

Chapter 16: Portugal and Spain*

Miguel Sousa Ferro*
Francisco Marcos^o

Abstract: This chapter analyzes the evolution and current state of antitrust damages litigation in Portugal and Spain. Both countries share the commonality of being novice jurisdictions in dealing with these types of claims. Courts and professionals have shown to be up for the challenges raised in handling antitrust damages' claims. In doing so, they have become a prominent jurisdictions for testing the projection of the principle of effectiveness of EU law in national rules, and dealing with the typical problems raised by antitrust claims (jurisdiction, standing, limitation periods, access to evidence). However, differences in the institutional and legal settings of both countries explain the different pictures emerging. Portuguese popular actions show a promising future as an efficient way of collectively managing these disputes, whilst the lack of any similar instrument in Spain explains the inefficient proliferation of multiple proceedings and judgments, with the subsequent risks of clogging the court system and leading to different solutions. Given the incipiency of antitrust litigation in both countries, it is still too early to assess in a rigorous manner if they will become a welcoming forum for litigation by those aggrieved by antitrust infringements.

Keywords: Competition law, private enforcement, damages, Portugal, Spain.

Table of contents

1. Introduction	2
2. Portugal	3
2.1. Reality of Portuguese antitrust private enforcement	4
2.2. Follow-on and stand-alone	8
2.3. Specificities in the transposition of the Damages Directive	8
2.4. Court system	10
2.5. Court costs and adverse costs	11
2.6. <i>Ratione temporis</i> applicability of new regime	12
2.7. Quantifying damages	15
2.8. Popular actions	16
2.9. Access to evidence	17
2.10. Limitation period	19
3. Spain	24
3.1. Before the trucks' cartel damages litigation	24
3.2. The trucks' manufacturers cartel damages litigation	27
3.2.1. <i>Jurisdiction</i>	31
3.2.2. <i>Access to evidence</i>	32
3.2.3. <i>Standing/joint claims</i>	32
3.2.3. <i>Limitation period</i>	35
3.2.4. <i>Binding effect of decisions by Competition Authorities</i>	37
3.2.5. <i>Proof of harm and Damages' assessment</i>	40
3.2.6. <i>Passing-on</i>	43
3.2.7. <i>Interest</i>	44
3.2.8. <i>Court costs and adverse costs</i>	45
3.3. After the trucks' manufacturers cartel damages litigation	46
4. Reflections and Outlook	49

*Professor at the University of Lisbon Law School (Portugal). Managing Partner at Milberg Sousa Ferro. Email: miguel.ferro@milberg.pt. In accordance with the ASCOLA declaration of ethics, the Author discloses that he acted or is acting for the claimant in private enforcement actions in Portugal (*inter alia*, the following cases mentioned herein whose representation is in the public domain: *Cogeco v Sport TV*, *OdC v Sport TV*, *Ius Omnibus v Super Bock*; *Ius Omnibus v Mastercard*, *Ius Omnibus v EDP*, *Ius Omnibus v Meliá*, *Ius Omnibus v Comcast/Universal*, *Ius Omnibus v Apple*; *Ius Omnibus v Google*, *Ius Omnibus v ANT*).

^o Professor at IE Law School, Madrid (Spain). Email: francisco.marcos@ie.edu. In accordance with the ASCOLA declaration of ethics, the Author discloses that he serves as academic consultant of CCS abogados, a law firm that has represented many claimants in the trucks' cartel damages litigation.

1. Introduction

Although Portugal and Spain are part of the same peninsula, and they share interesting developments in recent times in antitrust damage claims, as with antitrust public enforcement,¹ they show different contexts and outcomes. However, following somehow the metaphor that inspired José Saramago in *The Stone Raft* (1996), the legal systems in the Iberian Peninsula show significant communalities in antitrust damages litigation, and contrast on certain issues with the situation in other Member States. Courts and professionals lacked any significant experience in these types of claims, but the Damages Directive² and the litigation following some recent infringement decisions by the competition authorities (prominently the trucks' cartel)³ has changed the landscape. In contrast with other Member States, Spain and Portugal are similar in providing a rather inexpensive forum for litigation, which may offset the initial lack of experience of both courts and professionals. Indeed, that has proven not to be a relevant problem, as court decisions in both jurisdictions show how easily they have placed themselves at the forefront of the European-wide legal debate on the controversies raised by the private enforcement of EU Competition law and by the Damages Directive, contributing with a greater than fair share of the most recent preliminary references lodged before the CJEU on these issues.

¹ Miguel Sousa Ferro & Evelyne Ameye "Leniency in the Iberian Peninsula: Two Worlds Apart" [Competition Law Review 12/1 \(2016\) 95-114](#).

² Directive 2014/104/EU of the European Parliament and of the Council of 26/11/14 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU ([OJEU L 349 of 5/12/14](#)).

³ Following European Commission Decisions of 19/7/16 ([AT.39824 Trucks](#)) and 27/9/17 ([AT.39824 Trucks](#)).

2. Portugal

Often overlooked as a relevant jurisdiction, Portugal is starting to garner the attention of the EU antitrust community, in both public and private enforcement. This is, in my view, due to two main factors.

First, public and private antitrust enforcement are (predominantly) centralized at the Competition Court and at the specialized chamber of the Lisbon Court of Appeal, and Portuguese magistrates are engaging in increasingly sophisticated legal debates, providing important precedents, and referring a significant number of questions to the CJEU. In recent years, Portugal has “given” EU Competition Law *Cogeco*,⁴ *Meo*,⁵ *Antunes da Cunha*⁶ and *OTOC*,⁷ with 5 other referrals pending,⁸ and one more being currently pondered⁹.

Second, Portugal’s opt-out collective redress regime, together with the recent first uses of third-party funding for consumer claims, may make it a leading jurisdiction alongside the UK and the Netherlands when it comes to antitrust mass damages actions.

We will begin by looking at the history and *status quo* of Portuguese antitrust private enforcement (*infra* §2.1), including the split between follow-on, stand-alone and mixed actions (*infra* §2.2). The Portuguese specificities in the transposition of the Damages Directive will be summarized (*infra* §2.3), followed by an introduction to the Court system and to the rules on costs (*infra* §§2.4 and 2.5). We then delve into how the *ratione temporis* applicability of the new regime and the quantification of damages have been tackled so far (*infra* §§2.6 and 2.7). Finally, we describe the theoretical and practical reality of opt-out representative actions in Portugal, of access to evidence and of time-barring rules and their application (*infra* §§2.8, 2.9 and 2.10).

⁴ Case C-637/17 *Cogeco* EU:C:2019:263.

⁵ Case C-525/16 *Meo* EU:C:2018:270

⁶ Case C-627/18 *Antunes da Cunha* EU:C:2020:321.

⁷ Case C-1/12 *OTOC* EU:C:2013:127.

⁸ See Case C-331/21 *EDP*; Case C-211/22 *Super Bock Bebidas*; Case C-298/22 *Banco BPN/BIC et al*; Case C-23/22 *Caxamar*; and Case C-66/22 *Infraestruturas de Portugal*.

⁹ The Competition Court will decide in August 2022 on whether to send a referral in a case relating to an NCA decision on abuse of dominance addressed to EDP (energy incumbent).

2.1. Reality of Portuguese antitrust private enforcement

The history of antitrust private enforcement in Portugal, in law and in practice, may be divided into two phases: prior to and after 2018 (when the Antitrust Damages Directive was transposed).

A study covering 1988 to 2016 identified a total of 549 judgments, in 203 cases, i.e., an average of 18,9 judgments and 7 new cases per year.¹⁰ These figures are deceptive in two ways. First, excluding the over 100 iterations of a specific State aid case, in fact only 97 cases were identified, 88 relating to restrictive practices and 9 relating to State aid. Second, the results were far from thorough, given the absence of ways to effectively search 1st instance judgments in Portugal, and the incomplete databases of 2nd and 3rd instance judgments.

In those 97 cases, vertical disputes predominated. Parties invoking competition law had a success rate of 18%. In 29% of these, success was only achieved on appeal.

Competition law showed up in labour disputes¹¹ and public tenders,¹² was used to seek provisional measures,¹³ to defend a monopolist's right to stop offering discounts¹⁴ and a car manufacturer's right to terminate contracts with dealers,¹⁵ and to save an employer from paying certain salaries and compensations.¹⁶

¹⁰ See Miguel Sousa Ferro, "Jurisprudência de «Private Enforcement»", *CIDEEFF Working Paper*, 2016, available at http://www.cidieff.pt/xms/files/Projeto_4_grupo_III/Jurisprudencia_de_Private_Enforcement.pdf. All the data and cases provided in this section are from this study and are further detailed therein.

¹¹ Constitutional Court judgment of 12/7/90, *AEPSLAS et al* (102/89); and Supreme Court judgment of 3/6/93, *Maria da Conceição et al v Climex et al* (3639).

¹² There are over 20 cases in this category. See, e.g., Southern Central Administrative Court judgment of 2/6/16 (13205/16). And see pending referral in Case C-66/22 *Infraestruturas de Portugal*.

¹³ Coimbra Appeal Court judgment of 30/9/2003, *Agriculture cooperative* (1441/03); Porto Appeal Court judgment of 15/10/2004 (434478); Porto Appeal Court judgment of 9/5/2007 (731258); Lisbon Appeal Court judgment of 20/5/10 (1/10.0TVLSB.L1-8); Sintra Judicial Court, *ANVI v VASP* (5/21.8YQSTR).

¹⁴ Supreme Court judgment of 31/10/91, *JFV v Tabaqueira* (79744); and Supreme Court judgment of 8/7/93, *JCG v Tabaqueira* (81441).

¹⁵ Supreme Court judgment of 24/1/12, *Renault Portuguesa* (39/2000.L1.S1); and Lisbon Appeal Court judgment of 22/5/14 (8076/12.1T2SNT.L1-2).

¹⁶ See cases quoted in footnote 11.

Cases litigated before generalist courts took a long time¹⁷ and often led to normative positions contrary to the CJEU's interpretation of EU Competition Law, or to the sweeping aside of competition law arguments in favour of civil law.

The Supreme Court's track record on competition law, until recently, was rather surprising. It confused abuse of dominance and abuse of economic dependence.¹⁸ It affirmed that an infringement of competition law could not be a basis for tort liability.¹⁹ It identified an abuse of economic dependence with a superficial analysis and ordered compensation that seemed to amount to a civil fine (unconnected to damage).²⁰ It affirmed that competition law is not concerned with intra-brand restrictions and that a small retailer was in the same economic unit as the large energy company whose gas bottles it sold.²¹ It rejected the international jurisdiction of Portuguese courts to hear an abuse of dominance case on the basis of a jurisdictional clause, without a referral to the CJEU or discussing the criteria already set out by then in CJEU case-law.²² Given a chance to revise this ruling, the Supreme Court waited for the CJEU's ruling on the parallel French case,²³ and then concluded that the infringement was foreseeable (and thus the jurisdictional clause enforceable), even though some of the behaviours alleged did not derive from the contract, some even infringing the contract.²⁴

¹⁷ The worst example for this is the *Recensere et al v Tabaqueira* (49/11.8TVLSB.L1.L1), litigation which goes back more than 20 years and is still not over.

¹⁸ Supreme Court judgment of 24/4/2002, *Reuter Portuguesa v Mundiglobo Trading* (4170/01).

¹⁹ Supreme Court judgment of 21/10/10 (3130/08).

²⁰ Supreme Court judgment of 20/6/13, *Salvador Caetano* (178/07.2TVPR.T.P1.S1).

²¹ Supreme Court judgment of 3/6/14 (627/09.5TVLSB.L1-7). This was an example of private enforcement preceding public enforcement. A couple of years later, the CA imposed a fine for the same contractual clause discussed here. That fine was confirmed by the Lisbon Appeal Court (which had rejected the argument in the private claim) – see Lisbon Appeal Court judgment of 10/1/17, *Galp v AdC* (102/15.9YUSTR.L1). Appeals to the Supreme Court are not possible in public enforcement. This evidenced the asymmetry and added difficulties private litigants may face in Portuguese courts, when compared to the CA.

²² Funchal Judicial Court ruling of 27/4/14; Lisbon Appeal Court Judgment of 25/6/15; and Supreme Court Judgment of 16/2/16, *Interlog and Taboada & Barros v Apple* (135/12.7TCFUN). Described in Sousa Ferro, M., 'Antitrust private enforcement in Portugal and the EU: the tortuous topic of tort' (2016) 4 *Global Competition Litigation Review* 140. This case concerned a dispute parallel to the one which led to a French referral in Case C-595/17 *Apple* EU:C:2018:854.

²³ Case C-595/17 *Apple* EU:C:2018:854.

²⁴ Supreme Court judgment of 19/12/18, *Interlog and Taboada & Barros v Apple* (2312/16.2T8FNC.L1.S1). Following this ruling, the Portuguese former distributor, insolvent, and incapable of funding an expensive case in Ireland, dropped its attempt to obtain damages for the infringements of Article 102 TFEU.

More recent judgments show a notable change in depth of EU law and antitrust analysis, and in sensitivity to the specificities and complexity of antitrust law.²⁵ That being said, in a recent judgment which heavily relied on the CJEU's *Cogeco* judgment, the court noted that Portuguese general tort rules (article 498 of the Civil Code) must be interpreted in accordance with EU Law, including the principle of effectiveness. However, in what may simply have been imperfect phrasing, it said that this was limited by *contra legem* interpretation. This would confuse the obligation of *interprétation conforme*, applicable to the transposition of Directives, with the obligation to comply with the principle of effectiveness, which requires setting aside incompatible national rules. In effect, such a phrasing would reject that obligation, with the inevitable detriment to the primacy of EU Law.²⁶ In another judgment, it seemed to depart, without reasoning, from the Lisbon Appeal Court specialized chamber's earlier and thoroughly reasoned conclusion that the *dies a quo* for time-barring should begin to run when the decision becomes *res judicata* (see *infra* §2.10).

Success in obtaining damages has been limited so far. Only 7 cases ended with the party who invoked competition law obtaining a patrimonial benefit.²⁷ The highest compensation awarded by a Portuguese court was 50.000 EUR to a single claimant. One (not yet final) case led to compensation of over 16,5 million EUR for 23 claimants (indeed, a larger amount, with interest), but the Lisbon Appeal Court was required to correct some procedural issues.²⁸ An arbitral tribunal awarded IMS Health 887.000 for abuse of dominance by the Portuguese pharmacy association.²⁹

²⁵ See, e.g., Supreme Court judgment of 14/5/19 (312/07.2TCFUN.L1.S2); Supreme Court judgment of 8/3/22, *RNM v Daimler* (6/19.6YQSTR-C.L1.S1).

²⁶ Supreme Court judgment of 8/3/22, *RNM v Daimler* (6/19.6YQSTR-C.L1.S1), §21. But compare the Court's phrasing in §22.

²⁷ Lisbon Appeal Court judgment of 9/4/2002, *Tabou Calzados* (494/02); Porto Appeal Court judgment of 3/11/2009, (572/07.9 TBVLC.P1); Supreme Court judgment of 8/10/13 (191/10.2TVLSB.L1.S1); Lisbon Appeal Court judgment of 24/11/2005, *Carrefour v Orex Dois* (6882/2005-8); Supreme Court judgment of 20/6/13, *Salvador Caetano* (178/07.2TVPR.T.P1.S1); Supreme Court judgment of 29/4/10, *VSC and FPF v RTP* (4292/1999.L1.S1); Lisbon Appeal Court judgment of 3/4/14, *ANF v IMS Health* (672/11.0YRLSB).

²⁸ Lisbon District Court judgment of 13/2/19; Lisbon Appeal Court judgments of 8/10/20 and of 4/2/21; Supreme Court individual decision of 17/1/22, *Recensere et al v Tabaqueira* (49/11.8TVLSB).

²⁹ Lisbon Appeal Court judgment of 3/4/14, *ANF v IMS Health* (672/11.0YRLSB). There have been various antitrust arbitrations in Portugal, but this was the only one made public through an appeal. On enforcement of a foreign arbitral award, see Supreme Court judgment of 14/3/17 (103/13.1YRLSB.S1).

A prime example of the difficulties faced by claimants was the *NOS v Portugal Telecom* case.³⁰ In this (materially) follow-on case to a Competition Authority (CA) decision which never became final (because the fine became time-barred during judicial review), one of the largest corporations in Portugal was deemed not to have proven the margin squeeze identified by the CA, despite deep pockets and access to leading lawyers and economists.

Following the transposition of the Damages Directive, in 2018, there was a visible change in the number and nature of cases. In the trucks' cartel, most large Portuguese claimants joined collective actions in the Netherlands. There are just over 100 individual actions pending before the Competition Court, being heard by different judges. Very few have been aggregated. A first group of cases was filed in 2019 and is nearing completion. Cases continue to be filed, possibly by claimants who took action to interrupt the limitation period.

Beyond damages claims in the trucks' cartel, few Business-to-Business actions for damages have been filed. The following are known: a stand-alone claim by tobacco wholesalers for abuse of dominance and economic dependence by a manufacturer;³¹ a follow-on claim relating to a public tender cartel;³² a request for provisional measures filed by media retailers against a distributor;³³ and a mostly stand-alone claim against the incumbent postal operator by two potential entrants into the retail traditional mail sector.³⁴

In December 2020, a consumer association filed the first two opt-out class actions (popular actions) before the Competition Court to compensate consumers for antitrust infringements,³⁵ resorting to third party funding, and others have followed.

An outstanding feature of the current Portuguese antitrust litigation scenario is that undertakings almost always appeal CA decisions. Even undertakings which received immunity or 50% reduction of fines under leniency are now appealing CA decisions,

³⁰ Lisbon District Court judgment of 22/11/16, *NOS v Portugal Telecom* (1774/ 11.9TVLSB).

³¹ *Recensere et al v Tabaqueira* (49/11.8TVLSB).

³² *Parque Escolar v UEM et al* (73/19.2YQSTR).

³³ *ANVI et al v VASP* (5/21.8YQSTR).

³⁴ *VASP and Iberomail v CTT* (19/21.8YQSTR).

³⁵ The first opt-out consumer class action was filed in 2015 before the Lisbon District Court and is still pending: *OdC v Sport TV* (7074/15.8T8LSB).

challenging the existence of the infringement they confessed to or, creatively, challenging the amount of the fine (which was not applied) due to its alleged reputational effects.³⁶

2.2. Follow-on and stand-alone

Up to 2016 out of 97 cases, 93% were stand-alone claims (competition law was mostly used as a defence), 4% follow-on and 3% mixed.

If one looks at the number of individual actions, this reality has changed radically after the transposition of the Damages Directive. The more than 100 trucks cartel actions filed in about 3 years are all strictly *follow-on*. If one considers all these actions as a single case, then the change is more limited. Even if we consider only actions for damages,³⁷ strictly follow-on cases continue to be a minority,³⁸ with a majority of stand-alone³⁹ and mixed⁴⁰ claims (e.g., where the claimant argues that the material or temporal scope of the declared infringement was actually broader).

In one particular stand-alone claim, a Portuguese court has rejected drawing inferences from the fact that CA investigations on the same practices did not lead to findings of infringement.⁴¹

2.3. Specificities in the transposition of the Damages Directive

The Antitrust Damages Directive was transposed in Portugal by Law 23/2018, of 5 June (entered into force in August 2018).⁴² Portuguese law went beyond the requirements of the Directive in several ways.

³⁶ See appeals by Barclays and Montepio in the banking cartel public enforcement case (225/15.4YUSTR-W).

³⁷ It is safe to assume that competition law continues to be raised in many non-damages' actions.

³⁸ Trucks cartel cases; *Parque Escolar v UEM et al*; *Ius Omnibus v ANT*; *Ius Omnibus v EDP*.

³⁹ *Recensere et al v Tabaqueira*; *ANVI et al v VASP*; *VASP and Iberomail v CTT*; *Ius Omnibus v Apple*; *Ius Omnibus v Google*.

⁴⁰ *Ius Omnibus v Super Bock*; *Ius Omnibus v Mastercard*.

⁴¹ Lisbon Appeal Court judgment of 8/10/20, *Recensere et al v Tabaqueira* (49/11.8TVLSB.L1.L1), pp. 719 and 761.

⁴² For further details on this transposition, see Miguel Sousa Ferro, "Portugal" in Barry Rodger, Miguel Sousa Ferro & Francisco Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, Oxford University Press 2018, 304-325.

The regime is applicable, not only to claims for damages, but also to any “other requests” based on infringement of EU or MS competition law (injunctions, declarations of nullity of contractual clauses, requests for provisional measures, actions for access to evidence, etc.).⁴³

Well before *Skanska*, it foresaw the liability of the parent company and codified a presumption of exercise of control above a 90% shareholding.⁴⁴

Concerning joint and several liability, it replaces the Civil Code’s presumption of equal responsibility with a (refutable) presumption of liability for a share of damages equivalent to the average market share.⁴⁵

It grants a right to pre-filing discovery (actions to obtain means of evidence needed to assess the existence of a right or to prove it) (see below, *infra* §2.9).⁴⁶

It confirms that the Portuguese right of popular action (opt-out representative actions) may be used in antitrust damages actions, and adds special provisions, namely extending its scope to undertakings.⁴⁷

It seeks to ensure absolute protection for all settlement proposals (even withdrawn ones), with a play on words similar to the one used in the EC’s Notice on settlement procedures.⁴⁸

It seeks to create a centralized database of private enforcement actions, by requiring courts to notify the CA of any claims and rulings on antitrust rules.⁴⁹ The CA is then required to comply with article 15(2) of Regulation (EC) 1/2003. So far, the CA has not made this information public.

⁴³ Article 1(1) of Law 23/18.

⁴⁴ Article 3(2) and (3) of Law 23/18 (see also article 2(j)).

⁴⁵ Article 5(5) of Law 23/18.

⁴⁶ Article 13 of Law 23/18.

⁴⁷ Article 19 of Law 23/18.

⁴⁸ Article 14(4)(c) and 20 of Law 23/18 (amending article 22 of the Competition Act).

⁴⁹ Article 21 of Law 23/18, adding article 94A of the Competition Act.

2.4. Court system

Since August 2018, claims (damages, injunctions, provisional measures, etc.) based solely on infringements of EU or national competition law fall within the exclusive jurisdiction of the specialized Competition, Regulation and Supervision Court, based in Santarém. This Court sits for public and private enforcement of antitrust law (and also judicial review of fines applied by sectoral regulators).

The Competition Court is currently made up of 4 judges, with the occasional assistance of a 5th judge. All are career magistrates who received antitrust training on the job (prior knowledge of competition law is not a requirement, or even an advantage, when applying for a position at this court). The faces on the bench have tended to change. The longest serving judge has been at the Competition Court since its inception in 2012, but others have been there for only 2 years. Although long discussed, so far, the Competition Court has not had access to its own legal or economic assistants or advisers.

Private enforcement of antitrust law continues to be raised before other courts. First, cases pending in August 2018 were not transferred to the Competition Court.⁵⁰ Second, any “mixed” case, where the infringement of antitrust rules is invoked in parallel with infringements of other norms (e.g., civil or consumer protection law), must be filed at a generalist court.⁵¹ Third, competition law inevitable continues to be invoked as a defence in civil litigation. Cases that go before generalist courts can be heard by any one of hundreds of (non-specialist) judges, and the judge assigned to a given case often changes with the passing of time.

Appeals from Competition Court rulings are heard by a chamber of the Lisbon Appeal Court specialized in intellectual property, competition, and regulation. This recently created chamber is currently made up of 7 (career) judges. Appeals from generalist courts are heard by the territorially competent Appeal Court.

Whereas in public enforcement the Supreme Court has been excluded from judicial review of CA decisions, in private enforcement a final appeal to the Supreme Court will, usually, be possible, as well as a potential appeal to the Constitutional Court (if the

⁵⁰ The Lisbon District Court thus continues to hear antitrust cases such as *OdC v Sport TV* (7074/15.8T8LSB) and *NOWO v Sport TV* (16725/15.3T8LSB).

⁵¹ An example of such a recent filing is *Ius Omnibus v Apple* (17713/21.6T8LSB). As an example of a case initially filed at the Competition Court and then transferred to generalist court, see *ANVI v VASP* (5/21.8YQSTR).

requirements are met). Indeed, several private enforcement cases have reached both Courts.

2.5. Court costs and adverse costs

Portugal is not a loser-pays jurisdiction. Litigation in Portugal is, generally, inexpensive compared to other jurisdictions. Under the general rules of civil procedure, a party who is entirely unsuccessful (absent bad faith litigation⁵²) is ordered to pay only court fees (and other expenses which the court may have incurred in the case) and half of the amount of the total court fees as a contribution to the other side's legal fees. Court fees and adverse costs are calculated as a function of the value of the case (e.g., the damages claimed). Above 275.000 EUR, courts have a broad discretionary margin to impose additional court costs (and, proportionally, adverse costs), leading to uncertainty relating to risks when filing large claims.⁵³

Court costs also include the remuneration of court appointed experts (e.g., economists). As a general rule, these costs are initially split between claimant and defendant and then paid in full by the losing party. In the past, economist expert remuneration has often been low, but judges have a large discretionary margin in this regard. In the *NOS v Portugal Telecom* case, the court-appointed expert economist presented the Court with costs of 87.600 EUR. The Lisbon District Court quoted Constitutional Court case-law according to which the general costs rule setting a ceiling of 1020 EUR for expert remuneration could be unconstitutional in specific cases (such as this one).⁵⁴ The Constitutional Court upheld the ruling.⁵⁵

There are special rules for costs of popular actions, particularly favourable to claimants, which very significantly limit potential exposure of claimants to court costs and adverse fees.⁵⁶

⁵² In case of bad faith litigation, *inter alia*, the claimant may be ordered to pay a fine and all the (reasonable) costs of the defendants, and the attorneys of the claimants may also be held liable (articles 542 to 545 of the Code of Civil Procedure).

⁵³ See Decree-Law 34/2008, of 2/2/2008, as amended.

⁵⁴ Constitutional Court judgments no. 656/2014, of 14/10/14; and no. 16/2015, of 14/1/15.

⁵⁵ Constitutional Court Summary Decision no. 376/2015, of 5/6/15, *Ministério Público v NOS et al* (case no. 453/2015).

⁵⁶ See Miguel Sousa Ferro, "Class actions in Portugal: the little regime that could", (2021) 2 *Mass Claims Journal* 115, section 2.4(g).

2.6. *Ratione temporis* applicability of new regime

The temporal scope of the transposition of the Damages Directive is raising the same doubts in Portugal as everywhere else.

The Supreme Court has stated that, as a matter of national law, time-barring rules are substantive in nature, that the CJEU (*Cogeco*) has also reached the same conclusion for EU Law, and that article 6 of Law 23/18 is applicable only to infringements which occurred after the entry into force of this regime.⁵⁷

The Competition Court has systematically applied certain provisions of Law 23/18 to actions filed after the transposition, referring to infringements which occurred prior to it, such as rules on jurisdiction, notification of the EC/CA, and CA assistance for quantification. But the procedural nature of these provisions seems to be uncontroversial.

Defendants have argued that other provisions are substantial (rules on access to evidence, binding nature of CA decisions, presumptions of causation of harm and passing-on, etc.). Relating to such provisions, to the best of my knowledge, the Competition Court has so far avoided taking a position. For example, it confirmed that defendants can allege passing-on and request disclosure from defendants to prove it, while explicitly avoiding clarifying if article 8(1) of Law 23/18 was applicable to the case, arguing the same solution would derive from general rules and principles.⁵⁸

The Portuguese transposition may infringe EU Law.⁵⁹ It has been suggested that the Directive's procedural provisions must apply to actions filed after 26/12/14.⁶⁰ But the procedural provisions of Law 23/18 are only applicable to actions filed after August 2018.⁶¹

⁵⁷ Supreme Court judgment of 8/3/22, *RNM v Daimler* (6/19.6YQSTR-C.L1.S1), p. 18-20. This clarification was provided in the trucks' cartel, so the court did not have to discuss the applicability of the new regime in the case of continuous infringements ending after the entry into force of the new regime.

⁵⁸ See, e.g., Competition Court order of 23/9/20, *Transneiva v DAF Trucks* (10/19.4YQSTR).

⁵⁹ As noted in Ferro "Portugal" in Rodger, Ferro & Marcos (eds.) *The EU Antitrust Damages Directive. Transposition in the Member States*, 308.

⁶⁰ See, e.g., Opinion of AG Szpunar in C-163/21 *Paccar* EU:C:2022:286, §55. See Phillip Kirst "Laws applicable *ratione temporis* and limitation of actions" (chapter 5) of this book.

⁶¹ Article 24(2) of Law 23/18.

Another potential problem with the Portuguese transposition is that it did not entirely leave it up to courts to interpret what is a substantive or a procedural rule. It stipulated that rules on “burden of proof” should be deemed substantive.⁶² It is debatable exactly which provisions concern the burden of proof. Some have argued that the binding force of CA decisions⁶³ and the presumptions of harm and passing-on are included here. If so, this may create a conflict with the Directive’s obligations, if the CJEU were to clarify that any or all of those provisions should be deemed procedural under EU Law. It would then be up to national courts to decide if the national rule allows sufficient margin for an interpretation in accordance with the Directive.

It is also debatable what the prohibition of retroactivity means in this context, under the Directive and under Law 23/18. Some exclude the applicability of these provisions to cases where the facts of the infringement preceded the entry into force of Law 23/18. From this viewpoint, the date of the infringement is the *dies a quo* for the assessment of retroactivity. Others, including myself, argue that retroactivity of the rule on binding force should be assessed in relation to when the CA decision is adopted and, for the refutable presumptions, when the action is filed.

The goal of the *ratione temporis* provisions is to guarantee legal certainty and to protect legitimate expectations. In my view, when an undertaking carries out an infringement, it has no legitimate expectation that there will be no future change in the rules concerning binding effects of CA decisions, or whether causality or passing-on can be presumed. If the regime is already in force when a CA decision is adopted, the undertaking knows the potential civil consequences (in follow-on claims) of not appealing that decision and can protect its interests.⁶⁴ There is also no legitimate expectation to protect, at the time one carries out an antitrust infringement, concerning who has to prove what in a hypothetical future civil action. That is an issue of the adversarial process, arising only when the action is filed. Only then could legitimate expectations be infringed by a subsequent change in the rules of the game.

⁶² Article 24(1) of Law 23/18.

⁶³ For more on the binding effect of CA decisions, see Miguel S. Ferro “Binding effect of infringement Decisions” (Chapter 12) of this book.

⁶⁴ On the other hand, it would be retroactive and contrary to legal certainty to apply a rule adopted only when it was too late to appeal the CA decision.

Some authors seemingly believe that rules on the burden of proof cannot be applied retroactively because they affect the likelihood of success in enforcing a right. That does not seem a reasonable legal test to distinguish between substantive and procedural provisions. By that rational, any procedural rule could be substantive. Rules concerning access to evidence manifestly affect likelihood of success. Very short deadlines for claimants to act can make it impossible for them to exercise their rights. Awarding jurisdiction to a specialized court can make it much more likely for rights to be successfully enforced, etc.

The opposite view would mean that, for years to come, follow-on actions would not yet benefit – at least via the transposition of the Directive – from the binding effect of CA decisions, or from the presumption that cartels cause damage or that damages are passed down the distribution chain. By that argument, only when the CA began adopting decisions relating to infringements occurring after August 2018 would the new provisions kick in.

That being said, Portuguese courts could recognize that some binding effect of CA decisions (refutable presumption)⁶⁵ and the presumptions of damages and passing-on⁶⁶ were already derived from the principle of effectiveness of EU Law, prior to the Damages Directive. This is, ultimately, an issue to be clarified by the CJEU. I find the arguments in favour of such an interpretation persuasive. The special nature and complexity of competition law means that it will often be impossible or excessively difficult for claimants to prove a cartel without the binding effect of the CA decision. It would also dispense with the burdensome re-litigation of infringements before civil courts, possibly multiplied hundreds or thousands-fold, and potentially arriving at diverging outcomes and heterogenous interpretations of EU Competition Law concerning the same practice. Similarly, claimants will often find it excessively burdensome to prove passing-on of a surcharge. Arguably, if the EU legislator did not believe that these provisions were necessary to safeguard the effectiveness of these rights, they would not have been included in the Directive. Otherwise, their inclusion would even be unlawful (going beyond what is required to achieve the goals of the provisions which underlie the EU's competence).

⁶⁵ See Ferro “Binding effect of infringement Decisions” (Chapter 12) of this book.

⁶⁶ Ibid.

At the very least, I believe there must be room for a case-by-case assessment of whether the principle of effectiveness is infringed in the absence of such presumptions, given the features of the anticompetitive practice in question, the nature and resources of the parties, the quantum of damages, etc. However, leaving it up to a case-by-case assessment is likely to lead to very different standards from one court (or judge) to another, to the detriment of the homogeneous application of EU Law and of the effectiveness of some claimants' right to damages.

These debates are ongoing before Portuguese courts.⁶⁷

2.7. Quantifying damages

As noted in section 2.1, Portugal has very few precedents on the quantification of damages, and none post-transposition of the Directive. The system seems to be struggling. In some trucks' cartel cases, one Competition Court judge humbly and straightforwardly stated that she was not able to quantify the damages and to decide on the accuracy of the parties' widely diverging expert reports. She initially asked the CA to do the quantification.⁶⁸ After long delays, the CA – expectably – asked to be excused from that duty.⁶⁹ The Court then sought the appointment by the Portuguese Economists Association of an independent economic expert.⁷⁰ A similar position was taken by another judge (minus the request to the CA).⁷¹ But access to such experts by the courts is not optimal. In these cases, economists living near the Court (in a relatively rural area) tend to be appointed, seemingly with no concern for specific antitrust qualifications.

⁶⁷ See, e.g.: Appeal pending before Lisbon Appeal Court in *OdC v Sport TV* (7074/15.8T8LSB); *VASP and Iberomail v CTT* (19/21.8YQSTR); *Ius Omnibus v EDP* (18/21.0YQSTR); *Ius Omnibus v Super Bock* (20/20.9YQSTR). In the latter case, the Competition Court preliminary ruling of 25/5/22 did not take an explicit position on whether article 7(1) of Law 23/18 was applicable to this case, but it used that provision to justify the suspension of the case to await the outcome of the judicial review of the CA decision.

⁶⁸ Competition Court order of 2/6/21, *Transportes Guilherme Fernandes v Renault Trucks* (54/19.6YQSTR).

⁶⁹ As foreseen in article 9(3) of Law 23/2018. Portuguese CA letter to the Competition Court of 7/2/22, in *Transportes Guilherme Fernandes v Renault Trucks* (54/19.6YQSTR).

⁷⁰ Competition Court order of 2/3/22, *Transportes Guilherme Fernandes v Renault Trucks* (54/19.6YQSTR). A non-suspensive appeal by the Defendant is pending.

⁷¹ Competition Court order of 22/3/22, *Parque Escolar v UEM et al* (73/19.2YQSTR).

An alternative is for courts to ask Universities to appoint a Professor of Economics as an expert, but this too has tended to lead to the appointment of academics who do not specialize in antitrust. There simply are not that many (non-conflicted) specialists in Portugal. Additionally, courts will typically offer limited remuneration to such independent experts (see *supra* §2.6).

There are clearly growing pains. But the Competition Court is quickly gaining experience and testing new solutions. Its concern with finding the ‘right’ quantum, rather than using some simplified surcharge estimate, or going for the middle between the claimants’ and defendants’ views, suggests that better solutions and procedures may be found following initial experiences the Court may deem sub-optimal.

Although there is still legal uncertainty,⁷² majority opinion seems to hold that, as a rule, only updates for inflation can be obtained until the filing of the claim, and non-compound legal late interest apply from thereon (in principle, 4% for consumers, 7% for undertakings⁷³).

2.8. Popular actions

Portugal, alongside the UK and the Netherlands, is one of the few countries in Europe with opt-out regimes for antitrust infringements that are actually being put into practice.⁷⁴ Often considered the most permissive and claimant-friendly opt-out regime in Europe,⁷⁵ the Portuguese regime stands out also because it is rooted in a constitutional right of popular action.⁷⁶ For antitrust, the constitutional provision is implemented by article 19 of Law 23/18 and, subsidiarily, by the general regime of popular actions (Law

⁷² See Portuguese report in Monti, G. (ed.), *EU law and interest on damages for infringements of competition law— a comparative report*, EUI Working Paper 2016/ 11.

⁷³ See *Recensere et al v Tabaqueira* (49/11.8TVLSB).

⁷⁴ For a more detailed analysis, see Ferro, (2021) 2 *Mass Claims Journal* 115.

⁷⁵ Oliveira Pais, S., “Antitrust private enforcement and collective redress in Portugal”, in Oliveira Pais, S. (ed.), *Competition Law Challenges in the Next Decade*, Peter Lang, 2016, pp. 19-33; Rossi, L. and Sousa Ferro, M., “Private enforcement of competition law in Portugal (II): actio popularis— facts, fictions and dreams” (2013) 4(1) *Revista de Concorrência e Regulação* 35; Leskinen, C., “Collective actions: rethinking funding and national cost rules” (2011) 8(11) *The Competition Law Review* 87 at 91; Delatre, J. G., “Beyond the White Paper: rethinking the Commission’s proposal on private antitrust litigation” (2011) 8(1) *The Competition Law Review* 29 at 39; Mulheron, R., “Competition law cases under the opt-out regimes of Australia, Canada and Portugal”, Research Paper, available at: <http://www.bis.gov.uk/files/file49008.pdf>.

⁷⁶ Article 52(3) of the Portuguese Constitution.

83/95). It can be used to represent consumers and undertakings. Active legitimacy is granted to individual consumers and associations.

Courts have confirmed that popular actions may be used to seek compensation for consumers injured by anticompetitive practices,⁷⁷ to seek pre-filing discovery,⁷⁸ and to seek provisional measures.⁷⁹ Third party funding has been deemed irrelevant for the determination of active legitimacy in popular actions.⁸⁰

Only one such popular action has been concluded: a consumer redress opt-out action filed in July 2021 and settled, with court approval, in September 2021.⁸¹ Under the settlement, the defendant committed to paying damages of 5% of the amount paid by consumers for land surveying services during the relevant period, and paid the court costs (no claimant costs).

There are currently 5 antitrust damages popular actions pending,⁸² plus eight pre-filing discovery popular actions.⁸³

2.9. Access to evidence

Access to evidence is often challenging in Portugal,⁸⁴ and there are drastic asymmetries and variations, accentuated by a large discretionary margin given to judges. 1st instance judgments and rulings are not published, nor are many 2nd and 3rd instance judgments. It is often difficult to know when a *res judicata* ruling is reached because relevant decisions are not announced and access to them has on occasion even been

⁷⁷ Lisbon Appeal Court judgment of 4/12/18, *OdC v Sport TV* (7074/15.8T8LSB.L1-1); Competition Court preliminary ruling of 25/5/22, *Ius Omnibus v Super Bock* (20/20.9YQSTR).

⁷⁸ Competition Court preliminary ruling of 6/4/22 in *Ius Omnibus v Meliá* (6/21.6YQSTR).

⁷⁹ Sintra District Court judgment of 23/2/22, *ANVI v VASP* (5/21.8YQSTR).

⁸⁰ Competition Court preliminary ruling of 25/5/22, *Ius Omnibus v Super Bock* (20/20.9YQSTR); Competition Court preliminary ruling of 9 June 2022, *Ius Omnibus v Mastercard* (19/20.5YQSTR).

⁸¹ Competition Court judgment of 20/9/21, *Ius Omnibus v Associação Nacional de Topógrafos* (15/21.5YQSTR).

⁸² *Ius Omnibus v Mastercard* (19/20.5YQSTR); *Ius Omnibus v Super Bock* (20/20.9YQSTR); *Ius Omnibus v EDP* (18/21.0YQSTR); *Ius Omnibus v Apple* (3/22.4YQSTR); *Ius Omnibus v Google* (4/22.2YQSTR).

⁸³ See *infra* §2.10.

⁸⁴ For a more detailed analysis, see: Miguel Sousa Ferro, “The reality of access in antitrust private enforcement: overview of 3 years’ experience in Portugal”, (2021) 46-47 *Revista de Concorrência e Regulação* 37, available at <https://www.concorrenca.pt/en/magazine/competition-and-regulation-journal-46-47>.

refused by the Court. Sometimes access is granted to the full version of judgments or case files without any protection of confidentiality. In other cases, obtaining even non-confidential versions of public documents becomes a struggle requiring appeals dragging out for over a year.

The transposition of the Damages Directive has had no perceptible impact on the rights of access to evidence in antitrust private enforcement. The personal approaches and values of the judges hearing access requests have outweighed, by far, the impact of legislative reform. These personal approaches sometimes evolve quickly in reaction to practical experiences.⁸⁵

In the trucks cartel and at least one other case,⁸⁶ requests for access to evidence are often presented more by defendants than by claimants. They have had varying success in obtaining such evidence, with some judges occasionally preferring to appoint independent experts to peruse confidential documents.

In relation to the Directive, the only truly innovative aspect of the Portuguese transposition was the granting of a right to pre-filing discovery,⁸⁷ anticipating the concern recently stressed by AG Szpunar.⁸⁸ This right is being tested in popular actions intended to determine if Portuguese consumers were injured by two anticompetitive practices declared in EC decisions.⁸⁹ The Court has confirmed that popular actions can be used in this manner and that it has international jurisdiction under the Brussels Regulation and Portuguese Code of Civil Procedure, even when the defendant is from another Member

⁸⁵ In one case, one judge initially refused to grant claimant's request that the defendant and a third party be ordered to produce documents, instead giving the claimant a deadline to request those documents from the Competition Court and from the Competition Authority. When the first's order to grant access was appealed by the defendant, and the second refused to grant access, the judge changed approach and ordered the third party to produce the requested documents, to be made available to the parties in a confidentiality ring – see Order of the Lisbon District Court of 21/4/22, *OdC v Sport TV* (7074/15.8T8LSB).

⁸⁶ Competition Court preliminary ruling of 14/12/20 in *Parque Escolar v UEM et al* (73/19.2YQSTR).

⁸⁷ Article 13 of Law 23/18; articles 574-576 of the Civil Code; articles 1045-1047 of the Code of Civil Procedure.

⁸⁸ Opinion of AG Szpunar in C-163/21 *Paccar* EU:C:2022:286, ¶¶23-44; Opinion of AG Szpunar in C-57/21 *RegioJet* EU:C:2022:363, ¶48.

⁸⁹ *Ius Omnibus v Meliá* (6/21.6YQSTR); *Ius Omnibus v Dreamworks Animation Licensing* (7/21.4YQSTR); *Ius Omnibus v Dreamworks Animation* (8/21.2YQSTR); *Ius Omnibus v Dreamworks Animation Publishing* (9/21.0YQSTR); *Ius Omnibus v Universal Studios Limited* (10/21.4YQSTR); *Ius Omnibus v Universal Studios Licensing* (11/21.2YQSTR); *Ius Omnibus v Nbc Universal Media* (12/21.0YQSTR); *Ius Omnibus v Nbc Universal* (13/21.9YQSTR); *Ius Omnibus v Comcast Corporation* (14/21.7YQSTR).

State or third country.⁹⁰ It is too early to assess the success of this procedure, but two lessons can already be drawn. First, the procedure may take longer than suitable for such a preparatory action.⁹¹ Second, the procedure is proving cumbersome and costly, for the parties and the courts. This could be a barrier to effectiveness, as few claimants will be able or willing to invest the amounts required to litigate such a case just to find out if they have a right to damages. In two cases, the Defendant did not submit a Defense in time and the Court deemed the disclosure request to be reasonable and proportionate, ordering the production of all requested documents.⁹²

2.10. Limitation period

The courts' interpretation of time-barring rules, and their application to antitrust private enforcement cases, has been a challenging obstacle for claimants in Portugal. This can famously be illustrated by the *Cogeco* case⁹³. Various authors⁹⁴ and courts of other MS⁹⁵ interpreted the CJEU ruling as implying that the limitation period should be suspended during the public enforcement investigation. After the CJEU's declaration that Portuguese law infringed EU Law, one may have expected the rule to be set aside. However, the Portuguese courts concluded that the CJEU made a mistake in the

⁹⁰ Competition Court preliminary ruling of 6/4/22 in *Ius Omnibus v Meliá* (6/21.6YQSTR) (an appeal on international jurisdiction is pending). Competition Court judgment of 25/5/22, in *Ius Omnibus v Comcast Corporation* (14/21.7YQSTR); Competition Court judgment of 6/6/22, *Ius Omnibus v Universal Studio Licensing* (11/21.2YQSTR).

⁹¹ The above-mentioned cases were filed in July 2021, and the only ones to reach a 1st instance ruling so far, by the closing of this chapter, were two unchallenged actions, slightly under 1 year after being filed (but see next footnote).

⁹² Competition Court judgment of 25/5/22, in *Ius Omnibus v Comcast Corporation* (14/21.7YQSTR); Competition Court judgment of 6/6/22, *Ius Omnibus v Universal Studio Licensing* (11/21.2YQSTR). These judgments are not yet *res judicata*. The Defendant subsequently invoked the nullity of the service of the claim and is challenging the validity of the judgments, as well as appealing them.

⁹³ Case C-637/17 *Cogeco* EU:C:2019:263

⁹⁴ See, e.g.: Oliveira e Costa, G., "The first preliminary ruling on Directive 2014/104/EU: case 637/17 *Cogeco*", 2019; Cauffman, C., "The CJEU Clarifies the Rules on Antitrust Damages Actions Before and After the Harmonization", Competition Policy International, 2019; Van Calster, G., "Cogeco: Limitation periods and civil procedure *ius commune* at the Court of Justice", 2019; Siragusa, M. & Comino, A., "Private antitrust enforcement in Italy", 2019; Van Wamel, D., "Shining a light on the interface between EU and national Law in the private enforcement of the EU competition rules", (2019) 3 CoRe; Marcos, F., "La prescripción de las acciones de reclamación de daños causados por el cártel de los fabricantes camiones", 2019.

⁹⁵ See, e.g.: Amsterdam Appeal Court judgment of 4/2/20 (ECLI:NL:GHAMS:2020:194), §3.5.6, 3.5.9 and 3.6.6; Scottish Outer House Court of Session judgment of 11/11/20, *Glasgow City Council v Volvo et al* [2020] CSOH 92, §56. Arriving previously at a similar result: Belgian Constitutional Court judgment no. 38/2016 of 10/3/16.

interpretation of Portuguese law (because the limitation period may be interrupted by the injured person through a judicial notification⁹⁶), and found the action to be time-barred.⁹⁷

The outcome was the same as in the prior *Onitelecom v PT* case.⁹⁸ In both cases, the claimant had submitted a complaint to the CA, setting off the investigation. The courts concluded that, at that time, the claimant was already in possession of sufficient information to start the clock on the limitation period. By the time the CA's decision was adopted, and follow-on actions were filed, the 3 year limitation period had elapsed. While I cannot claim to be an impartial observer, for me this approach sits oddly with the principle of effectiveness.⁹⁹ One would first need to discuss whether the limitation period should have been suspended during the investigation, prior to the Directive. But even if there were no suspension, it seems dismissive of the special and complex nature of antitrust infringements to say that someone who files a complaint about a behaviour necessarily has enough information to start the clock running, especially when the CA then carries out an investigation that lasts several years, using its powers of authority to collect confidential evidence it deems necessary to conclude if there was an infringement.¹⁰⁰ This discussion seems rooted in two main aspects: the claimant's duty to investigate,¹⁰¹ as it relates to the initiation of the limitation period; and the need, according to Portuguese case-law, to have merely a "factual", not a "legal" knowledge of the existence of the infringement,¹⁰² and the relative ease with which "factual" knowledge is identified.

A sister action to *Onitelecom v PT* was saved from time-barring by replacing the tort claim with a contractually-based claim for restitution of undue sums, to which a 20

⁹⁶ Supreme Court case-law uniformizing judgment of 26/3/98 (97A519). See also, on apparent impossibility of subsequent interruptions of the limitation period (i.e., only once allowed): Supreme Court judgment of 5/11/13 (7624/12.1TBMAI.S1).

⁹⁷ Lisbon District Court judgment of 2/9/19, Lisbon Appeal Court judgment of 5/11/20, *Cogeco v Sport TV* (5754/15.7T8LSB).

⁹⁸ Judgment of the Lisbon Appeal Court of 31/10/13, *Onitelecom v PT* (2271/ 11.8TVLSB.L1-8).

⁹⁹ The claimant in the *Onitelecom v PT* case explicitly invoked the principle of effectiveness before the Lisbon Appeal Court, but the latter did not reply or address this issue.

¹⁰⁰ Similarly, see Carlos Ferreira de Almeida, Legal Opinion in case *NOS v Portugal Telecom* (1774/11.9TVLSB).

¹⁰¹ See, e.g., Supreme Court judgment of 23/6/16 (54/14.2TBCMNB-G1.S1).

¹⁰² See, e.g., Lisbon Appeal Court judgment of 31/10/13, *Onitelecom v PT* (2271/ 11.8TVLSB.L1-8).

year limitation period applies.¹⁰³ This would mean that direct clients (with a contractual relation with the infringer) would be considerably more protected than indirect ones, including final consumers, having much more time to react.¹⁰⁴ Traditionally, most Portuguese case-law suggests that the contractual liability regime should prevail when both contract and tort rules are applicable, and even recently this has been the approach in a private enforcement case.¹⁰⁵ However, the Supreme Court, addressing this issue specifically, noted that CJEU case law repeatedly qualifies antitrust damages actions as falling under tort rules, and that this must be considered when applying EU rules: “*the discussion concerning the infringement of competition rules fits within the scope of tort liability*”.¹⁰⁶

In *OdC v Sport TV* (a popular action following-on from the same CA decision as in *Cogeco*), the 1st instance court confirmed the inapplicability *ratione temporis* of the Directive (quoting *Cogeco*) and applied national rules without discussing the issue of EU law’s effectiveness. It concluded that none of the consumers’ rights were time-barred (*dies a quo* set as that of CA decision), save for one behaviour: the imposition of pure bundling of Sports channels. The Court rejected both the relevance of a continuous infringement for time-barring, and its suspension during the investigation.¹⁰⁷ An appeal is pending where, *inter alia*, the defendant argues that all or more of the infringements should be time-barred, and the claimant argues that consumers knew that tv operators refused to sell channels separately but could not know this was imposed in their (confidential) contracts with the defendant. On appeal, *inter alia*, the defendant argued that all or more of the infringements should be time-barred, and the claimant argued that

¹⁰³ Lisbon District Court judgment of 22/11/16, *NOS v Portugal Telecom* (1774/ 11.9TVLSB). The same issue may be addressed in *NOWO v Sport TV* (16725/15.3T8LSB), still pending.

¹⁰⁴ This may no longer be the case since the entry into force of the new regime, but is yet to be tested and may not be clarified for years to come.

¹⁰⁵ Lisbon District Court judgment of 13/2/19, Lisbon Appeal Court judgments of 8/10/20 and of 4/2/21, Supreme Court individual decision of 17/1/22, *Recensere et al v Tabaqueira* (49/11.8TVLSB). In this case, antitrust infringements were not the exclusive cause of action.

¹⁰⁶ Supreme Court judgment of 8/3/22, *RNM v Daimler* (6/19.6YQSTR-C.L1.S1), p. 16 (our translation; namely quoting cases C-548/12, C-302/13, C-352/13, C-451/18, C-882/19 and C-30/20). See also Supreme Court judgment of 19/12/18, *Interlog and Taboada & Barros v Apple* (2312/16.2T8FNC.L1.S1). This also seems to be the position of the Competition Court – see, e.g.: Competition Court preliminary ruling of 1471220, *Parque Escolar v UEM et al* (73/19.2YQSTR) (where there was a direct contractual relation); Competition Court preliminary ruling of 25/5/22, *Ius Omnibus v Super Bock* (20/20.9YQSTR).

¹⁰⁷ Lisbon District Court Order of 17/9/21, *OdC v Sport TV* (7074/15.8T8LSB). A different view on *dies a quo* in case of continuous infringements (not an antitrust case) was expressed, e.g., in Porto Appeal Court judgment of 2/7/13 (1567/09.3TBAMT.P1)

consumers knew that tv operators refused to sell channels separately, but could not know this was imposed in their (confidential) contracts with the defendant. The Lisbon Appeal Court accepted the claimant's argument and noted that, in any case, the 1st instance court could not have decided this issue before it had analysed all the evidence.¹⁰⁸

In the trucks' cartel, Portuguese courts, from the Competition Court to the Supreme Court, have settled on the position that the *dies a quo* cannot be the date of press releases about the EC decision, as this would violate fundamental principles.¹⁰⁹ In these cases, it was the date of the publication of the EC decision in the Official Journal, but in circumstances where, at that time, the Decision was already *res judicata*.

The Lisbon Appeal Court based this finding on the protection of legal certainty, on the need to use special powers of investigation to identify such infringements (unavailable to injured persons), and on the presumption of innocence which applies to addressees of an EC decision: “*only when a decision imposing a fine becomes res judicata can it be deemed shown, without margin for doubt, that an unlawful practice was carried out by the infringer, who until then benefited from a presumption of innocence (...). As noted in popular wisdom (...), all that glitters is not gold, and in these times of special effects and deep fakes, you really can have smoke with no fire*”.¹¹⁰ In other words, simply because the CA says there was an infringement, does not make it so. The Appeal Court warned about the risks of injured parties filing claims and then seeing the decision annulled on appeal, stating that it is neither legal nor ethically demandable for victims to take that risk.¹¹¹ It also noted that setting an earlier *dies a quo* in this case would make it impossible or excessively difficult for injured persons to exercise their right to damages.¹¹²

¹⁰⁸ Lisbon Appeal Court individual decision of 23/6/22, *OdC v Sport TV* (7074/15.8T8LSB-C.L1). The defendant has asked that the panel of judges of the Lisbon Appeal Court annul this individual decision (still pending).

¹⁰⁹ The Lisbon Appeal Court had arrived at a different conclusion in two earlier cases: individual decision in 29/19.5YQSTR-B.L1 and judgment in 71/19.6YQSTR-A.L1. See also Lisbon Appeal Court individual decision of 24/5/21, *Campicarn v Volvo* (5/19.8YQSTR-D.L1), in which the 1st instance ruling on time-barring was annulled on the grounds that it should have been left until after the trial.

¹¹⁰ Lisbon Appeal Court judgment of 23/9/21, *RNM v Daimler* (6/19.6YQSTR-C.L1), ¶¶33-37 and 42-45 (our translation).

¹¹¹ *Ibid.*, ¶¶38-39 (our translation). See also Lisbon Appeal Court individual decision of 29/12/21, and judgment of 24/2/22, *Transmaior v Renault Trucks* (2/19.3YQSTR-G.L1).

¹¹² Lisbon Appeal Court judgment of 24/2/22, *Transmaior v Renault Trucks* (2/19.3YQSTR-G.L1), §14.2.8.

The Supreme Court upheld the ruling but, with no reasoning in this regard,¹¹³ seemed to set a different *dies a quo*: the date of the adoption of the Decision (although it did refer to it as the “final” decision, and it must be kept in mind that this discussion was irrelevant for the outcome of this case). In a point with broader impact, quoting *Cogeco*, it stressed the special nature of antitrust infringements: “*One must consider the specificities of competition law cases and, more specifically, the circumstance that the filing of actions for damages for infringements of EU Competition Law requires, in principle, a complex factual and economic analysis*”.¹¹⁴ Explicitly raising the principle of effectiveness, the Court noted: “*Imposing on the claimant the duty to file a claim before waiting for the outcome of the [public enforcement] procedure, would be to condemn its claim to failure...*). *Furthermore, (...) if the Commission took 5 years to investigate, having had ample cooperation by the undertakings involved, what evidentiary evidence would be required of the claimant, a simple Portuguese logistics operator? It seems to us an impossible task, equivalent to denying a claim for compensation*”.¹¹⁵ It also stated that it would infringe EU Law to interpret article 498(1) of the Civil Code to mean that the limitation period would begin to run even if the claimant were unaware of the infringer’s identity and of the requisites of the right to damages.¹¹⁶

It has been decided, based on article 306 of the Civil Code, that the absolute limitation period cannot begin to run during the period when it was still impossible to know about the right to damages (so that damages could be claimed for trucks further back than 20 years).¹¹⁷

¹¹³ It merely stated that, with the adoption of the final decision, the injured party is aware of its right to damages, without explaining why that is, or addressing the presumption of innocence issue raised by the Lisbon Appeal Court. While the Supreme Court’s position on this still needs to be clarified, it seemed to follow the position that, if the EC says that there is an infringement, then injured parties should “know” there is an infringement and act accordingly. It also didn’t tackle the Lisbon Appeal Court’s concerns about what would happen if that decision were then annulled on appeal.

¹¹⁴ Supreme Court judgment of 8/3/22, *RNM v Daimler* (6/19.6YQSTR-C.L1.S1), ¶7 of the Summary and ¶23 (our translation).

¹¹⁵ *Ibid.*, ¶¶23-24 (our translation).

¹¹⁶ *Ibid.*, ¶8 of the Summary (our translation).

¹¹⁷ Lisbon Appeal Court individual decision of 24/5/21, *Campicarn v Volvo* (5/19.8YQSTR-D.L1).

3. Spain

Private enforcement of antitrust law in Spain has dramatically changed in the aftermath of the trucks' cartel damages litigation. As in the rest of the EU, private enforcement of the prohibitions of anticompetitive behavior was possible and has occurred in the past, even well before the modernization of EU competition law enforcement in 2004. However, until the advent of follow-on claims in the truck manufacturers' cartel, most private actions in court were stand-alone actions alleging unlawful vertical restraints in distribution contracts, with very few purely damages claims (see *infra* §3.1).

Litigation for damages in the trucks' cartel has greatly changed the Spanish landscape of antitrust private enforcement. Given the far-reaching spread of the potential victims of the trucks' cartel and the high value of cartelized goods, as elsewhere in the EU, professional services' offers to handle the claims have proliferated, popularizing antitrust law. Due to the inadequacy of the procedural rules for collective claims in Spain, thousands of claims have been filed in court against truck manufacturers. Despite the inefficiency of having to manage thousands of proceedings, Spanish commercial courts have generally ruled on them within a reasonable time, providing answers to the many relevant issues that these damages' claims raise. Analyzing what the courts have said in these cases provides an opportunity to survey the main procedural and substantive challenges faced by private antitrust litigants in Spain (see *infra* §3.2).

Finally, once the dust settles on the trucks' cartel damages litigation, looking into the future, it is possible to assess the prospective grounds for private antitrust litigation, with reference to other current and forthcoming cases (see *infra* §3.3).

3.1. Before the trucks' cartel damages litigation

The preeminence of public enforcement of the antitrust prohibitions made private claims almost non-existent until the amendment of the Defense Competition Act in 2007 (DCA).¹¹⁸ Before that date, private claims in court were only possible after there was a

¹¹⁸ Defense Competition Act (DCA) 15/2007 of 3/7/2007 ([Official Gazette 4/7/17](#)).

final decision by the competition authorities.¹¹⁹ Private claims based on articles 101 and 102 TFEU have only been admissible since 2000.¹²⁰

The institutional setting for private antitrust litigation was established in 2003 with the creation of a corps of specialized judges -commercial courts (*juzgados mercantiles*)-empowered to rule at first instance on the enforcement of the domestic and EU prohibitions of anticompetitive behavior. Thereafter, the 2007 amendment of the DCA explicitly enabled direct claims in court. Together with hundreds of judgments of courts of first instance and courts of appeals, to date the Civil Chamber of the Supreme Court has issued several judgments interpreting articles 101 or 102 TFEU (or domestic equivalents) in the context of private claims.

Table 1. Spanish Supreme Court judgments on antitrust private enforcement¹²¹

Date	Rapporteur	ECLI Reference	Parties	Type Action	Substantive grounds	Holding
26/10/05	C.Auger	ES:TS:2005:6533	<i>Eléctrica Avellana v. ENHER</i>	Follow-on	102 TFEU and/or domestic	No Harm
29/3/12	J.R.Ferrándiz	ES:TS:2012:2629	<i>AVS/Sogecable v. Tenaria</i>	Stand-alone	102 TFEU and /or domestic	Declaration
14/4/12	J.R.Ferrándiz	ES:TS:2012:1303	<i>AVS/Sogecable v. Euskaltel</i>	Stand-alone	102 TFEU and /or domestic	Declaration
8/6/12	J.R.Ferrándiz	ES:TS:2012:5462	<i>Gullón v. Acor.</i>	Follow-on	101TFEU and/or domestic	Damages award
12/11/12	I.Sancho	ES:TS:2012:7944	<i>X. v. Endesa</i>	Stand-alone	102 TFEU and /or domestic	Damages award
4/9/13	I.Sancho	ES:TS:2013:4739	<i>Céntrica v. Iberdrola</i>	Follow-on	102 TFEU and /or domestic	Time non-lapsed
7/11/13	R.Sarazá	ES:TS:2013:5819	<i>Nestlé v. Ebro</i>	Follow-on	101TFEU and/or domestic	Damages award
4/6/14	J.R.Ferrándiz	ES:TS:2014:2941	<i>Céntrica v. Endesa</i>	Follow-on	102TFEU and/or domestic	Damages award
9/1/15	I.Sancho	ES:TS:2015:669	<i>AVS/Sogecable v. Mediapro</i>	Follow-on	101TFEU and/or domestic	Contract nullity
6/7/17	J. Orduña	ES:TS:2017:2792	<i>Céntrica v. Iberdrola</i>	Follow-on	102 TFEU and /or domestic	No causation
3/11/17	J. Orduña	ES:TS:2017:3879	<i>Mediapro v. R. Zaragoza</i>	Follow-on	101TFEU and/or domestic	Contract nullity

Most of the cases in the first decade of judgments by *juzgados mercantiles* deciding private antitrust claims concerned vertical restraints in distribution contracts, mainly in the retail petrol industry.¹²² The widespread litigation in relation to the petrol industry can be explained by the difficulties raised by the interpretation of the regime of the Vertical Restraints Block Exemption Regulation and its changes, and to contradictory judgments issued by the Supreme Court in this regard.¹²³ Although the "antitrust retail petrol saga"

¹¹⁹ Damages actions at that time were generally based on the 1991 Unfair Competition Act ([Official Gazette 10 of 10/1/91](#)), see Francisco Marcos "Competition private litigation in Spanish courts 1999-2012" [Global Competition Litigation Review 2013/4: 168 and 171](#).

¹²⁰ Supreme Court Judgement of 2/6/2000 (Rapp. F. Marín, [ES:TS:2000:4520](#)).

¹²¹ Excluding antitrust claims in retail fuel distribution which led to 64 additional judgements by the Supreme Court (Civil Chamber). In addition, in relation to those cases, eight preliminary rulings were lodged by the Spanish Supreme Court with the CJEU on the interpretation of article 101 TFEU and the BER on vertical restraints (C-217/05; C-279/06, C-260/07, C-506/07, C-142/13, C-384/13), two of them directly concerning two issues raised by private damages claims: the binding effect of commitment decisions (C-547/16) and the binding effect of vertical restraints NCA decisions (C-716/16 rejected, but relodged-C-25/21).

¹²² See Marcos [GCLR 2013/4: 171-172](#) (50% of the cases).

¹²³ *Ibid.*

has now been dwarfed in significance by the trucks' cartel damages litigation, antitrust related conflicts in retail petrol distribution contracts continue to be a prominent source of litigation.¹²⁴

Otherwise, in the past the most notable cases involved a stream of damages claims for abuses of dominance in the electricity commercialization markets¹²⁵, several actions for abuse of dominance in the sale of football broadcasting rights¹²⁶ and in the telecommunications market (against former SOE Telefónica).¹²⁷

The very first follow-on antitrust damages actions,¹²⁸ that prompted the delivery of two leading judgments of the Spanish Supreme Court (civil chamber), were decided in 2012 and 2013.¹²⁹

¹²⁴ Especially, since damages have been awarded following the declaration of nullity of contracts after Supreme Court judgments of 12/1/15 (*Ribeira Baixa & Ribeira Alta v. REPSOL*, Rapp. I. Sancho, [ES:TS:2015:277](#)); 31/3/15 (*Estacio Servei Pineda del Mar & Olma v. REPSOL*, Rapp. I. Sancho, [ES:TS:2015:1553](#)); and 13/5/15, *Promotores Internacional & Pablo Rada Combustibles v. REPSOL*, Rapp. I. Sancho, [ES:TS:2015:2216](#)), which -following the CJEU Order on C-142/13, *Bright Service*, [EU:C:2014:204](#)- changed the doctrine held in the case-law regarding the effects of nullity by extending them to the whole contract if the anticompetitive clauses were essential for the economic balance of the contract (see ¶¶20–22 of the first judgment cited).

¹²⁵ Together with the stand-alone action against *Endesa* that reached the Supreme Court, three other judgments listed in the table above refer to the *Centrica* claims against *Iberdrola* and *Endesa*, there was another declaratory judgment against Unión Fenosa (see judgment of Audiencia de Madrid, sect. 28, of 29/5/15, roll 394/13, which the Supreme Court confirmed: [ES:TS:2018:82A](#)). See also judgment of Audiencia Provincial de Barcelona (sect. 15) of 1/12/11 (*Electra Caldense v. ENDESA*, [ES:APB:2011:14053](#)) and the Eléctrica de Curós judgment cited *infra* note 128.

¹²⁶ See four Supreme Court judgments in the table above deciding the *AVS/Sogecable* appeals [see also the subsequent judgment of Audiencia de Barcelona (sect. 1) of 28/6/19 (*AVS v. Mediapro*, [ES:APB:2019:13902](#))]. See also judgment of Audiencia de Madrid (sect. 25bis) of 18/12/2006 ([ES:APM:2006:18320](#)) revoking judgment juzgado de primera instancia 4 of Madrid of 7/6/2005 (*Antena 3 v LNFP*, [ES:JPI:2005:9](#)) and judgment of juzgado mercantil 2 de Madrid of 4/3/10 (*Cableuropa v. Sogecable/AVS*, [ES:JMM:2010:158](#)); judgment of Audiencia de Madrid (sect. 28) of 26/9/17 (*Getafe CDF v. Mediapro*, [ES:APM:2017:12208](#)); judgment of Audiencia de Pontevedra of 4/11/15 (*Celta de Vigo v. Mediapro*, [ES:APPO:2015:2317](#)); judgment of Audiencia de Pamplona (sect. 3) of 1/6/15, *Osasuna v. Mediapro* ([ES:APNA:2015:731](#)); judgment of Audiencia de Madrid (sect. 20) of 12/6/14, *Atlético de Madrid v. Mediapro* ([ES:APM:2014:9951](#)), judgment of Audiencia de Barcelona (sect. 15) of 11/12/13, *Real Zaragoza v. Mediapro* ([ES:APB:2013:14234](#)).

¹²⁷ See Judgment of Audiencia de Madrid (sect. 25) of 8/5/2007, *3C Telecommunications v Telefónica*, [ES:APM:2007:6002](#) (final amount of the award was settled by the parties); judgment of Audiencia de Madrid (sect. 28) of 25/5/ 2006, *Conduit Europe v Telefónica*, [ES:APM:2006:6773](#). Another follow-on collective claim (to European Commission Decision of 4/6/2008, [COMP/38.784 Wanadoo v. Telefónica](#)) by Ausbanc was quashed by Order of Audiencia de Madrid (sect. 28) of 30/9/14, *Ausbanc v Telefónica* [ES:APM:2013:2461A](#), because *Ausbanc* lost its legal standing as a “widely representative” association after being excluded from the Consumers and Users Council because it performed activities that the law banned to consumer associations (commercial advertising).

¹²⁸ The first cases, which never reached the Supreme Court, were based on the Unfair Competition Act, see judgment of Audiencia de Burgos (sect. 2) of 26/7/2002 (*x. v. Zardoya Otis, S.A et al*, [ES:APBU:2002:1066](#)) and judgment of Audiencia de Girona (sect.1) of 16/4/22 (*Eléctrica de Curosa SA v. Hidroeléctrica del' Empordá SLU*, [ES:APGI:2002:633](#)).

¹²⁹ See Judgments of the Supreme Court of 8/6/12 (*Gullón v. Acor*, rapp. J. R. Ferrándiz, [ES:TS:2012:5462](#)) and 7/11/13 (*Nestlé v. Ebro*, rapp. R. Sarazá, [ES:TS:2013:5819](#)), considered among the

After that, more than a dozen damages claims were decided by the courts following on the paper envelopes cartel sanctioned by the National Competition Commission (NCC) in 2013,¹³⁰ with damages awards to claimants exceeding €12 million in total, confirmed by the Courts of Appeals of Madrid and Barcelona,¹³¹ though the appeals before the Supreme Court for some of them are still pending (those of the Court of Appeals of Barcelona).

3.2. The trucks' manufacturers cartel damages litigation

Over 150.000 trucks were affected by the truck manufacturers cartel in Spain.¹³² More than 6.000 claims were filed in court against the trucks' manufacturers. Generally, most of the actions are small claims, concerning the overcharge paid in the acquisition of one or two trucks, targeting individually the respective truck manufacturer. Although a few law firms have accumulated a large number of claimants, managing to invest significantly in the common aspects of the claims, based on the same expert report and standardized suits, there have been many claims filed by inexperienced lawyers with one or very few small clients, with limited access to specialists when seeking expert reports.

Commercial courts across Spain have issued already over 3.000 judgments deciding truck cartel-related claims on the merits. The Courts of Appeals have issued approximately 1000 decisions. In general, although judges have decided the specific claim before them, two trends can be identified.

leading cases in the EU, see Simon Vande Valle *Private Antitrust Litigation in the EU and Japan*, Maklu 2013, 230), I analyzed the case and these rulings in "Damages claims in the Spanish sugar cartel" *Journal of Antitrust Enforcement* 3/1 (2015) 205-225.

¹³⁰ See Francisco Marcos "Antitrust Damages Claims in Spain" *Global Competition Litigation Review* 14/1 (2021) 23-24. *Global Competition Litigation Review* 14/1 (2021) 23-24.

¹³¹ Cortefiel ([ES:APB:2020:59](#)), Misiones Salesianas ([ES:APB:2020:58](#)), Grupo Planeta ([ES:APB:2020:201](#)), CIFSA ([ES:APB:2020:60](#)); Mutua Madrileña ([ES:APB:2020:186](#)), Manos Unidas ([ES:APB:2020:185](#)); Caixa Ontiyent ([ES:APB:2020:184](#)); Bankoa ([ES:APB:2020:698](#)); Obras Misionales Pontificias ([ES:APM:2020:1](#)); Cámara de Comercio ([ES:APM:2020:2](#)); IFEMA ([ES:JMM:2020:1552](#)), PSOE ([ES:APB:2022:1182](#)), PSC ([ES:JMB:2021:10972](#) time-lapsed), ING ([ES:JMB:2021:14522](#)). The first ten judgments issued were commented on by Marcos *GCLR* 14/1 (2021) 23 and J. Nicolás Otegui "Spain-Recent developments in competition damages claims: What once was just a possibility, is now a reality" *European Competition Law Review* 40/1 (2019) 40-41 and "Developments in competition damages claims in Spain, take II: now we know Barcelona is the place to go..." *European Competition Law Review* 40/5 (2019) 202.

¹³² In comparison with other cartels in which the breadth of the cartelized market is difficult to measure, in this case given that the cartelized goods (trucks manufactured by the infringing undertakings) have to be registered in the traffic authorities to be used, it's fairly easy to calculate how many trucks were affected, see Francisco Marcos "¿Cuántas víctimas del cártel de los fabricantes camiones hay en España?" *Almacén de Derecho* 9/7/19.

First, although judges have faced multiple individual claims, given their similarities, there has been substantial simplification, coordination, and standardization of the proceedings, resorting to joint court hearings. Digital attendance of the lawyers and experts at court hearings initiated during the COVID pandemic has remained in place. However, the indirect consolidation of the proceedings has not led to a single common resolution, with manifold judgments being issued, and the courts unavoidably succumbing to a copy-paste technique.

Secondly, courts have fallen into a form of "herding" behavior in tackling the different issues raised by parties in the trucks' litigation. From the early judgments issued by some commercial courts in early 2019, there has been substantial "judicial piggybacking": courts have tagged prior courts' decisions on the same dispute, where there was non-substantial variation in the facts and in the parties' claims. Despite the absence of binding precedent, the courts that made the largest investment in deciding the early disputes have been followed by their peers, who have largely free-ridden on those earlier decisions (reflected, e.g., in the extensive quoting of some of those initial judgments).¹³³ This has happened both at the first instance level and at the court of appeal level. To date, more than 60 commercial courts (*juzgados mercantiles*) have ruled on trucks' cartel damages litigation disputes and more than 30 courts of appeals (*Audiencias Provinciales*). Currently, the number of cases has ratcheted up to over 250 judgments monthly at first instance and an additional 70 on appeal.

In general, there is judicial consensus on many of the relevant issues brought up by these cases, building on the limited previous caselaw of the Supreme Court and Courts of Appeals. The EU Antitrust Damages Directive was implemented into Spanish law at the time when the first actions were filed in court.¹³⁴ Given the doubts raised by the Directive's temporal regime (*ratione temporis*),¹³⁵ Spanish courts have ruled that only those non-substantive rules introduced by the Directive were applicable (in accordance with article 22 of the Directive). They have concluded that neither were the new

¹³³ Andrew F. Daughety & Jennifer F. Reinganum "Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts" *American Law & Economics Review* 1 (1999) 160 ("an accumulation of public information garnered from previous decisions of others can overwhelm an individual decision maker's private information", footnote omitted).

¹³⁴ Decree Law 9/2017 of 26/5/17 (*Official State Gazette* 126 of 27/5/17). See Francisco Marcos "Spain" in Rodger, Ferro & Marcos (ed.) *The EU Antitrust Damages Directive. Transposition across the Member States*, 2019, 326-357.

¹³⁵ See Kirst "Laws applicable *ratione temporis* and limitation of actions" (chapter 5) of this book.

substantive rules applicable, nor was it possible to interpret pre-existing national law in accordance with the Directive.¹³⁶ Paradoxically, at the same time they have ruled unanimously, that many of the rules introduced by the Directive could already be extracted in one way or the other from the caselaw of the CJEU and of the Spanish Supreme Court.¹³⁷

The controversy regarding the temporal regime of the Damages Directive has been the object of a recent preliminary ruling by the CJEU ([C-267/20](#)). Other issues concerning the interpretation of EU Law have led to five more preliminary rulings lodged by Spanish Courts before the CJEU (on the liability of subsidiaries, C-882/19; on the territorial jurisdiction of the courts, C-30/20; on the scope and extent of the discovery scheme introduced by the Damages Directive, C-163/21; on the interpretation of the Commission Decision AT.39824 *Trucks*, C-285/21; and on court costs and the power of judges to estimate the harm, C-312/12).

¹³⁶ Based on ¶33 of C-637/17 *Cogeco*, [EU:C:2019:263](#) ("taking into account that Article 22(1) of Directive 2014/104 prohibits the retroactive application of the substantive provisions of Portuguese law adopted pursuant to Article 21 thereof, it must be held that that directive is, in any event, not applicable *ratione temporis* to the dispute in the main proceedings"), recently ¶77 of C-267/20 *Volvo*, [EU:C:2022:494](#). On the limits of the interpretation in conformity, see ¶13 of C-80/86, *Kolpinghuis Nijmegen B.V.*, [EU:C:1987:431](#). ¶¶110-111 of C-212/04 (*Adeneler*, [EU:C:2006:443](#)), ¶39 of C-176/12 (*AMS v. Union locale des syndicats CGT*, [EU:C:2014:2](#)), and ¶48 of C-167/17 (*Volkmar Klohn v. An Bord Pleanála*, [EU:C:2018:833](#)).

¹³⁷ See judgments of Audiencia de Valencia (sect. 9) of 16/12/19 (*Manipulados Guerrero Sancho SL v. Fiat Chrysler*, [ES:APV:2019:4151](#)), of Audiencia de Pontevedra (sect. 1) of 28/2/20 (*Transportes Gallegos Petroquím. al. v. MAN Truck & Bus*, [ES:APPO:2020:471](#)), of Audiencia de Barcelona (sect. 15) of 17/4/20 (*PNP v. CNH Industrial*, [ES:APB:2020:2567](#)), of Audiencia de Vizcaya (sect. 4) of 4/6/20 (*EULEN SA v. Iveco*, [ES:APBI:2020:265](#)), of Audiencia de Zaragoza (sect. 5) of 3/7/20 (*Infraestructuras Civiles SA v. Daimler*, [ES:APZ:2020:1717](#)), of Audiencia de Alicante (sect. 8) of 15/10/20 (*D. X v. AB Volvo*, [ES:APA:2020:3024](#)), of Audiencia de Zamora (sect. 1) of 16/10/20 (*Arcyca, SA v. AB Volvo*, [ES:APZA:2020:501](#)); of Audiencia de Cáceres (sect. 1) of 12/11/20 (*Transportes Marin SL v. DAF Trucks*, [ES:APCC:2020:1072](#)); of Audiencia de Oviedo (sect. 1) of 23/11/20 (*Transportes Gelado y Riesco SL v. MAN Truck & Bus*, [ES:APO:2020:4760](#)); of Audiencia de Guipúzcoa (sect. 1) of 15/1/21 (*Servicios de Txingudi SA v. Iveco*, [ES:APSS:2021:1](#)); of Audiencia de Girona (sect. 1) of 27/1/21 (*F v. AB Volvo*, [ES:APGI:2021:58](#)); of Audiencia de A Coruña (sect. 4) of 8/2/21 (*Gestal y López SL et al v. MAN Truck & Bus*, [ES:APC:2021:21](#)); of Audiencia de Jaén (sect. 1) of 22/2/21 (*HCM CB v. Iveco*, [ES:APJ:2021:313](#)); of Audiencia de Valladolid (sect. 3) of 11/3/21 (*Gilmartin Servicios Integrales del Transporte SL v. MAN Truck & Bus*, [ES:APVA:2021:357](#)); of Audiencia de La Rioja (sect. 1) of 12/3/21 (*Harinas Vázquez S.A. v. Iveco*, [ES:APLO:2021:121](#)); of Audiencia de Murcia (sect. 4) of 25/3/21 (*Dumatrade SL et al. v. MAN Truck & Bus*, [ES:APMU:2021:650](#)); of Audiencia de Álava (sect. 1) of 31/3/21 (*Argo Alquileres y Transportes SL v. Iveco*, [ES:APVI:2021:279](#)); of Audiencia de Teruel (sect. 1) of 19/7/21 (*Transdilla SL v. Renault Trucks SAS*, [ES:APTE:2021:162](#)); of Audiencia de Orense (sect. 1) of 21/7/21 (*Transportes y Logística SL v. Renault Trucks*, [ES:APOU:2021:544](#)); of Audiencia de Cuenca (sect. 1) of 16/11/21 (*SAT 6668 Cerro de las Olivas v. Daimler*, [ES:APCU:2021:451](#)); of Audiencia de Madrid (Sect. 28) of 10/12/21 (*EGA et al v. IVECO España SL*, [ES:APM:2021:14305](#)); of Audiencia de Tenerife (Sect. 4) of 29/4/22 (*FreAnroel SA et al v. Iveco*, [ES:APTF:2022:92](#)) and of Audiencia de Lleida (sect. 2) of 3/5/22 (*JRM v. Renault Trucks*, [ES:APL:2022:402](#)).

There is disagreement in the Courts of Appeals on the standard of proof required of claimants to quantify the harm, and also on the parameters followed in the judicial estimation of the harm.

Preliminary rulings on trucks' cartel damages cases lodged by Spanish Courts

Court	Date	Ref.	Reference	Parties	Status
Audiencia Barcelona (s.15) J. F. Garnica	24/10/19	C-882/19	ES:APB:2019:9370A	<i>Sumal SL v. Mercedes Truck España SL</i>	Opinion AG Pitruzzella 15/4/21 EU:C:2021:293 Judgment 6/10/21 (Rapp: D. Šváby EU:C:2021:800)
Juzgado mercantil 2 Madrid (A. Sánchez)	23/12/19	C-30/20	ES:JMM:2019:131A	<i>RH v. AB Volvo et al.</i>	Opinion AG De la Tour 22/4/21 EU:C:2021:322 Judgement of 15/7/21 (Rapp: M. Safjan EU:C:2021:604)
Juzgado mercantil 7 Barcelona (R. N. García)	21/2/20	C-163/21	ES:JMB:2020:333A	<i>AD et al v. DAF Trucks NV et al.</i>	AG Spuznar Opinion 7/4/22 EU:C:2022:286
Audiencia Pontevedra (s.1) J. J. Pérez	23/4/21	C-285/21	ES:APPO:2021:308A	<i>Epifanio Campo SL v. Renault Trucks SASU</i>	Suspended until C-588/20 is decided (AG Medina Opinion on that issued on 24/2/22, EU:C:2022:130)
Juzgado mercantil 3 Valencia (E. Pastor)	10/5/21	C-312/21	ES:JMV:2021:681A	<i>Tráficos Manuel Ferrer SL et al. v. Daimler AG</i>	AG Opinion expected on 13/10/22

In general, due to the multiplication of similar actions seeking damages caused by the trucks' cartel that had been filed in different courts across the Spanish territory (depending on the place of acquisition of the vehicle), individual courts have handled the disputes in a joint or collective way to seek to save and minimize costs. However, in many cases, courts have avoided duplicating unnecessary steps that would be required if the disputes were different.

Nevertheless, the outcome has been a replication of identical or similar judgments, many of which tag-along prior decisions, with little additional value. Successive judgments issued resolving trucks' cartel damages claims form an informational cascade: "*herding can amplify the sensitivity of individual court decisions to (possibly incorrect) judgments made by other courts, leading to a vastly different sequences of holdings for the same set of cases, depending only on the order in which they arise [...], too much harmony among court decisions may be cause for as much concern (and possibly more) than too much conflict*".¹³⁸ The evolution of this informational cascade in the judicial context is dynamic and may be subject to changes as new information is released and judges change their minds.¹³⁹ A good illustration of this can be seen in the acceptance of the standing of subsidiaries after the CJEU decided *Sumal* (C-882/19), and is likely to reoccur once the Supreme Court issues its first decision on the case.

¹³⁸ Daughety & Reinganum *American Law & Economics Review* 1 (1999) 159.

¹³⁹ *Ibid.*, 161.

3.2.1. Jurisdiction

The trucks' manufacturers cartel was a pan-european cartel, lasting from 1996 to 2011. The meetings of the cartel took place in Belgium, France, Germany, and the Netherlands (after 2004, the collusion was continued by the German subsidiaries of the manufacturers).¹⁴⁰ This has implications for the jurisdiction/venue where the claims can be filed. The Damages Directive is silent on these matters, which are governed by general rules of EU Law.¹⁴¹ These rules give flexibility to claimants to choose where to bring their claims, allowing litigation for damages in the trucks' cartel to spread across all Member States. Indeed, some of the Spanish victims of the cartel filed their claims in other jurisdictions,¹⁴² but many suits were filed before the Spanish courts, which have unanimously rejected the defendants' pleas of 'forum non conveniens'.

Although the jurisdiction of Spanish courts was confirmed early on,¹⁴³ there were a considerable number of disputes concerning which court was territorially competent to take the case.¹⁴⁴ Deciding a preliminary reference lodged by juzgado mercantil 2 de Madrid, the CJEU clarified that the EU rules on international jurisdiction determined, not only that Spanish courts were competent, but which court within Spain was territorially competent, specifically: the courts of the location where the cartelized good was acquired (where damage occurred).¹⁴⁵ However, if the cartelized goods were acquired in different places, the claimant could sue in its domicile.¹⁴⁶

¹⁴⁰ ¶¶49, 51-52, 54-56 of Decision 19/7/16 ([AT.39824 Trucks](#)) and ¶¶77, 81, 89, 98-181 of Decision of 27/9/17 ([AT.39824 Trucks](#)).

¹⁴¹ See section II.b)3 of Barry J. Rodger "Private International Law- Jurisdiction and Applicable law" (Chapter 6) in this book.

¹⁴² See for example LG Munich I of 19/2/21 ([37 O 10526/17](#)) rejecting the claim for the harm caused in the acquisition of 13 trucks filed by a Spanish freight forwarder. The macro-case filed in the Court of Amsterdam includes also Spanish claims transferred to some of the litigation vehicles used by the plaintiffs, see judgment of Rechtbank Amsterdam of 2/5/21 (C/13/639718/HA ZA17-1255 et al, [NL:RBAMS:2021:2391](#)).

¹⁴³ Early on by the Supreme Court, see Order of 26/2/19 (Rapp. J. Orduña, [ES:TS:2019:2140A](#), 2nd Legal ground).

¹⁴⁴ With over a hundred Supreme Courts orders solving the conflicts among different courts. There is controversy regarding the territorial competency both in the damages' claims following the EURIBOR derivatives cartel [Orders of juzgado mercantil 12 de Barcelona of 17/2/22, [ES:JMB:2022:340A](#) and [ES:JMB:2022:341A](#), registered before the CJEU as C-198/22 and C-199/22] and also in the automobile manufacturers' cartel [cfr. order of juzgado mercantil 1 de Pontevedra of 11/1/22 ([ES:JMPO:2022:25A](#)) and order of juzgado mercantil 3 de Valencia of 8/6/22 ([ES:JMV:2022:1573A](#))

¹⁴⁵ ¶¶39 and 43 of C-30/20, *RH v. Volvo* ([EU:C:2021:604](#)).

¹⁴⁶ *Ibid.* ¶¶42 and 43.

3.2.2. Access to evidence

A few prospective claimants have filed motions in court to request access to evidence allegedly needed to quantify the amount of the overcharge caused by the truck manufacturers' cartel. Although Spanish law already provided, before the implementation of the Damages Directive, tools for the parties' access to evidence (with pre-trial discovery having a rather narrow and limited scope),¹⁴⁷ the new 'disclosure scheme' introduced by the Directive has further promoted resort to its use in the trucks' damages litigation.¹⁴⁸ Despite the ease with which Spanish courts have welcomed the 'disclosure scheme', it has shown to be of little value for claimants and, indeed, it has backfired against them as it has been regularly used by defendants in order to question the claimants' damage assessment and to prove the passing-on of the overcharge.¹⁴⁹

3.2.3. Standing/joint claims

The Civil Code¹⁵⁰ and Spanish caselaw on tort claims provided the basic rules to assert who can claim antitrust damages and who is responsible in cases of harmful antitrust infringements. Following the CJEU case law, the courts have broadly considered that anyone harmed by the cartel can claim damages.¹⁵¹ Despite the difficulties of "umbrella" victims to claim compensation, this possibility has been accepted in the decennial insurance cartel (though the claim was finally dismissed for full passing on of harm).¹⁵²

The trucks' damages litigation has led to further development of the rules on standing of the parties, given the variety of situations faced by claimants and defendants in the multiple cases dealt with by the courts. Acquirors of cartelized trucks can claim

¹⁴⁷ See Marcos "Spain" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition across the Member States*, 2019, 348 (fn.100).

¹⁴⁸ With subsequent doubts concerning its scope, raised by Juzgado Mercantil 7 of Barcelona ([C-163/21 PACCAR/DAF Trucks](#)), lodged by Order of 21/2/20 (*AD et al v. DAF Trucks N.V. et al.*, [ES:JMB:2020:333A](#)). See Francisco Marcos "Access to evidence: The 'disclosure scheme' of the Damages Directive" (Chapter 11) of this book.

¹⁴⁹ *Ibid.*

¹⁵⁰ See articles 1902 and 1106 of the Civil Code ([Official National Gazette 206, 25/7/1889](#)).

¹⁵¹ See ¶36 of C-453/99 *Courage*, [EU:C:2001:465](#); ¶¶60-61 of C-295 to C-298 *Manfredi*, [EU:C:2006:461](#); ¶¶21 of C-536/11 *Donau Chemie*, [EU:C:2013:366](#); ¶41 of C-199/11 *Otis I*, [EU:C:2012:684](#) and ¶¶22 of C-557/12 *Kone*, [EU:C:2014:1317](#) (codified in article 3 of the Damages Directive). See also ¶26 of C-724/17 *Skanska*, [EU:C:2019:204](#); ¶23 of C-882/19 *Sumal*, [EU:C:2021:800](#) and ¶58 of C-267/20 *DAF & Volvo*, [EU:C:2022:494](#).

¹⁵² See ¶30 of judgment of Audiencia Provincial de Madrid (sect. 28) of 19/5/22 (*Realia v. Asefa & Scor*, [roll 292/91](#)).

compensation regardless of how they bought the truck (in a direct sale, sale on instalment credit terms, through leasing or renting contracts). Furthermore, given the considerable time that has passed since the time the infringement occurred, courts have shown considerable flexibility in accepting indirect means to prove purchase in order to grant standing to the claimant.¹⁵³

Spanish law does not provide a proper tool for collectivization of claims by aggrieved business (as class actions are only available for consumers and it have never been used successfully for antitrust damages claims).¹⁵⁴ Courts have accepted the joining and consolidation of claims of multiple claimants, provided there is a link among them (same object and claim).¹⁵⁵

On the other hand, regarding defendants, in the early days of the trucks' damages litigation most of the claims (not necessarily because of strategic planning) were addressed to the Spanish subsidiaries of the trucks' manufacturers.¹⁵⁶

Initial claims targeting the subsidiaries were rejected,¹⁵⁷ until the CJEU stated in its 6/10/21 judgment -deciding a preliminary reference lodged by the Audiencia de Barcelona (sect. 15)- that victims of competition infringements could invoke the liability of the subsidiary when an infringement had been established regarding the parent company if they prove an economic, organizational and legal connection among the two companies and also the "*existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was*

¹⁵³ See, among many others, judgments of Audiencia de Zaragoza (sect. 5) of 30/3/21 (*Pikolin SL v. IVECO Spa*, [ES:APZ:2021:273](#), legal ground 4th), Audiencia de Guipúzcoa (sect. 1) of 15/1/21 (*Servicios de Txingudi SA et al v. IVECO*, [ES:APSS:2021:1](#), Legal ground 3rd) and Audiencia de Ávila (sect. 1) of 30/7/21 (*Transportes y Excavaciones González y Galán SL v. Renault Trucks*, [ES:APAV:2021:290](#), Legal ground 5th).

¹⁵⁴ See article 11 of Civil Procedure Act/CPA ([Official Gazette 7 of 8/1/2000](#)) and Marcos [GCLR 2013/4: 181](#).

¹⁵⁵ In the trucks' cartel damages suits, the actions are based on the same underlying facts (infringement conduct). See Francisco Marcos "Acumulación de las acciones de indemnización de daños causados por el cártel de los fabricantes de camiones" [Almacén de Derecho 31/8/19](#) and judgment of Supreme Court of 21/10/15 (*Air Complet SL et al v. Bankinter SA*, rapp. R. Sarazá, [ES:TS:2015:4270](#)).

¹⁵⁶ The Spanish subsidiaries were not declared as infringers by the European Commission, however the Commission says -in its description of the collusive behavior- that the subsidiaries played a role in the infringement, see ¶25 of Decision of 19/7/16 ([AT.39824 Trucks](#)) and ¶¶25-26 of Decision of 27/9/17 ([AT.39824 Trucks](#)).

¹⁵⁷ Despite the positive initial prospects suggested by juzgado mercantil 3 de Valencia (E. Pastor) judgement of 20/2/19 ([ES:JMV:2019:34](#)), quashed by Audiencia de Valencia (sect. 9), 15/12/19 (*JAR v. MAN Truck & Bus Iberia SA*, [ES:APV:2019:4150](#)). More than 20% of the initial claims were rejected because of the nature of the defendant, see Peter Whelan, "Corporate Liability and Apportioning Liability/Joint and Several Liability" (Chapter 7) of this book.

held to be responsible, that subsidiary, together with its parent company, constituted an economic unit."¹⁵⁸ After the CJEU judgment, most courts have accepted claims against the subsidiaries of trucks' manufacturers with no additional proof requirements for claimants regarding the elements mentioned by the CJEU.¹⁵⁹ Nonetheless, some courts still reject claims, on the basis of a lack of proof by the claimant of the "specific link" between the subsidiaries' economic activity and the subject matter of the infringement.¹⁶⁰

Finally, where there are several co-infringers, as in the case of cartels, joint and several liability has been affirmed by the courts.¹⁶¹ Courts have rejected attempts by leniency beneficiaries to be protected by the limitation of liability introduced by the Damages Directive (art. 11.4) for claims filed before the Directive was implemented and adopted.¹⁶² In trucks' cartel damages claims, most actions targeted the company that manufactured the brand of the cartelized truck at stake,¹⁶³ and actions addressed to several manufacturers are exceptional.¹⁶⁴ Finally, courts have generally rejected the request by defendants for other co-infringers to be compelled to join the proceedings as Spanish law did not provide grounds for that request.¹⁶⁵

¹⁵⁸ ¶51 of C-882/19, *Sumal v. Mercedes* ([EU:C:2021:800](#)).

¹⁵⁹ Indeed, the Audiencia de Barcelona (sect. 15) that lodged the preliminary reference before the CJEU (judgment of 27/1/22, *Sumal v. Mercedes*, [ES:APB:2022:738](#)), and also the Audiencia de Madrid (sect.18) in five judgments of 10/12/21 (*EGA v. IVECO España SL*, [ES:APM:2021:14305](#)), of 31/1/22 (*CMG v. Volvo Group SAU*, [ES:APM:2022:1757](#)), of 6/5/22 (*Generadores Insonorizados Paulino Alonso e Hijos SA v. Mercedes*, roll 628/19); of 9/5/22 (*Central Eletrica Sestelo y Cia SA v. MAN*, roll14/20) and of 23/5/22 (*Gruas Domingo Garcia SL v. IVECO*, roll 946/20).

¹⁶⁰ See judgments of Audiencia de Jaén (sect. 1) of 27/10/21, *X v. Volvo Group España*, [ES:APJ:2021:1307](#); of 22/11/21, *X v. Volvo Trucks*, [ES:APJ:2121:1858](#); of 24/11/21 *X v. Volvo Group España*, [ES:APJ:2021:1522](#); of 25/11/21, *X v. Volvo Group España*, [ES:APJ:2021:1530](#); 16/12/21 *X v. Scania Hispania*, [ES:APJ:2021:1855](#) and also judgment of Audiencia de Madrid (sect. 28) of 21/3/22, *X v. Volvo Group España*, [ES:APM:2022:3791](#).

¹⁶¹ In the judgements deciding damages' claims in the envelopes' cartel, see *supra* note 131.

¹⁶² *Ibid.*

¹⁶³ But see judgement of Audiencia de Valencia (sect. 9) of 26/1/21 (*FMC v. Daimler AG*, [ES:APV:2021:170](#)), affirming without further comment the liability of Daimler for a IVECO truck bought by the claimant.

¹⁶⁴ But see, for example, judgments of Audiencia de Pontevedra (sect. 1) of 31/5/21 (*Transportes Cabalar v. DAF & Iveco*, [ES:APPO:2021:1175](#)); of 22/7/21 (*Celso Tome SL v. MAN Truck & Bus/Iveco*, [ES:APPO:2021:1665](#)); of 16/3/21 (*Magic Invest Europa SA v. Iveco/AB Volvo*, [ES:APPO:2022:445](#)); of 29/4/22 (*Freimar Porriño SL v. Renault Trucks SASU & MAN Truck & Bus SE* [ES:APPO:2022:1164](#)) and of 12/5/22 (*Granxatrans Porriño SL v. Iveco, Renault Trucks & Daimler*, [ES:APPO:2022:1185](#)).

¹⁶⁵ See Order of juzgado mercantil 5 de Madrid of 26/10/21 (*Acciona Construcción et al v. IVECO Spa, Daimler AG, et al*, [ES:JMM:2021:3740A](#)) regarding a claim to compensate €5.655.298,20 for the acquisition of 332 cartelized trucks, in which Daimler claimed that Renault joined the proceedings. See also Order of juzgado Mercantil 1 de Donostia de 21/6/20 (*apud* judgment 16/11/20, [ES:JMSS:2020:4121](#)) and ¶43 of Order of Juzgado Mercantil 3 de Valencia of 10/5/21 ([ES:JMV:2021:681A](#)). On the milk procurement cartel damages' claims see Order of Juzgado Mercantil 1 de Granada of 16/5/16 (*apud* judgment of 30/6/21 ([ES:JMGR:2021:6331](#))). On the envelopes' cartel damages' claims, see e.g., Orders of

3.2.3. Limitation period

The limitation period for antitrust claims in Spain before the implementation of the Damages Directive was one year, running since the claimant knew the harmful infringement occurred (article 1968.2 Civil Code). The Supreme Court interpreted the moment this period started to run (*dies a quo*) in a follow-on damages claim for an abuse of dominance, clarifying that the starting date was the moment “*the person harmed by the abuse of dominant position was able to ascertain the extent of the damage caused and determine it, in order to be able to claim damages from the defendant.*”¹⁶⁶

A preliminary reference to the CJEU lodged by the Audiencia de León queried whether the new rules introduced by the Damages Directive could be applicable to a trucks’ cartel damages suit filed in court after the Directive was implemented in Spain ([C-267/20](#)).¹⁶⁷ The CJEU issued its judgment on 22/6/22.¹⁶⁸ But, even before, Spanish courts had unanimously ruled that the *dies a quo* was the publication of the decision of the European Commission on 6/4/17.¹⁶⁹ While the Commission’s decision was announced on the day of its adoption (19/7/16), at that moment, given the limited content of the press release, claimants did not have enough information to consider filing their claims.¹⁷⁰

Spanish Courts had also ruled that the five-year limitation period introduced by article 10.3 of the Damages Directive was not applicable to these proceedings. However, according to the CJEU, this interpretation was mistaken and, therefore, can no longer be

Juzgado Mercantil 3 de Barcelona of 17/6/15 (apud judgment of 5/9/18, [ES:JMB:2018:2725](#)), of 6/7/15 (apud judgments of 10/9/18; [ES:JMB:2018:2727](#) and [ES:JMB:2018:2727](#)) and also Order of Juzgado Mercantil 11 de Madrid of 27/6/16 (apud judgment of Audiencia de Madrid, sect. 18, of 3/2/20, [ES:APM:2020:1](#)).

¹⁶⁶ See ¶6 of Supreme Court judgment of 4/9/13 (*Centrica v. Iberdrola*, rapp. I. Sancho, [ES:TS:2013:4739](#)). In ¶7 the Court expressly referred to article 10.2 of the Directive Proposal.

¹⁶⁷ Order of Audiencia de León (sect. 1) of 12/6/20 (*RM v. DAF Trucks NV & AB Volvo*, [ES:APLE:2020:291A](#)).

¹⁶⁸ [C-267/20 DAF & Volvo \(EU:C:2022:494\)](#).

¹⁶⁹ [OJEU C108 of 6/4/17](#).

¹⁷⁰ ¶71 of [C-267/20 DAF & Volvo, EU:C:2022:494](#) (“*In those circumstances, it cannot reasonably be considered that, in the present case, the elements necessary to enable RM to bring its action for damages became known to it on the date of publication of the press release relating to Decision C(2016) 4673 final, namely 19 July 2016. On the contrary, RM may reasonably be considered to have acquired 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*”). Similarly AG Rantos had said (and this was confirmed by the CJEU): “*the injured party could not have had the information enabling it to bring an action for damages until after the date of publication of the summary of the decision in the Official Journal of the European Union*” (¶133 of [C-267/20, EU:C:2021:884](#)).

sustained. The Court clearly stated that "*an action for damages for an infringement of competition law which, although relating to an infringement of competition law which ceased before the entry into force of that directive, was brought after the entry into force of the provisions transposing it into national law, falls within its temporal scope, in so far as the time limit for transposition applicable to that action under the old rules did not expire before the time limit for transposition of the same directive*".¹⁷¹ It arrived at that outcome after clarifying that the limitation rules should be applicable to "*legal situations existing after the expiry of the time limit for transposition of a directive*" and "*that applies a fortiori to legal situations which arose under the old rule and which continue to produce effects after the entry into force of the national acts adopted for the transposition of a directive after the expiry of the time limit for transposing it*".¹⁷²

The trucks' damages cartel may in fact be a rather easy context for claims, compared with follow-on claims to a decision by the Spanish Competition Authority, when the decision is appealed and many years pass until it becomes final. In those cases, it seems clear that the new five-year limitation period will be applicable to those claims in which the limitation period had not lapsed before the expiry of the time limit for transposing the Damages' Directive.¹⁷³ More troublesome however is the determination of the *dies a quo* of the limitation period, as it may be fixed either at the date when the CA decision was adopted or at some later stage in the judicial review.¹⁷⁴

In this regard the CJEU has considered that, given the "complex factual and economic analysis" required, antitrust damages claims¹⁷⁵ and the asymmetry of information suffered by injured parties in those situations,¹⁷⁶ "*the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the*

¹⁷¹ ¶79 of C-267/20 *DAF & Volvo* ([EU:C:2022:494](#)).

¹⁷² *Ibid.*, ¶¶33 and 34.

¹⁷³ ¶49 of C-267/20 *DAF & Volvo* ([EU:C:2022:494](#)): "*whether the situation at issue in the main proceedings arose before the expiry of the period for transposition of the same directive or whether it continued to produce effects after the expiry of that time limit*".

¹⁷⁴ As it will occur in the forthcoming damages claims in the milk procurement cartel and in the car manufacturers' cartel (on the later see Francisco Marcos "El régimen de prescripción de las acciones de daños por el «cártel de coches»" *Diario La Ley* 9975 of 21/12/21).

¹⁷⁵ *Id.* ¶54 and ¶46 of C-637/17 *Cogeco* ([EU:C:2019:263](#)).

¹⁷⁶ ¶55 of C-267/20 *DAF & Volvo* ([EU:C:2022:494](#)).

infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action for damages".¹⁷⁷

New rules introduced by the Damages Directive further provide clear rules on the *dies a quo*, establishing that it starts running when the infringement conduct has ceased and the claimant knows or can reasonably be expected to know that some behavior of an undertaking constitutes an infringement of competition law; the harm suffered by the claimant as a result of the infringement; and the identity of the infringer.¹⁷⁸ Moreover, in follow-on claims, the limitation period is interrupted if a competition authority initiates a formal investigation or proceeding of the infringing behavior until one year after the decision by the competition authority is final or the proceeding is otherwise terminated.¹⁷⁹

3.2.4. Binding effect of decisions by Competition Authorities

Claimants need to prove that an antitrust infringement caused them harm. Consequently, courts require that three elements (illicit conduct, causation, harm) be proven by claimants. In follow-on actions, claimants benefit from the infringement prohibition decision by the competition authority, whilst in stand-alone actions, claimants will need to also prove the occurrence of the unlawful conduct.

Before article 9 of the Damages Directive was implemented (article 75 DCA), follow-on actions to European Commission decisions provided a stronger footing than National Competition Authority (NCA) decisions (article 16 of Regulation 1/2003). The litigation in the trucks' cartel case is a good example of the binding force of a *final* decision of the European Commission, pursuant to article 16 of Regulation 1/2003.¹⁸⁰ No judgment has ruled yet on the binding force of a *non-final* decision of the European

¹⁷⁷ Id. ¶56. In C-637/17 *Cogeco* ([EU:C:2019:263](#)) the Court had ruled that it would run against the principle of effectiveness if the limitation period "cannot be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority or by a review court" (¶51).

¹⁷⁸ Article 74.1 and 2 DCA.

¹⁷⁹ Article 74.3 DCA.

¹⁸⁰ As other foreign courts have considered regarding the trucks' cartel settlement decision (see UK Court of Appeal judgment of 11/11/20 [[2020\] EWCA Civ 1475](#); Bundesgerichtshof judgment of 23/9/20, [KZR 35/19 Lkw Kartell II](#); and judgment of Court of Naples of 29/6/21, [4754/19](#)), the fact that the Decision was adopted in a cartel settlement procedure does not change its binding force, although it clearly implies that it may include less meaningful content or information for victims in support of their claims.

Commission, as claimants so far have apparently opted not to file their claims in courts until the decision is final.¹⁸¹

Recently the Spanish Supreme Court ruled on the binding effect of a commitment decision of the European Commission, following the CJEU judgment of 23/11/17 ([C-547/16](#)),¹⁸² considering that national courts cannot overlook such decisions and, therefore, they are required "to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU."¹⁸³

On the other hand, based on the principles of procedural efficiency and legal certainty (which would oppose re-litigation of the same facts),¹⁸⁴ the Supreme Court had already recognized the binding force of prior NCA decisions in those cases in which the decision was final.¹⁸⁵ It distinguished the facts and their legal assessment by the NCA from other *dicta* in those decisions that may be relevant in follow-on private claims.

First, concerning the factual evidence and its assessment, the Supreme Court clearly held that where the anticompetitive conduct which was subject of the NCA sanctions is

¹⁸¹ Against Scania, until the European Commission Decision fining Scania is final (the later has been appealed by Scania to the General Court, confirmed by T-799/17, [EU:T:2022:48](#), appeal pending before the CJEU, C-251/22P). The only known ruling regarding Scania in Spain refers to a follow-on claim against the Spanish subsidiary of Scania (Scania Hispania, S.A.) which was based on the first Decision of the European Commission on the cartel, and which was accepted by the juzgado mercantil de Jaén but which was quashed on appeal for lack of standing of the defendant, judgment of Audiencia de Jaén of 16/12/21 ([ES:APJ:2021:1855](#)) without paying attention to the fact that neither Scania nor its subsidiaries were addressees of the Decision of 19/7/16, because the plaintiff did not allege anything about the specific link between the manufacturer and its subsidiary. See *supra* note 160.

¹⁸² ¶26 of C-547/16 *Gasorba* ([EU:C:2017:891](#)): "it cannot be precluded that a national court may conclude that the practice which is the subject of the commitment decision infringes Article 101 TFEU and that, in so doing, it proposes, unlike the Commission, finding that an infringement of that article has been committed". In that case, Decision of the European Commission of 12/4/2006 ([COMP/B-1/38.348-Repsol CPP](#)).

¹⁸³ ¶29 of C-547/16 *Gasorba* ([EU:C:2017:891](#)). Extensively quoted and followed by Supreme Court Judgment of 7/2/18 (*Gasorba v. Repsol*, Rapp. P. J. Vela, [ES:TS:2018:297](#) Legal Grounds 7.4 and 5) to conclude that the agreement was null for its excessive duration (Legal Ground 9.2), see also *supra* note 124. See Eugenio Olmedo "The Evidential Effect of Commitment Decisions in Damage Claims. What Is the Assumptive Value of a Pledge?" *Common Market L. Rev.* 56/4 (2019) 979-1004.

¹⁸⁴ However, article 222 of CPA confers *res judicata* force only to final court judgments.

¹⁸⁵ See Ferro "Binding effect of infringement Decisions" (Chapter 12) of this book. Decisions that are not final are regarded an "authoritative instrument of conviction" - see Ignacio Sancho "Ejercicio privado de las acciones basadas en el derecho comunitario y nacional de la competencia" [Indret 1/2009: 26](#). Articles 434.3 and 465.6 of the CPA empower the courts to discretionally suspend the proceedings until the decision is final if the court deems it necessary before delivering its judgment (see also article 42.3 CPA).

the same in future compensation claims by victims, consequently, the factual evidence concerning its unlawfulness should be considered as settled before the civil court.¹⁸⁶

Secondly, any finding by the NCA concerning causation and damages calculation is not binding for the court deciding on the damages' action.¹⁸⁷ Only the national competent courts can decide "*who had suffered injury and exactly how much*".¹⁸⁸ Spanish courts followed this doctrine in the litigation for damages in the paper envelopes' cartel, in which the prior decision by the NCA¹⁸⁹ was deemed to have prejudicial effect for the subsequent judgment of the civil court (when it comes to the existence of the infringement). Naturally, the situation in terms of the effects and potential harm differ greatly depending on the type of infringement. The issues are not the same when the infringement is a cartel, an exploitative abuse of dominance spreading across a large part of the market (either directly or indirectly through an "umbrella effect"), an unlawful vertical restraint or an exclusionary abuse of dominance on a limited part of the market.¹⁹⁰

¹⁸⁶ See §3.5 of Supreme Court Judgment of 7/11/13, [ES:TS:2013:5819](#) ("*The factual scenario to which both public and private enforcement relate, as to the existence of a practice restrictive of competition, is the same one, because the private claim in the civil jurisdiction is seeking the compensation of damages caused by the cartel whose performance was the subject of the judgment of the administrative jurisdiction that punished the anti-competitive behaviour from the public enforcement perspective*"). The Audiencia Provincial de Madrid had considered instead that prices were result of bargaining, which contradicted the final decision adopted by the public enforcement authority ("*by holding that the prices were the result of individual bargaining between the defendant and each of the plaintiffs, it frontally contradicts the facts fixed in the judicial review and it does not include any reasoning that may justify such divergence*").

¹⁸⁷ ¶65 *in fine* of C-199/11 *Otis*, [EU:C:2012:684](#) ("*Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court*").

¹⁸⁸ In this regard, the Supreme Court assumed that the sugar cartel punished by the NCA led to an overcharge that negatively affected confectioners' costs, raising them, but it rightly considered that the power of NCA "*did not reach the issue of the impact of damage by direct buyers to their customers*". See §3.5 of Supreme Court Judgment of 7/11/13 ([ES:TS:2013:5819](#)).

¹⁸⁹ NCC decision of 25/3/2013 ([S/316/10 Sobres de papel](#)), confirmed by the Audiencia Nacional and the Supreme Court.

¹⁹⁰ For that reason, the question raised by the preliminary ruling lodged by juzgado mercantil 2 de Madrid concerning the binding effects of vertical restraints beyond the (declared) limited impact of the infringing conducts sanctioned by the NCC (resolution of 30/7/2009, [652/07 REPSOL/CEPSA/BP](#)) appears to be moot, see Order of EUCJ of 28/10/20, *ZA et al v. Repsol Comercial de Productos Petroliferos SA* (C-716/19, [EU:C:2020:870](#)), rejecting the preliminary ruling lodged by juzgado mercantil 2 de Madrid (ES:JMM:2019:88A), which has re-lodged it again as [C-25-21](#).

3.2.5. Proof of harm and Damages' assessment

Courts have decided upon issues regarding proof of harm and the calculation of damages by following the traditional rules for tort claims, interpreted in accordance with the principle of effectiveness.¹⁹¹ It falls on the claimant to prove the harm and its causal link to the infringement, and to quantify it (article 217.2 CPA), although the court must consider the availability and ease of proof to the parties.

Claimants must also quantify the amount claimed (article 219.1 of CPA). However, given the difficulties involved in this calculation, courts should be flexible in considering the circumstances that may make it arduous or impossible to plead an accurate figure.

As in other damages claims, parties in antitrust damages proceedings regularly resort to expert reports for their quantification of harm.¹⁹² Courts have been shown in many instances, to be capable of assessing these reports and adopting a sound and reasonable decision.¹⁹³

The Supreme Court has affirmed several broad principles on the quantification of harm by the parties in antitrust damages' proceedings in its leading decisions on the damage caused by the sugar cartel. Naturally, and according to the general principle of compensation in tort law, damages are determined by assessing what would have happened if the infringement had not been committed. The court acknowledged the known difficulties for the calculation of damages and the disparate assessments given by inferior courts in reliance upon the expert reports calculating damages.

A clear starting point is the “*impossibility of a perfect reproduction of what would have been the situation if there had not been unlawful conduct*”.¹⁹⁴ Accordingly,

¹⁹¹ Some actions that have reached the Supreme Court have been rejected as the plaintiff was unable to prove the harm or causation. See two of the cases reported in table 1 above.

¹⁹² Which they submit together with their suit or reply, see articles 299.1.4 and 335 CPA.

¹⁹³ See, e.g, ¶4 of the judgment of the Audiencia de Madrid (sect 15). of 18/12/2006, *Antena 3 v. LNFP* ([ES:APM:2006:18320](#)). See also ¶¶9 and 15 of the Audiencia de Madrid (sect. 18) judgment of 25/5/2006, *Conduit v. Telefónica* ([ES:APM:2006:6773](#)), confirming ¶8 of the judgment of juzgado mercantil 5 de Madrid (of 11/11/2005 ([ES:JMM:2005:70](#))). On this case, see Maite Martínez-Granado & Georges Siotis “Sabotaging Entry: An Estimation of Damages in the Directory Enquiry Service Market” *Review of Law & Economics* 1(2020) 1-57.

In the retail petrol cases, the quantification of the harm caused by the vertical restraints ponders the overcharge paid by the harmed petrol station to its supplier compared with the average supply in the station's region, considering also if the victim station had not recouped investments made in the station when the exclusive supply clause was declared void and any profits he may have gained, see ¶11 of judgment juzgado mercantil 2 de Palma de Mallorca of 3/3/2009, *E.S. Fontanet v. REPSOL* ([ES:JMIB:2009:14](#)) (confirmed by the judgment of the Audiencia de Palma de Mallorca (sect. 5) of 1/9/10 ([ES:APIB:2010:1683](#)) and Supreme Court judgment of 8/5/13 (rapp. F. Marín, [ES:TS:2013:2506](#)).

¹⁹⁴ See §7.5 of Supreme Court Judgment of 7/11/13 ([ES:TS:2013:5819](#)).

claimants' experts must “*formulate a reasonable and technically sound hypothesis not founded on erroneous and not testable data*”.¹⁹⁵ The flip side of the coin is that it is not enough if the defendant's expert report “*merely challenges the accuracy and precision of the quantification made by the expert report made at the injured party's request, but it is necessary that it justifies a better-founded alternative quantification.*”¹⁹⁶

These basic principles governing damages quantification were put in play in the envelopes' cartel and in the trucks' cartel damages cases. But they have led to disparate outcomes in the various courts' assessment of the parties' expert reports.

In the envelopes' cartel damages claims, both the Courts of Appeals of Barcelona and Madrid considered the harm to be a by-product of the cartel (*ex re ipsa*). Likewise, in the trucks' cartel damages litigation, almost every court in Spain presumed *ex re ipsa* that the cartel caused harm.¹⁹⁷ Courts have anticipated the presumption of harm included in the Damages Directive.¹⁹⁸

The settings are somehow simpler in the envelopes' cartel damages' claims. Apparently, there was a single expert report used by different claimants, considered defective by the courts (first instance and appeal) both in Madrid and Barcelona. The NCA decision included ample evidence about the overcharges caused by the cartel,¹⁹⁹ and some defendants' reports acknowledged the existence of some harm. Whilst the Court of Appeals in Barcelona opted for judicial estimation of an overcharge of 20%,²⁰⁰ the Court of Appeals in Madrid opted for the alternative quantification of the overcharge offered by one of the defendants (9%).²⁰¹

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Only juzgado mercantil 1 de Oviedo, see e.g. judgments of 19/4/21 (*Transportes Ana Fernández Soto SL v. Daimler AG* [ES:JMO:2021:3269](#)) and of 13/7/21 (*Ismael Cazón Alfonso SL v. Renault* [ES:JMO:2021:7952](#)); both quashed by Audiencia de Oviedo (sect. 1) judgments of 7/10/11 ([ES:APO:2021:2713](#)) and of 25/3/22 ([ES:APO:2022:926](#)).

¹⁹⁸ Article 17.2 implemented as 76.2 DCA.

¹⁹⁹ See NCC decision of 25/3/13 ([S/0316/10 Sobres de Papel](#), rapp. J. Costas).

²⁰⁰ See judgments of Audiencia de Barcelona (Sect. 15) of 10/1/20 (*Cortefiel*, [ES:APB:2020:59](#); *Misiones salesianas*, [ES:APB:2020:58](#); CIFDSA, [ES:APB:2020:201](#)); of 11/1/20 (Bankoa, [ES:APB:2020:698](#); *Manos Unidas*, [ES:APB:2020:185](#); *Grupo Planeta* ([ES:APB:2020:201](#)); *Mutua Madrileña*, [ES:APB:2020:186](#) and Caixa Ontinyent [ES:APB:2020:184](#)) and of 7/2/22 (PSOE, [ES:APB:2022:1182](#)).

²⁰¹ See judgments of Audiencia de Madrid (Sect. 28) of 3/2/20, *Obras Misionales Pontificias* [ES:APM:2020:1](#) (¶22) and Cámara de Comercio [ES:APM:2020:2](#) (FD7).

The trucks litigation presents probably the most complex situation for damages quantification, starting from the paucity of information and lack of useful quantitative data in the Decisions of the European Commission, the plurality of claims and different expert reports used by claimants (of widely varying depth) and, finally, the unanimous rejection by defendants' expert reports that the cartel caused harm. Still, a major disagreement persists among the Courts of Appeals regarding the standard of proof that the plaintiff must meet and the power of judicial estimation of the harm.²⁰²

Firstly, concerning the standard of proof that the plaintiff must meet, given that harm was presumed *ex re ipsa*, most courts have accepted the claims even if they did not include a proper expert report quantifying the harm.²⁰³ So far, only the Audiencia de Madrid (sect.28) has rejected claims if the expert report did not meet some minimum technical standards.²⁰⁴

Finally, some variation is seen in the calculation of compensatable harm by different courts. In the past, the courts had themselves estimated the amount of compensation when they found the parties' calculations unconvincing, but now the power to do so in antitrust damages claims is explicitly acknowledged in the Damages Directive. Recently, the CJEU has ruled that this power can be exercised by courts from 26/12/14,²⁰⁵ but doubts subsist regarding the basis to be followed by judges in calculating the harm and concerning its operation together with the joint and several liability introduced by the Directive (article 11).²⁰⁶

Herding behavior by courts had led them to follow four or five different calculations of the overcharge. After the early rulings by the Court of Appeal of Valencia and Pontevedra the largest group of courts have set the compensation at 5%; others instead

²⁰² See Gustavo A. Martín "Quantifying damages in cartel cases: the Spanish Courts' approach to the Trucks cartel" *Mass Claims* 2 (Dec. 2021) 125-131.

²⁰³ See, for example, judgment of Audiencia de Albacete (sect 1) of 4/3/22 (*Reciclajes Sanfer SL v. IVECO Spa*, [ES:APAB:2022:164](#)).

²⁰⁴ See judgments of 10/12/21 ([ES:APM:2021:14305](#), Legal Ground VI), 28/1/22 ([ES:APM:2022:796](#), Legal Ground 10th); 31/1/22 ([ES:APM:2022:1757](#), ¶32); 9/5/21 (*Central Eléctrica Sestelo y cia. v. MAN Truck Bus Iberia*, roll 14/20, ¶20) and of 23/5/22 (*Gruas Domingo García v. IVECO España*, roll 946/20, ¶21).

²⁰⁵ See ¶¶87-88 of C-267/20, [EU:C:2022:494](#).

²⁰⁶ See ¶¶42-48 of the preliminary ruling lodged on 19/5/21 ([ES:JMV:2021:681A](#)) by the Juzgado Mercantil 3 de Valencia ([Tráficos Manuel Ferrer, S.L. et al v Daimler AG, C-312/21](#)).

have picked other percentages, 8%, 10% or 15%. Finally, others have calculated the overcharge as a percentage reduction to the amount sought by claimant.²⁰⁷

3.2.6. *Passing-on*

Defendants may argue the passing-on of the overcharge caused by an antitrust enforcement as a natural extension of the logic behind damages compensation, according to which actions by aggrieved parties to mitigate the harm are taken into consideration when calculating the harm suffered by the mitigating party.²⁰⁸ Furthermore, it would be contrary to the general legal principle against unjust enrichment if claimants were allowed to recover damages above the amount of the actual harm suffered. Although this defense arguably did not have a basis in existing tort law in Spain,²⁰⁹ the Supreme Court legitimized the passing-on defense in its decision on the damages' claims in the sugar cartel.²¹⁰

Spanish Courts have unanimously rejected the passing-on arguments by defendants in the trucks' cartel litigation. However, these arguments have been accepted in two other cases. Firstly, in a damages' claim in the envelopes' cartel by a political party, the Audiencia de Barcelona (sect. 15) partially accepted the passing-on defense put forward by the infringing companies, given that “*in so far as the expenditure incurred by the plaintiff for the purchase of the envelopes, with the corresponding overcharge, was covered in full by the finalist subsidy granted by the State for the sending of electoral propaganda, the plaintiff was not harmed and cannot claim for it. The subsidy in such a case amounts to 100% of the expenditure, including any overpricing, so that the loss is passed on in full to the subsidizing Administration*”.²¹¹ Secondly, full passing-on of

²⁰⁷ See, e.g. judgments of Audiencia de A Coruña (sect.4) of 19/4/22 ([ES:APC:2022:968](#)); of Audiencia de Almería (sect. 1) of 15/6/22 (*Transfernán SL v. MAN Truck & Bus SE*, roll 116/21) and of Audiencia de Granada (sect. 1) of 1/7/22 (*Construcciones Porman SA v. MAN Truck & Bus SE*, roll 1671/21)

²⁰⁸ See Antonio Robles "Indirect purchasers and passing-on" in Chapter 11 of this book.

²⁰⁹ See Antonio Robles “La defensa basada en la repercusión del daño (passing-on) causado por infracciones del derecho de la competencia” [Indret 1/2020](#).

²¹⁰ §5 of Supreme Court judgment of 7/11/13, *Nestlé v Ebro* ([ES:TS:2013:5819](#)), revoking the judgment of the Provincial Court of Madrid (Sect. 8) of 3/10/11, *Nestlé v. Ebro* ([ES:APM:2011:12900](#)) which had admitted passing-on because it was proven that Nestlé had increased its prices (at §5.3). See also ¶11.5 *in fine* of judgment of 4/3/15, *Hidrocantábrico/Iberdrola*, ([ES:TS:2015:669](#)) declaring (in deciding a damages claim by Hidrocantábrico following a resolution of the NCC declaring an abuse of dominance by Iberdrola) that the burden of proof to demonstrate that the claimant's behavior enhanced or exacerbated the damages lies with the defendant (given Iberdrola's abusive failure to provide access to its network, which forced Hidrocantábrico to serve its clients through separate generators and hence caused a significant overcharge).

²¹¹ ¶34 of judgment of 7/2/22 (*PSOE v. Tompla*, [ES:APB:2022:1182](#)) and continues “*Although the applicant does not enclose the purchase invoices but makes an estimate of the expenditure based on the*

the overcharge led to the quashing by the Audiencia de Madrid (sect. 28) of the "umbrella" claim filed by a building promoter for compensation of the overcharge caused by the decennial insurance cartel, because "*the plaintiff fixed the prices including the recovery of all costs, including the ten-year insurance which was considered a direct cost. With this, it must be considered accredited that the overcharge that the plaintiff had to pay as explained above was passed on to the clients as a cost of the development, so that the harm derived from the unlawful action was not borne by the developer, but was passed on to the purchasers of the homes and this did not lead to a decrease in sales or in the plaintiff's income, since during the period of the cartel there was a real estate boom that caused an increase in the prices of the homes and in the results of the developers*".²¹²

3.2.7. Interest

In most cases, the court decision awarding damages tends to arrive after a lengthy period has passed since the harmful infringement occurred. To fully compensate for the present value of the harm, damages need to include interest on the damage since the date when the harm was suffered.²¹³ This is also arguably the rule that can be extracted from the aggrieved party's right to full compensation in accordance with the principle of effectiveness of the EU antitrust prohibitions, although it is national law which determines how the interest is calculated.

electoral roll and the price references contained in the NCC Resolution, that estimate supplements the invoices. And if these were paid in their entirety by the State (or the corresponding Administration), with prior justification, charged to the finalist subsidy, there is a passing-on of the surcharge, as we have said, similar to that which occurs when the damage is totally or partially passed-on, a passing-on which is frequently used as a defence in competition law infringements and which is contemplated both in the Damages Directive and in Article 78 of the DCA".

²¹² ¶54 of judgment of 19/5/22 (*Realia v. Asefa & Scor*, [roll 292/91](#)). It's worth pointing that there has been another successful claim for compensation of lost profits due to the exclusionary effect of the decennial insurance cartel, see judgment of commercial court 12 de Madrid of 9/5/14 (*Musaat v. ASEFA, SCOR & CASER*, [ES:JMM:2014:3797](#)), confirmed by judgment Audiencia de Madrid (sect. 28) of 3/7/17 ([ES:APM:2017:9034](#)) and by the Supreme Court order of 23/9/20 (rapp. J.M^a Díaz, [ES:TS:2020:7408A](#)).

²¹³ The CJEU has ruled that the compensation should include "*not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest*" ¶95 of C-295/04 to C-298/04 *Mandredi* ([EU:C:2006:461](#)), and this has been further clarified by recital 12 of the Damages Directive ("*The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose*").

Courts deciding upon antitrust damages claims in Spain have unanimously awarded interest (simple interest, not compounded) on the damages awarded since the harm took place.²¹⁴ That is the general rule followed in the Appeal Courts, both in the envelopes' cartel and in the trucks' cartel cases.²¹⁵

3.2.8. Court costs and adverse costs

Despite the complex legal and economic analysis required for the preparation and filing of antitrust damages claims,²¹⁶ there are no special rules concerning the payment of litigation costs involved in these cases.

Contrary to Portugal, Spain is a loser-pays jurisdiction. The general rule is that court costs are paid by the losing party, unless the court deems that the claim presents serious legal or factual complexities.²¹⁷ Hefty costs involved in the drafting of the claim and expert report, unless claimants could recover their expenses -even if their petition is not fully accepted by the court- they may be deterred from pursuing their claims. In the trucks' cartel damages' cases, as most claims are only partially accepted, generally plaintiffs don't recover litigation costs. This has prompted the lodging of a preliminary reference before the CJEU on whether this squares with the right of aggrieved parties to obtain full compensation and with the principle of effectiveness.²¹⁸

²¹⁴ See ¶17 of Supreme Court judgment of 4 of March 2015, *Hidrocantábrico/Iberdrola* ([ES:TS:2015:669](#)): 'the obligation to compensate in cases of non-contractual liability constitutes a debt of value, since its purpose is to restore the existing situation when the harm was produced, so it is necessary to adjust its amount to the moment in which the injured receives the corresponding compensation'. However, in the sugar cartel damages' awards, interest was calculated from the date the suit was brought to court [see Marcos *Journal of Antitrust Enforcement* 3/1 (2015) 219]. A similar solution has been followed in the trucks' damages litigation by the Audiencia de Valladolid (sect. 3), see e.g. judgment of 12/3/21 (*Transportes y Excavaciones Recio SL v. MAN*, [ES:APVA:2021:22](#)).

²¹⁵ In the trucks litigation some appeal courts made a different interest calculation when trucks were acquired through leasing, as they considered the harm was experienced with each of the instalments paid, and not with the signature of the leasing contract. See e.g. judgment of Audiencia de Zaragoza (sect. 5) of 20/4/21 (*Ituero96 SLU v. Renault Trucks SASU*, [ES:APZ:2021:1717](#)).

²¹⁶ Something the EUCJ has stressed in C-267/20 *DAF & Volvo*, [EU:C:2022:494](#) (¶54) and also C-637/17 *Cogeco*, [EU:C:2019:263](#) (¶46).

²¹⁷ Article 394 of the CPA (capped at one third of the total value of the action). In case of partial rejection/award of the claim, each party will bear its own costs and the common costs will be divided equally.

²¹⁸ See ¶¶22 to 27 of Order of Juzgado de lo Mercantil 3 of Valencia of 10/5/21 ([ES:JMV:2021:681A](#), *Traficos Manuel Ferrer, S.L. et al v Daimler AG*, C-312/21).

3.3. After the trucks' manufacturers cartel damages litigation

Spanish courts have not yet finalized deciding the trucks' cartel damages actions, but several claims on other cases are already being filed. Most of these actions are follow-on from decisions which predated the Damages Directive. Thus, as was the case in the trucks' cartel damages litigation, there will be doubts concerning the applicable rules *ratione temporis*.

The success of damages claims in the trucks' cartel has attracted the attention of litigation funds that are financing the new claims being filed in follow on claims in several cartel cases. Together with litigation funding, well-known international players in the private antitrust enforcement world have also become involved in some of the cartel follow-on actions being organized in Spain.²¹⁹

Contrary to the situation in the past, when there was a small bar of competition lawyers specialized in handling these complaints (both in public and private enforcement), in the aftermath of the trucks' cartel damages litigation, the community of lawyers undertaking antitrust litigation has grown. This surge has been experienced on the claimants' side, but also on the defendants' side. Given the need for specialization, it is perhaps inevitable to observe significant variations in quality and performance.

A similar development has occurred with economic experts, as most of the well-known experts have been working on the defense side, although this may be starting to change in new and ongoing cases (e.g., OXERA drafted the expert report in the milk procurement cartel for one of the claimants).

Several claims have been decided in relation to the manipulation of the Euribor index,²²⁰ although these are not properly follow-on claims to the European Decisions on the derivatives cartel,²²¹ as the alleged harm would have been caused by an overcharge in

²¹⁹ E.g., on the milk procurement cartel, see "Hausfeld Pairs Up With Madrid Firm To Target Milk Cartel" *Competition Policy International* 9/6/20 and CDC, [Milk cartel](#).

²²⁰ See judgments of juzgado mercantil 7 de Barcelona of 21/7/21 (*Deutsche Bank AG*, [ES:JMB:2021:6327](#)); of juzgado mercantil 3 de Barcelona of 26/7/21 (*Deutsche Bank AG*, [ES:JMB:2021:6332](#); [ES:JMB:2021:6333](#); [ES:JMB:2021:6334](#)); juzgado mercantil 12 de Barcelona de 27/7/21 (*Deutsche Bank AG*, [ES:JMB:2021:6427](#); [ES:JMB:2021:6424](#)); Juzgado Mercantil 1 de Girona of 29/9/21 (*Deutsche Bank AG*, [ES:JMGI:2021:6725](#)) and of 30/7/21 (*v. Deutsche Bank AG*, [ES:JMGI:2021:6609](#)); Juzgado mercantil 4 de Alicante of 17/9/21 (*Estalacant SL et al v. Deutsche Bank AG*, 20/21, PO97/21); juzgado mercantil 15 de Madrid of 24/9/21 (*Deutsche Bank AG*, 203/21, PO30/21) and Juzgado mercantil 1 de Palencia (P. Martín) of 27/9/21 (*Barclays Banks plc & Deutsche Bank AG*, [ES:JPII:2021:790](#)).

²²¹ Decision of the European Commission of 4/12/13 ([AT.39914 Euro Interest Rate Derivatives](#), Barclays, Deutsche Bank, Société Générale and RBS) and of 7/12/16 ([AT.39914 Euro Interest Rate Derivatives](#), JPMorgan Chase, Crédit Agricole and HSBC).

the interest rate of mortgages.²²² The EURIBOR cases prompted the lodging of a new preliminary reference before the CJEU on the rules on jurisdiction.²²³

In addition, following investigations by the national competition authority in the automobile industry, seven car dealers' distribution cartels were uncovered,²²⁴ and several claims against car dealers have been filed, most of them being rejected (either considering the limitation period lapsed or due to the lack of proof of harm).²²⁵ The competition authority uncovered an automobile manufacturers cartel,²²⁶ affecting the vast majority of the market and involving 23 firms. The collusive conduct occurred between 2004 and 2013, and the number of potential cartelized cars could make follow-on claims against automobile manufacturers the largest antitrust claim ever in Spain.²²⁷

Two cartels in railway related markets have been sanctioned by the national competition authority in 2019 and 2021,²²⁸ in which the victim was the State-owned Administrator of Railway Infrastructures (ADIF). ADIF has announced the filing of claims to obtain compensation for the harm suffered, launching a public procurement bid for the professional services to start the proceedings against the infringers.²²⁹

²²² See Francisco Marcos "Acciones indemnizatorias por la manipulación de los índices de tipos de interés en hipotecas referenciadas al EURIBOR" *Revista de derecho bancario y bursátil* 165 (2022) 125-162 (half of the claims have been partially successful).

²²³ See Orders of 16/2/22 Juzgado Mercantil 11 de Barcelona ([ES:JMB:2022:341A](#) and [ES:JMB:2022:340A](#)) C-198/22 and C-199/22.

²²⁴ See NMCC resolutions of 5/3/15 ([S/DC/488/13 Concesionarios Hyundai](#); [S/DC/487/13 Concesionarios Land Rover](#); [S/DC/489/13 Concesionarios Opel](#); [S/486/13 Concesionarios Toyota](#)); of 28/5/15 ([S/471/13 Concesionarios Audi/seat/VW](#)); of 28/4/16 ([S/DC/505/12 Concesionarios Chevrolet](#)); and of 12/6/16 ([S/0506/14 Concesionarios Volvo](#)).

²²⁵ See Judgments of juzgado mercantil 1 de Bilbao of 14/3/18 ([ES:JMBI:2018:1278](#)) and 9/7/19 ([ES:JMBI:2019:1146](#); [ES:JMBI:2019:1047](#)); of Juzgado Mercantil 1 de Donostia of 11/7/19 ([ES:JMSS:2019:1014](#); [ES:JMSS:2019:1013](#); [ES:JMSS:2019:1012](#)); of juzgado mercantil 12 de Madrid of 24/9/19 ([ES:JMM:2019:4227](#)); of juzgado mercantil 3 de Gijón 3 of 9/3/20 ([ES:JMO:2020:728](#); [ES:JMO:2020:729](#)); of juzgado mercantil 1 de Oviedo of 18/5/20 ([ES:JMO:2020:1539](#)); of juzgado mercantil 1 de Tarragona of 2/6/21 ([ES:JMT:2021:4406](#)). On the other hand, claims were accepted by judgments of juzgado mercantil 1 de Oviedo of 18/2/20 ([ES:JMO:2020:569](#)) and of juzgado mercantil 1 de Cádiz of 5/4/21 ([ES:JMCA:2021:508](#); [ES:JMCA:2021:509](#)).

²²⁶ See NMCC resolution of 23 July 2015 ([S/482/13 Fabricantes de Automóviles](#)).

²²⁷ The first judgment issued in the case by juzgado mixto 5 de Ceuta rejects the claim finding that the limitation period had lapsed, see judgment of 21/6/22 (*RMOT v. Nissan Iberia*, JV151/22).

²²⁸ NMCC resolutions of 14/3/19 ([S/DC/598/16 Electrificación y Electromecánicas Ferroviarias](#)) and of 29/9/21 ([S/DC/0614/17 Seguridad y Comunicaciones Ferroviarias](#)).

²²⁹ See ADIF, *Legal representation and defence services for the claim for damages caused to ADIF AV and ADIF, in relation to the conduct sanctioned by the Resolution of 14/3/19, issued by the NMCC* (3 batches), [Exp. 2.21/02110.017](#).

Moreover, stockbreeders injured by the milk procurement cartel have filed numerous claims against the milk processing companies sanctioned by the Spanish competition authority,²³⁰ arguing that they were underpaid in the milk they sold while the cartel was operating. Most of the actions have just arrived in court and are at the beginning of the proceedings, but some have already been rejected.²³¹

Finally, although there is little public information, claims have been filed before the Barcelona commercial courts following-on from the national competition authority decision in 2017 sanctioning cartels of manufacturers and distributors of low and medium voltage electrical cables²³². Likewise, there had been news reports of a follow-on collective claim initiated by the Madrid Federation of Associations of students' parents Francisco Giner de Los Rios for the damages caused by the schoolbooks' cartel sanctioned by the competition authority in 2019.²³³ Finally, although it's not truly a damages claim, the full strength of article 101 TFEU is set to be tested in the action brought by Superliga against UEFA.²³⁴

On the unilateral conduct side, there have also been two successful damages claims for abuse of dominance against the Spanish Football Federation,²³⁵ and there is a pending multimillion euro claim against Correos by Unipost for predatory pricing.

²³⁰ This case has been undermined by the annulment of the initial decision fining the cartel (NMCC resolution of 26/2/2015, [S/425/12 Dairy Industries 2](#)) by the Audiencia Nacional (Sect. 6) and the Supreme Court, prompting its readoption (NMCC decision of 11/7/2019, [S/425/12 Dairy Industries 2](#)).

²³¹ Quashed for the lapse of the limitation period by judgment of juzgado de primera instancia 2 de Lugo of 3/6/21 (ES:JPI:2022:902) [ES:JPI:2022:902](#)) and -oddly- quashed for the pending appeal of the decision by the NMCC by of juzgado mercantil 1 de Oviedo of 20/1/22 ([ES:JMO:2022:828](#)). However, was also an early partial award of damages by juzgado mercantil 1 de Granada judgment of 30/6/21 ([ES:JMGR:2021:6331](#)).

²³² NMCC decision of 21/11/17 ([S/DC/0562/15 Cables BT/MT](#)).

²³³ Organized from 2012 and 2018 (fixing of prices and other commercial conditions through the Code of Conduct of the association and delaying and making more expensive the use of digital books) by the main association of school textbook publishers (ANELE) and 34 member publishing firms was with fines totalling €33.88 million (NMCC resolution of 30/5/19, [ANELE S/DC/594/16](#)).

²³⁴ See order of juzgado mercantil 17 de Madrid of 11/5/21 (*European Superleague v. FIFA & UEFA*, [ES:JMM:2021:747A](#)) and [C-333/21](#).

²³⁵ See Judgments of juzgado mercantil 3 de Madrid of 10/1/22 (*Mediapro SLU v. RFEF*, [ES:JMM:2022:1026](#)) and of 16/2/22 (*Mediapro SLU v. RFEF*, PO1427/19).

4. Reflections and Outlook

In Portugal, antitrust private enforcement is heating up, but it is too soon to predict how it will play out. The significant number of opt-out representative actions on behalf of consumers has definitely put Portugal on the map as a jurisdiction to watch, namely for potential defendants. But we are still waiting for the first of these cases to be concluded (other than by settlement), to demonstrate that the regime can indeed lead to the effective compensation of consumers in situations of mass damages.

Changes and case-law developments are occurring swiftly. One can observe evolution in the judges' position on various practical issues, even the space of a few months, as initial experiences lead them to change their approach or to refine their positions. Given the centralization of antitrust private enforcement actions, in the 1st and 2nd instances, at two courts and a very small number of judges, the conditions are set – as long as these judges remain in place for relatively long periods – for the case-law to develop and consolidate in the short term. These judges are engaging more and more with the CJEU, choosing to send referrals even in situations where it is not obvious that there is a particularly dubious question of interpretation of EU Law.

The number of cases filed in Portugal remains small, particularly when compared to our neighbor, and it would not be surprising if many Portuguese companies affected by pan-European anticompetitive practices continued to choose to join mass claims in other jurisdictions, rather than to litigate the cases individually in Portugal. On the other hand, the possibility of opt-out representative actions for undertakings, set out in the law which transposed the Damages Directive, is yet to be tested, and could become a game changer.

In Spain, damages' claims in the trucks' cartel have filled the Spanish courts' dockets. The upsurge in antitrust damages litigation in Spain is a rather recent phenomenon, its development can be traced back to not more than ten years ago with the confectioners harmed by the sugar cartel -concluding with two leading judgments by the Supreme Court. It continued later with claims by businesses aggrieved by the paper envelopes' cartel. After that, antitrust damages litigation has flourished, prompted by the uncovering of numerous cartels by both the European Commission and the Spanish competition authorities.

Damages claims in the trucks' cartel have been incentivized by the high value of the cartelized goods. Although some Spanish-based claimants opted to transfer their claims to other jurisdictions, most of them chose to sue in Spain. The decision to bring their claims locally was based on proximity rather than on the adequacy of Spanish legal rules or the experience of Spanish Courts in these matters. Given that the harm caused by the cartel was highly dispersed and fragmented and that the Spanish legal system does not provide for a proper tool for collectivization of claims, more than six thousand actions have been filed before less than a hundred commercial judges (*juzgados mercantiles*).

Currently, around three thousand judgments have been delivered at first instance (and more than a thousand on appeal), in which the courts have dealt with the main issues raised in antitrust damages litigation (jurisdiction, access to evidence, standing, binding effect, proof of harm, etc.) to generally rule in favour of claimants, though in most cases they've only been awarded part of what they claimed.

Both courts and professionals involved in antitrust damages litigation have gained experience with the trucks' cartel, which coupled with some of the provisions included in the 2014 Damages Directive can ease the way in the ongoing and future claims. Although several preliminary rulings of the CJEU have clarified the relevant role that the principle of effectiveness of EU law plays in interpreting national rules governing these claims, there are still some open issues regarding the transitory regime of the Damages Directive that will probably require that courts resort again to the CJEU. Finally, considerable uncertainty remains regarding the minimum burden of proof claimants are required to meet and how courts should estimate the harm if the expert reports submitted by the parties are deemed unconvincing.