor case law at length set out in this decision is still compatible with the latest decision of the Court of Justice, at least as I believe it to be, I must henceforth abound in an exercise of evidential assessment that takes into consideration (i) the need to establish a standard of requirement compatible with the principles of effectiveness and equivalence of the right to full performance of the injured party by an anti-competitive infringement, (ii) so as not to make the judicial assessment of the damage the irreversible solution of a *follow on* process, (iii) to accept the limitations inherent to a quantification study on a hypothetical and probabilistic basis, which is the only one possible for this law, (iv) to promote the dissemination of measures of access to sources of evidence as a correct evidentiary activity for a correct litigation model, (v) that it does not avoid the duty of evidential assessment, (vi) that it sometimes accepts the moderation of its results, but according to contradictory assessment criteria, (vii) that it takes into account the intensity of the evidential performance of the parties in the process and (viii) that it reaches, in any case, economically justified solutions.

Fifth: Standing and validity of the action.

73.- I must assess the legal standing of the plaintiffs and the validity of their action. In fact, the documentary evidence attached to the claim (docs. 8-9 and annexes to the Auren report presented as doc. 10), together with the additional documentary evidence presented during the preliminary hearing, are sufficient, according to the body of case law I have summarised above, to prove that the purchase of the vehicles referred to in the claim was completed and that the claim was filed within the time limit. I believe that these are matters that have been completely overcome and on which it is not necessary to offer any additional reasoning.

Sixth: Effective compensation, exact quantification and uncertainties: a

jurisprudential rule for *follow on* litigation.

74.- In this ground, I will grant sufficient power of conviction to the expert opinion on the quantification of the damage presented by the plaintiff (document 10 actor, Auren report), which will determine whether the claim is upheld. To that end, I must subject Daimler's main claim for dismissal of the action to a devaluation test, set out a sufficient body of arguments for a standard of evidential assessment applicable to litigation following a cartel infringement, assess the usefulness of the plaintiff's report, disregard the usefulness of the expert report submitted by Daimler (report E.CA Economics, digitised on 26 January 2021 and extension letter digitised on 6 March 2021) and, lastly, also to grant the application of the interest requested by the applicant.

A) Cartels cause harm until proven otherwise

75.- As I have pointed out, during the proceedings Daimler has maintained a procedural strategy of maximums and resolved in the insistent request for the dismissal of the claim. And I must now reprove that position, insofar as it is not based on the evidentiary findings relevant to the outcome of the case, but on a distorted conception of the meaning of a cartel infringement.

76.- Indeed, as I will try to explain here, for the prosecution and resolution of a civil proceeding in Spain, it is more important what is said than what is proved, because what is proved is only of interest in its instrumental relationship with what is said. If nothing is said or, worse, if what is said is wrong or, even worse, openly false, then the evidence to be used in the case is of no use.

Thus, Daimler's evidentiary effort is resolved in an insistent denial of the most rudimentary thing in legal and economic science: that cartels cause harm until proven otherwise.

78.- Indeed, from a plural but recurrent perspective, Daimler distils in its response an unassumable approach to the above legal and economic maxim. This is how its constant allusions to the meaning of an infringement by object and not by effect, to the performance of the competition authority, to the result of a plausibility assessment of the suitability of cartel conduct such as that penalised to generate effects on the market, to the contributions of other jurisdictions that have dealt with the same case or, finally, in connection with its evidential activity, to the lack of evidence of the effects in Spain of the conduct penalised, must be understood from different angles. The expression of this qualitative bias throughout the defence is so insistent that it is truly difficult to gloss over it here. But suffice it to consider, no less, that the Statement of Defence devotes up to 20% of its entire length to expressly and openly stating that the starting point for the prosecution of an action following a cartel infringement is "the non-presumption of harm" (fact five).

79.- In the attempts to quantify those injured by a cartel infringement who litigate before Spanish courts and in the responses of our judges, perhaps a lack of experience or maturity can be noted. Very painfully, I must count myself among the inexperienced and immature. But I also see the same shortcomings in the design of the defendants' legal strategies: it should not be admissible to appear before a Spanish court to argue, as a main defence, the applicability to a case like this of a "no presumption of harm".

80.- What is a cartel? A very serious infringement, which compromises legal assets of a public and private nature, all of them of constitutional relevance both from a national and EU dimension and whose effects are empirically known: cartels distort the market power available to infringers, affect the supply of products and services, affect demand, introduce barriers to market access and hinder technological development. The cartel is the ideal means used by cartelists to achieve all these objectives. Otherwise, i.e. if it were not possible, cartelists would not have cartelised.

Since the pronouncement of the SSJM no. 3 of Barcelona of 6 June 2018, paper envelopes and 20 February 2019, already in this court and for the solution of an action with a similar object to the present one, I have had the opportunity to repeat the above ad nauseam.

82.- And, in analysis of the jurisprudential and legislative seed that led to the drafting of Article 17.2 of the Damages Directive, the Court of Justice has unquestionably pointed out that for the prosecution of an action with similar characteristics to the one under examination here, it can never be ignored that the cartel is the identifying fact for the development of a presumption of damage (CJEU, 1st Chamber, 22 June 2022, Case C-267/20, AB Volvo). This is the starting point of the case. And, therefore, the first burden of pleading and proof relevant to its solution falls on the defendant.

83.- None of this is to say that a cartel sanction completely empties the discretion of the private enforcement judge to decide on the applicability of the presumption of harm to the specific case in question, as I expressed in the judgment of 21 October 2022: *"102, "The practical requirements of a successful cartel", available in SSRN), it can never have an effect that is completely unrelated to its object. This note of unrelatedness, responding to the concept of relevant causality, is of economic formulation. And, based on the sanctioning decision, there is an absolute economic distance between two of the three market facets affected by the same cartel infringement sanctioned by the CNMC (based on Marcos, F., "Daños causados por el cártel de los coches", Almacén de Derecho, 18 November 2021). None of this has anything to do with its character as a single and continuous infringement. 103.- Therefore, the presumption of harm applicable to a cartel infringement in general cannot be used in this case in respect of those two conducts. At least not if what is at issue is to determine whether the purchase and sale of a vehicle made through an official distributor in 2011 was affected by the infringement found by the decision imposing a penalty. It would be a different matter, for example, if the plaintiff were to claim that it had been overcharged in connection with the conclusion of a supply, maintenance or similar loyalty programme contract concluded with the defendant during the infringement period. However, the claim relates to something else. 104.- The fact that a cartel infringement is the identifying fact with which Community case law and legislation have developed a presumption of damage is also compatible with a necessary analysis of the typology of the infringement sanctioned by the damages judge (again in the Otis I judgment). Our doctrine has already emphasised that the substrate resulting from the binding effect or the presumptions of damage, if it leads to the discretionary judgement of the commercial judge, still requires him to check the concurrence in the case in question of the premises of the rule of civil liability for damage in order to avoid incurring in excesses (in this sense, on some determining facets of the judgement of causality and imputation, see Marcos, F., "Alcance y límites de la responsabilidad solidaria por los daños causados por el cartel de fabricantes de*

automóviles", Working Paper IE Law School, 20 September 2022). 105.- On the contrary, an infringing conduct such as the brand club, which essentially consists of the exchange of information on one of the determining elements in the formation of the price of a car for sales made through an official dealer, such as remuneration and commercial margins with an effect on the setting of the selling prices of cars, is potentially harmful in terms of overpricing. Therefore, a presumption of harm is applicable to this conduct. None of this has anything to do with the fact that the plaintiff, as the final purchaser of the product, is a possible indirect victim of the infringement, again for that notion of causation relevant to the rule of liability for antitrust harm and in accordance with the provisions that grant it standing on that ground (art. 79.2 LDC). Because the first party affected by this conduct was, eventually, the concessionaire".

And Daimler is right that, where a presumption of harm is applicable, it must be rebuttable. And I must also concede to Daimler that a rebuttable presumption subject to a standard of proof that never effectively allows it to be rebutted is a distortion of the nature and purpose of that presumption. Thus, in addition to the terms in which I ruled on the reference for a preliminary ruling, which were not exactly hostile to the cartelists' procedural strategy, again by judgment of 21 October 2022, I stated that: *"63.- The corollary of all the reasoning up to this point is that the legal framework applicable to the resolution of this case still suffers from imperfections which, even accepting the enormous pressure we face as a result of the fragmentation and poor quality of this type of litigation, require Valencian judges (i) to avoid incorporating criteria that undermine the effectiveness of the right to full compensation of the injured party for an anti-competitive practice, (ii) to also avoid a standardised and arbitrary solution to these new groups of cases, (iii) to be respectful of defendants' rights of defence, (iv) to act as an incentive to encourage more sophisticated litigation and (v) to enable us to do our work better".*

85.- The subsequent question that remains to be addressed by the Spanish jurisdiction is this: how can the presumption of harm inherent in a cartel infringement be rebutted? Well, it is again significant to remember that for Spanish civil proceedings it is more important what is said than what is proved.

86.- Because one of the main milestones for conducting the judgment on the absence of rebuttal of the presumption of harm which, as I will say below, is applicable to the solution of the case, is the complete absence of explanation by any of the infringers sanctioned by the Commission's Decision as to the origin, content, functionality and economic utility that explain the infringement for which, also peacefully through the conventional solution of the public enforcement process, they agreed to be sanctioned.

87.- Over the last five years I have paid particular attention and energy to the prosecution of this group of cases. I have never received the slightest clarification on the above points from any addressee of the Decision referred to in the complaint.

88.- If the explanations are more important than the means of evidence offered for the rebuttal of the presumption of injury, because without postulation there is no relevant and useful evidence, this does not detract from the relevance and usefulness of the evidentiary work carried out to that end when such an explanation has been offered beforehand. But what means of evidence will be suitable for that and in such a case?

89.- Well, I must now state absolutely categorically that an econometric quantification report lacking the compensable damage is a completely irrelevant and useless piece of evidence to refute the applicability and economic significance of the presumption of damage applicable to a cartel infringement.

90.- Because the evidential activity to be carried out in this sense is much simpler, more accessible and terribly more powerful: together with the absence of explanation to which I referred earlier, no evidence has ever been made available to me sufficient to prove how the sanctioned cartel worked. In contrast to the purely hypothetical and speculative nature of an econometric report such as the one subscribed to by E.CA Economics, in order to prove the innocuous nature of the cartel sanctioned by the Commission, in terms of the absence of effects on the Spanish market, it would be sufficient to provide sufficient documentation relating to (i) the specific information that Daimler made available to the other infringers, (ii) the specific information that Daimler received in return, (iii) the content of the dialogue held for that purpose with identification of the persons who carried out those acts, (iv) the processing of that information through Daimler's structure, (v) its concrete business application and (vi) the experience shared between infringers on the results obtained as a result of all this.

91.- On the occasion of the judgment of 30 December 2019, I stated that: *"(...) (ii) To provide here the documents and information brought to the sanctioning file opened by the Commission, as a beneficiary of the leniency programme. Agustina, if it so wishes and in order to prove the absence of damage in this case and in the other cases currently being prosecuted before this and other Spanish courts, may itself share the documentation of that nature in its possession. There is nothing to prevent the holder of confidential information, a beneficiary of the various confidentiality remedies established in the private application of competition law, from sharing it spontaneously and voluntarily in a follow-on proceeding. Indeed, if Agustina's defence, summarised at least in substantive terms, focuses on the extreme of arguing that the infringement penalised is of a kind which does not have a direct effect on the market and that the characteristics of this particular market would not have permitted a different practice, it is all the better to provide the information which made it possible to establish the true nature of that infringement. Because the addressees of the obligation of confidentiality inherent in the documents or statements submitted in a leniency programme are the competition authority and the private enforcement courts of competition law, insofar as they cannot compel the competition authority to disclose information of this nature. But not the beneficiary of the leniency granted by that authority and the sole holder of that information. Here, Ms María Consuelo herself acknowledged that Agustina has not made such information available to her either*".

Similarly, the valuable judgment [2023] CAT 6, 7 February 2023, Royal Mail, has noted that: *"51. Mr Beard KC's submissions in relation to this centred on the qualification in relation to "market intelligence" and the suggestion that DAF did not in fact have sufficient market intelligence to be able to calculate its competitors' net prices. This, in our view, undermines the point being clearly made in the recital, namely that all the Addressees were better able to calculate each others' net prices because of the exchange of gross list prices and the degree to which each one individually might have been able to do so might have been dependent on the "quality of the market intelligence at their disposal". We think that, without evidence as to the market intelligence at DAF's disposal or indeed as to what DAF did use the gross list price information for, DAF is bound to*

accept that it was better able to calculate its competitors' "approximate current net prices" from the exchange of gross list prices. DAF did not secure any exemption for its allegedly different position in the Settlement Decision and cannot rely on any qualification in relation to market information without adducing evidence as to the market information at its disposal. (...) 116. We take no account of this speculation and it is an inappropriate way of approaching this issue by DAF. The burden remains on the Claimants to prove causation but where DAF has elected to call no evidence as to how the Cartel was operated by DAF and how it used the information to its advantage it is not open to its Counsel to speculate as to what actually happened. This was highly commercially sensitive information that was disclosed among the Cartelists over a long period of time. The Commission found that this information enabled the Cartelists to be better able to calculate their competitors' approximate net prices. Further, the basis of a finding of an infringement by object is that it is very likely to have had negative effects on transaction prices. Therefore, in our view, this means that, if DAF wished to argue that, because of the way it used the confidential information obtained through the Cartel, there was no effect on prices, it would have had to adduce factual evidence to such effect. In other words, DAF's admissions and the Settlement Decision establish a prima facie case that the Cartel had an adverse effect on transaction prices".

93.- The absence of effects following a cartel infringement is a very strange result, because what cartels aim to do is to produce them. And, in this case, the presumption of harm has not been adequately rebutted by Daimler. Because, in effect, the cartel sanctioned by the Decision is one that generates overcharging, it has offered no explanation as to its meaning and its evidence is inadequate for that purpose.

B) The cartel sanctioned by the Decision is a price-generating cartel.

94.- By judgment of 20 February 2019, my first judgment in this case, I offered an interpretation of what the Decision decided and what that should mean for the resolution of a proceeding such as this one, as follows: *"(...) The conduct sanctioned did not consist of a mere exchange of information between the cartelist companies, guided by the sole intention of making the market for the sale of trucks more transparent.) The conduct sanctioned did not consist of a mere exchange of information between the cartelist undertakings, guided by the sole intention of making the market for the sale of trucks more transparent, although it should also be noted that this alone would distort the setting of prices in that market, by reducing the margin of uncertainty with which the undertakings compete against each other in a perfect market, which would necessarily have had some sort of impact on the determination of those prices. However, leaving aside the latter argument, it must be held that the Decision does indeed show the commission of an infringement capable of causing damage in the form of overcharging the final recipient of the cartelised product, that is to say, the purchaser of a lorry such as the one bought by the plaintiff in these proceedings. All in accordance with the interpretation of the regime applicable to the case, as I will say again. It is a different matter that, for the purposes of sanctioning and deterring such conduct or to satisfy the aims of public enforcement of competition law in this case, the Commission did not consider the material impact of the sanctioned conduct on the market in either of its two relevant aspects here (gross price fixing and the impact of cost overruns due to the implementation of new technologies on emissions). Or, also, that it did not wish to disclose any additional data in its non-confidential version. 52.- To reach this conclusion, in accordance with the most elementary conjugation of the principle of binding what has*

been decided by the competition authority, it is sufficient to reproduce the operative part of the Decision, as I have cited in the list of relevant facts for the resolution of the case and as an effort on which it is not necessary to insist now. It is clear from the reproduction of the operative part of the Decision that the defendant, according to the rules on passive standing that I have assumed here, participated in collusive agreements consisting of the fixing of gross prices and the passing on of certain cost overruns, during the period from 1997 to 2011 and in relation to the trucks with the technical characteristics described in the body of the Decision. 53.- It is precisely from the statement of reasons for the Decision, in its non-confidential and authentic version, that relevant passages can be extracted which help to understand what were the facts found by the Commission, irrespective of the type or nature of the infringement subsequently sanctioned, in order to reject the defendant's line of argument on this point. Thus (emphasis added): '(2) The infringement consisted of collusive arrangements on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards. The infringement covered the entire EEA and lasted from 17 January 1997 until 18 January 2011. (...) (27) The pricing mechanism in the truck sector follows generally the same steps for all of the Addressees. Like in many other industries, pricing starts generally from an initial gross list price set by the Headquarters. Then transfer prices are set for the import of trucks into different markets via wholly owned or independent distributor companies. Furthermore there are prices to be paid by dealers operating in national markets and the final net customer prices. These final net customer prices are negotiated by the dealers or by the manufacturers where they sell directly to dealers or to fleet customers. The final net customer prices will reflect substantial rebates on the initial gross list price. Not all steps are always followed, as manufacturers also sell directly to dealers or to fleet customers. (28) With regard to the initial gross price lists of new trucks, all of the Addressees except Iveco applied a gross price list with harmonised gross list prices across the EEA. Renault introduced EEA price lists in 2000 but its implementation took some time, Volvo had an EEA price list since January 2002; DAF since September 2002; Agustina since 2004; and Daimler since 2006. These initial EEA gross price lists were decided by the Headquarters. The EEA price lists contained the prices of all medium and heavy truck models as well as all factory-fitted options that the respective manufacturer offered. (...) (51) From 1997 until the end of 2004, the Addressees participated in meetings involving senior managers of all Headquarters (see for example (52)). In these meetings, which took place several times per year, the participants discussed and in some cases also agreed their respective grossprice increases. Before the introduction of price lists applicable at a pan-European (EEA) level (see above at (28)), the participants discussed grossprice increases, specifying the application within the entire EEA, divided by major markets. During additional bilateral meetings in 1997 and 1998 apart from the regular detailed discussions on future grossprice increases, the relevant Addressees exchanged information on harmonising gross price lists for the EEA. Occasionally, the participants, including representatives of the Headquarters of all of the Addressees, also discussed net prices for some countries.They also agreed on the timing of the introduction of, and on the additional charge to be applied to, the emissions technology complying with EURO emissions standards. In addition to agreements on the levels of price increases, the participants regularly informed each other of their planned grossprice increases. Furthermore, they exchanged their respective delivery periods and their country-specific generalmarket forecasts, subdivided by countries and truck categories. In addition to the meetings, there were regular exchanges of competitively sensitive information by

phone and email. (52) The following examples of meetings illustrate the nature of the discussions, in particular between the Addressees at the Headquarter-Level during the early period of the infringement. On 17 January 1997, a meeting was organised in Brussels. It was attended by representatives of the Headquarters of all of the Addressees. The evidence demonstrates that future gross list price changes were discussed. During a meeting on 6 April 1998 in the context of an industry association meeting, which was attended by representatives of the Headquarters of all of the Addressees, the participants coordinated on the introduction of EURO 3 standard compliant trucks. They agreed not to offer EURO 3 standard compliant trucks before it was compulsory to do so and agreed on a range for the price additional charge for EURO 3 standard compliant trucks. (53) On the upcoming changes to Euro price lists, the evidence shows further that all of the Addressees were involved in discussions about using the introduction of the Euro currency to reduce rebates. The parties involved discussed that France had the lowest prices and agreed that prices in France had to be increased". 54.- It thus appears that the conduct sanctioned by the Commission was based on an agreement to fix gross prices, with the necessary impact on the determination of the net prices or sale prices to the final recipient of the cartelised product as I shall say, on the same mechanism for fixing and passing on prices which the Decision describes, unless it is proved otherwise. It is a different matter if the pricing mechanism contemplated other additional factors for the determination of the final price to be paid by the final recipient of the product. But the gross price of the trucks in question was cartelised for a long time and that, ontologically, had consequences on the net price at least as long as, I insist, Agustina does not prove otherwise. The same conclusion can also be drawn with regard to the second of the infringements found, the passing on of cost overruns due to the implementation of new technologies. This is explained by the CJEU (General Court, Fourth Chamber), cases T-379/10 and 381/10, 16/9/13: "(60) First of all, in general terms, indicative prices in price lists serve as starting point for subsequent negotiations with customers. Consequently, whatever the purchasing power of the wholesaler on the bathroom fittings an fixtures markets may have been, the annual coordination of those prices between manufacturers is liable to have influenced the level set for the transaction prices paid initially by those wholesalers and, subsequently, by the end consumer". 55.- It is true that the Decision also states the following: "(82) It is settled case-law that for the purposes of Article 101 of the TFEU and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the internal market and/or EEA, as applicable. Consequently, in the present case it is not necessary to show actual anti-competitive effects as the anti-competitive object of the conduct in question is proved". 56.- But, and I would also insist on this, this only reveals how unnecessary it is for the competition authority to examine the material impact of the practices it audits by reason of their object, for the purposes of sanctioning this type of conduct which, in itself, distorts free competition in the market (in paragraph 80 of the decision and with reference to CSTJUE C-67/13 and 286/13). It should not follow, therefore, from the fact that the effects of the conduct in question have not been quantified, that that conduct is not liable to cause damage and that, for that reason, the fact of damage must be established in subsequent proceedings or, to a lesser extent, that the presence of a causal link between the infringement and the damage relied on in those proceedings is absolutely excluded".

95.- Well, consistent with what has been observed in the previous section, I must retain the full applicability of the presumption of harm inherent in a cartel infringement to guide

the solution of the case. But I must also point out that even two well-known facts (art. 281.4 LEC) reinforce the full application of this presumption, which is as much as admitting that the cartel sanctioned by the Decision produced effects on the Spanish market, that these effects must be quantifiable in some way and that, yes, the latter must be an evidentiary effort by the plaintiff. Otherwise, the presumption of harm would mean nothing. Because I will address below contributions from other jurisdictions, I must recall the unique and continuous nature of the infringement sanctioned and its homogeneous affectation of the Community economic area.

96.- On the one hand, that other economic units targeted by the same sanctioning decision have already reached settlement agreements for confidential compensation for the damage caused by the infringement (CAT, 1291/5/7/18(T), Consent Order, 23 August 2022, trucks cartel).

97.- On the other hand, other economic units to which the same sanctioning decision was addressed have already openly acknowledged that it affected the net prices of their products. Thus in the judgment [2023] CAT 6, 7 February 2023, Royal Mail: *"44. DAF did make extensive admissions of the Claimants' allegations as to the Infringement derived from the Settlement Decision. Thus, in its Defence ([16] to [19]), DAF has admitted the following: (1) the Infringement followed a single economic aim, namely the distortion of price setting and the normal movement of prices for Trucks in the EEA; (2) the Infringement was ultimately aimed at restricting price competition; (3) all of the Cartelists exchanged gross price lists and information on gross prices, as well as other commercially sensitive information such as order intake, stock, delivery times, and other technical information; (4) most of the Cartelists engaged in the exchange of computer-based Truck configurators; DAF had access to at least three (and possibly four) of its competitors' configurators; the exchange of configurators helped the Cartelists compare their own offers with those of their competitors, which further increased the transparency of the market; and such exchanges also facilitated the calculation of gross prices for each possible Truck configuration; (5) the Cartelists discussed and informed each other of their respective planned gross price increases, and in some cases agreed those increases; (6) some of the Cartelists exchanged information on harmonising gross price lists for the EEA during bilateral meetings in 1997 and 1998; (7) the exchange of gross price lists and information on gross prices could be combined with other information gathered through market intelligence to enable a better calculation of another manufacturer's approximate current net prices than would have been possible otherwise; (8) such exchanges also placed the Cartelists in a better position to understand each other's European price strategy than on the basis of market intelligence alone, thus putting them in a position to take account of the information exchanged; (9) the exchange of information on gross prices may have influenced the price position of some of the Cartelists' new products; (10) the Infringement also included collusion in relation to net prices and net price increases; (11) the Infringement also included collusion on the timing for the introduction of emission technologies required by EU legislation, and the passing on to customers of the costs of those technologies; for example the Cartelists: (i) agreed not to offer Euro 3 compliant Trucks before it was compulsory to do so; (ii) agreed on a range for the additional price for Euro 3 compliant Trucks; (iii) discussed prices for the technology complying with the Euro 4 and Euro 5 standards; (iv) agreed not to introduce Euro 4 compliant Trucks until September 2004; and (v) shared information regarding the surcharges for EEV compliant vehicles; (12) the Cartelists engaged in the collusion through several layers of competitor meetings and*

other contacts at both the Headquarters level and the German subsidiary level; DAF further admitted that meetings took place regularly, and that the German subsidiaries reported back to Headquarters to varying degrees; and (13) Many of the specific examples of collusion which were pleaded by the Claimants in [18(a) to (ff)] were based on the disclosure from the Commission file".

Finally, some incontestable pieces of evidence are already known about the purpose, content and functionality of the cartel, which also involve Daimler and which reveal that the market for the sale and purchase of lorries was affected in very specific terms. Thus, again before the English jurisdiction and in the judgment [2023] CAT 6, 7 February 2023, Royal Mail: *"123. (...) (5) In an internal Mercedes email from Baldomero dated May 2008, there was reference to a 4.5% "exchange rate recovery price increase" by Mercedes and it discussed how much of that increase was likely to be achieved in increased transaction prices. Mr Jones added that "...DAF took a 4.5% price increase, including inflation, and advised me privately that they were budgeting on realising 2.4%". This (in addition to revealing evidence of the exchange of actual net price intentions between key competitors in the UK market) approximates to Mr Ashworth's evidence as to approximately half of the list price increase being reflected in the transaction prices but also illustrates how the Cartelists were able to gather confidential information about proposed changes in each others' net prices"*.

C) The Auren report is wrong and is useful for the solution of the case.

99.- As I have pointed out, from a judicial perspective, this type of litigation is characterised by the complexity of some of the evidence available for its solution, including the formulation of extensive expert reports with a strong economic accent, which seek to recreate a counterfactual scenario where the compensable damage can be observable, all through the management of a very large volume of data that are subjected to a process of intense and sophisticated analysis, for the expression of results that are once again in need of interpretation.

100.- If what is at issue is the creation of a jurisprudential rule indicating when and how the activity of the parties will be considered adequate for the solution of the case, consideration must be given to (i) the specificity of the test to be applied in this law, (ii) a remedy to the limitations of the judge's discernment, (iii) the meaning of the economic valuation that he is called upon to provide and (iv) the application of the doctrine of the Court of Justice when it emphasises that the accuracy of the existence and quantification of the compensable damage coexists with some unavoidable uncertainties.

101.- Because in recent years I have had sufficient opportunity to describe and analyse the expert reports presented here again for the solution of the case, in their different versions, as I have already summarised in the background to this decision, I would like to use this pronouncement to recreate this desirable jurisprudential standard, rather than to go into the content of one or the other expert report in more detail.

102.- On the first question, developing the criteria of evidentiary assessment established in the Sugar II judgment, which are also well known, in a judgment of 30 December 2019, where I also introduced some interpretative guidelines offered by the Provincial Court of Valencia in this regard and recension of other contributions taken from the Community *soft law* materials made available to national judges, I stated that: *"67.-*

From all this, after recognising who has to do what in a follow on process, to what extent this affects a judge of private application of competition law and before the evidentiary assessment, the expression of a real prejudice, thus: (i) That the limitations before which a person injured by an anti-competitive practice finds himself to offer a concrete quantification of the damage suffered, are diluted by the existence of a preceding procedural burden of which he is not the addressee (the accreditation of the absence of production of damage, which is incumbent on the defendant) and by the existence of a legislative and jurisprudential framework of evidentiary assessment that places a follow on process on a plane inclined and favourable to the estimation of private claims, in the context of a sanctioning law, competition law, which has begun a legislative and jurisprudential transition towards a tort law, without ceasing to pursue the same aims of deterring unlawful conduct and without altering the compensatory and non-punitive nature of civil liability for damages in which the private application of this law translates. (ii) That the preponderant role of economic science in the development of all aspects of competition law does not mean that, even recognising the tension that exists between the economic and legal meanings of this law, the judge should fail to resolve the issues that arise in accordance with strictly legal criteria and from an essentially legal perspective. The conflict between the parties is not economic, it is legal. The remedy given to resolve it, the process and its limits, are also legal and not economic tools. That is why judges always retain their discretion to assess the economic evidence provided by the parties to the process, just as they retain their discretion to assess any other evidence of a different nature. Therefore, it is not necessary for the judge, through his decision, to be able to enter into an economic dialogue with the experts presented by the parties and their opinions, because the solution of the case does not require this. (iii) In turn, it can never be ignored that economic theories and opinions themselves are subject to their own discussions, so that the choice of one or another method of estimation, the composition of the data samples, the selection and rejection of variables or the expression of one or another result, are never unquestionable. Therefore, it is sufficient that the quantification of the damages possibly suffered and the valuation of the expert opinions of the parties, be redirected to a simple judgement, more or less orthodox, but sufficient for the final solution of the case, considering the information available in the process and the conduct in it of each of the parties involved in the solution of that case. (iv) Although the judge alone can carry out an activity of criticism of the expert evidence, as in art. 347.2 LEC, there is a task of counter-analysis of the expert opinion presented by one of the parties that is only incumbent on the opposing party and that can only be carried out well by the opposing party, especially in scenarios of great technical and economic complexity. This is why, in my opinion, it is very artificial for judges to moderate the quantification of the damage offered by one of the parties themselves by partially rejecting its opinion without taking on another to replace it, in the absence of such a counter-analysis and of a more solid piece of evidence offered by the opposing party. When the judge descends to criticising particular aspects of the expert's report presented to him, which he will never understand comprehensively from a holistic and sensitive perspective, neither quantitatively nor qualitatively, his assessment can be very distorted and in reality be affected by contextual factors that are not those inherent to the expert evidence in question. The advantage for judges is that they do not need to do any of these things to offer good solutions and that, on the contrary, they can find those good solutions by relying on simple but effective economic judgements. The judge must avoid conducting himself with evidentiary scrupulosity, as an atavism or anchorage widely contrasted by the scientific literature: the positions of one and the other party intervene as maximums and minimums of quantification in the

judge's mens, who opts for intermediate quantification solutions, without having good technical (evidentiary) arguments to do so".

On the second question, more recently, in the judgement of 21 October 2022, I have stated that: *"122.- But I have also pointed out that the adoption of procedural management measures for the development of a more intense evidential activity is not only called upon to allow the intervening parties in this type of proceedings to reformulate their evidential strategies. It will also require a thorough critique of each party's attempts at quantification and thus allow for a more accessible interpretation and assessment by the judge. On the occasion of SJM no. 3 of Valencia, 24 February 2022, truck poster, I pointed out that: "33.- When the expert opinions are complex, extensive and clearly technical or when rhetorical approximations are no longer valid as sufficient tools for the analysis of an object that is obscure to the understanding of a jurist, it is the judge who cannot carry out the task of criticising an econometric expert opinion. This does not mean that it is impossible to assess a piece of evidence or that I renounce the exercise of the discretionary task of assigning damages that I am entitled to as a judge. But I must emphasise that the judge cannot do this in a global way, on his own and without a previous and adequate auxiliary work of the opposing party in question. Otherwise, the analysis of the expert evidence is summed up in a selection by result, as a criterion on which the (applicable) jurisprudential state has been visibly built (...). 34.- To maintain the contrary, i.e. to consider that the judge can assume or refute a study of these characteristics on his own, is either a marked exercise in voluntarism or simply an elaborate fallacy. In reality, this problem is apparent and is resolved by two fundamental and accessible maxims. First, that, if the judge had sufficient technical expertise to analyse such an object of evidence, he would not need the help of an expert to resolve the case by means of an orthodox and non-alternative quantification of the damage. In other words, the nature and function of expert evidence preclude such a voluntaristic approach, as an expert report is based on the expression of a science that the judge lacks. Secondly, that tort litigation in general is recurrently explained by the confrontation of different expert opinions on quantification and by the simultaneous and reciprocal criticism of one and the other opinion by each of the parties involved in the proceedings. This is what happens in any damage proceedings before the Spanish civil jurisdiction. Unreasonably, this allegedly false speciality of Competition Law, i.e. that one party can be relieved of the burden of thoroughly examining the expertise presented by another, seems to have excluded the most common experience in tort litigation. 35.- On the contrary, each party to the proceedings should, through its team of experts, undertake the censorship of the data obtained by the other parties and without relying on a single scruple for its rejection. Next, it should refute the choice of quantification methods, approaches and assumptions that drive the study in question. Finally, it should seek to reproduce the econometric study in which it is summarised, to confront it with its own contradictions or inadequacies. And, only when this has been done and by means of sufficient documentation, could the judge then develop a critical conviction on the aptitude of the evidence provided by one side or the other to resolve the process. In short: the civil judge, on his own, cannot identify what is wrong with an opinion such as the one presented by Agustina, even if he intuits it to be deviant, because it is inconsistent with the nature and characteristics of the sanctioned offence, the context of the proceedings and the result of the rest of the evidence in the case. Nor should it do so, even if it could, since it cannot replace the evidential activity of the parties in the proceedings*".

104.- On the third question, again in the judgment of 30 December 2019, I stated that: *"68.- Thus, in the major and minor case law reproduced above and in the documents suggested by the Commission, which determine this starting point for the expert analysis in the follow-on proceedings, it is sufficient for the judge, in order to assess the expert opinions brought to the proceedings, to carry out a verification task that intellectually goes through the following stages (taking as a reference the Passing-on Study, Chapter VI, "39 steps: a checklists for judges", pp. 181-205): (i) A pre-judgement must be made on the evidence that indicates that there is no evidence that the expert opinion was not admissible. 181-205): (i) A preliminary assessment must be made of the evidence indicating the existence of overpricing and the possibility of its downstream impact on the market affected by the infringement. (ii) There must be a sufficient understanding of the market affected by the infringement, as a preliminary economic consideration, discriminating which factors are involved in the determination of prices, which are affected by the infringement and which may not be, which requires a thorough fact-finding on the effects of the infringement. (iii) The choice of models for estimating the degree of pass-on of overcharging must be justified. (iv) If a comparative assessment is made between the evolution of the infringing market and another nearby market, the selection of that analogue market must be sufficiently justified. (v) Any assessment must be an individualised one, so as to discriminate how each infringing undertaking has intervened in the cartelised market and to analyse the possible capacity of the addressee of the conduct to bear, where appropriate, a higher or lower threshold of pass-on of the overcharge applied by the cartel. (vi) The robustness of an estimate will depend on the degree of transparency with which each expert explains what data he has taken into consideration, how he has obtained them and what their quality is, what valuation method he has used and why he has decided to do so, what are the quantitative and qualitative valuations that support his conclusions and, finally, how he has subjected his conclusions to the assessment of the cartel, finally, how he has subjected his own conclusions to criticism, disregarding the presence of confounding factors, reformulating his estimates using different variables and, in any case, expressing the reliability of these conclusions in terms acceptable to economic science".*

105.- And, on the fourth question, I now propose these jurisprudential guidelines: (i) The economic emphasis that must lead the judge to the formation of his conviction and the expression of the motivation that supports it, does not have as its object and purpose the substitution of the function that the expert is called upon to perform. (ii) In excess of what I am prepared to concede in terms of suitable presuppositions for recourse to the judicial assessment of damages, I do not consider acceptable the intellectual misunderstanding that Daimler seems to suggest in his last conclusions, which can be expressed as follows: that the judge should not hide, no longer behind the power of judicial assessment of damages, but should go out to meet his expert evidence in order to assess it according to the language and terms in which it is formulated. Because what Daimler is seeking, I would remind you again, is firstly, a judicial pronouncement declaring that a presumption of damage is not applicable to the solution of the case, and secondly, the assumption of an expert opinion, that of E. CA Economics, which excludes any type of damage.CA Economics, which excludes any type of effect caused by the infringement on the market and, thirdly, as a residual defence, the exclusion of the applicability of an alternative judicial assessment. (iii) Daimler cannot impose on any judge what sound criticism should consist of as an interpretative criterion referred to in Article 348 LEC and in the case law developments that are observable here. Nor, of course, can the plaintiff. (iv) On the contrary, the economic biases that a judge must

assume when assessing the evidential material of this kind are those that inspire the complex formulation of competition law, which is not only of a legal nature. (v) For example, that the meaning, function and effects of a cartel infringement is not only to make an oligopoly more transparent, but that cartel means coordination, if necessary through information, for the projection of that effort into a concrete result and effect on the market. (vi) For example, the assumption of correct valuation criteria to investigate the orthodox selection of methods for calculating the surcharge, suitable data for that purpose and a solvent expression of the results of that analysis. (vii) For example, a qualitative vision of the significance of the deterrent nature of the Law of Damages, as an added functionality to the merely compensatory and for the avoidance in the future of events such as the one in question, which compromise legal assets of a supra-individual nature and entail a terrible social cost. Because this is the meaning of the complementary relationship between the public and private facets of competition law. (viii) In short, the judge must remain attentive to all the qualitative guidelines that are appropriate to be able to give sufficient economic meaning to concepts that he initially perceives as exclusively legal. (ix) Well, a judge of private enforcement of competition law conducts himself in an acceptable manner in terms of economic valuation when he perceives that, among the elements that inform the rule of liability for damage, the causality inherent to the antitrust damage following a cartel infringement is merely hypothetical and that, for that reason, the damage can only be observed in probabilistic terms. And that is the link between the legal and economic meanings of uncertainty in the assessment of the available evidence to which the Court refers.

106.- The dispersion of the evidential assessments of Spanish judges can be summarised in four positions which, as they are well known and in addition to what I have already pointed out when recreating the framework of minor jurisprudence that I have abandoned, I will not gloss over. The first position is that of those of us who seem willing to assume, at some point, the effort of quantification proposed by the injured parties. The second position is that of those who, in my opinion voluntarily, try to reduce the economic extent of the actors' quantification reports for the reformulation of some of their terms, by means of the particular selection of some of their parameters, here and there, but omitting that the parameters and results subject to judicial assessment are an expression of the whole and incurring a terrible risk of artifice in the final evidentiary assessment. But this intellectual activity certainly has nothing to do with the judicial estimation of the damage, but rather with evidential moderation, out of mistrust and without being able to specify concretely why the evidence that is mistrusted is not disregarded. The third position, as I have already said, is that of those who convert the judicial estimation of damages into a standardised solution for private antitrust litigation, without taking into account the evidence in the case. The fourth position, very isolated, is that of those who have granted convincing power to the expert reports submitted by the defendants.

107.- As I have already said, I granted convincing power to a more complex expert report than the one presented by the plaintiff in these proceedings but which, at least partially, corresponds to it. In particular, in my judgment of 30 December 2019, I stated that: *"73.- Indeed, I believe that the CCS report sufficiently withstands examination according to the evidentiary assessment criteria set out above, as follows: (i) The report is based on an interpretation of the characteristics of the infringement sanctioned by the Commission that is consistent with the view set out in the relevant grounds of this decision. (ii) Together with this initial evidence, the report analyses and develops the*

presence of other evidence that makes it possible to contrast the plausibility of the repercussion of cost overcharges in the truck market, through the alteration of gross prices and, to the final recipients of the products in the form of net price, through the common channels of distribution of these products and according to the different and usual alternative ways of marketing these products. (iii) The experts have proactively searched for data on which to develop their models, which appear suitable to recreate the effects of the infringement and which have been made available to the defendant at the outset of the proceedings or at a later but equally relevant point in time. (iv) However, the CCS report appears to be suspicious of its data, of the methods that could be applied in the case and of its own calculations: it therefore subjects its assumptions, its data and its methods to a redundant treatment, through an alternative study that determines, in both cases, a close result. (v) The study is not satisfied with the expression of an average overcharge, but tries to individualise the damages possibly suffered by the plaintiff by recreating a chronological iter of the cartel's increased efficiency in passing on overcharges over time. (vi) In short, the CCS report is quantitatively and qualitatively transparent, very intensive and, for all these and other reasons, convincing in the absence of a better-founded report that would refute it or that would quantify the effects of the infringement in a different way or that would at least moderate its conclusions. (vii) In a commendable exercise of procedural fairness, Agustina has considered the qualifications of the experts who signed the CCS report to be "unimpeachable" and that the database used for its development is "abundant and complete" (letter of 27/12/19, third conclusion)".

108.- Well, although the infringers' criticism over the following years has been increasingly intense and extensive, at the time that judgment was handed down I had already had the opportunity to dismiss the relevance of the same inadequacies in the formulation of that expert report that Daimler has again highlighted in these proceedings, either through its response (fact 4.7), or through the E.CA Economics report, or during the main hearing, or when they were summarised again in its closing arguments of 1 March 2023. And I have upheld this conviction precisely in proceedings against Daimler, as in the judgment of this court of 15 September 2020, for the following reason: *"Econometrics tries to overcome all these obstacles, with certain unrealistic assumptions that are given as probable and that can be excused by the unavailability of all the appropriate and necessary data for an inaccurate but probable estimate to become an accurate one. Finally, the Caballer/CCS report is not only inaccurate, but also useful. On the contrary, the E.CA Economics report does not fulfil this function for the final solution of the case"*.

109.- Because, as was the case then, only that expert report now intervenes as suitable and sufficient evidence for the solution of the case. Only that expert report aims to quantify the effects of the infringement on the market, at least after a correct assumption of the meaning of what was decided by the competition authority, the acceptable outcome of a plausibility judgment on the harmful nature of the conduct and the logical correspondence between an alteration of gross prices and its impact on the formation of net prices. That is, the production of compensable harm and the concordance with economic findings as relevant as those I have set out above.

110.- That does not mean that, in carrying out this quantification exercise, the team of experts who underwrote it did not make errors which cannot be avoided. In particular, I consider the line of criticism employed by Daimler's experts to be a very suggestive and

convincing one, which consists in explaining, in a manner comprehensible to a judge, that a qualitative assumption regarding the full correspondence of gross and net price increases in absolute terms is not admissible. For the latter would be particularly affected by magnitudes outside Daimler's ability to organise its economic means to implement the effectiveness of the cartel, such as the evolution of economic cycles impacting on demand, the increase in production costs and the purchasing power of the injured parties when it was available to obtain discounts, which are not always homogeneous. But the problem is that, if I will still censure very strongly the performance of the assistants of the plaintiff in the process, I must warn that the work of criticism carried out by E.CA Economics is not much more fortunate. Because Daimler's expert team does not use all these nuances to reformulate the plaintiff's expert's report in terms that can be accepted by the court. On the contrary, this expert team takes up a completely contradictory and equally extreme point: the absolute lack of correspondence between gross and net prices, which at this stage of the litigation in this case should be untenable. In other words, not only does the plaintiff's deficient expert criticism prevent me from making a more economically well-founded decision in the case, but E.CA Economics' allegedly critical work, which is not such because it is based on an amendment to the Auren report in its entirety, does not allow me to moderate its results either.

111.- And, in the development of that hypothetical judgment on the quantification of the effects on the market of an infringing conduct which, unquestionably, did produce them, I must point out that it is more admissible to me that those effects can be quantified in the way that the Auren report suggests, rather than as proposed by E. CA Economics, that is to say, in no way at all. And this is the expert corollary of Daimler's delicate legal strategy, which is quite wrong, when for all useful effects in the proceedings it invariably seeks the dismissal of the claim. Thus, the Auren report is not only useful to prove a theory of damage in terms of plausibility, causation and imputation. The Auren report is also useful as a tool for the quantification of the damage, according to the probabilistic nature of the evidence to be used in these cases, which is compatible with the tolerance of errors that push the judge's decision not to the abyss of the difficulty of quantification, but to the uncertainty of a judgement of this nature that is acceptable as inevitable.

112.- The economic content of my evidential assessment exercise is therefore that of full acceptance of the Auren expert report and the manifestation of my power and responsibility as a judge, from which I will never shy away, is the tolerance of its inaccuracies.

D) The E.CA Economics report is wrong and not useful for the solution of the case.

113.- For the reproach of the qualitative biases of this expert report, when it was still content with a mere criticism of the opinions submitted on the contrary and the development of a hollow analysis on the lack of plausibility of the harmful nature of the infringement sanctioned, on the occasion of the judgment of 7 May 2019 I pointed out that: *"78.- Without the development of a method for calculating damages - or the absence of damages - based on a comparison of the evolution of gross and net price lists (or the evolution of production costs or any other acceptable econometric model), Ms. Nicolasa's quantitative assumptions are partial and Ms. Nicolasa's assumptions are not plausible. (i) That the fixing of a gross price for a product is a magnitude without any impact on the fixing of the net price of the same product, as if this second type of price were an autonomous entity, detached and distant from the prices of the first type,*

which, on the contrary and necessarily at least at some point, should be its origin (as found by the Decision in its paragraphs 27 and 28, already reproduced, on price-fixing mechanisms). (ii) That the exchange of information on a sensitive element of production between competitors in the same market (e.g. the price of their products), with the avowed aim of homogenising that element of production between all those producers and in the market in which they operate as a whole, is an effort that is unlikely to achieve the objective pursued, even if those same producers have an infrastructure that seeks that result in a sustained manner over time (an assertion which, in addition to being illogical, is contrary to the finding of the Decision in paragraph 2, reproduced above, on the objective scope of the infringement). (iii) That in the context of that infrastructure of communication, cooperation and agreement sustained over a long period of time (cartel) the producers are incapable of coordinating and conditioning their economic activity, precisely in those aspects that have motivated the creation of that infrastructure and the agreements reached by the group (a statement which, in addition to being illogical, is contrary to the findings of the Decision in paragraphs 51-53, already reproduced, on the material scope of the infringement). (iv) That the complexity of the products on the market in question acts as an ultimate and insurmountable barrier to the supervision of the conduct of the producers included in the group, when precisely one of the premises of the group's operation has been to make that market transparent in terms of its allegedly more complex aspects, an effort later found by the competition authority in the supervision of the group's operation (a statement which, in addition to being illogical, is contrary to the findings of the Decision here: "(48) Similarly, the exchange of configurators helped the comparison of own offers with those of competitors, which further increased the transparency of the market. In particular, it could be understood from the truck configurators which extras would be compatible with which trucks, and which options would be part of the standard equipment or an extra. All of the Addressees, with the exception of DAF, had access to the configurator of at least one other Addressee. Some configurators only granted access to technical information, such as bodybuilder portals, and did not include any price information'). (v) That in the context of a group which partitions the Community market by operating in each local market through a subsidiary and national company of that market, the fact that the same product may be sold to the final recipient on different economic terms depending on whether the purchase takes place in one or the other national partitioned market is incompatible with the passing on of injury in the form of a price premium. (vi) That the possibility of applying discounts to a net price calculated on the basis of another gross price which has not been fixed under conditions of competition converts a non-competitive market into a competitive one, spontaneously and while the infrastructure created by the group remains in operation (a statement which, in addition to being illogical, is contrary to the finding of the Decision in paragraph 25, already reproduced, on the implementation of the cartel agreements through the network of subsidiaries and retail dealers). (vii) That the relevance or irrelevance of the bargaining power of a buyer of a cartelised product must be considered according to its possibility of obtaining discounts on the non-competitive selling price set by the group, if that magnitude, the discount, is structural and constant in that market and therefore pre-determinable; and not by the impossibility of acquiring a homogeneous product not affected by the anti-competitive practice, i.e. from a producer not included in the group and in turn freed from the possible umbrella effect. All this in the context of a cartelised market with respect to virtually all producers in the same class. It is clear from Ms Nicolasa's own statements that the granting of discounts was a common feature of the market and therefore, because of its pre-deductibility, of little relevance in establishing the

impossibility of passing on additional costs, from which it is clear that the discount was intended solely for commercial purposes or with a view to suggesting to customers and not as a genuine position of strength for them or to affect the price determination processes of the defendant and other cartelist undertakings. In connection with this section, I consider the fluctuations in market shares summarised on page 11 of the opinion to be of little relevance, and which in any event refer to minimal transfers of customer shares between infringing companies (in the Iveco, Renault and Volvo cases, and also in the documentary contribution in the annexes, in which documentation is also provided on Agustina and Scania). (viii) However, in the final link in E.CA Economics' reasoning, an equally inconclusive corollary can be seen. If the final recipients of the cartelised product could not in any event be harmed by the cartelised conduct of the European truck manufacturers, who would have been potentially harmed by that conduct? Their subsidiaries? The dealers who dealt with them? However, even if that circumstance were established, it would not exclude the possibility that recipients of the kind of those of the plaintiff could have suffered damage, as indirect injured parties and in accordance with an interpretation of the ex re ipsa rule with the presumption of Article 14(2) of the Damages Directive. (ix) In short, it is not a question of the distance between gross and net prices or the presence of other factors affecting that net price, but of the transmission of damage in the form of overcharging. The defendant's report does not succeed in disproving the lack of transmission of that damage or its full absorption without repercussion by a third party other than the plaintiff, prior to his contact with the cartelised product, because the conclusions which the expert offers on those points are of a qualitative nature and the quantitative elements which are set out in the report are not provided for the recreation of an alternative method of quantification of the damage to that assumed by the plaintiff, but only to establish the presence of factors which would make it impossible to increase the net price paid by Mr Hernán in a correlation of 100% of the net price paid by the plaintiff. Hernán in a 100% correlation between gross and net prices".

114.- Since then, the E.CA Economics team has significantly increased the intensity and ambition of its performance. But nothing has changed for the solution of the case, for the following reasons.

115.- Firstly, because this expert opinion is perhaps a sophisticated and painstaking piece of evidence which, nevertheless, does not correspond to a postulation discourse to be accredited. I have said it before. Such an intensive and complex expert report is of no use if, before that, Daimler is unable to offer a reasonable and justified explanation as to why and for what purpose it participated in a cartel for fourteen years. Again, I will share the reasoning of the judgment [2023] CAT 6, 7 February 2023, Royal Mail: "*477. The first question we need to address was whether, based on a balance of probabilities test, the evidence points to the existence of a cartel Overcharge. We conclude that it does. There are sound a priori reasons for expecting that a concerted attempt by all the major European truck suppliers to restrict price competition that persisted over a 14-year period would to some extent have succeeded in materially affecting transaction prices. Further, whilst there are legitimate criticisms to be levelled at Mr Harvey's estimates of the effect, particularly with regard to the way his analysis approached exchange rate issues, we also consider it is clear that these criticisms do not justify the extreme approach of dismissing all positive Overcharge results. 478. Accordingly we find that the Claimants have established the requisite causation to complete their cause of action*".

Second, because, if in the empirical context that I have set out throughout this resolution, E.CA Economics is unable to consistently find a statistically relevant trace of cartel effects, it is for one of two reasons. The first is because it obtains statistically robust and consistent answers to incorrect questions. The second is because it dilutes any linkage between the manipulation and alterations of gross prices and their necessary impact on net prices to any appreciable extent, by the feverish hatching of factors (their "costs", "product mix" and "demand") that, in the development of his method, push any effect the cartel might have had on net price formation into statistical marginality. His report is thus affected by a pronounced flaw of multicollinearity which, admittedly, I am not able, on my own, to defuse in any depth. But I can warn that economics is a language. And an econometric report is an explanation. That is why the concepts used there are not univocal: things can be explained in many ways and using polysemic concepts. And, if a team of experts so chooses, they can explain the economic effects of a cartel without using the word cartel, i.e. without attributing a specific content to the cartel variable. E.CA Economics' model is robust to the extent that it omits a variable, the cartel, to which it first proposes to attach no meaning according to its qualitative assumptions about the sanctioned conduct.

117.- In relation to this last point, any finding on the effectiveness of the cartel as an alternative quantification scenario to the one proposed by the plaintiff must be disregarded if, first, for the expert team itself that developed the method and reached that result, it is one without statistical significance, that is, a calculation residue, an inexplicable detritus which, secondly, does not correspond to a subsidiary request by Daimler for partial acceptance of the plaintiff's claim for overrepetition.

118.- Time has passed, I have resolved this case a hundred times, mostly by replicating the doctrine of minor jurisprudence that I have abandoned here, and I am still searching for an answer that will stimulate better litigation. It has become increasingly clear to me that, if the plaintiff's expert team disregards the application of factors that could reasonably lead to a lessening of compensable harm, the defendant's expert team posits a model by reverberation of those factors to exclude any trace of compensable harm.

119.- The lack of loyal cooperation on the part of the plaintiff, its lawyers and experts in the transparent criticism of the defendant's expert opinion could not be more marked and, for this reason, my assessment of the E.CA Economics report is poor. It is completely reprehensible that, firstly, the plaintiff's entire critical effort is summed up in a brief note signed by its experts after the unsuccessful implementation of the measure of access to sources of evidence agreed in the proceedings and then, according to what the counsel assisting it on the occasion of its last pleadings, in a surprisingly more intense manner than its own experts had the good fortune to do. Their effort is so minimal that it can only correspond to one of two possibilities: either those professionals are not interested in strategic terms in developing that activity of intense criticism that any damage process requires, as the Court of Justice suggests, or they simply lack the appropriate professional qualifications to do so. Because the value of the criticism that they are called upon to provide to the judge does not correspond, for example, to the suggestion of qualitative errors regarding the composition of comparable data sets or the appropriate treatment of certain variables. For that is already something within the judge's reach. It is a question of the plaintiff's experts being able to reproduce the model of the defendant's experts, purifying it of their alleged errors and to achieve other

results, without distorting the models in an aberrant manner. In other words, the same thing that E.CA Economics has not done either. Only then can the judge understand the reason and extent of the methodological contradictions of the experts.

120.- Perhaps this last point is relevant for the expression of an additional jurisprudential guideline: judges in the private application of Competition Law should not allow themselves to be excessively influenced by the extreme that, as is clearly the case here, the infringer can bring together greater professional talent than the injured party to present his evidence in the proceedings. Because this is probably the most common situation, especially in the context of a *legal economy* such as Spain's, characterised by its fragmentation. Perhaps Daimler has always been aware of this situation. Thus, its *"poisoned apple"*, if I may recapitulate once again a consolidated jurisprudential criterion for this judicial party and which is already incompatible with the doctrine of the Court of Justice, never consisted in its insistence on the need to implement in these proceedings measures of access to sources of evidence, as a procedural institution with Community legal endorsement and which are the appropriate way to conduct this litigation in the future. On the contrary, Daimler has always exhibited great confidence in the solvency of its assistants, just as it is also aware that judges alone cannot technically refute its quantitative contributions. As I have already explained, this is not the role of the judge. And, of course, what judges can do is to censure their biases, to strike out their qualitative bases and, in a roundabout way, to point out that they are only due to an alignment with the interests of their clients if they insistently deny what for this case is more elementary.

121.- So nothing in these proceedings makes E.CA Economics' expert report more than what it is in order to provide an adequate solution: a useless tool. Perhaps it is time that the evidence necessary for the rebuttal of the presumption of compensable damage, which now seems incontestable, is effectively made available to this expert team. Perhaps in this way different questions will be asked in order to obtain correct answers and the analytical effort to support them will be based on impartial qualitative assumptions about the relevant facts for the solution of the case: the infringement, its characteristics, its economic content and the application that Daimler made of all this for the coordination and increase of its sales prices and the passing on of costs to its customers for fourteen years, first examining the behaviour of its employees and managers. Otherwise, as long as the expression of its model is strongly conditioned by variables provided exclusively by Daimler and which are not transparent, such as the development of its costs, when no concrete information on the functioning of the cartel is ever disclosed and seems not to have been made available to the experts either, the solution of the case will remain doomed to the open rejection of this expert's report.

122.- The raising and resolution of the Tráficos Manuel Ferrer preliminary ruling did not seek to overcome the open inadequacies of the jurisprudential state of the question in our country, which of course also affect my own decisions. I only intended to relocate the solution of the case in a suitable space for the *"confrontation of arguments and expert opinions in the framework of the contradictory debate"*, causing the restriction of access to the judicial estimation of the damage and to conduct the successive prosecution on a minimum basis of loyal collaboration between all the operators involved in the process. Trying more and better, in order to require judges to deliver better judgements. After the judgement of the Court of Justice, much remains to be done. Because the solution of the case remains at a crossroads and still requires further

developments, which cannot be achieved without the appropriate jurisprudential stimuli.

123.- For the cartelists, this resolution should be the definitive stimulus to abandon a procedural strategy of maximums and that seeks the global rejection of all the claims presented by the different groups of affected Spaniards. Simply because they are not going to succeed.

124.- For the group of affected parties that is hidden behind this process (because another of the realities that the recent SAP Valencia, 9th , no. 185/2023, rapporteur Purificación Martorell Zulueta pretends to ignore is that these groups of affected parties exist and that, therefore, proportionality judgements on the costs of a measure of access to sources of evidence should not be made taking into consideration only the perspective of an individual injured party), this decision which, if upheld, will waive the award of costs, which in itself is already a significant economic stimulus, should also be a starting point for reflecting on the suitability of up to two possible successive routes. Firstly, retaining a procedural strategy that has already failed, because there are more Spanish judges who refuse and will refuse to grant usefulness to their attempts at quantification for the solution of the case, while opting extensively for recourse to a judicial assessment of the damage disfigured in its formulation, content and purpose to that which was originally incorporated into the judgment of this court of 20 February 2019. As happened on the occasion of the valuable judgment [2023] CAT 6, 7 February 2023, Royal Mail, all estimation exercises are similar, but some are more similar than others: some are laden with perhaps misguided purpose and others are a journey to nowhere. The estimation of this court's judgment of 20 February 2019 was intended to intervene as a subsidiary remedy against the defendants' evidentiary passivity and for a precursor jurisprudence of a minimum economic content for the presumption of harm after cartel, without making that a standardised solution for private antitrust litigation. The evidentiary assessment of the Royal Mail judgment, which is not really an estimation exercise, pursues the open compromise solution of all proceedings pending before the English jurisdiction.

125.- It is also obvious that each of the judges' solutions presents its own problems of compatibility with the latest Community case law. And, as Daimler rightly points out, the bases for the extensive application of an abnormal solution for a damages process such as the judicial estimate that, erroneously, is normally being used by Spanish judges, are incompatible with the doctrine of the Court of Justice. I think so. Secondly, this should also be a suitable incentive for the claimants, as it seems inevitable that this judgment will be corrected by the Provincial Court of Valencia. Because the latter is a statistical certainty without apparent fissures for my constant work on this case. If the Provincial Court of Valencia insists on the solution by standardised estimation of this case, it is possible that its view of the premises and purposes of the institution will be challenged before the Supreme Court and under the protection of the doctrine of the Court of Justice. Depending on the ordinary and full nature of the second instance, perhaps this group of claimants can still vary a procedural strategy refractory to a fuller evidentiary activity, to combat through the appropriate channels, which are those of access to sources of evidence, the mistrust generated on the accuracy of their expert opinion, starting with the intense criticism of the expert presented by Daimler, perhaps accepting a part of their approaches and data for the correction of the errors of their own models and thus obtaining a smaller, but more solid, quantification of their compensatory claims. My task is not to persuade the Audiencia Provincial de Valencia to change its mind,

because that is a matter for the parties in this case, especially the plaintiff as she is favoured by my ruling. Of course, that will place it in a different position from the treatment that, following the Court's ruling, purely speculative claims undoubtedly deserve, i.e. that of the complete rejection of unfounded compensatory claims. This certainty gained by Daimler should also lead it to grant more than it does at present when the litigation is not speculative. Perhaps Daimler could make an effort to try to better discriminate the compensatory claims of those who were reliably its customers, were harmed by its unlawful conduct and sufficiently present their claims, as opposed to those other claims that are merely the manifestation of an abuse of rights.

126.- The latter also means that there should still be room for a different and common procedural strategy: the settlement of this case and the rest of the cases before this court involving the same stakeholders. The settlement costs for both groups are low. The cartelist will not additionally pay out much more than he will undoubtedly do as a consequence of the average projection of the Spanish judges' damage estimates and, on the contrary, by settling the appropriate groups of cases, he will clarify those other cases that deserve dismissal without recourse to a judicial estimate of the damage due to their speculative nature, more than compensating the transaction costs he may have previously incurred in order to terminate the first kind of litigation. Injured parties such as the plaintiff, for their part, will not renounce a compensation quota which, in the same average projection, has never been recognised as such by the majority and, on the contrary, they will avoid the costs associated with the imperative adaptation of the doctrine of Spanish judges on the assumptions of the judicial assessment and the dissemination of the measures of access to sources of evidence that the Court of Justice demands. And that is what explains why the judicial outcome of the Tráficos Manuel Ferrer case, at least as far as this instance is concerned, will not be important unless both parties decide to do something truly different and useful.

127.- Because, in this sense, in the terms that can be discussed procedurally in an open and contradictory manner, I expressly offer the parties confidential treatment, for the purposes of articles 232.3, 234.1 LOPJ and 15.2 LSE, of the economic content of any settlement agreement that they manage to reach immediately after the pronouncement of this judgement, to replace the terms of sentence that I will offer here with any other terms that do not violate public order and with the effectiveness of res judicata that can be enforced.

128.- And, to allow this achievement, with analogical application of article 19.4 LEC, I agree to suspend the proceedings for a period of sixty calendar days from the date of pronouncement of this judgement, with the period for lodging an appeal starting to run from the next working day after its expiry and without the need for new impetus from the parties or the court.

E) Interest

129.- Finally, the application of interest offered by the Auren report and requested by the plaintiff is also compatible with the position taken by this court in the judgment of 30 December 2019, which is sufficiently well known to the parties and which I will not reproduce.

Seventh: Absence of acceptable evidence of the impact of cost overruns.
130.- The E.CA Economics report does not offer a concrete and non-theoretical exercise that would make it possible to assess the existence of the passing on of additional costs and their quantification, either through the increase in the prices of the services provided by the actors to their clients or by reason of the resale of the cartelised products to third parties. All this according to the jurisprudential state of the matter that I have set out and to which I again refer.

Eighth: Costs of the proceedings.

131.- Without an order for costs, as there were doubts as to the facts under article 394 LEC. By virtue of the aforementioned precepts and others of general and pertinent application,

FAILURE

I uphold the application and, on that basis, make the following rulings:

Declare that Daimler is jointly and severally liable for the damages suffered by the plaintiffs as a result of the infringement of competition law declared by the decision of the European Commission of 19 July 2016, Case AT.39824. S

2. order the defendant to pay the costs:

(i) Payment to TRAFICOS MANUEL FERRER SL of 253,392.54 euros for damages suffered, of which 188,785.82 euros corresponds to the excess price paid and 64,606.72 euros to the updating - at the date of the expert's report - of that amount, by application of the legal interest rate, plus interest accrued from that date until full payment.

(ii) Payment to Juan Antonio of 26,813.31 euros for damages suffered, of which 17,862.49 euros corresponds to the excess price paid and 8,950.82 euros to the updating - at the date of the expert's report - of this amount by applying the legal interest rate, plus the interest accrued from that date until full payment.

3.- In the terms that can be discussed procedurally in an open and contradictory manner, I expressly offer the parties confidential treatment, for the purposes of articles 232.3, 234.1 LOPJ and 15.2 LSE, of the economic content of any settlement agreement that they may reach immediately after the pronouncement of this judgement, to substitute the terms of sentence that I offer here for any other terms that do not violate public order and with the efficacy of res judicata susceptible of enforceable execution.

4.- I order the suspension of the proceedings for a period of sixty calendar days from the date of pronouncement of this judgement, with the period for lodging an appeal starting to run from the next working day following the date of its expiry and without the need for any further action by the parties or the court.

5.- Not ordered to pay the costs.

An appeal is possible.

Notify it.

I agree, pronounce and sign.