CONSEJO GENERAL
DEL PODER JUDICIAL

Roj: AJM V 681/2021 – ECLI:ES:JMV:20221:681A

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Judicial body: **Juzgado de lo Mercantil (Commercial Court)**
Seat: **Valencia**
Section: **3**
Date: **10/05/2021**
Appeal no.: **1017/2019**
Ruling no.:
Proceedings: **Ordinary trial**
Presenter: **EDUARDO PASTOR MARTINEZ**
Type of ruling: **Edict**

Commercial Court no. 3 of Valencia

Ordinary trial 1017/2019

EDICT

(Submitting a question for a preliminary ruling from the Court of Justice of the European Union)

In Valencia on 10 May 2021

Eduardo Pastor Martínez

PLEAS OF FACT

(Object of the main proceedings and pertinent facts)

Preliminary details.- (i) Identification data of the submitting judicial body and of the parties in the proceedings:

Commercial Court no. 3 of Valencia

Ciutat de la Justícia de València

Avinguda Professor López Piñero, 14

46013 València (Spain)

Claimant: D. Ignacio y Tráficos Manuel Ferrer, S.L.

Legal Counsel: Mr. Álvaro Zanon Reyes

Court agent: Mr. Pascual Pons Font

Respondent: Daimler AG

Legal Counsel: Ms. María de los Desamparados Pérez Carrillo

Court agent: Mr. Luis Sala Sarrión

(ii) The submission of this question for a preliminary ruling takes the form of an Edict, which is that admissible under Spanish procedural law for deciding interlocutory references in a reasoned manner, articles ("arts.") 206.1.2nd and 208.2 of the Civil Procedure Law ("LEC", after its initials in Spanish) and that expressly imposed for submission of questions for a preliminary ruling in art. 4 bis 2 of the Organic Law on Judicial Power ("LOPJ, after its initials in Spanish). I have taken into consideration the "Recommendations of the European Union Court of Justice to national courts and tribunals in relation to the initiation of preliminary ruling proceedings" (Official Journal of the European Union ("OJ") 2019/ C 380/01) and their review in the "Recomendaciones y consejos prácticos en la formulación de cuestiones prejudiciales al Tribunal de Justicia de la Unión Europea" ["Recommendations and practical guidelines for the initiation of preliminary ruling proceedings before the Court of Justice of the European Union"] (REDUE-CGPJ).

FIRST .- 1.- On 11 October 2019 (as per computer registry), the representatives of D. Ignacio et al filed an ordinary lawsuit against Daimler A.G. ("Daimler") claiming damages for infringement of the Competition Law set forth in article ("art.") 101 of the Treaty on the Functioning of the European Union ("TFEU") with additional grounding in art. 1902 of the Civil Code ("CC"). The allegations of the claimants can be summarised as follows:

A) During the period 1997-2011, the respondent co-ordinated with other European truck manufacturers to set sales prices and delay the introduction of new technologies into the market, as an infringement of competition laws so deemed by the European Commission ("the Commission") in its Decision of 19 July 2016 ("the Decision"). The infringement consisted of setting and raising gross prices for trucks, affecting their net prices and the passing on of costs for introducing new emission technologies. The products concerned by the infringement were trucks weighing 6-16 tonnes (medium trucks) and trucks over 16 tonnes (heavy trucks), both rigid and tractor trucks.

B) During the period the cartel was in operation, the claimants acquired several trucks from Mercedes, Renault and Iveco, of the technical features affected by the infringement object of the Decision. Daimler manufactures Mercedes trucks.

C) As a result of that infringement committed by the respondent, the claimants state they have suffered damages in the form of being overcharged for the vehicles they acquired. The claimants have presented an expert report which quantifies the damages suffered developing a synchronous model. To apply the model, they start with the gross price lists of medium and heavy truck manufacturers, taken from the information supplied directly by the manufacturers to specialised journals published in Spain during the years the cartel was in operation. Alternatively, to reconstruct the analogue market, they take gross list prices for light trucks obtained from the same source, together with gross list prices for vans. The control variables deemed suitable for developing the model are selected (horsepower, mass, manufacturer, euro standard, time, discarding the other possible variables because they were not deemed significant). After applying the formulas employed to recreate the factual and counterfactual markets, they detail the technical bases of the econometric estimates that justify the identification of a mean surcharge in the cartelised market of 16.35%, articulating, in turn, the results from the model which enable these mean results to be broken down to quantify the surcharges in each tax year that the cartel was in operation.

Second.- 2.- The suit was declared admissible by Decree passed on 17 June 2020, which agreed transfer of the same and of the accompanying documents, with a summons to respond to the suit.

Third.- 3.- On 11 August 2020, Daimler's representatives in the proceedings, requested the participation of Renault Trucks SAS and Iveco SPA in the proceedings, invoking article 14 LEC. Daimler indicated that part of the vehicles referred to in the suit were not manufactured by them but rather by other recipients of the Commission Decision, whereby, were the proceedings to continue in the absence of those manufacturers, their right to defence would be violated as would that of Daimler, to the extent that in setting the price that customers like the claimants eventually paid for acquiring some trucks is a process where numerous factors come into play which differ for each manufacturer and therefore, Daimler had no control over vehicles that were manufactured and marketed by others.

Fourth.- 4.- By Edict of 22 September 2020, I rejected the said request, given that the mechanism stipulated in art. 14 LEC only allows for the participation of third parties not initially sued in the proceedings in cases of holding express legal powers, which was not the case for Spanish legislation. By edict of 23 October 2020, after the appeal for reversal lodged by Daimler, I confirmed my previous decision. Proceedings therefore continued normal processing with Daimler as the only respondent.

Fifth.- 5.- Daimler filed its defence to the suit on 12 November 2020, petitioning for its dismissal. In synthesis, Daimler stated that this process should be resolved by applying national legislation, that the infringement ruled by the Commission is not of the kind that gives rise to the presumption of damages and that these are not accredited by the expert report submitted by the claimants. To the contrary, on 25 January 2021, Daimler submitted its own expert report, refuting that presented by the claimants, setting forth a deep critique of the bases thereof, as well as by a diachronic analysis which gives a comparison of Daimler's net prices during the period of infringement with the net prices applied thereafter, considering the differences in terms of demand, costs and variations in product that occurred over said period. The expert team stated they were in possession of Daimler truck prices from the year 1999. In particular, the analysis had been carried out considering dealership prices, given that Daimler would not have had systematic access to the prices dealers charge end customers, that being the usual marketing channel for Daimler vehicles in Spain.

Sixth.- 6.- The parties were called to hold a pre-trial hearing, which took place on 28 January 2021, the content of which was recorded on a digital medium and by Procedural Decree that same day. During the said hearing, after Daimler expressly offered and such was accepted by the claimants, it was agreed that the latter would have access to the data taken into consideration in the expert report submitted by Daimler, with the dual purpose of allowing a deeper critique of that expert report and the eventual redrafting of the expert report previously submitted by the claimants. Access would be granted through a data room, the logistics of which would be organised as follows: It would take place at the address of the office of Daimler's legal counsel, for one week during business hours; the experts

and legal counsel of the two parties would be present in the said room and all the data employed in Daimler's expert report together with the commandos and processing methods likewise employed, equipped with a computer belonging to Daimler and installed with suitable software to analyse said data and recreate their models. The claimants would be entitled to reproduce and extract a data sample sufficiently large to fulfil the purpose of the access measures, enabling them to subsequently redraft their expert findings prior to holding the main hearing of the trial which was scheduled for 25 March 2021.

Seventh.- 7.- On 18 March 2021, the claimants submitted a technical report on the results obtained by the data room arrangement.

Eighth.- 8.- On the date of the main hearing, its purposes were exhausted. In particular, there was an oral critique of the expert findings presented by one and other party. After the two parties presented their conclusions and prior to declaring proceedings adjourned pending judgment, I announced the Order of Stay of the term stipulated for the same.

Ninth.- 9.- Indeed, by Suspension Order of 25 March 2021, I agreed interruption of the term for judgment and pursuant to arts. 267 TFEU and 4 bis. 2 LOPJ, I elicited the opinion of the parties concerning the convenience of submitting a question for a preliminary ruling before the Court. In particular, I proposed to them to investigate regarding the compatibility of the right to full redress in art. 101 TFEU with the regime of objective expiry and proceedings costs in art. 394.2 LEC, the eventual subsistence of asymmetries in the information which is the basis for judicially estimating the damages incurred by the petitioner after the latter was given access to the data on which the respondent had based their expert report and the eventual subsistence of information asymmetries in the event that the compensations claims are directed at an infringing party that did not market the product or service acquired by the aggrieved party, an acquisition that forms the basis of the damages being sued for in the proceedings.

Tenth.- 10.- Both parties have made allegations concerning the suitability and content of the submission of questions for a preliminary ruling, as stated.

PLEAS OF LAW

(Reasons justifying the submission of a question for a preliminary ruling)

First.- Relevance of the submission of a question for a preliminary ruling.

11.- From the summary of the pertinent facts and to issue a ruling in this case, I consider it necessary to have a preliminary ruling from the Court on the interpretation of European Union Law,

within the scope of art. 267 TFEU, on the compatibility of the Spanish system of allocating procedural costs and on the right of the aggrieved party to full redress for an infringement of the Competition Law and on the interpretation of the notion *of impossibility or excessive difficulty* in providing evidence by that aggrieved party, as a presumption for alternative court quantification of the damages eventually incurred, in their relation with the respondent's contradiction and defence capacities and the limits which, for that reason, must be imposed at judicial discretion.

12.- The latest developments in EU case-law (Judgment of the Court, Fourth Chamber, of 16 July 2020, in joined cases C- 224/19 and C- 259/19) have found Spanish procedural rules concerning the allocation of costs in cases where the ruling is partially in favour of the claimant, art. 394.2 LEC, to be incompatible with the principle of effectiveness of EU Law on consumer issues, to the extent that said rule can generate obstacles which may dissuade consumers from exercising the rights they are granted under this legislation and lowers the material scope of the acknowledgement of the said rights. This line of argument might be likened, at least in appearance, to a case like that now under trial, where the party potentially aggrieved by the infringement of art. 101 TFEU could have the compensation they effectively receive substantially reduced due to the application of that same national regulation on the allocation of costs in a similar scenario to that which gave rise to the submission of those questions for preliminary rulings, namely, of partially ruling in favour of their claims for compensation, which is equivalent to accepting that the infringement ruled against the respondent produced damages, the existence of which will effectively be acknowledged because, one way of another, they can be quantified. It is therefore necessary to discern whether that response by the Court can be extrapolated or not to the solution of this case and without the established jurisprudential doctrine on the absence of reasonable doubt in this respect being applicable.

13.- The Court has pending the preliminary ruling filed for by Section 1 of the Provincial Court of León (Spain), by Edict of 21 June 2020 in which, in synthesis and in a suit with the exact same object as this one, several different problematic scenarios are raised resulting from the temporal application of Directive 2014/104/EU ("the Damages Directive") according to art. 22. In particular, the Court has to rule on the eventually new (novative) nature of the power provided for in art. 17.1 of the Damages Directive of judicial estimation of harm or whether, on the contrary, it is a simple development of the principle of effectiveness of the aggrieved party's right to full compensation for a competition law breach under art. 101 TFEU, which was already part of our acquis prior to the publication of the Damages Directive and thus avoiding its problems of temporal application, in a way that is immediately applicable to the solution of the case giving rise to the submission of that question for a preliminary ruling and also of this one. In either one of these scenarios, equally relevant for the solution of this case, it is likewise necessary to investigate the assumptions and grounds for applying this alternative method of quantification of the harm suffered for an infringement of art. 101 TFEU, in its relationship with the respondent's possibilities of defence under art. 47 of the European Union Charter of Fundamental Rights ("the Charter"). Likewise, the Court has pending before it resolution of the preliminary ruling submitted by Commercial Court no. 7 of Barcelona, by Edict of 21 February 2020, on the possible scope of disclosure measures pursuant to art. 5 of the Damages Directive.

14.- Below, I will discuss the need for requesting the preliminary ruling in the terms indicated, expanding on the regime applicable to the case and the relevance of the questions as formulated for reaching a resolution.

Second – Question one, the resolution of which I propose to the Court.

15.- Art. 394 LEC, in its current wording at the time of filing the lawsuit which has given rise to proceedings and the submission of this question for a preliminary ruling, reads as follows:

"Article 394. Order to pays first instance costs.

1. *In declarative proceedings, payment of first instance costs is assigned to the party whose claims are rejected, unless the court deems and thus reasons that the case threw up serious doubts of fact or law.*
   For the purposes of ordering costs, jurisprudence passed in similar cases shall be taken into account to deem that the case was judicially dubious.

2. *If the claims were partially admitted or dismissed, each party shall pay the costs caused at their request and half of the joint costs, unless it were warranted that they be imposed on just one of them for having litigated rashly.*

(...)."

16.- That precept is the result of applying the principle known as "objective achievement" in Spanish civil proceedings ("loser pays"), whereby what is pursued is the recovery of the expenses the process has caused to the party in whose favour the ruling has finally resolved.

17.- That rule is reflected in art. 398 LEC, concerning the costs incurred in proceedings in ordinary and subsequent extraordinary instances, to which a judgment emitted in proceedings like the present is always susceptible.

18.- Therefore, in Spanish civil proceedings, the party whose claims are dismissed is obliged to pay the other party the legal expenses they have incurred. Alternatively, the application of this objective rule may only be altered in those situations in which the judge considers that despite dismissing the claims of the party that should be liable for payment of costs, the case involves special doubts that justify that party's position. In Spanish civil proceedings, however, if the claims of one party are upheld only in part, there is no possibility of imposing on the other the obligation of paying the procedural costs incurred because that party has only partially lost, unless their procedural stance is considered to have been reckless, which is an exceptional and serious circumstance.

19.- To amend the excessive literal strictness of this procedural rule, which is a quantitative and not qualitative question, Chamber One of the Supreme Court has coined the jurisprudential doctrine of substantial achievement, whereby payment of procedural costs may likewise be ordered when what is obtained is lower than what is claimed in the proceedings. However, this jurisprudential doctrine, which considers the financial aspect of the proceedings and the importance of what is *not* granted, is also a quantitative and not qualitative question (that can be deduced in the Judgments of Chamber One of the Supreme Court of 29 September 2003, number ("no.") 871/2003, appeal ("app.") 3908/1997, Rapporteur: Jesús Corbal Fernández; no. 553/2005, app. 296/1999, of 7 July 2005, Rapporteur: Pedro González Poveda; and no. 715/2015, app. 2833/2013, Rapporteur: Francisco Marín Castán). Hence, the strictness of the aforementioned legislative system can only be made more flexible in those cases where what is not granted can be classified as non-core, from the viewpoint of construction and relation of the different claims forming the object of the proceedings or according to their contribution to the overall financial cost of the proceedings. More recently, the Supreme Court has moderated the scope of art. 394.2 LEC for litigation in consumer matters, in application of jurisprudential doctrine of the Court (Plenary Judgment of Chamber One of the Supreme Court no. 35/2001, Rapporteur: Ignacio Sancho Gallo).

20.- The Court has, in turn, held in its Judgment of 20 September 2001, in Case C-435/99, *Courage*, and subsequently on many other occasions, that the aggrieved party's right to full compensation for an infringement of art. 101 TFEU is a consequence of the full effectiveness of the said provision and of the *effet útil* of the prohibition it entails.

21.- In the case, application of art. 394 LEC, even through the prism of the national jurisprudence I have referred to, could result in the infringing party respondent not being ordered to make full payment of the legal expenses incurred by the claimant if its claims are not admitted in full. The solution of the case would be equivalent, even if the action were grounded solely on national law.

22.- As is known, it is generally accepted by the scientific community and in the texts with which the EU authorities have endeavoured to guide private application of Competition Law by European judges, that the damages stemming from an infringement of art. 101 TFEU cannot be directly observed, but rather by an approximate estimation, the technical grounding and expression of the results of which are always debatable. Therefore, proceedings of this kind tend towards the aggrieved party's claims for redress for an infringement of these characteristics being partially upheld. It should be highlighted that the preparation of an expert report of this type is particularly onerous.

23.- To resolve this case, I must attend jurisprudential doctrine established by the body that is my immediate superior, whereby the right to effective legal protection to which both parties are entitled is not subjected to undue delays due to this criterion being neglected and the need to file an ordinary appeal against my decision. That body is the Provincial Court of Valencia which, in a previous case the object of which was identical to this, has rejected the power of conviction of an expert report drafted in the exact same way with identical content to that presented herein by the claimants, to grant an alternative compensation amount residual to that initially claimed in the suit (Judgment of the

Provincial Court of Valencia, Section 9, no. 90/2021, of 26 January 2021, Rapporteur: Purificación Martorell Zulueta). Here, in observance of that jurisprudential criterion and without at this point considering the overall doubts involved in its solution, in the case the claim would be admitted in part which, afterwards would determine the distribution of legal expenses between the parties in application of the national rule and doctrines transcribed; namely, under no circumstances would the respondent be ordered to pay costs.

24.- In fact, the important proliferation of proceedings in Spain with exactly the same object as the one at hand, evidences that rarely are the claims for compensation granted in full, thus giving rise to full application of the national rule referred to above as to the non-imposition of costs on the partially losing party. Furthermore, if the claimant in this process lodges an appeal against the judgment which has only accepted its compensation claims partially, that appeal will be dismissed, thus doubly prejudicing the amount of compensation initially obtained by virtue of filing that appeal, due to them possibly being ordered to pay proceedings costs in the second instance (as can be seen in the Judgment of the Provincial Court of Cáceres, Section 1, no. 323/2021, of 28 April 2021, Rapporteur: Mr. Antonio María González Floriano).

25.- Likewise, that piecemeal jurisprudential construction currently militates against finding significant doubts in the case as to the existence of harm, such as to avoid the imposition of costs on the offending party in the event of losing the proceedings, as was in a generalised, reasoned and prudent manner uniformly accepted by a large part of Spanish judges in an initial phase of this new kind of litigation. Since it has generally and recurrently been declared proven among Spanish judges that the actions on trial here caused damages, it would not be possible to exclude the imposition of procedural costs because doubts exist that justify a persistent and emphatic procedural position denying that said damages were caused.

26.- From here, if the rule on the cost allocation regime in court proceedings in Spain is a an eminently national question and if that regime is equally applied to the claims covered by national or EU law, in the case all of that may still compromise the validity of the principle of effectiveness of the right of the victim of an infringement of art. 101 TFEU to full redress.

27.- Indeed, the distribution of procedural costs, in a scenario which acknowledges the existence of damages susceptible to compensation, will lower the level of the compensation granted to the victim of an infringement of art. 101 TFEU and may become an obstacle to the victim exercising their right to redress granted under this rule and the case-law which interprets it. In a scenario where the compensation to be obtained is not quantitatively large and considering the difficulty and onerousness of private enforcement proceedings under Competition Law, as per the standards of pleading and evidence inherent to them, that victim may be dissuaded from filing their claim, faced with the threat of attaining no recovery of their legal expenses even when their claim for compensation is granted, albeit only in part.

Third.- Questions two and three, the resolution of which I propose to the Court.

28.- In transposition of the rules on procedural harmonisation set forth in the Damages Directive and, particularly, in art. 5, concerning the application of which, to the solution of the case, for reasons of temporal application, no doubts arise; in its current wording, art 283 bis LEC regulates a sophisticated mechanism for accessing the necessary information to prepare proceedings concerning private application of Competition Law. It is an extensive and detailed rule and, for this reason, its literal citation is superfluous here.

29.- Alternatively, suffice to indicate that, in the interpretation of that rule concordant with the national and pre-existing procedural institutions that co-exist with it, in particular arts. 328 and 330 LEC on *inter partes* or third party documentary requests and the possibilities of a full discussion on the content and grounding of an expert report in arts. 336 and 347 LEC, the claimant and the respondent must have the possibility of accessing the information they require to articulate their claims, providing their request for access is reasoned, pertinent and useful, proportionate, does not compromise the confidentiality of data without at the same time the necessary mechanisms for the protection of that confidentiality, and provided it does not interfere in any unjustified way in proceedings for the public application of Competition Law.

30.- At least that will be the case among us, Spanish judges, providing that we abandon a single formalistic criterion for interpreting these rules, in order to reconcile them with EU rules and case-law the aim of which is to ensure the effective compensation of victims, and which highlight the compensatory nature of liability for harm, prohibit overcompensation and allow for the respondent's proper defence, in the same case cited earlier and in its well-known development (the Court requires no guidance on the content and applicability of the foregoing to the case at hand). However, no consolidated doctrine exists in Spain concerning the scope of art. 283 bis LEC because it is new and due to the particularities of our system for unifying jurisprudential doctrine via extraordinary appeals.

31.- The Spanish procedural system does not regulate how to instrumentalise these requests for access in any way, especially as regards their logistical requirements. However, soft law approaches in this respect are known to Spanish judges and in particular, the *Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law* (OJ 2020/ C 242/01).

32.- As has been indicated and is recognised in recitals 14, 15, 45 and 46 of the Damages Directive, the creation of this type of mechanism principally seeks to grant claimants and victims the opportunity to obtain the data they require to provide evidence of the existence and quantification of the damages they claim to have suffered as a result of the infringement, subject to a prior finding by a competent authority, which is attributable to the respondent. The reality of the damages may be facilitated by certain presumptions of an empirical nature. The evidence of the extent of the damages may, on occasions, prove so difficult to ascertain that it may require the judge to make an alternative

quantification of the same. However, the granting of this kind of solution must be kept for those situations in which, after the proceedings and the evidence that has been submitted therein, there is an indication of information asymmetries between the parties and where the victim has encountered particular difficulty in providing evidence which it has been unable to overcome.

33.- For all the above, if the Damages Directive expresses prior EU jurisprudence which proscribes overcompensation (art. 3), it also grants judges an alternative, subsidiary faculty of estimating the damages the victim suffered, in those cases in which it proves practically impossible or excessively difficult to accurately quantify the damages suffered based on the evidence available (art. 17.1).

34.- Until the transposition of the Damages Directive into our legal system and in those cases where the full legal force of that national reform is not directly applicable, art. 1902 CC (which is the Spanish general rule on tort liability) is a suitable action for articulating the right to obtain compensation referred to in art. 101 TFEU. Before that, unanimous jurisprudential doctrine was constant when deeming the existence of damages to be accredited upon verification of the facts causing them, where art. 386 LEC allows presumptions of that kind to be integrated into our procedural system, subject to rebuttal. All of the foregoing in the context of civil proceedings based on the principles of delimitation of the scope of proceedings and production of evidence (art. 216 LEC) where the evidentiary intervention of the judge is limited to eventual insinuation in the intermediate phase of proceedings on evidential issues that it would be advisable to deploy (art. 429.1 LEC) and without particular legal empowerment for the judge, on their own, to decide to take advice from an independent expert to assist in the task of quantifying the damages (arts. 339 -341 LEC). In particular, the residual possibility of intervention or cooperation from the competition authorities (art. 15 bis LEC) does not provide a means to overcome this deficit because its functionality is limited merely to the provision of information or the presentation of remarks concerning the application of arts. 101 and 102 TFEU. Neither does that same system of expert evidence allow a party in the proceedings, without agreement from the other, to propose the appointment of independent experts appointed by the judge from a closed list made up of discretionary candidates especially qualified for this function according to the specific nature of this matter.

35.- In the solution of identical cases to the one at hand, when the alternative of judicial estimation has been resorted to, Spanish judges have nominally invoked the tort liability rule of art. 1902 in its interpretation consistent with art. 17.1 of the Damages Directive or they have sought to directly apply art. 101 TFEU, more or less explicitly, considering that these judicial powers of estimation are a further consequence of the principle of effectiveness of the right to compensation that that constitutional rule has always contemplated, such that they did not strictly need to be set out expressly in the Damages Directive. That is the seed of the doubts justifying the partial submission of the preliminary reference from the Provincial Court of León. There are points of nexus between that preliminary reference and this one. However, this request for a preliminary ruling does not reproduce the content of the former and neither does it overlap with the content of the request for a preliminary ruling submitted by Commercial Court no. 7 of Barcelona.

36.- Indeed, the context of this case throws up further doubts to those merely concerning the temporal application of the EU regulation or the scope of requests for information, in particular regarding the conditions for the application of this kind of alternative estimation, so that their extraordinary nature is not undermined and it only be permitted where there great difficulties continue to exist which advise integrating or completing the claimant's evidentiary activity.

37.- In such a case, as I have indicated, in the same view of national jurisprudence and prudent observation, in addition to rejecting the expert report presented by the claimant for providing insufficient evidence, there would be a possible lack of sufficient evidence to refute the presumption of the existence of damages, which may be deemed accredited in the exercise of that legal presumption which our system of civil and procedural liability has always supported. Thereafter, once a situation of information asymmetry has been established, an alternative, lower appraisal of those damages should be sought which would result in the claim being partially upheld, as already noted. That is the outcome that the proceedings will foreseeably have, as a corollary to the mass litigation currently ongoing in our country.

38.- However, in the case it occurs that during the course of the proceedings and as described in the Facts of this resolution, albeit aware of the existence of said case-law on the shortcomings of the expert report presented by the claimant in analogous cases, this claimant has declined, for the reasons they have given in the proceedings, the evaluation of which should not now be compromised, the opportunity of redrafting their expert report, despite having had access to a large volume of information purportedly related to the effects of the infringement on the market and which is the information the respondent is effectively using in these same proceedings. Suffice to say that the claimants and their experts do not trust that the data has not been manipulated. This circumstance marks a qualitative difference with widespread and recent Spanish jurisprudential experience.

39.- In these circumstances, at the least the claimant has been availed of access to the same data and in analogous evidentiary conditions as the respondent. If the expert report submitted by the claimant is rejected, it is then questionable whether there continues to be a situation of information asymmetry in the case which justifies subsequent extra action by the judge, that is undertaking an estimation of the extent of the harm suffered by the claimant which is not based on taking their expert report, or the data underlying the former, into account.

40.- For the purposes of the art. 267 TFEU, it would be out of place to try to pass to the Court the duty of carrying out an assessment of the evidence, a task pertaining to the national judge (which for the case of evaluating expert reports is that set forth in art. 348. LEC, due to its allusions to the rules of healthy criticism) or any other analysis of an eminently procedural nature and confined to the options provided by national legislative policy. The questions I wish to ask herein run the risk of being contaminated with those inappropriate pivotal issues. But, before going on to evaluate the outcome of the evidence submitted in the case, I consider it necessary to ask the Court about the kind of information asymmetry that should allow me to make an alternative estimation of the damages the

claimants have eventually sustained and, in particular, whether this should be a qualified appraisal or only that normally inherent to any scenario involving an infringement of Competition Law.

41.- Hence, in the case it becomes necessary to learn what the principles grounding the practical application of the mechanisms of art. 5 of the Damages Directive should be and their relationship with the dogmatic substantiation and limits of the power of judicial estimation of harm in scenarios with evidentiary weaknesses, overcoming the problems of the temporal application of art. 17.1 of the Directive or acknowledging its dependence on the principle of effectiveness of art. 101 TFEU, in a way always related to the rights of defence of art. 47 of the Charter. Because it should be noted: the respondent will never know the substantiation or content of the alternative estimation of the damages until the court ruling which resolves the court's determination of the case.

42.- In turn, art. 1144 CC recognises, in the event of joint and several obligations, the creditor's entitlement to address their claim simultaneously or alternatively against any joint and several party. In the Spanish civil system, joint and several liability has a conventional or legal origin. Together with those categories and in a wide array of cases in which our general rule of tort liability, the constant jurisprudence from the Supreme Court has recognised a third class of joint and several obligations, known as "*impropias*" (not based on law or convention), which are, for example, those obligations which are so considered by court ruling. This doctrine awards effective redress of the damages victim and resolution of the problem in the distribution of the quotas of liability among the causers of the damages, in a way similar to that set forth in art. 11 of the Damages Directive in questions of joint and several liability of the different undertakings infringing Competition Law. Hence, to solve the case, and when it comes to differentiating the joint and several relationships between the cartel members from which it is forthcoming, we can without difficulty skirt the problems concerning the temporal application of this EU rule, given its substantive rather than procedural nature, because the principle of effectiveness of art. 101 TFEU finds an adequate fit withing the possibilities offered by this pre-existing national framework.

43.- The connection of those substantive rules with the bases for the valid subjective constitution of civil proceedings in Spain [i.e. the right parties], means that the company infringing Competition Law may be recognised standing to be sued under art. 10 LEC and so may be obliged to attend claims for redress of the victim of that same infringement, even if the victim were such as the result of the acquisition of a cartelised product or service marketed by a different addressee included in the Decision. In such cases, there is no legal basis for forcing the intervention of third parties that were not initially sued, neither via joinder under art. 14 LEC (which regulates the forced joinder of third parties not initially sued), nor through defects in the constitution of the lawsuit by means of art. 420 LEC (which, during an intermediate stage in proceedings, permits the lack of a necessary party to the proceedings to be corrected).

44.- Nothing prevents that third party not initially sued from participating voluntarily in the process, resorting to an intervention mechanism different to those mentioned above (under art. 13 LEC).

45.- Nothing prevents any of the parties to the proceedings from requesting specific evidence from those same third parties. In particular, art. 283 bis LEC is an ideal instrument for such purposes, although not being formally and materially connected with the rules on the mandatory time limits for responding to the suit of the party initialled sued in the proceedings, whereby the lack of availability of the necessary information to formulate a suitable defence is not a cause exempting the respondent from their obligation to respond to the claim, as an obligation subject to a short, peremptory deadline, not open to extension in arts. 404 and 405 LEC.

46.- However, with no other justification than the freedom to do so, in this case the claimant has directed its damages claim against the respondent for damages which, at least in part, they have allegedly suffered through the acquisition of products marketed by third parties. Only part of the products acquired, and which support the filing of the claim, were bought directly from the respondent.

47.- It is evident that any offender shall always have more information concerning the infringement, its nature, characteristics and effects than any party possibly aggrieved by them. This does not appear a biased or prejudicial statement. But it is much less evident and not at all justified that any offender should have more financial information concerning the complex activity of the other offenders, in particular that concerning specific acts, causally connected with the damages that the claimant may have suffered and that is necessary to articulate the full and comprehensive defence that the case demands. Likewise, it is less evident that the sole availability of certain evidentiary instruments granted indiscriminately to any party in Spanish civil proceedings, requires that offender to request exhaustive evidence from the other offenders, even when the claimant has opted to file their suit against the party that has not forged the commercial relationship underpinning the claim for compensation and without having submitted evidence for this purpose, they do however transfer this to the respondent, having been able to do so using the same evidential instruments, but with the degree of deliberation that the former would not have been availed.

48.- The issue here is, through the very reasoning set forth above, if, in such cases, it is still possible to construe a situation of information asymmetry between the parties that justifies alternative, subsidiary judicial exercise of the power of estimation of the damages suffered by the claimant in that specific context, even when the power of conviction of their expert report is rejected pursuant to the rules of healthy criticism.

Fourth.- Questions which bring together the foregoing issues.

49.- In view of all the foregoing, I request the Court resolve the following questions:

(i) Is the regime set forth in art. 394.2 LEC which allows the victim of an anticompetitive conduct to be burdened with part of the procedural costs in function of the overall sum of the amounts unduly paid as an overcharge and which are reimbursed to them by virtue of its claim being partially upheld, which in turn, assumes as a declarative precondition the existence of a competition infringement and its causal relationship with the production of harm, which is indeed recognised, quantified and awarded as a result of the proceedings, compatible with the victim's right to full compensation under art. 101 TFEU and pursuant to the case-law which interprets it?

(ii) Does the power of the national court to estimate the amount of harm allow the same to be quantified subsidiarily and independently, because a situation of information asymmetry or irreconcilable difficulties in quantification is identified which must not impede the victim's right to full compensation for competition infringements under art. 101 TFEU and in its relationship with art. 47 of the Charter, even in the case where the victim of a competition infringement consisting of a cartel of a nature that generates overcharges, has had access during the course of the proceeding to the data on which the respondent themselves based their expert analysis to reject the existence of compensable harm?

(iii) Does the power of the national court to estimate the amount of harm allow the same to be quantified subsidiarily and independently, because a situation of information asymmetry or irreconcilable difficulties in quantification is identified which must not impede the victim's right to full compensation for competition infringements under art. 101 TFEU and in its relationship with art. 47 of the Charter, even in the case where the victim of a competition infringement consisting of a cartel of a nature that generates overcharges, directs its claim for compensation against one of the parties subject of the Decision, jointly and severally liable for that harm, but who did not market the product or service acquired by the victim in question?

Fifth.- Request for accelerated handling of the procedure

50.- Art. 105.1 of the Rules of Procedure of the Court of Justice ("the Rules") indicates that the referring court may request a preliminary ruling be determined pursuant to an expedited procedure when the nature of the matter requires that it be dealt with within a short time. To this end, I submit the particular reasons why I believe this case warrants a swift resolution from the Court pursuant to such a procedure.

51.- Currently, the Spanish court system is facing a great proliferation of proceedings identical to the one at hand. In all these cases, the national costs regime is applicable, according to which they are not imposed on the partial loser, leading to a *de facto* reduction in the compensation granted to the victim. In a growing percentage of the cases currently pending, the respondents offer access to their own data and business information, but they are generally resolved by judicial decisions admitting alternative compensatory sums for the damages suffered by claimants and despite rejection of their

expert reports, with the appreciation of a situation of information asymmetry between one and other party which justifies resorting to the said extraordinary measure. A residual percentage of claimants lodge their claims for compensation against addressees of the Decision which are not the manufacturer of the vehicles which are the object of their claims. However, the short annual statute of limitations for tort liability actions for damages in our system until the transposition of the Damages Directive, arts. 1902 and 1968 CC, means it is foreseeable that an important number of new actions may be brought against an eventual future economic unit against whom the same contents of the Decision may be enforceable by virtue of several liability (i.e. Case at. 39824 – Trucks, Decision of the European Commission of 27 September 2017, 2020 / C 216/07, "*Scania*").

52.- While no official data exists that can be objectively put forward for consideration by the Court, it is estimated that there are several thousand proceedings pursuing an identical purpose to the case at hand ongoing in Spain in first instance, second instance and before the Supreme Court.

53.- If this request is admitted for processing, it could determine that, by analogous and extensive interpretation of the rules governing civil prejudicial matters pursuant to art. 43 LEC, some Spanish courts or tribunals would decide to suspend the processing of matters of this kind. In no case would it be an imperative effect.

54.- It is true that none of the foregoing arguments evinces implicit, specific urgency to solving the case giving rise to the request for a preliminary ruling, but rather it is a generalised and problematic situation of this kind of proceedings in Spain.

55.- Nevertheless, I do believe that it could still be considered a special circumstance that requires clarification, as swiftly as possible, of the uncertainties giving rise to the submission of the question.

56.- In view of all the foregoing, I submit to the consideration of the Court the opportunity of applying the expedited procedure to this request as per art. 105.1 of the Rules.

I STATE

(request for preliminary ruling)

I agree to request before the Court of Justice of the European Union a preliminary ruling on the following questions:

(i) Is the regime set forth in art. 394.2 LEC which allows the victim of an anticompetitive conduct to be burdened with part of the procedural costs in function of the overall sum of the amounts unduly paid as an overcharge and which are reimbursed to them by virtue of its claim being partially upheld, which in turn, assumes as a declarative precondition the existence of a competition infringement and its causal relationship with the production of harm, which is indeed recognised, quantified and awarded as a result of the proceedings, compatible with the victim's right to full compensation under art. 101 TFEU and pursuant to the case-law which interprets it?

(ii) Does the power of the national court to estimate the amount of harm allow the same to be quantified subsidiarily and independently, because a situation of information asymmetry or irreconcilable difficulties in quantification is identified which must not impede the victim's right to full compensation for competition infringements under art. 101 TFEU and in its relationship with art. 47 of the Charter, even in the case where the victim of a competition infringement consisting of a cartel of a nature that generates overcharges, has had access during the course of the proceeding to the data on which the respondent themselves based their expert analysis to reject the existence of compensable harm?

(iii) Does the power of the national court to estimate the amount of harm allow the same to be quantified subsidiarily and independently, because a situation of information asymmetry or irreconcilable difficulties in quantification is identified which must not impede the victim's right to full compensation for competition infringements under art. 101 TFEU and in its relationship with art. 47 of the Charter, even in the case where the victim of a competition infringement consisting of a cartel of a nature that generates overcharges, directs its claim for compensation against one of the parties subject of the Decision, jointly and severally liable for that harm, but who did not market the product or service acquired by the victim in question?

I entreat the Court to consider applying the accelerated procedure to this request as per art. 105.1 of the Rules.

A written record of this resolution is to be sent in editable format to the Secretariat of the European Union Court of Justice, CCP-GreffeCour@curia.europa.eu.

The LAJ shall proceed to send this resolution through the digital validation service, to obtain an anonymised copy to send this version simultaneously together with the original, in editable format to the same address indicated above.

An integral record of the proceedings shall be sent via the E-curia application.

An integral record of the proceedings shall be sent by post to the Secretariat of the European Union Court of Justice (Greffe de la Cour de Justice, rue du Fort Niedergrünewald, L-2925 Luxembourg).

A copy of the anonymised version of this resolution shall be sent by e-mail to the CGPJ International Relations Service, at the address DIRECCION002.

Not susceptible to appeal.

To be notified.

I agree, order and sign.