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PROVINCIAL COURT OF MADRID SECTION 28

C/ Santiago de Compostela nº 100. Telephone:
91 4931988/89

APPEAL ROLL: 539/22
Originating procedure: Ordinary proceedings No 1371/19
Court of Jurisdiction: Commercial Court No. 14 of Madrid

Recurring party : "IVECO SpA
Procurator: [redacted]
Lawyer: [redacted]

Respondent : [redacted]
Procurator: [redacted]
Counsel: Mr Jaime Concheiro Fernández.

ILMOS. MRS. MAGISTRATES:
D. ALBERTO ARRIBAS HERNÁNDEZ
MR JOSÉ MANUEL DE VICENTE BOBADILLA
D. IGNACIO ZARZUELO DESCALZO

JUDGMENT No 231/2023

In Madrid, on the ninth day of March of the year two thousand and twenty-three.

The Twenty-eighth Section of the Provincial Court of Madrid, specialising in commercial matters, made up of the aforementioned distinguished judges, has heard the appeal, under number 539/22, lodged against the judgement dated 21 December 2021, handed down in ordinary trial no. 1371/19, heard by Commercial Court no. 14 of Madrid.

The parties to the appeal were, as appellants, the entity **"IVECO SpA"**; and, as appellees, the companies "[redacted] both parties defended and represented by the above-mentioned professionals.

Alberto Arribas Hernández is the reporting judge, expressing the opinion of the

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FACTUAL BACKGROUND

FIRST.- The proceedings were initiated by a lawsuit filed by the representation of the [redacted] against 'IVECO SpA', in which, after stating the facts, it The applicant claims that the Court should: (a) order the defendant to pay the costs of the proceedings and to provide the legal arguments which it considers to be in its interest and to put forward the legal arguments which it considers to be in support of its claim; and

"1. Principally

*1.1. declare that the defendant is liable for the claimed damages amounting to **EUR 86 621,56** suffered by my principals as a result of the infringement of competition law.*

1.2. order the defendant to pay the sums indicated and, if appropriate, the statutory interest accrued from the date on which the application was lodged and, in the alternative, from the date of the judgment

*2. In the alternative, if the **above request is not complied with:***

2.1. Declare that the defendant is liable for the damage which is established by the expert evidence as a result 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 application was lodged and, in the alternative, from the date of the judgment

3. order the defendants to pay the costs.

SECOND.- After following the trial through the corresponding procedures, the Mercantile Court no. 14 of Madrid, on 21 December 2021, issued a judgement, the operative part of which establishes:

"The application brought by [redacted] S.L. and S.A. v IVECO SPA and, consequently:

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a) declare that the defendant is liable for the damages claimed in these proceedings, amounting to the sum of €86,621.56;

b) order the defendant to pay the above-mentioned sums, together with interest at the statutory rate from the date of the lodging of the action

the lawsuit.

The defendant is expressly ordered to pay the costs.

THIRD.- Once the parties were notified of this decision, the defendant lodged an appeal, which, once admitted, was opposed by the plaintiff. Once the appeal had been processed in legal form, the proceedings were referred to the Provincial Court, which has given rise to the formation of the present case, which has been followed in accordance with the formalities of its kind, with deliberation and voting scheduled for 2 March 2023.

FOURTH - In the processing of the present appeal, the following rules have been observed
legal requirements.

THE LEGAL BASIS

FIRST - Pursuant to the decision of the European Commission of 19 July 2016, published on 6 April 2017, the entity "IVECO SpA", among others, was sanctioned as a consequence of its participation in anti-competitive conduct from 17 January 1997 to 18 January 2011.

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on the timing and impact of costs for the introduction of technologies

The plaintiff, the entities " [redacted] S.L." and " [redacted] S.A.", brought an action against the said cartel participant company by consider that they had been overpriced in connection with the purchase of four trucks, one the entity " [redacted] S.L.', and three the co-complainant.

These are the following vehicles:

"[redacted]

BRAND	REGISTRATION	acquisition price
IVECO	[redacted] 10.12.2004)	56.145 €

"[redacted] S.A."

BRAND	REGISTRATION	acquisition price
IVECO	[redacted] (30.9.2005)	67.025 €
IVECO	[redacted] 22.12.2005)	67.025 €
IVECO	[redacted] (12.5.2006)	67.025 €

The applicant considers that it has suffered an overcharge, according to the year of 20.99% for the vehicle purchased in 2004; 20.99% for the vehicle purchased in 2004; 20.99% 22.47% for vehicles purchased in 2005 and 21.69% for the vehicle purchased in 2005. purchased in 2006. It is also worth noting that the average price premium in the 14 years of duration of the cartel was 16.35%. Finally, damages are fixed 86,621.56 euros, of which 56,443.6 euros correspond to the 30,177.97 euros at legal interest from the date of acquisition. of each of the vehicles up to the date of the expert's report (although both 86,621.57), claiming also interest for the amount of legal since the filing of the lawsuit, all in accordance with the expert's opinion provided with the complaint prepared by Caballer, Herrerías et al.

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los precios brutos de los camiones medios (entre 6 y 16 toneladas) y pesados (de más de 16 toneladas) en el espacio económico europeo, así como de emisiones exigida por la normativa europea.

S.L."

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The judgment delivered at first instance rejects the defendant's plea of prescription and upholds the claim by accepting the plaintiff's expert's report, in the absence of any better-founded alternative hypothesis by rejecting the defendant's report drawn up by COMPASS LEXECOM.

The defendant contests the judgment of the Court of First Instance and seeks to have the action dismissed on the following grounds: (a) misinterpretation of the Commission's decision and of the application of the nature and scope of the unlawful conduct; (b) failure to establish the causal link; (c) failure of the plaintiff's expert's report to prove the damage, which has not been proved; (d) lack of damage according to the expert's report submitted by the defendant; (e) in the absence of proof, it is inappropriate to assess the damage;
f) statute of limitations; g) passing on the cost overrun; and h) improper award of interest on the presumption of damage.

SECOND.- For reasons of systematic order, we consider that we must first analyse the allegation reiterating the plea of prescription that was rejected in the judgment under appeal.

There was no dispute between the parties that the applicable limitation period was that of one year in article 1.968.2 of the Civil Code. However, we have already announced that the judgment of the Court of Justice of 22 June 2022, case C-267/20, has had an impact on the limitation period.

In essence, the defendant considers that the *dies a quo* must be calculated from 19 July 2016, the date of the Commission's decision, which was made public by means of a press release and disseminated information on its website.

The appellant considers that with the information disseminated in the press release and on the website, any injured party was in a position to bring an action for damages against the manufacturers.

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Thus, if the action was filed on 10 July 2019, the action would be time-barred in the appellant's view.

The judgment under appeal considers that the *dies a quo* must be calculated from the date of publication of the summary of the Decision, which took place on 6 April 2017, and attributes interruptive effects to various claims made on 16 and 28 March 2018, 5 and 6 April 2018 and 15 March 2019.

The question of the statute of limitations has already been analysed by this court in its judgment of 9 May 2022, among others.

In the aforementioned resolution we indicated the following: *"**12)** The legal institution of the prescription of actions and rights is traditionally observed in a restrictive manner by the doctrine of the courts, as it is not an institution based on material or intrinsic justice, but on requirements derived from legal security, see, for example, STS no. 142/2020, of 2 March. Therefore, what is fundamental is the determination of whether or not there has been a "silence of the legal relationship" during the legally established time. In this question, the acts interrupting the prescription, Art. 1.973 CC, are also ordinarily interpreted with a criterion of flexibility, for which it is sufficient that the creditor's unequivocal will to keep his right alive is on record, without the need for them to be in a specific form.*

It is also essential, for the purposes of examining the statute of limitations, to determine the initial moment of computation, since the limitation period only begins to run from the moment when the injured party could have brought the action, which may not coincide with the time when the harmful event occurred.

same. This involves circumstances such as the lack of knowledge on the part of the injured party of the harmful event itself or of the parties against whom he has to address his claim. This nuance in the computation of the limitation period is usually known as the theory of the actio nata, see SsTS nº 589/2015, of 14 December or nº 175/2016, of 17 March....

In accordance with the above, what happened on 19 July 2016 was the dissemination of a press release or press release by the EU Commission, of very limited length, barely one page, without

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specifying the identities of the infringers. On 6 April 2017, the provisional version of the sanctioning decision was published in the OJEU, with a description of the facts and circumstances and, above all, the identification of the offending companies. It is in this version that all the information necessary for the exercise of the action is specified: description of the conduct, duration of the cartel, member companies and exact time reference of the intervention of each cartelist in the specific conduct carried out. It is this publication, not the first press release, which discloses with a minimum of sufficiency the information necessary for the injured parties to bring an action".

This interpretation has been confirmed by the recent judgment of the Court of Justice of the European Union of 22 June 2022, case C-267/20.

In that judgment, the Court of Justice makes the following considerations:

"71. *In those circumstances, it cannot reasonably be considered that, in the present case, on the date of publication of the press release relating to Decision C(2016) 4673 final, namely 19 July 2016, RM was aware of the essential information which would have enabled it to bring its action for damages. On the other hand, RM can reasonably be considered to have had such knowledge on the date of publication of the summary of Decision C(2016) 4673 final in the Official Journal of the European Union, namely 6 April 2017.*

72. *Consequently, in order for Article 101 TFEU to be fully effective, the limitation period in the present case must be regarded as having begun to run on the day of that publication.*

As a result of the foregoing, the starting date for calculating the limitation period must be 6 April 2017, the date of publication of the summary of Decision C(2016) 4673 in the Official Journal of the European Union, without the interruptive effect of the claims made by the applicant being called into question in this instance, so that the action is not time-barred.

Furthermore, in relation to the applicable limitation period, we must take into account the provisions of the aforementioned judgment of the Court of Justice of the European Union of 22 June 2022, case C-267/2020.

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This judgment clarifies that Article 10 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law of the Member States and of the European Union must be interpreted as meaning that it constitutes a substantive provision within the meaning of Article 22(1) of that directive and that its temporal scope includes an action for damages which, although arising from an infringement of competition law which ended before the entry into force of that directive (as in the present case), was brought after the entry into force of the provisions transposing that directive into national law (Royal Decree-Law 9/2017, which entered into force on 27 May 2017), in so far as the limitation period applicable to that action under the previous regulation (one year) had not expired before the expiry of the period for transposition of that directive (27 December 2016).

The application of the time limit provided for in article 10.3 of the Directive and article 74.1 of Law 15/2007, of 3 July, on the Defence of Competition, in the wording granted by article three of Royal Decree-Law 9/2017, of 26 May, excludes any possible statute of limitations, which does not even occur with the application of the short period of one year.

THIRD - In the first of its arguments, the defendant criticises the judgment under appeal for having misinterpreted the Commission's decision and the scope and nature of the unlawful conduct.

This argument has already been examined and rejected by this court in its judgment of 8 July 2022, among others, the reasoning of which we will follow below, as we do not see any reason to depart from our precedents.

The Appellants submit that, in reality, the conduct sanctioned consisted of a mere exchange of information and not of gross or net price-fixing agreements. In short, that the infringement consisted in the exchange of gross price lists and information on gross prices, imputing certain translation errors to the Spanish version of the Decision.

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As we have already had occasion to analyse in other decisions, judgments of 10 December 2021, 6 May 2022, 9 May 2022 and 23 May 2022, we cannot share the above conclusion.

First, the *CJEU* itself *of 6 October 2021, C-882/2019*, establishes the scope of the Commission's decision, stating that:

"9. On 19 July 2016, the Commission adopted Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 - Trucks), a summary of which was published in the Official Journal of the European Union of 6 April 2017 (OJ 2017, C 108, p. 6) ('the Decision of 19 July 2016').

10. According to that decision, 15 European truck manufacturers, including Daimler, participated in a cartel which took the form of a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) consisting of collusive agreements on the fixing of prices and gross price increases for trucks in the European Economic Area (EEA), as well as on the timing and passing on of the prices of trucks in the EEA (OJ 1994 L 1, p. 3). 3) consisting in the conclusion of collusive agreements on the fixing of prices and gross price increases for trucks in the European Economic Area (EEA), as well as on the timing and passing on of costs relating to the introduction of emission technologies for those trucks, as required by the rules in force".

The judgment of the same Court of 22 June 2022, Case C-267/20, states in recital 16 that the infringement consisted in: *"agreeing, on the one hand, on price fixing and gross price increases... and, on the other hand, on the timing and passing on of the costs for the introduction of the emissions technologies required by the Euro 3 to Euro 6..."*

As a result, collusive agreements on the pricing and gross price increases of trucks in the European Economic Area (EEA), as well as on the timing and passing on of costs related to the introduction of emission technologies for these trucks are at stake.

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The EU Commission's decision certainly refers to these aspects, stating that "*(50) These collusive arrangements included agreements and/or concerted practices on prices and gross price increases with the aim of aligning gross prices in the EEA and the timing and passing on of costs for the introduction of emission technologies required by the EURO 3 to 6 standards".*

Moreover, the price-fixing agreements were not limited to a particular country or to part of the duration of the infringement. As the Decision states, the geographic scope of the infringement (61) covered the entire EEA for the entire duration of the infringement. In the case of a Commission decision, the Commission decision has always had a binding effect on the finding of the infringement (known as the supremacy rule) according to Art. 16 of Regulation 1/2003, the Commission Notice on Cooperation between the Commission and the Courts of the EU Member States, point 13, and the *ECJ of 13 April 1994, Case C-128/1994, 'Banks and the Commission', Case C-128/1994, 'Banks and the Commission',* point 13, and the *ECJ of 13 April 1994, Case C-128/1994, 'Banks and the Commission', Case C-128/1994, 'Banks and the Commission', point 13. C-128/1992, "Banks" (22-23)*. And fixed the above, even in the hypothesis held by the appellants on the presence of a cartel by object, not by effect, negative consequences on prices, production or innovation in the relevant market can be presumed (*Commission Staff Working Paper* accompanying the White Paper on damages actions for breach of EU competition rules, CSWP 2008, 88).

And the same conclusion is reached in relation to price fixing agreements or agreements combining, for example, price fixing and exchange of information. Prices may be fixed by other more subtle means, such as exchanges of information in this respect or of the price that distributors are recommended to charge, and there may be "explicit" agreements on mark-ups, although the exchange of information or attendance at such meetings is sufficient for the existence of an infringement (*R. Wish and D. Bayley*, *Competition Law,* 2012, pp. 523 and 539-543). In fact, the duration of the conduct and its extent show that the cartel had price effects and that the risk of such conduct was borne by the operators because of the benefits it brought them.

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In any event, we could also not accept that a cartel concerning the exchange of price information does not generally produce harm that is passed on to prices.

As highlighted in the Commission Communication on Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C *11/01*) (74):
"Thus, exchanges between competitors of individualised data on intended future prices or quantities should be considered a restriction of competition by object within the meaning of Article 101(1) (58) (59). In addition, private exchanges between competitors concerning their intentions as to future prices or quantities will normally be considered as cartels and will be fined as such since they usually have the object of fixing prices or quantities. Exchanges of information which constitute cartels not only infringe Article 101(1), but are also very unlikely to fulfil the conditions of Article 101(3)'.

It is this purpose of exchanges of price information that is referred to in the above-mentioned doctrine, considering this type of agreement as a price-fixing instrument.

Generally, price and quantity information is the most strategic, followed by cost and demand information (86).

On the other hand, the purpose of the decision is not to analyse the damage that could be caused by the infringing conduct, but this does not mean that the damage cannot be presumed on the basis of certain circumstances, including extremes that appear in the decision that serves as the basis for the *follow on* action.

The purpose of the competition authorities' proceedings is not to determine the harm caused to each individual victim. In order to assess whether such practices infringe Article 101 TFEU it is not necessary to quantify the concrete effects of the practices, since the object of the cartel agreement is to prevent, restrict or distort competition (Practical Guide, 139 and the judgments of the General Court which it cites, as well as the Commission Notice: Guidelines

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on the application of Article 81(3) TFEU, points 20 to 23. Its task is to focus on the public interest, not on the private interest, and to establish the compensation to be paid to the injured parties. Otherwise, as the document annexed to the White Paper 2008 (*Impact Assessment* 2008, point 63) points out, its role and function would be undermined.

On the other hand, in the case of infringements by object, as in the present case, it is not even necessary for the competition authority to determine the impact that the infringement has on the market, nor is it possible to rebut this assessment on the basis of the assertion that the conduct in question had no effect on the market (Judgments C-239/11 P, C-489/11 P and C-498/11 P, "Siemens and Others v Commission", paragraph 218, and C-373/14, "Toshiba Corporation", paragraph 25).

Precisely one of the difficulties that arise in relation to proof in liability actions is that which affects the assumptions regarding the damage and its quantification and the causal link, since it will be common for these aspects not to be analysed by the competition authority in the scope of its action (CSWP 2008, paragraph 90).

Consequently, the fact that a decision does not analyse the issues of damage does not mean that damage cannot be presumed.

The judgment under appeal characterises the defendant's conduct as a breach of the European competition law by virtue of the European Commission's decision of 19 July 2016 which, inter alia, penalised the defendant for engaging in collusive conduct in relation to prices and gross price increases, the Court being bound by the description of the facts and the legal assessment of the conduct set out in the decision, pursuant to Article 16 of Regulation 1/2003 (fourth legal basis).

Scania's decision is only taken into account, as an additional piece of evidence, to corroborate that the quantification resulting from the complainant's expert damage report is acceptable

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and to confirm that the exchange of price information is a very effective tool to achieve a collusive result.

FOURTH - By the second of the allegations, the appellants reject that the existence of the damage and the necessary causal link have been proven.

We do not consider that the judgment incorrectly presumes the existence of damage.

The Appellant reiterates that the Decision does not establish that the conduct produced effects on the market or harm to final purchasers of trucks, so we do not refer to the above.

As regards the presumption of harm, as the Practical Guide (140) points out, infringing the competition rules exposes cartel members to the risk of being caught and thus to being subject to a decision finding an infringement and imposing fines. The mere fact that undertakings nevertheless engage in such illegal activities indicates that they expect to derive substantial benefits from their actions, i.e. that the cartel will have an effect on the market, and thus on their customers. More specifically, the Practical Guide notes the following:
"(21) Infringements may lead to an increase in the prices paid by the customers of the infringing undertakings. Infringements having this effect include cartel infringements under Article 101 TFEU, such as price fixing, market sharing or output-limiting cartels. Abuses of dominance within the meaning of Article 102 TFEU can also have the same effect. Price increases mean that customers buying the product or service concerned pay an excessive price. In addition, a price increase may also lead to lower demand and may entail loss of profits for customers who use the product in their own business activities.

Once a decision is issued by the competition authority finding that there was a cartel operating in the market, it is reasonable to expect, on the basis of economic theory, that the cartel caused cost overruns. A different case is that of agreements that have not been implemented, where there will be no cost overrun (OXERA Report, p. 88).

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Based on the data obtained, the OXERA Report concluded that in 93% of all cartel cases examined, cartels lead to excessive costs. This finding is more difficult to refute the longer the duration of the cartel, as is the case here.

And for cost overcharges to exist, it is not necessary for the cartel to reach its most effective form (joint action of the cartelists as a monopoly).

In the case of a cartel and, in general, in infringements by object, negative effects on prices, production or innovation in the relevant market can be presumed (Commission Staff Working Paper accompanying the White Paper on damages actions for breach of EU competition rules, CSWP 2008, 88).

It should now be recalled that many aspects of the new European legislation were already part of the acquis communautaire or were already covered by national law and the case law of the Supreme Court.

As we explained in our judgment of 23 May 2022, actions for compensation for damages arising from collusive conduct were already based on Community case law before the enactment of Directive 2014/104/EU, as set out in the *SsCJUE of 20 September 2001, a.*

Courage, C-453/99, and of *13 July 2006, Manfredi, C-295/04 and 298/04*, among others.

These decisions linked actions for damages with the direct effect of primary law, Articles 80 and 81 TCEE, today Articles 101 and 102 TFEU, and with national rules on compensation for damages. It is this national and Community case law doctrine that establishes the guidelines for the interpretation of the conditions for the application of Article 1902 CC in the field of competition law. There are two fundamental aspects in this application, the accreditation of the reality of the damage and its quantification.

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Regarding the first aspect, case law admits that, from certain conducts, and under certain circumstances, the generation of pecuniary damage can be presumed, as derived from the conduct itself, under the doctrine known as *ex re ipsa loquitur*. Thus, the judgment of the Supreme Court of 21 October 2014, citing others, states that: "In any case, *this Court, in judgments such as 1163/2001 of 7 December and 692/2008, of 17 July (and those cited therein), considers the presumption of the existence of damage to be correct only when there is a situation in which the damages are 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 they are incontrovertible, evident or patent damage, according to the different dictionaries used. A situation arises in which the thing itself speaks ("ex re ipsa"), so that there is no need for proof, because reality acts incontestably for it*".

In the same line of jurisprudence, with regard to the possibility of presuming the production of pecuniary damage from the existence of a certain action, in the special field of the protection of exclusive rights, the judgment of the Supreme Court of 3 October 2019, FJ 2º, recalls that:

"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 party claiming them, both the existence and the amount (...). This doctrine, peaceful and reiterated, has an exception in the case law 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 incontestably for it.

But, as the aforementioned judgement 351/2011 of 31 May clarifies, "it is one thing if the situation of the case reveals the existence of the damage without the need to base it on evidence, and quite another if there is a legal presumption that excludes the need for evidence

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in any case". And, ultimately, we added in that judgement, "the assessment of that situation is part of the sovereign function of the courts hearing the case".

This doctrine on the presumption of causation of damage is perfectly applicable to the collusive conduct of cartels, within the scope of application of the action under Article 1902 of the Civil Code, in accordance with the Community principles of equivalence and effectiveness, so that the national rules, the aforementioned precept, cannot be applied in a decontextualised manner, in such a way that in practice they make it impossible or excessively difficult to exercise the right to compensation recognised in Articles 101 and 102 TFEU, or in a manner that is less effective than that which would result in the prosecution of similar claims under national law, cf. 101 and 102 TFEU, nor in a manner less effective than that which would result in the prosecution of similar claims under national law, see SsCJUE of 20 September 2001, a. Courage, C-453/99, and of 13 July 2006, Manfredi, C-295/04 and 298/04; and of 5 June 2014, C-557/21, a. Courage.

As regards the effects of the cartel and the harm to the indirect purchaser, it was already stated in our judgment of 10 December 2021, followed by those of 28 January 2022, 6 May 2022, 9 May 2022 and 23 May 2022, that economic theory and empirical studies show that any type of cartel can be presumed to affect prices.

Obviously, the fact that the products are marketed through the manufacturer's distribution network and that the final purchasers of the trucks have a direct relationship with the manufacturer's dealers does not preclude the existence of the damage consisting in the extra costs resulting from the unlawful agreements described above. Even the discounts which the dealers decide to apply from their distribution margin are applied on the basis of already distorted prices.

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In the automotive sector, it is well known that vehicle price increases are passed on to the manufacturer's own distribution chain, without prejudice to the discounts that dealers decide in each case to apply to their commercial margins, which always depend on the purchase price of the new manufacturer's prices. Dealers do not assume the manufacturer's price increases. In other words, as a general rule, when a manufacturer increases its prices, the prices of the vehicles sold by dealers are also increased. In short, passing on price increases through the manufacturer's distribution chain is a widespread commercial practice. This conclusion can be reached in our law in accordance with the principle of normality.

In this situation, in relation to the passing-on of price increases, the Commission Notice on Guidelines for national courts on how to calculate the share of the overcharge passed on to the indirect purchaser (2019/C 267/07) emphasises that (22) the burden of proving the existence and extent of such passing-on lies with the indirect purchaser claiming damages from the infringer. However, it adds that (23) the Damages Directive specifically addresses the difficulties faced by indirect purchasers in seeking compensation for the harm caused by the passing on of an overcharge. It notes in this respect that Article 14(2) of the Damages Directive establishes a *rebuttable* presumption according to which a claimant (the indirect purchaser) is deemed to have established that a pass-on from the direct purchaser to the indirect purchaser took place, provided that the claimant can prove that the following conditions are fulfilled:

a) the defendant has committed an infringement of competition law of the EU;

b) the infringement of EU competition law has had the effect of a cost overrun for the defendant's direct purchaser; and

c) the indirect purchaser has acquired the goods or services which are the subject of the infringement of EU competition law, or goods or services derived from or containing them.

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This presumption can also be assumed without departing from the rules of national law and in accordance with the principle of effectiveness, even if the presumption of damage contained in the Damages Directive is not directly applicable, which allows the existence of the damage and the causal link to be considered justified.

The Commission (CSWP 2008, 219) had already established that the proof of cost overrun in the case of actions brought by the indirect purchaser depended on the standard of proof of national law and that the cost overrun and its extent could be based on the presumption that the cost overrun that the defendant unlawfully imposed on the direct purchaser has been passed on in full up to its level. This does not preclude the claimant from proving (CSWP 2008, 220) the infringement - here this would not be necessary due to the existence of a Commission decision -, the existence of the initial overcharge and the extent of its damage. In other words, once the harm derived from the cartel and the harm caused to the indirect purchaser by way of presumptions has been established, this does not prevent this harm from being quantified (and the burden of proof lies with the plaintiff), either directly by calculating the overcharge passed on or by quantifying the overcharge and presuming the pass-on -if applicable, as is the case, as we have seen. We will analyse these aspects below when referring to the magnitude or quantification of the damage.

The Commission adds that, in particular, where in the course of the production/distribution chain the overcharged good or service was used to produce other goods or services, the complainant would still have to indicate the extent to which the goods or services it purchased incorporate the overcharged good or service of the defendant in order to prove its damage, which is not the case here.

The Commission considered the application of presumptions to ease the burden of proof on the indirect purchaser claimant to be justified since, once the victim has shown that there was an infringement and an overcharge, it is more equitable that the infringer, and not its victim, bears the risks arising from the infringement (CSWP 2008, 218).

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This is why the Damages Directive (cdo. 41) provides that passing on to the indirect purchaser must be presumed unless the infringer can credibly demonstrate to the satisfaction of the court that the loss suffered has not been passed on in whole or in part to the indirect purchaser. This *rebuttable* presumption is provided for in the aforementioned Article 14(2) of the Damages Directive. The above-mentioned Commission Notice on Guidelines for national courts on how to calculate the share of the overcharge passed on to the indirect purchaser elaborates on the quantification aspects. While the Practical Guide focuses on the overcharge, the Guidelines specifically address in more detail the passing on of the overcharge. The Practical Guide and the Guidelines should be read together (paragraph 3 of the Guidelines).

In conclusion, presumptions may be established in accordance with national law and in accordance with the principle of effectiveness, even if the Directive is not applicable as regards substantive provisions in relation to infringements completed before the expiry of the transposition period, which is the nature of the presumption of damages in the case of a cartel (judgment of the Court of Justice of 22 June 2022).

FIFTH - The non-existence of the damage cannot be sustained in the expert report provided by the defendant, which we will analyse below in response to the fourth allegation of the appeal.

In our judgment of 10 December 2021, we have already had occasion to criticise the COMPASS LEXECOM report submitted by the defendants, which is based on the same grounds as the one submitted here, even though it was submitted in order to combat expert evidence other than that submitted by the plaintiff.

As we maintained in that resolution, we cannot accept the conclusions of the COMPASS LEXECOM report in so far as:

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(i) The infringing conduct and the scope of the Decision are distorted in order to exclude the existence of damages. The report actually replaces the Commission's assessments - and even the scope of the Decision as expressed in the CJEU of 6 October 2021 (C-882/2019), to which we will refer later - with those established *pro domo sua*. The courts are bound by the Decision *in totum,* naturally within its material, temporal and territorial scope (cdo. 34 of Directive 2014/104). The binding effect relates not only to the operative part but also to the grounds on which the decision is based. The decision concerns IVECO in all aspects of the infringing conduct.

(ii) The fact that the Commission or the National Competition Authority does not need to analyse the market effects of an infringement by object does not mean that the Commission has not found market effects in the specific case, both with regard to the impact of the exchange of information on net prices and price increases.

(iii) The Decision (47, 49, 50, 51, 52, 53, 58, 71, 75) is not limited to assessing the information exchange conduct as such but also refers to the effects of such exchange (net prices, price increases). The addressees of the Decision were directly involved in the discussion of prices and price increases (49). The CJEU itself states in the above-mentioned judgment that collusive agreements on 'price fixing' were involved.

(iv) Even if the conduct was limited to the exchange of information on prices, this does not allow the existence of damage to be excluded as a prerequisite for the indemnity action - apart from the effects that have been seen in the Commission Decision itself, which, as we have noted, binds "in totum", in the terms set out above -. As stated in STS (Sala de lo Contencioso-Administrativo, Sección Tercera) nº 1145/2021, of 17 September 2021 (Rec. 5409/2020) , citing the previous judgment nº 1359/2018, of 25 July (Rec.

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2917/2016), the exchange of strategic information allows the companies to know the price that can be set, which is determined in accordance with a competition altered by the infringing conduct, insofar as the uncertainty about the market behaviour expected by the participating companies is eliminated. It may be presumed that those undertakings have actually determined their conduct on the market on the basis of concerted action, and that presumption is reinforced where the undertakings have concerted their conduct regularly over a long period (CJEU of 4 June 2009, C-8/08, paragraph 58).

(v) Such conduct is capable of preventing, restricting or distorting competition in the common market. The question of whether and to what extent such an effect actually occurs is relevant for the purpose of establishing damages claims. Given the subject-matter of the case and the temporal and spatial extent which is apparent in this case - which is not what is claimed by the defendant or the expert opinion submitted in its application - it is possible to presume that the cartel - even if it was limited to the exchange of price information - has had an impact on the final price charged to consumers. That was its objective and this justifies the risk taken.

The Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C 11/01), which replaced the Commission Guidelines on the applicability of Article 81 TEC to horizontal cooperation agreements (OJ 2001/C 3/02), refer to the exchange of information in paragraph 73 as follows: *The exchange of information on individual firms' intentions as to their future pricing or quantity behaviour is particularly likely to lead to a collusive outcome. Reciprocal information about such intentions may allow competitors to arrive at a common higher price level without running the risk of losing market share or triggering a price war during the period of adjustment to the new prices*.

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In other words, the objective of such conduct is to achieve a higher common price level. And frequent exchanges of information facilitate the monitoring of deviations (paragraph 91).

(vi) The damage may be established on the basis of presumptions, even if the Damages Directive does not apply, in accordance with national law and in accordance with the principle of effectiveness. Establishing the damage - on the basis of the considerations set out in the decision itself or the application of presumptions - does not in any event preclude the need to quantify its extent, which is a different matter.

(vii) The fact that prices are affected by several variables may make it necessary, when quantifying the damage, to discriminate between variables outside the collusive agreement, but this does not mean that the damage is excluded, but it will affect its quantification.

SIXTH.- Before examining the grounds of appeal challenging the quantification of the damage, we consider that we must analyse the seventh allegation relating to the repercussion of the damage or the *passing on* defence.

In the action, it is submitted that in the event that there was an overcharge, the applicant must prove that the dealer or intermediary who purchased the vehicle from the manufacturer passed it on to the applicant and that if the applicant suffered an overcharge, the applicant must prove that it did not pass on the overcharge downstream.

As regards the cost overrun and the indirect purchaser, we refer to the fourth of the grounds of this decision.

On the defence of the repercussion of the damage, the judgment of the Supreme Court of 7 November 2013 states that:

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"Although "passing-on" is sometimes referred to in a reductionist way as mere price pass-on in the sense of a price increase in the "downstream" market in proportion to the price increase suffered in the "upstream" market, in reality it is not the price increase that must have been passed on to the customers but the economic loss resulting therefrom, the damage, that must have been passed on to them. The increase in the prices of the products manufactured by the applicants, which in turn had suffered an unlawful increase in the prices of the sugar used to manufacture them, is a necessary condition for the passing on of the damage to have taken place, but it is not sufficient. What is decisive is that the direct purchaser against whom the defence is asserted has not suffered damage because it has succeeded in passing it on to third parties who are not claimants.

Already in the brief that the plaintiff associations filed before the Audiencia

Some of the passages of which are reproduced in the judgment of the Audiencia Provincial, it was stated that the transfer of the artificially high cost of sugar to products made from that raw material led to a loss of competitiveness and affected the commercial image of the undertakings manufacturing sugar products.

Furthermore, the decision of the Court of Competition Defence itself stated that this price increase harmed the competitiveness of the Spanish confectionery industry, and that this harm was particularly serious because of the intense export activity of the confectionery industry, which means that it is difficult for the "passing on", i.e. the passing on of the harm "downstream", to take place.

EU documents, such as the proposal for a Directive on certain rules governing damages claims for infringements of competition law provisions of the Member States and the European Union (echoing earlier work), contain this fundamental assertion about the functioning of free competition: price increases by the direct purchaser are likely to lead to a reduction in the volume of sales due to reduced demand.

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Community case law had already upheld this statement in relation to the defence of "passing-on" against claims for repayment of taxes and charges contrary to Community law. The Court of Justice of the European Union has held that even where it is established that the tax levied unduly has been passed on to third parties, the repayment of that tax to the economic operator does not necessarily imply unjust enrichment of the latter, since the fact of including the amount of the tax in the prices he charges may cause him a loss linked to a reduction in the volume of his sales (judgment, Full Court, 14 January 1997, Société Comateb and Others v Directeur général des douanes et droits indirects, Joined Cases C-192/95 to C-218/95, judgment, Fifth Chamber, 14 January 1997, Joined Cases C-192/95 to C-218/95; Judgment, Fifth Chamber, of 21 September 2000, Kapniki Michaïlidis AE v. Idryma Koinononikon Asfaliseon (IKA) , joined cases C-441/98 and C-442/98; judgment, Fifth Chamber, of 2 October 2003, Weber's Wine World Handels-GmbH and Others v Abgabenberufungskommission Wien , Case C-147/01; and judgment, Grand Chamber, of 6 September 2011, Lady & Kid and Others v Skatteministeriet). Therefore, in the case of a claim for compensation for the damage caused by the cartel's action of concerted price increases, it is not sufficient to prove that the direct purchaser has also increased the price of its products. It is necessary to prove that by increasing the price charged to its customers it has succeeded in passing on the damage suffered as a result of the price increase caused by the cartel. If the price increase has not succeeded in passing on all that harm because there has been a decrease in sales (because other competitors have not suffered from the cartel and have taken national or international market share away from those who have suffered from it, or because demand has shrunk in the face of the price increase, etc.), the passing-on defence cannot be upheld or cannot be made out in its entirety.

As we indicated in our judgement of 23 May 2022, the allegation of the *passing-on* defence requires the party who raises it to make an evidentiary effort in the sense of sufficiently proving that the damage entailed by the overcharge has been sufficiently passed on to third parties by the claimant injured party.

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A purely generic argument, such as that put forward by the appellant, that the applicant is an entrepreneur and therefore has the possibility, in the abstract, of passing on the additional costs arising from the cartel to its final customers, is not sufficient. This is merely a party's argument which has not been supported by the necessary evidence.

Under this paragraph, the appellants also argue that the overcharge allegedly borne by the applicant should be reduced by an amount equivalent to the tax reduction resulting from the depreciation of that overcharge.

Nor do we share the appellant's view.

As we stated in our judgment of 10 December 2021, the fulfilment of tax obligations and the tax relief or deductions that the injured party may legally benefit from for the acquisition of the property in no way give rise to compensation for damages that should be deducted from the compensation to be paid by the infringer.

By fulfilling accounting or tax obligations in the legally stipulated terms, the party injured by the unlawful conduct is not compensating himself for the damage suffered, nor does such fulfilment of obligations represent a compensable "profit". The rule of *compensatio lucri cum damno* has its basis in contractual liability *under* section 1106 of the Civil Code with regard to the settlement of compensable damage and is based on advantages that must derive from the facts themselves that give rise to liability, which is not the case here.

With regard to the alleged resale of one of the vehicles by the plaintiff, we have already indicated in our judgment of 1 July 2022, and now reiterate, that the resale in itself is irrelevant in order to obtain compensation for the extra costs resulting from the cartel, and does not constitute any unjust enrichment.

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The resale of the vehicle does not imply that the overcharge was not borne and does not preclude the claimant from being compensated for it. In a similar vein, judgment of this court of 22 July 2022.

SEVENTH - With regard to the quantification of the damages, the judgement accepts the expert report provided by the plaintiff in the absence of any other better-founded alternative hypothesis, rejecting the defendant's report which, as we have seen, denied the existence of the damage.

The report provided by the plaintiff has already been analysed in our previous judgments of 16 December 2022, 19 December 2022 and 13 January 2023.

We can only reiterate the reasoning of our previous resolutions in which we criticised the report in the following terms.

The report submitted by the applicant (CABALLER/HERRERÍAS report) quantifies the additional cost of acquiring the vehicles by applying a synchronous method. It compares the evolution of the gross prices of the factual market, that of medium and heavy trucks (the cartelised ones), with the evolution of the gross prices of the market considered as counterfactual or reference market, that of light trucks (the non-cartelised ones), during the period corresponding to the infringement.

In addition, to support the results, it also takes the van market as a counterfactual market.

Finally, in order to strengthen the conclusions obtained, it uses a diachronic method, based on the comparison of the prices of medium and heavy trucks during the relevant period with those existing after the end of the sanctioned

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conduct ("during and after" comparison). It chooses as a non-infringing or relevant market scenario the market for light trucks, which it considers to have a high degree of analogy or similarity with the cartelised market. It considers that these counterfactual products are very similar. The comparison of gross list price trends for the period 1998-2010, after applying econometric regression techniques to a series of factors or variables that can influence the price of the product (power, MMA, brand, and euro standard), leads to an average overprice of 16.35% for the entire cartel period. It then verifies the comparison of trends with another product (vans), which would reveal a higher average price premium (19.87%), although it discards this as the main counterfactual, because the difference in emissions standards and the greater variety of makes compared with lorries make it advisable, for reasons of prudent valuation. On the other hand, with the diachronic comparison model (which makes a comparison "during and after" by covering the evolution of prices over 20 years: 1997-2016), which it only uses as a supporting method, it arrives at the calculation of an average price premium of 18.67% (13.87% in the period 1997-2003 and 23.46% in the period 2004-2011).

The plaintiff's expert report presents serious objections, many of which are highlighted in the defendant's expert report and which have also been highlighted, in a similar manner, in other judicial precedents (judgments of the 4th section of the Murcia Provincial Court of 10 June 2021 and the judgments of this same section cited above).

With regard to the synchronic method, the following objections can be highlighted:
1.- the relevant market (light lorries and, as a back-up, vans) is not sufficiently similar for a meaningful comparison to be made; despite their apparent proximity, the market for light lorries differs considerably from that for medium and heavy lorries; On the one hand, the divergence in terms of relevant vehicle characteristics (power, number of axles, chassis, variants and degree of customisation - Commission Decision of 20 December 2006 concerning the Man-Scania merger, Case No IV/M.4336-) and this heterogeneity has an impact on prices; on the other hand, the demand factors affecting prices are different, as light trucks, especially the lightest among them, are used for different purposes than medium and heavy trucks

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(logistical support and development tool for the economic activity of purchasers or the transport of goods); the market volume in Spain for each type of vehicle is also markedly different, as shown by the fact that the number of registrations is quite disparate, with a huge difference in favour of light trucks and vans (according to DGT data); in addition, the manufacturing structure of light trucks differs from that of medium and heavy trucks, as they follow processes with a different degree of standardisation and, according to the Commission's Merger Decisions, the various types of trucks have different technical configurations, requiring different production lines and know-how to be used to manufacture each type of truck; the market structure also differs, as the number of manufacturers, their identity and the number of products in the light truck market differs from that of medium and heavy trucks; the price dispersion is also uneven in each market; so that all these circumstances lead us to believe that the justifications given in the expert report we are analysing on the choice of the counterfactual market lack sufficient consistency for us to understand that we are really dealing with two comparable markets;

2.- the calculation of the extra cost is verified by taking the manufacturers' gross prices taken from an industry magazine (CETM) for subsequent application to the final prices (which, after discounts, is the result of negotiation with the dealer/distributor, except in the case of direct sales by the manufacturer), without our being able to accept that the transfer proposed in the opinion relied on by the plaintiff is justified; This is because it must be borne in mind that the final price paid by customers is also the result of other variables which are applied to it (paragraph 27 of the Decision); the opposing party's expert opinion highlights the dispersion of discounts, their evolution over time and the disparate correlation between gross prices and final prices; this leads us to conclude that it would not be correct to calculate the extra cost in the manner in which it is done in the opinion submitted by the applicant;

3.- unlike other years, the data for 1997 has not been obtained, but a reference obtained by an econometric formula has been taken into consideration, which implies applying a peculiar

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operative for a significant moment, such as the time of the beginning of the cartel, which was set by the competition authority in January of that year;

4.- the selection of data must be representative in order to be able to apply econometric models, thereby avoiding the risk of bias in the choice of data, however, we note that the report may have been flawed in this respect; thus, it is not clear why the databases used are not homogeneous in composition; as far as the brands are concerned, on the one hand, some firms have been given greater representativeness according to the band, with the result that their presence over time lacks continuity, in favour of those with higher PVRs for medium and heavy trucks, which is increasing considerably over the period analysed, and, on the other hand, there has also been an emphasis on vehicles with a higher PVR for medium and heavy trucks, the focus has also been on vehicles of a certain power, so that if the sector affected by the cartel is medium trucks (between 6 and 16 MT) and heavy trucks (over 16 MT), the references used in the opinion are overwhelmingly to trucks with a mass greater than 16 MT and significantly to those over 30 MT; and as far as light trucks are concerned, most of the references are to trucks of 3.5 tonnes, and it is clear that from 2005 onwards, the higher power ranges began to gain weight; and

5.- the variables used for the regression model for medium and heavy trucks (Euro 3) to determine the price premium for the infringement are different from those used for light trucks (Euro 2), which invalidates their comparison and does not fit with the premise that the gross prices of both categories are determined by similar variables.

Finally, with regard to the diachronic ("during and after") model, there are also significant imbalances in the data sample and in the distribution by makes and reference periods, as well as shortcomings in the recording of vehicle power ratings. In any event, the diachronic method was not, in reality, the method of quantification on which the claim for compensation was based, but was only used as a mere contrast to the method used to quantify the damage, and

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could not therefore be used to make up for the shortcomings of the method used to base the claim.

Furthermore, we cannot fail to point out that the cartel was not projected on a single product, but on a multitude of products, of a complex nature and with different characteristics between them. Therefore, any approximation of the cost overrun should have referred to the specific vehicles purchased and their characteristics, since what we should be dealing with in this type of litigation is to determine the effect of the cartel on a specific transaction. The problem is that this effect is intended to be fixed in a standardised or "global" way, which may facilitate the preparation of mass claims, but has the disadvantage that it blurs, if not distorts, what should be the object of compensation in each individual case. Standardisation of a cost overrun would require a sample composed of a very large number of actual transactions in order to ensure the results of such a "global" figure as a percentage applicable to any purchase.

We do not dispute that the CABALLER/HERRERÍAS expert opinion attempts to offer a hypothesis of quantification of the damage that aims to fit the case of the truck cartel and tries to determine the magnitude of the pecuniary loss suffered by the injured party on the basis of a recognisable method, but, in the opinion of this court, the data it uses and its conclusions are seriously objectionable.

For the reasons set out above, we cannot accept the plaintiff's report in order to quantify the damage in the percentages resulting from that report.

However, the fact that we do not accept this expert's report should not lead in this case to the dismissal of the claim.

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As explained in our judgments of 10 December 2021, followed by those of 28 January 2022, 6 May 2022, 1 and 22 July 2022, among others, the difficulties in the assessment of damages were already highlighted in the 2005 Green Paper (CSWP 2005, 37). The Commission set out to provide estimation criteria for the calculation of damages that would facilitate the exercise of liability actions and provide guidance to the courts (CSWP 2008, 199). The result was the Practical Guide accompanying the Commission's Communication on the quantification of damages in actions for damages for breach of Articles 101 or 102 TFEU. It aims to provide non-binding assistance in quantifying damages in antitrust cases, both for the benefit of national courts and parties (CSWP 2008, 199).

It is for the national court to assess whether the claimant has established that the conditions for compensation have been met.

These requirements must not make it practically impossible or excessively difficult to obtain full compensation for the damage caused by the infringement of the competition rules (principle of effectiveness). This principle precludes the court, having assessed the infringing conduct, from not awarding any compensation simply because the claimant cannot prove with sufficient precision the amount of the damage suffered (Judgment of the Court of Justice of 13 July 2006, "Manfredi", paragraph 98, and CSWP 2008, 197).

The Commission was aware of the difficulties that the quantification of damages can pose for the complainant. It therefore referred to the requirements of the principle of effectiveness. Average overcharges in pricing cases were intended only as an aid to the exercise of the court's discretion in quantification in order to avoid far-reaching precision requirements, not as a substitute for quantification (CSWP 2008, paragraphs 199 and 200). This is in line with the final treatment of these issues in the Damages Directive.

Furthermore, in the judgment of the Court of Justice of the European Union of 22 June 2022, Case C-267/20, it states in paragraph 89 with regard to the standard of proof and the powers

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of assessment that Article 17(1) of Directive 2014/104 must be interpreted as meaning that it constitutes a procedural provision within the meaning of Article 22(2) of that directive and that its temporal scope includes an action for damages which, although it arises from an infringement of competition law which ended before the entry into force of that directive, was brought before the entry into force of that directive, of that directive and that its temporal scope includes an action for damages which, although arising from an infringement of competition law which ended before the entry into force of that directive, was brought after 26 December 2014 and after the entry into force of the national provisions transposing that directive into national law.

However, what cannot be assumed for quantification is an average derived from cartel studies in a multitude of different markets and with multiple spatial, temporal and material references. Generic averages do not exceed the minimum standard of proof that must be required of the plaintiff.

For this reason the Commission was also aware, in relation to the concrete proof of damage, that lowering the standard of proof in liability actions could lead to miscarriages of justice or abuse of claimants (CSWP 2008, 91).

The relevance of this aspect of the principle of effectiveness is elaborated in the Practical Guide (17).

The quantification of damages in competition cases is, by its very nature, subject to considerable limitations as to the degree of certainty and precision that can be expected. The applicable national 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.

Consequently, the action cannot be dismissed on the ground that the expert's report provided by the applicant is considered not to be optimal or sufficiently precise to determine the

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overcharge suffered by the applicant, that is to say, that it contains shortcomings of various kinds (breadth or scope of the sample, variables applied, method used, etc.).

It is in this context that it is feasible to have recourse to the powers of appraisal which, on the basis of the approximation made in the expert report provided by the applicant, make it possible to correct any deficiencies.

The judgment of the Court of Justice of the European Union of 22 June 2022, Case C-267/20, with regard to the provision of Article 17.1 of the Directive, whereby the States must relax the standards of proof for quantifying the damage and confer powers of assessment on the courts *"81 ... aims to ensure the effectiveness of actions for damages for infringements of competition law, in particular in those situations in which it would be practically impossible or excessively difficult to quantify precisely the exact amount of the damage suffered.*

82 The purpose of that provision is to make the standard of proof required to determine the amount of the harm suffered more flexible and to remedy the existing asymmetry of information to the detriment of the plaintiff concerned, as well as the difficulties arising from the fact that the quantification of the harm suffered requires an assessment of how the relevant market would have developed in the absence of the infringement.

83 As the Advocate General pointed out in point 73 of his Opinion, Article 17(1) of Directive 2014/104 does not impose a new substantive obligation on any of the parties to the dispute in question. On the contrary, that provision - and, more specifically, its second sentence - is intended to confer on national courts, in accordance with the 'national procedures' to which it refers, a particular power in disputes relating to actions for damages for infringements of competition law.

As we have indicated in our judgment of 3 March 2023 (rollo 1585/21):

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"In that doctrinal line, the pronouncements contained in the CJEU of 16 February 2023, Case C-312/21, must be understood as meaning that the national court, in resolving the specific dispute, must not resort to the judicial assessment of the damage, as a power of the court, if the plaintiff has not made its own effort to produce evidence on the quantification of the damage that reveals, in a rigorous manner, the particular difficulties in achieving a very approximate settlement of the sum into which that damage translates. From that perspective, which must be based on the legal qualification of the plaintiff as being precisely injured by the anticompetitive act, the court must take into consideration all the relevant elements that provide evidence of the efforts of that party injured by the cartel, among which is, as one more, having previously resorted to the proceedings for access to sources of evidence, as a possibility provided for by law, but not only that. In this regard, and by way of conclusion, para. (65) of the abovementioned CJEU of 16 February 2023 states that 'In the *light of the foregoing considerations, the answer to the second and third questions referred for a preliminary ruling must therefore be that Article 17(1) of Directive 2014/104 must be interpreted as meaning that Article 17(1) of Directive 2014/104 must be interpreted in the same way as Article 17(2) of Directive 2014/104, of Directive 2014/104 must be interpreted as meaning that neither the fact that the defendant in an action falling within the scope of that directive has made available to the applicant the information on which it relied in order to refute the latter's expert's report nor the fact that the applicant has directed its claim against only one of the perpetrators of that infringement is relevant, that assessment presupposes, first, that the existence of the damage has been established and, second, that it is practically impossible or excessively difficult to quantify it precisely, which implies taking into account all the parameters leading to such a conclusion, in particular the unsuccessful nature of formalities such as the request for production of evidence provided for in Article 5 of that directive*'.

In view of the standard of proof resulting from the judgment handed down by this court on 6 May 2022, which we accept here, we do not consider that there is any obstacle to understanding it to have been surpassed for the purposes of allowing the damage to be estimated in the case in question, as we have also found in the judgments of 1 and 22 July last

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and in those of 16 December 2022, 19 December 2022 and 13 January 2023, the latter precisely in view of the same expert report provided by the plaintiff.

In our previous judgment of 6 May 2022, we considered that the expert evidence provided by the plaintiff exceeded the minimum standard of proof required. This evidence consisted, in essence, of a comparison of the net price paid by the plaintiff for the purchase of a truck (the price affected by the cartel) with the net price offered in a quotation for the purchase of another truck of the same make, which was said to have similar characteristics to the one purchased by the plaintiff, deflated to the date of purchase by applying the variation of the Industrial Price Index (counterfactual scenario).

Consequently, and following the decision of this Court in its judgments of 6 May 2022, 1 and 21 July 2022, as well as those of 16 December 2022, 19 December 2022, and 13 January 2023, since the assessment of the additional costs cannot be fully accepted in the terms claimed by the plaintiff, but considering, nevertheless, that the plaintiff's expert assessment constitutes an approximation of the actual damage caused, it is not possible to dismiss the action on the ground that the expert assessment provided by the plaintiff is not considered to be optimal or sufficiently accurate to determine the additional costs, in an evidential effort which would exceed the minimum standard required, it is not possible to dismiss the action on the ground that the expert report provided by the applicant is not considered to be optimal or sufficiently precise to determine the overcharge suffered by the applicant, that is to say, that it has shortcomings of various kinds (breadth or scope of the sample, variables applied, method used, etc.), with the result that we are faced with a situation in which the applicant's expert's report is not sufficiently precise to determine the overcharge suffered by the applicant.), which means that we are faced with the need to resort to a judicial estimation of the damage in view of the difficulties that arise in this area in order to unravel a fully adjusted real cost.

In such a scenario and following mimetically what was set out in our previous judgment of 6 May 2022, for the purposes of quantifying the cost overruns deriving from the cartel's actions

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under consideration here, in the interests of the need to give uniform treatment to comparable situations, i.e., in the presence of cost overrun quantifications that are not fully acceptable and approximate to reality due to certain methodological shortcomings or errors, but which in any case are considered to exceed the minimum standard of proof required, as in the present case, the court has considered it prudent to establish the damage as a percentage of 5% of the purchase price, in the absence of acceptable evidence that could determine a different amount and in order to prevent a report that is not sufficiently precise from generating a quantification higher than that which corresponds to the damage truly suffered.

As we explained in our judgment of 9 September 2022, it is not possible for the court to make any kind of calculation resulting in a certain percentage of cost overrun. There is no evidence for this. Nor is there any other opinion that has made an alternative quantification that would serve as a comparative term. Nor can the quantification be based on generic empirical studies, which only serve to assess the existence of damages resulting from the cartel, not their quantification, as we have pointed out and as the Commission itself warns.

Therefore, it is a mere exercise of the powers of estimation, in order to fix a minimum which we consider must have occurred in any case given the characteristics of the cartel already described, and this in order to ensure the injured party's right to compensation in any case.

12,861, as detailed below, the amount to be discounted at the legal interest rate from the respective dates of purchase of the vehicle, which will be increased by two points from the date of the judgment of first instance, as we are limiting ourselves here to reducing the amount of the surcharge.

MATRICULA	Date of acquisition	Price	Indemnification 5%	Compensation
5150 DFK	10/12/200456	,145 €	2807,25 €	2807,25 € 5150 DFK
10/12/200456	,145 €	2807,25 €	2807,25	
9778DRN	30/09/2005	67.025 €	3351,25 €	3351,25

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4638 DVH 22/12/2005 67.025 € 3351,25 € 8422 FBF 12/05/2006 67.025 € 3351,25 € 8422 FBF 12/05/2006 67.025 € 3351,25 € 8422 FBF 12/05/2006 67.025 € 3351,25

TOTAL..... **12.861,00 €.**

SEVENTH.- The judgment under appeal awards the legal interest on the amount of the compensation from the date of acquisition of the vehicles, a criterion that we accept - although the amount of the compensation varies - and which the appellant disagrees with because it considers that, within the framework of the applicable legislation, which is that prior to the Damages Directive, they would only be payable from the moment the debtor falls into arrears.

We do not share the appellant's view.

The updating of the compensation with the legal interest is due to the fact that it is a debt of value that must be updated and not to the payment of default interest, which is accepted by case law.

The judgment of the Court of Justice of 13 July 2016, Manfredi, Joined Cases C-295/04 to C-298/04 (paragraphs 95, 100 and operative part), stated that: *"... by virtue of the principle of effectiveness and the right of any person to seek compensation for damage caused by a contract or conduct which is liable to restrict or distort competition, injured parties must be able to seek compensation not only for actual damage but also for loss of profit, as well as the payment of interest".* It adds, in paragraph 97, citing paragraph 31 of the judgment of 2 August 1993 in Case C-271/91 Marshall, that the award of interest, in accordance with the applicable national rules, constitutes an indispensable element of compensation.

In the same vein, the Guidelines state that: *"The addition of interest should also be taken into account. The award of interest constitutes an indispensable element of reparation. As the*

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Court of Justice has emphasised, full compensation for the harm suffered must include compensation for the adverse effects caused by the lapse of time since the harm caused by the infringement occurred. These effects are monetary depreciation and the lost opportunity for the injured party to have the capital at his disposal. National law should take these effects into account as statutory interest or other forms of interest, provided that they comply with the principles of effectiveness and equivalence...".

The Supreme Court also admits the updating of compensation as a debt of value (judgments of 8 June 2012 and 4 March 2015).

Finally, as we indicated in our judgment of 10 February 2023, given that we calculated the update up to the date of the judgment of first instance, it is not possible to add interest for late payment corresponding to an earlier point in time because to do so at the same time would constitute overcompensation. This was acknowledged by the plaintiff, as this was the reason why he limited his request for interest for late payment to that accrued from the filing of the lawsuit.

EIGHTH - Given that the claim has been partially upheld, in accordance with the provisions of article 394 of the Civil Procedure Act, it is not necessary to expressly impose the costs incurred at first instance on any of the parties.

Nor is it appropriate to impose the costs of this second instance as the appeal has been partially upheld, in accordance with Article 398(2) of the Code of Civil Procedure.

Having regard to the abovementioned legal precepts and other relevant and generally applicable provisions,

FAILURE

In view of the foregoing, the Chamber agrees:

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1.- To partially uphold the appeal lodged by the lawyer Mr Victorio Venturini Medina on behalf of **"IVECO SpA"** against the judgement handed down by Commercial Court number 14 of Madrid on 21 December 2021, in the ordinary trial no. 1371/2019 from which this case arises.

2.- To partially reverse the aforementioned judgment to partially uphold the claim and order the defendant **"IVECO SpA"** to pay **".** [redacted] **S.L." Y '** [redacted] **S.A.',** represented by [redacted], **12,861 euros** (of which 2807.25 euros corresponds to the amount of "[redacted] S.L." and 10,053.75 euros to ". [redacted] S.A.'), an amount which, in respec de la indemnización por cada vehículo, devengará el interés legal desde la fecha de adquisición, que se incrementará en dos puntos desde la fecha de la sentencia de primera instancia, sin efectuar expresa imposición de las costas procesales causadas en primera instancia.

3.- No express imposition of the procedural costs of the appeal.
of appeal.

In accordance with the provisions of section eight of the Fifteenth Additional Provision of the Organic Law of the Judiciary, the deposit deposited to appeal the judgement is to be returned.

The parties may lodge an appeal in cassation and, where appropriate, an extraordinary appeal for procedural infringement against this judgment with this Court within 20 days of its notification, which will be heard by the First Chamber of the Supreme Court, if appropriate in accordance with the applicable legal and jurisprudential criteria.

Thus, by this our judgement, we, the Most Illustrious Magistrates of this Court, pronounce, order 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 protection or the guarantee of anonymity of the victims or injured parties, where appropriate.

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This document is a certified true copy of the document Judgment on Appeal 465 signed electronically by ALBERTO ARRIBAS HERNÁNDEZ (PON), JOSE MANUEL DE VICENTE BOBADILLA, JOSÉ IGNACIO ZARZUELO DESCALZO