

# TRUCKS CARTEL DAMAGES CLAIMS: THOUSAND AND ODD JUDGMENTS ISSUED BY SPANISH APPEAL COURTS

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***Abstract:** This article explores the Spanish caselaw on the trucks cartel damages claims. It presents a rigorous empirical assessment of the courts' decisions (as of the cut-off date of 1/10/22), focusing particularly on the 1185 judgments on the merits issued by the courts of appeal. The large number of judgments is explained by the lack of an adequate instrument for class actions. Nevertheless, this article explains that the Spanish judicial system has managed to digest mass litigation through the collectivization of judgments, which replicate each other inefficiently but still manage to deliver justice.*

*There is consensus among Spanish courts that the trucks cartel was harmful and that it caused an overcharge in trucks' purchases while the cartel was in place, but they show disagreement on the level of proof claimants are required to meet in quantifying the overcharge and in the criteria followed by courts to estimate the overcharge when awarding damages.*

*The Spanish courts' experience with trucks damages claims will undoubtedly be helpful for the forthcoming follow-on damages claims emerging before the Spanish courts (prominently the milk procurement cartel and the car manufacturers' cartel). It may also be useful for courts and practitioners in other Member States in which the trucks cartel litigation is still in progress, as Spanish courts have had to deal with many of the numerous potential doubts, questions, and problems that this case poses.*

**Keywords:** Antitrust, Competition, Cartel, Damages, Trucks Cartel

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## 1. Introduction

Until recently, private enforcement of competition law and antitrust damages claims have been neither common nor popular in Spain.<sup>1</sup> It was the domain of a limited number of specialized lawyers; competition law arguments being used mainly in contractual disputes between retailers and their suppliers (prominently in the petrol distribution industry).<sup>2</sup> The situation has dramatically changed with the upsurge in litigation following the infringement decisions of the European Commission in the trucks manufacturers cartel.

Follow-on claims in the trucks cartel have been filed in the courts of several EU Member States,<sup>3</sup> but the Spanish litigation experience stands out. The case has prompted a massive number of small, fragmented claims, dispersed throughout the country, popularizing antitrust law among small law firms and individual practitioners. Sixty-nine commercial courts (*juzgados mercantiles*) across Spain have issued well over 3.000 judgments in deciding upon truck cartel-related claims on the merits. In addition, forty courts of appeal (*audiencias provinciales*) have already decided more than 1.000 appeals. Spanish courts have also been exemplary in referring many questions to the CJEU regarding private enforcement of EU competition law and the Damages Directive in connection with this case (see **Table 1**).<sup>4</sup>

**Table 1. Questions on trucks cartel damages cases referred to CJEU by Spanish Courts**

| Court  | Date     | Ref.                     | ECLI                              | Parties   | Status   |
|--|----------|--------------------------|-----------------------------------|---|--|
| Audiencia Barcelona (sect.15)<br>Juan F. Garnica | 24/10/19 | <a href="#">C-882/19</a> | <a href="#">ES:APB:2019:9370A</a> | <i>Sumal SL v. Mercedes Truck España SL</i>           | Opinion AG Pitruzzella 15/4/21 <a href="#">EU:C:2021:293</a> Judgment 6/10/21 (Rapp: D. Šváby <a href="#">EU:C:2021:800</a> )  |
| Juzgado mercantil 2 Madrid (Andrés Sánchez)      | 23/12/19 | <a href="#">C-30/20</a>  | <a href="#">ES:JMM:2019:131A</a>  | <i>RH v. AB Volvo</i>                                 | Opinion AG De la Tour 22/4/21 <a href="#">EU:C:2021:322</a> Judgement of 15/7/21 (Rapp: M. Safjan <a href="#">EU:C:2021:604</a> )  |
| Juzgado mercantil 7 Barcelona (Raúl N. García)   | 21/2/20  | <a href="#">C-163/21</a> | <a href="#">ES:JMB:2020:333A</a>  | <i>AD et al v. DAF Trucks NV</i>                      | AG Spuznar Opinion 7/4/22 <a href="#">EU:C:2022:286</a>  |
| Audiencia León (sect. 1)<br>Ana Del Ser          | 12/6/20  | <a href="#">C-267/20</a> | <a href="#">ES:APLE:2020:291A</a> | <i>X v. AB Volvo &amp; DAF Trucks NV</i>              | AG Rantos Opinion 28/11/21 <a href="#">EU:C:2021:884</a> Judgement of 22/6/22 (Rapp: A. Arabadjiev, <a href="#">EU:C:2022:494</a> )  |
| Audiencia Pontevedra (sect. 1)<br>José J. Pérez  | 23/4/21  | <a href="#">C-285/21</a> | <a href="#">ES:APPO:2021:308A</a> | <i>Epifanio Campo SL v. Renault Trucks SASU</i>       | Suspended until <a href="#">C-588/20</a> is decided (AG Medina Opinion on that case issued on 24/2/22, <a href="#">EU:C:2022:130</a> ) Judgement of 1/8/22 (Rapp: A. Arabadjiev, <a href="#">EU:C:2022:607</a> ) |
| Juzgado mercantil 3 Valencia (Eduardo Pastor)    | 10/5/21  | <a href="#">C-312/21</a> | <a href="#">ES:JMV:2021:681A</a>  | <i>Tráficos Manuel Ferrer SL et al. v. Daimler AG</i> | AG Kokott Opinion 22/9/22 <a href="#">EU:C:2022:712</a>  |

<sup>1</sup> See the surveys in “Competition private litigation in Spanish courts 1999-2012” [Global Competition Litigation Review 2013/4: 167-208](#) and “Antitrust Damages Claims in Spain” [Global Competition Litigation Review 14/1 \(2021\) 19-26](#).

<sup>2</sup> See Marcos [GCLR 2013/4: 171-172](#) (50% of the cases). Competition law related conflicts in retail petrol distribution contracts continue to be a prominent source of litigation, 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).

<sup>3</sup> And even beyond the EU, as there is a pending case before the Israeli Supreme Court on whether a follow-on claim a decision of the European Commission is possible in Israeli courts, see *Ralfi Agriculture Ltd v. MAN Truck & Bus AG et al*, case 6646/19.

<sup>4</sup> See CJEU judgments of 29/7/19 (6<sup>th</sup> Chamber, C-451/18 *Tibor Trans*, rapp. A. Arabadjiev, [EU:C:2019:635](#)) and of 1/8/22 (1<sup>st</sup> Chamber, C-455/20 *Schönackers Umweltdienste GmbH & Co. KG v. Daimler AG*, Rapp: A. Arabadjiev, [EU:C:2022:607](#)). There is a pending preliminary ruling on the request of the Kúria (Hungary) lodged on 28/6/22, *MOL Magyar Olaj- és Gázipari Nyrt. v Mercedes-Benz Group AG*, C- 425/22, [OJEU C326 of 29/8/22](#)).

After briefly summarizing the facts of the case, opposing arguments and the Spanish courts decision-making outcomes (*infra* §2), this article conducts a systematic empirical assessment of all the rulings issued by courts of appeal to date (*infra* §3). In Spain, courts of appeal (*audiencias provinciales*) occupy a prominent position in the judicial system: they are responsible for reviewing the judgments of first-instance courts. In most courts of appeal, there is a specialized chamber on competition law matters, in charge of deciding the appeals against the judgments of one or more first-instance commercial courts (*juzgados mercantiles*). Courts of appeal hold a significant position in the creation of caselaw, due to their superior hierarchy over first-instance courts, which tend to follow the criteria extracted from prior appeals' rulings when similar disputes brought before them. Trucks cartel damages litigation has shown these institutional dynamics at play, as courts have generally decided identical disputes in a coherent manner.<sup>5</sup> Further appeals to the Supreme Court are limited,<sup>6</sup> so the relevance of a line of repeated and consistent decisions on the trucks cartel damages claims by the courts of appeal cannot be overstated. An empirical analysis of the courts of appeal judgments shows that there is a solid consensus among them on most of the issues raised in these cases, but there is disagreement among them in the assessment of expert reports and the judge's power to estimate the amount of harm. The Supreme Court is expected to deliver its first decision on these disputes sometime in 2023.<sup>7</sup>

## 2. Courts' assessment of trucks cartel damages claims and counterclaims

As it is probably well known, the trucks cartel was sanctioned following a staggered hybrid procedure involving two decisions of the European Commission. The first decision was adopted after a settlement with five of the infringers (several companies within the corporate groups of MAN, Daimler, Iveco, Volvo/Renault, and DAF), published on 6<sup>th</sup> of April 2017.<sup>8</sup> The second decision, adopted following the ordinary infringement procedure against several companies in the corporate group of Scania (that did not

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<sup>5</sup> In words of the Audiencia de Valencia (sect. 9), repeated in other judgments, referring to the proceedings under review noticing the "*identity between the proceedings in which the same legal addresses, the same expert reports, the same questions, the same tone and protests coincide, as a kind of paramnesia of memory ("déjà vu") or previously lived experience, as a consubstantial effect of the plurality of these mass proceedings installed in the commercial courts*" (see §6 of judgment of 29/6/20, *Talleres Navales Valencia SL v. Volvo*, Rapp. Purificación Martorell, [ES:APV:2020:3516](#), §3.1 of judgment of 17/11/20, *MMN v. Volvo*, Rapp. Purificación Martorell, [ES:APV:2020:4230](#)). Obviously, the repetition of judgments deciding similar cases has prompted their standardization by each Court, their content may be substantially identical, with slight changes depending on the variation of the parties and the specificities of each case.

<sup>6</sup> Final appeals to the Supreme Court are possible if some requirements are met (breach of due process, minimum value, or sufficient legal interest), see articles 469 and 477 of the Civil Procedure Act (hereinafter CPA, [Official State Gazette 7 of 8/1/2000](#)).

<sup>7</sup> The first batch of appeals to the Supreme Court had recently been admitted (see orders of 21/9/22, *Hermanos Bailón SL v. MAN*, Rapp. Francisco Marín, [ES:TS:2022:12757A](#); *Gestión de Infraestructuras Civiles SA v. Daimler*, Rapp. Francisco Marín, [ES:TS:2022:12913A](#); *Llácer y Navarro SL v. Volvo*, Rapp. Pedro J. Vela, [ES:TS:2022:12832A](#); *X v. MAN*, Rapp. Antonio García, [ES:TS:2022:12760A](#); *Eulen SA v. IVECO*, Rapp. Antonio García, [ES:TS:2022:12839A](#); *Grúas Jordán SL v. Volvo*, Rapp. Pedro J. Vela, [ES:TS:2022:12958A](#); *Y v. Volvo*, Rapp. Francisco Marín, [ES:TS:2022:12733A](#); *Z v. DAF*, Rapp. Pedro J. Vela, [ES:TS:2022:12763A](#); *Transportes Especiales Siglo XXI v. DAF*, Rapp. Francisco Marín, [ES:TS:2022:12835A](#); *W v. IVECO*, Rapp. Pedro Vela, [ES:TS:2022:12743A](#); *Sánchez Álvarez SL v. MAN*, Rapp. Antonio García, [ES:TS:2022:12887A](#)), arguably decisions by the Supreme Court can be expected in the few months.

<sup>8</sup> The Decision was announced on 19/7/16 ([AT.39824 Trucks](#)).

participate in the settlement), was published (provisional version) on 27<sup>th</sup> of September 2017.<sup>9</sup>

As Margrethe Vestager said when she announced the first decision on the cartel: *"truck makers colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules"*.<sup>10</sup> When the second decision was announced, Vestager also declared: *"Our investigation found that the first meeting between senior managers of all six truck producers took place right here in Brussels, in January 1997. This was the beginning of a collusion that continued for 14 years. The cartel dealt with the sales of medium and heavy trucks throughout the European Economic Area. These are large vehicles weighing more than 6 tonnes each [...] So, with today's decision we have sanctioned all companies involved in this cartel. We have fined the 6 companies a total of €3.8 billion – a record fine for a cartel in the EU's 60-year history"*.<sup>11</sup>

More than 150.000 vehicles affected by the trucks cartel were sold in Spain and over 6.000 claims have been filed against the trucks manufacturers before Spanish courts.<sup>12</sup> Most of the actions are small, claiming the overcharge paid in the acquisition of a handful number of trucks, targeting individually the respective truck manufacturer of the vehicles in relation to which compensation is sought.

As could be expected, claimants and defendants disagree on their interpretation of the facts on which the claims are based. Although the truck manufacturers' cartel was declared as a "by object" infringement (without the Commission proving effects on the market),<sup>13</sup> all Spanish courts' rulings on the case have considered that -although the cartel is not a typical hard-core price-fixing cartel- the decision includes enough data indicating that there was indeed an effect on the market.

Following the Commission's Decision,<sup>14</sup> Spanish courts have considered that the trucks cartel consisted of an exchange of information about prices and price increases and other relevant market conditions and concluded that it was effective in reducing competition among the truck manufacturers and raising the sale prices of trucks.<sup>15</sup>

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<sup>9</sup> The Decision was announced on 27/9/17 ([AT.39824 Trucks](#)). It has been appealed by Scania to the General Court, confirmed by T-799/17, [EU:T:2022:48](#), pending before the CJEU, C-251/22P).

<sup>10</sup> "Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel" [Press Release 16/7/16](#).

<sup>11</sup> "Statement by Commissioner Vestager on fining Scania for participating in trucks cartel" [Press Release 27/9/17](#).

<sup>12</sup> 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 [Almacén de Derecho 9/7/19](#). An unknown number of cartelized trucks purchased in Spain are being litigated in bundled or assigned claims in the Netherlands or Germany.

<sup>13</sup> ¶81 of Decision of 19/7/16 ([AT.39824 Trucks](#)).

<sup>14</sup> In accordance with article 16.1 of Regulation 1/2003 of 16/12/2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([OJ EU L1, 4/1/2003](#)), Spanish courts have considered themselves bound by the infringement declaration of the Commission. It does not matter that it was a settlement decision: there is no doubt about the unlawful behavior of the five participants in the infringement. This is an important requirement for the claims to proceed.

<sup>15</sup> So far only two Courts in Spain has considered that there *"is not proof of overcharge"* and that it is *"scientifically proven that there has not been such"*, see juzgado mercantil 1 de Oviedo (Alfonso Muñoz), judgment of 12/4/21 (*AFDLR v. Daimler*, [ES:JMO:2021:3265](#)). Unsurprisingly, the defendant's lawyers in the case have considered this to be a pioneering judgment in the trucks cartel case, see "Sentencia pionera del Juzgado de lo Mercantil de Oviedo en el caso de los camiones", [Cuatrecasas 14/4/21](#). However, the Court of Appeals of Oviedo (sect. 1) has quashed it, awarding the claimant €16.343,88 plus interest for the acquisition of three cartelized trucks, see judgment of 7/10/21 (rapp. Miguel J. Covian, [ES:APO:2021:3189](#)). The juzgado mercantil 1 de Oviedo [lately joined by juzgado mercantil 2 de Zaragoza (M<sup>a</sup> del Carmen Villegas), e.g, judgments of 3/11/21 (*X c. DAF*, PO n<sup>o</sup> 521/19) and of 8/7/22 (*Leader*

Parties disagree on most legal issues concerning these claims. At the forefront, there is controversy on the applicability *ratione temporis* of Directive EU/2014/104.<sup>16</sup> Some claimants have sought the Directive (*rectius* their implementing rules)<sup>17</sup> to be applicable, but Spanish courts have generally rejected this argument with a view to the non-procedural rules of the Directive.<sup>18</sup> On the other hand, Spanish courts have generally accepted evidence requests -by both parties- based on the novel "disclosure regime" introduced in the Damages Directive.<sup>19</sup>

Nevertheless, Spanish courts have ruled that some of the provisions introduced in the Damages Directive were indirectly applicable as they could already be derived in the case law of the CJEU and the Spanish Supreme Court. For example, although Spanish courts have not applied the presumption of harm to cartels (article 17.2 of Directive), they have used the pre-existing legal doctrine of *res ipsa loquitur* to consider that the cartel was harmful.<sup>20</sup> The Supreme Court has held that in some matters (contractual liability, tort liability, unfair competition, trademarks, and patents), certain unlawful actions generate harm in themselves. This presumption of the existence of harm "*is necessarily and fatally deduced from the wrongful act or breach, or they are a forced, natural and inevitable consequence, or incontrovertible, evident or patent damage, according to the various dictionaries used. A situation arises in which it 'speaks for itself' (ex re ipsa), so that proof is not necessary, because reality acts incontestably for it*".<sup>21</sup> The assertion of harm *ex re ipsa* implies an attenuation of the evidentiary requirements for the plaintiff so that in scenarios of evidentiary difficulty, the Supreme Court has ruled that the requirements of proof and its assessment should not prevent compensation to the victims, making "*the consequences of the lack of proof fall on the party that is in a prevailing or more favorable position, due to the availability or proximity to its source*".<sup>22</sup>

Even before the trucks cartel, since the first judgments on damages claims in the sugar cartel -which was a price-fixing cartel-, Spanish courts have understood that "*if the defendant sells at excessive prices, the direct purchasers of those products will suffer*

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*Transport Aragón SL et al v. IVECO*, PO n° 310/19)] have continued dismissing trucks cartel damages claims, which have consistently been overruled on appeal.

<sup>16</sup> Article 22 of Directive 2014/104/EU of the European Parliament and of the Council of 24/11/14 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 L349, 5/12/14](#)). See Philipp Kirst "The Application *ratione temporis* of the Damages Directive's Provisions and Conflicting Limitation Periods under National Laws" in Barry J. Rodger, Miguel S. Ferro & Francisco Marcos (ed) *Handbook on Antitrust Private Enforcement*, Edward Elgard, forthcoming 2023 ([chapter 6](#)).

<sup>17</sup> Decree Law 9/2017 of 26/5/17 ([Official State Gazette 126 of 27/5/17](#)). See Francisco Marcos "Spain" in Barry J. Rodger, Miguel S. Ferro & Francisco Marcos (ed) *The EU Antitrust Damages Directive. Transposition across the Member States*, 2019, 326-357.

<sup>18</sup> This position may need to be revisited after the recent CJEU (1<sup>st</sup> Chamber) ruling C-267/20 of 22/6/22 (*X v. Volvo/DAF Trucks*, rapp. A. Arabadjiev, [EU:C:2022:494](#)), which considered that the new rules on the duration of the statute of limitations would be applicable to "*to the future effects of a situation which arose under the old rule as well as to new legal situations*" (¶32).

<sup>19</sup> See Francisco Marcos "Access to evidence: The 'disclosure scheme' of the Damages Directive" in Rodger, Ferro & Marcos (ed) *Handbook on Antitrust Private Enforcement*, forthcoming 2023 ([chapter 11](#), see §3.3).

<sup>20</sup> A.G. Rantos Opinion in C-267/20 confirmed that this was in accordance with EU Law, as long as the principles of effectiveness and equivalence were respected (see ¶¶85, 139 and 141, [EU:C:2021:884](#)).

<sup>21</sup> Courts of appeal cite Supreme Court judgments of 17/7/8 (rapp. Jesús E. Corbal, [ES:TS:2008:4125](#), at §2); of 21/10/14 (rapp. Antonio Salas, [ES:TS:2014:3936](#), at §4); of 21/4/14 (rapp. Sebastián Sastre, [ES:TS:2014:1762](#), at §6) and of 10/9/14 (rapp. Francisco J. Orduña, [ES:TS:2014:3907](#), at 2.3).

<sup>22</sup> Courts of appeal cite Supreme Court judgments of 30/3/10 (rapp. José A. Xiol, [ES:TS:2010:1866](#), at §6A); of 29/10/14 (rapp. José R. Ferrándiz, [ES:TS:2014:5212](#), at §5); of 5/10/16 (rapp. Francisco J. Orduña, [ES:TS:2016:4273](#), at §3.3) and of 7/9/19 (rapp. José L. Seoane, [ES:TS:2019:2854](#), at §2.1).

damage for the part of the price paid for the purchase of those products that exceeds the competitive price".<sup>23</sup> Subsequently, the presumption of harm from cartels has also been upheld in the case of an envelope market-sharing cartel.<sup>24</sup> In the trucks cartel, courts have ruled that an analogous reason allows for the application of the doctrine of harm *ex re ipsa loquitur* in this case.<sup>25</sup> In any case, they recognize the defendant's right to rebut it.<sup>26</sup>

Indeed, even before assessing any of the expert reports filed by the parties, looking at the description of the context and facts on which the Commission grounded the infringement declaration,<sup>27</sup> Spanish courts' have ruled that it could be presumed that harm was produced by the trucks cartel. Based on a detailed analysis by the courts, expert reports filed by defendants, attempting to show that the cartel produced no harm, have all been found to be unconvincing.<sup>28</sup>

Also, Spanish courts have also concluded that there was a causal link between the infringing conduct of the truck manufacturers and the overcharge in trucks' purchases. Although most of the information exchanges among them referred to gross prices and gross price increases,<sup>29</sup> all courts of appeal have concluded that there is a connection with net purchase prices: increases in gross prices are unavoidably reflected in the sale (net) prices of trucks.<sup>30</sup>

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<sup>23</sup> Judgment of Audiencia de Valladolid (Sect 3) de 9/10/9 (*Nestlé v. ACOR*, rapp. José J. Sanz, [ES:APVA:2009:1185](#)).

<sup>24</sup> See judgments of Audiencia de Madrid (sect. 28) of 3/2/20 (*Cámara de comercio*, rapp. Alberto Arribas, [ES:APM:2020:2](#), at §6), of 3/2/20 (*Obras Misionales*, rapp. Gregorio Plaza, [ES:APM:2020:1](#) (¶19), and of 3/6/22 (*IFEMA*, rapp. Alberto Arribas, [ES:APM:2022:8164](#), at §4) and judgments of Audiencia de Barcelona (sect. 15) of 10/1/20 (*Misiones Salesianas*, rapp. José M<sup>a</sup> Ribelles [ES:APB:2020:58](#), at ¶¶42-43; *Cortefiel SA*, Luis Rodríguez [ES:APB:2020:59](#), at ¶42-43; *Grupo Planeta*, rapp. José M<sup>a</sup> Ribelles [ES:APB:2020:201](#), at ¶¶37-38), of 13/1/20 (*Mutua Madrileña*, rapp. Juan F. Garnica [ES:APB:2020:186](#), at ¶¶29-30; *Caixa Ontiyent*, rapp. Marta Cervera, [ES:APB:2020:184](#), at ¶¶ 37-38; *CIFDSA*, rapp. Juan F. Garnica, [ES:APB:2020:60](#), at ¶¶ 41-42; *Manos Unidas*, rapp. José M<sup>a</sup> Fernández [ES:APB:2020:185](#), at ¶¶37-38; *Bankoa*, rapp. José M<sup>a</sup> Fernández [ES:APB:2020:698](#), at ¶¶37-38), and of 7/2/22 (*PSOE*, rapp. José M<sup>a</sup> Ribelles, [ES:APB:2022:1182](#), at ¶¶41-42).

<sup>25</sup> Following the pioneering judgments of Audiencia de Valencia (sect. 9, rapp. Purificación Martorell) judgments of 16/12/19 ([ES:APV:2019:4152](#), at §10.3), of 16/12/19 ([ES:APV:2019:4152](#), at §9.3) and of 23/1/20 ([ES:APV:2020:292](#), at §8.2): "The application to the case of the *ex re ipsa* doctrine, with the caution and prudence that derives from the decisions of the First Chamber of the Supreme Court in matters close to the one at hand, but without ignoring that the scenario is suitable for its practical application".

<sup>26</sup> See judgment of Audiencia de Barcelona (sect. 15) of 17/4/20 (rapp. Marta Cervera, [ES:APB:2020:2567](#)): "This is a rebuttable presumption which, although it may favor the plaintiff, allows evidence to the contrary to be adduced by the defendant in order to deny the existence of harm suffered by the plaintiff corresponding to the overcharge it claims to have had to pay as a result of the anti-competitive infringement" (¶36).

<sup>27</sup> In particular ¶¶46-47 and 49-50 of Decision of 19/7/16 ([AT.39824 Trucks](#)), that some courts have coupled with references to Decision of 27/9/17 ([AT.39824 Trucks](#)), which is more detailed about the operation of the cartel, see judgment of Audiencia de Alicante (sect. 8) of 15/10/20 (*x v. Volvo*, rapp. Luis A. Soler, [ES:APA:2020:3024](#)).

<sup>28</sup> [Compass Lexecon](#) for DAF, IVECO, and MAN; [E.CA economics](#) for Daimler; and [KPMG](#) for Volvo/Renault. Likewise, the complementary reports [OXERA](#) drafted for the truck manufacturers (*How to assess the effects of the trucks infringement, Economic expert opinion commissioned by the OEMs*, 6/5/19 and *Addendum to the Oxera 2019 report. Clarificatory note, following the publication of the non-confidential Scania Decision*, 26/10/20) have also been deemed to be unconvincing by Spanish courts.

<sup>29</sup> Not only gross (list) prices, as net prices were also communicated occasionally, see ¶53 of Decision of 19/7/16 ([AT.39824 Trucks](#)).

<sup>30</sup> See e.g. ¶43 of judgment of Audiencia de Pontevedra (sect. 1) of 28/2/20 (*x v. MAN*, rapp. José J. Pérez, [ES:APPO:2020:471](#)): "The price resulting from the individual negotiation, which is arrived at through all the variables to be identified (the high degree of individuality of the products [...] does not seem relevant to us, when it is proven that information was also exchanged on the configuration systems of the various elements), must necessarily be based on a gross price, from which it is assumed, or which must

There is a discrepancy among the courts on the assessment of the claimants' expert reports presented to quantify the overcharge. In contrast to the limited number of experts involved on the defendants' side, given the large number of scattered small and unrelated claims, with several small law firms involved (although a few firms have filed suits on behalf of numerous claimants in different courts)<sup>31</sup>, there is divergence in the nature of the expert reports used by claimants in quantifying the overcharge which has led to different assessments by courts.<sup>32</sup>

On one hand, some claims were based on superficial reports that quantified the overcharge based on meta-studies. Courts have generally found them to be unconvincing,<sup>33</sup> yet they have not rejected the claims based on them.<sup>34</sup> Rather, courts have decided the damages award based on an estimation. As it is shown below (see *infra* §3.4.3), there are some discrepancies in the range of courts' estimates of the overcharge. On the other hand, some expert reports filed by claimants have been considered as being convincing, and that has led some courts to accept the damages claims as quantified in them.

Moreover, Spanish courts have unanimously rejected the passing-on defense in these disputes, where defendants have argued the existence of a potential passing-on to clients through an increase of the prices of services rendered to downstream clients and/or concerning the resale of the cartelized goods in the second-hand market.<sup>35</sup> The starting point of the passing-on argument is a weak one, as the defense has been used in an abstract

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*necessarily be taken as a reference, to fix discounts, and to assume the rest of the factors on which there was competition in the market. That this possibility - that gross price increases lead to an increase in the final price - is a natural effect on the market is assumed by economic theory, as explained in paragraph 6 of the defendant's expert's report, and we consider that the differentiating elements on which the opinion insists lack conviction: the fact that the gross price must be known to the customers does not seem to us to be relevant to the effect under consideration, and the fact that the price of the trucks is relatively high does not seem to us to constitute an assertion capable of destroying the above hypothesis either. Finally, the evolution of discounts - which the experts assume on the basis of the data provided by the defendant, a conclusion which must necessarily be questioned in a dispute in which the plaintiffs have not had access to the same source of evidence - does not seem to us to disprove the assumption that the final price is determined by the gross price, as the initial element in the chain of determination of the final price, and that, consequently, increases in the gross price must necessarily lead to increases in that price, since the higher the gross starting price, the greater the manufacturer's room for manoeuvre in negotiation. This is an issue that may affect the specific quantification of the damage, but it does not destroy the presumption that the final price was increased by the anti-competitive conduct, and that, if it had not been for the cartel, the prices of the trucks at destination would have been lower".*

<sup>31</sup> Prominently [CCS Abogados](#), [Garrigues](#), [Hispajuris](#), and [tugesto, reclamador](#) and [FAVE Legal](#).

<sup>32</sup> Expert reports are generally identified in the judgments, in the sample used in this article a dozen different expert reports were used by plaintiffs (namely Addvalora, Auren, Caballer, Cerro Prieto, ESI, ICID, Global Economics, LBP, NERA, PQAxis, Trouburst, University of Granada, Zunzunegui & Sobrino and Zuya).

<sup>33</sup> But see judgment of Audiencia de Badajoz of 24/3/22 (*X v. Daimler/MAN*, rapp. Juan M. Cabrera, [ES:APBA:2022:318](#)).

<sup>34</sup> But see judgments of Audiencia de Madrid (sect. 28) of 10/12/21 (*EGA v. IVECO*, rapp. Gregorio Plaza, [ES:APM:2021:14305](#)), of 28/1/22 (*X v. IVECO*, rapp. Enrique García, [ES:APM:2022:796](#)), of 31/1/22 (*CMG v. Volvo*, rapp. Fernando Caballero, [ES:APM:2022:1757](#)), and of 6/5/22 (*Central Eléctrica Sestelo y Cia SA v. MAN*, rapp. Francisco B. Villena, [ES:APM:2022:6962](#))

<sup>35</sup> Again, starting with Audiencia de Valencia (sect. 9) of 20/12/19 [ES:APV:2019:5941](#), at §8.3), among the latest, see judgment of Audiencia de Madrid (sect. 28) 8/7/22 (*X v. IVECO*, rapp. Alberto Arribas, [ES:APM:2022:8681](#), at §7). Courts have also rejected a partial passing on concerning to the potential tax benefit that the injured may have obtained in the acquisition of the cartelized vehicle. See, e.g. judgments of Audiencia de Valencia (sect. 9) of 28/2/20 (*Teinco SL v. Fiat Chrysler*, rapp. Luis Seller, [ES:APV:2020:1982](#), at §9.2) and of Audiencia de Zaragoza (sect. 5) of 20/4/21 (*Frutas Almar CB et al v. IVECO*, rapp. Alfonso M<sup>a</sup> Martínez, [ES:APZ:2021:1424](#), at §10)

and speculative manner, starting from the absolute rejection of any cartel overcharge that could be passed on, which thereby hinders a plausible calculation of a passing-on rate.<sup>36</sup>

Finally, there is consensus on including in the damages award the legal interest accrued by the overcharge from the moment the harm was caused, considering that they integrate the harm because of the monetary depreciation.<sup>37</sup> Courts have included in the award interests from the purchase of the cartelized trucks,<sup>38</sup> but some courts have considered that the calculation of interest should be different in those cases in which the vehicle was acquired through a leasing contract.<sup>39</sup> The final amount of the award bears interest at an annual rate equal to the legal interest rate plus two percentage points (interest on arrears), and is calculated from the date of the judgment until full payment.<sup>40</sup>

### 3. Descriptive data

As of the cut-off date of the study (1/10/22), forty courts of appeal (*audiencias provinciales*) have issued 1.185 final judgments relating damages caused by the trucks cartel.<sup>41</sup> They decide upon appeals against judgments issued by commercial courts (*juzgados mercantiles*), which are those competent to rule on competition law damages disputes. In Spain, jurisdiction among the commercial courts in cartel damages claims is allocated based on the place where the cartelized goods were acquired, to the extent that it is determined based on article 7.2 of the Brussels Regulation.<sup>42</sup>

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<sup>36</sup> The Supreme Court issued relevant doctrine on passing-on in a single judgment in one of the sugar cartel damages claims (§5 of Supreme Court judgment of 7/11/13, *Sugar Cartel Damages II, Nestlé v Ebro*, rapp. Rafael Sarazá, [ES:TS:2013:5819](#)) and see Francisco Marcos “Damages claims in the Spanish sugar cartel” *Journal of Antitrust Enforcement* 3/1 (2015) 219-224. In comparison with other recent cartel damages cases decided by Spanish courts in which the passing-on defense was accepted, see ¶34 of judgment of Audiencia de Barcelona (sect. 15) 7/2/22 (rapp. José M<sup>a</sup> Ribelles, [ES:APB:2022:1182](#)) and ¶54 of judgment of Audiencia de Madrid (sect. 28) 19/5/22 (*Realia v. Asefa & Scor*, rapp. M<sup>a</sup> T. Vázquez, [ES:APM:2022:8315](#)).

<sup>37</sup> Supreme Court judgment of 8/7/12 (*Sugar Cartel Damages I, Bombonera Vallisoletana SA v. ACOR*, rapp. José R. Ferrándiz, [ES:TS:2012:5462](#), at §18): “Interest is one of the means of correcting the nominalist rigours and of approaching full reparation of the damage with the satisfaction determined by the idea of real equivalence. This criterion is not alien to the caselaw (...), which has made use of it to take into account fluctuations in the purchasing value of money, including those occurring during the course of the proceedings”.

<sup>38</sup> See e.g., judgments of Audiencia de Oviedo (sect. 1) of 23/11/20 (*Transportes Gelado y Riesco SL v. MAN*, rapp. Miguel J. Covián, [ES:APO:2020:4760](#)); Audiencia de Coruña of 8/2/21 (*Gestal y López SL et al v. MAN*, rapp. Pablo González-Carrero, [ES:APC:2021:21](#), at §7) and Audiencia de Zaragoza of 30/3/21 (*Pikolín SL v. IVECO Spa*, Rapp. Alfonso M<sup>a</sup> Martínez Areso, [ES:APZ:2021:273](#), at §11).

<sup>39</sup> Some courts make 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. judgments of Audiencia de Zaragoza (sect. 5) of 20/4/21 (*Ituero96 SLU v. Renault Trucks SASU*, rapp. Alfonso M<sup>a</sup> Martínez, [ES:APZ:2021:1717](#)) and of Audiencia de Girona (sect. 1) of 14/7/22 (*X v. Volvo*, rapp. Soraya M<sup>a</sup> Callejo, [ES:APGI:2022:1002](#), at §7).

<sup>40</sup> See article 576 of CPA.

<sup>41</sup> All judgments are published in the official reporter [CENDOJ](#) briefly after they had been notified to the parties. Although there is some delay in their availability to the public, as of the cut-off date, 86,75% of the judgments used in this article were available (instead for first instance judgments the situation is different as only 20% of them are reported in the official database). In the past, I've published some accounts on the earlier decisions by the courts of appeals ([Almacén de Derecho 27/4/20](#), [28/4/20](#) and [21/1/22](#)). I thank Margarita Alonso-Graña, Lluís Bielsa, Javier Borque, Jaime Concheiro, Juan De la Cruz, Pablo Fuentes, Rafael Fuentes, Javier García de la Serrana, Pedro González, Manuel Martín, Sergio Mencher, Pedro Miralles, Manuel Sánchez, Almudena Vázquez, and some judges for sharing with me judgments which were not yet included in the official database [CENDOJ](#).

<sup>42</sup> Deciding a preliminary reference lodged by juzgado mercantil 2 de Madrid, the CJEU has clarified that the EU rules on international jurisdiction determined, not only that Spanish courts were competent, but

### 3.1. Number of judgments on appeal

The first set of appeals on truck-related claims was decided in June 2019,<sup>43</sup> but the number of judgments issued has increased dramatically in the last twelve months of the dataset -in which courts of appeal have decided on average 65 appeals monthly. Most of them have considered (and cited) in their decisions prior judgments on these disputes issued by other courts of appeal (and even foreign judgments) despite their lack of any precedential value.<sup>44</sup>

Two observations emerge from a systematic study of the large number of judgments.

First, the courts that made more efforts in deciding the early disputes have been followed by their peers, many of them largely free riding on those earlier judgments (reflected, e.g., in the extensive quoting of some of those initial judgments).<sup>45</sup>

Second, given that the cases decided by the courts are very similar in terms of fact and law, they have tried to avoid duplicating unnecessary steps that would be required if the disputes were different, by joint or collective management of proceedings that saves and minimizes costs. At the end, for each court, the judgments tend to be a replication of identical or similar prior judgments.

In general, Spanish courts have decided on appeal cases very expeditiously, on average 200 days after the first instance judgment was issued.<sup>46</sup> As of the cut-off-date, there are still ten courts of appeal that have yet to rule on appeals on truck-related claims, although these rulings are expected soon.<sup>47</sup>

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which court within Spain was territorially competent, specifically: the courts of the location where the cartelized good was acquired (where harm occurred), see ¶39 and 43 of CJEU judgment (1st Chamber) of 15/7/21 (C-30/20 *RH v. Volvo*, rapp. M. Safjan, [EU:C:2021:604](#)). However, if the cartelized goods were acquired in different places, the claimant could sue in its domicile (*Ibid.* ¶¶42 and 43).

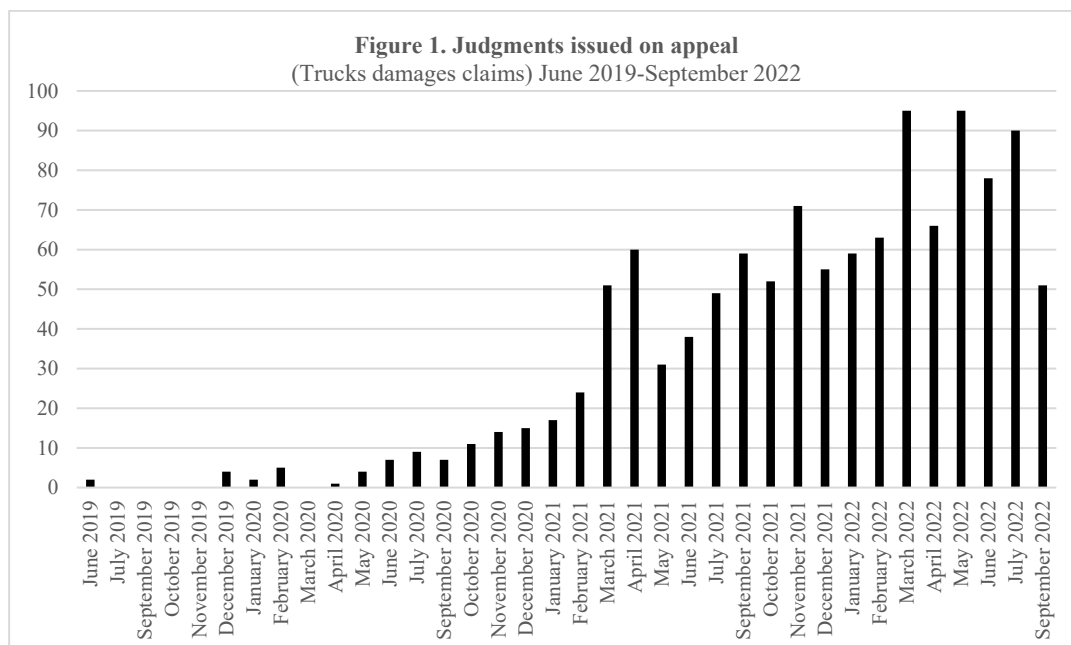
<sup>43</sup> See Judgments of Audiencia de Murcia (sect. 4, rapp. Rafael Fuentes) of 20/6/19 (*X v. MAN*, [ES:APMU:2019:1308](#)) and 27/6/19 (*Explotaciones Agrícolas Blasol, S.L. v. Volvo*, [ES:APMU:2019:1331](#)).

<sup>44</sup> That explains the interest of parties to submit those judgments to the court that might not be publicly available at the time of their decision, see [Almacén de Derecho 16/3/20](#) y [Almacén de Derecho 18/3/20](#).

<sup>45</sup> Successive judgments issued resolving trucks cartel damages claims form an "informational cascade", see Andrew. F. Daughety and 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). On first instance, the leading judgment was issued by juzgado mercantil de Valencia 3 (Eduardo Pastor) on 20/2/19 (*JAR v. MAN*, [ES:JMV:2019:34](#)). On appeal, the same can be said of judgments of 5/12/19 and 16/12/19 of Audiencia de Valencia (sect. 9) (*JAR v. MAN*, [ES:APV:2019:4150](#); *Manipulados Guerrero Sancho SL. v. Fiat Chrysler*, [ES:APV:2019:4151](#)) both penned by Purificación Martorell.

<sup>46</sup> The fastest is the Audiencia de Soria, that ruled on the first appeal in 91 days (*Copiso Soria S. Coop v. IVECO*, rapp. M<sup>a</sup> Belén Pérez-Flecha, [ES:APSO:2021:98](#)), but has decided appeals more recently in less than 2 months since the first instance judgment was delivered (see judgments of 13/12/21, *Hormisoria SL v. Renault*, [ES:APSO:2021:436](#); *PSR v. Renault*, [ES:APSO:2021:442](#), both rapp. José Manuel Pérez-Siscart)

<sup>47</sup> Audiencia Provincial de Cádiz (sect. 5); Audiencia de Castellón (sect. 3); Audiencia de Ciudad Real (sect. 1); Audiencia de Huelva (sect. 2); Audiencia de Huesca (sect. 1); Audiencia de Las Palmas (sect. 1); Audiencia de Lugo (sect. 1); Audiencia de Sevilla (sect. 5); Audiencia de Toledo (sect. 1). The first instance judgments that might be appealed to some of these courts have recently been issued [see judgment of juzgado mercantil 1 de Castellón (Beatriz M<sup>a</sup> Sarrión) of 13/6/22, *AEPSA SL et al v. MAN*, [ES:JMCS:2022:5658](#); and judgment of 24/5/22 of juzgado mercantil 2 de Las Palmas de Gran Canaria (Julio L. Wood) *Congelados Herbania S.A. v. Renault*, [ES:JMGC:2022:3100](#)], therefore, it may take some time for the appeals upon them to be decided.



Four Courts of Appeal (Valencia, Oviedo, Pontevedra and Zaragoza) account for almost half of the total decisions issued so far (**Table 2**). This reflects not only the large number of claims filed in each of those provinces, but the fact that their respective commercial courts were the ones that first decided the claims filed, and their fast handling of any appeals.

Courts of appeal are collegiate bodies formed by three magistrates, one of them acting as rapporteur of the decision.<sup>48</sup> Almost every decision -but three-<sup>49</sup> have been adopted unanimously or by the majority.

**Table 2. Number of judgments issued by courts of appeal**

| AUDIENCIA PROVINCIAL | NUMBER |                       |     |                              |             |
|----------------------|--------|-----------------------|-----|------------------------------|-------------|
| ÁLAVA (SECT. 1)      | 11     | GIRONA (SECT. 1)      | 38  | PALENCIA (SECT. 1)           | 54          |
| ALBACETE (SECT. 1)   | 8      | GRANADA (SECT. 1)     | 5   | PALMA MALLORCA (SECT.5)      | 5           |
| ALICANTE (SECT. 8)   | 44     | GUADALAJARA (SECT. 1) | 9   | PONTEVEDRA (SECT. 1)         | 129         |
| ALMERÍA (SECT. 1)    | 10     | GUIPÚZCOA (SECT. 2)   | 2   | STA. CRUZ TENERIFE (SECT. 4) | 1           |
| ÁVILA (SECT. 1)      | 18     | JAÉN (SECT. 1)        | 9   | SEGOVIA (SECT. 1)            | 2           |
| BADAJOS (SECT. 2)    | 1      | LA RIOJA (SECT. 1)    | 17  | SORIA (SECT. 1)              | 40          |
| BARCELONA (SECT. 15) | 4      | LEÓN (SECT. 1)        | 1   | TARRAGONA (SECT. 1)          | 7           |
| BURGOS (SECT. 3)     | 16     | LLEIDA (SECT. 2)      | 11  | TERUEL (SECT. 1)             | 45          |
| CÁCERES (SECT.1)     | 56     | MADRID (SECT. 28)     | 12  | VALENCIA (SECT. 9)           | 144         |
| CANTABRIA (SECT. 4)  | 1      | MÁLAGA (SECT. 6)      | 5   | VALLADOLID (SECT. 3)         | 94          |
| CÓRDOBA (SECT. 1)    | 5      | MURCIA (SECT. 4)      | 34  | VIZCAYA (SECT. 4)            | 24          |
| A CORUÑA (SECT. 4)   | 7      | NAVARRA (SEC. 1)      | 4   | ZAMORA (SECT. 1)             | 8           |
| CUENCA (SECT. 1)     | 17     | OURENSE (SECT. 1)     | 18  | ZARAGOZA (SECT. 5)           | 124         |
|                      |        | OVIEDO (SECT. 1)      | 145 | <b>TOTAL</b>                 | <b>1185</b> |

<sup>48</sup> In some Courts the rapporteur has always been the same judge, who has penned all the judgments issued until now (Jacinto J. Pérez in section 1 of Audiencia de Pontevedra; Ignacio Martín in section 3 of Audiencia de Valladolid and Rafael Fuentes in section 4 of Audiencia de Murcia).

<sup>49</sup> See Judgments of Audiencia de Vizcaya (sect. 4) of 4/6/20 (*Eulen SA v. IVECO*, rapp. Lourdes Arranz, [ES:APBI:2020:265](#), with a dissenting opinion signed by Ana B. Iracheta); of Audiencia de Zaragoza (sect. 5) of 6/4/20 (*Transportes Buera-Sancho SA v. Daimler*, rapp. Antonio L. Pastor, [ES:APZ:2022:1465](#), with a dissenting opinion signed by Alfonso M<sup>a</sup> Martínez) and of Audiencia de Madrid (sect. 28) of 9/5/22 (*Generadores Insonorizados Paulino Alonso e Hijos, SA v. Mercedes-Benz Trucks*, rapp. José I. Zarzuelo, roll 629/19, with a dissenting opinion signed by Alberto Arribas and Angel Galgo).

### 3.2. Claimants and defendants

Courts of appeal have ruled that acquirors of cartelized trucks can claim compensation regardless of how they bought it (in a direct sale, sale on instalment credit terms, through leasing or renting contracts).<sup>50</sup> 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.<sup>51</sup> The few damages claims that targeted only truck retailers independent of the manufacturers, have all been dismissed.<sup>52</sup>

Due to the breadth of the infringement, as described by the Commission in its decisions, most of the claims by any purchaser of new medium and large trucks while the cartel was in place have been awarded damages.<sup>53</sup> Damages claims on used trucks have

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<sup>50</sup> There is some controversy among Spanish Court of Appeals regarding the standing and means of proof when the claimant can show ownership of the cartelized trucks but does not keep a receipt of their exact price, either because the purchase included additional items or due the long time passed since it took place. Regarding the "extras", the CJEU has recently clarified (judgment of 1<sup>st</sup> Chamber of 1/8/22, *Landkreis Northeim v. Daimler*, rapp. A. Arabadjiev, [EU:C:2022:607](#)) that the cartel included "*all special and standard equipment and models and all factory-fitted options offered by the respective manufacturers*" (¶47), including "*all factory-fitted options (for specialised equipment)*" (¶48). On the other hand, in those cases in which the claimant does not have direct proof of the specific price paid, some courts have accepted an estimation of the price made by the claimants' expert based on the prices of similar vehicles at the time of purchase [see judgments of Audiencia de Alicante (sect. 8) of 20/5/22 (*Glem Gasóleos SL et al v. IVECO*, rapp. Antonio Soler, roll 713/21, at §6.1); judgments of Audiencia de Cáceres (sect. 1) of 6/5/21 (*Hormigones La Barca SL v. Renault*, rapp. M<sup>a</sup> Luz Charco, [ES:APCC:2021:520](#), at §3); Audiencia de Murcia (sect. 4) of 30/3/22 (*Home Depot Logística SL v. Renault*, rapp. Rafael Fuentes, [ES:APMU:2022:827](#), at §3.4); Audiencia de Palencia (sect. 1) of 12/11/21 (*MEP et al v. MAN*, Rapp. Mauricio Bugidos, [ES:APP:2021:606](#), at §4); Audiencia de Pontevedra (sect.1) (e.g., judgment of 1/3/21, *Gasóleos Tea SLU et al v. MAN*, rapp. José J. Pérez, [ES:APPO:2021:325](#), at §¶20-21); Audiencia de Teruel (sect.1) of 23/12/21 (*Alitrans SL v. IVECO*, rapp. M<sup>a</sup> Teresa Rivera, [ES:APTE:2021:170](#), at §2); Audiencia de Valencia (sect.9) of 16/11/21, *Transportes Montserrat Calero SL v. IVECO*, rapp. Purificación Martorell, [ES:APV:2021:4228](#), at §5.5); Audiencia de Zaragoza (sect. 5) of 16/4/21 (*Teletransporte Aragón SL v. MAN*, rapp. Alfonso M<sup>a</sup> Martínez [ES:APZ:2021:2495](#), at §4). Other courts of appeals have rejected this possibility (see judgement of Audiencia de Palma de Mallorca (sect. 5) de 6/4/22 (*Distribuciones Servera SA et al v. IVECO*, rapp. Mateo L. Ramón, [ES:APIB:2022:964](#), at §2), Audiencia de Pontevedra of 22/7/21 (*Otero Trans SL v. Daimler*, [ES:APPO:2021:1684](#), at ¶59); Audiencia de Valencia (sect. 9) of 12/11/22 (*Transportes Corpfran SL v. Renault*, rapp. Rafael Giménez, [ES:APV:2022:236](#), at §2); and Audiencia de Soria (sect. 1) de 13/12/22 (*Hormisoria SL v. Renault*, rapp. José M. Sánchez, [ES:APSO:2021:436](#), at §3).

<sup>51</sup> See, among many others, judgments of Audiencia de Zaragoza (sect. 5) of 30/3/21 (*Pikolín SL v. IVECO*, rapp. Alfonso M<sup>a</sup> Martínez, [ES:APZ:2021:273](#), at §4); Audiencia de Guipúzcoa (sect. 1) of 15/1/21 (*Servicios de Txingudi SA et al v. IVECO*, rapp. Beátriz Hillinger, [ES:APSS:2021:1](#), at §3) and Audiencia de Ávila (sect. 1) of 30/7/21 (*Transportes y Excavaciones González y Galán SL v. Renault*, rapp. Antonio N. Dueñas, [ES:APAV:2021:290](#), at §5).

<sup>52</sup> For example, confirming the rejection of a claim against the independent retailer that sold the truck, see judgement of Audiencia de Zaragoza (sect. 5) of 3/6/22 (*X. v. Mecánicas Hercas S.L.*, rapp. Alfonso M<sup>a</sup> Martínez, [ES:APZ:2022:1285](#)) and also judgment of juzgado mercantil 3 de Barcelona (Berta Pellicer) of 22/3/21, *JMSS v. Talleres Autóllica S.A.*, [ES:JMB:2021:1170](#)).

<sup>53</sup> Claims for damages experienced in the purchase of cartelized special trucks, such as truck-mixers and dumper trucks have generally been admitted, see judgments of Audiencia de Álava (sect. 1) of 18/6/21 (*Hormigones Gasteiz SA v. Daimler*, rapp. Íñigo Madaria, [ES:APVI:2021:609](#), at §4 *in fine*); Audiencia de Cáceres (sect. 1) of 4/5/21 (*Homydesan SA v. Daimler*, rapp. Antonio M<sup>a</sup> González, [ES:APCC:2021:451](#), at §1 *in fine*); Audiencia de Guipúzcoa (sect. 2) of 24/5/21 (*Servicios Txingudi Txingudiko Zerbitzuak SA v. Daimler*, rapp. Ana I. Moreno, [ES:APSS:2021:900](#), at §4); Audiencia de Valencia (sect. 9) of 22/2/22 (*Construcciones Franca SL v. Daimler*, rapp. Rafael Giménez, [ES:APV:2022:403](#) at §2 *in fine*); Audiencia de Zaragoza (sect.) of 18/4/22 (*Áridos y Hormigones Cortés SL v. Daimler*, rapp. Alfonso M<sup>a</sup> Martínez [ES:APZ:2022:779](#) at §4 *in fine*). Likewise, damages had been awarded to purchasers of hazardous freight trucks, see judgment of Audiencia de Burgos (sect. 3) of 26/11/21 (*MI et al v. Daimler*, rapp. Ildefonso J.

been dismissed.<sup>54</sup> In addition, as one could expect,<sup>55</sup> some discrepancy exists among courts regarding the admissibility of damages claims for trucks acquired in the post-cartel period.<sup>56</sup>

On the other hand, Spanish law does not provide a proper tool for the collectivization of claims by aggrieved businesses (class actions are only available for consumers and they have never been used successfully for antitrust damages claims)<sup>57</sup> but courts have accepted the joining and consolidation of claims of multiple plaintiffs, provided there is a link among them (same object and claim).<sup>58</sup> Although the judgments issued as to the cut-off-date show the increasing tendency of plaintiffs to join and consolidate the claims involving several claimants/trucks, the vast majority of claims are individual (65,32%) and 23% of them concern the purchase of a single truck, whereas 56% involved four or more vehicles (in 11,2% of judgments involved ten or more trucks) (see **figure 2**).<sup>59</sup>

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Barcala, [ES:APBU:2021:1141](#), at §3). Finally, it seems that the pending preliminary ruling to the CJEU [C-285/21](#), requested by Audiencia Pontevedra (sect. 1) on 23/4/21 (*Epifanio Campo SL v. Renault*, [ES:APPO:2021:308A](#)) regarding damages claims for special vehicles has been rendered moot after CJEU judgment of 1/8/22 (supra note 51).

<sup>54</sup> See judgment of Audiencia de Álava (sect. 1) of 21/1/22 (*ECAS v. Renault*, rapp. Íñigo Elizburu, [ES:APVI:2022:246](#), at §3).

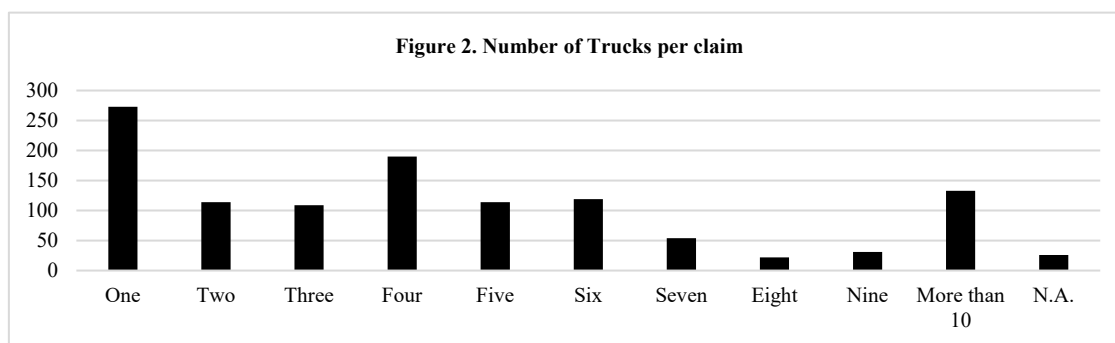
<sup>55</sup> See H. Peter Boswijk, Maurice J.G. Bun y Martin P. Schinkel “Cartel Dating” [J. Applied Econ. 2018: 1](#) (“The formal cartel dates need not coincide with the point(s) in time at which the anticompetitive effects produced by the violation began or ended. The collusive agreements may take a while take effect, become ineffective its members ultimately disband, or rather have lasting effects-including unilateral incentives for former cartelists to keep posted prices up in order to mask their conspiracy...”); Joseph E. Harrington Jr. “Postcartel pricing during litigation” [J. Industrial Econ. 52 \(2004\) 517-533](#) and Can Erutku “Testing post-cartel pricing during litigation” [Econ. Letters 116 \(2012\) 339-342](#).

<sup>56</sup> Among the Courts of Appeals awarding damages for trucks purchased in the postcartel period are Audiencia de Cuenca (sect. 1) (e.g., judgment of 14/12/21, *Transportes Vidal Algarra SL v. IVECO*, rapp. José E. Martínez, [ES:APCU:2021:575](#), at §2.1); Audiencia de Murcia (sect. 4) (e.g., judgment of 25/3/21, *Dumatrade SL et al. v. MAN*, rapp. Rafael Fuentes, [ES:APMU:2021:650](#), at §5); Audiencia de Palencia (sect.1) (e.g., judgment of 26/9/22, *Gohetrans Logística SL et al v. DAF*, rapp. Ignacio-Javier Raffols, roll 60/22, at §7) and Audiencia de Valladolid (sect. 1) (e.g. judgment of 28/9/21, *Núñez Martos SL v. IVECO*, rapp. Ignacio Martín, [ES:APVA:2021:1391](#)). On the other hand, among those that have dismissed claims for trucks purchased after 18/01/11, are Audiencia de Pontevedra (sect.1) (e.g., judgment of 1/3/21, *Paradanta Oil SL v. Renault*, rapp. José J. Pérez, [ES:APPO:2021:325](#), at ¶¶18-20), Teruel (sect. 1) (e.g. judgment of 22/9/21, *Translop SL v. Renault*, rapp. M<sup>a</sup> D. Cerdá, [ES:APTE:2021:134](#), at §II *in fine*), Valencia (sect. 9) (e.g. judgment of 24/5/22, *Derribos del Mediterráneo SL et al v. IVECO*, rapp. Rafael Giménez, [ES:APV:2022:1503](#)); Zaragoza (sect. 5) (e.g. judgment of 27/12/21, *S.A. de Transportes Aragoneses v. Renault*, rapp. Juan C. Fernández, [ES:APZ:2021:2854](#), at §7) and Madrid (sect. 28) (e.g. judgment of 8/7/22, *X v. IVECO*, rapp. Alberto Arribas, [ES:APM:2022:8681](#), at §6). However, Spanish Courts have already considered when ruling on the damages claims on the envelopes' cartel that the effects of the cartel could be extended 6 to 12 months after the "official" end of the cartel, see judgement of Audiencia de Madrid of 3/2/20 (of 3/2/20 (*Cámara de comercio*, rapp. Alberto Arribas, [ES:APM:2020:2](#), at §7 *in fine*).

<sup>57</sup> See article 11 of CPA and Marcos [GCLR 2013/4: 181](#). See also Miguel S. Ferro "Consumer antitrust private enforcement in Europe: as complete a survey as possible (extended version)", Working Paper 19/7/22, at §IV. 5.

<sup>58</sup> Trucks cartel damages claims are based on the same underlying facts (infringement conduct), see judgment of Supreme Court of 21/10/15 (*Air Complet SL et al v. Bankinter*, rapp. Rafael Sarazá, [ES:TS:2015:4270](#)). See [Almacén de Derecho 31/8/19](#).

<sup>59</sup> On appeal the largest damages' claims (in number of cartelized trucks) had been: 108 vehicles in judgment of Audiencia de Valencia (sect. 9) of 23/1/20 (*Llácer y Navarro SL v. Volvo/Renault*, rapp. Purificación Martorell, [ES:APV:2020:292](#)), 143 trucks in judgment of Audiencia de Zaragoza (sect. 5) of 29/1/21 (*Grupo Carreras Logístico SA v. Renault*, rapp. Antonio L. Pastor, roll 51/21), 133 trucks in judgment of Audiencia de Zaragoza (sect. 5) of 27/4/22 (*Carreras Grupo logístico SA v. IVECO*, rapp. Antonio L. Pastor, roll 509/21), 204 trucks in judgment of Audiencia de Zaragoza (sect. 5) of 23/9/22 (*Grupo Logístico Carreras SA v. Daimler*, rapp. Antonio L. Pastor, roll 617/21) and 123 vehicles in



On the defendant's side, given that in the trucks cartel there were several co-infringers, claimants' suits could target any of them, as joint and several liabilities for cartel damages have been affirmed by Spanish courts.<sup>60</sup> But they have expressly ruled out defendant's counterclaim of other co-infringers to be brought to the damages' proceedings.<sup>61</sup> Most actions have targeted the company that manufactured the brand of the cartelized truck at stake,<sup>62</sup> and claims addressed to several manufacturers have been rare.<sup>63</sup> In general, each manufacturer has been a party to a number of judgments on appeal approximately reflecting their respective market share while the cartel was in place (see *infra* Table 5).<sup>64</sup>

In the early days of the trucks cartel damages litigation, most of the claims (not necessarily because of strategic planning) were addressed to the Spanish subsidiaries of

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judgment of Audiencia de Cuenca of 10/3/22 (*Transportes Iniestenses SA v. IVECO*, rapp. José E. Martínez, [ES:APCU:2022:109](#)).

<sup>60</sup> In the Courts of Appeals' judgments deciding damages' claims in the envelopes' cartel see *supra* note 25.

<sup>61</sup> See Orders of juzgado mercantil 5 de Madrid (Moisés Guillamón) of 26/10/21 (*Acciona Construcción SA et al v. IVECO/Daimler*, [ES:JMM:2021:3740A](#)); order of juzgado mercantil 3 de Valencia (Eduardo Pastor) of 10/5/21 (*Tráficos Manuel Ferrer et al v. Daimler*, [ES:JMV:2021:681A](#)) and judgment of juzgado mercantil 1 de Donosti (Pedro J. Malagón) of 6/11/20 (*Igarsanz Europea SL et al v. Daimler*, [ES:JMSS:2020:4121](#)).

<sup>62</sup> But see judgements of Audiencia de Valencia (sect.9) of 26/1/21 (*FMC v. Daimler*, rapp. Purificación Martorell, [ES:APV:2021:170](#)) and of Audiencia de Girona (Sect. 1) of 20/4/22 (*Excavacions y Llenlles Pages SL v. Daimler*, rapp. Nuria Lefort, [ES:APGI:2022:533](#)), affirming both without further comment the liability of Daimler for some IVECO trucks bought by the claimants. See also judgment of Audiencia de Valencia (sect.9) of 1/3/22 (*Juan Martínez Rosaleny v. DAF*, rapp. Rosa M<sup>a</sup> Andrés, [ES:APV:2022:676](#)) and 2/6/22 (*Aldatrans SL et al v. DAF*, rapp. Rafael Giménez [ES:APV:2022:2148](#)) declaring DAF liable for the damages of MAN and Volvo trucks.

<sup>63</sup> But see, for example, judgments of Audiencia de Badajoz (sect. 2) of 24/3/22 (*X v. Daimler/MAN*, rapp. Juan M. Cabrera, [ES:APBA:2022:318](#)); of Audiencia de Pontevedra (sec. 1, rapp. José J. Pérez) of 31/5/21 (*Transportes Cabalar v. DAF/IVECO*, [ES:APPO:2021:1175](#)); of 22/7/21 (*Celso Tome SL v. MAN/IVECO*, [ES:APPO:2021:1665](#)); of 16/3/21 (*Magic Invest Europa SA v. IVECO/Volvo*, [ES:APPO:2022:445](#)); of 29/4/22 (*Freimar Porriño SL v. Renault & MAN*, [ES:APPO:2022:1164](#)); and of 6/5/22 (*Transportes Severo Piñeiro SL v. MAN/Volvo/DAF*, [ES:APPO:2022:1342](#)); of Audiencia de Oviedo (sect. 1) of 10/6/22 (*Honorio Vega SL v. Renault/DAF*, rapp. Miguel J. Covián, [ES:APO:2022:2134](#)); of Audiencia de Palencia (sect. 1) of 15/7/22 (*Gil Martín S.L. v. DAF/Daimler/Volvo*, rapp. Ignacio Segoviano, [ES:APP:2022:385](#)); and of Audiencia de León (sect. 1) of 19/9/22 (*Z v. DAF/ Volvo*, MP: Ana del Ser, [ES:APLE:2022:1005](#)).

<sup>64</sup> In the last five-year period of the cartel the average market share of each manufacturer: DAF 8,4%, Daimler 15,6%, IVECO 25%, MAN 14,8%, Volvo/Renault 27,9% (source Anuario Estadístico General, Dirección General de Tráfico).

the truck manufacturers.<sup>65</sup> Initial claims targeting the subsidiaries were rejected,<sup>66</sup> 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 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 held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.*"<sup>67</sup> After the CJEU judgment, most courts of appeal have accepted claims against the subsidiaries of truck manufacturers with no additional requirements of proof regarding the "specific link" indicated by the CJEU.<sup>68</sup> Nonetheless, some of them continue rejecting 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.<sup>69</sup>

### 3.3. Outcome of the appeals

Most of the decisions on appeal favor claimants, who were awarded damages in 92% of the cases (**Figure 3**). As a general rule, the legal costs are paid by the losing party (unless the court deems that the claim presents serious legal or factual complexities).<sup>70</sup> Yet, because most of the trucks cartel damages claims were only partially accepted, generally plaintiffs did not recover litigation costs.

Given the hefty costs that are 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 of pursuing their claims. This concern underlies the first question of a preliminary reference (C-312/21) before the CJEU on whether this squares with the right of aggrieved parties to obtain full compensation and with the

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<sup>65</sup> 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](#)).

<sup>66</sup> Despite the positive initial prospects suggested by juzgado mercantil 3 de Valencia (Eduardo Pastor) judgment of 20/2/19 ([ES:JMV:2019:34](#)), quashed by Audiencia de Valencia (sect. 9) judgment of 15/12/19 (*JAR v. MAN*, rapp. Purificación Martorell, [ES:APV:2019:4150](#)). More than 20% of the initial claims were rejected because of the nature of the defendant.

<sup>67</sup> ¶51 of CJEU judgment (Grand Chamber) of 6/10/21, C-882/19 (*Sumal v. Mercedes*, rapp. D. Šváby, [EU:C:2021:800](#)).

<sup>68</sup> Indeed, see Audiencia de Barcelona (sect. 15) that lodged the preliminary reference (judgment of 27/1/22, *Sumal v. Mercedes*, rapp. Juan F. Garnica, [ES:APB:2022:738](#)), and also the Audiencia de Madrid (sect.28) in six judgments of 10/12/21 (*EGA v. IVECO España SL*, rapp. Gregorio Plaza, [ES:APM:2021:14305](#)), of 31/1/22 (*CMG v. Volvo*, rapp. Fernando Caballero, [ES:APM:2022:1757](#)), of 6/5/22 (*Generadores Insonorizados Paulino Alonso e Hijos SA v. Mercedes*, rapp. José I. Zarzuelo, roll 628/19); of 9/5/22 (*Central Eletrica Sestelo y Cia SA v. MAN*, Rapp. Francisco B. Villena, [ES:APM:2022:6962](#)); of 23/5/22 (*Gruas Domingo Garcia SL v. IVECO*, Rapp. Francisco B. Villena, [ES:APM:2022:8316](#)); and of 8/7/22 (*X v. IVECO*, rapp. Alberto Arribas, [ES:APM:2022:8681](#), at §10).

<sup>69</sup> See judgments of Audiencia de Jaén (sect. 1) of 27/10/21 (*X v. Volvo*, rapp. Mónica Carvia, [ES:APJ:2021:1307](#); of 22/11/21, *M v. Volvo*, rapp. Nuria Osuna, [ES:APJ:2121:1858](#)); of 24/11/21 (*L v. Volvo*, rapp. Antonio Carrascosa, [ES:APJ:2021:1522](#); of 25/11/21, *Z v. Volvo*, rapp. Nuria Osuna, [ES:APJ:2021:1530](#)); of 16/12/21 (*R v. Scania Hispania*, rapp. Nuria Osuna, [ES:APJ:2021:1855](#)) and and also judgment of Audiencia de Madrid (sect. 28) of 1/3/22 (*Y v. Volvo*, rapp. José I. Zarzuelo, [ES:APM:2022:3791](#)).

<sup>70</sup> Article 394 of the CPA (capped at one third of the total value of the action). In case of partial acceptance/rejection of the claim, each party will bear its own costs and the common costs will be divided equally.

principle of effectiveness.<sup>71</sup> In her opinion on that case, AG Juliane Kokott has considered that such cost regime “*is not compatible with the principle of effectiveness where, in the event that the claimant’s being unsuccessful in part is due to excessive difficulties in quantifying the harm or to the impossibility of such quantification, that principle results in the claimant nevertheless being required to bear his or her own costs and half of the common costs*” and “*Article 101 TFEU, in conjunction with the principle of effectiveness, [...] requires that that legislation can be interpreted in conformity with EU law as meaning that, where the claimant has been partially unsuccessful because it is excessively difficult or practically impossible to quantify the harm, the defendant is to bear all the costs or, depending on the circumstances of the case, may be required to bear at least a reasonable portion of the claimant’s costs*”<sup>72</sup>. Some first-instance courts have already anticipated that solution and have started requiring defendants to pay adverse costs even with partial damages awards,<sup>73</sup> but some courts of appeal refrain from doing so even when they award full damages to claimants.<sup>74</sup> This is probably explained by the reigning disparities among courts of appeal on assessing claimants’ expert reports until the Supreme Court rules on the issue.

The very rare rejections on appeal (6%) were based on the claims being time-barred, the exclusion of liability of subsidiaries,<sup>75</sup> the lack of standing of the plaintiff and the absence of probative effort by the claimant.<sup>76</sup> Most of the rejections are concentrated in a single court of appeal, that has delivered more than half of the dismissals: section 9 of Audiencia de Valencia (37)<sup>77</sup>. The rejection rate in the rest of the courts of appeal is very low (twenty-two of them have not rejected a claim yet).<sup>78</sup>

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<sup>71</sup> See ¶¶22-27 of Order of juzgado de lo mercantil 3 of Valencia (Eduardo Pastor) of 10/5/21 ([ES:JMV:2021:681A](#), *Tráficos Manuel Ferrer, S.L. et al v. Daimler*, C-312/21).

<sup>72</sup> ¶¶72 and 81 ([EU:C:2022:712](#)).

<sup>73</sup> See, e.g., judgments of Juzgado mercantil 2 de Madrid (Andrés Sánchez) of 16/6/21 (*Hormigones Pirenaicos SL v. Daimler*, PO1499/18, at ¶68); juzgado mercantil 1 de Badajoz (Zaira González) of 22/3/22 (Julio Arnaiz SL v. Daimler, [ES:JMBA:2022:4583](#), at §8); juzgado de primera instancia de Ciudad Real 4 (Carmelo González) of 8/2/22 (*Sondeos Toledo SL et al v. MAN*, PO349/19, at §8); juzgado mercantil 1 de Alicante (Gustavo A. Martín) of 4/3/22 (*PJP et al v. IVECO*, [ES:JMA:2022:2175](#), at §14); juzgado mercantil 12 de Barcelona (Jose M<sup>a</sup> Fernández Seijo) of 7/7/22 (*Claret SL v. MAN*, [ES:JMB:2022:7755](#), at 12); juzgado mercantil 11 de Barcelona (Jose M<sup>a</sup> Fernández Seijo) of 15/2/22 (*Pere Ventura Palet v. Volvo*, [ES:JMB:2022:1575](#), at §9); juzgado mercantil 10 de Barcelona (Jose M<sup>a</sup> Fernández Seijo) of 29/11/21 (V v. IVECO, [ES:JMB:2021:13100](#), at §9) and juzgado de primera instancia 2 de Lugo (Aurelia Bello) of 27/1/22 (*Transpenor SLU v. DAF*, PO793/20, at §6).

<sup>74</sup> That’s the case of Audiencia de Zaragoza (sect. 5), Audiencia de Lleida (sect. 1) and Audiencia de Segovia (sect. 1).

<sup>75</sup> See *supra* footnote 70.

<sup>76</sup> Absence of probative effort when an expert report is not presented, see judgments of Audiencia de Pontevedra (sect. 1) of 31/5/21 (*Transportes Cabalar SA v. IVECO/DAF*, [ES:APPO:2021:1175](#)) and 25/6/21 (*Grupo de Transportes Javier Estévez SL v. IVECO*, [ES:APPO:2021:1275](#)), or when the expert report is considered not such, see judgments of Audiencia de Madrid (sect. 28) of 10/12/21 (*EGA et al v. IVECO*, rapp. Gregorio Plaza, [ES:APM:2021:14305](#)), of 28/1/22 (*VGE v. IVECO*, rapp. Enrique García, [ES:APM:2022:796](#)); of 31/1/22 (*CMG v. Volvo*, rapp. Fernando Caballero, [ES:APM:2022:1757](#)); of 6/5/22 (*Central Eléctrica Sestelo y Compañía SA v. Man*, rapp. Francisco B. Villena, [ES:APM:2022:6962](#)) and of 9/9/22 (*MASL v. MAN*, rapp. Angel Gago, roll 829/21). They all dismiss the claim based on a popular pseudo-report that quantifies the harm following meta-studies of harm caused by cartels.

<sup>77</sup> This figure is unrelated to the number of judgments issued by the Audiencia de Valencia (sect. 9), even considering that it is the court that has decided the largest number of appeals, it delivers a striking number of dismissals.

<sup>78</sup> One quarter of the judgments of the Audiencia de Valencia reject the claims (25,7%), although the highest rejection rate is 77,8% by Audiencia de Jaén (sect. 1) concerning claims against the truck manufacturers’ subsidiaries (see *supra* footnote 67).

In only one percent of all judgments have the courts of appeal annulled the proceedings due to errors committed in the first instance on the summoning of defendants,<sup>79</sup> breach of due process,<sup>80</sup> or due to incompatible rulings on first instance.<sup>81</sup>

The main ground for dismissal (also at first instance) was the time-barring of the claims (**Figure 4**). Spanish law prior to the Damages Directive had one of the shortest limitation periods for damages claims in the EU (1 year), so it was foreseeable that this would be one of the main sources of disputes.<sup>82</sup> Defendants have argued that the starting date for the limitation period was the announcement date of the Decision by the Commission (19/7/16), but Spanish courts have considered that the relevant date for that purpose is the publication date of the non-confidential text of the Decision (6/4/17).<sup>83</sup> Nonetheless, the judgments on appeal rejecting claims on this basis refer either to claimants that filed their claims after that date, mistakes in giving due notice to defendants or claim notices being sent to the infringers' subsidiaries.<sup>84</sup>

The recent CJEU judgment of 22/6/22 (C-267/20) has further confirmed that the publication date is the relevant date for the starting of the limitation period,<sup>85</sup> at least in what concerns the first trucks cartel Decision, which had already become *res judicata* by the time it was published. But it has complicated matters further, as it has introduced doubts about the possible application of the new 5-year limitation period to those claims

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<sup>79</sup> See judgments of Audiencia de Murcia (sect. 4) of 27/6/19 (rapp. Rafael Fuentes, [ES:APMU:2019:1331](#)); Audiencia de Orense (sect. 1) of 15/10/21 (rapp. Ricardo Pailos, [ES:APOU:2021:685](#)); Audiencia de Girona (sect. 1) of 28/1/22 (rapp. Fernando Herrero, [ES:APGI:2022:119](#)); Audiencia de Valencia (sect. 9) of 2/3/21 (rapp. Antonio Pedreira, [ES:APV:2021:849](#)); Audiencia de Valladolid (sect. 3, rapp. Ignacio Martín) of 17/3/22 ([ES:APVA:2022:436](#), [ES:APVA:2022:437](#), [ES:APVA:2022:439](#)) and of 3/5/22 ([ES:APVA:2022:693](#)); and Audiencia de Madrid (sect. 28) of 15/7/22 (*Pizarras Santa Cruz SL v. Daimler AG*, rapp. Gregorio Plaza, [ES:APM:2022:11370](#)). Some of these conflicts even have reached the Constitutional Court, see judgments 91/22 of 11/7/22 (*IVECO v. Casa Severón SL*, rapp. Antonio Narváez, [BOE-TC195 of 15/8/22](#)) and 179/21 of 25/10/21 (*IVECO v. Karin SL*, rapp. Encarnación Roca, [BOE-TC 282 25/11/21](#)).

<sup>80</sup> See judgment of Audiencia de Pontevedra (sect. 1) of 5/7/22 (*Elmar Frozen Food SLU v. AB Volvo*, rapp. José J. Pérez, [ES:APPO:2022:1918](#)) and five judgments of Audiencia de Vizcaya (sect. 4, rapp. Ana Belén Iracheta) of 29/7/22 (*Zanjadoras y Desmontes SA v. MAN*, roll 470/22; *Transageve SL et al v. Renault*, roll 472/22; *Hormigoneras Reunidas SL v. Daimler*, roll 632/22; *Carnes Erdella SL v. MAN*, roll 637/22; and *Autoescuela Basurto SL et al v. MAN*, roll 647/22). All these annulments concern the stream of first instance judgments issued by juzgado mercantil 1 of Bilbao (Marcos F. Bermudez) after running a collective/joint proceeding for all the trucks damages claims filed in this court (all resulting in partial awards of damages of 15% of purchase price of trucks), see e.g., judgments of 28/3/22 (*Anaidel SL et al v. Daimler*, [ES:JMBI:2022:4884](#)); 25/3/22 (*Autoescuela Basurto SL et al v. MAN*, [ES:JMBI:2022:4886](#)); 17/2/22 (*Transageve SL et al v. Renault*, [ES:JMBI:2022:2221](#)); 15/2/22 (*Zanjadoras y Desmontes SA v. MAN*, [ES:JMBI:2022:2219](#)); and of 14/2/22 (*Hormigoneras Reunidas SL v. Daimler*, [ES:JMBI:2022:2217](#)).

<sup>81</sup> See judgments of Audiencia de Palencia (sect. 1) of 18/5/22 (*Bello López Venta de Baños SL v. Volvo*, rapp. Mauricio Bugidos, [ES:APP:2022:288](#)) and 8/6/22 (*Y v. Volvo*, rapp. Ignacio Segoviano, [ES:APP:2022:297](#)).

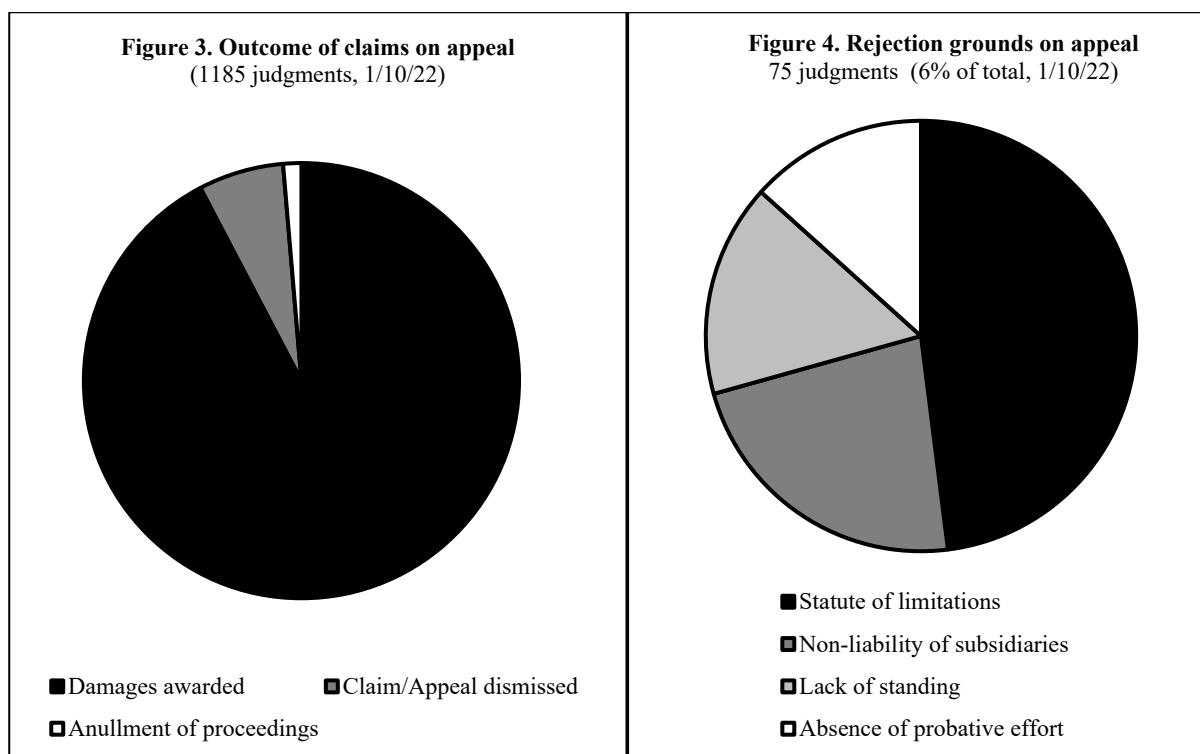
<sup>82</sup> See [Almacén de Derecho 28/6/19](#) (although the interruption of the limitation period is fairly easy, through any means of extrajudicial communication to the defendant).

<sup>83</sup> See also ¶¶125-135 AG Rantos of 28/10/21 in C-267/20 ([EU:C:2021:884](#)).

<sup>84</sup> There may be some difficulty in accurately classifying the causes of rejection, as there could be an overlap in the claims that were deemed time-barred because they were sent in time but addressed to the subsidiary of the infringer. The interruption of the limitation period in the subsidiary has been accepted by Audiencia de Pontevedra from its judgment on 29/6/60, *Sanchez Álvarez SL v. MAN*, [ES:APPO:2020:1243](#) (see [Almacén de Derecho 27/8/20](#)) and this position has been followed by other courts of appeal. On the contrary, Audiencia de Valencia has rejected this possibility (see, for example, judgment of 23/9/21, Rapp: Rosa M<sup>a</sup> Andrés, *Vicente Subiela SL v. Daimler*, [ES:APV:2021:3470](#)). In my opinion, this position is no longer tenable after the CJEU judgment 6/10/21 (C-882/19 *Sumal*, MP: D. Šváby, [EU:C:2021:800](#)).

<sup>85</sup> See ¶¶71-72 of CJEU Judgment of 22/6/22 (C-267/20, *RM v. Volvo/DAF*, [EU:C:2022:494](#)).

whose limitation period for bringing them under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the Damages Directive and even has continued after the entry into force of the national transposition rules.



### 3.3.1. Outcome: courts of appeal vs. first instance

The dataset provides also relevant information concerning the evolution of caselaw on trucks damages litigation as courts of appeal have set their criteria and eventually courts of first instance on their territories have followed them.

Appeal courts tend to confirm the first instance judgment (52%), but they have also overturned the decision at the first instance -which either dismissed the claim or awarded a smaller amount- (24%). In some cases, appeal courts have also reduced the damages awarded at the first instance or rejected claims that were accepted therein (22%).

Most of the dismissals of claims on appeal follow the prior rejection at the first instance. Only one quarter of dismissals on appeal concern claims that initially were accepted at the first instance.<sup>86</sup> However, it should be underlined that often Spanish courts of appeal have revoked a significant number of prior dismissals at the first instance, converting them to full or partial damages awards (11,8% of judgments in dataset of the study).<sup>87</sup>

The legal uncertainty surrounding the assessment of the validity of the claimants' expert reports and the varying criteria followed in estimating harm is reflected in the split of the average confirmation rate at 50%. Per court, the confirmation rates on appeal vary depending on how the first instance courts decided the first claims and how they have

<sup>86</sup> 55,5% of them by the Audiencia de Valencia (sect. 9), mostly for the claims considered time barred.

<sup>87</sup> Most of these correcting judgments refer to claims that were found time-barred at first instance (70.7%). Audiencia de Zaragoza (sec. 5) is by far the one that has revoked more first instance dismissals (67); almost half of all the claims resurrected by all courts of appeal, followed by Audiencia de Valencia (sect. 9), Audiencia de Ávila (sect. 1) and Audiencia de Oviedo (sect. 1).

adapted to the criteria and standards adopted by the respective courts of appeal. This shows how much legal certainty there is in each territory, but the measure is only relevant when many claims have been decided, preferably involving several claimants' expert reports. Among the courts of appeal that have issued more judgments, both Audiencia de Zaragoza (sect. 5) and Audiencia de Oviedo (sect. 1) show very low confirmation rates (in comparison, e.g. with sect. 9 of Audiencia de Valencia or sect. 1 of Audiencia de Pontevedra), as some of the first instance courts there continue to issue judgments which have not adjusted to take account of the criteria previously set by the respective court of appeal.<sup>88</sup>

**Table 4. Confirmation rates on appeal (only courts that have issued at least 10 judgments)**  
(% of judgments/per court)

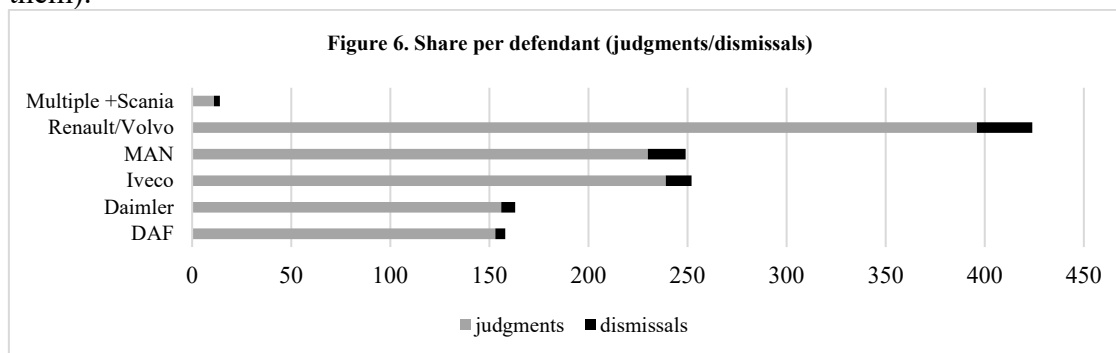
| AUDIENCIA PROVINCIAL | CONFIRM | REDUCE | INCREASE |
|----------------------|---------|--------|----------|
| ÁLAVA (SECT. 1)      | 100     | 0      | 0        |
| ALICANTE (SECT. 8)   | 11,4    | 4,5    | 84,1     |
| ALMERÍA (SECT. 1)    | 10      | 10     | 80       |
| ÁVILA (SECT. 1)      | 16,7    | 0      | 83,3     |
| BURGOS (SECT. 3)     | 25      | 0      | 75       |
| CÁCERES (SECT.1)     | 98,2    | 0      | 1,8      |
| CUENCA (SECT. 1)     | 17,6    | 0      | 82       |
| GIRONA (SECT. 1)     | 39,5    | 39,5   | 18,4     |
| LA RIOJA (SECT. 1)   | 82,3    | 17,5   | 0        |
| LLEIDA (SECT. 2)     | 0       | 0      | 100      |

|                      |       |      |      |
|----------------------|-------|------|------|
| MADRID (SECT. 28)    | 58,3  | 16,6 | 16,6 |
| MURCIA (SECT. 4)     | 97    | 0    | 0    |
| OURENSE (SECT. 1)    | 0     | 94,4 | 0    |
| OVIEDO (SECT. 1)     | 22,1  | 64,1 | 13,8 |
| PALENCIA (SECT. 1)   | 92,6  | 0    | 3,7  |
| PONTEVEDRA (SECT. 1) | 76,7  | 16,3 | 6,2  |
| SORIA (SECT. 1)      | 60    | 40   | 0    |
| TERUEL (SECT. 1)     | 2,2   | 95,5 | 2,2  |
| VALENCIA (SECT. 9)   | 70,1  | 12,5 | 16,6 |
| VALLADOLID (SECT. 3) | 85,11 | 1,1  | 9,6  |
| VIZCAYA (SECT. 4)    | 62,5  | 12,5 | 4,2  |
| ZARAGOZA (SECT. 5)   | 19,3  | 2,4  | 78,2 |

**Notes:** Variations in the calculation of interest rates are considered confirmations in this table. Revocation refers only to the amount awarded and not to a change in the cause of rejection. 17 judgments annulling proceedings are not included in the Table.

### 3.3.2. Outcome per manufacturer

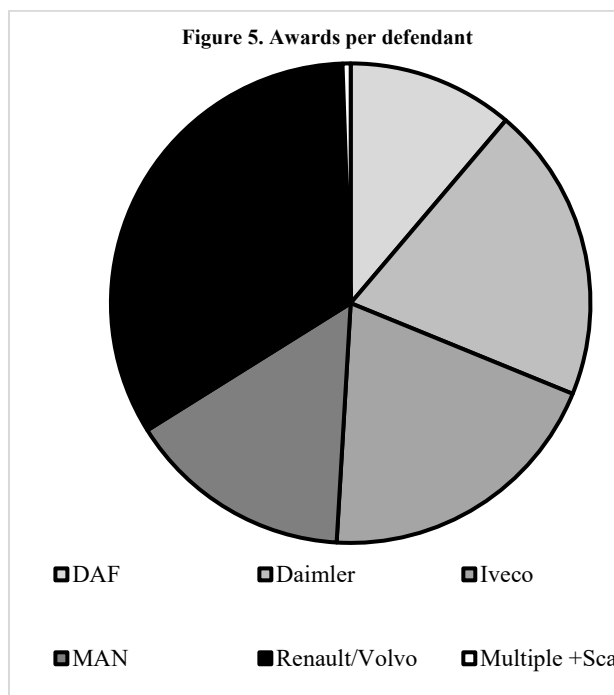
Renault/Volvo is the truck manufacturer with the largest number of judgments against it, followed by Iveco, MAN, Daimler, and DAF (see **Table 5**). Their share of judgments roughly coincides with their market share in Spain in the last period of the cartel (although MAN and DAF have a slightly higher number of judgments against them).<sup>89</sup>



A rough estimation of the total damages awarded on appeal exceeds €69 million for the claims concerning the purchase of 7073 trucks (see **Table 5**). Renault/Volvo, who is the defendant in a third of the cases, has the largest share of the total awards in the amount of Euros (and, correspondingly, also the largest number of trucks).

<sup>88</sup> That's notably the case of Juzgado mercantil 2 de Zaragoza (M<sup>a</sup> del Carmen Villellas, all her judgments -but one- had been revoked on appeal), Juzgado mercantil 1 de Oviedo (Alfonso Muñoz, all his judgments had been overturned on appeal), Juzgado mercantil 2 de Oviedo (Miguel A. Álvarez-Linera, all his judgments had been quashed on appeal). All these judges keep issuing judgments in contradiction with prior decisions of their superior regarding the same parties and expert reports.

<sup>89</sup> See *supra* footnote 65.

**Table 5. Awards per defendant**

| MANUFACTURER    | AMOUNT      | TRUCKS  |
|-----------------|-------------|---------|
| DAF             | 7734538,52  | 751     |
| DAIMLER         | 13793862,26 | 1076    |
| IVECO           | 13650679,92 | 1287    |
| MAN             | 10480585,21 | 1181    |
| RENAULT/VOLVO   | 23029927,83 | 2632,00 |
| MULTIPLE+SCANIA | 376216,28   | 146,00  |
| TOTAL           | 69065810,02 | 7073    |

**Note:** The final amount is rough as the number of trucks and/or the amount of award is not known in 2% of judgments, in addition, only some awards already include in the calculation of the interests whilst the majority do not.

### 3.4. Damages Awards

Victims of the truck manufacturers cartel claim compensation for the overcharge paid in relation to the purchase of cartelized trucks.<sup>90</sup> Therefore, the amount of damages claimed depends on the price paid for the trucks and their quantification by the claimants' expert reports.

On appeal, 28% of the judgments give all damages requested, fully accepting claimants' quantification of the overcharge (see **Figure 6** and **Table 6**). However, half of the courts of appeal have found the same reports not to be convincing, and they have decided the amount of the award on a discretionary basis, following different patterns and based on various criteria (*infra* §3.4.3). Damages awards may depend on the court deciding the case and the expert report used by the claimant to quantify the harm.

**Table 6. Type of decision by court of appeal (% of judgments/per court)**

| COURT OF APPEAL       | FULL ACCEPTANCE | PARTIAL ACCEPTANCE | DISMISSAL |
|-----------------------|-----------------|--------------------|-----------|
| ÁLAVA (SECT. 1)       | 81,8            | 9,1                | 9,1       |
| ALBACETE (SECT. 1)    | 12,5            | 75                 | 12,5      |
| ALICANTE (SECT. 8)    | 0               | 100                | 0         |
| ALMERÍA (SECT. 1)     | 0               | 90                 | 10        |
| ÁVILA (SECT. 1)       | 100             | 0                  | 0         |
| BADAJOS (SECT. 2)     | 100             | 0                  | 0         |
| BARCELONA (SECT. 15)  | 0               | 100                | 0         |
| BURGOS (SECT. 3)      | 68,7            | 31,2               | 0         |
| CÁCERES (SECT.1)      | 100             | 0                  | 0         |
| CANTABRIA (SECT. 4)   | 0               | 100                | 0         |
| CÓRDOBA (SECT. 1)     | 0               | 100                | 0         |
| A CORUÑA (SECT. 4)    | 0               | 100                | 0         |
| CUENCA (SECT. 1)      | 88,2            | 11,8               | 0         |
| GIRONA (SECT. 1)      | 0               | 97,4               | 0         |
| GRANADA (SECT. 1)     | 0               | 100                | 0         |
| GUADALAJARA (SECT. 1) | 0               | 88,9               | 11,1      |

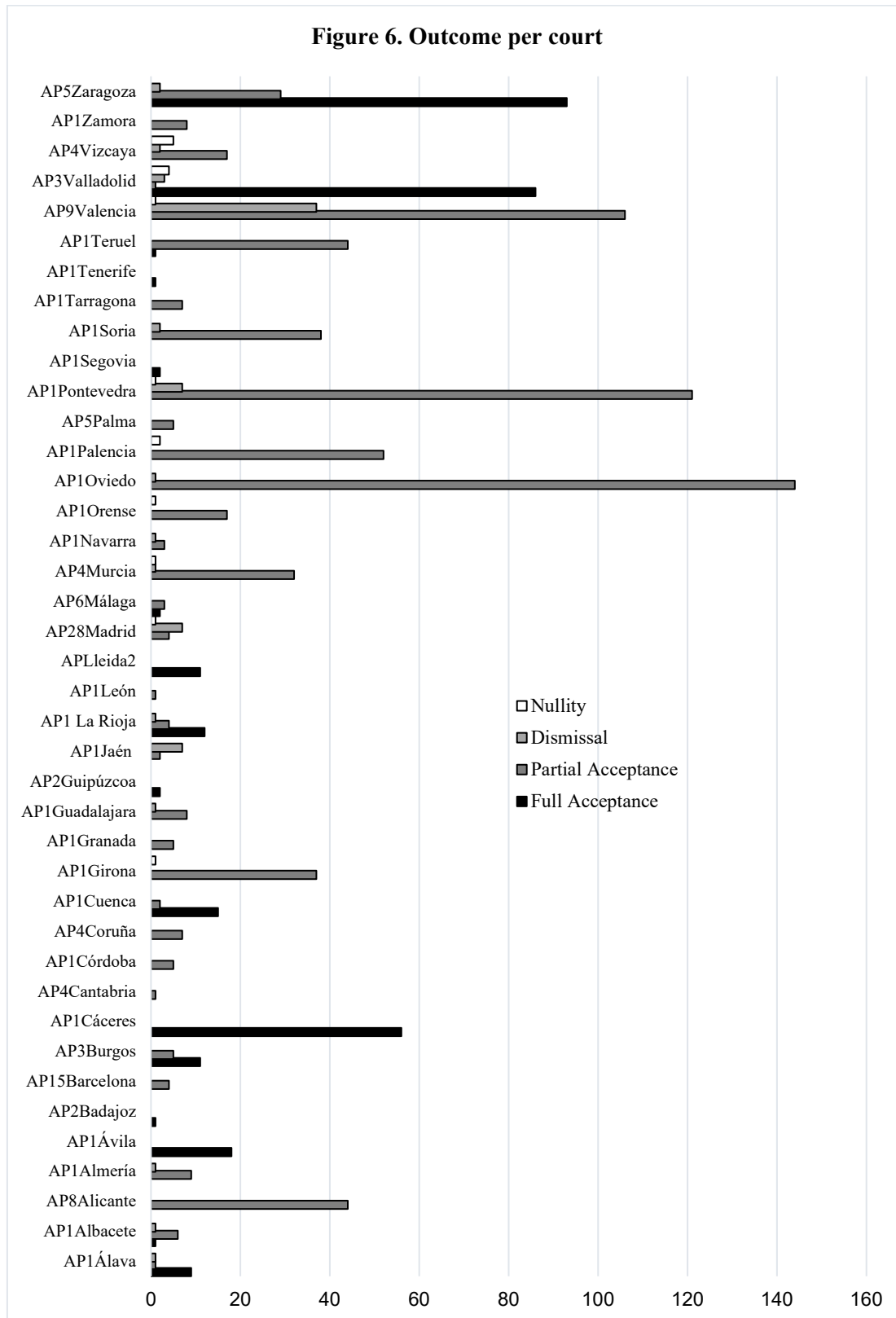
|                              |      |      |      |
|------------------------------|------|------|------|
| GUIPÚZCOA (SECT. 2)          | 100  | 0    | 0    |
| JAÉN (SECT. 1)               | 0    | 22,2 | 77,8 |
| LA RIOJA (SECT. 1)           | 70,6 | 23,5 | 5,9  |
| LEÓN (SECT. 1)               | 0    | 100  | 0    |
| LLEIDA (SECT. 2)             | 100  | 0    | 0    |
| MADRID (SECT. 28)            | 0    | 33,3 | 58,3 |
| MÁLAGA (SECT. 6)             | 40   | 60   | 0    |
| MURCIA (SECT. 4)             | 0    | 94,1 | 3    |
| NAVARRA (SEC. 1)             | 0    | 75   | 25   |
| OURENSE (SECT. 1)            | 0    | 94,4 | 0    |
| OVIEDO (SECT. 1)             | 0    | 99,3 | 0,7  |
| PALENCIA (SECT. 1)           | 0    | 96,3 | 0    |
| PALMA MALLORCA (SECT.5)      | 0    | 100  | 0    |
| PONTEVEDRA (SECT. 1)         | 0    | 93,8 | 5,4  |
| SEGOVIA (SECT. 1)            | 100  | 0    | 0    |
| STA. CRUZ TENERIFE (SECT. 4) | 100  | 0    | 0    |
| SORIA (SECT. 1)              | 0    | 95   | 5    |
| TARRAGONA (SECT. 1)          | 0    | 100  | 0    |

<sup>90</sup> Some claimants have made a separate claim concerning the delay in the implementation of pollution control measures and the pass-on of the cost of those measures, that has rarely been accepted by Spanish courts.

|                      |      |      |      |
|----------------------|------|------|------|
| TERUEL (SECT. 1)     | 2,2  | 97,8 | 0    |
| VALENCIA (SECT. 9)   | 0    | 73,6 | 25,7 |
| VALLADOLID (SECT. 3) | 91,5 | 1,1  | 3,2  |
| VIZCAYA (SECT. 4)    | 0    | 70,8 | 8,3  |

|                    |      |      |      |
|--------------------|------|------|------|
| ZAMORA (SECT. 1)   | 0    | 100  | 0    |
| ZARAGOZA (SECT. 5) | 75   | 23,4 | 1,6  |
| <b>TOTAL</b>       | 27,1 | 65,1 | 6,33 |

**Notes:** Variations in the calculation of the interest rate are still considered full awards in this table. 17 judgments annulling proceedings are not included in the table.



### 3.4.1. Damages' awards per court of appeal

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. Namely, it falls on the claimant to prove the harm and its causal link to the infringement and to quantify the harm, although the court must consider the availability and ease of proof to the parties.<sup>91</sup> 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. Parties in antitrust damages proceedings regularly resort to expert reports for their quantification of harm (which they submit together with their suit or reply).<sup>92</sup>

Judicial assessment of expert opinions presented by the parties is carried out in accordance with the rules of sound criticism.<sup>93</sup> The Spanish 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 damages caused by the sugar cartel. It acknowledged the difficulties for the calculation of damages and the disparate assessments given by inferior courts in reliance upon the expert reports calculating damages and the need for courts to be flexible in considering the circumstances that may make it arduous or impossible to plead an accurate figure. 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"*.<sup>94</sup> Accordingly, claimants' experts must *"formulate a reasonable and technically sound hypothesis not founded on erroneous and not testable data"*.<sup>95</sup> 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."*<sup>96</sup>

These basic ideas governing damages quantification have been put into play in the trucks cartel damages cases, leading to disparate outcomes in how different courts have assessed the claimants' expert reports. The main cause of disagreement among the courts of appeal seems to be the standard of proof that the plaintiff must meet in quantifying the harm and the power of judicial estimation of the harm.<sup>97</sup>

If the claimant's expert report was found to be convincing, the damages requested by the plaintiff has been awarded. However, several courts have not found any of the claimants' reports to be convincing and, thus, they awarded damages basis on a judicial estimation of the overcharge. On the one hand, the largest group of courts of appeal have set the compensation at 5% of purchase prices of trucks following the early rulings of Audiencia de Valencia (sect. 9) and Audiencia de Pontevedra (sect. 1); others instead have set their estimation of overcharge higher, 8% or 10% of the purchase price of vehicles. On the other hand, a few courts of appeal have calculated the overcharge as a percentage reduction of the damages sought by the claimant.

The pattern followed by each court of appeal in awarding damages can only be ascertained when each court has decided on several different cases and it has assessed diverse

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<sup>91</sup> Articles 217 and 219 CPA.

<sup>92</sup> Articles 299.1.4 and 335 CPA.

<sup>93</sup> Article 348 CPA.

<sup>94</sup> See §7.3 of Supreme Court Judgment of 7/11/13 (*Sugar Cartel Damages II*, [ES:TS:2013:5819](#)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Gustavo A. Martín "Quantifying damages in cartel cases: the Spanish Courts' approach to the Trucks cartel" *Mass Claims* 2 (Dec. 2021) 125-131.

claimants' expert reports.<sup>98</sup> Although courts of appeal tend to confirm the judgments issued at first instance, disagreements on the assessment of the plaintiff's expert reports and the judicial estimation of harm have made them overturn the judgments on appeal, either increasing it or decreasing the amount of first instance awards.<sup>99</sup> The variations in the damages' awards by Spanish courts of appeal can be explained by their different assessment of claimants' expert reports (*infra* §3.4.2), and the disparate positions regarding the judicial estimation of harm when the experts' reports are found not convincing (*infra* §3.4.3).

#### 3.4.2. Assessment of claimants' expert reports

Some claimants' expert reports have been considered convincing and sufficient to quantify damages by some courts of appeals, but unconvincing and insufficient by others.<sup>100</sup> Obviously, this reflects a different understanding of thresholds or standard of proof required. Nevertheless, given that harm was presumed *ex re ipsa*, most courts have awarded damages even if the claimant had not presented a proper expert report quantifying the harm.<sup>101</sup>

Although the courts have vast expertise in the assessment of expert reports, there is little experience in reports quantifying antitrust damages, and it is unclear yet how the context of cartel damages claims affects the threshold required of the plaintiff in quantifying the overcharge. Together with the difficulties faced by claimants in accessing the information and data needed to bring a claim;<sup>102</sup> the factual, legal, and economic complexity of antitrust law claims should be considered by the courts in setting the minimum probative threshold for quantification of the harm caused by the cartel.<sup>103</sup> If the threshold is set too high, obtaining compensation could be deemed to make it impossible in practice or excessively difficult,

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<sup>98</sup> Nowadays, this exercise can't be done for all of them, as some have only ruled appeals all based on the same expert report [that's the case of Audiencia de Guipúzcoa (sect. 2), Audiencia de Navarra (sect.1), Audiencia de Segovia (sect. 1) and Audiencia de Tarragona (sect. 1)] and three of them had decided only one single appeal [Badajoz (sect.2) -judgment of 24/3/22 ([ES:APBA:2022:318](#))-; Cantabria (sect. 4)- judgment of 15/6/22 (*Servicios Públicos y Contratas SL v. DAF*, rapp. M<sup>a</sup> Mar Hernández, [ES:APS:2022:941](#)); León (sect. 1) - judgment of 19/9/22 ([ES:APLE:2022:1005](#))- and Santa Cruz de Tenerife (sect.4) - judgment of 29/4/22 (*Anrodel S.L. et al v. IVECO*, rapp. Pilar Aragón, [ES:APTE:2022:92](#))].

<sup>99</sup> Some courts of appeal have corrected the awards of full damages by the commercial courts in first instance (Guadalajara, Navarra, Oviedo, Tarragona, Teruel, and Zamora). On the contrary, other courts of appeal have corrected the partial award of damages by the commercial courts and moved to full award on appeal (Badajoz, Burgos, Cuenca, Lleida, Segovia and Zaragoza). In a middle ground, some court of appeal have reduced the prior estimation on instance (Cantabria, Orense, Pontevedra), whilst others have increased it (Alicante, Almería, Granada).

<sup>100</sup> That is the case so far of Caballer used by [CCS abogados](#), [LLuis Bielsa Partners](#), [PQAXis](#) and [Naider](#). It takes the biscuit that some Courts that have taken the two opposite positions regarding the same expert report in subsequent judgments (even penned by the same judge), compare judgments of Audiencia de Teruel (sect. 1) of 19/7/21 (*Cristobal Villanueva SL v. Renault*, rapp. Fermín Hernández, [ES:APTE:2021:161](#)) and of 19/7/21 (*Cereales y Semillas Lahoz SL v. Renault*, rapp. Fermín Hernández Gironella, [ES:APTE:2021:61](#)); likewise compare judgments of Audiencia de Albacete (sect. 1, rapp. José García Bleda) of 27/6/22 (*Transpostes Frigoríficos Villarobledo SA v. Renault*, roll 109/21; *Anigma SL et al v. IVECO*, roll 690/20).

<sup>101</sup> So far, only the Audiencia de Madrid (sect. 28) has rejected claims if the expert report did not meet some minimum technical standards, see judgments of 10/12/21 ([ES:APM:2021:14305](#), at 4), 28/1/22 ([ES:APM:2022:796](#), at 10); 31/1/22 ([ES:APM:2022:1757](#), at ¶32); 9/5/21 (*Central Eléctrica Sestelo y cía. v. MAN Truck Bus Iberia*, rapp. F. de Borja Villena, [ES:APM:2022:6962](#), at ¶20) and of 23/5/22 (*Gruas Domingo García v. IVECO España*, rapp. F. de Borja Villena, [ES:APM:2022:8316](#), at ¶21).

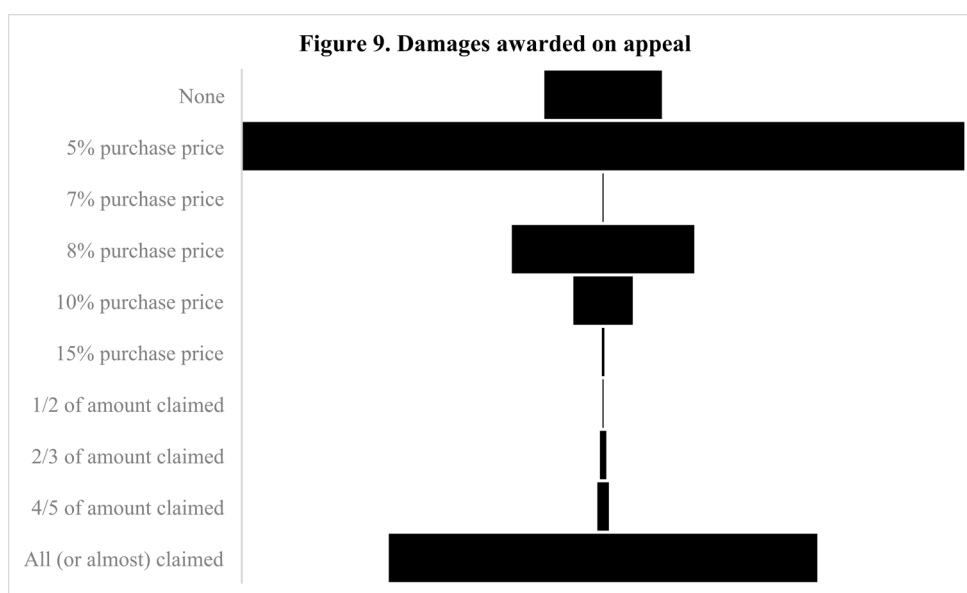
<sup>102</sup> See ¶55 of CJEU judgment 22/6/22 (C-267/20 *DAF/Volvo*, [EU:C:2022:494](#)).

<sup>103</sup> See ¶46 of CJEU judgment (3<sup>rd</sup> Chamber) of 28/3/19 (C-637/17 *Cogeco*, rapp. A. Arabadjiev, [EU:C:2019:263](#)) summarized in ¶54 of CJEU judgment 22/6/22 (C-267/20 *DAF/Volvo*, [EU:C:2022:494](#)) and see also ¶37 of CJEU judgment of 15/7/21 (*Volvo*, [EU:C:2021:604](#)).

running against the effectiveness of the antitrust prohibitions.<sup>104</sup> Of course, if the probative threshold is set too low, that may incentivize the filing of claims based on superficial expert reports (e.g., based on metadata studies, unrelated to the case).

### 3.4.3. Judicial estimation of damages

Most of the courts of appeal have undertaken judicial estimation of the overcharge (at least in cases with certain expert reports).<sup>105</sup> As they consider that the trucks cartel was harmful but the overcharge quantification presented by the claimant is not found to be convincing, courts have used their powers to estimate themselves the amount of the overcharge.<sup>106</sup> The resulting range of overcharges shows the lack of uniformity as to how courts have approached the estimation task, depending on the criteria and sources used by them for the estimation and the outcome of the exercise (see **Figures 9 and 10**).



Spanish law allows the possibility of appointing a court expert, but the nomination procedure is not well suited for these types of claims.<sup>107</sup> In addition, although Spanish

<sup>104</sup> See ¶29 of CJEU judgment (Grand Chamber) of 20/9/2001 (C-453/99 *Courage*, rapp. M. Wathelet, [EU:C:2001:465](#)); ¶71 of CJEU judgment (3<sup>rd</sup> Chamber) of 13/7/2006 (C-295/04 to C-298/04 *Manfredi*, rapp. S. Von Bahr, [EU:C:2006:461](#)); ¶30 of CJEU judgment (Grand Chamber) of 14/6/11 (C-360/09 *Pfleiderer*, rapp. E. Juhász, [EU:C:2011:389](#)); ¶27 of CJEU judgment (1<sup>st</sup> Chamber) of 6/6/13 (C-536/11 *Donau Chemie*, rapp. A. Tizzano, [EU:C:2013:366](#)); ¶25 of CJEU judgment (5<sup>th</sup> Chamber) of 5/6/14 (C-557/12 *Kone*, rapp. A. Rosas, [EU:C:2014:1317](#)); ¶43 of CJEU judgment of 28/3/19 (C-637/17 *Cogeco*, [EU:C:2019:263](#)); and ¶50 of CJEU judgment 22/6/22 (C-267/20 *DAF/Volvo*, [EU:C:2022:494](#))

<sup>105</sup> All courts of appeal but seven: Audiencias de Ávila (sect. 1), Badajoz (sect. 2), Cáceres (sect. 1), Guipúzcoa (sect. 2), Lleida (sect. 2), Segovia (sect. 1) and Santa Cruz de Tenerife (Sect. 1)

<sup>106</sup> They do this based on consolidated caselaw (see judgment of the Supreme Court of 24/10/2008, rapp. José A. Seijas, [ES:TS:2008:5536](#)), and not in exercise of the power of estimation introduced by the Damages Directive (art. 17.1), although lately the CJEU has confirmed that this provision may be applicable to trucks cartel damages claims (see ¶¶88-89 of CJEU Judgment of 22/6/22, C-267/20, *RM v. Volvo/DAF*, [EU:C:2022:494](#)). Doubts subsist regarding the basis to be followed by judges in calculating the harm and also concerning its operation together with the joint and several liability introduced by the Damages Directive (article 11), see ¶¶42-48 of the preliminary reference C-312/21 lodged on 19/5/21 ([ES:JMV:2021:681A](#)) by Juzgado Mercantil 3 de Valencia (*Tráficos Manuel Ferrer, S.L. et al v. Daimler*) and ¶¶99-110 of AG Kokott Opinion ([EU:C:2022:712](#)).

<sup>107</sup> Articles 339-336 of CPA. Apparently, a court expert was appointed in the proceedings that lead to judgment of Audiencia de Zaragoza (sect. 5) of 13/7/22 (*Transportes Sinpeco 2002 SL v. Renault*, rapp. Alfonso

competition authorities can also assist the courts in providing guidance on how to estimate cartel overcharges and other antitrust harms,<sup>108</sup> they cannot substitute the court in its task of deciding the case in accordance with the evidence presented by the parties.<sup>109</sup>

#### 3.4.3.1. Fixed award

Following the first Audiencia de Valencia (sect. 9) rulings, many courts of appeal have set the damages awarded for all claims at a standardized fixed overcharge of 5% of the purchase price of cartelized trucks.<sup>110</sup> One way or another, this figure is chosen as a "prudent" estimation extracted from meta-studies on the average overcharge produced by cartels.<sup>111</sup> Courts rationalize this figure with qualitative reasons regarding the features of the trucks cartel, which are unrelated to that specific magnitude. Indeed, a higher standardized overcharge (again for all claimants) have been set by other courts based on the same reasoning: 8% of the purchase price by Audiencia de Oviedo (sect. 1), 10% of the purchase price by Audiencia de Alicante (sect. 8), an 15% of the purchase price by Audiencia de León (sect.1). They all have in common that fact the damages awarded are unrelated to the data provided in the claimants' expert reports before them<sup>112</sup> and, consequently, the award is the same for every claimant, a solution which is also defended based on the principle of equality set out in the Spanish Constitution.<sup>113</sup> A concern that claimants must have is that the first cases that get decided end up setting the percentage of surcharge for future cases, even if the evidence provided (reports) on the latter is different and better.

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M<sup>a</sup> Pastor, [ES:APZ:2022:1542](#), at §27), but little is explained about the report presented (that calculated an overcharge of 18% of price) and seems not to have been very useful, as the court awarded damages of 5% of purchase price of cartelized trucks.

<sup>108</sup> Now explicitly foreseen in article 76.4 Defence Competition Act (*Official Gazzette 159 of 4/7/2007*).

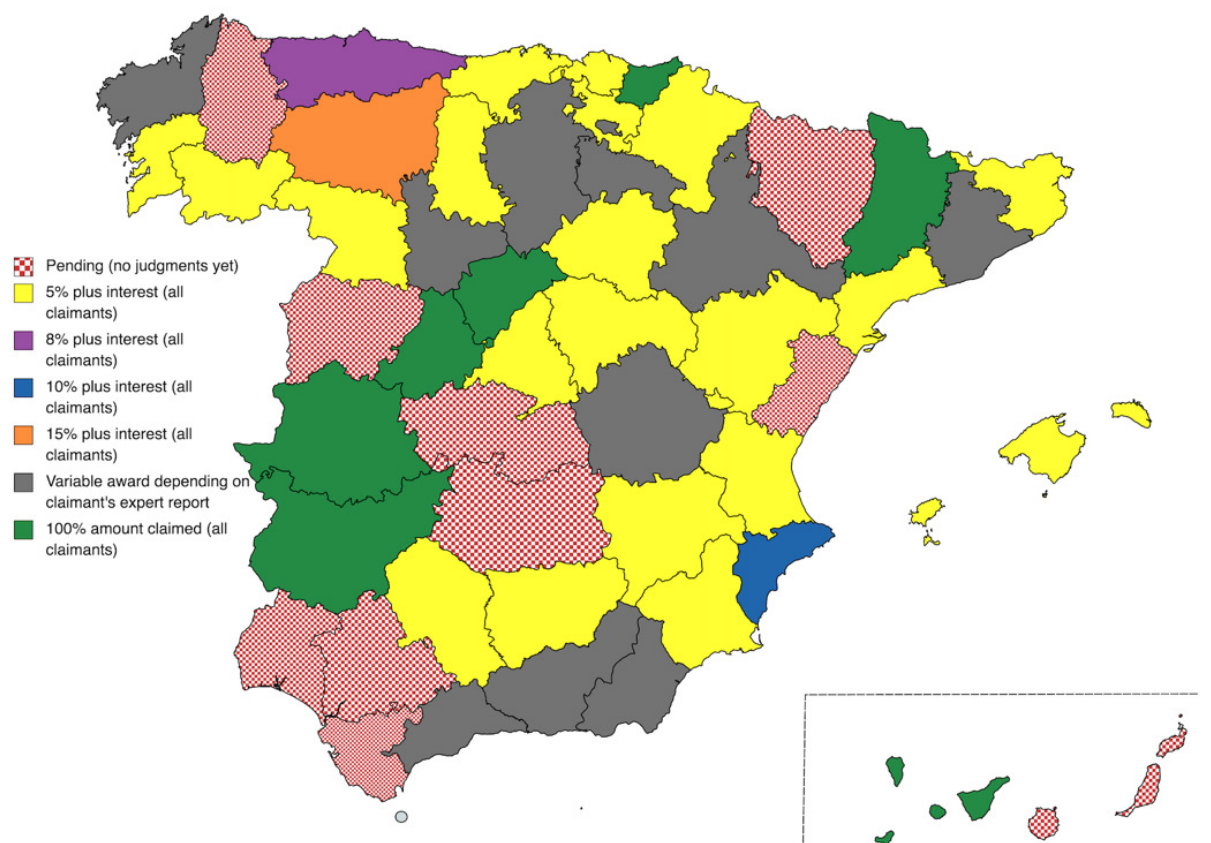
<sup>109</sup> See *Almacén de Derecho* 24/11/21, 14/12/21 and 19/1/22.

<sup>110</sup> Audiencia de Girona, Audiencia de Guadalajara, Audiencia de Jaén, Audiencia de Madrid, Audiencia de Murcia, Audiencia de Valencia, Audiencia de Orense, Audiencia de Pontevedra, Audiencia de Tarragona, and Audiencia de Zamora.

<sup>111</sup> The common reference is OXERA, *Quantifying Antitrust Damages. Towards non-binding guidance for courts*, dec. 2009. The origin of that estimation comes from judgments of juzgado mercantil de Valencia 3 (Eduardo pastor) of 20/2/19 (*X v. Man*, [ES:JMV:2019:34](#), at ¶¶94-96) and of 13/3/19 (*Llácer y Navarro SL v. Volvo*, [ES:JMV:2019:187](#), at ¶¶95-96), reluctantly assumed by Audiencia de Valencia (sec. 9), that further supported the award on that being the amount that was being claimed in cases brought before German Courts (see judgment of 16/12/19 [ES:APV:2019:4152](#), at §8.3).

<sup>112</sup> On first instance, before the courts of appeals started ruling on the case, there were other estimations: 15% by juzgado mercantil 1 de Bilbao, juzgado mercantil 1 de Almeria, juzgado de primera instancia 8 de león and juzgado de primera instancia 4 de Salamanca; 10% by juzgado mercantil 7 de Barcelona ([ES:JMB:2019:1121](#)), juzgado mercantil 1 de Burgos, juzgado de primera instancia 2 de Lugo, juzgado de primera instancia 6 de Logroño, and juzgado de primera instancia 6 de Lleida ([ES:JPI:2021:458](#)); 9% by juzgado mercantil 1 and 2 de Pontevedra ([ES:JMPO:2019:976](#)), juzgado de primera instancia 4 de Orense and juzgado mercantiles 1, 2 and 3 de Alicante; and 8% by juzgado de primera instancia 2 de Segovia, but many of these estimations have been weeded out on appeal.

<sup>113</sup> In words of the Audiencia de Valencia (sect. 9) in one of its last judgments: "*As we have argued on previous occasions, we are in accordance with the jurisprudential doctrine relating to the principle of equality resulting from Article 14 of the Constitution (both in its aspect of equality before the Law, as well as in its aspect of equality in the application of the Law), which implies that when faced with the same factual assumptions, the consequences should be the same and that in judicial proceedings, judicial decisions should be identical when analyzing the same factual assumptions*" (judgment of 13/6/22, Hormigones Carlet SA v. Daimler, Rapp. Montserrat Molina, [ES:APV:2022:2048](#)).

**Figure 10. Mapping of Trucks cartel damages awards in appeal courts**

The recourse to a common pattern of compensation is easy and intuitive. That explains its generalization and expansion in different trials and courts, but it could be considered arbitrary. It also appears mistaken to base it on an alleged requirement of the constitutional principle of equality. When feasible, the calculation of the compensatable damage by courts should rather be based on the expert reports of the parties.<sup>114</sup> Quantification that dispenses with such a process in order to always award a "standard" compensation that disregards those reports and which is inspired by other parameters outside the proceedings, seems unreasonable.

#### 3.4.3.2. Variable award depending on the claimants' expert report

A few courts of appeal have approached the estimation task starting from the expert reports presented by claimants.<sup>115</sup> Although they have considered that the reports could not be deemed to be fully convincing, as they were either based on models with small or limited data samples, methodological flaws, or defects, still they have been considered as presenting a better approach to the damages' quantification than any alternative. For that reason, the courts have estimated the compensatable award in the amount claimed with a reduction justified because of the shortcomings on the claimant expert's report.<sup>116</sup>

<sup>114</sup> See [Almacén de Derecho 5/12/20](#).

<sup>115</sup> Audiencia de Coruña (sect. 4), Audiencia de Granada (sect. 1), Audiencia de Almería (sect.1) and Audiencia de Barcelona (sect. 15) with the reports Addvalora, Caballer and PQAxis.

<sup>116</sup> See, e.g., judgments of Audiencia de A Coruña (sec.4) of 19/4/22 (*Xv. MAN*; rapp. Eduardo Fernández-Cid, [ES:APC:2022:968](#)); of Audiencia de Almería (sect. 1) of 25/5/22 (*Morteros Iralmería SL v. Fiat Chrysler*, rapp. Juan A. Lozano, roll 1476/21), of Audiencia de Granada (sect. 1) of 4/7/22 (*RMLS-V v. IVECO. raop. Enrique Pinazo*, [ES:APGR:2022:697](#)); and of Audiencia de Barcelona (sect.15) of 18/7/22 (*Gruas Transportes y Carretillas El Rayo Amarillo SL v. Iveco*, rapp. Jose M<sup>a</sup> Ribelles, [ES:APB:2022:7669](#)).

Although an estimation based on the expert's report presented in court is consistent with the need to enable the court to be flexible in calculating the overcharge and seems more suitable than resorting to an arbitrary figure. Yet, there are doubts on whether such an approach would not fall under the "Solomonic solution" that the Supreme Court criticized in the sugar cartel damages cases.<sup>117</sup>

In the past, there has been only one antitrust dispute in which the courts of appeal (Barcelona and Madrid) have resorted to judicial estimation, namely in the paper envelopes cartel, but the situation in that case was different (not only because some defendants offered an alternative overcharge estimation,<sup>118</sup> but because the decision by the Spanish Competition Authority contained copious quantitative data about the alleged effects of the cartel in the market). Moreover, it remains a matter for debate to what extent courts should indulge in tolerating the weaknesses or deficiencies in the expert reports, while still considering them as being valid for the purpose of estimating damages on their basis.

#### 4. Conclusion

Damages claims in the trucks cartel have been incentivized by the high value of the cartelized goods. Although some Spanish 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, and that Spanish rules on adverse costs create an economic incentive for lawyers not to aggregate claims, more than 6,000 actions have been filed before around 70 commercial judges (*juzgados mercantiles*).

Damages claims in the trucks cartel have filled Spanish courts' dockets: around three thousand judgments having been delivered at the 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 favor of claimants, though in most cases they've only been awarded part of what was initially claimed. This article has analyzed the 1185 Judgments delivered to date by forty courts of appeal (80% of the courts deciding on appeal in Spain).

Both courts and professionals involved in antitrust damages litigation have gained experience with the trucks cartel, which, coupled with some of the provisions introduced by the Damages Directive, can ease the way forward for future antitrust damages cases to be started and progressed. 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, but there are still some open issues relating to the transitory regime of the Damages Directive that will probably require further preliminary references to the CJEU. Finally, considerable uncertainty remains regarding the minimum burden of proof claimants are required to meet in quantifying damages and how courts should estimate them if the expert reports submitted by the parties are considered to be unconvincing.

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<sup>117</sup> In which the first instance court (judgment of juzgado de primera instancia 50 de Madrid of 1/3/11, PO 735/2007) had set the compensable award in 50% of what was claimed, and the Supreme Court ruled that "this greater flexibility cannot be confused with "Solomonic" solutions lacking the necessary justification" (§7.4 of judgment of 7/11/13, *Sugar Cartel Damages II*, [ES:TS:2013:5819](#)).

<sup>118</sup> One of them being chosen as the compensable award by Audiencia de Madrid (sect.28), in the cases cited *supra* footnote 25.