ADMINISTRATION
OF JUSTICE

MERCANTILE COURT No 1
OVIEDO

SENTENCE: 35/2021

C/ LLAMAQUIQUE S/N

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ORD ORDINARY PROCEDURE 0000245 /2019-B
Originating procedure: /
On OTHER MATTERS
PLAINTIFF, PLAINTIFF [*Redacted*]

Procurator: EVA CORTADI PEREZ
Lawyer: JAIME CONCHEIRO FERNANDEZ
Defendant: DAIMLER AG
Procurator: MARIA ANGELES PEREZ-PEÑA DEL LLANO
Lawyer: PAUL ANTHONY HITCHINGS

PRINCIPADO DE
ASTURIAS

Signed by: ALFONSO MUNOZ PAREDES
12/04/2021 14:27
Minerva

JUDGMENT

In Oviedo on 12 April 2021, Alfonso Muñoz Paredes, Judge of the Mercantile Court No 1 in Oviedo, having regard to the proceedings in the case of Ordinary Judgment proceedings pending before this Court under registry number 245/2019, brought in tort action by [*redacted*], who appear represented by the Procurator Ms Cortadi Pérez and under the legal assistance of Mr Concheiro Fernández against DAIMLER AG, which appears represented by the Procurator Ms Peña del Llano and assisted by the lawyer Ms Pérez Carrillo.

BACKGROUND

FIRST. [*Redacted*] brought an action for ordinary proceedings against DAIMLER AG in which, after stating the facts and law which they considered to be applicable, they sought an order that:

1. Mainly

1.1. Declares that the defendant is liable for the claimed damages amounting to [*redacted*] suffered by my clients, as a result of the infringement of competition law.

1.2. Orders the defendant to pay the above amounts and, if applicable, statutory interest from the date on which the application was lodged and, subsidiarily, from the date of the judgment.

2. Subsidiarily, in the event that the above request is not complied with:

2.1. Declare that the defendant is liable for the damage which is established on the basis of expert evidence as a consequence of the infringement of competition law.

2.2. Order the defendant to pay the sums resulting from the evidence adduced and, if appropriate, the statutory interest accrued from the date on which the action was brought and, alternatively, from the date of judgment.

3. And order the defendants to pay the costs involved.

SECOND. Once the application was admitted for processing, the defendant was summoned to reply, which it did by opposing the application.

THIRD. It has been agreed to coordinate the processing of procedures Nos. 130, 184, 245, 268, 276 and 396, all of 2019.

When the parties were summoned to the preliminary hearing, they confirmed their respective pleadings and motions, requesting that the case be heard as evidence.

The parties were summoned to trial (held in two sessions on 8 and 24 March 2021), the evidence proposed and admitted was heard, with the result that appears in the case file, and the case was set for judgment.

LEGAL FUNDAMENTS

FIRST. *Positions of the parties*.

The plaintiffs bring an action for damages arising from non-contractual liability (Article 1902 of the Civil Code). This is, in particular, a follow-on action, in so far as it follows the Commission Decision of 19 July 2016 relating to a proceeding pursuant to Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area ("the Decision" from now on).

The Decision, which is available only in its provisional and non-confidential version and is the only authentic text in English, imposes substantial financial penalties on certain entities, including the defendant "[b]y colluding 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 applicant submits that the decision penalises, among other anti-competitive conduct, the pricing and increase of gross prices for trucks of 6 tonnes or more, which necessarily had an impact on net prices, which is the sole subject of its complaint, leaving aside the possible effects of the other conduct assessed by the Commission.

In order to calculate the overcharge paid, and within the methods offered by the Commission's Practical Guide for quantifying the damage in actions for damages for breach of Articles 101 or 102 of the TFEU, it opts in its expert opinion for a double method; as the main method, a comparative synchronic method which takes as comparable or counterfactual non-cartelised markets the light truck market (first level of analogy) and the van market (second level); and, as a support or comparison, a comparative diachronic method between the cartelised period (which it divides into two halves) and the post-cartel period. The expert opinion submitted by the complainants is hereinafter referred to as the "Caballer-Herrerías opinion" in reference to the leaders of the two teams of experts who took part in its preparation.

The synchronic method gives an average price premium of 16.35% when the comparable market is light trucks and 19.87% for vans, which is the most conservative overpricing calculation. The diachronic gives an average price premium of 13.85% for the first half of the cartel (1997-2003) and 23.46% for the second half (2004-2010), for an average of both values of 18.67%.

To calculate the surcharge in the main method, the Caballer-Herrerías opinion is based on the gross prices published by the magazine *Transporte Profesional* of the Spanish Confederation of Freight Transport (Confederación Española de Transportes de Mercancías, CETM). The idea behind the opinion is that the increase in gross prices has been passed on in full to the net prices paid by the end client, given the impossibility of their absorption by dealers and distributors, who have a minimum margin.

The vehicles included in this claim are:

1. For [*redacted*], registrations [*redacted*] and [*redacted*], both subjects of leasing contracts dated 9 April and 22 February 2001 respectively, for amounts, also respective, of [*redacted*] and [*redacted*].
2. For [*redacted*], registration [*redacted*], acquired by direct purchase on 13 May 2010, for [*redacted*].

DAIMLER contests the claim for damages, arguing, in summary, that:

i. The Commission has not sanctioned a hard or hardcore price-fixing cartel, but essentially an exchange of information, which, moreover, affected gross prices and not net prices, which are those paid by the client after a process of negotiation with the dealer.

ii. Since the Decision did not rule on the market effects of the conduct and did not establish the existence of actual price coordination (either gross, let alone net) or overcharging, the applicant has the burden of proving the existence of damage, its amount, and its causal link to the conduct, which it considers it has failed to do.

DAIMLER provides an expert opinion prepared by E.CA Economics which, in addition to refuting the Caballer-Herrerías opinion, concludes that there is no overcharge, using a diachronic method of temporal comparison based on transaction prices, that is, the net prices paid in Spain to DAIMLER by dealers (own or third parties) from 1999 to 2016, on the understanding that if there is no overcharge at this stage - upstream - there cannot be one for the end customer - downstream - which is obvious.

And as regards the grounds of opposition relating to the specific complaint, it alleges that:

a. The [*redacted*] does not duly accredit the price of the vehicle registration number [*redacted*].

b. The [*redacted*] calculates the alleged overcharge on a higher price than it actually paid for the vehicle with registration [*redacted*], since it was given a discount of [*redacted*] for delivery in exchange for a truck with registration [*redacted*]. As a consequence, the price it actually paid for the truck (without tax), which would be the basis for the calculation of the alleged overcharge, is [*redacted*].

c. The plaintiff resold the vehicles with registration numbers [*redacted*], [*redacted*] and [*redacted*], which would have mitigated the impact of any alleged damage.

d. In the case of the vehicles acquired by leasing, only the hypothetical increase in the price of the instalments paid could be claimed.

Finally, it is alleged that the action is time-barred due to the expiry of the one-year period under art. 1968.2 CC, taking 19 July 2016, the date of the Commission's Communication, as the *dies a quo*.

In this respect, we agree with the criterion of the 1st Section of the Provincial Court of Asturias of setting 6 April 2017, the date of publication of the Decision, as the initial date, and therefore, having accredited the interruption by extra judicial claims of 5 and 6 April 2018 and 15 March and 5 June 2019, the action is still alive.

SECOND. *Applicable regulatory framework.*

The non-contractual liability action is brought under Article 1902 of the Civil Code, taking into account the date of the possible occurrence of the damage, identified with the date of acquisition of the trucks.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 (Article 22 of which prohibits its retroactive application, see in this regard STJUE of 28 March 2019, Case C-637/17, Cogeco Communications) is not applicable, nor is the result of its transposition for Spain (amendment of the Law on the Defence of Competition by Royal Decree-Law 9/2017 of 26 May). C-637/17, Cogeco Communications), nor the result of its transposition for Spain (amendment of the Law on the Defence of Competition by Royal Decree-Law 9/2017, of 26 May), except, of course, in the part of the latter which, as it affects purely procedural rules (article 4, "Amendment of the Law on Civil Proceedings", introduction of articles 283 *bis* a)-k)), is governed by the time of filing of the claim and not the time when the damage was caused.

Therefore, the current wording of articles 71 *et seq.* of the Law on the Defence of Competition is not applicable and, in particular, the five-year limitation period (article 74), the rebuttable presumption of damage in infringements classified as a cartel (article 76.3) or the power of judicial estimation of the damage, when "*it is proven that the plaintiff suffered damages but it is practically impossible or excessively difficult to quantify them precisely on the basis of the available evidence*" (article. 76.2).

However, the Directive does not have a completely innovative content. Its Recital 12 states that, on the contrary, it "*confirms the* acquis communautaire *on the right to damages for infringements of Union competition law, in particular with regard to standing and the definition of damages, as established in the jurisprudence of the Court of Justice.*"

The CJEU of 28 March 2019, cited above, takes up this jurisprudence:

> *38 In this regard, it should be remembered that Article 102 TFEU has direct effect in relations between individuals and creates rights for individuals which the national courts must protect (see, to that effect, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 20 and the jurisprudence cited).*

39 The full effectiveness of Article 102 TFEU and, in particular, the useful effect of the prohibition laid down in that article would be called into question if it were not possible for any person to seek compensation for the harm suffered as a result of abusive conduct by a dominant undertaking which is liable to restrict or distort competition (see, by analogy, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 21 and the jurisprudence cited).

40 Thus, any person has the right to seek compensation for the damage suffered where there is a causal link between that damage and the agreement or practice prohibited by Article 102 TFEU (see, by analogy, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 22 and the jurisprudence cited therein).

41 The right of any person to seek redress for such damage strengthens the effectiveness of the EU competition rules and may discourage abuses of a dominant position which may restrict or distort competition, thereby contributing to the maintenance of effective competition in the European Union (see, to that effect, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 23 and the jurisprudence cited).

42 In the absence of Union legislation on the matter, applicable ratione temporis, it is for the domestic legal system of each Member State to regulate the procedures for exercising the right to seek compensation for damage resulting from an abuse of a dominant position prohibited by Article 102 TFEU, including those relating to limitation periods, provided that the principles of equivalence and effectiveness are respected (see, by analogy, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 24).

43 Thus, the rules applicable to the appeals intended to ensure that the rights conferred on individuals by the direct effect of EU law are safeguarded must not be less favourable than those applicable to similar domestic appeals (principle of equivalence) and must not make it practically impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 25).

44 In this regard, and specifically in the context of competition law, these rules must not undermine the effective application of Article 102 TFEU (see, in this sense, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 26).

Finally, the Practical Guide to the quantification of damages claims for breach of Articles 101 or 102 TFEU (which accompanies the Commission Notice on the quantification of damages claims for breach of these provisions) reiterates that the right of any person who has been prejudiced by a breach of Articles 101 or 102 TFEU to claim damages for this prejudice is guaranteed by primary EU law, with a footnote (1) citing the relevant jurisprudence (Case C-453/99, Courage; accumulated cases C-295/04 to 298/04, Manfredi; C-360/09, Pfleiderer).

In the comparative law of the Member States, before the Directive, it was already common to appeal to presumptions or maxims of experience causally linking the existence of a cartel (in particular hardcore price-fixing cartels) with the occurrence of damage. Given the intrinsic and extrinsic difficulties in proving and quantifying harm, it is common in cartel cases to resort to presumptions (legal or judicial) or maxims of experience. The Practice Guide recognises that legislators and courts have often adopted pragmatic approaches in determining the amount of damages to be awarded, such as, for example, the establishment of presumptions or the reversal of the burden of proof where the claimant has provided a certain amount of facts and evidence.

In its recent judgment of 23 September 2020 (KZR 35/2019), which dealt precisely with the cartel case at hand, the BGH reviews its jurisprudence. The judgment does not apply the Directive but the version of the German antitrust law [Gesetz gegen Wettbewerbsbeschränkungen (GWB)] in force at the time of delivery (cf.

paragraph 16), which was the one resulting from the 2005 reform (7. Novelle), which established a factual link between the judge and the penalty decision, a link which only covered the determination of the infringement, to the exclusion of the causation of the damage and its quantification, which were in any event subject to the free assessment of the evidence. This is explained in the memorandum to the draft law (§33, 'Zu Absatz 4', p. 54, first paragraph in fine) of 12 August 2004 (cited in the judgment of 23 September 2020 (24)):

> *"Die Tatbestandswirkung bezieht sich allein auf die Feststellung eines Kartellrechtsverstoßes. Alle weiteren Fragen, insbesondere zur Schadenskausalität und zur Schadensbezifferung, unterliegen der freien Beweiswürdigung des Gerichts."*

Despite this, the BGH (paragraph 40) recalls that it is settled jurisprudence that, for the benefit of the buyer of an undertaking participating in an antitrust infringement, there is a factual presumption that the prices achieved in the context of the restrictive practice are, on average, higher than those which would have been achieved in its absence, a presumption which is based on the high probability of such an occurrence, based on economic experience.

In Italy, it is classic to cite the judgment of the Corte di Cassazione (Civile) of 2 February 2007, n. 2305, as. Fondiaria Sai SpA v. Nigriello, which, because of the linguistic similarity, is transcribed directly below.

"[I]l giudice potrà desumere l'esistenza del nesso causale tra quest'ultima et il danno lamentato anche attraverso criteri di alta probabilità logica e presunzioni, senza tuttavia omettere una valutazione degli elementi di prova offerti dall'assicuratore, tendenti a superare dette presunzioni o a dimostrare l'intervento di fattori causali diversi, idonei di per sé a produrre il danno o che abbiano, comunque, concorso a produrlo."

And it concludes that in order to settle the damage, *"il giudice può determinare equitativamente l'importo del risarcimento, fissandolo in una porcentuale (...)."*

The *Cour d'Appel de Paris*, in Arrêt of 26 June 2023 (JCB Sales et al. v. SA Central Parts, confirmed by Cass. Comm. of 6 October 2015), ruling on an action following a Commission decision imposing a penalty under the former Article 81 TEC, concluded that the damage was necessarily caused by the competitive practices ("...*ont nécessairement causé*..."), although, given the insufficient evidence available to it to quantify it, it appointed an expert to assist it.

In Belgium, the *Cour de Cassation*, in Arrêt of 13 January 1999, validated an *ex aequo et bono* assessment:

> *"Attendu que le juge du fond apprécie en fait l'existence d'un dommage causé par un acte illicite et le montant destiné à le réparer intégralement; qu'il peut recourir à une évaluation ex aequo et bono s'il indique la raison pour laquelle le mode de calcul proposé par la victime ne peut être admis, et constate en outre l'impossibilité de déterminer autrement le dommage tel qu'il l'a caractérisé (...)."*

Hungarian competition law before the Directive went even further, because with the 2009 reform it not only established - retroactively - [formerly Art. 88/C, today Art. 88/G (6)] a rebuttable presumption of overpricing (but not of damage, because of the possible passing-on) but also fixed it quantitatively at 10% [we transcribe below the English version, available on the Web site of the Hungarian Competition Authority (GVH)]:

> *"(6) In the event of a competition law infringement caused by a cartel, it shall be assumed, unless proved otherwise, that the competition law infringement had a ten percent effect on the price applied by the infringer"*

And judicial assessment is not alien to the Hungarian text either, since in the event that the defence of passing-on is invoked and the defendant succeeds in proving its existence, but not its extent, it will be the court that will fix it [Art. 88/G (2) *in fine*]:

"If the extent of the passing-on cannot be established, the court shall determine its level by using an estimate, having assessed all the circumstances of the case"

The difficulty for the plaintiff in proving the causal link and quantifying the damage in accordance with the rules of the common law of non-contractual liability, together with the existence of various studies concluding that cartels, in a high probability, imply an increase in prices, are at the basis of this legal and jurisprudential trend, to which the Spanish experience is no stranger.

Indeed, the doctrinal and jurisprudential evolution of Art. 1902 of the Civil Code, fundamentally in relation to proof of the causal relationship and the certainty of the damage (the certainty referring both to its existence and to its amount) and the positivisation of the rule of availability and ease of proof (Art. 217.7 LEC) bring the national and Community regimes, before and after the Directive, closer together, without becoming identified. From the "all or nothing" of the classical causation test, in specific sectors of tort law, we have moved to criteria of probabilistic causation.

It is also common in our jurisprudence to resort to the "*in re ipsa loquitur*" doctrine when faced with the proof of the damage caused by the infringement of industrial property rights or the committing of acts of unfair competition. The judgment of the Supreme Court of 3 October 2019 summarises the Court's doctrine:

i. *[T]he The general doctrine of this Court in matters of compensation for damages and losses is that they are not presumed but must be accredited by the person claiming them, both the existence and the amount (...). This peaceful and reiterated jurisprudence has an exception in the jurisprudence itself, which considers the presumption of the existence of the damage to be correct (apart, of course, from when there is a specific legal rule) when a situation occurs in which the damages are revealed as real and effective. These are cases in which the existence of the damage is necessarily and fatally deduced from the wrongful act or the non-performance, or they are a forced, natural and inevitable consequence, or incontrovertible, evident or patent damage, according to the various 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 incontrovertibly for it."*

ii. *"But (...) it is one thing for the situation of the case to reveal the existence of the damage without the need to base it on evidence, and quite another for there to be a legal presumption that excludes the need for proof in any case". And, in the last instance (...) "the assessment of that situation is part of the sovereign function of the courts hearing the case."*

And in relation to the minimum compensation of 1% of the trademark law, it clarifies that this rule "*cannot therefore be interpreted as meaning that there is a right to compensation even in cases where it has been established that the infringement could not have caused any "detriment" to the trademark owner. It requires, as a precondition, the existence of 'damage', irrespective of the extent of that damage*.

As has been pointed out in the doctrine, this rule does not alter the compensatory nature of the action for damages, which presupposes the existence of damages. It does not introduce a kind of penalty for the infringement, to the benefit of the owner of the infringed trademark, but rather the ratio of the rule is to facilitate the quantification of the compensation: in any case 1% of the turnover made by the infringer with the unlawfully marked goods or services."

The STS of 7 November 2013, handed down in relation to the so-called "sugar cartel," recognises the greater flexibility in the estimation of damages by the judge, without this being confused with the imposition of "Solomonic" solutions lacking the necessary justification.

THIRD. *Conduct. Its description in the Decision*.

The action of Article 1902 of the Civil Code requires the concurrence of three conditions, conduct (here, the infringement), causation and damage. The parties, as we have summarised above, disagree on all of them, as they give very different readings of the Decision, the content of which is binding (Art. 16.1 of Regulation 1/2003).

Interpreting the Decision is not a simple task, for various reasons:

a. It is provisional. It is therefore presumed to be less well drafted than a final version.

b. We have only the non-confidential version. The text is mutilated, which sometimes makes it difficult to follow and understand.

c. The only authentic version is the English version. Each of the parties submits its own sworn translation and the differences are relevant.

d. It is the result of a settlement procedure, starting with the acknowledgement by the addressees of their responsibility for the infringement, briefly described as to its subject matter, the main facts, its legal qualification, including their role and the duration of their participation in the infringement in accordance with the results of settlement discussions ("*an acknowledgement in clear and unequivocal terms of the Addressee's liability for the infringement summarily described as regards its object, the main facts, their legal qualification, including its role and the duration of its participation in the infringement in accordance with the results of the settlement discussions*" [paragraph 43]). The existence of compliance excuses the Commission from further describing the conduct. The SCANIA decision (which did not comply and followed the ordinary procedure) of 27 September 2017 is more descriptive and detailed, although it suffers to an extreme degree from the requirements of confidentiality.

e. Moreover, in order to impose a sanction for anti-competitive conduct, the Commission does not need to demonstrate its actual effects.

The Decision consists of seven main sections: Introduction, 2. Procedure, 3. Description of the conduct, 4. Legal assessment, 5. Duration of the infringement, 6. Responsibility and 7. Measures.

Various of these sections contain references to conduct.

In the Introduction (2), it starts with a first description of the facts, the product concerned and its duration:

"*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*."

The expression of conduct is very similar in section 3.2, *Nature and scope of the infringement*:

"*These collusive arrangements included agreements and/or concerted practices on pricing and gross price increases in order to align gross prices in the EEA and the timing and the passing on of costs for the introduction of emission technologies required by EURO 3 to 6 standards*."

The use of the term pricing raises doubts as to whether we are dealing with a hardcore price-fixing cartel, which the complainants claim and DAIMLER denies. The fact is that the Commission uses expressions such as ***price fixing*** (Press release concerning the Decision of 4 July 2019, AT.37956, *Concrete reinforcing bar*, not so in the authentic text of the Decision, in Italian) or ***price coordination*** (Decision of 29 September 2020, AT.40299, *Closure systems*; Decision of 5 March 2019, AT.40481, *Occupant Safety Systems* (II); Decision of 21 February 2018, AT.40113, *Spark Plugs*; Decision of 22 November 2017, AT.39881, *Occupant Safety Systems supplied to*

Japanese Car Manufacturers; Decision of 16 June 2017, AT.39780, *Envelopes*]. The same is true in the specialised scientific literature (e.g. CONNOR, *Price-Fixing Overcharges*, in its various versions).

The term *pricing*, by itself, does not in the Commission's language imply price coordination. At most, the Commission speaks interchangeably of *price coordination* and *coordinating their pricing behaviour* (Decision of 21 February 2018, AT.40009, *Maritime Car AT 40009 Carriers*).

However, the fact is that the Decision in question does not only talk about *pricing*, but also about *concerted practices on pricing* (50), *coordinate each other's gross pricing behaviour* (71) or *price coordination arrangements* (115).

The Decision (29) refers to the fact that the truck sector is characterised by a high degree of transparency, due to the fact that manufacturers and distributors had regular contact with several industry associations AND in these associations they exchanged information on order books, delivery times or stock levels. They also had access to additional information through customers who spontaneously submitted competitors' offers in order to negotiate prices and through mystery shoppers. As a consequence - it continues - one of the remaining uncertainties for the addressees was the future market behaviour of the competing truck manufacturers and, in particular, their respective intentions with regard to changes in their gross prices and their gross price lists.

To this end, the Decision describes:

i. Exchanges of gross price lists and gross price information and eventually exchange of computerised truck configurators, which facilitated the calculation of the gross price for each possible truck configuration (46);

ii. That by exchanging current gross prices and gross price lists, together with other information obtained through market intelligence, they could better estimate the approximate net prices of their competitors (47);

iii. That the addressees' head offices were directly involved in discussions on prices, price increases and the introduction of new emission standards (49);

iv. That these collusive arrangements included agreements or concerted practices on prices and gross price increases with the aim of aligning gross prices in the EEA and the timing and cost repercussion for the introduction of the emission technologies required by the EURO 3 to 6 Standards (50).

v. That between 1997 and the end of 2004 they met several times a year, where they discussed and in some cases also agreed on their respective gross price increases.

Exchanges of information on gross prices and, to a lesser extent, future increases, appear repeatedly (51 et seq.). Mentions of net prices are rare, both in number and in the quality of the information provided; thus, it is stated (50) that net prices for some countries were occasionally discussed (*'[o]ccasionally, the participants, including representatives of the headquarters of all of the addressees, also discussed net prices for some countries'*), that (55) the issues discussed normally concerned gross prices ("*normally gross prices*") and that (56) net prices and net price increases were not usually exchanged ("*and usually no net prices or net price increases were exchanged*").

The exchanges, it concludes, at least enabled the addressees to take account of the information exchanged for their internal planning process and the planning of future gross price increases for the following calendar year, and may have influenced the price positioning of some of the new products (58).

It is primarily but not only an information-sharing cartel. There was a systematic exchange of gross price information and gross price increases were routinely discussed (and, more exceptionally, agreed). What the Commission does not say is that this has resulted in a net price increase or that the conduct has directly (or indirectly) affected net prices, which it confirms in the SCANIA decision, when, in response to SCANIA's claim

that the price structure made price coordination unworkable, it clarifies (to the extent permitted by confidentiality [290]) that "*the Commission is not alleging that the parties were agreeing to charge the same prices – either at the gross price level or at the end customer level or anywhere in between. Rather, the Commission concludes on the basis of the evidence gathered during its investigation and presented in section 6.2 that […] exchanged sensitive pricing information and future pricing intentions, [confidentiality claim pending] […] [confidentiality claim pending]. Therefore, while the parties did not reach a formal agreement as to actual price levels, the gross price information exchanged together with the other information available to the parties (see recitals (22) to (24) and (287)) [confidentiality claim pending].*"

The Decision does explain (27) the pricing mechanism, which - it states - generally follows the same steps for all addressees: (a) It starts from an initial gross list price set by the head offices; (b) Then the transfer price is set for importation through own or independent distribution companies; (c) The price to the dealer; (d) The final price to the customer. Not always - it warns - are all steps followed, as manufacturers also sell directly to dealers and fleet customers. In any event, the decision makes it clear that in this process the price is substantially reduced.

However, it cannot be overlooked that (i) the introduction of price lists for the EEA was very variable over time depending on the brand [28], (ii) IVECO did not even have a gross price list, although it received those of the others, and (iii) the configurators are said to have contained detailed gross prices for all models and options and replaced the price lists, facilitating the calculation of the gross price of each possible configuration [46] and it is acknowledged that the exchange was not global, nor was it at the level of the manufacturers (not all had access to the configurators of all, but at least to that of another manufacturer, with the exception of DAF, which appears not to have had any) nor) nor the information provided by the configurator (some only allowed access to technical information and did not include prices information) [48].

Nor do we know whether the effect may have varied over time (even if it is described as a single continuous infringement), by Member State or by manufacturer, which does not make it possible to exclude, a priori, that (i) there has been no effect on net prices, that (ii) if there has been, it has occurred irregularly in space and/or time, or alternatively or cumulatively, (iii) there has been in some manufacturers and not in others. This last circumstance is not irrelevant, because even if the action brought is in tort and the liability is joint and several (improper), as the damage is limited in the claim to an increase of the net contract price, the judgment has to be individual for each manufacturer. If a buyer has not been overcharged by his manufacturer, it makes no difference to him that other brands have artificially increased their net prices, as he will not have standing to sue them for lack of damage.

At most, the decision presumes that, because of market share and turnover, the effects on the market are considerable (85). But we must not confuse the concept of 'effects on the market' with the damage and, even less, with the individual damage. In establishing this presumption, the Decision does so with express reference (note 57) to the Guidelines on the concept of effect on trade contained in Articles 81 and 82 TEC, to which the current 101 and 102 are heirs. And it does so for purely jurisdictional purposes. The cited Guidelines seek to clarify the very concept of effect on trade between Member States, as a prerequisite for the application of Community law; the notion of "may affect", we are told, implies that it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (23), with an impact on at least two of them (21). Precisely because of the jurisdictional nature of the concept, the Guidelines (27) make it clear that there is no obligation or need to calculate the actual volume of the impact, although *"[t]he nature of the agreement and practice is an indication, from a qualitative point of view, of whether the agreement or practice is capable of affecting trade between Member States. Some agreements and practices are by their very nature capable of affecting trade between Member States, while others require a more detailed analysis in this respect. Cross-border cartels are an example of the former, while joint ventures limited to the territory of a single Member State are an example of the latter"* (29).

The concept of market effects is jurisdictional, not finalistic or empirical. A conduct may have an effect on trade and not necessarily translate into a price increase.

The categorisation of the cartel is secondary. There can be inefficient price-fixing cartels and price-sensitive information transmission cartels. What is relevant is the test to be applied, in particular the econometric one.

In short, in the gathering of the facts of the Decision and in the formation of the intimate conviction, we must operate with all prudence, examine the circumstances of each specific case and avoid (or at least not prioritise) global solutions, so that the classic "all or nothing" of the causal judgement ends up appearing in the judgement of imputation, transformed into an "all or none." The improper solidarity of non-contractual liability does not excuse us from assessing, whenever possible, the individual conduct, for which the contrast between the claimants' experts (who start from general data - basket of trademarks - with the experts of the addressees of the Decision, who use their own transactions as a database, is nuclear. It goes without saying that the solution reached may be different according to the manufacturer and even within the same manufacturer, depending on the evidentiary activity or the source of evidence (the versions of the expert reports have evolved).

FOURTH. *Jurisprudential guidelines for the proof and quantification of damage: the background of the "sugar cartel."*

The Spanish experience in judicial claims for cartel damages is much more limited than in other countries. As far as the Civil Chamber of the Supreme Court is concerned, the judgments of 8 June 2012 and 7 November 2013, arising from the so-called sugar cartel, are the only ones cited.

Both judgments are based on the Resolution of the Plenary Session of the Court for the Defence of Competition of 15 April 1999, which declared that a practice restricting competition had been carried out in the form of concerted selling prices for sugar for industrial uses from February 1995 to September 1996.

The same companies that denounced the collusion before the Competition Defence Service initiated, once the administrative decision was final, civil proceedings for compensation for damages. Just as the STS of 8 June 2012 (as. Acor) does not present excessive elements of interest with regard to proof and quantification of the damage, the judgment of 7 November 2013 (as. Ebro Foods) is rich in reasoning, particularly with regard to the requirements of expert evidence and the concept and proof of *passing-on*.

Limiting ourselves now to what affects the expert evidence, the SC affirms that:

i. "*The expert report submitted with the application is based on correct grounds (the existence of the cartel and the concerted fixing of prices above those which would have resulted from free competition)"*;

ii. *"[I]t uses a reasonable method, from among the various methods advocated by economic science and accepted by the courts of other countries, for the calculation of the damages caused to the plaintiffs, which is to estimate what would have occurred in the absence of the restrictive practice of competition by examining the period immediately preceding, taking into consideration the sugar prices in that period immediately prior to the commencement of the cartel activity, modulating them in accordance with the variations in production costs over the period of the cartel's operation (...) and comparing them with the prices charged by the defendant to each plaintiff during the cartel's operation (...) and comparing them with the prices charged by the defendant to each plaintiff during the period of the cartel's operation divided into the four periods determined by the different concerted price changes. The result would be the anti-competitive overcharge (...)*";

iii. "*[T]he impossibility of carrying out a perfect reproduction of what the situation would have been if the unlawful conduct had not taken place, but this is a problem common to all damage assessments that consist of projections of what would have happened if the unlawful conduct had not taken place. This is what the proposed Directive calls the comparison between the actual situation, which is the consequence of the restrictive practice, and the "counterfactual hypothetical situation", that is, the situation that would have occurred in the absence of the unlawful practice. For the proposal, this difficulty should not prevent victims from receiving an adequate*

amount of compensation for the harm suffered, but would justify a greater extension of the judges' power to estimate the harm."

iv. "*What is required of the expert's report provided by the injured party is that it formulates a reasonable and technically well-founded hypothesis based on verifiable and non-erroneous data. The Court considers that the expert's report contains both of these elements and that therefore, in the absence of any alternative hypothesis that could be considered to be better founded, the valuation of the damage made in that report must be considered reasonable and accurate.*"

v. "*In contrast to that expert's report, the report drawn up by the defendant is based on unacceptable grounds, such as denying the existence of a cartel, denying concerted price increases and thus denying the existence of overcharging.*"

vi. "*In a case such as the one at issue in the appeal, in which the defendant has engaged in unlawful conduct giving rise to damage, it can be generally stated that it is not sufficient for the expert report provided by the party responsible for the damage to be limited to questioning the accuracy and precision of the quantification made by the expert report carried out at the request of the injured party, but it is necessary for it to justify a better-founded alternative quantification (...). Another solution would be difficult to reconcile with the legal principle of compensation for damage suffered as a result of the wrongful act of another and the effective protection that must be granted to the injured party's right to be compensated.*"

vii. In response to the lower court's decision to reduce the amount of compensation claimed by 50%, the Court reasoned that *"[t]he existence of discrepancies between the experts on both sides and the absence of expert evidence from a court-appointed expert (...) are not arguments in themselves adequate to justify such a reduction. The fact that the calculation of damages must be based on hypotheses of factual situations that have not actually occurred may justify greater flexibility in the judge's estimation of damages. But this greater flexibility cannot be confused with "Solomonic" solutions lacking the necessary justification."*

This last reference by the High Court to the cartelist's burden of providing a *better-founded alternative quantification* must be understood in the context in which it ruled: a cartel in which both the Court for the Protection of Competition and, on review, the contentious jurisdiction found that a concerted increase in prices to the final (industrial) customer was proven: 4 pesetas/kg on 1 February 1995, another 4 pesetas/kg from April 1995 and 1 peseta/kg on 1 May 1996. This case is quite different from the one at issue, since what was a proven fact there is the main disputed fact here. It is sufficient to compare the account of the facts in the Commission's decision with that of the CPC to appreciate the obvious differences between the truck cartel and the sugar cartel.

This being so, the High Court's censure of the cartelist's denial of the overcharge and the requirement that it justify a better-founded alternative quantification must not be understood in the truck cartel (where there is no prior proof of the overcharge) as an impossibility (in terms of feasibility) of defending a zero overcharge, on pain of standardising the judicial response (mass litigation does not imply mass judicial response) and turning the incipient application of private competition law in Spain in cartel matters into a walk to the gallows, a sort of certus an incertus quantum, in which the cartelist is forced to disavow his innocence (zero overcharge) and confess (an always superior reasonable alternative) if he wants to have any chance of reducing the storm. This is quite different from what happens in countries with a longer judicial experience in cartel damages claims, where both the "yes" of the damage and its specific amount (*«sowohl das "Ob" das als auch die konkrete Höhe möglicher Kartellpreiseffekte»*) depend on a large number of factors and cannot simply be assumed by abstracting from the specific facts of the case, in particular the counterfactual situation (with reference to German jurisprudence, COPPIK and HEIMESHOFF, *Praxis der Kartellschadensermittlung: Empirische Evidenz zur Effektivität von Kartellen*, Wirtschaft und Wettbewerb, no. 11-2020, p. 585).

In other words, the reasonableness of the alternative should not be measured so much by the result as by the means used to obtain it, its scientific basis and its robustness. The zero surcharge alternative, in itself, is not unreasonable or unacceptable (nor is the surcharge set by the plaintiff), but, as it is based on expert evidence, it

must be subjected to the rules of sound criticism and assessed together with the rest of the evidence in the case file. Let us not forget that, even if the presumption of harm of the LDC is applicable, the presumption is so unless there is evidence to the contrary. If this is the case with a legal presumption, it is even more so in a *praesumptio hominis*.

This does not mean to say that the complainant and the cartelist are in the same evidentiary position. The Practical Guide is very expressive in this respect:

i. "*In the absence of EU legislation on the matter, it is up to the domestic legal system of each Member State to regulate the exercise of the right to reparation guaranteed by EU law. This regulation, however, must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness), nor must it be less favourable than those governing claims for damages for breach of similar rights conferred by national law (principle of equivalence)*";

ii. *"National courts have to determine whether the claimant has been harmed by the infringement and, if so, the amount to be awarded as compensation for that harm. Determining this - assessing and proving the amount in actions - is often difficult"*;

iii. *"It is for national law to lay down the detailed rules for the application of the concept of "causal link", provided that the principles of equivalence and effectiveness are respected"*;

iv. "*Excessive difficulties may arise in exercising the right to seek damages guaranteed by EU law and thus concerns about the principle of effectiveness, for example because of disproportionate costs or excessively stringent requirements as to the degree of certainty and precision of a quantification of the damage suffered*";

v. "*The key question in the quantification of damages for anti-competitive infringements is therefore to determine what would probably have happened in the absence of the infringement. This hypothetical situation cannot be directly observed and therefore some form of estimate is necessary to construct a reference scenario with which to compare the real situation. This reference scenario is referred to as the 'no infringement scenario' or 'counterfactual scenario*'."

vi. *"It is impossible to know with certainty exactly how a market would have evolved if Articles 101 or 102 TFEU had not been infringed. Prices, sales volumes and profit margins depend on a number of complex, often strategic, factors and interactions between market participants that are not easy to estimate. Therefore, the estimate of the hypothetical no-infringement scenario will, by definition, be based on a number of assumptions. In practice, the unavailability or inaccessibility of data will often add to this intrinsic limitation."*

vii. "*For these reasons, the quantification of harm in competition cases is, by its very nature, subject to considerable limitations as to the degree of certainty and precision that can be expected. There can be no single "true" value of the harm suffered that can be determined but only best estimates based on assumptions and approximations. The applicable national legal provisions and their interpretation should reflect these inherent limitations in the quantification of harm in damages claims for breach of Articles 101 and 102 TFEU in accordance with the principle of effectiveness of EU law, so that the exercise of the right to seek damages guaranteed by the Treaty is not excessively difficult or impossible in practice.*"

It is against this background that we must examine and critique the expert opinions provided by the parties.

FIFTH. *The Caballer-Herrerías expert opinion (2019 version). Valuation.*

Within the methods offered by the Practical Guide, the Caballer-Herrerías opinion opts for comparative methods. A synchronic one that takes the light truck market (not affected by the cartel) as the first degree analogue

or counterfactual market and, in the second degree, the vans market, which is simply used to confirm the solvency and validity of the previous model. And, as a supporting method, a diachronic one.

Starting with the main synchronous model, which takes the light truck market as the counterfactual market, it chooses the gross prices provided by manufacturers on an annual basis to the magazine *Transporte Profesional* from 1996 to 2011 as a source of data. A database - the expert insists at the hearing - whose main virtue is that it is complete (it has been published year by year), public (freely accessible), non-manipulable and that it refers to gross prices, which are those affected by the infringement.

The number of references (truck models) for the cartelised market is 5,843 out of a total of 8,260, from which (i) 1,414 have been discarded because they do not have all the chosen explanatory variants (price, power, make, MAW and EURO regulations), (ii) 781 because they belong to SCANIA; and (iii) 222 because they belong to non-cartel makes.

The number of references for the counterfactual is 569 out of a total of 654, from which (i) 68 have been discarded because not all explanatory variables were available and (ii) 17 models did not have continuity across all EURO periods.

The opinion starts from the principle that "*the degree to which the conditions of similarity, analogy, likeness or resemblance of the estimated non-infringing market and the actual cartelised market are met will determine the appropriateness of the synchronous methods*" (p. 58). And after stating that the market for light trucks and the market for medium and heavy trucks are "*very similar products in their properties, in the needs they satisfy and in their production processes*," with "*parallel emission requirements (...)*" (p. 62), it concludes that they are analogue markets (p. 59), as is the market for vans (p. 59).

On the basis of such analogy or comparability between the factual cartelised market and the counterfactual market, gross or list prices are used because it is a gross price cartel (p. 62).

The opinion carries out two regressions. With the first, it uses the equation to calculate the relationship between the gross price of medium and heavy trucks and certain explanatory variables: power, expressed in horsepower, MAW, expressed in tonnes, brand (DAF, IVECO, MAN, MERCEDES and VOLVO-RENAULT), and EURO regulations (II to V). The variable "year of the cartel" is also introduced, assigning "year 1" to 1997 as the starting date of the cartel.

With the second regression, the relationship in the gross price of light trucks is found, although the explanatory variants change: power and MAW are retained and the brand is completely and the EURO Standard partially disregarded (only the IV and V), as they do not coincide in both markets.

After finding the factual and counterfactual market equations, the opinion explains that the light truck formula is applied to past truck data to model how the price of each heavy truck would have behaved in the absence of the infringement. Two average price curves are thus obtained, to which an "adjustment" is applied: the constant is modified by 0.43 so that both curves coincide at the origin (1996).

The percentage difference between the two curves indicates the overcharge, which has been calculated (i) year by year, with a minimum limit of 3.42% for 1997, as year 1 of the cartel, and a maximum of 24.06% in 2009, and (ii) as an average of all years, with 16.35%, which is the one that rises to the plea.

The same operation, *mutatis mutandis*, is carried out using the van market as a counterfactual, with the average price premium here rising to 19.87%.

The opinion and, with it, demand (or inversely) fully pass on the increase in gross prices to net prices, as it is difficult for it to have been diluted "downstream."

The average R^2 for the whole duration of the cartel is 0.926 for heavy trucks and 0.726 for light trucks, which means, according to the opinion, that the same variables explain in light trucks the price variability in heavy trucks in a proportion of 78.45% (0.726/0.926).

As a supporting method, a diachronic method is chosen that no longer starts from gross prices, but from net prices, specifically from 5,396 individual truck purchases. Three periods are compared: first half of the cartel (17 January 1997 to 31 December 2003), second half of the cartel (1 January 2004 to 18 January 2011) and post-cartel (2011 to 2016).

The result of the regression equation is 13.87% for the first half of the cartel and 23.46% for the second half, for an average of 18.67%, higher - but in line - with that of the main synchronous method.

In the eyes of the Practical Guide, both a synchronic and a diachronic method are suitable, from an abstract point of view, to calculate a possible overpricing ["*Each has its own advantages, properties and disadvantages*" (123)]. The Caballer-Herrerías opinion combines the two, in order to give greater robustness.

The problem is that this abstract aptitude is not such in the specific case. Both models, albeit for different reasons, are incapable of exceeding the evidentiary standard mentioned above, however relaxed it may be, without this undermining the authority of the signatories.

Starting with the synchronic method, we believe that it errs in the choice of the load-bearing wall on which the whole structure of the expert's report rests, which is the choice of the light truck market (and, to a lesser extent, the van market) as the analogue or counterfactual market.

In this respect, the Guide (37) notes that:

i. "*Important market properties that may play a role in considering whether two markets are sufficiently similar are the degree of competition and concentration of those markets, the cost and properties of the demand and the barriers to entry. It depends on national legal systems whether the level of similarity between the market in which the infringement occurs and the comparison market or between time periods is considered sufficient for the results of such a comparison to be used in the quantification of harm*" *(37);*

ii. *"[T]he comparison product should be carefully chosen taking into account the nature of the products being compared, how they are marketed and the characteristics of the market, for example in terms of the number of competitors, their cost structure and the purchasing power of customers"* (55).

The opinion is, of course, based on the assumption that the "*appropriate choice of the relevant market*" (p. 16) is basic to the model, which is reiterated by the statement that "*the degree to which the conditions of similarity, analogy, likeness or resemblance of the estimated non-infringing market and the real cartelised market are met will determine the appropriateness of the synchronous methods*" (p. 58).

And given that the infringement affected exclusively medium and heavy trucks "*but left out light trucks and other commercial vehicles such as vans, these markets can provide a high quality benchmark for what should have been a market for commercial vehicles in free competition*" (pp. 16 end and 17). "*Both medium-sized trucks and vans - we are told - make use of similar inputs for their manufacture and supply similar transport needs in the economy, so that very similar macroeconomic demand variables seem to be affected"* (p. 17, para. 2), which is reiterated on p. 62 ("*products very similar in their characteristics, in the needs they satisfy and in their production processes*"). This leads the experts to conclude (p. 17, para. 2) that there is a high (very high on p. 59) degree of similarity between the two markets.

The trial proceedings sought to reinforce the analogy of the markets on the basis that (i) they share administrative status in various regulations (e.g. The EU vehicle classification, which includes trucks between 3.5 and 12 tonnes in the "medium" category), (ii) the product comes from the same dealers and (iii) companies

usually combine light, medium and heavy trucks in their fleets, so that variations in demand are similar, as are costs (a change in the price of steel, for example, would affect a light truck as much as a heavy truck), reducing the difference to a question of scale. This whole – added - judgement of analogy would be summed up in the saying "there's nothing more similar to a truck than another truck."

However, the fact that - hypothetically - there is no more analogous alternative market does not make the one chosen adequate. The opinion itself provides data that call into question the claimed comparability. The difference in the number of references, that is, models, is very telling, as the cartelised market is ten times larger than the light market. This reinforces the assertion in the Decision (26) that trucks are not commodity products, but are defined according to each customer's needs and are inherently complex, so that all addressees offer a range of trucks and hundreds of different options and variants. The huge difference in the number of models undoubtedly reveals that the medium and heavy market is (much) more versatile and specialised than the light market. The lack of analogy is even more glaring with the van market, to the extent that the opinion (p. 21) clearly acknowledges that the variables 'brand' and 'EURO standard' are not included, because of a mismatch. Furthermore, the E.CA Economics opinion provides data showing that the two markets differ significantly in terms of (i) customer type, (ii) demand, (iii) supply and (iv) emission standards.

The opinion, with the caution imposed by the asymmetry of knowledge between judge and expert and the extreme complexity of expert opinions, has insurmountable shortcomings, with all due respect to the experts, whose ability it would be foolhardy for a layman to question:

a. *Omission of the "brand" variable*. The "brand" variable is omitted from the regression equation of the counterfactual because the same variable does not exist for medium and heavy trucks. In the trial, the expert tried to explain that (i) as the brands do not coincide, if the cloud of observations of medium and heavy trucks is added to the equation for light trucks, the system would give an error, and (ii) as there is joint and several liability between the cartelists, the specific brand is irrelevant, to the extent that they could have considered a generic brand ("infringer") in their report.

The first statement is contradicted by the fact that, as the expert acknowledges, they have managed to replicate the model by adding the matching marks, although this correction should not be taken into consideration as it constitutes an extemporaneous extension of the expert's report (document 10 *bis*). This, however, demonstrates that there was no impossibility but merely a technical decision.

As for solidarity as an excuse for the omission, the expert confuses stages of reasoning: for there to be solidarity (which is the *posterius*) there must be damage (which is the *prius*), so it is illogical to transfer solidarity (the irrelevance of the brand) to the calculation of the damage, discarding it as an explanatory variable. In fact, by focusing on power, MAW and EURO Standard (IV and V), the adjusted R^2 (hereinafter, R^2) barely exceeds 0.50 (see table 3, p. 74, compared to 0.933 of the regression of medium and heavy trucks, see table 5, p. 78, which does include the brand), which in the words of the opposing expert means that "50% of the variation in the prices of light trucks is still not explained" (p. 117). By adding "brand" as an explanatory variable, the R^2 of the regression model would, according to E.CA Economics, rise to 0.778 (see note 129, p. 117). In short, the variables chosen are insufficient because they only manage to explain 50% of the variation in price; the omission of significant explanatory variables (including the brand) implies attributing to the infringement an effect on price that has its origin in other factors.

b. *Omission of the costs and demand variables*. In setting out the factors to be taken into account in assessing the comparability of markets, the Guide specifically mentions the cost structure and the purchasing power of customers. The opinion omits to include both variables. As the expert explained in court, the reasons for this are many: (i) a change in costs and/or in demand affect both markets equally and at the same time; (ii) both variables make sense in a diachronic, but not in a synchronic; (iii) the costs were not available and, in any case, would be an endogenous variable.

The explanation that cost and demand effects are the same in the two markets is not only not supported by evidence, but the opinion of E.CA Economics proves the opposite: both the type of customer and the demand are different.

It has not been explained why costs and demand are relevant in a diachronic (in which they have been included, cf. p. 83, through the "$IPRI_{EU28}$" and "*ind.dem*" indices) and not in a synchronic. Assuming that this is the case, since costs and demand are relevant elements for assessing the comparability of markets, this would simply render the synchronous method inadequate.

The endogenous character of "cost" as a variable has also not been sufficiently justified. For two variables to be endogenous, they have to explain or influence each other; just as it is logical that the cost influences the price, we cannot see how the price can influence the cost, at least in this case. The reasoning offered by the expert [*redacted*] at the hearing is not at all convincing; he tells us (video number 4, minute 18:02) that if you lower the price, you sell more and that if you sell more you will have lower unit costs. We interpret that what the expert wanted to convey is that, in order to sell more, the manufacturer in turn needs more supplies and that by increasing its purchasing volume the prices of inputs must go down. But for this to be the case, the manufacturer would have to be able to influence, depending on its purchasing volume, the price of world markets for steel, oil, etc., which it is very doubtful that they respond to an individual stimulus. The cost, in our opinion, is here an exogenous variable and should have been included, without the need to resort to internal company data, as has in fact occurred in the diachronic, in which the "$IPRI_{EU28}$" is used because, in the opinion of Caballer-Herrerías, it "*reflects the production costs of the trucks*" (p. 83, para. 1). This is without prejudice to the fact that we do not consider the IPRI to be suitable to explain the cost-price relationship, as we shall see in the analysis of the diachronic.

c. *Forced analogy by adjustment of the constant*. Nor is there any explanation of the scientific reason for the application to the constant of the so-called "analogy index", which almost seems to be taken for granted (p. 69), despite the fact that it entails: (i) graphically, raising the curve of the counterfactual, bringing it closer to the factual one; (ii) in logarithmic terms, adding 0.43 to the constant, increasing it from 7.45 to 7.88; and (iii) in economic terms, adding 25,000 euros to the average price. Beyond the scientific authority of [*redacted*] as the expert-director of the synchronous model, this adjustment, which is not reflected in the Guide, is not understandable, even though it is informative and non-binding. If they really were analogous markets and the chosen variants explained the price in a similar way in both markets, when applying the data of the medium and heavy markets to the equation for light markets, we understand that the curves should tend to converge; since they do not, the analogy is forced by the inclusion of this index, an inclusion that obeys a technical criterion of the economist. ("*So what do I have to say to the software? This is the point where you have to start*" - referring to 1996 - explained in minute 7:21 video no. 4), of doubtful scientific support.

d. *Questionable treatment of the data for 1996 and 1997*. Another of the points discussed in the expert opinions is that of the prices in those years. There are three points of friction: (i) whether or not the prices published in 1997 in *Transporte Profesional* are affected by the cartel; (ii) whether the technical criterion of the Caballer-Herrerías opinion to exclude the real prices of 1996 and 1997 (which it claims to have, cf. p. 17, point 5), to replace them with an estimate obtained by "*extrapolating the results obtained for 1998-2010 from the coefficients of the econometric regression*" (p. 71) is correct; and (iii) what use has been made of the data for 1996 and 1997.

We must begin by saying that the report is very opaque on this point and that the explanations given by the expert [*redacted*] at the trial (video no. 3, end of video no. 5 and beginning of video no. 6) do not manage to dispel all the doubts.

In the trial we are told (video nº 3, from minute 50:00 onwards) that, according to what they were told by the magazine's editors, the 1997 data were supplied at the end of 2016 (51:03), so, as they were before the beginning of the cartel, they were not cartelised prices and the econometric rigour required, first, their exclusion from the regression and, then, to estimate them and, with it, the annual and average overpricing. The problem is

not minor, because it is precisely in 1997 that the published list prices reflect a significant decrease and the difference between including or not including 1997 and between including the estimated price and the published price alters the result in an extraordinary way, to the extent that the overcharge disappears. The complainant has not submitted any evidence that the gross prices for 1997 were provided in 1996 and were therefore unaffected by any cartel effect. However, the opinion of E. CA Economics (p. 262, text and note 271) acknowledges that Mercedes-Benz sent the prices between October and November of the previous year and that the magazine was published in April of the following year, as reported to Cuatrecasas by [*redacted*] of the administration department of *Transporte Profesional* in a telephone call on 15 July 2019 at 11:10 a.m. Then, having admitted that the 1997 data reflected prices prior to the start of the cartel, it was appropriate to exclude them from the regression, as seems to have been done. More dubious (and more significant) is the treatment of the 1996 data, not so much because they are not related to the cartel (which is not disputed), but because the actual prices are again disregarded and an estimate is used, not in the regression, but as an ideal point of convergence of the factual and counterfactual lines through the application of the analogy index (see section 6.1.1.1.1.2 of the report by E. CA Economics), with a notable impact on the results, as shown by the comparison between figure 43 (p. 125) and 44 (p. 126).

If the synchronic method breaks down at the base (the analogy of markets, or rather the lack of it), the diachronic method of support does so, fundamentally, for the following reasons:

a. *Lack of justification for the division of the duration of the cartel into two periods and absence of robustness test*. The Caballer-Herrerías opinion distinguishes (p. 20) four periods of the cartel: (1) January 1997 to August 2002, when the cartel was organised through the headquarters; (2) August 2002 to the end of 2004, with the entry of the German subsidiaries; (3) Early 2005 to the end of 2007, when the organisation is exclusively in the hands of the German subsidiaries; and (4) From 2008 to January 2011, with the use of more formal methods of collusion. These four periods seem to be deduced by the experts from the Commission's description of the facts. Without assessing whether or not the division of the cartel into four sub-periods is correct, it is inconsistent that only two (with an average price premium of almost 10 percentage points difference) are then taken with no other justification than "*not to make an excessively complex model*" (p. 24). And if the choice is made to split the cartel into two periods instead of the initial four, the judge must be offered a robust test to remove any suspicion that the split is arbitrary and/or self-serving; to this end, alternative scenarios should have been incorporated - temporarily and not through a misnamed "erratum" - so that alongside the one chosen (2 periods), it would be shown how taking a single period (1997 to 2011) or the initial four sub-periods affects the results.

b. *Lack of uniformity of the sample (by category of buyer) and insufficiency of the "purchase volume" variable to explain it*. Among the explanatory variables, the Caballer-Herrerías opinion includes what it calls "purchase volume," which would indicate the size of each purchase (p. 83), that is, how many trucks are purchased in each operation, since it is understood - and it is obvious - that the higher the purchase volume, the better the price. However, a variable measuring the size of the buyer has been omitted, since it is also obvious (even if it is not to expert [*redacted*], video no. 6, minute 14:30) that a large company will receive a better price than a small company even if it buys only one vehicle, since if it buys from its usual dealer it will be given a discount in line with its purchase history and future potential, and if it buys from a different dealer, the latter will offer a good price to try to attract it. Size of purchase and size of buyer are therefore different variables and both need to be included in the equation.

The opinion of E. CA Economics shows that the sample for sub-period 3 is overwhelmingly composed of two large buyers ("size" 542 and 1863, with the most influence on price negotiation), while small buyers are 99% concentrated in sub-periods 1 and 2. Figure 55 (p. 160) shows graphically how buyers with a "size" value of 1-100 are very predominant in the period of the infringement (in round numbers between 70 and 95%) to become anecdotal in the non-cartelised period (20% in 2011, less than 5% in 2015 and 2016 and zero in 2012, 2013 and 2014). By not including in the equation a variable that measures the size of the buyer and not of each individual purchase, a price difference that should have been captured by this explanatory variable is imputed to the infringement. The omission of this relevant variable, together with others that could be relevant, explains the low R^2 obtained (0.71).

c. *Inadequacy of the "IPRI$_{EU28}$" to measure costs*. In table 9, "results of the econometric regression" (p. 88) this indicator appears with a negative value (-0.1610). As the expert [*redacted*] explained (video no. 8, 27:11), this means that if the IPRI (in theory, the measure of costs) goes up, the price goes down, which shows that the experts have not been right in choosing this indicator to justify the costs.

The Caballer-Herrerías opinion, in sum, does not exceed the jurisprudential standard required of the Claimant's expert opinion.

SIXTH. *The expert opinion of E. CA Economics (version 27 January 2021). Valuation*.

DAIMLER's opinion uses a diachronic (during-after) method based on the net prices billed to concessionaires from 1999 to 2016 to conclude that there is no evidence of overcharging.

In view of the length of the opinion, we will structure its analysis in various sections:

1. Database.
2. Choice of explanatory variables.
3. Sample composition and cleaning process.
4. Results of the central model.
5. Reliability or robustness analysis.

1. **Database**. The opinion explains in section 1.3 (pp. 5-7) the sources of information available to it:

1.1. Transaction-level price data for Germany, France, the United Kingdom, the Netherlands, Belgium and Spain. For our country, the data cover the period from 1999 to 2016, as - it is said (p. 53) - only from that year onwards have they been able to systematically and smoothly access specific information on the price of trucks. The data are taken from the defendant's accounting system. The experts have had at their disposal all the sales in Spain from 1999 to 2016, both to dealers (own or independent) and direct sales to end customers (representing 2%) [p. 52, text and note 52].

1.2. Transaction-level costs data, including variable costs for each truck sold in Spain since 2003 and total costs per truck (including the relevant part of general costs) since 1999.

1.3. Truck-level data on the properties of the unit sold.

1.4. Information on the properties of the contracts, identifying whether they were sold with services contracts, financing, leasing, etc.

1.5. Aggregated price data from 1997 to 2010 from the DAIMLER accounting system containing, on a monthly basis (before 2000, annual), figures for total gross and net receipts in Spain broken down by subcategories of trucks.

1.6. Registration data from 1997 to 2015 (various public sources).

1.7. Data on gross list prices from *Transporte Profesional*.

2. **Choice of explanatory variables**.

The following were taken as explanatory variables:

2.1. Production costs.

2.2. Properties of the transaction, in turn including:

2.2.1. Technical properties of the trucks (use, chassis, power, MAW, configuration, cab size, suspension, truck adapted to the customer, trucks adapted for heavy goods transport, trucks ordered with the production phase already started).

2.2.2. Customer properties (total trucks purchased/number of years), resulting in four groups: fewer than 2, 2 to fewer than 6, 6 to fewer than 25 and 25 or more.

2.2.3. Package properties: a variable is introduced to control whether the sale was made together with a services or leasing contract.

2.2.4. Sales channel: independent and own dealers and direct sales.

2.3. Demand, measured in tonnes/km.

3. **Sample composition and cleaning process**.

Of the total number of trucks sold between 3Q/1999 and 2Q/2016, 65,996, 9,286 have been eliminated due to lack of information on prices, 272 due to lack of information on costs and 1,766 due to lack of other information or errors. The total sample analysed amounts to 54,672 transactions.

The percentage of observations for each year of the period 1999 to 2016 is sufficiently uniform, as shown in Figure 18 (p. 67).

4. **Results of the central model**.

Table 6 (p. 70) gives the results of the regression. As the variables mentioned above are added (most notably the costs and the truck's properties), it can be seen how the model becomes stronger as R^2 increases until it reaches 0.951 for the base model (column 7) (compared to 0.715 for the Caballer-Herrerías diachronic model). This base model does not show overpricing and its statistical significance is 1%.

5. **Reliability or robustness analysis**.

Robustness analyses are carried out (pp. 253 et seq.), consisting of introducing changes in the various variables, without any statistically significant overcharge attributable to the infringement appearing. It is noteworthy that the Caballer-Herrerías opinion lacks sensitivity analysis at all, choosing to make the synchronous model robust by varying either the market (from light trucks to vans) or the model (from synchronous to diachronic). And just as the Caballer-Herrerías opinion neither gets the main model nor the reinforcement models (which weaken rather than reinforce) right the multiple sensitivity analyses in the E. CA Economics opinion increase the credibility of the base model.

The changes affect:

i. *The trucks' properties*, adding four specifications: 2.a), which adds explanatory variables (a/c, aluminium rims, power take-off, etc); 2.b), which subtracts variables and eliminates completely those relating to cab size, axle configuration and suspension; 3), which adds an explanatory variant for the percentage of extras or options; and 4), which excludes special vehicles.

The R^2 is scarcely altered, ranging from 0.948 to 0.969 (for 0.951 in the central model).

ii. *The measurement of the demand*, including seven alternative scenarios: 1) Base model (tonnes/km); 2) GDP growth and tonnes/km; 3) Credits and tonnes/km; 4) Transport investment; 5) GDP growth and transport investment; 6) Credits and transport investment; and 7) Registrations.

The R^2 does not suffer either and fluctuates by four thousandths (minimum of 0.948, maximum of 0.952). Nor is the difference significant when using the "reduced sample" (available only since 2006), as the R^2 does not fall below 0.924.

iii. *The sample*, which is restricted from the base model to add two reinforcement scenarios including (2) trucks sold without a services or financing package and (3) excluding leasing. The R^2 is even higher.

iv. *The consideration that the cartel produced prolonged effects* ("lag effect" in the terminology of the plaintiff). The relevant period is extended to 31 December 2011, with R^2 remaining unchanged.

v. *Regression in "levels"* (p<10%-5%-1%) instead of logarithms for prices, costs and tonnes/km. The R^2 is 0.919.

The common denominator of the reliability tests is a very high R^2 (and very close to that of the base model) and the absence of overpricing attributable to the infringement.

After an exhaustive study of the expert opinion, we can conclude that it presents a high degree of transparency (much higher than the Caballer-Herrerías opinion, which omits some relevant data and explanations) and that it has not been refuted scientifically.

The database can hardly be improved. It covers practically the entire period of the cartel (since 1999) and the fact that two years are missing is not relevant, given that the plaintiff itself assumes that the level of organisation and efficiency of a cartel is increasing, so the absence of the first two years is not very significant; in any case, if there is overcharging, it should emerge and be visible in the following years. The experts have all the data relating to sales, discounts, costs, etc.

The plaintiff questions the veracity of the data, which, being internal, could have been manipulated. This line of defence must be firmly rejected, not so much (which is also the case) because it involves questioning accounting data that have been transferred to annual accounts subject to audit, but because the plaintiff could have had access to them and has refused this possibility. The opinion of E. CA Economics describes the internal and external audit process to which the data provided by DAIMLER have been subjected (paragraph A1.1.3, pp. 222 et seq.). There is not the slightest indication that the data have been manipulated *ad hoc* for these legal claims or were manipulated already since 1999 *ad cautelam*, in the hypothetical case that the cartel was discovered and a defensive strategy had to be devised in the future. The manipulation of these data is not credible; so many variants have been examined by the experts and it is so difficult to foresee how a possible distortion would affect an econometric study that we cannot even conceive that the data (which number in the hundreds of thousands) have been manipulated by the manufacturer (neither *ex ante* nor *ex post*), basically because a layman would not know how to alter the data to obtain the desired econometric result; nor is it possible to conceive that the alteration came from the experts, who have taken an oath or promise in the terms required by the LEC.

The loss of references in the sample cleaning process (17.2 %) does not merit criticism either. The Practical Guide (84) warns that "*most data series are incomplete*" and that *"[d]ata deficiencies should not prevent an economic analysis from being given the importance it deserves*" (84). Moreover, the loss is lower, in percentage terms, than the loss suffered by the plaintiff's expert for the factual market (1,414 out of 7,257 - excluding SCANIA and non-infringing brands - which represents 19.48%) and slightly higher than the loss of the counterfactual (13%), even though DAIMLER's sample is much larger in number than those supplied by *Transporte Profesional*. And if the exclusion process of certain trucks is questioned, it was sufficient to request the data from DAIMLER's experts to verify it. E. CA Economics' experts, even without access to the digitised data in the database used by the plaintiff, have done so (see Appendix 3, section A3, entitled "[d]etails on the

digitisation and cleaning of the data and the processing of the data in the plaintiff's expert's report"). What is unacceptable, as contrary to procedural good faith, is to cast doubt on the origin of the data or the cleansing process and then refuse access to information that could eliminate or confirm it.

The explanatory variables are not in doubt, nor is the way of incorporating them into the regression equation, drawing numerous alternative scenarios that confirm the goodness of fit of the base model. We did not notice any problem of omitted variables.

The plaintiffs questions the uniformity of the sample (fig. 73, p. 227), which would include more (more expensive) long distance trucks in the post-cartel period than during the cartel, which according to the expert [*redacted*] (video no. 4, minute 43:33) "*pulls the average price upwards*," which would contribute to conceal an overcharge attributable to the infringement. However, this does not detract from the credibility of the model, any more than the Caballer-Herrerías diachronic model did from the imbalance (in this case of brands) between the three sub-periods, since in both opinions both "truck use" (E.CA Economics) and "brand" (Caballer-Herrerías) have been included as explanatory variables.

Indeed, the Caballer-Herrerías diachronic database, which operates on net prices, consists of 5,396 individual purchases, which are distributed over three time periods: First half of the cartel (1997-2003); (2) Second half (2004-2010); and (3) Post-cartel period (2011 onwards). We are told that the database is balanced by brands, when the mere viewing (pp. 85 and 86) of tables 8.A ("composition of brands in sub-period 1"), 8.B ("composition of brands in sub-period 2") and 8.C ("composition of brands in sub-period 3") reveals precisely the lack of uniformity. Thus, for example, IVECO, which is in the "cheap" range (if not the most), appears 64 times in sub-period 1, 361 in sub-period 2 and 345 in sub-period 3. And MERCEDES-BENZ (DAIMLER), which belongs to the "expensive" range (if not the most), 118, 616 and 58 respectively. The lack of uniformity of the sample is more pronounced in sub-period 3, precisely the one in which a drop in prices is reported, which is attributed to the end of the cartel: 58 trucks of one of the most expensive brands for 345 of one of the cheapest. The sample, therefore, is not balanced at source (something common in practice) but this does not deprive the model of validity or credibility (it loses them for other reasons, already explained), since this initial imbalance is corrected with the explanatory variant "brand", which captures this difference in price instead of attributing it to the "cartel." Table 9 (p. 88), giving the regression results, shows how each brand is assigned a coefficient/value, ranging from -0.0282 for IVECO to 0.0946 for VOLVO.

The same imbalance is seen (and in the same period, post cartel) in the E.CA Economics opinion, not in the brand obviously (all observations are DAIMLER sales) but in the use of the truck, since there are more long distance (more expensive) ones than in the cartelised period. As the expert [*redacted*] clarified (video no. 10, minute 15:24), the inclusion of the variable "truck use" captures whether the truck is long distance and, therefore, more expensive, preventing the effect on the price from being imputed to the "cartel" variable. If we check table 31 (p. 249), it is easy to see how the properties of the truck constitute the most detailed variable, with 28 sub-variables, including the "use for which the truck is intended": construction, long distance, TDM and short distance. The concern therefore falls.

The composition of the sample is also criticised for the exclusion of Econics, Unimogs and Zetros trucks. In the opinion of E.CA Economics (p. 66, footnote 79), the decision is justified because they are special trucks and account for less than 1% of the observations in Spain, so it is concluded, "*they are not relevant for our analysis*." When questioned by the plaintiff's counsel (video no. 10, minute 7:28 onwards), the expert confirmed his decision, even questioning whether they could be considered trucks due to their speciality. In any case, given that they do not represent even 1% of sales in Spain, their inclusion or exclusion is not considered relevant. Neither is the inclusion or not of special trucks (fire engines, concrete mixers, car transporters, road sweepers, etc), which are included in the base model and excluded in the fourth sensitivity analysis (cf. pp. 253 and 254), with no noticeable change in the R^2 (0.951 by 0.960, respectively).

The plaintiff also contests the fact that the experts of E.CA Economics have reduced certain costs. On pages 212 et seq., the opinion explains that certain unforeseen and unusually high costs were corrected

econometrically for the new “Actros” series from its launch in 2011 to 2012 and 2013. The objection must be overruled, because as [*redacted*] explained repeatedly at the hearing (video no. 9, minute 20:00, video no. 10, 41:00, video no. 11, 3:40), the correctness of this technical decision (present in the base model) has been assessed through a sensitivity analysis consisting of its elimination, without affecting the results. Figure 7 (p. 75) shows how two sensitivity analyses are carried out on the "cost variable," the second one being "base model without the cost correction for the introduction of new series." Table 9 (p. 77) shows in detail these cost sensitivity analyses and the one in question is irrelevant (0.951 of the R^2 for the base model, 0.947 for the alternative without cost correction).

The Practical Guide (153) warns of some problems that may arise from opting for a diachronic model, in particular the reliance that may be placed on data after the infringement has ceased:

“*With regard to the appropriateness of using price data observed after the infringement, it is possible that the cartel produced effects on the market even after its members had ceased to participate in this type of cooperation forbidden by Article 101 TFEU. This may be the case, in particular, in oligopolistic markets, where the information gathered through the cartel may enable its members to take sustainable action - after the cartel infringement has ended - aimed at selling at a price higher than the likely non-infringing price, without engaging in the kind of practices forbidden by Article 101 TFEU. It is also possible that, after the end of the cartel, former cartel members resort to another type of infringement of competition rules that increases prices to their customers. In such cases, any diachronic comparison based on prices observed after the infringement has ceased may lead to an underestimate of the excess cost paid by the customers of the infringers, since post-infringement prices may still be influenced by an infringement*."

In order to cover these possible prolonged effects, E. CA Economics' opinion carries out a further sensitivity analysis, extending the relevant period by a reasonable period (1 year), with no impairment of the model. The plaintiff, in its cross-examination of the expert [*redacted*], again seeks to cast doubt on whether the post-cartel period is affected by a "lag" or "learning" effect beyond December 2011, suggesting that overcharges are being claimed in Germany until 2016 (video no. 10, minute 23:46 onwards). The criticism should be dismissed for several reasons; first, there is no evidence that the cartel had effects beyond the date indicated by the Decision and second, the attempt to undermine the reliability of the prices of that period is not consistent with the Caballer-Herrerías opinion, which in its diachronic model resorts without expressing any doubt to net prices from 2011 to 2016 and concludes, moreover, that they experience a "*significant drop in 2011, when the cartel ended*" (p. 87). Therefore, if the plaintiff's experts rely on the post-2011 data for their report (without fear, at least expressed, of a prolonged effect, for which, moreover, they do not carry out any sensitivity analysis) and conclude a sudden fall in prices on them, it is neither coherent nor, therefore, acceptable to question the opinion of E. CA Economics (which does carry out a sensitivity analysis) simply because its results are not favourable to the plaintiff. If there is a lag or learning effect, it will be there for ever and for everyone, not according to the procedural moment or the interest being defended.

After examining both expert opinions, not only is there no evidence of overcharging, but we consider it scientifically proven that there has been no overcharging.

This conclusion does not conflict with the content of the Decision nor with the economic studies (not always econometric) on the effects of cartels, which, although they conclude as a general rule an effect on prices that is at the basis of the presumption of harm, also observe a non-negligible percentage of cartels in which the price is not altered [6% CONNOR, 4% BOLOTOVA, 7% OXERA (2009), 8% SMUDA and 17% BOYER and KOTCHONIE, despite all operating on the basis of the former's data].

And even these data must be interpreted with great caution. In relation to the study commissioned to OXERA in 2009, the Practical Guide itself acknowledges that "*care must be taken when interpreting the results of this exercise*" (141), as these studies may have biased results because more attention is paid to cartels that have price effects than to those that do not (note 118, p. 48). And recent articles such as that of COPPIK and HEIMESHOFF (*op. cit.*) - the BGH judgment of 23 September 2020 takes care to cite it (40) - which do not seem

to have an authorial bias (in the curriculum vitae preceding their commentary they are careful to note that they have worked on the assessment of cartel damages both for plaintiffs - mainly HEIMESHOFF - and defendants - mainly COPPIK) - warning that (i) these studies are prepared for scientific purposes and therefore do not meet the requirements that should be required of evidence of harm, among other things, in terms of database, estimation method and case selection; (ii) their results are subject to estimation uncertainties, systematic measurement errors may occur and have significant biases; (iii) they are not suitable for making projections for individual cases in order to set a specific harm figure (nor is this the intention of these studies) nor can they substitute for a carefully conducted differential hypothesis for the particular case to be assessed.

It is a different matter, we add, if the judge considers the damage to be proven (at least in terms of probabilistic causality) but not its amount, and then turns to these studies as another element that helps him or her to set the amount of the compensation.

In the light of the above, it being understood that there is no proof of overpricing and that the opinion of E.CA Economics completely destroys any presumption or maxim of experience, the claim must be dismissed in its entirety.

SEVENTH. *Costs*.

Despite the rejection of the claim, there is no need to impose costs due to the intrinsic and extrinsic limitations suffered by the plaintiff in this type of claim, a circumstance that is considered to be similar to doubts of fact (art. 394.2 LEC), even though in this case these doubts refer exclusively to the party bringing the action and not to the party prosecuting it.

In view of the foregoing facts and legal grounds

RULING

DISMISS the application brought by [*redacted*] against DAIMLER AG, and acquit the defendant of the claims made against it, with no order as to costs.

APPEAL: An **APPEAL** against this decision may be lodged within **TWENTY DAYS** of the date of its notification.

In order to lodge the appeal referred to in the previous paragraph, it is necessary to make a deposit of 50.00 euros to be deposited in the following account of this court, if the deposit is made over the counter: BANCO SANTANDER 2274 0000 04 0245 19.

In the "Item" field, indicate that it is a payment to lodge an APPEAL.

If the payment is made by bank transfer, it must be made to the account number ES55 0049 3569 9200 0500 1274 and in the "item" field, insert the provisions of the previous section and the sixteen digits indicated in that section.

The deposit can also be made through ATMs, giving the following details:

File account number (the one given for the counter).

Details of the person obliged to pay: surname and first name, type and number of document and telephone number.

Amount in figures.

Thus by this my sentence, I pronounce, command and sign it.

The dissemination of the text of this decision to parties not interested in the proceedings in which it has been issued may only be carried out after dissociation of the personal data contained therein and with full respect for the right to privacy, the rights of persons requiring a special duty of care or the guarantee of anonymity of the victims or injured parties, where appropriate.

The personal data included in this resolution may not be transferred or communicated for purposes contrary to the law.