# Expert economic evidence in damages proceedings: transparency, data rooms and replication.[1]

by Paul Hitchings[2]

A number of judgments handed down in recent months in the Spanish Trucks litigation have highlighted the relevance of procedural issues pertaining to the judicial evaluation of economic expert reports submitted in the course of damages actions for breach of competition law. In this brief analysis, I will refer to four of them. In doing so, I will highlight how the courts have defined the respective rights and duties of party experts in the presentation of their results, as well as in the critique of their opponents' reports, and we will see how these aspects have marked the outcome of each case.

## Judgment of Commercial Court nº3 of Valencia, 15 September 2020 (291/2020)

By Orders of 3 March and 28 May 2020, Commercial Court nº3 of Valencia, acceding to the request formulated by the defendant at the pre-trial hearing, granted **access to its economic experts to the sources and analyses used by the claimants' experts** in the preparation of their report. The orders also required the claimant to provide access to certain documentation of relevance to the defendant's pass-on defence. Access to the information was implemented via a data room set up by the parties privately, outside the court premises, in accordance with terms established by the court (*inter alia* as regards its duration and the access restrictions the claimant could apply).

The use of a data room in this way in damages litigation was granted in Spain for the first time also by Commercial Court nº3 of Valencia by its Order of 4 June 2019 in relation to the first of a series of requests for disclosure submitted by another group of claimants prior to filing their actions, in accordance with Article 283 bis e) 1 of the Spanish Civil Procedural Law ("**CPL**").[3] In that decision, the court considered that a data room was a proportionate means to protect the parties' respective interests (the claimant's interest to access the data, and the defendant's interest in the protection of the confidentiality of its information). It was also appropriate given the nature of the information to

[1] Article published in its original Spanish in Almacen de Derecho, 12 May 2021: https://almacendederecho.org/la-prueba-pericial-economica-en-los-procedimientos-de-reclamaciones-de-danos.

[2] The author has participated in a number of the proceedings mentioned in this commentary as legal counsel representing one of the manufacturers (Daimler) until September 2020. My views are nevertheless personal, based on my professional experience and my reading of the corresponding judicial resolutions.

[3] ES:JMV:2019:48A, Order which was confirmed by Order of the Valencia Appeal Court of 4 December 2019 (ES:APV:2019:3717A). This resolution has been followed by subsequent resolutions in the Trucks litigation (see, in this regard Francisco Marcos, '*"Salas de datos" para acceso y comprobación de información y fuentes de prueba en los litigios de daños de camiones*', Almacen de Derecho, 16 February 2020) and the use of data rooms is at the same time contemplated by the Commercial Court nº7 of Barcelona in the preliminary question submitted on March 11, 2020, Case C-163/21, asserting that the possibility of using data rooms derives from the guiding principles of Art. 5 Directive 2014/104 and from Art. 283 bis CPL.

be shared; i.e. economic data of a high volume. Additionally, the court agreed that the use of data rooms was supported by various EU recommendations or best practices (soft law), including the Commission's Guidelines on Confidential Information, then in draft form, or its Best Practices on the Disclosure of Information in Data Rooms.

Returning to the 2020 proceedings: the data room was executed in July and, once completed and in advance of the trial which took place in September, the defendant's economic expert submitted a further report (which had been admitted at the pre-trial hearing) in which it amplified its critique of the claimant's report. In the meantime, in the period between the pre-trial hearing and trial, the claimant also submitted a new complementary expert opinion of its own, which, while not admitted at the pre-trial hearing, as explained in the September judgment: *"was admitted in the process under the same criteria of procedural flexibility which led to the acceptance of the second, corrected version, of the [defendant's] expert opinion or the [defendant's] request for access to the sources of the [claimant's] expert report"*.

The judgment broaches its assessment of the competing economic expert reports in its Fifth Legal Ground. Paragraph 49, concerning the use of the 'EU Study on Passing-On' (and, specifically the "39 Steps: a checklist for judges") as a guide for assessing the quality of an expert economic report, well merits further attention on another occasion; as do the assertions made in paragraph 51 in relation to the purported conditioning effect for the case at hand of prior judgments concerning the same claimant expert report. Nevertheless, in this brief note, I will focus on just two remarks made by the judgment concerning the position adopted by each expert in relation to the economic model (and corresponding data) employed by the opposing expert:[4]

- The judgment criticizes the claimant's expert for "*passing up the opportunity of carrying out an open and profound critique of the model used by [the defendant's expert], pointing to the mistrust, due to the lack of transparency, which the data upon which it was based deserved*". This assertion denotes a certain distancing from judgments of other courts which have considered the scepticism of some claimants around the data used by manufacturers' experts (data normally collected from the manufacturers themselves) to be justified. The court concludes that "*in this process a critique of the economic model has not been carried out and that is a missed opportunity for the claimant and its expert team*".

- The judgment highlights, at the same time, that, despite making use of the data room access to the claimant experts' model to carry out a more in-depth critique, the defendant's experts did not formulate a better-founded hypothesis for the quantification of the effects of the infringement (i.e., an "alternative quantification"), noting that "*this was the second purpose for which the measure was granted*".

[4] Paragraphs 56 and 57 of the judgment.

These observations are indicative of how this particular judge conceives the economic expert process: he supports the possibility of an exchange between experts as a means of deepening in the assessment of the weight and credibility of the opposing expert reports and, to this end, contemplates certain additional flexibility in the proceeding. The court's indication as regards the second purpose of the data room exercise is also important: the court considers that access to the counterparty's data must -or may, at least - be used not only to check (and, perhaps, replicate) the opposing expert's economic model, but also to **carry out a new quantification** based on the data used by that expert.

How the positions adopted by each expert team affected the interplay of burdens of proof in the particular case can be seen later as we read on in the decision. Despite recognising deficiencies both in the claimant's critique of the defendant expert's econometric model, as well as in the model used by its own experts to quantify harm, the judgment nevertheless considers that the claimant did enough to quantify the harm it alleged to have suffered, whilst the defendant had failed to rebut that quantification. Accordingly, the court decides to maintain the line adopted in its decisions on previous claims by the same claimant group, upholding entirely the claim (and the claimant's quantification of harm) and rejecting the alternative quantification presented by the defendant's experts. The court's principal objection to the defendant expert's analysis is its contention that the infringement had no impact on the prices of the trucks purchased by the claimant (i.e., the expert quantified a zero overcharge), whereas the court considers that position to be untenable by virtue of contravening the presumption of harm which it has deemed applicable to this case.

**Judgment of the Valencia Appeal Court (Section 9), 17 November 2020 (1284/2020) ES:APV:2020:4230**

In an earlier decision, of 10 December 2019, Commercial Court nº3 of Valencia had rejected a claim on the grounds of the passivity of the claimant as regards the available evidence. In that case, later the subject of the appeal ruling I refer to here, the defendant offered access to its economic model (and data) through a data room and the claimant rejected that offer:

> *"the defendant made available to the claimant the documentary sources of its expert report, as data ideally suited to carry out an exercise of quantification of harm, while the claimant does not justify why that data is of no use, which requires, at least, that it show some interest in examining the data"*

In contrast to other cases where, despite rejecting the expert quantification presented by the claimant the court did not reject the claim but rather estimated the overcharge itself (at 5%), in this case the judge rejected the expert report and the claim since, in his opinion, the position adopted by the claimant contravened the precondition for judicial estimation (namely, the evidentiary difficulty for the claimant) and delegitimated any judicial intervention in aid of the claimant.

The Appeal Court, by contrast, partially upheld the appeal and ordered the defendant to pay compensation equal to 5% of the purchase price, plus interest. According to the Appeal Court, the

claimant's rejection of the data room in the terms offered by the defendant at the pre-trial hearing was not a factor to be weighed against the claimant in the court's assessment of whether it had fulfilled the burden of proof that it suffered harm and could not justify the rejection of the claim.

The judgment contains an extensive exposition of its grounds for rejecting the use of the data room mechanism, averring in essence that, in the terms proposed by the defendant, such a mechanism does not have a place within the current confines of the Spanish CPL. More in particular it raises the following key grounds:

- A data room, organised outside the premises of the court and without the direct supervision of the court, does not find an easy fit with Spanish civil procedural rules and guarantees which, *inter alia*, require the presence of a judge during declarations and explanations of expert witnesses (Article 137.1 CPL) and the judicial custody of the proceedings file (Article 146 CPL). (It seems, nevertheless, that the Court does not entirely exclude this possibility, as evidenced by its previous resolution of December 2019 already cited).

- Neither does the offer of data room access fit within the limits of the procedural stage of the pre-trial hearing (moment when it was addressed by the judge), an act which is focused on preparation for trial and contemplates the presentation of additional evidence (such as the extension of expert reports) solely when certain exceptional circumstances are met (and provided the parties make the necessary requested, Articles 426 and 427 CPL).

- The proposed measure did not amount to a disclosure request within the terms of the new Article 283 bis CPL ("access to sources of evidence"). Rather, it entailed an offer made by the defendant itself. The Court notes that the claimant is not obliged to submit such a request if it does not wish to (or, as in the present case, to accept the offer made by the opposing party) and is free to determine the material evidence it wishes to submit or request during the proceedings. Hence, following the criterion applied by Section 9 of the Valencia Appeal Court, the second purpose of data room access identified by Commercial Court nº3 (namely, that the claimant carry out a new quantification on the basis of the defendant's data, even though the claimant has not so requested) is apparently ruled out. In this respect, I share the Appeal Court's view: the claimant neither requested access to the defendant's information in order to carry out a new quantification, nor can be obliged to do so. A different question are what consequences which may be drawn by the judge in light of the claimant's evidentiary effort during the course of the proceedings if the claimant has failed to make use of the mechanism of disclosure offered by the law, something which should be assessed in the light of all relevant aspects of the particular case.

- Neither the requirements of transparency applicable to the submission of expert opinions, pursuant to Article 336.2 CPL, justified (or required) the proposed method of exhibition of the data underlying its model by the defendant. In fact, referring to a previous judgment of

23 January 2020 (ES:APVV:2020:292), the Court highlights that, in its view, it is not necessary to disclose the underlying data with the expert report if the expert believes there are adequate reasons for not doing so. Furthermore, the parties have the possibility of requesting the exhibition of data as part of the expert's testimony to trial under Article 347.1.1ª CPL. In this case, neither party made such a request. In my opinion, it is seriously questionable whether such a mechanism can offer the same possibilities of contradiction as a data room.

- The Appeal Court adds that the defendant had not adequately justified why the information concerned was of a confidential nature and, therefore, why the special protection of the data room it proposed was justified.

- The **offer made by the defendant in this case would have created an imbalance between the parties**, and this would lead to the practical consequence of requiring every claimant, irrespective of whether (as in this case) it has purchased only one truck, to incur the costs associated with a data room, and under terms unilaterally laid down by the defendant (the defendant proposed, for instance, signing a non-disclosure agreement with a penalty clause of EUR 250,000 in case of default by the claimant). However, apart from these specific conditions put forward by the defendant in this particular case (which could logically have been moderated by the judge), this objection, which clearly weighed heavily in the mind of the Appeal Court, perhaps raises questions of another nature, related rather to the excessive fragmentation of the litigation deriving from the truck cartel, whose solution is of another type and requires separate consideration.

Hence, the judgment of the Appeal Court rejects the defendant's offer of a data room as a mechanism for providing greater transparency to the economic model of the defendant's expert and concluded that the refusal, by the claimant, to accept such an offer could not determine the dismissal of the claim. Consequently, the judgement partially confirms the damages claim by applying the court's own estimation of the overcharge, fixing it at 5% as in previous cases.

Lastly, the Appeal Court is especially critical of the transposition of the disclosure rules in Directive 2014/104 by the Spanish legislator. It avers that it has erred in its adaptation of the new mechanisms to the domestic rules of procedure (*inter alia* by not contemplating circumstances such as those of the case at issue). Otherwise expressed, according to the Court, the adaptation (and, maybe, flexibilization) of the process, which it seems implicitly to recognize as a necessary implication of the new mechanism of disclosure introduced by the Directive, is not possible under the current legislation and would require prior modification of that framework.

**Judgement of Appeal Court of Valencia (Section 9), 22 February 2021 (222/2021) ES:APV:2021:585.**

In this later decision of the Appeal Court, it has reiterated its assessment of the approach of Commercial Court nº3 of Valencia in a similar case involving a data room.[5] The only material difference is that the claimant accepted the use of a data room offered by the defendant in the pre-trial hearing and submitted a new expert report after the exercise had been completed. The data room took place under the terms laid down by Order of 8 July 2019, in the offices of the defendant's legal advisers in Valencia, applying certain confidentiality restrictions, with access being provided to the data in a computer format with the lawyers and experts of both parties present, and during a seven-working-day period.

The judgment dismissed the claim again. It rejected the initial expert report (which was based on a statistical analysis of the effects of cartels in general) in accordance with previous rulings and considered that the counter-report presented by the claimant's expert had not done enough to justify the court performing its own judicial estimation of harm:

> *"the claimant has declined the opportunity to prepare an expert opinion methodologically adjusted to any of the analysis standards accepted by the Practical Guide. It has only made an attempt to search some data with which to contextualize or set the previously issued report".*

From the appeal judgment one can see that the claimant complains, both during the proceedings and in the subsequent appeal, that: (i) its acceptance of the data room was conditioned by the fact that its refusal would lead to the dismissal of the claim in line with the previous case commented (something which was highlighted by the judge himself at the pre-trial hearing); and (ii) the uselessness of the exercise, given the dubious reliability of the data used by the defendant's expert and the limited time, first, to analyze them and, second, to offer an alternative quantification (the second purpose of the data room according to the court).

The Appeal Court agrees again with the position adopted by the claimant and reiterates the reasoning applied in its Order of November 2020 with all the objections previously mentioned. It also stresses and develops a point from that first resolution; namely, the lack of legal provision for the mechanism and the absence of judicial control or supervision (carried out in the defendant's premises and not at court) in order to permit the court to ensure observance of the principles of the rights of defence.

In the light of the allegations of the claimant's expert presented in the report to the effect that the underlying data used by the defendant's expert was very voluminous and highly complex, the expert adds another reason for the alleged uselessness of the data room. Due to its interest, I quote this part in full:

[5] The Commercial Court's judgment in question was dated 12 February 2020.

> *"As much as the defendant's expert stated at the trial that all the data could be processed within seconds using regression techniques applied with commands from the computer program, the truth is that the claimant's expert showed, and it is considered reasonable, that in the data provided there were not only an enormous amount of observations (more than 30,000 in Spain and more than 200,000 in the main 5 European countries in terms of acquisitions of this type of trucks) but that, in addition, there were dozens of columns with variable data that could affect the price. Thus, not only was the amount of data to be analyzed under these conditions enormous. Furthermore, such data was organized by concepts whose meaning and scope could determine or, at least, condition the results of the analysis. Hence, the evidence mechanism did not articulate a system that enables to know the concepts through which, later, to apply the regression rules. And, much more, to lead to the dismissal of the claim. "*

The judgment concludes with the partial estimation of the claimant's appeal claim and condemning the payment of a 5% overcharge (judicially estimated) plus interest.

I cannot help but make two discreet remarks in respect of the reasoning of the Appeal Court on the limitations attributed to the use of data rooms (without prejudice to the other reasons provided in included in the previous point). First, it should be noted that the Commission's Guidelines on Confidential Information allude, in the context of the so-called "confidentiality rings", to the example of the use of data rooms within the scope of the administrative application of competition law (paragraph 57 of the Guidelines as well as footnote 54 which in turn refers to the Commission's Best Practices on Data Rooms) as a mechanism to preserve the confidentiality of information disclosed between the parties. Likewise, for the logistical organization of confidentiality rings, it contemplates flexible and modern methods:

> *"80. [..] confidentiality rings may involve the physical or the electronic disclosure of confidential information. Physical disclosure may be organised at the court premises with court personnel in control of the disclosure or by the parties at their premises with no involvement of the court. Physical disclosure may involve handing over paper copies of documents but also the disclosure of evidence by means of a CD, DVD or a USB key in a physical location, in court premises or at parties' premises. […]*
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> *82. Disclosure of information in a confidentiality ring may occur also by electronic means. In such case, the information is uploaded and stored in an electronic location (e.g. cloud), and access to the information is protected by adequate encryption."*

Secondly, the critique in relation to whether the exercise lent itself to the nature of the intended analysis is of particular importance. Among the options envisaged by the Commission's Practical Guide on Quantification of Harm, depending on the characteristics of the particular case, are regression models which typically apply high volumes of data and use powerful statistical programmes to process them. Whether the use of a data room offers appropriate mechanisms in this context, under which conditions and for what specific purposes are important questions. In my

opinion, the experience offered by competition authorities, particularly by the European Commission, in order to verify this type of models is something which our courts should not disregard, at least as a reference point.

Both of these aspects put the focus on a real issue. We are faced with a type of evidence which poses challenges for civil judges, not only in terms of material assessment, but also, before that, of a procedural nature. This requires in-depth reflection. What are the adequate (and proportionate) mechanisms for a transparent and efficient assessment of this type of evidence? Which mechanisms fit into our civil procedural order? What does the experience accumulated so far tell us?

**Judgement of Commercial Court nº1 of Oviedo, 12 April 2021 (resolution nº 35/2021).**

The recent judgment of Commercial Court nº1 of Oviedo stands out as it is the first case in Spain where a court has accepted the estimation of zero overcharge offered by the defendant, dismissing, on this basis, the damages claim of the respective claimants. At the same time, in the context of this short commentary about the economic evidence if offers a further interesting reference point.

Firstly, we should not overlook the fact that the court rejects, as extemporaneous, the extension of the expert report made by the claimant after the claim was filed (in contrast to the already mentioned judgement of Commercial Court nº 3 of Valencia in September 2020, albeit in somewhat different circumstances).

Second, and more importantly, the judge examines the attitude of each expert as regards the opposing expert's model. The judgment rejects the argument posed by the claimant's expert on the alleged lack of reliability of the information used by the defendant's expert in his report, *inter alia* due to the fact that the claimant was offered the possibility of accessing that information, an offer which it however rejected:

> *"The claimant questions the veracity of the data, which, because it is internal, could have been manipulated. This line of defence must be firmly rejected, not so much (but also) because it involves putting into question accounting data that has been transferred to annual accounts subject to audit, but because the claimant has been able to access the data and has turned up that opportunity.*
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> *[…]*
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> *What cannot be admitted, as it is contrary to procedural good faith, is to sow doubts about the origin of the data or the cleaning process and at the same time refuse to access the information that could eliminate or confirm those doubts."*

On the contrary, for their part, the defendant's experts engaged with the economic model used by the plaintiff, digitized the underlying data and produced an empirical rebuttal (replication) which the court found convincing.

Finally, it shall be noted that in this case the Oviedo court adopted the mechanism of joint processing of a number of parallel claims brought by the claimant firm against the same manufacturer, therefore avoiding the repetition of several trials with the same expert evidence and, without a doubt, allowing more in-depth consideration of the case in a single hearing. In fact, as can be seen from the decision, the court dedicated a significant time to the oral presentation of the evidence: the trial took place during two sessions separated by a period of two weeks, mostly devoted to the expert evidence.[6]

**Conclusions**

The above-mentioned cases are four examples of the increasing attention offered by commercial courts to the issue of transparency in the submission of economic evidence and to the level of empirical engagement required in the critique of economic evidence presented by the expert of the opposite party.

Some of these rulings require a certain degree of real or constructive exchange between the parties' experts during the process and, especially in the case of the Commercial Court No. 3 of Valencia but not only, present a somewhat more iterative approach to the presentation and exchange of economic evidence. This movement, if it can be called that, raises the question of **how such "flexibilization" can be adequately incorporated into the process, taking account of the restrictions of the current Spanish procedural legislation**. The judgments of the Appeal Court of Valencia of November 2020 and February 2021 are a clear warning in this respect, although one may not agree with all the objections it raises.

At the same time, this debate poses important questions with regards to the **impact that EU law has on the procedural processing of these cases** and, more concretely, on the submission and assessment of expert economic evidence. For example: How does the Damages Directive impact the national procedure? Is it limited to the disclosure mechanism? Does it have more implications? How does the new mechanism of access to sources of evidence impact the process of submission and assessment of expert evidence? How far does the procedural autonomy of Member States go in this matter? What relevance do the right to effective judicial protection or the parties' right to be heard have? What relevance or utility can soft law have for national judges in terms of the presentation of economic evidence or the treatment of confidential data? What capacity does the national judge have to order or adapt the procedure? And, at the end of the day: which are the best (and feasible) ways to provide adequate quality and efficiency to the submission and assessment of

[6] Joint processing of similar cases in this way was one of the proposals for the reorganization of the trucks litigation which were formulated by a group of Commercial Judges during the first phase of the State of Alarm decreed by Royal Decree 463/2020 of 14 March (during the period of suspension of procedural deadlines effected by the Second Additional Provision of the same).

expert economic evidence in the judicial process, safeguarding the procedural rights of both parties?

For now, it may be premature to offer the answers that I consider appropriate. Furthermore, I believe that these are questions that lead to a necessary and in-depth debate among all of those who intervene in this field of specialization (judges, lawyers, economists and competition authorities) to seek out the most suitable solutions. Nevertheless, it is significant that these issues have begun to gain the attention of courts and to influence, albeit timidly at the moment, the processing and resolution of certain cases.