THE IMPACT OF EU LAW ON NATIONAL CIVIL PROCEDURE IN COMPETITION DAMAGES LITIGATION

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For Ana

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Contents

GLOSSARY vi
CASE-LAW CITED ix
INTRODUCTION 1
PART I – THE EU LEGAL FRAMEWORK 5
A – EU CIVIL PROCEDURAL LAW 7
Introduction 7
1. Fundamental principles of EU law 8
1.1. Direct effect 9
1.2. Primacy 11
1.3. Full, effective and uniform application 12
1.4. Sincere cooperation 18
1.5. Subsidiarity (and proportionality) 22
2. Procedural Autonomy 23
2.1. What is procedural autonomy? 23
2.2. The limits to procedural autonomy 25
2.3. Effective Judicial Protection 30
2.4. Examples 39
a) Court organization: the case for centralized or specialized courts 39
b) Evidence: the hearing of evidence and the right to a fair trial 42
c) Disclosure 46
d) Standard of proof and presumptions 48
e) Costs 51
3. Harmonization 52
3.1. Area of Freedom, Security and Justice 52
3.2. Sector-specific legislation 58
3.3. Soft law 61
B - EU COMPETITION LAW AND DAMAGES ACTIONS 63
4. The case-law of the CJEU 66
4.1. An EU law right to damages? 66
4.2. The full effectiveness of the EU competition rules 72
a) The complementary roles of public and private enforcement 74
b) Deterrence 77
c) Maintenance of effective competition throughout the internal market 80

d) Consistency and uniform application of EU competition law 83
4.3. Effective judicial protection 87
5. Directive 2014/104 92
5.1. Background and objectives 92
5.2. Disclosure 102
5.3. Quantification of harm 107
6. Soft law 112
6.1. Quantification Guidelines 114
6.2. Communication on the Protection of Confidential Information 116
6.3. DG COMP Best Practices 117
6.4. Collective Redress 119
PART II - THE UK EXPERIENCE 121
Introduction 123
7. The Competition Appeal Tribunal 125
7.1. The institution: a specialist court 125
7.2. Its procedural regime 128
8. The Overriding Objective 129
8.1. The aim and scope of the overriding objective 129
8.2. A new theory of justice 130
8.3. Resistance to change: judges and lawyers 132
8.4. Further challenges: logistics and the role of technology 135
9. The CAT's Collective Action Regime and the Influence of EU Procedural Law 136
9.1. The new collective action regime 136
9.2. *Merricks* 137
10. Case Management 141
10.1. Introduction and comparison with civil law 141
10.2. Functions of case management 142
10.3. Case management and procedure 143
10.4. The case management of mass claims 144
11. Disclosure 147
11.1. What is disclosure? 147
11.2. Challenges and reform 148
11.3. The role of case management 150
11.4. Competition law 152
a) Access to the file 152
b) Inter partes disclosure 154

12. Expert evidence 159
12.1. The role of experts 160
a) What qualifies as admissible expert evidence? 160
b) Factual evidence and experts 162
c) Experts and legal opinion 164
d) The use of court-appointed experts 164
e) Duties of the expert 167
12.2. The role of the judge 170
a) The non-delegable function of adjudication 170
b) Judicial assessment of contradictory expert evidence 171
c) BritNed 174
d) Judicial estimation 177
12.3. Process 179
a) Introduction 179
b) Admissibility 180
c) Access to information 181
d) Pre-trial engagement 183
e) Trial 184
PART III - THE CHALLENGES OF COMPETITION LITIGATION IN SPAIN 187
13. The emergence of a new theory of justice? 189
13.1. Introduction 189
13.2. Public policy goals of Spanish justice 192
a) Justice as a public service (quality and efficiency) 192
b) Equal treatment 197
13.3. Interim conclusion 204
14. Institutional organization: specialization 204
14.1. The Spanish commercial courts 205
14.2. Impediments to effective specialization 207
a) Consumer law 208
b) Remuneration of judges 209
c) Concentration of proceedings 210
14.3. Procedural specialization 210
14.4. Interim conclusion 211
15. Case Management 212
15.1. General principles 212
15.2. Specific powers to case manage 214

a) Management of parallel claims 215
b) Duties of parties and their lawyers 222
c) Time-limits and stays 225
d) Preparation for trial 231
15.3. Interim conclusion 238
16. Disclosure 238
16.1. Implementation and practice in Spain 238
16.2. An EU right to disclosure 242
16.3. The impact of disclosure on Spanish procedure 247
a) Introduction 247
b) Key aspects of the new Spanish disclosure regime 249
c) Paragraph 58 of *Tráficos Manuel Ferrer* 256
d) Some examples of the new approach in Spanish court practice 264
e) Proportionality 266
f) Interim conclusion 267
16.4. The impact of disclosure on the standard of proof 268
17. Expert evidence 274
17.1. Role of experts 274
a) The nature and scope of expert evidence 274
b) Facts and evidence on which the expert relies 279
c) Court-appointed experts 288
d) Duties of experts 292
17.2. The role of the judge 294
a) The non-delegable function of judicial assessment of expert evidence 294
b) The judicial assessment of expert evidence 296
c) Court initiative in the production of expert evidence 301
17.3. Process 303
a) Conditions for the production of expert evidence 303
b) Possibilities to 'flex' the existing process - compliance with the adversarial principle (equality of arms) 307
c) Pre-trial engagement 312
d) Trial 316
PART IV - CONCLUSIONS AND RECOMMENDATIONS 319
Introduction 321
18. Conclusions 321
18.1. National judges as EU judges 321

18.2. The procedural challenges of competition litigation 324
19. Recommendations 326
19.1. Institutional proposals 327
a) Court specialization 327
b) Training 328
c) Transparency 331
d) Case management 330
e) Collective actions and the concentration of claims 331
19.2. Procedural proposals 331
a) Statements of case 332
b) Expert reports 333
c) Disclosure 335
d) Preliminary hearing 336
e) Trial 338
f) Costs and penalties 3368
BIBLIOGRAPHY 339

GLOSSARY OF TERMS

2014 Guidance for Experts	Guidance for the Instruction of Experts in Civil Claims 2014
AAP	Auto de la Audiencia Provincial (order of a Spanish Provincial Court)
AFSJ	Area of Freedom, Security and Justice (Title V, TFEU)
AJM	Auto del Juzgado de lo Mercantil (order of a Spanish commercial court)
ALI	American Law Institute
ATS	Auto del Tribunal Supremo (Order of the Spanish Supreme Court)
B&PC	Business and Property Courts (a division of the English High Court)
BOCG	Boletín Oficial de las Cortes Generales (the Official Bulletin of the Spanish Parliament)
BOE	Boletín Oficial del Estado (the Spanish Official State Journal)
Brussels I Regulation	Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
CAT	Competition Appeal Tribunal
CAT Guide	The CAT Guide to Proceedings 2015
CAT Rules	The Competition Appeal Tribunal Rules
CE	Spanish Constitution
Chancery Division	A division of the High Court specialized in all types of property dispute
Charter or CFREU	Charter of Fundamental Rights of the European Union
CJEU or Court	Court of Justice of the European Union
CMC	Case management conference
Collective Redress Directive	Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22
Collective Redress Recommendation	Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory

	collective redress mechanisms in the Member States concerning violations of rights granted under Union Law
Commission	European Commission
Communication on Quantifying Harm	Commission, 'Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union'
CPO	Collective Proceedings Order
CPR	The Civil Procedure Rules 1998 of England and Wales
Damages Directive or Directive	Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
Data Room Best Practices	DG COMP Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation
DGCOMP	Directorate-General for Competition of the European Commission
Economic Evidence Best Practices	DG COMP Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ELI	European Law Institute
EU or Union	European Union
GCEU	General Court of the European Union
Green Paper	Commission Green Paper 'Damages actions for breach of the EC antitrust rules'
High Court	The courts of first instance of England and Wales whose competence covers all civil matters of sufficient value and importance, and which also have supervisory jurisdiction over all subordinate courts, subject to certain legal exceptions.
Jackson Report	Jackson LJ, Review of Civil Litigation Costs: Final Report
LDC	Ley de Defensa de la Competencia (Spanish Law 15/2007 of 3 July for the Defence of Competition)

LEC	Ley de Enjuiciamiento Civil (Spanish Law 1/2000 of 7 January on Civil Procedure)
LG	Legal Ground
LOPJ	Ley Orgánica de Poder Judicial (Spanish Organic Law 6/1985 of 1 July on the Judiciary) as amended
MIF	Multilateral interchange fees
Model European Rules	ELI-Unidroit Model European Rules of Civil Procedure – From Transnational Principles to European Rules of Civil Procedure
NCA	National Competition Authority
Pass-on Study	Commission, DG COMP, Benoit Durand, Iestyn Williams, Paul Hitchings et al, 'Study on the passing-on of overcharges: final report'
Pass-on Guidelines	Commission Communication, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser'
Practical Guide to Quantification	Commission SWD, 'Practical Guide – Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the TFEU'
PD	Practice Direction (concerning the application of the CPR)
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
RSC	Rules of the Supreme Court of England and Wales
SWD	Commission Staff Working Document
SAP	Sentencia de la Audiencia Provincial (judgment of Spanish provincial appeal court)
SJM	Sentencia del Juzgado de lo Mercantil (judgment of Spanish commercial court)
STC	Sentencia del Tribunal Constitucional (judgment of Spanish Constitutional Court)
STS	Sentencia del Tribunal Supremo (judgment of Spanish Supreme Court)
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
White Book	White Book Service (Sweet & Maxwell 2022)

White Paper	Commission, 'White Paper on damages actions for breach of EC antitrust rules'
Woolf Report	Woolf LJ, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales'

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INTRODUCTION

Private litigation in the area of competition law in Europe has witnessed an enormous growth in the last seven years since the effective entry into force of the EU Damages Directive in 2016. This marks a second phase in the development of private enforcement in the EU, centred prior to that largely, albeit not exclusively, on three major Northern jurisdictions; namely, the UK, the Netherlands and Germany. In this second phase, we have witnessed not only a marked increase generally in the bringing of private damages and other civil actions but also the development of private enforcement litigation in a number of 'nascent' continental jurisdictions, including, very notably, Spain.

This new wave of litigation is characterised, frequently, by: complex legal and factual questions which courts are called to answer (typically with the aid of expert evidence); mass claims on behalf of whole markets or sectors and, at times, different levels of related markets; significant aggregate but, at times, low individual claim values; an international dimension, ranging from the varied nationality of claimants and defendants, to the existence of parallel litigation in different courts around the EU and the world; and the growth of a new litigation industry with strong economic incentives, including those of law firms (representing both claimants and defendants), consultancies (such as auditors, economists, data harvesters, etv), claims administrators, funders and the like.

This has, in turn, brought rapidly to the fore some fascinating challenges for the national court systems which apply EU competition law. How to ensure proportionate and fair access to justice? How to ensure effective enforcement of EU competition law? How to ensure that the issues and arguments in dispute are properly aired? How to achieve consistency and efficiency? How to equip judges for the task? How to avoid the commoditization of justice? How to ensure the independence of the judiciary (and administration) in high stake claims? How to broach potential conflicts of interest of the different players involved in the process?

It is not the aim of this research even to attempt to answer all these questions or the endless range of other interesting questions which arise when considering this topic. Rather it is our objective to offer a contribution to the debate from a specific perspective; arguably, the key perspective.

It is stating the obvious that the application of competition law by national courts (private enforcement) involves the application of EU law. However, what is less obvious is the extent to which EU law shapes the way in which national court systems should go about that task. They do so employing national procedural mechanisms and applying national procedural law. They are heavily influenced by normal legal practices and culture in their countries. This is normal and legitimate. It is, indeed, the dual institutional structure that the EU legal order has chosen to implement since its very birth. However, this picture is only partially true. National courts applying EU competition law are charged with applying EU primary and secondary law, including Treaty provisions and general principles, as interpreted by the CJEU, and to do so mindful of EU policy and practice. The EU framework within which they act includes procedural rules and principles. It does so increasingly. Indeed, civil procedure is central to the private enforcement of EU competition law, is in consequence inseparable from the goals of EU substantive law in this area and is influenced directly (through EU procedural rules) and indirectly (through EU procedural principles, policies and practices) by the growing body of EU procedural law.

Accordingly, the question we seek to answer in this research is this: what is the impact of EU law on national civil procedure in the private enforcement of competition law? In order to make this potentially unassailable exercise both viable and useful, in practical terms, our focus will be on one of the central issues in almost any piece of private enforcement litigation: the quantification of harm (or damages). This then is the specific question which this work seeks to address: what is the impact of EU law on the quantification of harm in competition damages litigation?

We will begin broaching this question with a thorough investigation into relevant EU law and principles, both the growing body of EU law on civil procedure generally and the specific rules developed under the competition rules of the Treaty (*lex specialis*). We will do so paying specific attention to the question of what is the relevance and application of these EU procedural rules and principles to private damages litigation. These procedural issues are critical for competition litigation, and ones which are becoming increasingly a central subject of legal debate and case-law in this area. However, they are ones which have received insufficient academic attention to date.

Our analysis will be fed by a further source of law, this time of comparative law. We will investigate the extensive experience of the UK courts and civil procedural system in applying EU competition law. We will focus on recent institutional and procedural developments which impact directly on the question we have raised. Consideration of the UK experience offers the opportunity to address our subject-matter from a very different perspective but, as we will see, in a context where law and policy in both the UK and the rest of the EU is gravitating towards similar areas of compromise and balance, driven by similar concerns and objectives.

Finally, we will address the implications of EU law, with the aid of UK comparative law, for the private application of competition law in Spain. Our research will include an in-depth analysis of the key challenges faced by the Spanish system and of the initial solutions which begin to be aired by practitioners, courts and policy-makers alike. Spain has become a popular jurisdiction for competition litigation over recent years and offers an excellent test case for addressing the challenges and possible solutions that applying EU competition law through national civil process raises. Indeed, many of the challenges we face in Spain are shared by most other EU jurisdictions. Furthermore, the solutions required - or at least influenced - by EU law need to be, to the extent possible, common and coherent solutions, while still catering for significant national particularities, the fruit of centuries of legal development. Indeed, this work comes at a time when greater uniformity in procedural practice has become a political priority but where the consensus has moved away from adopting strong top-down harmonisation legislation towards pragmatic and organic change from below based on principle and the development of best practices. This movement is of particular relevance in matters of complex litigation and all the more so when it relates to common EU law, such as EU competition law. Accordingly, an exercise in assessing in detail how the same overall EU rules and principles can be applied and adapted in a particular national context (in this case, the Spanish), without a wholesale change to the law, offers a necessary contribution to advancing the EU debate and the development of effective solutions.

The quantification of harm raises many specific material procedural issues which need to be considered in our analysis. These include: inter partes disclosure; rules and practice relating to the presentation of economic expert evidence; means of assessing economic analysis, etc. The judicial task of quantifying harm is also influenced indirectly, but in a very real way, by how civil actions are processed and case-managed, both in a broad sense (joinder of claims, court allocation, etc.) and a

narrow one (deadlines, staging, treatment of evidence, confidentiality, etv). All of these issues will be the subject of our analysis. They are subject, on the face of it, to rigid procedural rules in Spain, and, by contrast, to a much greater degree of flexibility in a Common Law jurisdiction such as the UK. However, as we will see, there are already some interesting winds of change in both countries, which we will consider and seek to build on, relating, for instance, to judicial practice, legislative proposals, case management protocols, etc.

Our goal finally is to offer recommendations for procedural best practices on how to deal with the procedural challenges of quantifying harm in competition damages cases, in line with the exigences of EU law. I aim thereby to offer a contribution to the ongoing debate in Spain and around the EU on this matter, as well as practical tools and proposals for their solution.

PART I

THE EU LEGAL FRAMEWORK

A. EU CIVIL PROCEDURAL LAW

Introduction

The EU legal order has created and confers on individuals rights, as well as concomitant obligations, including notably in the area of competition law. It has not created an autonomous civil court system for applying those rights, however. It relies rather on the Member States, each of which 'contributes its own judicial system for the sake of ensuring the effective application and enforcement of [Union] law'.[1] The national courts are the 'ordinary' EU courts before whom disputes between private parties, or between private parties and national institutions, concerning the application of rules of EU law are heard.[2]

At the same time, each national court is truly an EU court of law which has the duty and ability to apply EU law in private actions under the supervision and with the guidance of the CJEU pursuant to the mechanism under Article 267 TFEU whereby national courts request a preliminary ruling from the Court on a question of interpretation of EU law in a specific case before it. Indeed, it is important to note that each national court has an autonomous and unfettered right to request guidance from the CJEU on questions of the interpretation of EU law even if this means questioning the validity of national law or the application by superior national courts of the law.[3] As one CJEU judge has put it, the EU legal system veritably 'encroaches upon the hierarchy of the national judicial system'.[4]

The courts and tribunals of the Member States, in this sense, form part of a complete interlocking judicial system with the CJEU, which are together charged with protecting the EU legal order, ensuring the availability of effective remedies and guaranteeing the rule of law.[5]

As will be recalled in this section, EU law imposes limitations on the national legal systems of the member States; in particular, in the form of the principles of equivalence, effectiveness and effective judicial protection. At the same time, we are witnessing the development of EU law's own nascent body of procedural guidance, principles and rules. All of this activity is justified by one primary legal aim; namely, that of ensuring, in the application by national courts of EU law, that the underlying goals set out in the Treaties are achieved. The EU effort to frame national procedures and the activity of national courts in this way is principally realized through two means: (i) the CJEU's judgments adopted pursuant to the Article 267 TFEU preliminary ruling mechanism; and (ii) the development of procedural rules in secondary EU legislation (in particular, Regulations and Directives). Observation of the material fruits of this labour has led one commentator to refer to the 'emerging EU standard of fair

[1] Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 CML Rev 1625, 1625.

[2] This is the case in those areas where jurisdiction has not been conferred on the CJEU, as per art 274 TFEU. 'Ordinary courts' is the term employed by the CJEU in Opinion 1/09 and excludes the possibility for Member States to delegate jurisdictional functions related to the application of EU law to other courts pursuant, for instance, to international agreement as in the case of the proposed Unified Patent Court, EU:C:2011:123; [2011] ECR I-1137, para 80. See also, Koen Lenaerts, Ignace Masells and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak (ed), OUP 2014), para 1.04: 'the national courts are in effect the "lynchpin" of the judicial system of the European Union. They can be considered the normal Union courts'.

[3] Case 166/73 *Rheinmühlen-Düsseldorf* EU:C:1974:3; [1974] ECR 33, confirmed by Case C-173/09 *Elchinov* EU:C:2010:336. For a fuller discussion, see: Catherine Donnelly and Thomas de la Mare, 'Preliminary Rulings and EU Legal Integration', in Paul Craig and Gráinne de Burca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021).

[4] Allan Rosas, 'The National Judge as EU Judge: Some Constitutional Observations' (2014) 67 SMU L Rev 717.

[5] See, to this effect, paras 66-70 of Opinion 1/09 (n 2) and art 19(1) TEU.

and effective protection' in the area of procedural law.[6] Indeed, there can be no doubt that EU law has had a considerable impact on procedural law in the Member States.[7]

However, at the same time, this impact is by nature 'fragmented and disparate',[8] given the way in which EU law is created and applied in different policy areas and with varying degrees of intensity. One can point, also, to the real practical difficulty of developing procedural law through the case-law of the CJEU, given the capacity limitations of the Court (which is already faced with an ever increasing number of preliminary references) and the inherent difficulty of creating a coherent set of legal rules on the basis of case-law.[9] Added to this is the political difficulty - undesirability, indeed - of achieving a comprehensive legislative solution at the EU level, given the necessary respect for diverse national legal traditions in this area.[10] Accordingly, the development of soft law tools, serving as benchmarks or best practices, may currently offer the most effective method for achieving an increased approximation (as opposed to harmonization) of civil procedural rules and the ultimate goal of higher uniform standards in the quality of justice delivered by national courts when they apply EU law. Indeed, the time may be ripe for such a solution.[11]

1. Fundamental principles of EU law

Unlike normal international treaties, the Treaties on which the EU is founded have established a new legal order based on specific constitutional principles. A significant part of these have been developed through the case-law of the CJEU, without express reference to them appearing in the Treaties themselves. These matters are widely discussed by qualified academic commentators and it is not the purpose of this work to provide a comprehensive review of that work (nor would it be its place).[12]

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[6] Dominik Düsterhaus, 'Constitutionalisation of European Civil Procedure as a Starting Point for Harmonisation' in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of European Law of Civil Procedure* (Intersentia 2020), 78. The author is referring specifically to the art 267 case-law of the CJEU, although these in turn involve both the interpretation of primary Treaty rules and principles of procedural law and also secondary legislation containing procedural norms.

[7] Fernando Gascón Inchausti and Burkhard Hess, 'Introduction' in *The Future of European Law* (n 6) refer to CJEU case-law as a 'source of transformation of national procedural rules', p 3, and Eva Storskrubb, 'EU Civil Justice at the Harmonisation Crossroads?' in Anna Nylund and Magne Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Intersentia 2019) who notes: 'the impact of EU law, both on domestic procedural law in general and in domestic courts, can be considered significant', p 12.

[8] Storskrubb, ibid.

[9] Furthermore, through the preliminary reference mechanism, the Court does not resolve cases but rather provides guidance for national courts to apply in their national law settings. On the fragmented nature of procedural concepts developed by the CJEU in its case-law making difficult the application by national courts of rulings developed in the detailed and specific context of one particular policy area and factual circumstances of a case before the Court to another case before a national court, see Loïc Cadiet, 'L'autonomie procédurale dans la jurisprudence de la Court de justice', in Burkhard Hess and Koen Lenaerts (eds), *The 50th Anniversary of the European Law of Civil Procedure* (Hart 2020).

[10] Respect which is guaranteed by art 67 TFEU. The resistance to comprehensive harmonization of procedural law can be seen in the failed attempts of such initiatives as the 1994 Storme Report or, more recently, the 2017 European Parliament proposal for a Minimum Standards Directive, notwithstanding the significance of such initiatives; see Marcel Storme (ed), *Approximation of Judiciary Law in the European Union* (Kluwer 1994); European Parliament, 'Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the EU' P8_TA(2017)0282.

[11] Marcel Storme's introduction to the Storme Report notes the enormous differences between national systems in key questions, such as cost or duration or levels of compensation - a diversity which, without a doubt, continues today, n 10, 11 and 45.

[12] See, for example, Craig and de Búrca, *The Evolution of EU Law* (n 3) or Robert Schütze and Takis Tridimas, *Oxford Principles of European Union Law* (OUP 2018).

However, in seeking to understand the impact of EU law on specific aspects of Spanish civil procedural law, which is our objective, it is essential first to establish the ground rules.

1.1. Direct effect

In its seminal judgment in 1962 in *Van Gend en Loos*, the CJEU addressed the question of whether a private party (a Dutch importer of chemical products from the Federal Republic of Germany) was entitled to invoke directly before the competent Dutch national tribunal the Community rule prohibiting the creation of new customs duties on trade between Member States (Article 12 EEC Treaty).[13] The Court, rejecting the arguments of the intervening Member States that the EEC Treaty was an international treaty establishing obligations only as between them, determined affirmatively that Van Gend en Loos was entitled to invoke that prohibition before the national tribunal since Community law was 'intended to confer upon individuals rights which become part of their legal heritage'. Furthermore, Article 12 was sufficiently clear and unconditional to permit direct application by the national tribunal. The Court had established the principle of direct effect.

It is worth focussing a moment on the reasoning both of the Court, of course, but also the particularly clear and wide-ranging arguments advanced by the Commission in the proceedings (as reported by the Court in its judgment). The Commission, applying a teleological interpretation of the EEC Treaty and the legal system which it established, maintained that 'Member States did not only intend to undertake mutual commitments' but also 'to establish a system of Community law' (that is, a new autonomous legal system). At the same time they did not 'wish to withdraw the application of this law from the ordinary jurisdiction of the national courts of law'. That is, the Community did not create a new judicial system or procedures to apply that new legal system but chose to rely on the existing national court systems. At the same time, the Commission noted that 'Community law must be effectively and uniformly applied throughout the whole of the Community', which in its opinion implied a fortiori three consequences: (i) 'the effect of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law'; (ii) 'national courts are bound to apply directly the rules of Community law'; and (iii) 'the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later'. In other words, the Commission was advocating already a number of the fundamental concepts and principles which have come to define the nature of EU law: EU law as an autonomous legal order, the procedural autonomy of the Member States, and the principles of effectiveness, uniform interpretation, direct effect and primacy of EU law.

For its part, the Court, considering 'the spirit, the general scheme and the wording' of its provisions, concluded that the Treaty intended to confer rights on individuals. In particular, the Court's judgment notes that: (i) the functioning of the Common Market which the Treaty aimed to establish was of 'direct concern to interested parties in the Community'; (ii) the preamble included express reference to peoples (and not just governments); (iii) it created institutions 'endowed with sovereign rights the exercise of which affects Member States and their citizens'; and (iv) nationals were 'called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee'. It observed that this conclusion was supported by the

[13] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1; [1963] ECR 13.

creation of the preliminary reference mechanism pursuant to Article 177 EEC (now Article 267 TFEU) 'the object of which is to secure uniform interpretation of the Treaty by national courts'. That mechanism presupposed that national courts were to deal with questions of Community law which, accordingly, 'has an authority and can be invoked' before them by nationals.

Based on this reasoning, the Court declared that the Treaty had created a new legal order covering specific areas in which the Member States had chosen to give up their sovereign rights to the benefit of that new common order (the EEC) and which created directly applicable legal rights which could be relied upon before national courts:

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[14]

In addition, the Court points already in its judgment to the necessary role of private enforcement in contributing to the effective application of Community Law both particularly (for the benefit of the affected party) and generally (for the benefit of the effectiveness of Community Law):

> A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.
>
> The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.[15]

As noted by Professor Tulibacka, and as we shall see in due course, the CJEU's introduction of private enforcement into EU law has, in turn, brought about an inevitable interest in national remedies and civil procedures, whose compatibility with the objectives and requirements of EU law has become, as a result, a focus of the Court's attention.[16]

As is well known, the CJEU has determined the conditions for a rule of EU law to have direct effect. The rule must be 'unconditional and sufficiently precise'.[17] Rules may be contained, inter alia, in the Treaty, in the Charter of Fundamental Rights of the European Union (the "**Charter**"), in a Regulation, or in a Directive. In this latter case, direct effect is only granted vertically (i.e., in an action against the State, as opposed to between private parties)[18] and once the deadline for transposition into national law has

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[14] ibid p 12.
[15] ibid p 13.
[16] Magdalena Tulibacka, 'Europeanization of Civil Procedures: in search of a coherent approach' (2009) 46 CML Rev 1531.
[17] See, for example, Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique* EU:C:2012:33, para 41.
[18] See, for example, Case C-193/17 *Cresco Investigation GmbH v Achatzi* EU:C:2019:43, para 72; Case C-573/17 *Poplawski* EU:C:2019:530, para 65. The meaning of State is interpreted broadly and includes public bodies; see, Case C-188/89 *Foster v*

passed.[19] The directly effective rule may be just a specific aspect of an EU instrument or provision, while other aspects do not have direct effect. [20] A fairly broad principle may have direct effect.[21] The fact that the provision in question foresees the adoption of national measures to implement the relevant rule having direct effect and allows a certain 'degree of latitude' to Member States in the choice of the precise implementing measures, does not condition the direct effectiveness of the rule, which establishes the minimum protection that the national courts must grant to the rule.[22] So, for example, the fact that a Directive establishes (as is typically the case) that the Member State is to adopt the 'necessary measures' to achieve a certain result does not prevent the rule which defines that result from having direct effect.

1.2. Primacy

Together with direct effect, the CJEU established the twin constitutional principle of primacy (or supremacy) in its ruling in *Costa v ENEL* in 1964.[23] There, on a referral from the Giudice Conciliatore of Milan, and in opposition to the position not only of the Italian Government but also the Italian Constitutional Court, the CJEU deemed that primacy, meaning the binding and unconditional force of EU law which takes precedence over national legal measures, was a necessary corollary both of the direct effect granted to its rules and of the underlying nature of the constitutional system which the Member States had created through the Rome Treaty:

> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.[24]

Furthermore, the 'executive force' of EU law would be compromised if it were permitted to 'vary from one State to another'. Such a situation would constitute a breach of the Member States' duties to avoid measures which could jeopardize the attainment of the Treaty's objectives (Article 4(3) TEU) and of non-discrimination (Article 18 TEU). Primacy was, hence, based partly at least on the need for uniformity in the application of EU law.

As a result of this principle, in a case which arose from the simple fact of an individual consumer's challenge of his electricity bill, the Italian national judge was obliged to assess the compatibility of the Italian law nationalizing the State electricity company with directly effective provisions of the Treaty

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British Gas EU:1990:313; [1990] ECR I-3313, para 20. See also, Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials* (7th edn, OUP 2020), ch 8.

[19] Case 148/78 *Ratti* EU:C:1979:110; [1979] ECR 1629; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* EU:C:1986:84; [1986] ECR 723, paras 46, 49; Joined Cases C-378/07 to 380/07 *Angelidaki v Organismos Nomarchiakis Autodioikisis Rethymnis* EU:C:2009:250; [2009] ECR I-3071, paras 193-194; Case C-243/09 *Günter Fuß v Stadt Halle* EU:C:2010:609; [2010] ECR I-9849, para 56.

[20] eg Joined Cases C-397/01 to 403/01 *Pfeiffer & Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*. EU:C:2004:584; [2004] ECR I-8835, paras 104-105.

[20] eg Joined Cases C-397/01 to 403/01 *Pfeiffer & Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*. EU:C:2004:584; [2004] ECR I-8835, paras 104-105.

[21] For example, art 47 Charter; see Ch 2.3 below.

[22] Case 2/74 *Reyners v Belgian State* EU:C:1974:68; [1974] ECR 631, paras 24-30; *Pfeiffer* (n 20), para 105; *Dominguez* (n 17), para 35.

[23] Case 6/64 *Costa v ENEL* EU:C:1964:66; [1964] ECR 585.

[24] ibid pp 593-4.

(the rule against discrimination on the grounds of nationality in relation to State monopolies and the right of establishment).

The CJEU subsequently confirmed in *Simmenthal* that all national courts are under the duty to give pre-eminence to EU law and, where necessary, to disapply incompatible national law in a specific case which is put to them within the exercise of their jurisdiction. [25] They must have the power to do so immediately and unconditionally, without having to wait for a prior determination, for example by the national constitutional court or by the national legislature.[26] The non-subordination of EU rules to national, even constitutional standards, was underlined in *Melloni*.[27] On a case referred by the Spanish Constitutional Court concerning the execution in Spain of a European arrest warrant in relation to an in absentia criminal conviction adopted in Italy against Mr. Melloni, the Court held that the standards for effective judicial protection, a fair trial and rights of defence, as applied in the relevant EU instrument, not only were compatible with Articles 47 and 48 of the Charter but could not be subordinated to different national constitutional standards and must be applied by the national court.[28]

Finally, the CJEU has clarified that the full force of the primacy of EU law is linked to direct effect; more particularly, is reliant on the rule in question having direct effect.[29]

1.3. Full, effective and uniform application

The CJEU further held in *Simmenthal* that, in accordance with the principle of primacy, directly applicable rules of EU law must be fully and uniformly applied in all the Member States. This term refers both to the full effectiveness or 'effet utile' of directly effective EU provisions and to their uniform application throughout the EU.[30]

The principle of full effectiveness requires national courts to ensure, to the extent possible, the full practical effect of EU law.[31] This was understood by the CJEU in *Factortame I* to mean that the English courts could not be prevented by English law from awarding interim measures to suspend the application of an Act of Parliament on fishing quotas while the substantive question of its compatibility with EU law was pending before the CJEU (following a complaint by Spanish fishermen):

> 20. … any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from

[25] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49; [1978] ECR 629.
[26] See also Case C-378/17 *An Garda* EU:C:2018:979, paras 35-9.
[27] Case C-399/11 *Melloni v Ministerio Fiscal* EU:C:2013:1074.
[28] ibid paras 57-63.
[29] *Poplawski II* (n 18), paras 60-62. Accordingly, a provision of EU law which does not have direct effect may not be relied on to disapply a provision of national law which conflicts with EU law.
[30] According to Sacha Prechal, 'Community Law in National Courts: the lessons from van Schijndel' (1998) 35 CML Rev 681, 686, effectiveness is not a corollary of primacy, at least in the sphere of procedural rules, but is more a question of effective judicial protection, ambit in which the EU may require higher standards.
[31] As noted by AG Tesauro (recently deceased) in his Opinion in Case C-213/89 *R v Secretary of State for Transport ex p Factortame* EU:C:1990:216; [1990] ECR I-2433, para 13: 'the national court is obliged to afford judicial protection to the rights conferred by a Community provision as from the entry into force of that provision and for so long as it continues in force'.

> having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 March 1978 in *Simmenthal*, cited above, paragraphs 22 and 23).
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> 21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[32]

The requirement to give full effect to EU law may imply that certain EU obligations should be protected by a suitable remedy for affected private parties, such as a right to claim damages against the State as established in *Francovich*:

> 33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.[33]

In addition, the full effectiveness of EU law may require that private parties be granted the right to a private civil remedy against another party who has infringed a directly applicable rule of EU law (as opposed simply to the possibility to seek public action by the administration via a complaint to the competent authority). That is, EU rights must be capable of private, as well as public, enforcement. Accordingly, in *Muñoz*, the Court recognized the right of a Spanish grape importer to bring civil proceedings before the English courts against a competitor, which had marketed competing grapes in the UK in breach of EU quality standards, in order to enforce that obligation. The Court underlined the need to ensure the practical effect of the obligation and, furthermore, the positive contribution to the effectiveness of EU law which private enforcement actions offered:

> 31. The possibility of bringing such [private civil] proceedings strengthens the practical working of the Community rules on quality standards. As a supplement to the action of the authorities designated by the Member States to make the checks required by those rules it helps to discourage practices, often difficult to detect, which distort competition. In that context actions brought before the national courts by competing operators are particularly suited to contributing substantially to ensuring fair trading and transparency of markets in the Community.[34]

It should be noted that no private civil action existed as a matter of national (English) law for enforcement of the EU standards in questions, such that the judgment had the effect of creating an EU actionable remedy.[35]

Similar reasoning had been invoked one year earlier in the competition law field in *Courage* which will be the subject of attention in Part I.B below.[36]

The practical effect of EU norms may require very specific solutions to be granted. These can be surprising in their detail. For instance, the Court has held in *CCOO*[37] that the guarantee of work rest

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[32] *Factortame I* (n 31) EU:C:1990:257. The case was resolved on the merits in favour of the Spanish fishermen leading to the disapplication of the English quota system: Case C-221/89 *R v Secretary of State for Transport ex p Factortame* EU:C:1991:320; [1991] ECR I-3905.

[33] Cases C-6/90 and 9/90 *Francovich v Italian Republic* EU:C:1991:428; [1991 ECR I-5357.

[34] Case C-253/00 *Antonio Muñoz Cia SA v Frumar Ltd* EU:C:2002:497; [2002] ECR I-7289.

[35] Enforcement of the EU quality standards was attributed solely to a public authority; *Muñoz*, ibid, paras 15-6.

[36] Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465; [2001] ECR I-6297.

periods established in the EU Working Time Directive[38] requires employers to set up a system for recording time, regardless of the cost that might involve. This was despite the fact that the Directive was silent as to the mechanisms for ensuring observance of rest periods, that Spanish law allowed workers to rely on any type of evidence in bringing a claim related to working time and that the Spanish Supreme Court had determined as a matter of Spanish law that there was no requirement on employers to adopt such a specific and onerous solution.[39]

The principle of uniform application is perhaps less omnipresent in the reasoning used in the CJEU's case-law but is nevertheless an essential element of the underlying criteria for the application of EU law.[40] The Court observed in 1964, in *Costa v ENEL*, that the 'executive force of Community law cannot vary from one State to another'.[41] The CJEU has since expressly invoked the concept of uniform application on a number of occasions and, in doing so, required Member States to apply uniform conditions in specific circumstances; for instance, when simultaneously applying national and EU competition law (*Walt Wilhelm*),[42] when determining the conditions for the suspension of national rules based on EU regulation which were allegedly incompatible with the Treaty (*Zuckerfabrik*),[43] when establishing the terms of State liability for breach of Union law (*Brasserie de Pecheur*),[44] or even when determining applicable EU technical standards.[45] The *Zuckerfabrik* judgment contains the following classic formulation:

> 25. […] it must be observed that the rules of procedure of the courts are determined by national law and that those conditions differ according to the national law governing them, which may jeopardize the uniform application of Community law.
>
> 26 Such uniform application is a fundamental requirement of the Community legal order. It therefore follows that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned.[46]

In its Opinion 2/2013 on ECHR accession, the Court recalled that, since the Lisbon Treaty, the Member States have engaged in a process of integration towards an 'ever closer union among peoples'.[47] That integration is based on: (i) a set of common values; (ii) the implied mutual trust that those values will be recognized, and EU law implementing those values respected, in all the Member States; and (iii) the

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[37] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* EU:C:2019:402.
[38] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.
[39] *CCOO* (n 37), paras 40-3, 58. It should be noted that, in assessing what constituted effective national measures, the Court attributes relevance to the fact that the worker is the weaker party in the employment relationship and could be concerned by reprisals, paras 44-5.
[40] See, generally, on this topic the seminal article of Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 CML Rev 501.
[41] See, n 23, p 105.
[42] Case 14/68 *Walt Wilhelm v Bundeskartellamt* EU:C:1969:4; [1969] ECR 1, paras 4-5.%
[43] Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* EU:C:1991:65; [1991] ECR I-415.
[44] Case 46/93 *SA Brasserie de Pêcheur v Germany* EU:C:1996:79; [1996] ECR I-1029.
[45] Case C-613/14 *JEC Elliott* EU:C:2016:821, para 34.
[46] *Zuckerfabrik* (n 43).
[47] Opinion 2/13 *EU Accession to the ECHR* EU:C:2014:2454.

pursuit of common objectives in core areas of EU competence (in particular, the internal market, EU citizenship, the area of freedom, security and justice, and, finally, competition policy) which are designed to contribute to the fundamental aim of integration (the 'raison d'être of the EU itself').[48] In order to preserve the specific characteristics and autonomy of the EU legal order, the Treaties 'have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law'.[49] That system involves both the CJEU and the national courts, which are together charged with ensuring the full application of EU law and the judicial protection of an individual's EU rights throughout the EU.[50]

The preliminary ruling procedure (Article 267 TFEU) forms a central part of this judicial architecture and has the object of ensuring the uniform interpretation of EU law. In its Opinion on the Agreement on the creation of the Unified Patent Court, the CJEU went further, underlining that the mechanism's aim was to ensure EU law the same effect in all Member States and, accordingly, to contribute to its uniform application:

> Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States.[51]

It is, however, necessary to acknowledge certain nuances to the concept of uniform application. The 'uniform interpretation' of EU law, while sometimes confused with 'uniform application', is not the same concept. The uniform interpretation of EU law is guaranteed by the CJEU, in collaboration with the national courts and tribunals, pursuant to the preliminary reference mechanism (which, in final instance, is an obligation of the national court should it harbour relevant doubts as to the proper interpretation of EU law). The uniform application of EU law by national courts is not, or at least not necessarily, so guaranteed since the CJEU does not normally have competence to apply EU law directly itself but rather, as we have seen, delegates enforcement to the national judicial systems which are per se different. Hence, the application (enforcement) of EU law depends on national law and this depends at least in part on national court systems which are tasked with the full and effective enforcement of EU law using local remedies and procedures. Hence, there cannot be total uniformity. To be otherwise would be contrary to the characteristics of the dual judicial architecture created in the EU legal order.[52] The tension between the two legal orders (EU and national) can be seen in the CJEU's formulations on this topic, in which it is careful not to declare as such a principle of uniform application which the national courts must respect. This can be seen from the judicious choice of wording used in Opinion 2/2013 in the reasoning alluded to earlier - uniform interpretation through the CJEU Article 267 mechanism, on the one hand, and full application by national courts, on the

[48] ibid paras 167-8 and 172, with reference to the founding articles of the TEU (arts 1-3).
[49] ibid para 174.
[50] ibid paras 174-5. The judgment refers to Opinion 1/09 (n 2) which, in turn, invokes the principle of sincere cooperation as a basis for the duty of national courts under art 4(3) TEU and Case C-432/05 *Unibet (London) Ltd v Justitiekanslern* EU:C:2007:163; [2007] ECR I-2271. We return to these authorities below.
[51] Opinion 1/09 (n 2), para 83.
[52] See further below Ch 2.2 on procedural autonomy.

other. Similarly, the Court concludes its reasoning on the nature and characteristics of the preliminary reference mechanism referring to 'the correct application and uniform interpretation of European Union law':

> The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.[53]

Indeed, as Professor Van Gerven has pointed out, the concept of uniform application was referred to by the CJEU rather in *Zuckerfabrik* as a 'fundamental requirement' of EU law, as opposed to a principle having the same nature as direct effect or supremacy.[54]

In this sense, 'uniform application' is not an absolute concept. Nor is it an ineffective or irrelevant concept; quite the contrary. Rather, the level of intensity of the requirement of uniform application (and hence its executive force) varies. It varies first depending on whether the EU law right has direct effect or not, as noted by the Court in *Poplawski II*:

> [T]he principle of the primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all of the provisions of EU law by the national courts.[55]

That is, as already indicated in *Van Gend en Loos*, the direct effect of EU norms refers to rules which are to have full and uniform effects in all Member States from the moment they come into force.[56] As pointed out by the CJEU in *Poplawski*, this is not the case for rules which do not have direct effect.

The uniformity of the application of EU law also varies in a vertical sense, by which I mean that its executive force depends on the extent to which EU law has intervened to impose harmonized conditions. A rule that has direct effect can be directly applied by a national court without more (for example, the rule of equal treatment at work), but that does not mean that its application is purely a matter of EU law or, therefore, that it will be uniform, even if the meaning of that rule must be the same throughout the EU. Indeed, its application will normally be a matter largely of national law. However, EU law may, and frequently does, descend farther to determine certain harmonized conditions of remedies or procedures.

Such harmonization may, first, be by virtue of the activity of the CJEU. On an increasing number of occasions, the CJEU has held that the full effectiveness of a particular EU law right requires and determines certain harmonized remedies; such as the private enforcement remedies recognized in *Courage* and *Muñoz*. We have seen the level of detail into which the CJEU is prepared to go in the name of the practical effect of a directly effective EU right in order to define the conditions of that right, or even detailed matters of evidence, for example in *CCOO* in the area of worker's rights. In its line of cases on the recovery of taxes or duties collected in breach of EU law, the CJEU has recognized an entitlement to recovery (the remedy of restitution) derived directly from EU law (as 'a consequence

[53] Opinion 1/09 (n 2), para 84.
[54] Van Gerven, 'Of Rights' (n 40), 516, 522.
[55] *Poplawski II* (n 18), para 60.
[56] Araceli Mangas Martín and Diego J Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* (10 edn, Tecnos 2020), 421.

of, and adjunct to' the EU right).[57] The Court has proceeded to determine a number of common conditions for how such claims should be adjudicated in relation, for instance, to burdens of proof and evidentiary rules and standards.[58] In this way, as Van Gerven has observed, EU law (the CJEU) has directly established the existence of a remedy (the entitlement to recovery of sums) and harmonized some of the conditions for that remedy, laying them down 'in a uniform way'.[59] It is also notable that, even in the context of rights which are not directly effective, the Court, while recognizing that it is for the national court to determine whether national law can be interpreted in a way which is compatible with EU law, has frequently and increasingly taken some pains to provide guidance to the national court on which interpretation of national law would, in its view, fulfil the national court's obligations under EU law.[60]

Harmonization may come about by a second means: EU secondary legislation. Where necessary, the EU has at times acted to adopt legislation to harmonize certain areas of national law the divergence of which may be impeding the uniform application of EU law.[61] This may relate to matters of a horizontal nature, in particular the rules adopted in the area of cross-border civil justice.[62] It also relates to rules adopted in particular sectors, such as intellectual property or competition law. Such harmonization may, in itself, not be absolute but, rather, partial. EU harmonization law may often seek to 'approximate' laws rather than harmonize them and may be limited to the adoption of Directives which set out only minimum standards without establishing a harmonized set of rules.[63]

Finally, it is worth noting that the force of these principles (both that of full effectiveness and uniform application) in practice varies also in a horizontal sense. That is, their force varies from one EU policy area to another. Accordingly, weaker parties such as consumers or employees may well be granted stronger protection, and receive stronger intervention, by the Court when it is consulted by national courts. This may be the case too where the policy area has a particularly strong EU framework, such as the case of competition law (which is an area of exclusive competence of the EU) or cross-border procedural mechanisms (such as service or taking of evidence), where the vertical force of EU law is strong and where, typically, the EU may have moved to adopt harmonization legislation. In these areas, legal concepts and rules increasingly take on an autonomous EU meaning, which may be at odds with national concepts. As Advocate General Bobek has observed:

> [T]he more harmonised the (procedural) standards in EU law itself, the more thorough the review likely to be required at the national level. Conversely, as in many other areas of EU law, the less explicit the provisions of EU law on the matter, the greater the leeway given to the Member States in shaping the way judicial protection is provided.[64]

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[57] Case C-188/95 *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet)* EU:C:1997:580; [1997] ECR I-6783, para 38.
[58] See, among others, Case 199/82 *San Giorgio* EU:C:1983:318, [1983] ECR 3595, *Weber's Wine World Handels GmbH v Abgabenberufungskommission Wien* EU:C:2003:533; [2003] ECR I-11365.
[59] Van Gerven, 'Of Rights' (n 40), 520.
[60] See, eg, Case C-167/17 *Klohn v An Bord Pleanála* EU:C:2018:387, para 68; *Poplawski II* (n18), para 87.
[61] See Joined Cases 205 to 218/82 *Deutsche Milchkontor GmbH* EU:C:1983:233; [1983] ECR 2633, para 24.
[62] Instruments adopted pursuant to art 81 TFEU, within the Chapter on an Area of Freedom, Security and Justice. See further below Ch 3.1.
[63] See Tulibacka 'Europeanization of Civil Procedures' (n 16), 1534.
[64] Case C-98/17 *Secretary of State for the Home Department v Rozanne Banger* EU:C:2018:225, para 107.

However, it should also be noted that the Treaty on the Functioning of the EU invites the Union to ensure consistency between its policy areas and avoid therefore a fragmented or purely sector-specific approach to different areas of legal subject-matter:

> The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.[65]

1.4. Sincere cooperation

The CJEU's case-law on the full effectiveness and uniform application of EU law is anchored in a further essential principle of the EU legal system, which merits specific attention: the duty of sincere cooperation of the Member States. Originally included in Article 5 of the Rome Treaty, now Article 4(3) TEU, it was described by Advocate General Tesauro in *Factortame I* as the 'real key to interpretation of the whole system'.[66] Pursuant to this principle, as set out in Article 4(3), Member States are to: (i) 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'; and (ii) 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

This obligation applies, inter alia, to national courts and is the original Treaty basis for requiring national courts to collaborate in ensuring the effective and uniform application of EU law.[67] It finds further expression in Article 288 TFEU, which determines the full and direct binding effects of regulations as well as the binding effects of directives on Member States 'as to the results to be achieved', while leaving to them 'the choice of form and methods' of implementation. The Lisbon Treaty (2009) introduced an express requirement that Member States 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Article 19(1) TEU). It is also reflected by the mechanism for referring necessary questions of interpretation of EU law to the CJEU under Article 267 TFEU, which is mandatory in the case of courts of last instance.

Hence, on the basis of the obligation of sincere cooperation, the CJEU has established the duty of national courts to ensure the legal protection of directly applicable rules, including the competition rules,[68] and, as we have seen, to ensure, to the extent possible, their full, practical and uniform effect. This requirement on national courts extends to EU law rules which do not have direct effect, where the court is still obliged to do all in its power to interpret the full system of domestic law to permit the effective application of EU law:[69]

> It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure those rules are fully effective.[70]

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[65] art 7 TFEU.

[66] *Factortame I* (n 31).

[67] See, for example, Case 14/83 *Von Colson and Kamann* EU:C:1984:153; [1984] ECR 1891, para 26; Case C-441/14 *Dansk Industri v Estate of Karsten Eigil Rasmussen* EU:C:2016:278, para 30.

[68] See *Factortame I* (n 32), para 19; Joined Cases C-430 and 431/93 *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* EU:C:1995:441; [1995] ECR-I 4705, para 14.

[69] Although this will not extend to disapplying a contrary rule, ie primacy will not be given its full rein (n 55).

[70] *Pfeiffer* (n 20), para 111.

This statement, from the Court's ruling in 2004 in *Pfeiffer*, forms part of a well-known line of case-law which began with its seminal ruling in *Von Colson* in 1983.[71] That case concerned the application of the 1976 Equal Treatment at Work Directive, Article 6 of which required Member States to introduce measures into the national legal systems necessary to enable wronged persons 'to pursue their claims by judicial process'.[72] Two German ladies, Sabine von Colson and Elisabeth Kamann, complained of discrimination by a prison in North-Rhine Westphalia because their applications for employment as social workers at the all-male prison were rejected on the grounds of their sex, despite their having better qualifications than the men who were subsequently appointed to the posts. The case before the CJEU addressed the question of whether the Directive precluded a national German rule which limited redress for a breach of equal treatment to compensation for the wasted costs of making the application (such as, the travel expenses to attend the interview). Article 6 did not have direct effect since it was not sufficiently precise or unconditional and left it to the Member States to determine appropriate judicial redress (whether, for instance, that be via a right to require specific performance (obligation to contract), to the imposition of penalties, or to compensation). However, the CJEU determined that the limitation on the amount of damages under German law implementing the Directive was incompatible with the purpose and full effectiveness of the Directive and, furthermore, that the national court was bound to interpret national law to avoid such a limitation, to the extent that courts were granted a discretion to do so under national law. In this way, the CJEU established an obligation on the national court to guarantee the real and effective judicial protection of the Directive right to equal treatment, derived directly from the Treaty obligations of the Member States, including their national courts, under Articles 5 and 189 EEC (now 4(3) TEU and 288 TFEU).

The full reasoning of the Court is worth recalling to mind, beginning with its stance on the full effectiveness of the Directive:

> 22. It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.
>
> 23. Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.
>
> 24. In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.[73]

[71] *Von Colson* (n 67).
[72] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] OJ L39/40.
[73] *Von Colson* (n 67)

It went on to declare the obligation of the national court to use its interpretative faculties under national law to ensure, to the extent possible, that national law be applied in a manner consistent with the Directive's full effect:

> 26. [T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.[74]

And, finally, it concluded:

> 28. [A]lthough Directive No 75/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member States chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.[75]

It is worth flagging that the judgment not only uses the already standard and recurrent term 'effective' on a number of occasions in its reasoning, but also employs additional terms such as 'deterrent effect' or 'adequate' (i.e., not purely nominal) compensation to reinforce the strength and purpose of the remedy that must be conceded by national damages law in this area.

The CJEU returned to the subject of compensation under the 1976 Equal Treatment at Work Directive in *Marshall*, a long-running case in the UK concerning the retirement age for women.[76] Miss Marshall was a lady whose employment was terminated in 1980 by the Southampton and South West Hampshire Area Health Authority after she had reached the age for women to qualify for a State pension (set five years before the age for men). On a first referral, from the Court of Appeal, the CJEU held that the prohibition against discrimination under Article 5(1) of the Directive was directly effective, was breached by a policy which applied different retirement ages for men and women, and was enforceable against the defendant authority as part of the Member State (who, since the deadline for transposition of the Directive had passed, could not raise its own failure to comply with its obligations under Article 189 EEC, now 288 TFEU, to resist the full effectiveness of the Directive).[77] In a second referral from the House of Lords, the CJEU confirmed in 1993, that in order to achieve the EU objective of equality in 'real' terms, such compensation must be 'adequate' (as established in *Von Colson*).[78] Furthermore, this meant that loss and harm actually suffered should be 'made good in full', and consequently required that the English courts disapply a national rule which imposed an upper

[74] ibid
[75] ibid
[76] *Marshall I* (n 19).
[77] That is, the rule had vertical direct effect.
[78] Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* EU:C:1993:335; [1993] ECR I-4367.

limit on compensation fixed a priori and excluded an award of interest.[79] As a result, Miss Marshall was to be granted remedies not foreseen, and in fact expressly excluded, under the implementing English legislation in order to ensure the full effectiveness and effective judicial protection of her rights under the Directive (and, one might add, of particular importance given she had to wait nearly 15 years to receive full compensation). This is a notable advance and constitutes the setting of EU minimum standard for remedies for breach of EU law (in this case, for damages claims).

Although the essence of the obligation of consistent interpretation was already fully spelled out in *Von Colson*, the content of the obligation has been further developed and nuanced over time. So, for instance, as regards the methods of interpretation, the CJEU has repeatedly stated that the national court must consider the whole body of rules of national law and apply methods of interpretation that are recognized by those rules.[80] It has gone somewhat further to require the national courts to take into account not only the wording but also the context and the objectives of the legislation of which the relevant EU rule forms a part, including its context, origin and history.[81] This extends to taking into account preparatory texts and the recitals to legislation.[82] It may, where relevant, include considering recommendations where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law.[83] It has confirmed that national courts, in performing their duty of consistent interpretation, must ignore (and, therefore, change) established national case-law which is inconsistent with EU law.[84]

This brings us on to one final aspect of this topic which has received some scholarly attention over the years: the extent to which court discretion under national law converts into a duty under EU law.[85] Important rulings of the CJEU have suggested that, in the field of application of EU law, national courts are under a duty to apply EU law where national law grants them the discretion to do so.[86] However, such a discretion-cum-duty which has on occasions been the position adopted by the CJEU is not an absolute principle either. Judicial discretion is not to be applied automatically, without taking into account other legitimate objectives of judicial proceedings, such as the protection of rights of defence or the good administration of justice. Indeed, it is established case-law that national courts are limited by general principles of law, such as legal certainty, and should not adopt contra legem interpretations of national law.[87] Advocate General Bobek has recently had the opportunity to expound on this proper balance, advocating for the necessary protagonism of national judges in

[79] ibid paras 24, 26.
[80] eg *CCOO* (n 37), para 69.
[81] Case C-414/16 *Egenberger* EU:C:2018:257, para 44.
[82] eg Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland* EU:C:2015:433, paras 30 et seq.
[83] Joined Cases C-317-320/08 *Alassini v Telecom Italia SpA* EU:C:2010:146; [2010] ECR I-2213, para 40.
[84] *Dansk Industri* (n 67) para 33-34; *Egenberger* (n 81) paras 72-73; *CCOO* (n 37) para 70.
[85] See, for example, Anna Wallerman, 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' self-imposed limits on national procedural autonomy' (2016) 53 CML Rev 339.
[86] *Van Schijndel* (n 68), paras 13-4, with reference to Case 33/76 *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* EU:C:1976:188; [1976] ECR 1989 (the principle of equivalence) and *Factortame I,* n 32 (the duty to ensure effective legal protection).
[87] Case C-268/06 *Impact v Minister for Agriculture and Food* EU:C:2008:223; [2008] ECR I-2483, para 100; *Egenberger* (n 81), para 71. These limitations are also reflected in the qualification 'as far as possible' (or 'wherever') which was first introduced by the CJEU to the *Von Colson* principle in *Marleasing*, Case 106/89 EU:C:1990:395; [1990] ECR I-4135, para 8. According to AG Sharpston some years later, those words do not require national courts to impose 'an artificial or strained interpretation of national law', *Unibet* (n 50) EU:C:2006:755, para 55.

exercising their judicial discretion, as well as for a good dose of 'common sense', in a case concerning an action by an Irish national seeking to oblige the Irish administration to ensure compliance with EU rules on dual-language product labelling where new EU rules which would lighten that regime for manufacturers were on the point of entering into force:

> [I]t seems to me that it is the very case-law of the Court that in fact requires national courts to take into account, when exercising their discretion with regard to relief and remedies sought, elements such as those indicated by the referring court: undue delay in bringing proceedings, failure to seek other more appropriate remedies, a lack of candour on the part of the applicant, failure by the applicant to act in good faith, prejudice to third parties, and where granting of relief would serve no useful purpose. Taking those elements into account does not, per se, deprive an applicant of judicial protection, or render ineffective the substantive rights of which an applicant seeks protection.
>
> On the contrary, by taking the aforementioned elements into account, the national court is doing nothing more than carrying out its judicial function which is to find, for each dispute, the most appropriate solution by looking at the specific context and all the relevant circumstances. Again, the principles of effectiveness of EU law and of effective judicial protection cannot be interpreted as imposing upon national courts any (senseless) automaticity.[88]

However, we are already straying onto the territory of procedural autonomy and the so-called rule of reason, to which we will return in section 2 below.

1.5. Subsidiarity (and proportionality)

A brief reference should, finally, be made to the principle of subsidiarity, as well as of proportionality:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.[89]

Clearly, civil procedure, for the reasons already mentioned, is not an area of exclusive competence of the EU. Indeed, the EU has delegated to the national civil court and procedural system the application of EU law, subject to the EU adopting measures in specific areas of competence. Accordingly, the principle of subsidiarity applies. In the area of civil justice, the Union expressly recognizes that it will respect the 'different legal systems and traditions of the Member States', which can be seen as a specific expression of the subsidiarity principle.[90] In addition, this involves not going further than necessary in the adoption of measures at the EU level (i.e., the proportionality principle).

Advocate General Jacobs mentions the principles of subsidiarity and proportionality in his opinion in *Van Schijndel*:

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[88] Case C-64/20 *UH v An tAire Talmhaíochta Bia agus Mara* EU:C:2021:14, paras 57-8. The opinion was not followed by the CJEU in its subsequent ruling, the Court considering that the incompatible national law in question should be disapplied without further consideration, EU:C:2021:207.
[89] arts 5(3) and (4) TEU.
[90] art 67(1) TFEU. See, further, Eva Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (OUP 2008), 72.

> [I]f the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection. It could be regarded as infringing the principle of proportionality and, in a broad sense, the principle of subsidiarity, which reflects precisely the balance which the Court has sought to attain in this area for many years.[91]

These principles, of course, do not mean that the Union cannot act in the area of civil justice. It has and does. Action in this area has been contemplated in the Treaties since the Amsterdam Treaty in 1999. But its action is limited, must fall within an area where competence has been conferred on it by the Treaties and is, indeed, respectful of national procedural traditions. This brings us on to our next topic: procedural autonomy.

2. Procedural Autonomy

2.1. What is procedural autonomy?

As already noted, the EU relies on the national court systems for providing the necessary civil protection and enforcement of EU law rights and obligations. Those courts have the duty to ensure the effective and, to the extent possible, uniform application of those rules, respecting the fundamental EU constitutive principles of direct effect and supremacy. EU law accordingly relies on the civil procedural rules of the Member States. The Court's formulation in *Salgoil* in 1968, a case from Italy related to the application of the prohibition on quantitative restrictions or measures of equivalent effect on cross-border trade between Member States, is clear:

> [I]n so far as the provisions in question confer on persons subject to the jurisdiction rights which national courts must protect, those courts must ensure that the said rights are indeed protected, but that it is for the legal system of each Member State to decide which court has jurisdiction and, for this purpose to classify those rights with reference to the criteria of national law.[92]

Moreover, the Court confirmed later in the *Butter-Buying Cruise* case that EU law 'was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law', albeit 'it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect'.[93]

This is the starting point for civil procedural law in the Union. It is fundamentally and historically a Member State competence and, as we have seen, the domestic judicial systems are expressly to be respected by the Union, noting that they form a coherent system based on years of development and dependent on the traditions of each country. The term 'procedural autonomy', which is used to describe this situation, or matter of principle, was first coined by the legal commentator Rideau in 1972. The term was not invoked expressly by the Court of Justice itself and incorporated into the language used in its rulings on this matter until 2004 in *Wells*, even though the concept was already applied since the 1970s.[94]

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[91] AG Jacobs in Joined Cases C-430 491/93, *Van Schijndel* (n 68) EU:C:1995:185, para 27.
[92] Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade, Rome* EU:C:1968:54, [1986] ECR 453, p 462.
[93] Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* EU:C:1981:163, [1981] ECR 1805, para 44.
[94] Case C-201/02 *Q v Secretary of State for Transport ex parte Wells* EU:C:2004:12; [2004] ECR I-723, paras 65, 67, 70.

Procedural autonomy has been referred to as a misnomer since Member States are not truly autonomous in their application of national procedural rules.[95] As we will see in the following discussion, they are constrained and influenced by EU law. There may indeed be a clash or a balancing or a collaboration (depending on your point of view and the particular case) between two autonomous systems (EU and national). Frequently one has to cede to the other, it being true that, due to the principle of supremacy and the increasing legislative reach of EU law, EU law tends to impose its own autonomy more and more on national autonomy, but never to the point of eliminating it. How this balancing or tension operates will become clearer as we review the practice of the CJEU during the course of this section.

However, there is another aspect of the term 'procedural autonomy' which receives less attention, and which is as important and, in fact, more imprecise. It is the word 'procedural'. What does 'procedural' refer to in the term 'procedural autonomy'? It clearly refers in the first place to rules of civil procedure sensu stricto (rules of evidence, procedural time-limits, pleading rules, the role of the judge, hearings, joinder, appeals, execution, etc). It also refers to rules concerning the organization of the court system (for example, types of courts, or subject-matter jurisdiction (or competence) and territorial jurisdiction). In addition, it refers to matters which are, or may be considered, matters of substantive law: such as available remedies or causes of action, the conditions for those remedies to be granted, statutes of limitation, the rules for quantification of harm or the burden of proof.

Judge Lenaerts has described the concept of 'procedural law' in this sense as follows:

> What is meant is all those rules of law which come into play in order to apply Union law in the Member States' legal systems. They may have to do with the conduct of judicial proceedings, such as rules on admissibility, procedural time limits, and rules of evidence, or with the execution of judgments. However, concepts of civil law or other substantive law (e.g. the concept of unjust enrichment) may sometimes be relevant.[96]

Prechal has ventured that rules are 'substantive' to the extent that they are established by the EU (and accordingly, are vested with primacy over national rules), whether they refer to substantive rights, remedies or procedures, and procedural when set by national law; i.e., this is more a question of competence than of the nature of the rule.[97] Nonetheless, I suggest such a distinction might perhaps become confusing.

The Court when referring to procedural autonomy has itself used alternative expressions over time to the classic formulation of 'detailed procedural rules'.[98] It has used terms such as 'substantive and procedural conditions' (employed in *Francovich* and *Fantask*),[99] or 'domestic rules on liability' (in

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[95] Constantinos Kakouris, 'Do the Member States possess judicial procedural autonomy?' (1997) 34 CML Rev 1389; Diana-Urania Galetta, *Procedural Autonomy of EU Member States: a paradise lost?* (Springer 2010); Michal Bobek, 'Why there is no Principle of Procedural Autonomy of the Member States' in Hans-Wolfgang Micklitz and Bruno de Witte (eds), *European Court of Justice and the autonomy of the Member States* (Intersentia 2012); Michal Bobek, 'The effects of EU law in the national legal systems?' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020).

[96] Lenaerts, *EU Procedural Law*, n 2, p 108.

[97] Prechal, 'Community Law in National Courts' n 30, p 685, fn 16.

[98] Which is extended by the CJEU expressly to include the Member States' designation of the courts and tribunals with jurisdiction to hear relevant actions.

[99] n 33 and n 57 respectively.

Brasserie de Pécheur),[100] or simply 'rules'. In his seminal article 'Of Rights, Remedies and Procedures', Van Gerven proposed that a clear distinction could be drawn between subjective EU law rights (requiring of protection in the national legal systems, such as a right to compensation for a breach of the principle of equal treatment or of the competition rules), remedies (the relevant cause of action defining the conditions for the enforcement of that right, such as liability for harm being conditional on adequate proof of the infringement, harm and causation, or the heads of recoverable damage or, even, how harm should be calculated) and, finally, procedures (relating sensu stricto to the national rules organizing the domestic civil process). The first category (rights) sits within the sphere of competence of the EU legal order, the third (procedures) within that of the Member States and the second (remedies) somewhere between the two, to the extent that the CJEU may itself determine aspects of the remedy as a necessary part of the EU law right (e.g. causation or heads of harm).

Indeed, as we will now see, the Court has over time developed a number of limitations to this so-called procedural autonomy, on occasions positively developing itself EU uniform rules or principles applying to remedies or, even, to procedures for the enforcement of EU law rights.

2.2. The limits to procedural autonomy

The landmark cases *Rewe* and *Comet* set out the original formulation of the concept of procedural autonomy in EU law.[101] Both judgments (adopted on the same day in December 1976) refer to the attempt by certain private parties to recover import / export duties charged to them by Member States in relation to the cross-border movement of goods in breach of directly effective Treaty provisions, claims which were however time-barred under the relevant national law (German and Dutch respectively). Comet, the applicant in the Dutch action which was seeking repayment of duties it had paid on exports of tulip bulbs to Germany, argued not only that EU law overruled any national decision in breach of EU law (principle of primacy) but that, furthermore, based on its directly effective EU law right under the then Article 16 of the Treaty, it possessed 'an independent right of action which is unaffected by limitations provided for under national law which are liable to weaken the impact of the direct effect of that article in the legal order of the Member States'. That is, the applicant argued for the existence of an autonomous EU cause of action not bound by national limitation provisions, which should be uniformly applied regardless of the particular Member State where the breach arose.

The Court declined the applicant's invitation, observing that this was not the system foreseen by the Treaty. Rather, the national courts, in application of the principle of cooperation laid down in the then Article 5 EEC (now Article 4(3) TEU), were 'entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law'. In the event that there were differences in the relevant national laws which could distort the functioning of the common market, the Treaty provided the legal bases (in particular, relating to the internal market) necessary for eliminating such differences; i.e., via the adoption of harmonization legislation. Where this was not the case and the EU has not adopted harmonized rules in this way, the Union defers to the Member States' legal systems for implementation according to their national rules. It is at this point that the Court uses

[100] n 44.

[101] Case 33/76 *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* EU:C:1976:188; [1976] ECR 1989 and Case 45/76 *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191; [1976] ECR 2043.

the now famous formulation which continues to serve as the basis for the concept of procedural autonomy until this day (albeit, as noted above, with some developments):

> [I]n the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law.[102]

As is well known, the Court introduced two key provisos to this rule of national procedural autonomy which serves as basic EU constraints to that autonomy: 'provided that such rules are not less favourable than those governing the same right of action on an internal matter' (principle of equivalence), and unless 'those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect' (principle of effectiveness).[103]

The Court, moreover, underlined the need for time-limits for bringing legal actions in 'application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom is payment claimed'.[104] That is, the Court expressly acknowledged the need to balance the enforcement of the EU law right in question with fundamental procedural rights (recognized generally by the national legal systems). Noting that the time-limits in question were reasonable, it deemed that the national conditions for recovery of undue duties did not make legal action to enforce EU law practically impossible in the referred cases. In this sense, echoing what we have noted earlier in relation to uniformity, in those cases where national procedural rules have not been harmonized by the EU (for example, as regards time-limits), those rules may not be uniform and may (and, in fact, invariably will) vary from Member State to Member State. This divergence is perfectly compatible with the EU legal order. While the Court has on occasions has expressed its regret at this situation and indicated its desire that there be equal treatment throughout the EU,[105] it is not in its power to impose itself generally such harmonized rules, reflecting the division of powers we have already highlighted. Others have expressed their surprise at such a proposition, reaffirming the dual nature of the system. This is the case notably of Advocate General Jacobs: 'It cannot seriously be suggested that, in the interests of uniformity, Community law requires all time-limits for claims arising from it to be set aside. In the absence of harmonized rules, the sole requirement can be that national remedies and procedural rules provide adequate legal protection'.[106]

The original formulation in *Rewe* and *Comet* has been developed somewhat overtime, without moving away from its fundamental tenor. First, the constraints of EU law have been broadened in at least two ways by the CJEU: (i) it has increased the scope of the initial exception where there has been prior EU legislative action from the original 'harmonization measures' to the more recent and loose 'rules governing the matter' or 'legislation in this area'; and (ii) it has, most importantly, expanded the effectiveness principle to include situations where national law makes the exercise of rights not only

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[102] *Rewe* ibid para 5; *Comet* ibid para 13.
[103] *Rewe* ibid; *Comet* ibid paras 13, 16.
[104] *Rewe* ibid; *Comet* ibid para 18.
[105] Case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* EU:C:1980:121; [1980] ECR 1887, para 12.
[106] Opinion of AG Jacobs, *Van Schijndel* (n 68) EU:C:1995:185, para 45.

'practically impossible' but also 'excessively difficult',[107] vesting the CJEU with a considerable margin of discretion.[108]

Some commentators have also drawn attention to the fact that the CJEU has dropped its reference to 'direct effect' when it refers to the sorts of EU rules which merit the protection of equivalence and effectiveness, the more recent formulation reading 'rights which individuals derive from EU law'.[109]

Secondly, the Court has developed a so-called 'rule of reason' (or balancing exercise) in its assessment of the compliance by domestic procedural rules (in the broad EU sense we have described) with the principles of equivalence and effectiveness. This occurred in another simultaneous pair of judgments of the Court, this time in December 1995; namely, *Van Schijndel* and *Peterbroeck*.[110] Both cases referred to the procedural limitations established by national law as regards the raising of new arguments based on breach of EU law. *Van Schijndel*, a referral from the Dutch Council of State, concerned an attempt by the claimants to raise a breach of competition law in support of their request for an exemption from their obligatory participation in an occupational pension scheme (set up by the national physiotherapists' profession). They sought to do so at the cassation stage, not having raised the argument earlier, at first or second instance. They argued before the Council of State that the lower courts should themselves have raised the argument ex officio in order to avoid the effectiveness of the EU competition rules being compromised. As a matter of Dutch law, this new plea was not permitted at the cassation stage for two reasons: first, it involved various facts and circumstances which had not been established or relied on during the prior proceedings, and Dutch cassation rules only permitted new arguments on pure points of law; and, secondly, the principle of judicial passivity applicable under Dutch law (similar to the rogatory principle under Spanish law[111]).

Peterbroeck was a referral from the Belgian Cour d'Appel, which concerned the attempt by Dutch claimants to raise on appeal the argument that the superior rate of tax on partnership earnings applied to them in Belgium infringed their right to equal treatment with Belgian nationals pursuant to their freedom of establishment under Article 52 of the EEC Treaty. This argument had not been raised before in the administrative proceedings before the fiscal authorities and was considered time-barred as a matter of Belgian law. For the same reason, the appeal court was not permitted to raise the matter ex officio.

In both cases, the Court laid out its so-called 'rule of reason' in the application of the *Rewe / Comet* principles. The formula was expressed as follows:

> [E]ach case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as

[107] *San Giorgio* (n 58) para 14.
[108] As noted by Stephanie Law and Janek T Nowak, 'Procedural Harmonisation by the European Court of Justice' in Gascón and Hess, *The Future of European Law* (n 6) p 37.
[109] This is the formulation employed in *Impact* (n 83) paras 42, 44. See, further, Law and Nowak, 'Procedural Harmonisation'.
[110] *Van Schijndel* (n 68) and Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* EU:C:1995:437; [1995] ECR-I 4599.
[111] art 216 Spanish LEC.

> protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[112]

The principle has been reiterated by the Court in subsequent case-law.[113]

In *Van Schijndel*, this led the Court to decline from requiring the national court to ignore the applicable procedural restrictions under Dutch law and take up the new EU law pleas (or act *ex officio*), even if this could compromise, or weaken at least, the full and effective application of EU competition law. The Court's reasoning was as follows:

> 20. In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.
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> 21. That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.
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> 22. In those circumstances, the answer to the second question must be that Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.[114]

The Court's took a different view, however, on the facts of *Peterbroeck*. There, the applicant had 60-days from the date the tax authorities' resolution rejecting its complaint had been lodged with the appeal court to bring its claim and raise any arguments it wished to rely on. After that moment, the applicant was precluded from raising new arguments and, equally, the court was precluded from raising such arguments ex officio (subject to certain limited exceptions which were not applicable in the case in point). While recognizing that the imposition of a time-limit of 60-days was not of itself unreasonable (indeed, as noted in Advocate General Jacobs' opinion, the same period applies to appeals before the EU Courts), the Court considered that a rule impeding the national court's ability to raise ex officio a question of interpretation of EU law (Article 52) in the circumstances of the case should be disapplied. The Court's reasoning is driven, therefore, by the concern, not so much with the reasonableness of the time-limits from the perspective of the litigants, but with ensuring the ability within national proceedings for courts to raise a question of EU law and, if necessary, seek guidance from the CJEU under the referral mechanism. Accordingly, the Court's reasoning highlights the fact that the Cour d'Appel was the first court or tribunal to intervene in those proceedings (the fiscal authorities did not qualify as courts or tribunals and so did not have the ability to make a referral to the CJEU) and that, by the time the Cour d'Appel intervened practically in the case (at the first hearing)

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[112] *Van Schijndel* (n 67) para 19; *Peterbroeck* (n 105) para 14.
[113] See, for example, Joined Cases C-370/17 and C-37/18 *CRPNPAC v Vueling Airlines SA* EU:C:2020:260, para 93 or Case C-86/19 *SL v Vueling Airlines SA* EU:C:2020:195, para 40.
[114] *Van Schijndel* (n 68).

the 60-day deadline had already passed impeding that it invoke EU law ex officio. In light of these particular facts, the Court held that national principles of legal certainty and proper conduct of the proceedings were outweighed by the need to ensure the full effectiveness of Article 52 EEC. This position is similar to that adopted by the Court in *Eco Swiss* some years later when it required that a national court be able to review the compatibility of an arbitral award with EU competition law.[115]

This was not the view of Advocate General Jacobs, however, who concluded in both cases alike that the application of time-limits was justified by the principle of procedural autonomy and, on the facts of each case, did not infringe the principles of equivalence or effectiveness. He and Sacha Prechal have insisted that procedural autonomy implies a necessary constraint on EU law which defers to national legal systems for its enforcement, subject only to the basic limiting principles, and that procedural divergence, in contrast to uniformity, is the norm. Nor can this situation be challenged, and EU law thereby impose itself, despite the dictates of national procedural law, on the grounds of supremacy. Rather, what is required of national systems is that they afford EU law rights equivalent protection to national law rights (thereby essentially extending to EU law litigants the means of enforcement made available under national law, generally assumed therefore to offer adequate legal protection). Both have observed, consequently, that there is no reason why EU law should impose higher legal protection on the enforcement of EU law rights than national rights:

> [..] if the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection. It could be regarded as infringing the principle of proportionality and, in a broad sense, the principle of subsidiarity, which reflects precisely the balance which the Court has sought to attain in this area for many years. It would also give rise to widespread anomalies, since the effect would be to afford greater protection to rights which are not, by virtue of being Community rights, inherently of greater importance than rights recognized by national law. It can, for example, scarcely be argued that Mr van Schijndel's and Mr van Veen's putative right under Community law to choose their own insurance scheme is more important and merits greater protection than, for example, the right of a plaintiff to recover damages for personal injury.
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> For reasons both of principle and of practice […] the conclusion should be that a national court must apply of its own motion a provision of Community law only where it would be required to apply of its own motion a corresponding provision of national law. That might admittedly lead to the unequal application of Community law but such unequal application is, as we have seen, a consequence of the variety of the national legal systems themselves.[116]
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> Once it is accepted that Community law provisions are a part of the valid law in the Member States, they should in principle be handled in the same way as national law. Then it is difficult to understand why certain rules, such as procedural provisions should be dismissed with the sole argument that they hamper the full application or direct effect of Community law; after all, they hamper in the same way the application of national law, even, where appropriate of the Constitution. And what is so special about Community law provisions that they should be treated differently?[117]

[115] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* EU:C:1999:269; [1999] ECR I-3055.
[116] Opinion of AG Jacobs in *Van Schijndel* (n 91), paras 27, 38.
[117] Prechal 'Community Law in National Courts' (n 30) 686.

At the same time, Prechal acknowledges that EU law may, nevertheless, impose higher standards of judicial protection, but insists that this is based not on supremacy or direct effect but rather on fundamental rights law and, in particular, the principle of effective judicial protection:

> Another, very different, issue is that the national legal environment is limited by certain Community law principles. In particular, national provisions must, under certain circumstances, yield to the principle of effectiveness or the principle of effective judicial protection. This is, however, not a matter of supremacy or direct effect, but of Community law imposing higher standards on procedures, remedies, etc. than the existing national ones. The ultimate basis of these standards seems to be in fundamental legal principles, which are, inter alia, laid down in Article 6 of the ECHR.[118]

It is averred that the conservative approach of Jacobs and Prechal has been superseded. EU procedural standards have been, and continue to be, developed by the EU. We turn to the topic of effective judicial protection now.

2.3. Effective Judicial Protection

From its beginnings, the CJEU has recognized fundamental rights drawn from the constitutional traditions common to the Member States and the ECHR as general principles of EU law.[119] Effective judicial protection is one of those principles and it was expressly recognized for the first time in *Johnston*,[120] another case in the *Von Colson* line concerning the 1976 Equal Treatment at Work Directive and the right of aggrieved parties 'to pursue their claims by judicial process' (Article 6). The Court there referred to the right to 'effective judicial control' as a general principle of law, which was reflected in Article 6 of the Directive. In *Johnston*, the principle required that a certificate signed by the Secretary of State, which under national rules served to justify unequal treatment by an employer on national security or public safety grounds, not be considered conclusive evidence and allow of rebuttal in judicial review proceedings. The Court referred expressly to the constitutional traditions common to the Member States and the ECHR (Articles 6 and 13) as sources for this principle, which imposes on Member States the duty to ensure effective judicial control of EU law rights before their courts:

> 18. The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.
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> 19. By virtue of Article 6 of Directive No 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with

[118] ibid.
[119] Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006).
[120] Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206; [1986] ECR 1651.

> the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.[121]

We have seen that the Court already invoked the language of effective judicial protection in the case-law relating to the full effectiveness of EU law which we have referred to above, from *von Colson* and *Marshall* to *Factortame*, *van Schijndel*, *Muñoz* and *Courage*. In recent years, however, we have witnessed a further 'constitutionalization' of the principle, couched increasingly in terms of fundamental rights law, and a certain degree of 'positivization' of the CJEU's case-law on civil procedure.

The process can be traced back to the adoption by the Union institutions of the Charter in 2000, although it was not until some years later, shortly before the Lisbon Treaty was signed (in December 2007), that the Court began to make express reference to the Charter in its rulings, including in particular Article 47 on the 'Right to an effective remedy and to a fair trial'. This can notably be seen in the Grand Chamber rulings in *Unibet* and *Impact*.[122] Both illustrate already a certain strengthening in the Court's position on effective judicial protection.

Unibet concerned the question of whether EU law required a free-standing action for a declaration of incompatibility with EU law (and corresponding interim measures) to be made available, where no such action existed under national law. Unibet sought to challenge the legality of the rule in the Swedish gaming laws which prohibited the promotion of its on-line services provided from other Member States (UK and Malta), and which the Swedish State had used to bring legal actions against newspapers who had published advertising for Unibet. It did not have standing to do so as a matter of Swedish law. Nevertheless, Unibet did have an admissible claim for damages and, according to the referring court, was able to raise the compatibility of the law with the provisions of the Treaty (Article 49 EC) as a preliminary issue in those proceedings. Recalling the need to assess the compatibility of a national procedural provision by reference to the role of that provision within the national procedural system as a whole (the rule of reason),[123] the Court held that the possibility to challenge the gaming law indirectly by way of a separate preliminary issue in a damages claim would, in principle, be sufficient to satisfy the principle of effective judicial protection.[124] Conversely, although the Treaty 'was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law' (*Butter Buying Cruises*), it would be otherwise 'if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law' (my emphasis).[125] Echoing developments in the case-law of the ECtHR, the Court held that it would be a breach of the right to effective judicial protection were the applicant forced first to commit an infringement giving rise to sanction proceedings against it in order to be able to raise the breach of EU law incidentally in those proceedings.[126] On the question of interim measures, the Court held that it must be possible to request interim measures under national law in

[121] ibid.
[122] *Unibet* (n 50); *Impact* (n 83). For a comment on both cases, Koen Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13.
[123] *Unibet* ibid para 54.
[124] ibid paras 58-9, 65. The national court was to determine whether this possibility was indeed guaranteed under national law.
[125] ibid paras 40-1.
[126] ibid paras 62-4.

order to ensure the full effectiveness of a declaration that the national rule was contrary to EU law (in the context of the damages action).[127] In its reasoning, the Court recalled the *Johnston* line of case-law on effective judicial protection, the obligation under Article 4(3) for Member States and their courts to do all in their power to ensure the effective judicial protection of EU law rights (*Van Schijndel* and *Factortame*), the requirement for Member States to establish a system of legal remedies and procedures which ensures respect for those rights (*Unión de Pequeños Agricultores*) and, finally, the obligation of sincere cooperation.[128] Importantly, it made an express connection between Article 47 and the principle of effective judicial protection, stating that the latter had 'been reaffirmed by Article 47 of the Charter'.[129] In sum, although on the facts of the case the Court did not require the creation of a self-standing EU law declaratory action, it left the door open for the creation of such an action should indirect means to that end not be available under national law.

In the *Deutsche Lufthansa* case, the CJEU ruled that the ability to challenge airport tariffs indirectly via civil actions in that case did *not* permit airport users (airlines) to carry out a proper judicial review of the decision based on administrative law principles (such as non-discrimination or due process in the adoption of the charges).[130] The judgment does not talk directly of creating a free-standing EU action, but rather of the general principles of effective judicial protection and sincere cooperation, and of their application to the question of standing to bring a judicial review action under German law. However, the effect, as in *Factortame I* or *Muñoz*, is to require a direct action, whether it be directly based on EU law or by disapplying a condition for an existing national action.[131]

Impact is a fascinating case. Ireland has a specialized jurisdiction for employment law matters - the Rights Commissioner and, on appeals, the Labour Court - which was the competent jurisdiction for matters arising under the Irish legislation implementing the Fixed-Term Work Directive.[132] The case concerned the lack of competence of that specialized jurisdiction to apply the Directive directly during the transitional period between the date for its transposition and the (late) entry into force of the domestic implementing legislation (a period when certain provisions of the Directive had direct effect and could as a matter of EU law be enforced against the State employer, defendant in the underlying proceedings). The Court, reiterating the principles of effective judicial protection, sincere cooperation and procedural autonomy under previous case-law, including *Unibet*, concluded - in an apparent attempt to bring all the principles together in one coherent concept - that equivalence and effectiveness 'embody' the obligation on Member States to ensure effective judicial protection:

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[127] ibid paras 75-7.

[128] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* EU:C:2002:462; [2002] ECR I-6677. See *Unibet* (n 50) paras 37-44.

[129] *Unibet* ibid para 37. This formulation has since been confirmed in: Case C-93/12 *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplashtatelna agentsia* EU:C:2013:432, para 59; Case C-752/18 *Deutsche Umwelthilfe eV contra Freistaat Bayern* EU:C:2019:1114, para 34.

[130] Case C-379/18 *Deutsche Lufthansa AG v Land Berlin* EU:C:2019:1000, paras 54-71.

[131] This may be a question of semantics, as suggested by Francesca Episcopo: 'the use of direct effect and the doctrines established to compensate for its lack of operability can be considered 'remedies *lato sensu*', which not only expand the field of application of EU law, but also directly impinge upon national standards of procedural protection', 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing European Union Law before National Courts', in Craig and de Búrca, *The Evolution of EU Law* (n 3) 275, 292.

[132] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, [1999] OJ L175/43.

> 47. Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.
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> 48. A failure to comply with those requirements at Community level is — just like a failure to comply with them as regards the definition of detailed procedural rules — liable to undermine the principle of effective judicial protection.[133]

Applying these principles to the facts of the case, the Court went on to observe that the requirement for an aggrieved individual 'who sought to bring a claim based on an infringement of that legislation before a specialised court to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, *would be contrary to the principle of effectiveness if — which is for the referring court to ascertain — it would result in procedural disadvantages* for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive'[134] (my emphasis added). The Court considered that the alternative for the complainant to bring one single action before the ordinary courts who did have competence to apply the rules at all relevant times was not a valid one, recognizing implicitly therefore that the complainant had a legitimate right to seek relief before a specialized court, if one existed.

The Lisbon Treaty (which came into force in 2009) gave further legal substance to these principles incorporating the Charter formally into the EU legal order. Article 6 of the EU Treaty granted equal Treaty status to the Charter, provided for the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "**ECHR**") and declared to be general principles of EU law the fundamental rights as they are guaranteed by the ECHR and 'as they result from the constitutional traditions common to the Member States'. For its part, Article 19(1), second paragraph, of the EU Treaty expressly imposed on Member States the obligation to 'provide remedies sufficient to ensure the effective legal protection of in the fields covered by Union law' (echoing the language of *UPA*).

The formal incorporation of the ECHR and the Charter into EU law has undoubtedly had an impact. It forms part of a certain 'constitutionalization' of judicial protection under EU law, with a distinctly rights-based flavour. It arguably signals too an increased interventionism by the EU legal order in aspects of national procedural law. There is some extensive scholarly debate about the precise relationship between effective judicial protection, on the one hand, and the principle of effectiveness (in the *Rewe/Comet* sense), on the other. Some consider that the right is essentially the same principle, others that it offers a different facet of that principle, others too that it is entirely separate.[135] Without

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[133] *Impact* (n 83).
[134] ibid para 51.
[135] AG Kokott has expressed the view that the principle 'embodies' the existing principles of effectiveness and effective judicial protection: Case C-73/16 *Puškár v Finančné riaditeľstvo Slovenskej republiky* EU:C:2017:253, para 51. AG Bobek in *Banger* (n 64), para 100, doubts they are truly very different and considers they are largely overlapping, and in *An tAire* (n 88), paras 43-44, suggests that they approach the same issue of effective judicial protection from different angles. For further discussion, see Sasha Prechal and Kees Cath, 'The European Acquis of Civil Procedure: Constitutional Aspects' (2014) 19 Unif L Rev 179.

doubt, its application and invocation by the Court is not neat or stream-lined and is difficult to fit into one simple pattern.[136] Nevertheless, there is general acknowledgement that the express incorporation of Article 47 of the Charter to the EU Treaty marks an increased relevance of the right in the Court's judicial activity and in EU law.[137]

Support for this can be seen in the CJEU's case-law following the Lisbon Treaty, which contains a notable change in language and content. *DEB* is frequently cited as marking a first real development in the Court's Charter-based fundamental rights approach to procedural law.[138] Indeed, the judgment, concerning the availability to legal persons of legal aid, contains express reference to the third paragraph of Article 47 of the Charter, which consecrates the right to legal aid in the EU Treaties, and extensive references to the case-law of the ECtHR. One could say, in fact, that the Court's resolution of the case was fundamentally influenced by the ECtHR's interpretation of the right (reflecting the Charter's strong interdependence with the ECHR) and relied heavily on the prior work of Advocate General Mengozzi in reviewing those precedents.[139]

The relevant case-law following the Lisbon Treaty is, indeed, marked by references to the new Treaty-based rights (in particular, Article 47 of the Charter and Article 19(1) TEU), which are incorporated into the more traditional procedural autonomy language of the Court and, in turn, signify a somewhat clearer and stronger fundamental rights legal architecture. The judgment of the Court in *Berlioz* (a referral from the Luxembourg Administrative Court concerning the rights of a private party to challenge an information order adopted by the tax authorities in Luxembourg further to a request from the French authorities pursuant to EU cooperation rules in the field of taxation) is illustrative of the new language and approach:

> According to Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. The obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right.
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> […] It should be noted in that regard that the principle of effective judicial protection is a general principle of EU law, which is now set out in Article 47 of the Charter. Article 47 secures in EU law the protection afforded by Article 6(1) and Article 13 of the ECHR.[140]

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[136] AG Bobek notes in his opinion in *An tAire* ibid para 46: 'There is, naturally, abundant case-law on (Rewe-) effectiveness, which over the past decade has essentially been taken over by effective judicial protection under Article 47 of the Charter. However, that deeply case-specific case-law can hardly be considered consistent'.

[137] Bobek observed in 2020 in 'The Effects of EU Law' (n 91) that: '[T]he recent case law of the Court has begun to discuss issues concerning national remedies more in terms of effective judicial protection. The dual requirement of equivalence and/or effectiveness is still present, but the rhetoric has shifted. This terminological move corresponds to the change brought about by the Treaty of Lisbon.'

[138] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* EU:C:2010:811; [2010] ECR I-3849.

[139] ibid EU:C:2010:489, in particular paras 63-8.

[140] Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373, paras 44, 54. See also Joined Cases C-439 and 488/14 *SC Star Storage SA v Institutul Naţional de Cercetare-Dezvoltare în Informatică (ICI)* EU:C:2016:688, para 46; Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:838, para 50; *Puškár* (n 135) EU:C:2017:725, paras 57-9. In *Berlioz*, this entailed that the relevant party had the right to have the information order reviewed in the light of objective criteria (specifically, 'foreseeable relevance') to avoid 'fishing expeditions' or requests for information which were unlikely to be relevant for the tax investigation in question. In that context, the party should be

Equally, the approach to limitations on effective judicial remedies is characterised by the new fundamental rights approach set out in the Charter. In accordance with Article 52(1) of the Charter, a limitation to the right to an effective remedy can only be justified if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others.[141] Advocate General Kokott has observed that the principle of proportionality is also relevant in the application of the effectiveness principle (for instance, in the limitation on excessive complication).[142] Nevertheless, the new legal packaging denotes a development in legal approach.

As observed by the Court in *Otis*, Article 47 comprises various elements including, in particular 'the rights of the defence, the principles of equality of arms, the right of access to a tribunal and the right to be advised, defended and presented'.[143] Accordingly, Article 47 incorporates certain counter-balances to the principle of effective judicial protection of EU law rights, aimed at protecting the parties' rights of defence and, more broadly, the right to a fair trial. This is reminiscent of the balancing considerations advocated by the Court's *Van Schijndel/Peterbroeck* rule of reason test, which explicitly acknowledges national procedural guarantees (inter alia rights of defence, legal certainty and due process) as legitimate limits to the effective application of EU law.[144] Düsterhaus has observed that 'effective judicial protection by national courts does not always serve the purpose of furthering the effectiveness of such rights' but that it can 'also be a safeguard against undue enforcement of EU law', adding that Article 47 'covers not only positive entitlements but also the situation of those who seek to defend themselves against the enforcement of EU law', which 'may find its limits in Article 47 CFR insofar as access to court must be guaranteed also in order to contest an obligation stemming from EU law and because all parties to judicial proceedings under that law are entitled to a fair trial'.[145] The right to a fair trial entails, for instance, the principle of equality of arms pursuant to which 'each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[146]

At the same time, these rights of defence are not absolute and must be weighed up by the court, taking into account 'the specific circumstances of each case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question'.[147] In *Donau Chemie*, this meant that it was necessary to take into account, inter alia, the defendant's right to the protection of business secrets in documentation on the competition authority's administrative file to which the claimant was seeking access in order to obtain evidence useful for its claim for damages which it alleged arose from the infringement in question.[148] In *Berlioz*, the protection of the objectives of speed, efficiency and secrecy in the cooperation between tax authorities also involved recognizing that the

granted certain limited rights to access to the foreign tax authorities' request (subject to secrecy requirements) in order to be able to ascertain the nature of the investigation and, so, effectively exercise its right to a judicial remedy.

[141] *Puškár* (n 135), para 62; *Star Storage* (n 140) para 49.

[142] *Puškár* (n 135), paras 50-1.

[143] Case C-199/11 *Europese Gemeenschap v Otis NV* EU:C:2012:684, para 48.

[144] See, Prechal (n 30).

[145] Düsterhaus, 'Constitutionalisation of European Civil Procedure' (n 6) p 78.

[146] *Otis I* (n 143), para 71; *Berlioz* (n 140), para 96.

[147] *Berlioz* ibid para 97; Case C-348/16 *Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano* EU:C:2017:591, para 41.

[148] See Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG,* EU:C:2013:366.

national court was entitled to impose certain limits on the applicant's EU right to a judicial remedy; in particular, as regards the extent of its access to the French cross-border tax authority request which formed the basis for the Luxembourg information order it sought to challenge.

As some commentators have suggested, this process before the Court involves the beginnings of EU procedural standards.[149] These standards are developed and set under Article 47. They are to have the same meaning and scope as the equivalent articles under the ECHR (namely, Articles 6(1) and 13), such that the ECHR and its interpretation in the case-law of the ECtHR take on an increased importance in the CJEU's case-law. In addition, however, the Court is entitled to bestow a higher level of protection than the ECHR under Article 47.[150] Article 47 accordingly has its own proper and autonomous meaning.[151] Indeed, within its scope of application, Article 47 establishes an EU standard to the exclusion of differing (even higher) national standards of effective judicial protection.[152] It is also directly applicable and may be invoked by individuals before the national courts.[153] It may consequently be necessary to disapply a contrary provision of national law to guarantee the full effectiveness of Article 47.[154] At the same time, the development of the Article 47 draws, in practice, on the traditions and concrete practices of the Member States for its inspiration, in that way compensating somewhat for the piecemeal nature of CJEU case law.[155]

These standards differ materially from the traditional *Rewe/Comet* effectiveness control of national procedural autonomy exercised by the Court since they involve the establishment of positive procedural obligations on national courts, sometimes where such obligations did not previously exist. This contrasts with the traditional approach which set down negative limits, requiring national courts to disapply national rules where they impeded excessively the effectiveness of EU law (or discriminated in favour of equivalent national actions).[156]

Furthermore, it has been noted that the development of EU procedural standards under Article 47 is, unlike the ECHR, strongly national court-led. What does this mean? In the ECHR system, the review of fundamental rights occurs at the final stage of the process as a last resort review mechanism instigated by the affected party, once all national appeals have been exhausted. By contrast, in the EU

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[149] See the excellent article of Pieter Van Cleynenbreugel, 'Judge-made standards of national procedure in the post-Lisbon constitutional framework' (2012) 37 EL Rev 90.
[150] As per art 52(3) Charter.
[151] See, eg, *Otis I* (n 143), paras 46-47; *Berlioz* (n 140), para 54.
[152] *Melloni* (n 27, 28).
[153] Both as against the State (vertical direct effect), Case C-556/17 *Torubarov v Bevándorlási és Menekültügyi Hivatal* EU:C:2019:626, para 56; Joined Cases C-585 and 624-25/16 *AK and Others v Sąd Najwyższy* EU:C:2019:982, para 161, and against another private individual (horizontal direct effect), *Egenberger* (n 81), para 78. For a further discussion of the nature of the horizontal direct effect of Charter rights, see Michal Bobek 'Institutional Report' in Marleen Borman and Jurian Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (FIDE XXIX Congress, The Hague, Eleven International Publishing 2020), 65-8.
[154] *Egenberger* ibid para 79.
[155] Marek Safjan and Dominik Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' Yearbook of European Law Vol 33 nº1 (2014) 3, 37: 'This common EU standard has by no means been created from scratch. It indeed stems from a host of sources, which continue to influence its further development. We should stress in this regard that national procedural rules and principles are not only scrutinized, but eventually taken on board, when their compliance with EU law is challenged before the Court. This incorporation of national standards through the case law is still indispensable due to the piecemeal state of written EU procedural law.' See also Düsterhaus, 'Constitutionalisation of European Civil Procedure' (n 6) 85.
[156] See Van Cleynenbreugel, 'Judge-made standards' (n 149) 94.

system, it is the national court, before taking its decision on a case, that may raise a preliminary question on the scope or meaning of fundamental rights under, for example, Article 47 of the Charter, for interpretation by the CJEU. This, which may even occur at the first instance level (and frequently does), vests in each national tribunal a high level of initiative and prominence in the development of common procedural rights in the EU. It also entails procedural rights issues being raised much earlier on in a process, potentially therefore having a more effective impact on national procedures.

Van Cleyenbreugel has described the relationship between the CJEU and national courts in this area as one of 'guided deference', whereby he means 'a situation in which the Court of Justice, based on particular standards or principles, provides a blueprint or at least guidance for national courts to develop and structure particular procedural provisions in a coherent and unified framework'. In turn, he underlines the importance of the role of the national courts in crafting new standards:

> [N]ational courts, in the formulation of their references for a preliminary ruling, can steer the Court towards developing guiding standards, based upon the interpretation of ECHR provisions by the ECtHR. As such, national courts continue to play a dominant role in standard setting. Even though standards of fair trial in national procedures are developed at EU level, national courts enable their coming into being and determine whether and to what extent the Court grants more protection to rights recognized under the ECHR.
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> The upswing of the development of procedural standards in this way is that national judges are invited to reflect upon their national procedural systems from the vantage point of EU law and the ECHR. In provoking a guided deference approach through the Court's judgments, national judges could pinpoint deficiencies in their own system and subsequently rely on the European Court of Justice to enforce the positive obligations imposed on them by the ECtHR more directly. Since a national court will be bound by the Court's answer to the reference for a preliminary ruling when deciding on the concrete dispute before it, the ECJ's involvement in the case guarantees an authoritative ex-ante assessment of the scope and role of positive procedural obligations that need to be complied with in the case at hand.[157]

What can we say, finally, about the substantive content of EU procedural standards under Article 47? It is suggested that, as a result of the constitutionalisation of the principle of effective judicial protection, those standards are now based on higher standards of protection than was previously the case under *Rewe/Comet* effectiveness. Advocate General Jääskinen has observed that 'the standard of effective judicial protection for EU based rights seems to be more demanding than the classical formula referring to practical impossibility or excessive difficulty', which in his opinion implies that national remedies should, in fact, be 'accessible, prompt, and reasonably cost effective'.[158] Advocate General Bobek broadly concurred with this view, albeit less enthusiastically, in his Opinion in *Banger*:

> [I]t would appear that since the entry into force of the Charter, Article 47 has been developing in a more robust manner. Reviewing the case-law of the Court, it would indeed appear that Article 47 of the Charter currently sets a higher standard than the principle of effectiveness. How far that stems from the text of Article 47 of the Charter itself and how far that fact is the natural and simple consequence of the newer, post-Lisbon case-law focusing on and being developed on the basis of that article, can safely be left to scholarly discussion.[159]

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[157] ibid 98.
[158] See *Bundeswettbewerbsbehörde*, n 148, paras 5-6, 47.
[159] See *Banger*, n 64, para 101.

In the words of Judge Safjan in 2014:

> The binding character of the fundamental right enshrined in Article 47 CFREU facilitates the promotion and enforcement of the EU standard, resulting, notably, in a stricter framing of national procedural rules and, consequentially, growing uniformity. From a structural and functional complementarity, the relationship of the national and EU legal orders thus evolves towards convergence and interdependence. The EU standard of protection is thereby universalized.[160]

Safjan's co-author, the référendaire Düsterhaus, has argued more recently that 'when dealing with procedural issues under Article 47 CFREU the CJEU certainly fosters a common standard of procedural rights by construing primary and secondary law in a way that ensures its compliance as well as that of domestic rules and practices with the requirements of fair, effective and expedient judicial protection'.[161]

It would be too simplistic to suggest that the development of procedural rights under the umbrella of Article 47 effective judicial protection began with the Charter or the Lisbon Treaty. This is contradicted by the prior case-law developments since *Johnston*. However, there is a clear intensification of this area of work within the EU courts and the emergence of EU procedural law standards as a subject-matter in itself.[162] This in turn raises new questions about the ability of the current system to respond to the challenges ahead. The emergence of judge-led standards can only, at best, be piecemeal given the very nature of judge-made law. Furthermore, the preliminary reference process does not offer an agile mechanism for the resolution of procedural matters, nor can it offer more than guidance which national courts must then act upon in accordance with the specifics of the case and national law. Indeed, the ever greater level of detail into which the CJEU seems to delve to provide responses in particular cases, is testimony to the size of the problem.[163] The CJEU simply does not have the resources, nor arguably should it, to deal with the ever increasing number of preliminary references on these issues.[164] The challenge is made greater as the Court's assessment involves the consideration of ever increasing sources of law; notably, ECtHR case-law, but also other sources, such as national procedures, international conventions or soft law. This adds complexity, delay and cost to the process.

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[160] Safjan and Düsterhaus, 'A Union of Effective Judicial Protection' (n 149), 37.

[161] Düsterhaus, 'Constitutionalisation of European Civil Procedure' (n 6), 70.

[162] The relevance of EU law on effective judicial protection has, of course, reached particular notoriety in the context of the so-called rule of law crisis, where the independence and impartiality of national courts, even Supreme Courts, has come under CJEU scrutiny in recent times, even outside the direct scope of application of EU law; see, inter alia, C-824/18 *AB v Krajowa Rada Sądownictwa* EU:C:2021:153; C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311.

[163] See n 60. AG Bobek has referred to the problem of what he calls the Court's 'factual jurisprudence' and calls attention to the striking level of factual detail with which questions are asked and answered, many times generating further referrals on similar factual variations on the same legal issue, and questions the sense of such detail, in 'Institutional Report' (n 153), 87-8.

[164] The number of preliminary references has increased markedly over the years. There were 255 references courts in 1999, 249 in 2004, 302 in 2009, 428 in 2014 and 641 in 2019, and they represented 76.4% of the CJEU's docket in 2019 (see data presented by Catherine Donnelly and Thomas de la Mare, 'Preliminary Rulings and EU Legal Integration: Evolution and Continuity' in Craig and de Búrca, *The Evolution of EU Law* (n 3), 263-274, drawn from the CJEU Annual Reports up until 2019). There were 556 preliminary ruling proceedings brought in 2020 (Source: CJEU Annual Report 2020). The CJEU made a proposal on 30 November 2022 to share some of the workload of preliminary references with the General Court: Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union; available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf (accessed 27 July 2023).

All of this suggests that other approaches need to be explored to assist (not substitute) the CJEU in its development of procedural standards.

2.4. Examples

As a conclusion to this section, it is useful for the subject of this work to take a specific look at a number of examples where the CJEU, through its dialogue with national courts via the preliminary reference mechanism, has determined certain procedural conditions or standards, or at least provided detailed procedural guidance, in the context of the application of EU law. We will centre our attention on precedents from a number of areas of law, leaving the in-depth analysis of competition damages precedents for Chapter 4. We will focus on purely procedural issues, such as evidence, and matters relating to the designation of competent courts (a matter, in fact, reserved to national competence, as we have seen). We will start with the latter.

a) Court organization: the case for centralized or specialized courts

While a matter of Member State competence, the CJEU has considered the question of court organization on a number of occasions in the context of questions relating to EU law matters, such as jurisdiction. Given our subject-matter, it is particularly instructive to take a look at some recent cases where the Court has focused its attention on the use of specialized or, at least, centralized national courts for certain subject-matters. This issue has been addressed both in the context of the application of EU common jurisdictional rules and of a specific policy area (concretely, the Common Agricultural Policy). It is posited that these cases have initiated an interesting debate about the benefits for justice of domestic court specialization in certain areas of EU law involving complex technical analysis.

The first case is *Agrokonsulting*.[165] This was a referral from the Administrative Court of Sofia in Bulgaria in relation to a domestic jurisdiction conflict concerning an appeal by a farmer from Burgas against an administrative decision denying it the payment of certain agricultural aid under the CAP. The referring court, which would ordinarily have been the competent court to hear the appeal since it coincided with the seat of the relevant authority (the Executive Director of the National Agriculture Fund), asked whether its assumption of jurisdiction (in the place of the court of the domicile of the farmer) would infringe either the principles of equivalence and effectiveness or Article 47 of the Charter. In particular, the court of Sofia noted that the agricultural plots in question were quite some distance from Sofia (over three hundred kilometers, implying a journey by car of approximately 3 hours)[166] and that this could adversely affect the rights of farmers (described by the court as a vulnerable social group) since the collection of evidence, the production of expert reports and the inspection of properties were liable to be delayed and rendered more costly as result of the distance.[167]

In its assessment of the impact of the effectiveness principle, the Court recalled the *van Schijndel/Peterbroeck* rule of reason requirement; namely, that the court take into consideration 'the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules, before the various national instances', as well as, 'as appropriate, the principles which lie at the basis of the national legal system concerned, such as the protection of

[165] n 129.
[166] See the opinion of AG Bot, EU:C:2013:172, paras 42-3.
[167] n 129, para 31.

the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings'.[168] It went on to highlight a number of factors which, subject to a more in-depth analysis by the local court, it considered did not preclude the establishment of a centralized court to deal with appeals of this nature: (i) the party could be represented by a lawyer at the in-person hearings, legal aid was available, costs could be awarded and the burden of proof on the applicant could easily be displaced to the administration; (ii) the preferred means of assessing evidence in this type of case was an expert report and the expert report was normally based on public data with site visits being the exception rather than the norm; (iii) the proceedings normally lasted 6 to 8 months which did not appear excessive; (iv) the concentration of cases before the Sofia court allowed the court to acquire specific expertise, which could limit the average length of proceedings, and, as noted by the German Government in their observations, 'a centralised court, specialising in agricultural aid, seems likely to ensure uniform practice throughout the national territory, thereby contributing to legal certainty'.[169] The Court accordingly concluded that the jurisdiction rule did not on the face of it breach the principle of effectiveness.[170] Nor, for the same reasons, did it breach the principle of an effective judicial remedy pursuant to Article 47 of the Charter.[171] Nevertheless, in accordance with standard practice, it left it to the national court to determine whether the rule did indeed satisfy the effectiveness test as set out by the CJEU.[172]

The second case is *Sanders & Huber*.[173] These were two cases under Council Regulation 4/2009 relating, inter alia, to jurisdiction in matters of family maintenance obligations, referred respectively by the District Courts of Düsseldorf and Karlsruhe.[174] Both referrals queried the compatibility with the regulation of a German 'centralization of jurisdiction' rule whereby cross-border claims for maintenance should be dealt with by the local court situated in the territory of the Higher Regional Court of the domicile of the relevant German creditor or debtor. The rule for domestic cases, however, was that jurisdiction was vested in the local court of the domicile of the creditor or debtor. In its judgment, the Court confirmed, first, that the connecting factor establishing jurisdiction under the Regulation ('place where the creditor is habitually resident') determined both international and territorial jurisdiction.[175] Secondly, national law determined the competent court to adjudicate a case within that jurisdiction, provided that such rule did not undermine the objectives of the Regulation or render it ineffective.[176] Thirdly, it examined the compliance with those EU law conditions. To this end, it identified the key objectives of the jurisdiction rule for maintenance creditors: first, the proximity to the creditor's habitual residence (in order to facilitate claims by a person who is normally the weaker party), and, second, the proper administration of justice (both from the perspective of the optimal organization of courts, but also of the litigants' interest, inter alia, in easier access to justice and predictable jurisdiction rules).[177] It proceeded to apply those principles and considered: (i) the

[168] ibid paras 38, 48.
[169] ibid paras 50-6.
[170] ibid para 58.
[171] ibid paras 59-60.
[172] ibid para 61.
[173] Joined Cases C-400 and 408/13 *Sanders v Verhaegen* and *Huber v Huber* EU:C:2014:2461.
[174] Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1.
[175] *Sanders & Huber* (n 173), para 30.
[176] ibid para 32.
[177] ibid paras 26-9, 36-7, 40.

proximity requirement did not create an obligation on Member States to establish a court in each and every place of domicile of maintenance creditors, conceding however that a cross-border rule which applied a less localized solution than the rule for domestic cases 'does not necessarily help to achieve the objective of proximity'; and (ii) the extra travel implied in a centralization of courts did not necessarily arise where one of the objectives of Regulation 4/2009 was to maximise the use of communications technologies to avoid in-person hearings.[178] In addition, it considered that the centralization of jurisdiction arguably contributed to the achievement of all of the goals of the regulation:

> [A] centralisation of jurisdiction, such as that at issue in the main proceedings, promotes the development of specific expertise, of such a kind as to improve the effectiveness of recovery of maintenance claims, while ensuring the proper administration of justice and serving the interests of the parties to the dispute.[179]

Notably, the Court referred once more to arguments from the German Government, as well as this time of the Commission, in support of centralization which they maintained 'has a positive effect on the administration of justice, because it makes it possible to have access to courts which are specialised, and thus have greater expertise in that type of litigation, which … is often of great factual and legal complexity'.[180] In conclusion, disagreeing in this case with Advocate General Jääskinen, the Court again considered that court centralization was not necessarily incompatible with the EU framework. It did so, nevertheless, in more cautious terms than in *Agrokonsulting* (no doubt given the more sensitive nature of the subject-matter and the clearer terms of the EU framework) and remitted the specific analysis back to the national court.

Volvo I was also a case on jurisdiction, on this occasion concerning jurisdiction in a tort action (specifically, an action for damages for breach of competition law) pursuant to the special jurisdiction rule of Article 7(2) of the Brussels I Regulation.[181] The CJEU confirmed that the EU rule determined both international and territorial jurisdiction, by reference to the place of the harmful event as per the terms of Article 7(2) as interpreted by the Court. Which national court has jurisdiction, in that place and for the relevant subject-matter (competition law), was nevertheless a matter for national law (the organization of its court system). Up to this point, the judgment says nothing new. However, it is the additional obiter comments as regards court specialization which merit our attention. The Court states the following:

> 35. As the defendants in the main proceedings, the Spanish and French Governments and the Commission have noted, that provision does not preclude a Member State from deciding to confer a particular type of dispute to a single court, which therefore has exclusive jurisdiction irrespective of where the damage occurred within that Member State.
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> 36. The Court has already stated that a centralisation of jurisdiction before a single specialised court may be justified in the interests of the sound administration of justice (see, to that effect, judgment of 18 December 2014, Sanders and Huber, C-400/13 and C-408/13, EU:C:2014:2461, paragraph 44).

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[178] ibid paras 35-9, 43 by reference to recital 23 Regulation 4/2009 (n 168).
[179] *Sanders & Huber* (n 173), para 45.
[180] ibid para 42.
[181] Case C-30/20 *RH v AB Volvo* EU:C:2021:604. See further, Paul Hitchings, 'RH v AB Volvo: a call for centralized and specialized courts in the midst of jurisdictional dispersion', (2021) 2 Mass Claims Journal 136.

> 37. As the Advocate General observed in point 128 of his Opinion, in the context of Article 7(2) of Regulation No 1215/2012, the technical complexity of the rules applicable to actions for damages for infringements of competition law provisions may also militate in favour of a centralisation of jurisdiction.[182]

According to the judgment, these comments responded to the observations of the Spanish and French Government and of the European Commission. They were not the object of the Madrid referring court's preliminary reference. On further inspection of the written observations in question, there is no evidence that the Spanish Government raised this point directly itself – rather it responded to a question from the Court confirming its position was in line with the French Government and the Commission.[183] Indeed, Spain does not have a centralized competition court but rather a large number of commercial courts located in each province around Spain which have subject-matter jurisdiction in a number of commercial matters, including competition law.[184] The French Government did raise the specific point, however, seemingly concerned to preserve its national procedural autonomy to organize its local court system, including the possibility to create specialized courts. For its part, the Commission dedicates the last section of its observations to the issue of specialized courts and, repeating the *Sanders & Huber* doctrine, maintains that the jurisdiction rules do not preclude a certain specialization in proceedings of a technical nature, where such specialization may indeed be desirable, provided the effectiveness of the EU jurisdiction rule is not undermined. The fact that the Court, echoing the reasoning of Advocate General de la Tour, emphasizes the technical complexity of competition law (by implication giving greater justification for centralization than the law of child maintenance), is notable in that it goes further than the parties or the referring court to make this point. I would suggest this is a clear indication to the Member States that this path is open to them should they wish to follow it. Many of them have indeed already realized certain reorganisation of their courts for competition matters; such as the Italian creation of three specialized courts in Milan, Rome and Naples,[185] or the Portuguese specialized Competition and Regulation Supervision Court in Santarem which has exclusive competence both for damages actions and the judicial review of decisions of the national competition authority.[186] In this way, the location of the harmful event within a country for jurisdiction purposes pursuant to Article 7(2) (which potentially opens up a large number of competent courts) becomes less relevant since there is only one centralized national court (or only a few courts) with competence to hear the case.

b) Evidence: the hearing of evidence and the right to a fair trial

Interestingly, there have been a handful of cases before the CJEU which have addressed the implications of the fundamental right to a fair trial (Article 6 ECHR and Article 47 of the Charter) for

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[182] *Volvo I* (n 181).

[183] The author has been granted access to the observations under the EU Transparency Regulation (Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

[184] See Part III, Ch 13.2 below.

[185] Italian Legislative Decree of 19 January 2017, which implemented the Damages Directive into Italian law, amended art 4 of Legislative Decree of 27 June 2003 to attribute exclusive regional competence to these three court centres.

[186] The 'Tribunal da Concorrência, Regulação e Supervisão' was created pursuant to Law 46/2011 of 24 June, Decree-Law 67/2012 of 30 March and Ministerial Order 84/2012 of 29 March. The court's area of territorial jurisdiction corresponds to the national territory (Decree-Law 49/2014 of 27 March). It has exclusive jurisdiction to rule on civil actions based solely on violation of competition rules and is the competent body for reviewing decisions of the Portuguese Competition Authority pursuant to Law 32/2013 of 26 August.

how parties should be allowed to contest evidence; in particular, evidence of a technical nature. The Court's judgment of April 2003 in *Steffensen* concerned German proceedings relating to the review of a fine imposed on the applicant for a breach of marketing regulations in the sale of certain food products.[187] Those regulations implemented an EC Directive. The Court's ruling concerned the admissibility of the results of the analysis of certain food samples in the proceedings before the German court when certain procedural rights of the applicant set out in the Directive (namely, to a second opinion) had not been guaranteed during the administrative process. Part of the Court's reply addressed the question of whether this would entail a breach of the applicant's right to a fair trial. Drawing on the case-law of the ECtHR, the Court noted that Article 6(1) ECHR does not lay down rules on evidence as such, so that it does not determine the admissibility or inadmissibility of evidence, which is a matter of domestic law. Nevertheless, the requirements of a fair trial - essentially that the parties be given an adequate opportunity to participate in the court proceedings - relate to the proceedings considered as a whole and this extends to the way in which evidence is taken.[188] Furthermore, where the parties are entitled to submit observations to the court on a particular piece of evidence, the right to adversarial proceedings which Article 6(1) guarantees implies that 'they must be afforded a real opportunity to comment effectively on it'. This is all the more so where the evidence in question 'pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on the assessment of the facts by the court'.[189]

This principle derives from the *Mantovanelli* ECHR case where the ECtHR recognized the rights of appellants in French medical negligence proceedings to have been involved in the process of preparation of the relevant court-appointed expert medical report which was, then, the key piece of evidence in the court proceedings.[190] The ECtHR considered that the ability to challenge and rebut that report before the court was insufficient to guarantee their right to a fair trial in that case. This is a very interesting (and controverted) ruling, upheld by a slim majority of five votes to four. The dissenting judges considered that the Court erred too far into the domestic realms of evidence and beyond the confines of the right to a fair trial, it being sufficient for the parties to be able to contest the evidence before the court in legal proceedings, rather than having a further right to be involved in its preparation by the expert.[191] However, the decision, understood on its facts, is compelling. The appellants were the parents of a child who had lost her life further to serious complications which arose following medical treatment on an abscess on her thumb. The medical report was ordered by the administrative court and was realized by a court-appointed expert. It was of a technical nature and clearly would heavily influence the court in the outcome. The preparation of that report had involved interviews with the hospital staff without prior notice to the appellants or their lawyers and without their involvement. The majority of the Court underlined that the protection of the appellants' rights to adversarial proceedings required that they be granted the 'effective' opportunity to rebut the expert evidence and that, on the facts of the case, this required that they be granted the ability to be involved in, and comment on, the preparation of that expert report:

[187] Case C-276/01 *Steffensen* EU:C:2003:228; [2003] ECR I-3735.
[188] ibid para 76.
[189] ibid para 77.
[190] *Mantonavelli v France* App no 21497/93 (ECtHR, 18 March 1997).
[191] See the dissenting opinions annexed to the judgment.

> 33. The Court notes that one of the elements of a fair hearing within the meaning of Article 6(1) is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, mutatis mutandis, the *Lobo Machado v. Portugal* and *Vermeulen v. Belgium* judgments of 20 February 1996, Reports of Judgments and Decisions 1996, p. 31 and p. 33, respectively, and the *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports of Judgments and Decisions 1997, p. 24). In this connection, the Court makes it clear at the outset that, just like observance of the other procedural safeguards enshrined in Article 6(1), compliance with the adversarial principle relates to proceedings in a "tribunal"; no general, abstract principle may therefore be inferred from this provision that where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal" (see, mutatis mutandis, the *Kerojrvi v. Finland* judgment of 19 July 1995, Series A no. 322, p. 16, 42 in fine).[192]

As the ECtHR notes, and as the CJEU has done elsewhere,[193] this did not amount, however, to a general abstract right to participate fully in all aspects of the process of the court-appointed expert (as opposed to a right to challenge findings in the court proceedings themselves).

The principle of effective challenge of evidence relied upon to base a decision against a party has been echoed in tax cooperation cases.[194] It has also been invoked recently in a merger case in the context of the use by the European Commission of econometric models to predict the impact of the proposed transaction on the market and so justify its decision under the Merger Regulation.[195] In the case in question, *UPS*, the Commission had communicated its underlying econometric model to the notifying party, and discussed it with UPS, during the administrative process. However, the Commission had made adjustments to the final model which it relied on its decision to reject the proposed merger (the acquisition of TNT) and these were not communicated to UPS prior to the decision being adopted. The Court held that this failure to communicate the final model to UPS breached the party's rights of defence and to a fair trial, vitiating the decision and, consequently, grounding its annulment:

> 31. Observance of the rights of the defence before the adoption of a decision relating to merger control therefore requires the notifying parties to be put in a position in which they can make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on (see, by analogy, judgment of 22 October 2013, *Sabou*,C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited).
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> 32. As regards the econometric models used in merger control procedures, it should be recalled that the necessary prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on the markets affected. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraphs 42 and 43).

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[192] ibid.

[193] Joined Cases C-204-5, 211, 213, 217 and C-219/00 P *Aalborg Portland A/S and Others v Commission of the European Communities* EU:C:2004:6; [2004] ECR I-123, para 70.

[194] See, for instance, C-276/12 *Sabou v Finanční ředitelství pro hlavní město Prahu* EU:C:2013:678, para 38.

[195] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1; Case C-265/17 P *United Parcel Service, Inc. v European Commission* EU:C:2019:23.

> 33. To that end, the use of econometric models allows better understanding of the planned operation by identifying and, where relevant, quantifying some of its effects, and thus contributes to the quality of the Commission's decisions. It is therefore necessary that, where the Commission intends to base its decision on such models, the notifying parties are able to submit their observations in that regard.
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> 34. The disclosure of such models and methodological choices underlying their development is all the more necessary as it contributes, as the Advocate General observed in point 43 of her Opinion, to ensuring that the procedure is fair, in accordance with the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.[196]

On the point of evidence and rights to a fair trial, mention should be made to *Pupino*, a criminal case concerning the taking of witness evidence outside the courtroom and the main court proceedings.[197] The EU 2001 Framework Decision on the standing of victims in criminal proceedings provided for vulnerable victims to be protected from the effects of giving evidence in open court and allowed for the competent court to permit evidence to be given by other means 'compatible with its basic legal principles'.[198] *Pupino* concerned Italian criminal proceedings brought against a schoolteacher for alleged bullying and maltreatment of her five-year old pupils. The public prosecutor sought permission from the Court of Florence in charge of the preliminary (investigation) stage of the proceedings to carry out the interviews of the alleged victims outside the courtroom pursuant to special arrangements aimed to protect the dignity and privacy of the children and, furthermore, for those interviews to be treated as evidence at trial without the need for them to give testimony again in open court. The general requirement of Italian law is that witness evidence should be provided in open court during the second (adversarial) stage of proceedings, permitting cross-examination and all the usual guarantees of the rights of defence. The law allows for certain limited exceptions to this requirement, including in the case of sex offences where the law grants the same probative value to evidence taken during the investigation stage and, in addition, permits the evidence to be taken pursuant to the sorts of special out-of-court arrangements being requested by the public prosecutor in the *Pupino* case. This exception did not extend to other vulnerable victims, such as the young children in *Pupino*, however. The Court held that the Framework Decision required that such special arrangements to avoid having to give testimony in open court be extended to the children, who were clearly vulnerable victims within the meaning of that legal text, and that the Court of Florence was under the obligation to interpret national law to the extent possible in line with that requirement.[199] At the same time, the national court was required, in so doing, to ensure the protection of the defendant's right to a fair trial, in accordance with Article 6 ECHR, and in particular that the proceedings, considered as a whole, were not likely to become unfair. In this sense, it is to be noted that the special out-of-court arrangements contemplated for sex offence cases included mechanisms to ensure the sound and audiovisual recording (or proper alternative documentation) of the witness

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[196] ibid.

[197] Case C-105/03 *Pupino* EU:C:2005:386; [2005] ECR I-5285.

[198] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1.

[199] In her analysis of the legal basis for the Framework Decision, AG Kokott concluded that the general objective to improve judicial cooperation and provide citizens with a high level of security within an area of freedom, security and justice, justified the promulgation of common standards for the protection of victims when giving evidence in criminal proceedings, objective which furthermore contributed to judicial cooperation by guaranteeing that evidence be usable in all Member States; see her opinion, EU:C:2004:712, paras 48-52.

testimony and, it is to be understood, the possibility for the defendant's lawyer to observe the examination and, within reason, put questions.[200]

All the CJEU rulings we have mentioned thus far on evidentiary issues concern criminal or administrative law decisions. The principles of a fair trial may largely be extensible to civil cases, however.[201] *Puškár* is a civil case where the Court applied Article 47 of the Charter.[202] The Court was there faced, inter alia, with the question of how the Slovak referring Supreme Court should deal with evidence which had been obtained by a party seeking to rely on it (the claimant in the national proceedings: Mr. Puškár) purportedly in contravention of data protection rules. In that regard, the Court held that the dismissal of the evidence on the ground that it had been obtained without the legally required consent of the data controller was a limitation of the claimant's right to an effective remedy under Article 47 of the Charter. Such limitation would need to be justified on the basis of Article 52(1) of the Charter and in particular should be proportionate, something the Court doubted on the basis of the facts referred.

c) Disclosure

The Court has had the opportunity on a number of occasions to underline the need for parties to obtain access to information in the hands of another party in order to ensure the effectiveness of their rights arising under EU law (or their rights of defence when disputing an EU right). An example is the Court's judgment in *Boiron.*[203] That case concerned an action by a French pharmaceutical company, Boiron, for repayment of a tax which, it alleged, granted an unfair advantage to certain competitors (wholesale distributors) and amounted to state aid incompatible with the internal market. Those competitiors enjoyed an exemption from paying that tax on the basis that they performed certain public service tasks. Boiron alleged that the exemption entailed overcompensation for those tasks. It had the burden under French law of proving that allegation. To do so, it would need to show that the compensation granted to the wholesale distributors (the tax exemption) exceeded the additional costs arising from the discharge of their public service obligations. This, as pointed out by Advocate General Tizzano, could require that Boiron have access to the competitor's management costs, information which is normally strictly confidential.[204] The Court ruled that the national court was required to use its general discretion under French procedural rules to order measures of inquiry and document production by one of the parties, or a third party, necessary to permit Boiron the ability to make out its case.

The Court made a similar point in *Vueling*, in the context of passenger claims, under EU rules implementing the Montreal International Air Carriage Convention, for compensation for harm caused by the loss of baggage.[205] The national court in that case, Commercial Court nº 9 of Barcelona, requested guidance from the CJEU on how to calculate the amount of compensation to be granted to

[200] As noted by AG Kokott, the right to a fair trial and to adversarial proceedings requires that the defendant be permitted to put questions to a key prosecution witness (*Pupino*, n 193, para 67).
[201] See Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention of Human Rights* (5th edn, Intersentia 2018), 561-2. See, further, Düsterhaus 'Constitutionalisation of European Civil Procedure' (n 6) s 2.1.
[202] n 135.
[203] Case C-526/04 *Laboratoires Boiron SA v URSSAF* EU:C:2006:528; [2006] ECR I-7529.
[204] ibid, EU:C:2006:219, para 70.
[205] Case C-86/19 *Vueling* (n 113).

a passenger who complained that their baggage had been lost by the air carrier, in circumstances where the passenger had not provided evidence to establish the value of the lost effects contained in its baggage (or the cost of replacement). The national court noted that there were divergences in the approach to quantification of harm in Spain:

> Where loss of baggage is established, certain courts grant the maximum limit for compensation laid down in the latter provision, since that is the most serious case of damage to baggage among those provided for in Article 22(2) of the Montreal Convention, without requiring the passenger to put forward or adduce additional evidence. By contrast, other courts hold that the amount of compensation to be awarded to the passenger in the event of loss of baggage must be determined by the court on the basis of the evidence submitted, the injured party being required to prove, by whatever means are permitted in law, the harm suffered.[206]

The Court recalled that it is for the claimant passenger to establish to the requisite legal standard the contents of the lost baggage in making its claim for compensation and that matters of evidence are a question of national law, subject to the principle of effectiveness. The Court went further, responding to the specific queries raised by the national court, and advocated a balanced, case-by-case, approach. The court should be able to take into account objective factors of assistance in assessing harm - e.g. the weight of the lost baggage or whether the loss occurred during an outbound or return journey - provided such factors were not assessed in isolation but, rather, as a whole.[207] In addition, the Court required national courts to utilize available mechanisms for access to evidence under procedural law to assist the claimants in discharging their burden of proof.[208]

In the CJEU's case law concerning claims for reimbursement of taxes or duties exacted in breach of EU law, the Court has recognized the right of Member States to seek disclosure, where this is necessary in order to meet its burden of proof to make out a defence of pass-on (i.e., that the claimant has passed on the unlawful charges and would be unjustly enriched if the charges were repaid).[209]

Finally, useful insight can be gleaned on disclosure from Advocate General Kokott's opinion in *Tedesco*.[210] The case concerned a request by the Court of Genova under the Taking of Evidence Regulation.[211] It requested that the English courts gather evidence at the premises of a company accused of breaching a patent belonging to the claimant in the Italian proceedings. In accordance with a measure available under Italian patent law, that evidence was to include a description of the alleged infringing product at the defendant's UK premises as well as other evidence of the contested conduct (such as invoices, delivery notes, commercial offer letters, advertising material and computer archive data). To that end, the Italian court order authorised the taking of evidence to include the removal of samples and the assistance of an expert. The English court refused to comply with the order on the ground that it was not within the scope of its practices and, by implication, fell outside

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[206] ibid para 17.
[207] ibid para 42.
[208] ibid para 43.
[209] *Weber's Wine World* (n 58), para 115.
[210] C-175/06 *Tedesco v Tomasoni Fittings Srl* EU:C:2007:451; [2007] ECR I-7929. The case was withdrawn before a judgment was adopted by the Court.
[211] Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.

the scope of the Regulation. Among other reasons, this was due to evidence normally being provided inter partes during the proceedings pursuant to the parties' disclosure obligations under English law. In her opinion, Kokott took the opportunity to clarify the scope of measures that could be requested under the Regulation. She noted, first, that the concept of evidence that could be obtained via the Regulation must have an independent and autonomous meaning. Secondly, she underlined the specific subject-matter of the case (intellectual property) and the fact that intellectual property cases commonly pose a difficulty for the right holder of obtaining adequate access to evidence to prove the infringement since it would frequently be in the possession of another party (i.e., the party responsible for the infringement). Indeed, this area was already the object of specific regulation aimed at harmonizing the protection and private enforcement of intellectual property rights in the EU (the IP Private Enforcement Directive) and required national mechanisms be adopted for preserving evidence (Article 7).[212] As a result, all Member States (including the UK) were required by the Directive to offer similar procedural mechanisms. Thirdly, the mechanisms should be applied with due respect for the principle of proportionality and the adequate protection for confidentiality.[213] Fourthly, Kokott drew a distinction between legitimate pre-trial access to evidence (specific documents or categories of document) and illegitimate fishing expeditions or the inspection of documents merely as a basis for identifying further documents which may serve as evidence ('train of enquiry' evidence). She indicated that the open-ended request from the Genova court for types of evidence which may elicit proof of the alleged illegal conduct may be considered disproportionate or beyond the scope of the Regulation.[214] Finally, the Advocate General addressed the objection of the English court that it had no practice of itself carrying out such evidentiary orders (the English system being based on inter partes disclosure), search orders being carried out not by the court or a court agent but by a solicitor engaged by the court. She noted that there was no requirement that the measure be carried out by the court itself (as opposed to under its supervision and authority) and that to impose such a requirement would be to jeopardise the practical effectiveness of the Regulation.[215]

d) Standard of proof and presumptions

In *Eturas*, a Lithuanian competition case concerning an alleged concerted practice between on-line travel agencies, the CJEU provided some guidance on the standard of proof for establishing the existence of a concerted practice in breach of Article 101 TFEU.[216] The facts of the case were as follows: an on-line travel booking system (E-TURAS) communicated to the travel agencies which used the platform the establishment of a new reduced maximum discount for their sales over the platform and this new price regime was then implemented across the platform. The Lithuanian Competition Council found that the platform provider and the travel agencies, which had expressed no objection to the reduced discounts, had thereby colluded on prices and, so, infringed Article 101 TFEU.

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[212] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

[213] As regards confidentiality, Kokott observed that the Italian court's request provided for the documentation to be collected in the presence of the applicant and his lawyer but did not allow them to inspect the documents, requesting expressly that the documents be dispatched to the court in a sealed envelope; *Tedesco*, n 204, para 63.

[214] *Tedesco* para 75.

[215] ibid paras 103-4. Kokott gives the example of the obtaining of expert reports which are not drawn up by the court itself but by the expert - presumably, she is here referring to court-appointed experts.

[216] C-74/14 *Eturas UAB v Lietuvos Respublikos konkurencijos taryba* EU:C:2016:42.

The finding of collusion involved the application of a number of presumptions by the national competition authority. The most relevant concerned certain given facts (the communications between the platform and the user travel agencies as to the new discount regime) being deemed sufficient to prove the participation by the platform provider and agencies in a concerted practice. This raised the issue of whether the sending of a message by the platform to the users was sufficient to impute an adequate degree of knowledge on the part of the agencies and, hence, participation in a concerted practice. This was the nub of the question referred by the Lithuanian Supreme Court to the CJEU. The Court observed in response that, while EU law established that the burden of proof in this regard lay with the national competition authority, nevertheless the standard of proof and the principles governing the assessment of evidence were, in keeping with the principle of procedural autonomy, subject to national legal standards.[217] This said, the Court went on to provide detailed guidance to the national court on the application to the case of the EU principles which frame those national standards: in particular, the principle of effectiveness and the principle of the presumption of innocence (article 48 of the Charter).[218] The Court noted that the principle of effectiveness requires that a concerted practice may be proven not only by direct evidence but, more usually (since such evidence is frequently unavailable), by indirect evidence or indicia. At the same time, the presumption of innocence prevented the mere sending of a message by the Eturas platform to the travel agencies from being considered sufficient evidence that the agencies were actually aware of the message and, further, the agencies must be able reasonably to rebut any presumption that they had become so aware. In sum, a balance needed to be struck.

Further presumptions came into play in the case. These presumptions were not factual presumptions applied pursuant to national standards, but rather EU law presumptions deriving directly from Article 101 as interpreted by the Court in its case-law. The Court provided specific guidance also on the evidence necessary to rebut these presumptions: the agencies could have defeated the presumption that they would have taken account of the information received in their conduct on the market (causality presumption), by providing evidence that they, in fact, applied higher discounts, and the presumption that they participated, albeit passively, in the conduct (participation presumption) by virtue of the evidence of their knowing receipt of the information, by proving they had objected expressly to the new discount regime.[219]

Not in the area of competition law, but a civil case concerning liability in tort for damages, *Sanofi Pasteur* offers a further benchmark for the Court's approach to evidentiary standards.[220] The case concerned a claim under the umbrella of the Defective Products Directive.[221] It arose from the tragic illness and death of a French citizen from multiple sclerosis, allegedly provoked by a defective Hepatitis B vaccine produced by pharmaceutical company, Sanofi Pasteur. There had been a series of conflicting decisions by the French courts on the matter, applying an inconsistent approach to evidentiary standards. The Court's judgment offers a series of considerations in response which are worth setting out quite fully here:

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[217] *Eturas* ibid paras 29-31, 34; Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art 2, recital 5.
[218] *Eturas* ibid paras 35-41.
[219] ibid paras 42-9.
[220] Case C-621/15 *NW v Sanofi Pasteur MSD SNC* EU:C:2017:484.
[221] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

- The Directive establishes (Article 4) that it is the claimant's *burden to prove* the elements of the tort: defective product, causation and harm. Causation is not defined in the Directive, which does not harmonise the sphere of liability for defective products; nor does the Directive address how causation should be proven.[222]

- In keeping with the principle of *procedural autonomy*, national law determines questions relating to the production and admissibility of evidence as well as the probative value of evidence or the standard of proof. Nevertheless, EU law establishes limits to that procedural autonomy, including the principle of effectiveness.[223]

- In terms of what would constitute sufficient discharge of that burden, the Court approves the pragmatic and probabilistic approach adopted by French case law.[224] The CJEU observes that requiring claimants to produce medical research proving the causal relationship, where none existed, could involve an *excessively high evidentiary standard* as a matter of EU law,[225] particularly in light of the Directive's objectives: (i) to apportion the risks inherent in modern technological production fairly between victims and producers; and, (ii) to protect consumer health and safety.[226] Advocate General Bobek adds that it may be necessary to correct certain information asymmetries as between consumers and pharmaceutical companies.[227] Accordingly, the claimant's burden of proof could be discharged on the basis of a number of indirect indicators such as the temporal proximity between the vaccine being administered and the occurrence of the disease, the lack of personal and family history of multiple sclerosis, and the existence of a significant number of cases of multiple sclerosis occurring following the defendant's vaccine being administered.[228]

- The evidentiary requirements demanded of claimants must be sufficiently rigorous so as not to involve in effect *reversing the burden of proof*. This would be the case if the courts were to accept 'irrelevant or insufficient evidence' from alleged victims or, in the words of Advocate General Bobek, where no evidence is required of the claimant, or if irrelevant or excessively weak evidence were accepted.[229]

- The application of a *presumption* to determine the existence of the breach and causation on the basis of indicative evidence produced by the claimant could constitute disregard for the burden of proof, if the presumption were legally irrefutable (i.e., a iuris et de iure presumption) or if, without being irrefutable, it involved in essence ignoring the evidence produced by the defendant.[230] The Court grounded its position partly on the principle of EU

[222] *Sanofi Pasteur* (n 220) paras 21-4.
[223] ibid paras 25-6.
[224] ibid para 28. On the matter of the probabilistic approach to causal relationships (in a case concerning personal harm caused by air pollution) see also the opinion of AG Kokott in Case C-61/21*JP v Ministère de la Transition Ecologique* EU:C:2022:359, paras 126-141.
[225] *Sanofi Pasteur* ibid, para 31, where reference is made 'by analogy' to *San Giorgio*, n 58, para 14.
[226] *Sanofi Pasteur* paras 31-2.
[227] ibid AG opinion, EU:C:2017:176, para 23, by reference to C-310/13 *Novo Nordisk Pharma* EU:C:2014:2385, paras 27, 32.
[228] *Sanofi Pasteur* para 41.
[229] ibid para 35; AG opinion, para 62.
[230] ibid paras 36, 42, 53-4.

law that national courts should have the faculty *freely to assess all the evidence before it*.[231] National courts should consider the evidence produced by both parties and assess the *plausibility* of the parties' respective explanations of the proven facts.[232]

- The national court has a duty to ensure *foreseeability and consistency in the application of EU law* – by implication, that like situations receive a like solution.[233] However, for the reasons just mentioned, the Court rejects France's proposal to establish a presumption based on the production of certain factual evidence in order, precisely, to address the issue of divergence in national rulings.[234]

Accordingly, the judgment touches on central questions for the assessment and proof of causation of harm under EU law. Adopted in a different setting of course, the judgment nevertheless offers an interesting reference point for the issues that arise in competition cases.

e) Costs

Caixabank was a case concerning the nullity of certain mortgage bank charges pursuant to the Unfair Terms Directive.[235] Under Spanish law, costs were not due and would not be awarded to the claimant where not all the sums claimed in the claimant's writ were granted by the court in judgment. Accordingly, even if the mortgage clause in question was held to be unfair and therefore unenforceable pursuant to the Directive, as it was, the claimants would not be awarded costs as they were not successful in all their claims. The Court held that this Spanish rule on costs was contrary to the principle of effectiveness and therefore incompatible with EU law, since the inability of the consumer to recover the costs of bringing an action may dissuade him or her from bringing the claim in the first place.[236]

Klohn concerned a provision in the Environment Directive that proceedings to challenge acts which contravene environmental law should be, among other things, 'not prohibitively expensive'.[237] That provision did not have direct effect, but the national court was required to interpret national law in a way which was consistent with the purpose and objective of the Directive. The awarded costs in that case were those of the successful defendant Irish Planning Appeals Board which, taxed by the Taxing Master at 86,000 €, were nearly three times the costs incurred by the private applicant (32,000 €). Aside certain important questions which arose in the case around the temporal application of the rule and the res judicata effect of the court's decision on costs (as opposed to the Taxing Master's decision on their amount), which do not concern us here, the Court advocated the need for the national court to

[231] ibid para 36, again by reference to *San Giorgio*, para 14. AG Bobek notes (para 51 of the opinion, n 221) that that the effectiveness principle precludes a rule excluding consideration of certain types of evidence which are generally allowed under national law (*San Giorgio*) or identifying a particular type of evidence as definitive evidence of a given fact (*Johnston*).
[232] ibid para 42.
[233] This is both as a general principle of law to be respected by national courts (ibid para 50, by reference to case C-358/08 *Aventis Pasteur* EU:C:2009:744, para 47) and the requirement to 'ensure to the greatest possible degree the uniformity in the application of the EU rules in question' (ibid para 51).
[234] ibid paras 52-4.
[235] Joined Cases C-224 and 225/19 *CY v Caixabank SA* EU:C:2020:578; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.
[236] *Caixabank* ibid para 98.
[237] *Klohn* (n 60); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

carry out a proper control of the level of costs to ensure the effectiveness of private enforcement of EU environmental law:

> 35. The objective pursued by the EU legislature when it laid down the not prohibitively expensive rule in Article 10a of Directive 85/337 as amended means that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that provision, by reason of the financial burden that might arise as a result (judgment of 11 April 2013, *Edwards and Pallikaropoulos*,C-260/11, EU:C:2013:221, paragraph 35). That objective, which is to give the public concerned wide access to justice, pertains, more broadly, to the desire of the EU legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role, and to ensure that the right to an effective remedy and the principle of effectiveness are observed (see, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos*,C-260/11, EU:C:2013:221, paragraphs 31 to 33).

The Court, furthermore, underlined the relevance for the national court's assessment of the foreseeability for the applicant of the level of costs which could be awarded against him.

3. Harmonization

As the Court observed in *Rewe* and *Comet*, the procedural autonomy initially vested in the Member States is subject not only to the CJEU's scrutiny pursuant to the legal principles we have described, but also to the absence of Union legislation harmonising the relevant procedural rules (in which case, those EU rules apply). Hence the Court's formulation invariably begins with words like: 'in the absence of Union rules governing the matter'. In this section, we will turn briefly to consider the development of EU policy in the area of harmonization of civil procedural rules, beginning with the provisions falling within the Area of Freedom, Security and Justice.

3.1. Area of Freedom, Security and Justice

Title V of the TFEU, specifically the Article 67 general provision, provides that the Union will constitute an area of Freedom, Security and Justice ("**AFSJ**"). The AFSJ includes within its scope, as well as asylum, immigration and criminal matters, matters of civil justice. The area is a shared competence with the Member States, such that the Member States have competence and may act in this area until such time as the EU acts to adopt unified rules.[238] In creating the AFSJ, the Union is to ensure respect for fundamental rights and for 'the different legal systems and traditions of the Member States'.

On matters of civil justice, Title V includes a specific provision on 'Judicial cooperation in civil matters', which provides a legal base for the Union's action in this area (Article 81 TFEU). As we will see, the terms of the Union's competence are, in fact, somewhat cautious reflecting the same tension (or balancing) with the legitimate interests and aims of domestic legal systems that can be seen in the CJEU's case-law.

Article 67 itself makes only the following specific allusion to civil justice: 'The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters' (Article 67(4)). For its part, Article 81(1) refers to 'cooperation' in judicial matters, reiterates the primary place of mutual recognition in the EU's policy, and contemplates the possibility of 'the adoption of measures for the approximation of the laws and regulations of the

[238] art 4(2)(j) TFEU.

Member States'. The precise objectives that such rules of 'approximation' may have are set out in Article 81(2), focussed on questions of importance for cross-border litigation, such as jurisdiction, enforcement, service or taking of evidence in cross-border situations. Article 81(1) limits EU competence generally in this area to civil matters 'having cross-border implications'. This restriction has been one of the principal limits to its scope of application and a key bone of contention between the Commission and the European Council over the years.[239] Approximation measures may be adopted to ensure 'the elimination of obstacles to the proper functioning of civil proceedings', but this is only where such measures are necessary and involve 'promoting the compatibility of the rules on civil procedure applicable in the Member States' (Article 81(2)(f)), the EU legislator avoiding the use of stronger unification language. The Lisbon Treaty introduced further objectives which could justify approximation legislation - in particular, the general objective of ensuring effective access to justice (Article 81(2)(e)). However, this legal base has only rarely been deployed by the EU legislator.[240] Indeed, to date, the competence to legislate in the area of judicial cooperation in civil matters has scarcely been used as a tool to harmonise rules for such general objectives of increasing the compatibility of different national procedural rules or promoting access to justice, despite the perception that Member States rules do require such further approximation.[241]

The caution in the language in Article 81 is reflective of the deference to national legal systems acknowledged in Article 67(1) (as well as, more broadly, to the general principle of subsidiarity). It can also be seen in the historical development of the EU policy area of justice and home affairs, which started out life as a matter subject to looser intergovernmental cooperation under the Third Pillar of the Maastricht Treaty and which has been directed by a series of policy guidelines of the Council up until the Lisbon Treaty.[242] Even today, when the policy area forms part of the TFEU and is subject to the ordinary co-legislation process with the European Parliament, there continues to be provision for guiding principles to be set by the Council (Article 68) and the Council has been reluctant to loosen the constraints of the 'cross-border implications' condition in order to permit the EU to extend its general competence in this area, despite the efforts to the contrary of the Commission and, more recently, the European Parliament.[243]

Despite the foregoing, there have, of course, been some very significant achievements by the EU in the creation of harmonized rules in matters of civil justice. Key among these are the unified rules on jurisdiction and enforcement of judgments, pursuant to the Brussels I Regulation, but also the rules on cross-border service.[244] Such instruments have undeniably had a real impact on cross-border civil

[239] Storskrubb, 'EU Civil Justice at the Harmonisation Crossroads?' (n 7), s 2.2.

[240] e.g., Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

[241] As we will see, this has been addressed rather in a sectorial fashion on the basis of so-called 'vertical' harmonisation legislation.

[242] The Tampere Programme pursuant to the European Council meeting of 15-16 October 1999 (see Commission Communication of 24 March 2000, COM(2000) 167 final); European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1; European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C 115/1.

[243] See, for example, the European Parliament's proposal for a Minimum Standards Directive (n 10).

[244] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1; Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) [2020] OJ L405/40.

litigation creating common autonomous rules which have altered national court procedures.[245] By way of example from our area of interest, the Trucks litigation in Spain was marked in the initial stages by intense discussion around the application of the EU cross-border rules of service and jurisdiction (most of the defendants being non-Spanish EU companies).[246]

However, these legislative developments, supported as they have been by the CJEU's unifying interpretative function, have necessarily been piecemeal and incomplete. They address only discrete aspects of the civil process and still rely on the varied national systems for their implementation. This has led to general criticism of a lack of coherence in the system, as can be seen in the conclusion reached by the European Added Value Statement prepared in the context of preparation of the European Parliament's proposed Minimum Standards Directive:[247]

> Our review of the existing standards systematically along the lines of the categories of principles specified above was a complex process and revealed gaps, inconsistencies, and the general lack of a systematic approach. The attempt to review the existing standards along the general structure of civil proceedings was abandoned because the results it produced were difficult to systematise and revealed even more significant gaps.[248]

This criticism has been exacerbated by the tendency of the EU over recent times to resort to so-called 'vertical' harmonisation measures in specific sectors, based on its internal market competences, thus developing procedural standards the application of which is limited to a certain subject-matter area.[249] Such concerns are precisely what led to the European Parliament's request to the Commission to propose a Directive which would seek to establish horizontal minimum standards in civil procedures, would adopt a broader (more encompassing) concept of 'cross-border implications' and would be based on the general Article 81 TFEU legal base (i.e., the proposed Minimum Standards Directive).

Nevertheless, the failure of that initiative[250] reflects the underlying characteristic of this area of law, to which we have alluded. EU civil procedure depends on national systems for its application and the EU has adopted a general position of deference to local legal traditions and cultures (as Article 67(1) illustrates), not wishing to impose itself with strong top-down intervention. This is not just a question of national jealousy over sovereignty in matters of national procedure and court organisation.[251] It is

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[245] eg, Case C-325/11 *Alder v Orlowska* EU:C:2012:824, para 27, by reference to art 1(1) of the 2007 Service Regulation, Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 [2007] OJ L324/10.

[246] On jurisdiction, see: *Volvo I* (n 175), a request from Commercial Court nº 2 of Madrid on the interpretation of Art 7(2) of the Brussels I Regulation (reversing earlier rulings by the Supreme Court in 2019; eg order of 26 February 2019, ES:TS:2019:2140A); Case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL* EU:C:2021:800, a request from the Appeal Court of Barcelona on the application of the concept of undertaking to the jurisdiction rules. As to service, see the pending referral by the Spanish Supreme Court pursuant to order of 7 October 2022, ES:TS:2022:13837A, C- 632/22 *AB Volvo v Transsaqui SL* and the opinion of AG Szpunar of 11 January 2024, EU:C:2024:31.

[247] Proposal for a Minimum Standards Directive, n 10. The proposal was based on art 225 TFEU.

[248] European Parliament, 'Common Minimum Standards of Civil Procedure; European Added Value Assessment' PE 581.385, June 2016, p 52. Already the Council's Stockholm Programme had observed in 2010 that 'the development of legislation in the area of freedom, security and justice is impressive, but it has shortcomings in terms of overlapping and a certain lack of coherence. At the same time, the quality of legislation including the language used in some of the legal acts could be improved', n 237, p 5, s 1.2.3.

[249] We will return to the subject of sectoral regulation in the following section.

[250] The Commission declined to take the proposal forward (SP(2017)539 of 16 October 2017).

[251] See Storskrubb, 'EU Civil Justice' (n 7), 18: 'the persistent resistance of the Member States in the Council to a broad interpretation of the cross-border limitation … demonstrates that civil justice matters are sovereignty-sensitive.'

also a simple practical recognition that domestic legal systems have developed over many years in their own ways, each finding their own particular balance between relevant civil justice objectives, such as the protection of parties' fundamental (procedural) rights, the effective and efficient resolution of disputes or the law-making role of civil processes. That is, it is above all, a question of realism. Caponi has, indeed, suggested that ***local legal mindset*** is the key factor in influencing judicial practice, having a greater impact on outcomes than legal rules:

> Judicial practice is influenced by a number of factors, among which the binding force of legal rules plays a less critical role than the mindset, cultural views and ethical beliefs of parties, judges and professionals.[252]

The inculcation of common standards of civil procedure requires, therefore, a process of cooperation and understanding, not imposition. This has been a realisation of the EU from the beginning. Hence, after the initial focus on important legislative initiatives, such as the common rules on jurisdiction, enforcement, service, etv, the EU policy papers have included and tended towards, indeed, a greater focus on seeking measures to facilitate the gradual creation of ***a common legal culture*** which would, in turn, favour the adoption of more common approaches and the acceptance of common standards and practices (while at the same time looking to ensure the guarantee of fundamental rights).[253] This so-called 'bottom-up' approach has hence been favoured over time.[254] As Storskrubb observes:

> A more decentralized and flexible development of common procedural rules and cooperation mechanisms has hence been favoured with simultaneous development of a common legal culture and discussion on fundamental principles.[255]

Tulibacka made a similar observation in her article on the Europeanisation of Civil Procedure in 2009:

> Harmonisation entails a much more flexible, long-term process of legal integration. It is not aimed at total uniformity, at least not instantly. Its aim is to coordinate a number of national legal systems and to eliminate the major differences between them. Thus, it is a naturally partial and fragmented process… Unification is normally far from being a preferred and practically achievable option with regard to civil procedure. Flexibility, and differentiation, various forms of flexible harmonization, and even less invasive methods such as cooperation and mutual recognition, appear better fitted to the nature of civil procedure.[256]

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[252] Remo Caponi, 'Harmonizing Civil Procedure: Initial Remarks' in Burkhard Hess and Xandra Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2017) 43, 46.

[253] The European Council in its Stockholm Programme refers to 'a genuine European judicial and law enforcement culture' and the need of 'developing a European judicial culture based on the diversity of legal systems and unity through European law', n 236, 6, adding that 'The judicial systems of the Member States should be able to work together coherently and effectively in accordance with their national legal traditions', 11. The Commissioner for Justice, Consumers and Gender Equality, V. Jourova, in her keynote speech at the 15th Annual Meeting of the EJN, 'Building a stronger European Judicial Network' 1 February 2017 observed: 'Real trust is earned over time through successful cooperation. Through the long-lasting contacts you and all actors involved in the proper application of EU civil justice instruments, namely *judges, lawyers, notaries and bailiffs contribute to developing a common European legal culture*. This is exactly what you have achieved' (my emphasis added).

[254] Tulibacka 'Europeanization of Civil Procedures' (n 16) 1539: 'The bottom-up approach is one where convergence of national procedural standards is more spontaneous; where the role of the EU is to encourage mutual trust and recognition, but rather to refrain from establishing hard procedural rules'.

[255] Eva Storskrubb, 'Civil Justice – A Newcomer or an Unstoppable Wave?' in Paul Craig and Graínne de Búrca (eds) *The Evolution of EU Law* (2nd edn, OUP 2011), 299, 302

[256] Tulibacka 'Europeanization of Civil Procedures' (n 16) 1534.

For its part, the EU Justice Agenda for 2020 underlines the need to preserve 'the diversity of legal systems and traditions in the EU' and ensure respect for the principles of subsidiarity and proportionality.[257] As some have noted, 'less ambitious in proposing new legislation' than previous policy documents, the 2020 Agenda contemplates measures merely to 'consolidate, codify and complement' existing EU legislation.[258] This more conservative horizon is confirmed by the civil justice strategic goal identified by the European Council for the 2015-2020 period; namely, to 'improve judicial cooperation among our countries: by building bridges between the different justice systems and traditions; by strengthening common tools, including Eurojust; by mutual recognition of judgments, so that citizens and companies can more easily exercise their rights across the Union'.[259] Indeed, it has been noted that there exist very material differences in the organizational structure and budgets of courts in the different Member States which make effective harmonization difficult and require another approach which, instead, takes account of and embraces these differences.[260] Others have highlighted the need to work on the development of uniform concepts across existing EU procedural measures, given current disparity.[261]

The EU's policy focus in the area of civil justice has thus, over time, shifted away from the horizontal harmonization of rules. Civil procedural standards have not fallen away as an EU goal, of course. Rather, the focus has adjusted. This adjustment has included a move towards a greater attention on supervising and improving the implementation of existing instruments.[262] This has, in turn, included a greater use of 'soft' measures aimed at increasing the contact and coordination between different domestic court systems (European Judicial Network),[263] the training of judges and other legal practitioners in EU law,[264] or the monitoring and comparison of court systems through indicators (the EU Justice Scoreboard).[265] Many have been adopted on the basis of the ASFJ competence (i.e., the current Article 81 TFEU). The cluster of measures forms part of a broader civil justice policy designed to

[257] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union' COM(2014) 144 final. This message is reiterated by the Commission in its response to the European Parliament on the proposed Minimum Standards Directive: '[a]ny further reinforcement or intensification of European minimum standards for civil procedure has to be done with respect to the diversity of laws and legal traditions of the Member States and to the benefit of the citizens and companies', n 244.

[258] Burkhard Hess and Xandra Kramer, 'An Introduction' in Hess and Kramer, *From Common Rules to Best Practices* (n 246), p 10.

[259] European Council Conclusions 26-27 June 2014, 'Strategic Agenda for the Union in Times of Change'.

[260] Alan Uzelac, 'Harmonised Civil Procedure in a World of Structural Divergences? Lessons from the CEPEJ Evaluations' in Xandra Kramer and C H van Rhee (eds), *Civil Litigation in a Globalising World* (Asser Press 2012) 175, 183.

[261] Storskrubb, 'EU Civil Justice' (n 7) p 33; Hess and Kramer, 'An Introduction' (n 252) p 26.

[262] As the Commission noted in its response to the European Parliament's Minimum Standards Directive in 2017 'the best way to promote minimum standards in procedural law and thereby an enhanced mutual trust is to focus on the implementation of the existing acquis' (n 250). The Commission added that it was following the ELI/UNIDROIT joint project 'in order to see whether and to what extent further action in this area is needed'.

[263] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L174/25.

[264] See, eg, Commission Communication of 29 June 2006 to the European Parliament and the Council on judicial training in the European Union COM(2006) 356 final; Regulation (EU)1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 [2013] OJ L354/73; Commission Communication 'Ensuring justice in the EU — a European judicial training strategy for 2021-2024', COM(2020) 713 final.

[265] The Scoreboard has been in operation since 2013. Its objectives are the independence, quality and efficiency of national judicial systems. See, Storskrubb, 'EU Civil Justice' (n 7), p 30; Caponi, 'Harmonizing Civil Procedure' n 252, pp 52-5.

contribute to the creation of the common EU legal and judicial culture we have referred to earlier.[266] The value of this work cannot be overstated.

At the same time, there is (understandably) still much work to be done to achieve a truly common legal culture. A number of specific defects can be identified in the overall EU system currently, deriving in part logically from its complex and unique multi-layer structure, but which also reflect a quite inadequate organization of resources within that structure. EU incursions into civil procedural rules (such as, the creation of new rules or the amendment of existing rules and practices at national level) flow from different institutional acts (including, in particular, judgments of the CJEU, or EU legislative measures emanating normally from the Council and the Parliament, supported by the Commission) and depend on the different national civil justice systems for their implementation (which is, not infrequently, influenced also by related public enforcement rules, as in the case of competition law). Within this complex scenario of actors and relationships, it is easy to detect a lack of necessary expertise at a number of levels as well as a lack of necessary informational transparency and coordination between the various actors involved. To take just a few examples, I would suggest that there is a need for:

(i) EU civil justice policy and the training of judges in EU law and instruments to be more infused with the practical experience of private practitioners;[267]

(ii) that training to be furthermore infused by comparative experience from different Member States in implementing and applying EU instruments and rules;

(iii) a greater level of understanding and expertise among public enforcers who design and supervise the application of EU rules (e.g. drafters of legislation or practical guidelines) of domestic judicial systems and the practical application of EU instruments;[268]

(iv) a greater level of expertise among civil judges as to related public enforcement goals and practice (and an increased level of contact with the relevant public enforcers); and

(v) greater direct access for civil judges in different member States to each other.[269]

All of these factors point to the need for a more open organizational architecture which would facilitate greater exchange between the various actors in the field of civil justice, increase levels of competence and awareness, and improve the quality of justice.[270]

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[266] Recent years have seen other policy considerations gaining greater weight in the EU's strategies; in particular, the rule of law (focusing on issues such as the independence and impartiality of judges) and, in the EU Justice Agenda for 2020 (n 253), mutual trust (for example, through the reinforcement of civil procedural rights as regards service and the taking of evidence), or improving access to justice through measures to simplify processes of dispute resolution for consumers and take full advantage of new communications technology (e-Justice).

[267] See, in the same sense, Irene Andreu Mora and Carlos-R Puigcerver Asor, 'Las dificultades de la armonización: la escasa aplicación del Derecho Europeo procesal' in Andrés de la Oliva Santos and María Pía Calderón Cuadrado (dirs) *La Armonización del Derecho Procesal tras el Tratado de Lisboa* (Aranzadi 2012) 151, 193.

[268] This is particularly acute when the legislation is sector-specific and may emanate from officials whose competence is focused on the substantive subject-matter of that sector area which they work on.

[269] Note that network contact points in the EJN are civil servants, not judges, and have a much more general and administrative mandate; see art 5, Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L174/25, as amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 [2009] OJ L168/35.

The EU's work on seeking harmonised procedural rules and standards does not end here. As we have seen, EU procedural standards are developed by the CJEU on a case-by-case basis, resulting in a piecemeal, but at the same time material, impact on national law, generating EU procedural standards. In addition, there are two further increasingly important areas, to which we will now turn our attention: first, secondary sector-specific or 'vertical' EU legislation, and, finally, the development of best practices through soft law.

3.2. Sector-specific legislation

Sector-specific harmonization of civil procedural rules has been referred to variously as 'vertical harmonisation', the 'new approach' to procedural harmonization, or as part of the 'invisible pillar of Europeanisation of procedural law'.[271] It concerns the adoption of secondary EU legislation in an area of substantive EU competence (such as, EU competition law) which includes rules relating to civil procedural issues. It can be traced back to instances such as the 1976 Equal Treatment at Work Directive containing simply minimal access to justice requirements.[272] However, over time it has developed to find application in an increasing number of subject-matter areas as well as to an increasing array of procedural matters and at an increasing level of detail. These developments form part of the movement of EU legal policy towards fomenting the ability of private parties to complement the EU institutions' public enforcement of EU law with their own private enforcement actions.[273]

Areas in which the EU has adopted such vertical legislation include public procurement,[274] consumer law,[275] the environment,[276] intellectual property,[277] competition[278] and data protection.[279] The rules are generally enacted on the basis of the EU's internal market competence; i.e., that permitting the adoption of measures which approximate national laws and have as their object the establishment and functioning of the internal market (currently, Article 114 TFEU). Accordingly, the objective of the

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[270] For an excellent discussion of this subject, see Tulibacka, 'Europeanization of Civil Procedures', n 16, s 5.2.

[271] See Gerhard Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' in Kramer and van Rhee (eds) *Civil Litigation in a Globalising World* (n 260) 93, 101; Burkhard Hess, 'Procedural Harmonisation in a European Context' in Kramer and van Rhee ibid, p 164; Bart Krans, 'EU Law and National Civil Procedure Law: An Invisible Pillar', European Review of Private Law 4-2015, 567; and, generally, Storskrubb, 'EU Civil Justice' (n 7), 17.

[272] See, now, the Gender Equality Directive, which introduced a chapter on remedies and enforcement, in part codifying the CJEU's *Von Colson* line of case-law referred to above (Ch 1.4); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

[273] F G Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies it Provides for' (2016) 53 CML Rev 887, 888-9.

[274]Council Directive 89/665 of 21 December 1989 on the coordination of the law, regulations and administrative provisions relating to the application of the review procedures to the award of public supply and public works contracts [1989] OJ L 395/33, as amended by Directives 92/50 [1992] OJ L 209/1, 2007/66 [2007] OJ L 335/31 and 2014/23 [2014] OJ L 94/1.

[275] Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22 [2020] OJ L 409/1.

[276] Directive 2003/35 (n 237).

[277] Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L157/45 and corrigendum [2004] OJ L195/16.

[278] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

[279] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

IP Enforcement Directive was to approximate and improve national systems of intellectual property right protection given that such systems offered disparate protection and this threatened the cohesion of the internal market and healthy competition therein.[280] This key internal market legal base has at times been combined with other more sector-specific competences (such as competition law, Article 103, in the Damages Directive) or more specific legal bases have been used in place of the general internal market competence (e.g., in the area of intellectual property – Article 118 TFEU, data protection – Article 16 TFEU, or environment – Article 192 TFEU). These vertical instruments are not based on the more general legal base for civil justice (i.e., Article 81 TFEU) and are not, therefore, subject to the cross-border requirement. As such, they may apply equally to domestic and cross-border situations.

Rules adopted in sector-specific legislation vary tremendously from one area to another and cover matters such as costs, time-limits, interim measures, access to evidence or disclosure, compensation, joint and several liability and representative actions. These procedural rights and conditions are normally derived from and justified by the need to ensure the effective and uniform application of EU law rights.[281] In this way, they reflect a similar approach to the CJEU case-law we have already referred to, whereby the requirements of substantive Treaty law open up a potentially limitless basis for incursion into realms of national procedural law. As Advocate General Bobek has noted:

> [T]he (incidental) authority to reach into domestic procedure is dependent of the existence of EU substantive law or rights on the national level. Once this condition is satisfied, its reach is limitless. In other words, once there is a EU law based right which is to be enforced at the national level, its equivalent or effective enforcement covers all possible aspects of national procedure: from court fees, time-limits and standing via representation, burden of proof to appeals, enforcement and finality of the decision.[282]

At the same time, they may also be influenced by the broader context of underlying international conventions, which have been the basis for the adoption of EU legal instruments, as, for instance, in the area of intellectual property (TRIPS)[283] or environmental law (the Aarhus Convention).[284]

As noted, significant criticisms have been levelled at the lack of coherence of such an approach from the perspective of civil justice since it creates specific procedural rules for certain specific areas in contrast with national civil procedures which, as a general rule, apply equally to all types of proceedings coming before the courts.[285] Indeed, this may create situations of reverse discrimination, whereby a litigant in one subject-matter area is granted more rights than in another because EU law is implicated (a risk which Advocate General Jacobs already highlighted in the 1990s). Furthermore, this approach brings about a varied set of procedural rules even between the specific areas of EU law

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[280] See recitals 8-10 to the Directive 2004/48 (n 277). A similar theme is seen in the Damages Directive (see Ch 5.1 below).
[281] Michael Dougan, *National Remedies before the Court of Justice* (Hart 2004), who notes that private enforcement ensures that 'the vast potential resources of the general European population [are] enlisted to supplement the Commission in its efforts to secure the uniform and effective application of EU law', p 76.
[282] Bobek, 'Why there is no principle of "procedural autonomy" of the Member States', in Micklitz and de Witte (n 95) 305, 320.
[283] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to the WTO Agreement (Marrakesh, 15 April 1994).
[284] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998).
[285] Tulibacka, 'Europeanization of Civil Procedures' (n 16) 1545. There are of course numerous exceptions at national level, such as in relation small value claims or certain specialized areas (such as insolvency) and this is a criticism levelled also at national level, for instance in Spain.

which are addressed. While there are some similarities between a number of the instruments (such as the creation of a right to access to evidence (disclosure) in the IP Enforcement, Damages and Collective Redress Directives), each instrument is on the whole materially different from the next. This is clear from a simple textual comparison of the instruments or if we compare their respective scopes. The IP Enforcement Directive provides for a fairly broad (albeit not complete) set of procedural rights which Member States must ensure (including some innovative measures such as disclosure of evidence or interim pre-action measures to preserve evidence) in the case of any infringement of intellectual property rights under EU or national law. The Collective Redress Directive provides for the creation of at least one representative action mechanism for the protection of certain EU consumer rights (excluding competition law), without prejudice to the existence of other national mechanisms for EU or national law rights, and is very high level from a procedural perspective, omitting to enter into key aspects of process such as the certification or admission of claims. For its part, the Environment Directive is limited to granting rights to individuals and NGOs to judicial remedies to challenge public decisions affecting the environment and requiring that such remedies be 'fair, equitable, timely and not prohibitively expensive'. That is, one can appreciate a veritable patchwork and unsystematic approach to procedure across the different instruments, reflective of sector-specific considerations.

At the same time, others have rightly observed that the creation of certain hard procedural rules at the EU level (even if unsystematic) is an effective way to bring about change in procedural practice.[286] They can also have positive knock-on effects within national procedural law outside the immediate area which is the object of EU requirements. The introduction of new measures in one specific area, which may not have previously been available in many Member States (such as certain types of disclosure), allows court systems to trial the new mechanism in a limited arena and adapt processes to it, before it is considered for more general application in the system.[287] Such a gradual process of adaption on occasions may, in my view, be eminently sensible.[288] In all events, I suggest, in the words of Storskrubb, that this is indeed an 'unstoppable wave' in EU legal policy,[289] and one that is better to guide and work with, rather than try to revert.

The Unified Patent Court (UPC) warrants a final brief word on this topic. It is too early to consider its success as its procedural rules were not finally adopted, and the court did not finally start operations, until the entry into force of the UPC Agreement in June 2023.[290] However, suffice it to note that the creation of one common court of the Member States for resolving EU patent law disputes offers a new and novel solution in the area of patent litigation which may serve as a template for further areas of law.[291] In particular, the concept of a single specialized EU court offers a potentially ideal mechanism for ensuring the coherent resolution of disputes with EU-wide implications by a court with technical expertise in the matter and with procedures adapted to the specificities of the litigation in question.

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[286] Caponi, 'Harmonizing Civil Procedure' (n 252) 49: 'it is worth noting that new codes and procedural rules can, conversely, stimulate and alter the culture of parties, judges and lawyers in remarkable ways'.
[287] See Uzelac, 'Harmonised Civil Procedure' (n 260) 177.
[288] See below, Ch 16, for a discussion of the incorporation of disclosure to the general Spanish procedural rules under the Damages Directive in Spain.
[289] See Storskrubb, 'Civil Justice – A Newcomer or an Unstoppable Wave?' (n 255).
[290] See 'Agreement on a Unified Patent Court' [2013] OJ C 175/1 and https://www.unified-patent-court.org/en.
[291] Of course, one must be mindful of the particular rules on uniform patent protection provided for in art 118 TFEU and subsidiary legislation, like Regulation 1257/2012, which is exceptional to this area.

Of particular note, for our topic, from a procedural standpoint, are the provisions on interim conferences or case management.[292]

3.3. Soft law

This brings us on to the last section of our analysis of EU civil procedural law: soft law.

To begin this section, we should recall a recurring theme in EU policy in this area, which finds expression in policy papers and academic comment, but also at times in EU case-law (or, at least, Advocate General opinions) and express legislative objectives. This refers to the objective of higher (or minimum) standards of quality and efficiency of justice throughout the EU. The EU Justice Agenda 2020 has referred to the goal of 'Improving the independence, quality and efficiency of national justice systems'[293] and these three principles have been reiterated in the EU Justice Scoreboards since their inception in 2003. Indeed, the comparators used in the scoreboards serve to evaluate the level of satisfaction of these factors across all Member States. As is well documented, the EU and the CJEU have been concerned recently with ensuring the independence and impartiality of local courts.[294]

The IP Enforcement Directive establishes that the measures, procedures and remedies the Member States are required to implement in order to ensure the effective enforcement of intellectual property rights shall be 'fair and equitable and […] not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays' (Article 3(1)). Similarly, the Environment Directive requires that redress procedures be 'fair, equitable, timely and not prohibitively expensive'. Identical language is included in the 2013 Collective Redress Recommendation.[295]

The quality and efficiency of civil Justice has come to be seen as an objective not only in its own right (being a clearly laudable goal in ensuring the effective application of EU law) but also as a way to improve the competitiveness of the Union.[296]

However, such minimum standards are not achievable through legislation. There is not the political appetite to do so. Nor is it realistic to achieve standards in this way given the disparate nature of national systems, procedures and cultures. Accordingly, the focus moves towards complementing hard law with soft law. This involves an acceptance that domestic regimes remain different. At the same time, there exists a conviction that those differences need not be an impediment to achieving

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[292] Rules 101-106 and 331-340, respectively. See, further, Guillermo Schumann Barragán, 'La gestion y la flexibilidad del procedimiento: ¿un proceso civil convergente con Europa?' in Fernando Gascón Inchausti and Pilar Peiteado Mariscal (dirs), *Estándares europeos y proceso civil* (Atelier 2022), 117, s 6.2.

[293] 'EU Justice Agenda for 2020', n 257, p 3.

[294] See n 162 above.

[295] Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013 L 201/60, para 2.

[296] See, Fernando Gascón Inchausti, *Derecho Europeo y Legislación Procesal Civil Nacional: entre autonomía y armonización* (Marcial Pons 2018), 59: 'En el caso del proceso civil, se trata, ante todo, de mejorar la calidad de la litigación trasfronteriza y de reforzar la seguridad jurídica en las relaciones intraeuropeas, algo que se consigue si las soluciones legales a nivel nacional son predecibles. Pero no se trata solo de eso: como veremos más adelante, puede tratarse, igualmente, de mejorar la calidad de los sistemas nacionales de justicia civil, como forma de mejorar la competitividad de la Unión y, singularmente, como forma de asegurar que se logra una efectiva puesta en práctica del Derecho privado de origen europeo.'; Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 'The 2021 EU Justice Scoreboard', 2021COM(2021) 389: 'Well-functioning and fully independent justice systems can have a positive impact on investment and therefore contribute to productivity and competitiveness', p 1.

minimum standards.[297] Uzelac has usefully advocated a focus on results as opposed to formal normative or organizational identity:

> The ideal of an area of justice with equal or compatible standards of legal protection for all European citizens creates an obligation of result, not an obligation of formal adherence to the same values or legal norms … [W]here different procedural structures turn out to be equally effective, fair, transparent and user-friendly, the pluralism of procedural forms may even be considered as desirable.[298]

The EU's attempt to bring about effective collective redress mechanisms through its 2013 Collective Redress Recommendation is an example of soft law. Recommendations are not binding but are not without legal effects.[299] Nevertheless, this particular recommendation has been largely ineffective in its aim (to promote collective damages actions); principally, in my view, because it was not accompanied by any further hard law. This, in turn, gave rise to the recent adoption of the Collective Redress Directive, the implementation of which is still in process in Spain and other EU countries.[300]

Recent times have pointed increasingly to the need to develop more detailed best practices which are offered to the legal community as a basis for convergence and improvements.

The language of best practices has appeared, for instance in the EU's Justice Programme for 2014-2020:

> The European added value of actions [..] shall be assessed in the light of criteria such as their contribution to the consistent and coherent implementation of Union law and to wide public awareness about the rights deriving from it, their potential to develop mutual trust among Member States and to improve cross-border cooperation, their transnational impact, their **contribution to the elaboration and dissemination of best practices or their potential to create practical tools and solutions** that address cross-border or Union-wide challenges.[301]
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> (My emphasis added)

For its part, the Stockholm Programme stated that:

> The development of action at Union level should involve Member States expertise and consider a range of measures, **including non-legislative solutions such as agreed handbooks, sharing of best practices** (inter alia, making use of the European Judicial Network) and regional projects that address those needs.[302]
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> (My emphasis added)

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[297] Neil Andrews, 'Fundamental Principles of Civil Procedure: Order out of Chaos' in Hess and Kramer, *From Common Rules to Best Practices* (n 258), 19, 25: 'It might, therefore, be better to direct the efforts in this area not so much towards a unified procedural system for transnational cases but towards the establishment of general normative standards that allow for considerable variations'.

[298] Uzelac, 'Harmonised Civil Procedure' (n 260), 177, 204.

[299] Art 288 TFEU. As noted in Ch 1.4 above, recommendations will, in particular, have legal effects in Member States, and national proceedings, where they serve to interpret or apply existing EU instruments (see the CJEU case-law flowing from Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* EU:C:1989:646; [1989] ECR 4407).

[300] See further the sections on collective actions in Chs 9 (UK) and 14 (Spain) below.

[301] n 264, art 2(2).

[302] n 242, p 5, s 1.2.2.

The language of best practices has the advantage over minimum standards of permitting a softer approach, avoiding the need for agreed rules which tends towards the fixing of a common (lowest) denominator. Rather it can offer looser and, at the same time, more detailed and better tools.

The recent ELI / UNIDROIT project offers perhaps the most promising example to date. The project came to its completion in 2020 with the approval of the Model European Rules of Civil Procedure which were finally published in October 2021.[303] It began in October 2013 and involved around 50 international experts (predominantly academics). A number of organisations also participated as observers, including the European Commission, the European Parliament and the CJEU, as well as lawyer associations such as the CCBE, IBA and AIJA. The project built on the previous ALI-UNIDROIT Principles of Transnational Civil Procedure,[304] seeking to develop more detailed rules and adapt them for use in the specific European context. Their purpose: to serve as a 'framework of reference and source of inspiration for a broad range of actors, notably legislators and policymakers', as well as practitioners; their hope: that they might represent a milestone in the quest for 'modern, efficient, and fair rules of civil procedure'. [305] The authors chose to develop model rules (as opposed to a complete model code) with the idea of providing the bases for harmonised approaches in specific areas which may be considered particularly appropriate and ready for such development; for example, mass consumer litigation. The Rules begin with a number of important overriding principles (in the style of the French Code de Procédure Civile or the English Civil Procedural Rules). Of these, the general principle of cooperation (which extends to parties, lawyers and the court) and the related case management duty of the court, stand out.[306] Indeed, the Model European Rules foresee that the parties and the court will cooperate to a certain degree to adapt the process to the case, in particular in complex cases; for instance, permitting preliminary issues to be determined separately early on in the proceedings, allowing for staged pleadings, fomenting flexible case management in dialogue with the parties, and encouraging pre-commencement exchanges between parties to narrow down contested facts and facilitate settlement.

It remains to be seen what impact these rules may have on existing procedural law in the EU. Nevertheless, it is certainly an exhaustive document offering a wide array of principles and tools adapted to the current challenges of commercial litigation, which may offer useful inspiration for policymakers, courts and practitioners. As noted, it has the advantage of being a model set of rules, not an imposed code of minimum standards, thus permitting adaptation and flexibility in its use. The rules are furthermore very fully researched, explained and motivated, offering a degree of authority

[303] *ELI-Unidroit Model European Rules of Civil Procedure – From Transnational Principles to European Rules of Civil Procedure* (OUP 2021).
[304] ALI/UNIDROIT, *The Principles of Transnational Civil Procedure* (Cambridge University Press 2006). Other sources include the Storme Report (n 10), the Council of Europe Committee of Ministers Recommendation (84) 5 'Principles of Civil Procedure designed to Improve the Functioning of Justice', adopted on 28 February at the 367th meeting of the Ministers' Deputies; the UNCITRAL Model Law on International Commercial Arbitration and the Rules of Procedure of the Unified Patent Court (n 284).
[305] Foreword and Introduction to the Model European Rules.
[306] These are contained in the following rules set out in Section 2 – Principles, Part A. Cooperation of the Model Rules; in particular in Rule 2. General: 'Parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute' and Rule 4: Role of the Court – the General Case Management Duty: 'The court is responsible for active and effective case management. The court must ensure that parties enjoy equal treatment. Throughout proceedings it shall monitor whether parties and their lawyers comply with their responsibilities under these Rules'. See further Schumann, 'La gestion y la flexibilidad del procedimiento', n 292, s 6.1.

(albeit, soft authority) to those who wish to invoke them. We should recall, further, that, in rejecting the European Parliament's proposal for a Minimum Standards Directive in 2017, the Commission indicated that it was waiting to see the results of the ELI/UNIDROIT project before it would revisit the question of whether and to what extent further harmonisation measures would, in fact, be needed. We remain, therefore, pending next moves by the EU institutions with regard to the Model European Rules. In this paper, following the drafters' own invitation, I draw on the rules as inspiration where I think they may offer a useful benchmark for particular procedural issues we address.

At the same time, as Cuniberti has observed in the context of comparative procedural law, one has to be especially mindful of when best practices (and a certain flexibilization of national civil procedure) can, in fact, be adopted within the confines of existing national rules or when, actually, a change of law would first be required:

> Best practices can only be relevant where applicable norms do not dictate the behaviour of the relevant legal professionals. Where a professional (whether a lawyer or a judge) has an obligation to act in a certain way under the applicable legal rule, he may not decide to act otherwise. Whether he finds that the rule that governs his conduct is not as good as a foreign practice cannot release him from his duty to comply with the applicable legal rule.
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> In many cases, however, legal rules do not dictate one single behaviour, and importing a foreign better practice can be contemplated.[307]

We will address this aspect too in our final recommendations.

[307] Gilles Cuniberti, 'The Promotion of Best Practices in European Civil Procedure: Some Introductory Remarks', in Hess and Kramer, *From Common Rules to Best Practices* (n 252) 439, 440.

B. EU COMPETITION LAW AND DAMAGES ACTIONS

Much has been written about the private enforcement of EU competition law and the implications of the Damages Directive. It is not my intention to offer even a summary of that very extensive work.[308] The focus of this research is the impact of EU law applicable to competition[309] on national civil procedure and, in particular, on procedural rules and practices of relevance to the quantification of antitrust harm. Hence, in this second section, we will take a journey through the EU legal scenery, picking out those items of particular interest in framing and addressing our subject.

As already noted, competition is one of the most important policy areas of the Union. The extent of EU law's incursion into national law applying the EU competition rules offers one of the strongest examples of EU law's impact on procedural law. Indeed, 'vertical harmonisation' seeking the 'effective and uniform application' of 'EU rules having direct effect' are all terms which take on their fullest meaning in the area of private enforcement of competition law. This has led one commentator to refer to the developments in this area as 'arguably the most significant example of the 'vertical harmonisation' of European tort law to date, comprising substantive and procedural harmonisation of

[308] For example, Ionnis Lianos, Peter Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015); Maria Bergstöm, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation. The New Directive and Beyond* (Hart 2016); David Ashton, *Competition Damages Actions in the EU. Law and Practice* (2nd edn, Edward Elgar 2018); Pier Luigi Parcu, Giorgio Monti and Massimo Botta, *Private Enforcement of Competition Law. The Impact of the Damages Directive* (Edward Elgar 2018); Barry Rodger, Miguel Sousa Ferrer and Francisco Marcos, *The EU Antitrust Damages Directive Transposition in the Member States* (OUP 2018); Fernando Díez Estela, 'La aplicación Privada del Derecho de la Competencia: Acciones de Daños y Pronunicamientos, Judiciales', (2019) 11 nº 1 Cuadernos de Derecho Transaccional 267; Magnus Strand, Vladimir Bastidas Venegas and Marios Iacovides (eds), *EU Competition Litigation. Transposition and First Experiences of the New Regime* (Hart 2019); Rafael Amaro, *Private Enforcement of Competition Law in Europe* (Bruylant 2021); Philipp Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law. A Law and Economics Analysis* (Edward Elgar 2021); Andrea Biondi, Gabriela Muscolo and Renato Nazzini, *After the Damages Directive. Policy and Practice in the EU Member States and the United Kingdom* (Wolters Kluwer 2022); Barry J Rodger, Miguel Sousa Ferro, Francisco Marcos (eds) *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar 2023). For texts with a more Spanish focus, see Antoni Font i Ribas and Blanca Vilà Costa (dirs), *La indemnización por infracción de normas comunitarias de la competencia* (Marcial Pons 2012); Juan Ignacio Ruiz Peris (dir), *La Compensación de los Daños por Infracción de las Normas de Competencia tras la Directiva 2014/104/UE* (Thomson Reuters Aranzadi 2016); Victoria Torres Sustaeta, *Daños y Perjuicios por Infracción de las Normas de Competencia* (Thomson Reuters Aranzadi 2016); Juan Ignacio Ruiz Peris and Teresa Palomar Tejedor (dirs), *Problemas Actuales de las Acciones de Compensación de Daños por Infracción de las Normas de Competencia* (Thomson Reuters Aranzadi 2019); Noemí Jiménez Cardona, *Acciones por daños de las infracciones del Derecho de la Competencia* (Wolters Kluwer 2019); Silvia Gómez Trinidad (dir) and Lluis Caballol Angelats (coord) *Resarcimiento de daños por la infracción de las normas concurrenciales en el Real Decreto-ley 9/2017 de transposición de la Directiva 2014/104/UE* (Marcial Pons 2021); Jaume Martí Miravalls, *Responsabilidad civil por la infracción del Derecho de la Competencia* (Tirant 2022); Pedro Callol and M. Yuste, 'La directiva comunitaria sobre reclamación de daños y perjuicios derivados de infracciones del Derecho de la competencia. Principales novedades y potencial incidencia en el ordenamiento jurídico español' in Miguel Angel Recuerda Girela (coord.) *Problemas prácticos y actualidad del Derecho de la Competencia. Anuario 2015* (Civitas 2015) 297; Paul Hitchings, Miguel Angel Malo and Luis Loras, 'Considerations concerning the implementation of the EU competition law damages directive in Spain' Concurrences Nº 2-2015 25; Helmut Broekelmann, 'La Directiva de Daños y su Trasposición en España' (2015) 37 Revista General de Derecho Europeo; Fernando Gascón Inchausti, 'Aspectos Procesales de las Acciones de Daños Derivados de las Normas sobre Defensa de la Competencia: Apuntes a la luz de la Directiva 2014/104 y de la Propuesta de Ley de Transposición' (2017) 9 Cuadernos de Derecho Transnacional 125.

[309] We focus our analysis on EU competition law. However, it should be noted that national competition law is also affected to the extent that national competition law (as in Spain) is largely modelled on EU law (and follows its development where relevant) and some EU competition law directly affects national competition law, as is the case of the Damages Directive.

the disparate national rules'.[310] At the same time, such harmonisation is by no means complete. Nor does it represent a strong top-down model of harmonisation. The EU relies rather on a 'complex web' of substantive and procedural mechanisms, which in turn derive from 'an interlinked combination of judicial pronouncements, persuasive soft law instruments … and mandatory hard law' or what has been termed 'pragmatic second best harmonisation'.[311]

This mix of hard and soft harmonisation mechanisms are the subject of this section, which will take us on an EU lex specialis journey, from CJEU interpretation of primary Treaty competition law through to EU competition policy, sectorial regulation and best practices. All these factors form part of an evolving legal framework for action, in which, since its adoption, harmonisation legislation (notably, the Damages Directive) takes on a particularly relevant role.

To appreciate the full scope and implications of these developments they need, further, to be analysed in the context of their application in national law and by national courts in what is, some thirty years on, an ongoing process of legal development. As observed by Advocate General Koopmans in March 1994, the development of EU law is characterized by what he termed 'legal evolution'.[312] By this, Koopmans referred to the slow organic case-law based development of the law, where national courts and legal practitioners are the key protagonists in the process of introducing new concepts based on supra-national law into more traditional areas of national law and practice in their own jurisdictions. From time to time, this evolution will also feel the impact of policy developments, which are of particular force when they take the shape of specific harmonisation legislation, such as in our case the Damages Directive. In this sense, this chapter presents the first part of the story of the development of EU law on private enforcement – namely, that protagonised by the EU institutions – while the implementation of those EU rules into national law and their application by national courts (namely, in the UK and Spain) will be the subject of the following two parts of this work. These are not static compartments, since the dialogue between EU and national institutions continues in this second implementation stage - in particular, via the requests raised by national courts to the CJEU under Article 267 TFEU – so that our discussion of national law in Parts II and III also contains references to these relevant developments.

4. The case-law of the CJEU

4.1. An EU law right to damages?

In understanding the impact of EU competition law on national procedure, it is pertinent to address a preliminary issue. To what extent is the right to claim damages an EU law right? The influence of EU law – i.e., the extent or strength of its vertical descent into national law - is framed and dependent (at least, in part) on the answer to this question. Indeed, some commentators have noted that the grounding of legal rights and remedies directly in EU law increases the judicial protection national

[310] Niamh Dunne, 'Antitrust and the Making of European Tort Law' (2016) 36 Oxford Journal of Legal Studies 366, 368.
[311] ibid 384.
[312] AG Koopmans, 'The European Community and Legal Evolution' in *Community Law and National Courts: Rights and Remedies*, conference organised by the Centre for European Legal Studies and Trinity Hall, 26-27 March 1994, Trinity Hall 2000 Papers, Nº 1, 1-10.

courts can provide to the right to damages, broadens the impact of EU law on national procedural rules and, as a result, reinforces the uniformity of judicial protection across the EU.[313]

The starting-point for our analysis is not a judgment of the CJEU, nor a case relating even to Articles 101 or 102 TFEU, but rather the classic, now thirty-year-old, opinion of Advocate General Van Gerven in *Banks v British Coal*.[314] That case concerned the competition rules of the European Coal and Steel Treaty (ECSC). There, the late Advocate General set out the contours of an ECSC competition law action for damages which, while not confirmed by the Court's judgment, has offered a reference, an 'inspiration' indeed, for developments in the private enforcement of EU competition law since.[315]

Having determined the direct effect of the relevant competition provisions of the ECSC Treaty (the point on which the Court subsequently disagreed), [316] Advocate General Van Gerven turned to the question of the obligation or faculty of a national court to award damages for a breach of those rules. His extensive analysis merits careful attention. He began by asking himself whether there was a legal base under Community law for such a right to damages. As he observed, the answer to that question (which he gave in the affirmative) has important implications. Should Community law directly establish a basis for an action for damages for breach of the competition rules, this would imply: [317]

- The Court would be competent to determine the 'detailed rules for bringing an action for damages of this kind'.
- The principle of supremacy would apply. National courts would, as a result, be obliged to disapply rules which posed an impediment to the exercise of the right to claim damages.
- The serious risks posed to the uniform and effective application of European competition law by leaving too many details to divergent national laws would be alleviated.
- There would necessarily be 'greater interaction between Community and national law, where the previous relationship between them was characterized by the exclusive dependence of the former on the latter as regards the machinery for enforcement'.

This reasoning was somewhat prophetic. Thirty years on, we are witnessing a very notable increase in CJEU preliminary referrals from national courts who present the Court with doubts about the precise EU law conditions and contours for an action for damages and grant the Court the opportunity to

[313] Sara Drake, 'Scope of Courage and the principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice' (2006) EL Rev 841, 857, 864; Van Cleynenbreugel, 'Judge-made standards' (n 149).

[314] Case C-128/92 *H J Banks & Company Ltd v British Coal Corporation* EU:C:1993:860; [1993] ECR I-1212.

[315] See the opinion of AG Wahl in Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* EU:C:2019:100, para 1: 'This case concerns the conditions governing private liability for a breach of EU competition law, liability that was forcefully argued for by the late Advocate General Van Gerven in his seminal opinion delivered some 25 years ago in *Banks*. That opinion resonated with me then and still provides inspiration today. It is therefore a pleasure to be able to finish my own mandate as an Advocate General by delivering an Opinion in that very field and to build on the legacy of the Opinion in *Banks*.' See also the opinion of AG Kokott in Case C-557/12 *Kone AG v ÖBB-Infrastruktur AG* EU:C:2014:45, para 34.

[316] The Court in its judgment determined that the competition provisions of the Treaty (in particular, arts 4, 65(1) and 66(7)) were subject to an exclusive competence of the executive body, the Commission; accordingly, they could not be relied on before the national court - they did not have direct effect (EU:C:1994:860; [1994] ECR I-1268). A similar situation arose previously in connection with exemptions under art 101(3) until the enactment of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[317] Paras 46-7 of the opinion in *Banks*, n 314.

determine what those are. We are arguably also witnessing a not insignificant increase in the CJEU's appetite to give an answer and, thereby, create law. The adoption of the Damages Directive has been material in this regard.

Van Gerven answered affirmatively in *Banks* that there was a Community law right to damages for breach of its competition rules. In his opinion, this right arose from the principle established in *Rewe* and *Simmenthal* pursuant to which national courts must ensure the legal protection and full effect of Community law rights. That principle had already implied that certain private legal remedies must be made available to parties affected by Member State breaches of Community law, including interim measures (*Factortame*) or damages (*Francovich*).[318] In *Francovich*, the Court held that the Member State's obligation to make good loss and damage caused to individuals by its breach of Community law was 'inherent in the system of the Treaty' and, accordingly, a 'principle of Community law'. At the same time, this principle gave rise to a concomitant right to compensation on the part of the damaged party which was 'founded directly on Community law'. Van Gerven considered that these principles applied equally and a fortiori to the situation of a claim for damages between individuals for breach of competition rules, where those rules furthermore had direct effects as between those individuals which should accordingly be protected by the national courts in national proceedings (horizontal effect). Moreover, he considered that the availability of damages was the only way to ensure the full effectiveness of the competition rules (and the legal protection of the rights it generates for individuals) where an infringement has already taken place. In such a situation, the effects of the breach cannot be averted by judicial intervention to prevent the breach occurring (i.e., an injunction) – or, one might add, regulatory intervention - but can only be repaired ex post by way of an award of damages.

Van Gerven added what he considered to be a powerful public policy argument for requiring a right to damages: the goal of making the competition rules 'more operational'. By this, he meant that private enforcement by national courts offered a significant and necessary complement to their public enforcement by the Commission. In this context he noted, inter alia by reference to the Commission's 1986 Report on Competition Policy, that 'the Commission, as guardian of [the competition] rules, itself acknowledges that it is dependent on the cooperation of the national courts in enforcing them'.[319]

The Advocate General concluded that a right to damages for breach of Community competition law was based on the Community legal order itself. He went on to set out the conditions he considered applicable to such an action, with particular reference to the Court's case-law on the non-contractual liability of the Community institutions (under current Article 340 TFEU), which in turn draws on the general principles common to the legal systems of the Member States:[320]

- *Conditions for Liability.* He identified these as: (i) the existence of unlawful conduct, (ii) damage, and (iii) a causal relationship between the two.[321]

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[318] These cases employ the language of 'full effectiveness' and the model formulation: 'The full effectiveness of [EU rules] would be impaired if it were not open to [EU right holder] to request [a particular remedy]'. That principle flows both from the principle of supremacy of EU law and from the obligation of sincere cooperation incumbent on national courts pursuant to art 4(3) TEU (*Factortame I*, n 32, para 19, and *Francovich*, n 33, para 36). See Ch 1 above.
[319] Para 44 of the opinion; European Commission, *Fifteenth Report on Competition Policy* (Publications Office 1986), 38-43.
[320] Para 50 of the opinion, n 308.
[321] Ibid para 50.

- *Unlawful Conduct.* Conduct is unlawful when it entails a breach of the competition rules, it not being a prerequisite for such a breach that there be intention.[322]

- *Damage.* What constitutes recoverable damage refers to compensation 'in full', i.e., that which makes good the loss of capital caused by the unlawful conduct (restitutio in integrum).[323] Damage should have a real deterrent effect and, therefore, be 'adequate', meaning it should not be merely symboliv[324] Accordingly, it should also not be subject to a cap and it should include interest from the moment harm occurred in order to take into account the loss in the value of money due, for example, to the effluxion of time. Nor should damage be merely speculative, i.e., the fact of harm should be sufficiently established.[325] Compensation should also avoid unjust enrichment to the claimant and, hence, damage should take into account mitigation of the loss which the claimant could reasonably be expected to have realized and, in all events, the compensatory effect of the passing-on of any harm in its downstream selling prices.[326]

- *Quantification.* In terms of the methods of quantification of harm, 'sampling methods habitually used in economic surveys … provided that the basic facts are sufficiently reliable' can be used by a court to reach acceptable approximations as to the harm suffered; harm which is by nature based on a hypothetical 'but for' (counterfactual) scenario (i.e., that which would have arisen in the absence of the infringement).[327] In *Mulder*, Van Gerven himself averred that the guideline for assessing loss should be 'the normal course of events having regard to the special circumstances'; meaning that the basis for calculation would be the counterfactual situation 'which, according to reliable statistical data, is representative of the relevant Member State or region with specific characteristics in the relevant year in the case of farm of the same size as the applicant's'.[328] In this exercise, a court is recognized an 'unfettered discretion in assessing all the evidence submitted to it'.[329] In the *Mulder II* judgment which

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[322] ibid para 53.

[323] Ibid para 54 by reference, inter alia, to Joined Cases C-104/89 and 37/90 *J M Mulder v Council* EU:C:1992:217; [1992] ECR I-3061, para 34, which rejected as compensation for loss a lump sum which had no connection with the loss actually suffered, and the opinion of AG Capotorti in Joined Cases C-64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *Dumortier Frères v Council*, EU:C:1977:137; [1977] ECR 1753.

[324] ibid para 54 by reference to *Von Colson*, n 67, paras 23-4, and *Marshall I*, n 19, para 18.

[325] ibid para 51. This does not require damage necessarily to be capable of assessment where it is imminent and sufficiently foreseeable, most Member State legal systems providing for the possibility for declaratory relief (see, inter alia, Joined Cases 56 and 66/74 *Kurt Kampffmeyer Mühlenvereinigung KG v Commission and Council*EU:C:1976:78; [1976] ECR 711, para 6).

[326] ibid para 51 by reference, in particular, to *Mulder* and Case C-238/78, *Ireks-Arkady GmbH v Council and Commission* EU:C:1979:226; [1979] ECR 2955.

[327] ibid para 51 by reference to Joined Cases 29, 31, 36, 39-47, 50-51/63 *Société Anonyme des Laminoirs v High Authority* EU:C:1965:120; [1965] ECR 911.

[328] Opinion of 28 January 1992 in *Mulder* EU:C:1992:34; [1992] ECR I-1212, para 41. The loss in that case referred to the loss of profit caused to certain Dutch and German milk producers on sales of milk which were unlawfully impeded due to the discriminatory application of quota restrictions to them as a result of the fact that they had acceded to suspend milk sales during an immediately prior period as part of a Community policy to reduce milk production. The first judgment in *Mulder*, following AG Van Gerven's 1992 opinion, was an interlocutory decision determining the existence of liability of the Community institutions for that loss, but postponing a decision on quantum (n 326). The second case, *Mulder II*, concerned the determination of the quantum of loss - once the possibilities of agreement between the parties had been exhausted - and was adopted further to the opinion of a court-appointed expert (judgment of 27 January 2000, EU:C:2000:38; [2000] ECR I-288).

[329] Para 51 of Van Gerven's opinion in *Banks*.

related to the determination of the harm caused to the claimant farmers, the Court, recognizing the complexity of the exercise of quantifying harm, underlined the presiding court's broad discretion in assessing evidence. The Court's statement, oft relied on since, sets out the following guiding principle:

> It should be noted that, in the present cases, the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage.[330]

- *Causation*. There should be a 'direct causal connection' between the wrongful act and the damage sustained - liability does not extend to any harmful consequence of the act, including a remote one.[331]

The approach of Advocate General Van Gerven was not adopted by the Court in *Banks* since the Court denied the ECSC competition rules direct effect. Nor has the Court adopted such a clear and comprehensive approach on any case since concerning the private enforcement of competition law. Indeed, such an approach would arguably meet with an objection. EU law does not impose on Member States a positive obligation to create a free-standing EU law action for the enforcement of EU law rights, provided there exist remedies under national law which provide equivalent and effective protection (*Butter Buying Cruises*, *Unibet*).[332]

Certainly, the Court has been careful to employ the traditional procedural autonomy approach to the private enforcement of competition law. Hence, it has required national courts, in the name of the full effectiveness of competition law, to disapply national rules which could impair the enforcement of the Community law right, such as the bar on claims for damages by parties to unlawful contracts under English law (the subject-matter of the referral in *Courage vs Crehan*) or the bar to umbrella damages under Austrian law (in *Kone*) or the bar to access to the competition authority's file, also under Austrian law (*Donau Chemie*). However, the Court has not invoked its own stand-alone set of EU law conditions for liability.

Nevertheless, the case-law of the Court has illustrated a progressively bolder EU law approach over time. Notably, the Court has moved, very gradually, to subtly more explicit statements as to the positive and direct EU law grounding of the action for damages. For instance, in its ruling of 11 November 2021 in *Stichting Cartel Compensation*, the Court seems to base the action for damages more directly and explicitly on Article 101 TFEU than previously:

> Any individual can rely on a breach of Article 81(1) EC before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that provision, as laid down in Article 81(2) EC […]

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[330] *Mulder II* n 323, para 79.
[331] Para 52, opinion in *Banks*, and case-law cited.
[332] *Butter-Buying Cruises*, n 93, para 44, and *Unibet*, n 50, paras 40, 47. See also opinion of AG Jääskinen in *Donau Chemie*, n 158, paras 67-8.

> [and] that individual may also claim compensation for the harm suffered where there is a causal relationship between that harm and that agreement or practice.[333]

The Court has also become more forthcoming in the development of specific EU conditions for the enforcement of the EU law right to damages, albeit frequently under the traditional guise of national procedural autonomy and without the Court ever explicitly claiming the ground as an exclusive conquest for EU tort law. This has been the case, for instance, in determining when participation in an unlawful contract would prevent a claim for damages (ex turpi causa)[334] or the heads of damage which constitute recoverable harm for breach of EU competition law[335] or the defence of passing-on[336] or the rules applicable to the legal test for causation[337] or the application of limitation periods.[338]

Still, the Court treads carefully and leaves a significant margin of discretion to national courts as to how they apply the tort principles set out in its judgments.[339] By contrast, the opinions of the advocates general, notably Kokott and Wahl, have sought to continue pushing and defining the scope of the EU competition law tort in a more explicit and complete manner and serve as a strong under-current to the Court's jurisprudence, at times explicitly approved in the Court's rulings.[340] Both advocates general have distinguished what they refer to as the substantive constitutive elements of the action for damages for breach of EU competition law from the procedural enforcement, or application, of such claims. The former, they maintain, are subject to EU law; the latter a matter of national law (subject to the principles of equivalence and effectiveness). In turn, in support of the direct EU law regulation of the substantive elements of the damages action, both advocates general have invoked the fundamental requirement of uniform application of EU competition law.[341] In this way, the advocates general have kept burning the fire lit by Van Gerven in *Banks* in support of uniform conditions of liability in damages for breach of EU competition law.

The foregoing suggests that EU law does increasingly define the substantive and constitutive elements of an action for damages for breach of EU competition law, the contours of an EU law tort as

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[333] C-819/19 *Stichting Cartel Compensation v Koninklijke Luchtvaart Maatschappij NV* EU:C:2021:904, 49. The word 'and' is not in fact used in the official English translation in the judgment but is, however, used in the original Dutch text and seems more correct. The statement at para 49 contrasts with the negative prohibition statement in *Courage* (n 36), para 26, whereby the full effectiveness of Article 101 would be put at risk if it were not open to an individual to claim damages, or the statement in Joined Cases C-295-8/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* EU:C:2006:461; [2006] ECR I-6619, building on the former in more positive terms: 'It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC', para 61. We return to these formulations of the right to damages in Ch 4.2 below.

[334] *Courage*, n 36, paras 31-5.

[335] *Manfredi*, n 333.

[336] *Courage*, para 30 and *Manfredi*, para 94. The CJEU there recognizes expressly the defence of the unjust enrichment of the claimant. It does so on the basis of prior EU tax law, which in turn employed the argument of unjust enrichment to justify the passing-on defence. Hence, the reference to this principle and these authorities is generally accepted as recognition of the pass-on defence by the CJEU. See, further, Commission, DG COMP, Benoit Durand, Iestyn Williams, Paul Hitchings et al, 'Study on the passing-on of overcharges: final report' (Publications Office 2016) ("**Pass-on Study**"), II.C; Gustavo Martín Martín, *Competencia, Enriquecimiento y Daños* (Tirant 2019).

[337] *Kone* (n 315) EU:C:2014:1317 and Case C-435/18 *Otis Gesellschaft mbH. v Land Oberösterreich* EU:C:2019:1069.

[338] Case C-637/17 *Cogeco Communications Inc* EU:C:2019:263 paras 45-53.

[339] Save where the question refers to a substantive matter of the EU competition rules, which as such is to be determined exclusively by EU competition law; as is the case, for example, regarding what constitutes an infringing undertaking for the purposes of arts 101 and 102 (see *Skanska*, n 315, EU:C:2019:204 and *Sumal*, n 246)

[340] See, for example, *Skanska*, ibid, paras 28 and 45; *Otis II*, n 337, paras 27 and 31.

[341] AG Wahl in *Skanska* (n 315) para 67, and AG Kokott in *Kone* (n 315) para 29 and *Otis II* EU:C:2019:651, para 55.

such. Indeed, the Damages Directive refers in its recitals to the Union law 'right to compensation'[342]. However, it still remits to national law for its detailed enforcement and, arguably, may still depend on the specific tort action regulated under national law.[343] This would mean that issues of a more detailed or procedural nature, such as the assessment of evidence of the quantification of harm and related evidentiary rules, would not be directly determined by EU law. That is surely correct. Nevertheless, this is not the end of the story. The procedural rules applying to the private enforcement of EU competition law are increasingly influenced by the demands of EU law. In this sense, as we shall see, the grounding of the right to damages directly in EU law, has a real impact in 'Europeanising' actions for damages under national law, including potentially on the level of procedural rules.

4.2. The full effectiveness of the EU competition rules

Unlike the nullity of agreements in breach of the prohibition set out in Article 101(1) TFEU, which is expressly prescribed by Article 101(2), the remedy of damages for breach of competition law is not contemplated in the Treaty. Rather, it has been a construct of the case-law of the CJEU based on a teleological interpretation of the Treaty and its competition provisions, bearing in mind their overall intent and purpose. In this way, as in other areas we have seen in earlier chapters, the CJEU has fleshed out the bases for the direct application of technical Treaty rules invoked by its citizens before the competent authority (national courts or administration). [344] Following the refusal of the Court to take up the matter under the ECSC Treaty in *Banks*, it was of course the seminal *Courage* judgment in which it did finally confirm the existence of such a right under the directly effective provisions of the, then, EC Treaty. It should be noted that, by that stage, a number of national jurisdictions had recognized a right under national law to claim for damages caused by breach of the EU competition rules,[345] leading some commentators to observe that, as a result, the CJEU did not need to require the creation of a new EU law remedy, nor in fact did, since one already existed under national law.[346]

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[342] Recitals 3 and 4, Damages Directive.

[343] This used certainly to be the generally accepted position. For instance, art 1902 Spanish Civil Code, in conjunction with arts 101 or 102 TFEU, based a claim for damages for breach of EU competition law under Spanish law; art 1240 (former art 1382) French Civil Code for a claim under French law; s 823(2) German Civil Code under German law; or the tort of breach of statutory duty under English law deriving from s 2(1) of the European Communities Act 1972 (now repealed) which provided for the enforceability of rights arising under the EU Treaties in English law: 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.' Interestingly, some Member States have chosen to create a new legal base when they transposed the Damages Directive into national law. These include Spain via the new art 72 LDC. For its part, Germany had already incorporated a specific competition law base for damages action in art 33 of the Act against Restraints of Competition in 2005, and this was modified to implement the Directive. See further Amaro, *Private Enforcement of Competition Law* (n 308).

[344] AG Koopmans referred in 1994 to the need for the Court to use fresh sources of legal reasoning outside the European treaties to do this - including, in particular, general principles of law common to the legal traditions of the Member States – given that the treaties 'are too technical, too much concerned with economic matters, to provide such fresh sources' ('The European Community and Legal Evolution', n 312, p 4).

[345] For example, *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 as regards claims in English law.

[346] See, for instance, Drake, 'Scope of Courage', n 313, 850. Dunne, 'Antitrust and the Making of European Tort Law' notes that 'many scholars, particularly those schooled in the continental legal tradition, insisted that the nature of the remedies available was essentially a question of national law' (n 310), 378.

It is well worth paying attention to the precise reasoning of the CJEU in *Courage*. The motivation, while not exhaustive and subject to development since, singularly shapes the development of the right to damages for breach of competition law as a matter of EU law and identifies the key underlying EU policy goals of that right. The Court observes first, by reference to its *Van Gend en Loos* and *Costa v ENEL* case-law, that the EU has created its own legal order which is directly applicable in the Member States' legal systems. That legal order generates not only express obligations but also concomitant rights for individuals affected by the breach of those obligations which those individuals can invoke before the national courts when those obligations satisfy the requirements to be granted direct effect.[347] In addition, the Court notes the fundamental place of the competition rules within the Treaty, and their essential role in the accomplishment of the tasks entrusted to the Community, in particular for the functioning of the internal market. This central role grounded the express provision for automatic nullity in Article 101(2) of the Treaty. [348] In *Eco Swiss*, it had led the Court to require a national court to consider as a matter of public policy the compatibility of an arbitral award with the EU competition rules in an action for annulment.

Having recalled the direct effect of Article 101 TFEU, the Court goes on to address the matter of damages. The judgment begins with the classic formulation regarding the need for national courts to ensure the full effect and legal protection of EU law rights:

> [I]n accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see inter alia the judgments in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and in Case C-213/89 *Factortame* [1990] ECR 1-2433, paragraph 19).[349]

The requirement of national courts to ensure the full legal protection of EU law rights is further supported by the principle of sincere cooperation under Article 4(3) TEU, as expressly affirmed by the Court in *Francovich*[350] and, before, in *Rewe*.[351]

At the central paragraph 26 of the judgment, the Court establishes the requirement that a party affected by a breach of Article 101 TFEU be able to claim damages, based on the full effectiveness of Article 101 and the practical effect ('effet utile') of the prohibition under Article 101(1):

> The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[352]

In that simple formulation lies the essence of the right to damages developed under EU law: the right of 'any individual' (standing) for 'loss' (damage) 'caused to him' (causation) by a 'conduct liable to

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[347] *Courage*, n 36, para 19. The Court cites the same reasoning employed in *Francovich*, n 33, para 31.
[348] ibid paras 20-1, by reference to Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* EU:C:1999:269, [1999] ECR I-3079, para 36, and art 3(g) of the EC Treaty, now art 3(3) TEU and art 3(1)b TFEU. On this, see also Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83; [2011] ECR I-527, paras 20-1.
[349] ibid, para 25.
[350] n 33, para 36.
[351] n 101, para 5, second indent.
[352] *Courage*, n 36, para 26.

restrict or distort competition' (wrong).[353] As already noted, all these constituent elements of the right, and not just the nature and scope of the wrong itself (which are directly determined by Article 101 as interpreted by the CJEU), have been subject to specific development and elaboration by the Court in subsequent rulings.[354]

At paragraph 27, the Court goes on to add an important public policy argument in support of the right to claim damages:

> Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

Public policy goals were similarly invoked in *Francovich*[355] and *Muñoz*[356] to support the existence of private civil remedies.

It is necessary to explore further this public policy aspect of the right to damages. It has served as a tool for the CJEU in its interpretation of the concept of full effectiveness of the competition rules and its evolution over time. It is not a straightforward concept to delimit. Indeed, it has been the subject of discrepant views forming part of the debate over the direction and purpose of private enforcement until today. Notably, Advocate General Jääskinen observed in *Donau Chemie* that, in his view, 'victims of restrictions on competition in the European Union are, unlike perhaps their United States counterparts, simply seeking protection of a private law claim-right rather than enforcing a public policy'.[357] As we will see, that view almost certainly understates the public policy role currently attributed to private enforcement. It is also true that the role of damages actions does not equate to that of their equivalent in the US. In all events, we will endeavour now to break the concept down into discrete (albeit very much interlinked) facets and, thereby, draw out some greater clarity as to its rich meaning.[358]

a) The complementary roles of public and private enforcement

Perhaps the first facet which one should highlight is the complementary role which private enforcement plays to its elder sibling, public enforcement. Application of competition law by the national courts supports the enforcement of EU competition law by the European Commission. As noted by Van Gerven in his *Banks* opinion, enforcement by the courts makes the competition rules

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[353] Similar statements can be found regarding other specific private remedies, for example, in *Francovich* (as regards claims for damages for State liability for breach of EU law), paras 33 and 35, and in *Muñoz* (claims for specific performance of a directly applicable EU obligation), para 30.

[354] See section 1 above in this chapter.

[355] n 33, para 34.

[356] n 34, para 31. In *Muñoz*, this justification follows similar reasoning to that adopted in *Courage*, private enforcement offering a complement to, and strengthening, the public enforcement of the EU rules on quality standards: 'The possibility of bringing such proceedings strengthens the practical working of the Community rules on quality standards. As a supplement to the action of the authorities designated by the Member States to make the checks required by those rules it helps to discourage practices, often difficult to detect, which distort competition. In that context actions brought before the national courts by competing operators are particularly suited to contributing substantially to ensuring fair trading and transparency of markets in the Community.'

[357] n 158, para 48.

[358] This assessment by no means purports to be the only way in which this matter could be presented.

more 'operational' since the Commission is not able to attend to all the instances of competition law infringements in the EU (nor is it required to do so)[359] and relies on the assistance of a network of enforcers, including both national competition authorities ("**NCAs**") and national courts, for the effective enforcement of the rules throughout the EU.

The decentralized nature of competition law enforcement through this network of agencies and courts was further consolidated by Regulation 1/2003 which confirmed the parallel powers of NCAs and national courts to apply EU competition law (as well as removing the Commission's exclusive power to grant exemptions under Article 101(3)).[360] Article 1 of Regulation 1/2003 confirms the direct applicability of Article 101 in its entirety, including Article 101(3), meaning that an infringement of Article 101(1) which does not satisfy the conditions of Article 101(3) for exemption is directly prohibited, 'no prior decision to that effect being required'. Article 102 TFEU is, similarly, directly appliable in its entirety. Confirming furthermore the direct effect of Articles 101 and 102 TFEU, as recognized by the CJEU since *BRT v SABAM* and *Guérin* respectively,[361] Article 6 of Regulation 1/2003 declares that 'National courts shall have the power to apply Articles [101] and [102] of the Treaty'. Together, these principles presuppose that a national court, and litigants, need not obtain a prior administrative decision, or wait for such a decision, before they can initiate civil proceedings related to such alleged breaches and rules limiting such faculties and rights would have to be disapplied.[362]

Recital 7 of Regulation 1/2003 elaborates on the complementary role of national courts, as follows:

> National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

EC law at the time, Recital 7 included, underlined the different role played by private enforcement, aimed at the protection of subjective rights of private parties and giving rise to civil remedies such as injunctions, nullity and damages,[363] as opposed to the broader public policy function of administrative agencies (detection of infringements and fines). This echoes the distinction drawn in *Automec*, where the General Court condoned the power of the Commission to set its investigatory priorities and contrasted this with the obligation of private courts to process and adjudicate private claims which are presented to them:

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[359] See Case T-24/90 *Automec Srl v Commission* EU:T:1992:97; [1992] ECR II-2223, paras 85-86; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* EU:C:2000:689; [2000] ECR I-11369, para 47; C-119/97 P *Union française de l'express (Ufex) v Commission* EU:C:1999:116; [1999] ECR I-1341, para 88; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65, para 8.

[360] See further section d) below.

[361] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM* EU:C:1974:6; [1975] ECR 35; Case C-282/95 P *Guérin automobiles v Commission* EU:C:1997:129; [1997] ECR I-1503.

[362] In Spain, this meant that the rule contained in art 13(2) of Law 16/1989 of 17 July on the Defence of Competition, which barred actions for damages until such time as an administrative decision finding infringement had become final (ie it limited such actions to pure 'follow-on' claims), definitively could not be applied to claims based on the directly applicable EU competition law provisions. That direct applicability was famously disputed by the Spanish Supreme Court in its ruling of 30 December 1993 in *Campsa* (ES:TS:1993:9282), although that position was later corrected by its judgment of 2 June 2000 in *DISA* (ES:TS:2000:4520). Art 13(2) was finally derogated in 2007 by Law 15/2007 of 3 July on the Defence of Competition.

[363] See, on this, also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [now arts 101 and 102 TFEU], [2004] OJ C 101/54, para 4 in fine.

> [I]t should be borne in mind that, unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice.[364]

In time, public and private enforcement have increasingly come to be characterized as two integral parts of one common competition law enforcement policy:

> [J]ust as is the case for the implementation of the EU competition rules by public authorities (public enforcement), actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 45).[365]

This has been interpreted to mean, for instance, that certain terms must have a common meaning in the two enforcement fields, such as the term 'undertaking' in Articles 101 and 102 TFEU.[366] On one level, this is intuitive and obvious, since Articles 101 and 102 directly define the personal scope of the prohibitions contained in the rules. However, it is not uncontroversial when the interpretation of the concept 'undertaking' can mean that long-standing principles of national civil law of obligations (such as the limited liability of legal persons) are, as a result, overlooked. The Grand Chamber's decision in *Sumal* established the binding effects of a Commission decision on a subsidiary which formed part of the relevant 'undertaking' in a private follow-on damages claims, even where that subsidiary was not one of the legal persons named in the relevant decision and had not been expressly defended in the administrative proceedings.[367] All such objections have been overcome in the interest of ensuring the full effectiveness of the EU competition rules, which implies that strong complementary functions are granted to private and public enforcement and the uniform application of substantive competition law concepts.

The dual face of competition enforcement (public and private) can at times raise conflicts of interests between the two separate jurisdictions. This has occurred where civil litigants have sought access to relevant evidence contained in the competition authority's investigation file to prove their claims. Two conflicting interests arise: (i) an individual's right to claim compensation and to promote the private enforcement of competition law, which, in turn, supports and makes more effective its public enforcement and can, as a result, be considered a matter of public interest itself;[368] and (ii) the ability of public authorities to investigate antitrust behaviour effectively. The Court has been called upon to resolve such situations on several occasions, whether by reference to requests made pursuant to the transparency rules or pursuant to specific access to the file mechanisms. In those cases, the Court has not recognized either interest an absolute value but has required that agencies and national courts weigh up the respective interests: on the one hand that public investigations continue to be effective

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[364] *Automec,* n 359, para 85. In similar terms, the Commission's Complaints Notice notes, para 8, that: 'While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases'.

[365] *Sumal*, n 246, para 37.

[366] *Sumal* ibid para 38; *Skanska*, n 315, para 47.

[367] For a different (earlier) view from a national court, see the ruling of the CAT in *Emerson Electric Co v Morgan Crucible Co plc* [2011] CAT 4, paras 32 and 49, confirmed by the Court of Appeal, [2012] EWCA Civ 1559.

[368] The Commission uses the term public interest by reference to the private enforcement of competition law in its SWD published as an annex to the Green Paper 'Damages actions for breach of the EC antitrust rules' COM(2005) 672 final, para 52.

(and that investigated parties be encouraged to comply with their obligations to collaborate in such investigations) and, on the other, that the right to claim for compensation not be rendered 'nugatory'.[369] This has meant, for instance, that a bar to claimants gaining access to the administrative file is precluded and courts should be able to assess requests for access from claimants. At the same time, such requests should be limited to what is necessary for bringing a damages claim, there not being a general right to access to the file. That question (what is necessary and, by implication, justified) should be determined on a case-by-case basis considering all relevant factors, including the availability to the claimants of other modes of accessing evidence. This balancing exercise was required even in the case of leniency applications in *Pfleiderer*, the Court not acceding to the argument that such evidence should be absolutely protected by dint of arguments against self-incrimination.[370] A more restrictive approach is adopted under the transparency rules, where the need to protect the functioning of specific competition law procedures is granted greater general weight, although broadly the same general principles (no absolute bar to access, balance of interests and case-by-case analysis) still apply.[371]

Conflicts between public and private enforcement proceedings may also arise where they evolve in parallel and concern the same alleged anticompetitive conduct. In these circumstances, the CJEU has required coordination between the two jurisdictions to avoid conflicting decisions.[372]

b) Deterrence

The second facet of the public policy goal of the full effectiveness of Article 101 is deterrence. By this, we refer to the role of private enforcement actions to, in the words of *Courage*, 'discourage' agreements which infringe the prohibition in Article 101 TFEU.

We should start perhaps with what deterrence is not. Deterrence is not about imposing punitive damages on infringers. In *Manfredi*, the CJEU clarified that punitive damages are not required by the effectiveness principle and, indeed, that EU law does not exclude national courts taking steps to avoid the unjust enrichment of those who exercise EU rights (namely, by taking into account the passing-on of losses to third parties, for instance via an increase in the right holder's selling prices, in order to reduce the amount of compensation).[373] At the same time, it did not prohibit punitive damages, leaving open the possibility, in application of the principle of equivalence, that breaches of EU competition law could give rise to exemplary or punitive damages.[374] Paragraph 27 of *Courage* itself, identifies the 'existence' of the right as strengthening the enforcement of competition law, which arguably identifies the deterrent effect of private damages actions with the existence of damages

[369] *Donau Chemie*, n 158, para 32.
[370] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389; [2011] ECR I-5161. See the discussion (and more receptive treatment) of the argument on self-incrimination in the opinion of AG Mazák, EU:C:2010:782, para 38 et seq.
[371] See inter alia Case C-365/12 *Commission v EnBW Energie Baden-Württemberg AG* EU:C:2014:112. The CNMC's practice has to date been similarly restrictive; see, for example, Resolution of 29 October 2020, AIP/30/20.
[372] See inter alia Case C-234/89 *Delimitis v Henninger Bräu AG* EU:C:1991:91; [1991] ECR 1-935; *Masterfoods*, n 359. We will return to this topic more fully below in Ch 4.3 below. See also Case C-57/21 *RegioJet as v České dráhy as* EU:C:2023:6 (referred to further in Ch 16.2 below).
[373] n 333, paras 93-4.
[374] As noted by Wils, the prohibition of ne bis in idem was not raised in *Manfredi* and may arguably militate against the imposition of punitive damages, as was held by the English High Court in *Devenish etc.* v *Sanofi-Aventis etc.*, [2007] EWHC 2394 (Ch); Wouter PJ Wils 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 1 World Competition: Law and Economics Review 3.

actions per se, not suggesting any further strengthening of the actions themselves to the benefit of plaintiffs. Indeed, the compensatory nature of damages actions has been confirmed in the Damage Directive.

Deterrence has been invoked in somewhat bolder and positive terms post *Courage*. The first case in point is *Kone*.[375] The ruling in *Kone*, concerning the availability of 'umbrella' damages,[376] does not employ the concept of deterrence in its reasoning, at least not explicitly in the sense we are referring to. Indeed, we should rather categorise the case as one of ensuring 'effective competition' in the *VEBIC* sense.[377] Nevertheless, it may have been in the mind of the Court and was expressly mentioned by Advocate General Kokott in her opinion.[378] More explicitly still, Advocate General Wahl in *Skanska* refers to *Kone* as being, not only based on the full effectiveness (or effective application) of competition law, but also, in his words, 'firmly tied to deterrence'. He attributes this conclusion to fact that the Court discarded the requirement for a 'direct causal link' to be established for liability for harm to be imposed (thereby, opening the door to umbrella claims). He, furthermore, underlines that one of the goals of deterrence is to open up damages claims to a 'number of potential claimants', as opposed to just individual claimants, by which he certainly means the potential of mass claims from groups of claimants in a potentially affected market or markets.[379] The analysis of Wahl, now Judge of the CJEU, concluding that the deterrent function of damages claims is, in his view, of superior importance, in fact, to their compensatory function, merits citation in full:

> 44. Second, as a close corollary to the emphasis put on the full effectiveness of Article 101 TFEU, the rationale of a right to claim compensation for harm caused by an infringement of EU competition law was in Kone firmly tied to deterrence. Indeed, by discarding the applicability of a rule requiring a direct causal link in order to establish private liability, the Court held that Article 101 TFEU precludes a domestic rule which excludes the private liability of undertakings belonging to a cartel for harm caused by an increase in prices on the market as a result of the anticompetitive conduct.
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> 45. The 'harm' caused by umbrella pricing is a consequence of an independent pricing decision taken by a person not involved in the impugned anticompetitive conduct. Such a decision may affect a vast number of individuals. As a result, the number of individuals enjoying a right to claim damages on the basis of a breach of EU competition law directly on the basis of Article 101 (or Article 102 TFEU), considerably increases. Bearing that in mind, the ruling in Kone constitutes a decisive step in consolidating the role of actions for antitrust damages as an instrument designed to deter undertakings from engaging in anticompetitive behaviour.
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> 2. Whether the emphasis placed on deterrence is warranted
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> 46. Although a great deal could be said about the added practical value of the solution reached in Kone for the effectiveness of the system of private enforcement overall, the emphasis the Court placed on deterrence in general is in my view justified for several reasons. I will highlight two of them briefly.

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[375] n 315.
[376] Umbrella damages relate to the negative effects of an infringement on the pricing (or other conditions) offered by non-infringers active in the same market. See *Kone*, ibid paras 27-30.
[377] Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* EU:C:2010:739; [2010] ECR I-12471. See further s 4.3 below.
[378] At para 65 and fn 38.
[379] See Lianos, Davis and Nebbia *Damages Claims*, n 308, ch 7.

> 47. First, as the Court has observed, private enforcement through actions for damages provides a complementary deterrent for anticompetitive behaviour, which public enforcement alone is unable to achieve. Like public enforcement, private enforcement aims to influence the behaviour of undertakings on the market, in order to deter those undertakings from engaging in anticompetitive behaviour.
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> 48. On the one hand, if individuals (often with first-hand knowledge of cartels or other anticompetitive conduct) have effective private law remedies at their disposal, the likelihood increases that a greater number of illegal restrictions will be detected and that the infringers will be held liable. In other words, the risk of detection increases considerably. On the other hand, while the deterrent effect of a single claim for compensation is arguably negligible, it is the number of potential claimants that, together with the increased risk of detection, help explain why private enforcement mechanisms (such as actions for damages) constitute an effective means of ensuring that competition rules are observed.
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> 49. Second, it should be called to mind that harm caused by anticompetitive conduct is usually purely economic harm. Although it may be relatively straight-forward to identify and prove direct harm to certain persons' economic interests, it is worth emphasising that infringements of competition law also involve indirect harm and, more generally, negative consequences on the structure and functioning of the market. Needless to say, quantifying or proving harm, let alone causation, on the basis of a counterfactual chain of events, raises a plethora of problems.
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> 50. Fundamentally, however, the real harm caused by illegal restrictions of competition is the dead weight loss resulting from such restrictions, that is to say a loss of economic efficiency caused by the anticompetitive conduct in question. This means that the harm identified in actions for damages based on an infringement of competition law is in reality a proxy for the economic inefficiencies resulting from the infringement and the corollary loss to society as a whole in terms of reduced consumer welfare. In the final analysis, therefore, the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function.[380]

This last paragraph is truly food for thought. By placing the compensatory function within a broader framework of the full harmful effects of competition infringements to the market (including deadweight loss)[381] for which damages are a proxy, Wahl attributes to compensation a primarily public policy (deterrent) function.

On the specific issue raised in the *Skanska* case itself (i.e., the ability for a claimant to sue the economic successor to an infringing company on the basis of the principle of economic continuity recognized and applied in the field of public enforcement), Advocate General Wahl founded his proposed answer (namely, that that same broad concept of undertaking should also be applied in the private enforcement sphere) largely on the deterrence function of private actions:

> 76. … [A] private action for damages, like the public enforcement of competition law by competition authorities, also has the function — though not through the same mechanism — to deter undertakings from engaging in anticompetitive behaviour. Indeed, as *Vantaan kaupunki* has pointed out, public and private enforcement of EU competition law together form a complete system of enforcement, albeit with two limbs, that should be regarded as a whole.

[380] Opinion in *Skanska*, n 315

[381] That is, the lost value to consumers of sales and purchases which were not realized given the distortionary effects of the infringement on prices or quantities; see, for instance the Pass-on Study, n 336, para 35 and Annex A.

> 77. If the principle of economic continuity were not applied in the context of actions for damages, it would considerably weaken the deterrent element involved in allowing any individual to claim damages for an infringement of EU competition law.
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> 80. … [I]n my view, there is nothing extraordinary — or for that matter surprising — about that solution. As I have explained above, actions for antitrust damages form an integral part of the enforcement of EU competition law, a system that (taken as a whole) aims primarily at deterring undertakings from engaging in anticompetitive behaviour.

In the ensuing *Skanska* judgment, the Court explicitly upheld that thinking in no uncertain terms:

> As the Advocate General stated essentially, in point 80 of his Opinion, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.[382]

In *Sumal*, the Court, sitting in Grand Chamber and now including Judge Wahl, explicitly made its own this thinking on the wider deterrent effect of the private enforcement of competition law:

> Beyond the compensation itself for the harm alleged, the establishment of such an entitlement contributes to the objective of dissuasion, which is at the heart of task of the Commission, which is under a duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the FEU Treaty and to guide the conduct of undertakings in the light of those principles (see, to that effect, judgment of 7 June 1983, *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 105). **That entitlement is thus capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned**.[383]
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> (My emphasis added)

This role of private enforcement has since been reiterated by the CJEU in both *Paccar* and *Tráficos Manuel Ferrer*.[384]

In this way, we can see that deterrence has taken on notions which go beyond the strict confines of the mere existence of damages actions themselves and, while not grounding punitive or exemplary damages (which are now expressly excluded by the Damages Directive), is invoked as part of the broader policy goal of ensuring that the full force of the competition rules is felt and achieved throughout the internal market.

c) Maintenance of effective competition throughout the internal market

The third facet of the policy goals of the private enforcement of the competition rules is 'the maintenance of effective competition' in the Union (the last phrase of paragraph 27 in *Courage*). This facet has increasingly been linked causally, in the language used by the Court, to the deterrence effect of damages claims which we have just been discussing. However, it is nevertheless helpful to deal with it separately. Of the four facets we discuss here, it is the one which echoes most clearly the underlying

[382] *Skanska*, n 339, para 45.
[383] *Sumal*, n 246, para 36.
[384] Case C-163/21 *AD v Paccar Inc* EU:C:2022:863, paras 55-56; Case C-312/21 *Tráficos Manuel Ferrer v Daimler AG* EU:C:2023:99, paras 41-2.

public policy goal highlighted by the Court in *Eco Swiss*, and invoked in *Courage*; namely, to ensure effective competition throughout the EU and the creation of the internal market.[385] The specific evocation of this principle has given rise to some notable extensions to the right to claim damages, in particular as regards the scope of the ambit of protection of the competition rules (i.e., who can claim).

The starting point for this facet is not a private enforcement case, however, but *VEBIV*[386] *VEBIC* concerned the rights of an NCA (the Belgian competition authority) to intervene in the appeals of its regulatory decisions before the competent court of judicial review (specifically, in the appeal by VEBIC, the party sanctioned by the NCA, before the Brussels Court of Appeal). Such intervention was not directly prescribed by applicable EU rules (i.e., Regulation 1/2003). Nevertheless, Regulation 1/2003 provided the legal base for the designation of NCAs by the Member States and required that those NCAs ensure the effective application of the competition rules in the general interest.[387] Accordingly, the Court held that:

> Although Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules **must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities**.[388]
>
> (My emphasis added)

The case is remarkable because it effectively imposes a positive obligation on the Member State to create a new procedural right (a right of intervention for the competition authority) and challenges the limitations in that respect established in earlier case-law. On the question of the application of competition law by the courts which interests us here, the Court adds a further point. It is one that echoes the concerns (which we saw in the context of the fundamental right to effective judicial protection in Chapter 2.4) that courts not become captive to expert technical evidence or submissions they may not understand very well, where, for instance, the subject-matter is of a complex legal or economic nature. Specifically, the Court observes:

> In that regard, as the Advocate General has remarked in point 74 of his Opinion, if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU.[389]

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[385] *Courage*, n 36, para 20.
[386] n 377.
[387] Pursuant to art 35(1), Regulation 1/2003, and recitals 5, 6, 34 and 35 (para 56 of the judgment).
[388] *VEBIC*, n 377, para 57
[389] ibid, para 58.

Accordingly, the effective application of competition law may require granting specialized competition agencies procedural rights, something which may also have implications for civil proceedings.[390]

The language of effective application of competition law was next utilized in *Kone* to justify the availability of 'umbrella' claims. The Court notes that the detailed national rules governing claims for damages for breach of EU competition law (which apply in the absence of EU rules governing the matter) 'must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU'. The Court goes on to affirm that the full effectiveness of EU competition law requires that those national procedural rules in question must 'specifically take into account the objective pursued by Article 101 TFEU, *which aims to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition*' (my emphasis added). This, in turn, serves as a prism through which to apply the bald statement in *Courage* and *Manfredi* that 'any' individual has the right to claim compensation for loss sustained as a result of a breach of EU competition law. This is, indeed, the platform for confirming the rights of third parties (i.e., those not party to a contract with the infringer), such as indirect purchasers, suppliers, consumers, umbrella claimants and even parties further afield. It may, too, be reflective of the deterrence goal of the private enforcement of Articles 101 and 102, as ventured by Wahl; i.e., the more enforcers (potential claimants), the greater the deterrence. However, it is most noticeably a question of assisting the competition authorities in ensuring that effective competition is encouraged and achieved throughout the internal market - ultimately, as the judgment notes, that prices are set on the basis of free competition.

Otis II[391] marks a further step on this path. This case concerned the standing to claim for damages of a public authority (in the Province of Upper Austria) which provided loans to real estate promoters and alleged that the value of those loans had been inflated as a consequence of the Austrian elevators and escalators cartel causing it harm (economic loss). From any perspective, this was a clearly more remote type of claim than any previously contemplated by the Court, or probably by any national court in the EU. Nevertheless, the Court upheld the standing of the claimant. In doing so, it incorporated the question of legal causation into the scope of EU law, essentially reducing the question to one of a factual nature (empirical evidence) to be assessed by the national court.[392] Its justification for doing so was based largely on the public policy aspect of the requirement of the full effectiveness of the competition rules and, more particularly, of their effective application:

> 25. In that regard, and specifically in the context of competition law, national rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU must not jeopardise the effective application of that provision (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 26 and the case-law cited).
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> 26. Therefore, the law of Member States must, in particular, take into account the objective pursued by Article 101 TFEU, which strives to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition. It is for the purposes of guaranteeing that effectiveness of EU law that the Court has held, as was noted in paragraph 23 of the present judgment, that national legislation must recognise the right of any individual to claim compensation for loss

[390] See further Chs 5.3 and 17.2 below.
[391] *Kone*, n 337.
[392] ibid paras 30-4.

> sustained (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 32 and the case-law cited).
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> 27. It should be noted that, as was also stated, in essence, by the Advocate General in point 78 of her Opinion, both the guarantee of the full effectiveness of Article 101 TFEU and effective protection against the adverse effects of an infringement of competition law would be seriously undermined if the possibility of requesting compensation for loss caused by a cartel were limited to suppliers and customers of the market affected by the cartel. That would from the outset systematically deprive potential victims of the possibility of requesting compensation.[393]

The number of familiar terms borne of the line of case-law relating to effective application which are employed here is noticeable; for example: 'must not jeopardise the effective application' of the competition rules, 'must take into account the objective pursued by Article 101 TFEU, which strives to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition' and, finally, the concern with the number and ambit of 'potential victims' to claim.

In *Sumal*, ostensibly under the heading of deterrence, the Court also set out a broad concept of the reach of EU competition law when it referred to providing a remedy not only for direct harm but also, in terms quoted above, 'the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned'.[394]

In this way, we can quite clearly identify an evolution in the reasoning of the Court, which builds on terms and develops them, many times led by more detailed considerations and reasoning of the advocate generals. The result: a continual encroachment of EU law on the terms of national actions for breach of EU competition law.

d) Consistency and uniform application of EU competition law

The fourth and final facet is the principle of consistent, or uniform, application of EU competition law. This is one of the key considerations that has driven the move towards more harmonized concepts in the field of private enforcement of EU competition law. It is no doubt somewhat forced to include this aspect under the umbrella of the public policy goals referred to at paragraph 27 of the *Courage* judgment. It is probably better understood as a matter of the full effectiveness of competition law generally. Nevertheless, the principle has its source in competition law policy goals generally and, for this reason, is included here.

Beyond the fundamental principle of uniform application of EU law, our reference point in the ambit of competition law is Regulation 1/2003. Regulation 1/2003 introduced a more decentralized enforcement of EU competition law making fuller use of the network of national agencies and national courts to support the Commission in its task. The recitals to the Regulation emphasize the fundamental objective of effective and uniform application of the EU competition rules in order to ensure undistorted competition throughout the internal market and, furthermore, the need for

[393] ibid paras 25-27.
[394] *Sumal*, n 246, para 36, and followed in *Paccar* and *Tráficos Manuel Ferrer* (n 384).

'consistency' within a 'system of parallel powers'.[395] The Regulation itself includes express provisions, in particular in Articles 15 and 16, to facilitate such consistency via mechanisms of cooperation between the national courts and the competition agencies and the establishment of a hierarchy in the case of parallel proceedings.

Regulation 1/2003 also coins the phrase 'level playing field', which has become significant in the area of private enforcement. The Regulation uses the term to refer to the need to foment a consistent consideration of agreements and conducts under EU and national competition law in situations where both may be applicable.[396] The term has been adopted more broadly by Advocate General Kokott in several of her opinions in the field of competition law.[397] Notably, in the context of private enforcement actions, she has used the term to underline the need for a standard substantive meaning to be given to the constituent elements of liability for damages, warning too against the risk of 'forum shopping' if those conditions are not given a uniform meaning:

> If the legal criteria by which national courts assess the civil liability which those participating in an agreement, decision or concerted practice within the meaning of Article 81 EC or Article 85 of the E(E)C Treaty owe to certain persons for certain kinds of loss were to differ fundamentally from one Member State to another, there would be a risk of economic operators being treated differently. This would not only run counter to the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ('level playing field'), it would also be an invitation to 'forum shopping'.[398]

This was in the context of cases relating to the requirements for a causal relationship between the wrongful conduct and the damage being alleged, where Kokott averred that the legal concept of causation was a matter of the substantive, constituent elements of the right to damages and therefore a matter of EU law. Furthermore, the concept had an extensive meaning. The Court, as already noted, agreed.

In his opinion in *Skanska*, Advocate General Wahl also underlined the importance of achieving uniform conditions of liability for breach of competition law. Recalling the extensive analysis by Van Gerven in *Banks* on this very point, as well as the reasoning of Kokott in *Kone*, Wahl emphasizes the risk of courts in different Member States applying different rules and warns of the need to restrict national discretion as regards who (which persons) should be liable for damages:

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[395] See recitals 1, 14, 17, 21 and 22. The principle of uniformity is also central to the ECN+ Directive, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

[396] Recital 8. More particularly, the Regulation provides under art 3 that NCAs should apply art [101] alongside national competition law, where trade between Member States may be affected, and art [102] where the conduct would be prohibited pursuant to that provision. It establishes further that agreements which would not be prohibited under art [101] should not be prohibited under national law either, whereas a stricter standard is permitted under national law for unilateral conduct than that applied pursuant to art [102].

[397] For instance, as regards the need for uniform conditions of EU substantive competition law (Case C-681/11, *Bundeswettbewerbsbehörde v Schenker & Co. AG* EU:C:2013:404, para 48); the relevance of non-binding Commission notices as a source of guidance for national courts in a decentralized system (Case C-226/11, *Expedia Inc v Autorité de la concurrence* EU:C:2012:544, para 37; not followed by the Court); the uniform application of the ne bis in idem principle and legal professional privilege rules (Case C-17/10, *Toshiba Corporation v Úřad pro ochranu hospodářské soutěže* EU:C:2012:72, para 118; C-550/07, P *Akzo Nobel Chemicals Ltd v Commission* EU:C:2010:512; [2012] ECR I-8301, para 169).

[398] *Kone* n 315, para 29. For similar reasoning, *Otis II*, n 337, para 55.

> The constitutive conditions of liability must be uniform. If the persons liable to pay compensation differed from one Member State to another, there would be an obvious risk of economic operators being treated differently, depending on the domestic jurisdiction dealing with the private law claim for compensation. From the perspective of the effective enforcement of EU competition law, leaving the determination of the persons liable for damages to the discretion of the Member States could considerably limit the right to claim compensation. Furthermore, the application of different rules across the Member States on a fundamental issue directly affecting the very existence of a right to claim compensation would not only run counter to one of the fundamental objectives of EU competition law, which is to create a level playing field for all undertakings active on the internal market, but also be an invitation to forum shopping.[399]

It is notable that both advocate generals point to 'forum shopping' as an undesirable risk arising when different rules apply to claims in different Member States. Forum shopping refers to the possibility for litigants to choose to commence actions in a particular Member State in light of the more beneficial rules that, in their opinion, would apply to that action. Indeed, litigants can frequently choose from a number of possible fora in the case of the most relevant competition infringements, since these will often be cross-border conducts involving legal entities domiciled in different Member States which have joint and several liability for the harm alleged to have been caused, potentially arising across different parts of the EU.[400] Furthermore, they frequently do so choose.[401] Is that a bad thing? Many commentators have advocated, on the contrary, that jurisdictional competition is a positive (as well as inevitable) force:

> [I]n the particular context of competition actions, there appears to be a sound basis in principle for letting the different national systems of the Member States compete with one another. An imposed, harmonized, solution will simply reflect one way of doing things; and not necessarily the best way in any or any given legal culture in the Member States. In contrast, if one particular legal system develops a particularly effective (or ineffective) way of dealing with competition actions, or certain procedural aspects of a competition action, other legal systems may learn from that experience.[402]

As Lasok notes, competition between jurisdictions can serve as a practical means of promoting the development by Member States of better rules. Such development may be with the goal of attracting

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[399] *Skanska*, n 315, para 67.

[400] The Brussels I Regulation provides that persons may be sued in the country of their domicile (art 4(1)) or, in a case arising in tort, in the place where the harmful event occurred (or may occur) (art 7(2)). For how art 7(2) is to be interpretated in the context of competition law actions, see the CJEU's judgments in *Volvo I*, n 181, Case C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF Trucks NV* EU:C:2019:635 and Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH* EU:C:2015:335. For further discussion of these cases and the implications of the Court's judgment in *Sumal* for the choice of court, see Hitchings, 'RH v AB Volvo' n 181; Paul Hitchings, 'Daños Antitrust: ¿Cómo Conseguir una Mayor Coherencia y Eficacia en la Resolución de las Reclamaciones en Masa? Comentario a raíz de las Sentencias del TJUE en *Volvo I* y *Sumal* (Caso Camiones)' in Miguel Angel Recuerda Girela (dir) *Anuario de Derecho de la Competencia 2022* (Thomson Reuters 2022), 105.

[401] Whether to bring damages claims in a jurisdiction perceived to be more favourable for claimants or to pre-empt claims by commencing claims for a negative declaration in jurisdictions perceived less favourable (a so-called 'torpedo' action launched by an infringer to block a claimant's action in its jurisdiction of choice).

[402] KPE Lasok QC 'Some Procedural Aspects and How they Could / Should be Reformed' in Mihail Danov, Florian Becker and Paul Beaumont (eds), *Cross-Border EU Competition Actions* (Hart 2013), 208. See also Stephen Weatherill, 'Why Harmonise?' in Takis Tridimas and Paolisa Nebbia (eds), *European Law for the Twenty-First Century: rethinking the new legal order* Vol 2 (Hart, 2004), 11: 'in a geographically and functionally expanded EU the establishment of common rules is not only increasingly difficult to achieve, it is also increasingly undesirable as a suppression of competitive and cultural diversity' (p 11). These views may reflect a particularly English approach to the question.

judicial business or simply improving civil justice, with the possibility furthermore that Member States learn from each other's experience of what does and does not work.[403]

EU private international law arguably foments forum shopping by providing that a claimant who sues a defendant in its domicile for breach of competition law may elect to base its claim against that defendant (and any other, including foreign, defendants joined to the same claim) on the law of the court seised, provided that the market of that Member State is directly and substantially affected by the restriction of competition on which the claim is based.[404] That is, the claimant can, if those conditions are met, ensure that only one set of substantive rules will apply to its case and thereby significantly simplify claims. In this way, the choice of jurisdiction will thereby determine not only the procedural rules applicable to the case (which is the automatic consequence of choosing to litigate in a particular court) but also the substantive rules. In this way, the choice of forum takes on an even greater weight to the legal framing (and outcome) of the case.

This said, the tendency of EU courts and policy makers over recent years has been quite the opposite. Indeed, the wish to avoid differences between tort compensation regimes in different Member States is one of the key motives underpinning the decision to adopt vertical harmonization legislation in the area of competition damages law. As Kokott notes in *Otis II*, this is stated expressly in Recitals 8 and 9 of the Damages Directive.[405] In those recitals, the EU legislator does not raise a clear objection to forum shopping as such, but rather to differing national rules creating 'an uneven playing field' and compromising both the internal market and uniform conditions for competition. The expressed concern of the Union is that victims of antitrust infringements should be allowed to claim damages in their own 'home' courts (since this is assumed generally to be their preference) without this posing any legal disadvantage to them. In addition, the place of establishment within the EU should not pose a disadvantage (or advantage) to companies or persons, whether victims or infringers, by virtue of the difference in the rules applicable to competition claims, such that the freedom of establishment may be negatively affected. From the perspective of choice of the forum in which to litigate (i.e., forum shopping), the Directive seems, therefore, to be concerned more with protecting the ability for victims (notably, more unsophisticated victims such as consumers) to litigate in their own country. This possibility reflects the role of consumer and internal market policy objectives in the final preparation of the legislation. Arguably, that same perspective can be detected in the CJEU's decision in *Sumal* allowing a small claimant (a purchaser of just one truck) to file its follow-on claim against a local Spanish subsidiary and, thereby, avoid the need to sue and effect service on the foreign parent company which had been found in breach of the competition rules in the Commission's Truck decision.

Be this as it may, the objective of creating a level playing field has crept into the centre of EU policy and thinking in the area of private enforcement. Advocate Generals Kokott and Wahl invoked the principle as a reason for establishing uniform substantive (constitutive) conditions of liability for breach of competition law. However, Recitals 8 and 9 of the Directive, which Kokott refers to in *Otis II*,

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[403] Anne-Marie Van den Bossche, 'Private Enforcement, Procedural Autonomy and Article 19(1) TEU: Two's Company, Three's a Crowd' (2014) 33 Yearbook of European Law 41, refers to this as 'reflexive harmonization', noting that it can be fomented by benchmarks of a soft law nature.

[404] Art 6(3) of Regulation 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[405] Para 55, fn 42 of the opinion, *Otis II*, n 341.

in fact, go further. The Directive harmonises not only certain minimum substantive rules (arguably with a fairly limited impact, at that), but also some important procedural rules (notably, disclosure). While the justifications of Kokott and Wahl are related to interpreting the meaning, scope and requirements of the EU Treaty competition provisions (and focus, therefore, on substantive aspects), they do not venture into the realms of procedural law. Therefore, the inclusion of procedural provisions in the Directive is an important development. However, we are now straying from our topic. We will return to the Directive in Chapter 5 below.

By way of conclusion to this section, one may observe that the full effectiveness of competition law not only grounded the Court's recognition of a right to damages in *Courage* but has also provided the basis for the development of a series of interpretative criteria aimed at ensuring a coherent and effective system of EU competition law enforcement by competition agencies and national courts. These criteria have, in turn, permitted the CJEU via the preliminary reference procedure to shape certain aspects of national law applicable to actions for damages; in particular, in relation to substantive aspects of the right to claim damages (such as, standing, causation, limitation, etv) but also to procedural aspects of national damages actions too (for instance, access to evidence on the administrative file).

4.3. Effective judicial protection

The applicability and implications of Article 47 CFR for Article 101 civil cases were expressly addressed in *Otis I*.[406] That case related to a claim by the European Commission on behalf of the EU for economic losses, in the form of inflated prices for the installation and maintenance of elevators and escalators in buildings of the EU institutions, alleged to have arisen as a result of an infringement which had been the object of a prior decision by the Commission fining those companies in exercise of its powers under Regulation 1/2003. At issue was the respect for the principles that no party should be judge in its own cause (nemo iudex in sua causa) – the Commission had determined the existence of an infringement and the civil court was bound by that finding - and the equality of arms – the Commission had had privileged access to evidence during the prior investigation where it exercised its powers under Regulation 1/2003 in order to investigate and prove the infringement. The Court framed the legal assessment of these issues in the following terms:

> 46. It must be borne in mind in that regard that the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).
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> 47. Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 51).
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> 48. The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.
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> 49. With regard, in particular, to the right of access to a tribunal, it must be made clear that, for a 'tribunal' to be able to determine a dispute concerning rights and obligations arising under EU law in accordance

[406] n 143.

> with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it.[407]

On the facts before it, the Court determined that there was no breach of the principles emanating from Article 47. On the question of equality of arms, the Court found that there were sufficient guarantees in place to avoid the Commission employing information obtained during the administrative phase, or otherwise bestowing on itself an unfair advantage, in the civil proceedings. As to the principle of nemo iudex in sua causa, it noted that the infringers, defendants in the Belgian civil proceedings, had available to them effective legal protection by virtue of their ability to challenge the finding of infringement through the judicial review process (appeals before the General Court and then to the Court itself). The Court thereby gave weight to a holistic view of legal protection of parties' rights of defence and sanctioned the division of powers as between public and private enforcement in those cases where an administrative investigation had preceded the civil action. Hence, the Court, recalling the requirement under *Masterfoods* and Article 16(1) of Regulation 1/2003 to avoid decisions running counter to a Commission decision applying Article 101, observed:

> 52. An application of the EU competition rules is thus based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the EU Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty (*Masterfoods and HB*, paragraph 56).
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> 53. It must be borne in mind in that regard that it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 12 to 20).
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> 54. The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts.[408]

It went on to confirm the role left to the courts in private actions following on from an administrative decision (so-called 'follow-on' actions) in the following terms:

> 65. Finally, a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.
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> 66. Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003.[409]

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[407] *Otis I,* ibid.
[408] ibid.
[409] ibid.

Therefore, the national courts were recognized their own specific and exclusive area of competence, namely as regards causation and loss, whereas they were to defer to a prior administrative decision of the Commission as regards the existence of an infringement (and, on occasions, the existence of effects). Where prior administrative action is ongoing, or is subject to appeal, such that the findings of the Commission are not yet certain, national courts are invited to consider staying proceedings before them to avoid the adoption of decisions which could conflict with the future (or final) Commission decision.[410]

This acceptance of the division of powers, and the ascendency granted to the Commission in the interpretation of Article 101, is a consequence of the obligation of sincere cooperation of the Member States (and their courts) with the EU institutions.[411] It is also reflective, however, of a further underlying consideration, which we referred to earlier in the context of *VEBIC*: namely, that competition law involves complex legal and economic assessments which competition agencies are especially equipped to evaluate.[412] Considerations such as these grounded Advocate General Kokott's view in *Cogeco* that national competition authority decisions must, too, be granted weight in civil proceedings:

> [T]he enforcement of claims for damages due to breaches of Article 102 TFEU would be rendered excessively difficult if the preliminary work of a competition authority were to be accorded no effect whatsoever in the civil action for damages. In view of the particular complexity of many antitrust offences and the difficulties that injured parties face in practice in proving such offences, the principle of effectiveness dictates that the final finding of an infringement by the national competition authority be given at least an indicative effect in the action for damages.[413]

A similar approach can be seen in the way in which Spanish law deals with the relationship between national administrative proceedings and Spanish civil proceedings in competition law since the adoption of the current Law 15/2007 for the Defence of Competition, in the wake of Regulation 1/2003. That law ushered in a new improved regime for private enforcement of competition law in Spain, recognizing full powers to national courts to apply national, as well as EU competition law, directly without any prior administrative intervention by the competition authorities.[414] It also provided for similar coordination mechanisms between the Spanish competition authorities and national courts to those introduced at EU level by Regulation 1/2003, including provisions concerning the amicus curiae intervention of the Spanish competition authorities in civil proceedings.[415] The new provisions also provided for a civil procedural rule allowing courts to stay proceedings before handing

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[410] *Masterfoods*, n 359, para 57, and art 16(1), Regulation 1/2003.
[411] *Delimitis*, n 372, para 52; *Masterfoods*, n 359, para 57.
[412] *VEBIC*, n 377, para 58, and para 74-75 of the opinion of AG Mengozzi to which the Court alludes. See also Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' [2004] OJ C 101/54, para 8, and Joined Cases C-215-6/96 *Bagnasco v Banca Popolare di Novara soc coop arl (BNP)* EU:C:1999:12; [1999] ECR I-135, para 50.
[413] *Cogeco* n 338, para 93; albeit the full binding effect of NCA decisions would, in her opinion, require an express rule to that effect (paras 94-6). See now art 9, Damages Directive. On the subject of the effect of NCA decisions, see also Alfonso-Luis Calvo Caravaca and Julia Suderow, 'El Efecto Vinculante de las Resoluciones de las Autoridades Nacionales de Competencia en la Aplicación Privada del Derecho Antitrust' (2015) 7 Nº 2 Cuadernos de Derecho Transnacional 114; Ignacio Sancho Gargallo, 'El efecto vinculante de las decisiones de las autoridades nacionales de la competencia' in Ruiz Peris and Palomar, *Problemas actuales en las acciones de compensación de daños* (n 308), 21.
[414] As noted above, n 355, the new law derogated art 13(2) of the prior Law 16/1989 on Defence of Competition.
[415] art 16 and 2nd Additional Disposition (introducing a new art 15 bis to the Spanish LEC).

down judgment (i.e., after trial) where the court wishes to have sight of an administrative decision, which is pending at that point in time, before adopting its decision.[416] In parallel, the Spanish Supreme Court has recognized NCA decisions particular evidentiary weight in civil proceedings and conferred binding effect on judgments of review courts confirming those decisions.[417]

Clearly, this new system grants more effective judicial protection to the rights of those affected by competition law infringements who wish to seek judicial remedies and enforce those rights, above all because they no longer need to wait on prior administrative intervention. Equally, as suggested earlier, it could be argued that the delicate deference still granted to competition authorities, and their investigations and decisions, in the ways just indicated, contributes to the effective judicial protection of the right of the parties, since it permits the courts and the parties to enjoy the support of a specialized and independent agency on matters of technical complexity (for example, through their intervention as amicus curiae) and permits courts to avoid the full re-litigation of issues which have already been the subject of the full administrative process (including, where relevant, judicial review by the courts). However, this should not, in my opinion, give rise to the civil proceedings being subjugated anew to the prior administrative process, as under the prior 1989 Spanish competition regime, since this would remove the very advances in effective judicial protection that the new regime introduces. This, in particular, becomes an impediment where courts consider that it is necessary to await the full judicial review process before they can act.[418] On current estimations, the judicial review process can take up to 5 to 6 years thereby causing very lengthy delays before civil proceedings can be brought. This, in my opinion, is a current misunderstanding in the way Spanish courts (and many practitioners and commentators) are generally approaching this issue and runs the risk of converting the Spanish system, in practice, into a pure follow-on jurisdiction.[419] The system created by the new regime is, however, more sophisticated than that and permits parallel public-private enforcement in the same case and appropriate coordination mechanisms which a civil court may use if it deems it necessary (for example, by staying proceedings, above all if it is contemplating the adoption of a decision before a competition investigation of the same infringement has reached resolution or which runs counter to a prior administrative decision). The complexity of these arguments should not be underestimated and, indeed, it can be expected that the right balance between public and private

[416] art 434 LEC. The Madrid Appeal Court has applied that provision by analogy also to the situation where a decision is pending before an appeal court and is, therefore, not yet final; Order 12167/2009 *AUSBANC v Telefónica de España* SAU ES:APM:2009:12167, LG 3.

[417] See Supreme Court judgment 191/2015 in *Audiovisual Sport SL v Mediaproducción SLU* ES:TS:2015:191.

[418] See Pierre VF Bos and Joost A Möhlmann, 'Mastering Masterfoods: Food for Thought on Staying Civil Damages Litigation Pending Appeals before the European Courts' in Danov, Becker and Beaumont, *Cross-Border EU Competition Law Actions*, n402, ch 14. This view is shared by the Barcelona Appeal Court, which has issued a series of orders relating to claims for damages in the Milk case where it has annulled the decision of some commercial courts to suspend civil proceedings pending the finality of the CNMC's decision; among them, AAP Barcelona 105/2023 of 28 September in which it affirms the inadmissibility of allowing civil actions that are not "pure follow-on" to be prevented from proceeding.

[419] I refer, in particular, to a number of rulings in the damages actions launched on the back of CNMC decisions in Milk and Automobile Manufacturers, which have been rejected on the basis that the relevant regulatory decision relied upon as evidence of the infringement was not final. See, for example, judgment 36/2022 of Commercial Court nº 1 of Oviedo ES:JMO:2022:828. By contrast, see the order of 31 May 2019 Commercial Court nº 1 of Granada (unpublished but referred to in the ensuing judgment 110/2021 ES:JMGR:2021:6331, LG 4). See further below Ch 15.2 in relation to case management tools to address this matter; for instance, by way of a stay of proceedings.

enforcement in the search to ensure effective judicial protection will continue to be the subject of debate before the courts.[420]

Another aspect of how the relationship between public and private enforcement proceedings can have an impact on the effective judicial protection of private rights can also be seen in Advocate General Jääskinen's opinion in *Donau Chemie*; on this occasion, in relation to the question of access to evidence. Unlike the Court, which relied essentially on the principle of effectiveness in its decision to preclude an absolute bar on a claimant's request for access to the administrative file in that case, the advocate general employed in addition the language of access to justice and effective judicial protection in reaching the same conclusion:

> 46. Therefore, the crucial question is as follows: does the Austrian restriction, as described by the Cartel Court, mean that it is not open to the Association or its member undertakings to claim damages for the loss caused to them by an unlawful cartel, in the sense that the Austrian ban renders it impossible in practice or excessively difficult? Following the Court's findings in *DEB*, it needs to be asked whether there is available to the Association a legal remedy which ensures effective judicial protection of the rights which it derives from EU law; is it able to assert its EU law rights before the Austrian courts?
>
> 47. Finally, due account needs to be taken of Article 19(1) TEU, and the extent to which it supplies a supplementary guarantee to the principle of effectiveness. Pursuant to Article 19(1), Member States are bound to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law'. In other words, in the light of that Treaty provision, the standard of effective judicial protection for EU based rights seems to be more demanding than the classical formula referring to practical impossibility or excessive difficulty. In my opinion this means that national remedies must be accessible, prompt, and reasonably cost effective.

He went on to add:

> 52. As the Court has recently observed, the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. Moreover, the right of access to a court also includes, according to the case-law of this Court, a 'power' in the hands of national courts to consider all the questions of fact and law that are relevant to the cases before them. In my opinion a national tribunal deciding on civil law consequences of an illegal restriction of competition cannot have such 'power' if it is in practice precluded from accessing key evidential material, such as files compiled in public law competition proceedings, and in which an unlawful restriction of competition, such as a cartel, has already been established.
>
> 53. Hence, limiting availability of critical evidential material undermines the right of litigants to a judicial determination of their dispute. It also impacts on their rights to bring cases effectively.
>
> 54. The right of access to a court is not, however, absolute. It can be subject to limitations, provided that they do not undermine the very core of the right of access, pursue a legitimate aim, and where there is a relationship of proportionality between the means employed and the legitimate aim sought to be achieved.

[420] See, for example, the pending referral before the CJEU from the Prague City Court in Case C-605/21 *Heureka Group as v Google LLC* which, while focussed on limitation issues, raises questions about the relationship between EU regulatory decisions and civil actions; see, the opinion of AG Kokott, 21 September 2023, EU:C:2023:695. See also, Case C-57/21 *RegioJet as v České dráhy as* EU:C:2023:6.

This line of argument was not invoked by the Court, although the same result was achieved. Nevertheless, it is consistent with the reasoning in *Otis* and other CJEU case-law, and its absence from the Court's judgment does not rule out its application in another case.[421]

These examples are to date limited, but they illustrate the potential scope for the incursion of EU law into important questions of national procedure in the field of private enforcement through the application of the principle of effective judicial protection - something we have already seen more broadly in the context of our discussion in Chapter 2 above. This may, in turn, permit a certain 'Europeanisation' of procedural standards, particularly following the entry into force of the Damages Directive with its increased regulation of questions of a procedural or evidentiary nature (matters to which we turn in the next section).[422] Nevertheless, as has been more generally observed, the Court's case-law is necessarily fragmentary, since it is dependent on case-specific questions from national judges, and is normally expressed in quite high-level guidance to national courts since they are the competent bodies to apply the law to the case before them. In this sense, the preliminary reference mechanism does not offer a route to a systematic solution.[423]

5. Directive 2014/104

5.1. Background and objectives

The adoption of the Damages Directive, after ten years of intense public debate, signified the end of the 'absence' of EU harmonized legislation in the area of the private application of competition rules.[424] It undoubtedly marks a very significant milestone in the development of EU law in this area and, indeed, has fomented a huge increase in follow-on damages actions.[425] At the same time, it is but a stepping-stone on the path. This is so, first, in a restrictive sense, because it was necessary to reach a political consensus on what would be the object and scope of EU harmonization in what touches on delicate areas of national competence and legal tradition (civil procedure and tort law), and hence the new legislation could not 'overstep' the mark. However, it is also a stepping-stone in a more forward-looking sense, because the new rules serve as a platform for further developments by the CJEU and the national legislature, as well as through national court practice and soft law.

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[421] The CJEU's reasoning across its case-law does not tend to conform to strict patterns, so that one cannot deduce that the emphasis on one principle of interpretation in one case means that others are necessarily excluded in other, even similar, situations (see, for example, Ch 2.3 above).

[422] See, Albertina Albers-Llorens, 'Antitrust Damages in EU Law: The Interface of Multifarious Harmonisation and National Procedural Autonomy' (2018) 37 University of Queensland Law Journal 139, 151, and Van Cleynenbreugel, 'Embedding Procedural Autonomy: the Directive and National Procedural Rules' in Bergstöm, Iacovides and Strand, *Harmonising EU Competition Litigation* (n 308) 99.

[423] See, for example, Van Cleynenbreugel, ibid, 100, 109; Katri Havu, 'Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?' (2018) 43 EL Rev 24. On certain criticisms of the preliminary reference mechanism from England and Wales: Mihail Danov and Stephen Dnes, 'Cross-Border EU Competition Litigation: New Evidence from England and Wales' in Danov, Becker and Beaumont, *Cross-Border EU Competition Actions*, n 402, c 3. We have already referred to these limitations of the preliminary reference procedure generally in Ch 2.3, as too the backlog of cases before the CJEU which causes delay and further impedes the mechanism's effectiveness as an instrument for the systematic development of the law; see Donnelly and de la Mare, 'Preliminary Rulings', n 3.

[424] F G Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies it Provides for' (2017) 53 CML Rev 887.

[425] See Commission, 'SWD on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' SWD(2020) 338 final, pp 3-4.

Echoing the findings in the Commission's Fifteenth Report on Competition Policy,[426] the 2004 Ashurst Study, commissioned by the Commission to assess the obstacles to damages actions in EU Member States, concluded that 'The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment'.[427] That diversity related to the variety and, above all, uncertainty surrounding the conditions for liability in damages in the different Member States, language which reappears in the recitals to the Damages Directive.[428] For the Commission, it extended even to the possibility that different levels of compensation be granted by courts in different Member States in relation to the same infringement:

> If a litigant in one Member State faces a better chance of his national court making him a larger damages award than the litigant in another Member State, then the substantive body of Community competition law, itself uniform across the Union, will not be enforced in a uniform way across the Community. It is essential to ensure that the rights of European citizens are subject to the same protection across the whole Community.[429]

The 2004 study, and the Green Paper which followed in its wake the next year, identified a number of specific obstacles to damages actions. These included:

- the difficulty of accessing evidence necessary to prove the infringement or harm;
- the (at times) excessively rigid standards of proof required;
- the complexity of the methods for assessing harm, made all the more difficult if pass-on were also to be considered;
- the disproportionate effort for consumers (or other victims), who may have suffered low levels of harm in absolute terms, to bring a successful claim; or
- the need for particular expertise in the matters put before the courts.

All of these factors reflected an underlying information asymmetry for potential claimants, generated uncertainty about possible outcomes and thereby disincentivized claims.[430]

We will return in more detail below to these five obstacles as they are finally addressed in the Damages Directive. They are, all of them, key to the quantification of harm in antitrust damages actions. For now, I would like to highlight the last point concerning the need for expertise in court proceedings. While the specific proposal floated in the Green Paper was later ignored (namely, the mandatory availability of court-appointed experts in civil damages proceedings), it is a concern which has not gone away and has rightly continued to be a focus for legislative and policy proposals. At the time, the Commission identified inter alia the following possible measures to address the challenge:

> Specialist courts or specialist panels for competition cases might be useful in fostering a culture of expertise of the judges involved and could play a positive role in promoting efficient enforcement of

[426] n 319.
[427] Commission, DG COMP, 'Study on the conditions of claims for damages in case of infringement of EC competition rules: comparative and economic reports' (DGCOMP, 2004), p 1-1.
[428] Recitals 7-9, Damages Directive.
[429] Green Paper SWD, para 50.
[430] ibid para 45.

> competition law. … [T]he expertise of the courts will be further increased through the training programmes for national judges in EC competition law first introduced in 2002 by the Commission. The situation could also be further improved were the national courts to make greater use of the existing possibilities of Article 15 of Regulation 1/2003.[431]

Accordingly, three essential recommendations were made to address the need for technical expertise in the adjudication of competition damages claims: (a) the creation of specialized courts, (b) the use of the EU judges' competition law training programs, and (c) enlisting the support of competition authorities as amicus curiae in court proceedings. We will recall these recommendations as we proceed to our own conclusions and proposals for Spain.

The Commission considered that the obstacles it identified in the Green Paper impeded the effective private enforcement of competition law through damages actions. [432] Addressing them was its aim, if necessary through EU vertical harmonisation legislation.[433]

As the Commission notes, clarity as to the substantive terms of competition law already existed in the form of a body of settled law at EC level.[434] The focus of its attention for possible legislation, therefore, was on remedies and, above all, procedure:

> The focus of the Green Paper and of this Commission Staff Working Paper is on the rules as to the remedies and procedures governing damages actions, i.e., the rules for the enforcement in the courts of the substantive law. If potential claimants, undertakings and individual citizens alike, do not know what the rules are which they will face in court before they commence an action, this will deter them from litigating and enforcing their rights. These rules can make a big difference because they can influence the likelihood of a finding of liability in the first place or they can determine other issues as, for instance, the amount of the damages which the court is likely to award.[435]

The focus on remedies and procedures reflects the nature of the EU legal order (already addressed in Chapter 1 above), namely that: 'there is no court at [EU] level competent to hear damages actions brought by private parties for breach of [EU] antitrust rules'.[436] It is the national courts in the Member States which hear damages cases.[437] It is principally at the level of enforcement (national remedies and procedures) that the effective and uniform application of EU competition law stands or falls. Indeed, the impact of procedural rules on claims for damages is of 'paramount' importance in the adjudication of damages claims[438] and, I would add, in today's world of largely similar substantive competition rules (and, albeit to a lesser extent, laws of tort) arguably of the highest importance.[439] The inclusion of such precepts in EU harmonizing legislation in turn permits the further development of those new

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[431] ibid paras 255 and 260.
[432] ibid para 45: 'The risk/reward balance in antitrust litigation is skewed against bringing actions. This needs to be addressed in order to encourage claimants to enforce their rights and bring claims'.
[433] ibid s I.G.
[434] ibid para 48.
[435] ibid para 49.
[436] ibid para 2.
[437] Green Paper, p 4.
[438] Lasok, 'Some Procedural Aspects', n 402, 207. See Dunne, 'Antitrust and the Making of European Tort Law', n 310, who notes the need for procedural harmonization to ensure the effectiveness of harmonized substantive rules and, similarly, Burkard Hess, 'Procedural Harmonisation in a European Context' in Kramer and van Rhee, *Civil Litigation in a Globalising World*, n 260.
[439] This was also the prevailing view reflected in submissions from England and Wales in the project which is the subject of Danov, Becker and Beaumont, *Cross-Border EU Competition Actions*, n 402, 43.

provisions through the case-law of the CJEU, in particular in light of fundamental principles, such as effective judicial protection.[440] Accordingly, this is a significant step.

At the same time, the adoption of harmonizing legislation in the area of procedural and tort law, involves touching on sensitive areas of national law which, in principle, have enjoyed a certain autonomy and, furthermore, form part of the legal cultural diversity of the EU which the Treaty expressly recognizes and protects.[441] The sensitivity of this interaction was recognized already in the Ashurst Study:

> One way to reduce these uncertainties and thus create greater legal certainty and facilitate private actions would be some degree of harmonisation of national procedural rules applicable to EC competition law-based damages actions. It should be noted that such a development would, however, constitute an inroad into the principle of national procedural autonomy and possibly also involve a degree of harmonisation of fundamental concepts of national civil law (both substantive and procedural).[442]

The final legislative instrument adopted in 2014 reflects this delicate tension. Despite the calls of some, the instrument adopted is a directive, not a regulation.[443] In this way, it establishes obligations on Member States to ensure certain ends, as opposed to imposing a set of directly applicable rules.[444] The legal base for its adoption includes, together with competition (Article 103 TFEU), the internal market legislative competence (Article 114 TFEU) which requires the co-decision process involving the European Parliament with the Council. Albers-Llorens suggests that the inclusion of Article 114 TFEU responded not only to the wish to include national competition law within the scope of the proposal but also to the need to address the sensitivities of regulating in the area of national procedural autonomy.[445] An earlier Commission proposal in 2009 based uniquely on Article 103 TFEU, permitting adoption by the Council alone, indeed met with firm resistance and never officially saw the light of day. Thus, the aim of the Directive is an 'approximation' of national rules',[446] as opposed to their

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[440] See Pieter Van Cleynenbreugel, 'Embedding Procedural Autonomy' (n 422) 99, 117. The author refers to CJEU precedents in the area of environmental and asylum law: Joined Cases C-128-131 and 134-135/09 *Boxus v Région wallonne* EU:C:2011:667; [2011] ECR I-9711; Case C-69/10 *Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2011:524; [2011] ECR I-7151.

[441] art 67 TFEU.

[442] n 427, p 131.

[443] For examples of calls for a regulation, see Van Gerven, 'Harmonisation of Private Law: do we need it?' (2004) 41 CML Rev 505, 524: 'in order to allow the national courts to perform this task adequately, they need uniform rules on remedies … That can only be done, in an orderly way, by means of an additional [EU] regulation'; Van den Bossche, 'Private Enforcement', n 403, s V.

[444] Art 288 TFEU. As noted by the Commission in the explanatory memorandum to the 2013 draft proposal: 'A Directive requires Member States to achieve the objectives and implement the measures into their national substantive and procedural law systems. This approach gives the Member States more freedom when implementing an EU measure than does a Regulation, in that Member States are left the choice of the most appropriate means of implementing the measures in the Directive. This allows Member States to ensure that these new rules are consistent with their existing substantive and procedural legal framework', Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM(2013) 404 final, p 12.

[445] Albers-Llorens, 'Antitrust Damages in EU Law', n 422, 144. Previous secondary legislation in the area of EU competition law (such as Regulation 1/2003) had, by contrast, been adopted as a regulation under Article 103 by the Council on proposal from the Commission and simple consultation with the European Parliament.

[446] Recital 9, in fine, Damages Directive.

harmonization, much less unification. According to one UK practitioner, the Directive 'is not a blueprint set of procedural rules that govern damages actions from start to finish'.[447]

While the Directive keeps broadly to the procedural autonomy model, it nevertheless positivizes a number of rules. That is, it creates clear positive EU obligations on Member States to adopt procedural rules, as opposed to the mechanism of negative obligations usually applied in the Court's case-law.[448] Closer inspection reveals that the Directive adopts a mix of legislative techniques, including the adoption of uniform rules which are, in themselves, complete (such as the presumption of harm in cartel cases or the limitation rules or the binding effect of final NCA decisions) or harmonized basic rules which devolve to the Member States only for their detailed elaboration with each national system (such as the disclosure rules).[449] Other areas leave open a wide field of possibilities; such as the rule in Article 12(2) of the Directive requiring Member States to 'lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level' or the rules on the effect of settlement agreements on liability for contribution as between infringers or on ongoing claims against non-settling parties (Article 19).

This brings us to the question of the objectives of the Damages Directive. The key objectives of the Directive have, in broad terms, remained pertinent over the ten long years of the Directive's gestation. These include: the complementary role of private damages claims to the public enforcement of competition law, access to justice and effective legal protection for victims of competition infringements, the creation of a level playing field in the internal market and the adequate and efficient use of the judicial system. However, the relative emphasis and the meaning of these objectives has altered over time, none more so perhaps than in the case of the role of private enforcement and its relationship with the public enforcement work of the Commission and NCAs.

In keeping with the Court's statements in *Courage*, the Green Paper identified damages actions as fulfilling a dual purpose: first, that of ensuring a right of compensation to the victims of competition infringements, and, second that of deterrence, by which it was referring to its view that 'Increased private enforcement will enlarge the range of infringements for which competition law will be enforced as well as the level of enforcement generally'.[450] Among the more controversial options for legislation which it put to public consultation, the Commission included as means to further the deterrence goal: (i) the possibility of employing a damages multiplier in horizontal cartel cases (double damages), (ii) collective actions for competition damages claims, or (iii) a bar to the pass-on defence.[451] The latter contemplated a number of alternatives, including the possibility of allowing parallel direct and indirect purchaser claims (and, so, opening up the possibility of double recovery) or the distribution of funds between direct and indirect purchasers in a secondary proceeding once direct actions were completed. Certainly, some of the options contemplated in the Green Paper evidence the influence of the US experience of private enforcement (something which, at the same time, was eminently normal given the considerably greater level of experience of private actions in the US). Nevertheless, the suggestion by some that this consisted in a 'flirtation' with the US private

[447] Anneli Howard, 'Too little, too late?: The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 4(6) JECLAP 455, 456.
[448] *Butter Buying Cruises*, n 93. See Van Cleynenbreugel, 'Embedding Procedural Autonomy', n 422, 110-7.
[449] See Albers-Llorens, 'Antitrust Damages in EU Law', n 422.
[450] Green Paper SWD, para 6.
[451] These are Options 16; Options 25-26 (for consumers or other affected groups); Options 20-4.

enforcement model seems to overstate things.[452] Indeed, the SWD points itself to the alleged excesses of the US system, invites lessons to be carefully drawn from the US experience, and underlines the need for moderation (and the avoidance of excessive litigation).[453] It also expressly avows a balanced approach: 'The ultimate objective should be to foster a competition culture, not a litigation culture'.[454]

Rather, it seems that the Commission's primary concern with its Green Paper was to make competition damages claims more effective. Hence, it focused its attention on how to address the real and perceived difficulties with evidencing infringements and quantum of harm. Accordingly, the lengthiest parts of the document are dedicated to issues of access to evidence and quantification (issues to which we will return in some detail below).[455] Equally, on the question of pass-on, the Commission is primarily concerned with the proportionality of applying a strict approach of apportionment of harm between different levels of the relevant supply chain (parties directly and indirectly affected by each infringement) given the 'highly complex and technical nature' of estimation methods:[456]

> While a certain level of complexity is necessary in determining the total overcharge of the cartel, replicating this complexity at every stage of the supply chain would magnify the complexity and cost of actions for damages. It does not appear possible to construct a model which accurately identifies, at reasonable cost, the harm suffered by players at different levels of the supply chain.[457]

Indeed, its proposed options not only include a US-style approach (bar on pass-on defence and the possibility - recognized in certain States - for indirect purchasers also to claim), but, in addition, the possibility for claimants to sue for all the damages suffered as a result of the infringement (with no reduction for pass-on) and then, in later proceedings, the allocation between all affected parties (direct and indirect) of the total damages, a solution which was entertained for a while by the German courts.[458]

Be that as it may, there was, admittedly, some negative reaction to the perceived excessive weight granted to deterrence by the Commission in its Green Paper during the public consultation that followed. Moreover, an adjustment to priorities can subsequently be seen in the White Paper in 2008 where the primary objective is avowedly the full compensation of victims (the 'genuinely European' approach) and the role of private enforcement to 'complement' but 'not replace or jeopardise' public enforcement.[459] In keeping with the Court's jurisprudence, the deterrence function of private

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[452] Wils, 'Private Enforcement', n 374, s IV.
[453] Green Paper SWD, para 47.
[454] ibid para 12.
[455] Of the sixty pages of proposals set out in the Green Paper SWD, twelve pages deal with access to evidence (Section II) and eleven with damages and quantum (Section IV).
[456] That comment was based on the short section dedicated to pass-on in the Ashurst Study, n 427, paras 4.15-21. The methods for estimating pass-on have been further developed since; in particular in the Pass-on Study and, finally the Commission Communication, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser' [2019] OJ C 267/4.
[457] Green Paper SWD, para 161.
[458] Ruling of the Higher Court of Berlin of 1 October 2009 in the ready-mix concrete cartel case (2 U 10/03 Kart) which recognized standing to direct and indirect purchasers as joint creditors pursuant to section 428 of the German Civil Code and ruled out the pass-on defence. That ruling was partially followed by the Higher Regional Court of Karlsruhe in its judgment of 11 June 2010 (6 U 118/15) in the carbonless paper cartel case. However, the definitive position under German law, admitting the pass-on defence, was set out by German Federal Court in its judgment of 28 June 2011 (KZR 75/10) in that same case.
[459] Commission, 'White Paper on damages actions for breach of EC antitrust rules' COM(2008) 165 final, p 3.

enforcement is still present in the White Paper. It could not be otherwise.[460] However, the practical result at that stage was that certain of the 'bolder' policy options of the Green Paper (such as, double damages or the ban on pass-on or indirect purchaser claims) were discarded in favour of the EU principle of compensation for all affected parties. In time, further reinforcement of the public enforcement regime would become one of the explicit priorities of the Directive as a result of the Court's *Pfleiderer* judgment and the concern of the Commission, and part of the business community, that leniency statements could, in certain circumstances, be made available to claimants in follow-on damages litigation.

It is insightful to identify some of the concerns that were raised about the use of private enforcement as a deterrence mechanism around that time. Hodges, in particular, raised interesting policy considerations in his article published in 2006, following the Green Paper's publication:[461]

- The risk of inconsistency that will inevitably arise where there exist a larger number of diversified enforcers, with the addition of multiple private enforcers (private parties and courts) to the existing regulatory agencies. In this regard, he notes the greater transparency in decision-making which a more complex enforcement environment requires if consistency is to be ensured: how does one ensure transparency and access in a situation of multiple court decisions affecting private parties?

- The lack of alignment in the motives of private enforcers with public policy goals of deterrence and the risks of creating a litigation culture. He refers, in particular, to the motives of lawyers (who have their own economic interests in litigation) or consumer associations (whose prime functions are of a representative and lobbying nature) who will frequently be driving damages actions.

- The impact that strong sector-specific reforms could have on the delicate balance struck in national civil justice systems (including in Spain, which had recently undergone a major civil procedural reform aimed at reducing the costs and delays of litigation).[462]

- Whether private action will be an effective deterrence to anti-competitive behaviour; i.e., is it an appropriate regulatory tool?[463] In this regard, he raises concerns about the additional burden ('transaction costs') of private litigation, queries whether it will influence corporate behaviour in a positive way (or simply dampen risk-taking and innovation) and suggests that, in an environment already marked by strong regulation, a more effective route would be to strengthen the penal consequences of serious infringements.[464] In conclusion, he asks 'Is there

[460] In particular, in light of the developments in CJEU case-law we have addressed in the previous Ch 4.2(b).
[461] Christopher Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the case?' (2006) 43 CML Rev 1381.
[462] Law 1/2000, of 7 January, on Civil Procedure. He refers also to important civil justice reforms in other Member States such as the UK (Civil Procedure Rules 1998) and Germany (Gesetz zur Reform des Zivilprocesses 2001).
[463] Hodges reflects on further underlying philosophical questions about the choices of regulatory model drawing on Baldwin's work 'The New Punitive Regulation', which would merit separate consideration; Hodges, n 461, 1393-94.
[464] See, similarly, Wils, 'Private Enforcement', n 374; Wouter PJ Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 3 World Competition 473.

> a risk that the "punitive" policy may simply increase business costs, possibly across the board and irrevocably, and defeat the promotion of sufficient competitiveness or innovation?'[465]

Hodges' underlying objection to private enforcement legislation has been surpassed by events, in the sense that the EU determined to support the private enforcement of competition law with the adoption of secondary legislation.[466] Nevertheless, not only were some of the perceived excesses of US litigation (such as punitive damages or a bar to the pass-on defence) discarded in the White Paper, and then the Directive, but many of the concerns he airs are still pertinent in today's world of private enforcement and, therefore, worth recalling. Indeed, as noted in the introduction to this work, the explosion of mass competition litigation in Spain, in particular follow-on cartel damages claims, has placed firmly on the table of courts, competition authorities and policy makers precisely these points of concern: namely, problems of consistency in decision-making, a lack of transparency regarding court decisions, a fast-growing litigation culture and the involvement of varied potentially conflicting interests (including of a financial nature), challenges for the existing civil justice system which finds existing procedures and court organization inadequate to deal with the demands of this new type of litigation, and policy questions around the appropriate balance between public and private enforcement (and, more generally, the right regulatory model to implement). To these one should add others, such as the administrative costs to the judicial system (and, frankly, the alarming inefficiency) of managing multiple claims of a similar (often almost identical) nature in a multitude of different fora, the disproportionality of such costs and the inevitable impoverishment of the quality of judicial resolutions, precisely because of all these prior difficulties. We will return to these issues later. Let us return, for the moment, to the policy choices adopted with the Damages Directive.

So, how does the Directive draw the balance? First, the competition rules are declared to be a matter of public policy in the EU, aimed at ensuring undistorted competition in the internal market.[467] Second, those rules have direct effect and, so, the rights and obligations they create for individuals must be enforced by the national courts.[468] Third, national courts in enforcing directly effective competition rules have, together with the Commission and national competition authorities, 'an equally essential part to play in applying the competition rules'.[469] In this way, private enforcement is portrayed as part of a two-pronged approach to enforcement. Fourth, when they apply competition law, national courts protect subjective rights of individuals, for example by awarding damages to victims of infringements.[470] Fifth, the full effectiveness and practical effect of the competition rules require individuals to be able to claim compensation before the national courts for harm suffered, which constitutes a Union law right to compensation.[471] Sixth, private enforcement by the courts is complemented by regulatory decisions which give parties an incentive to provide compensation (relating, it is understood, to the threat of follow-on actions).[472] Seventh, the two tools should be

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[465] Hodges, n 461, 1404. See also Katri Havu, 'Causation and Damage: What the Directive Does Not Solve and Remarks on Relevant EU Law' in Strand, Venegas and Iacovides *EU Competition Litigation*, n 308, 187, 194.
[466] Although Hodges is highly sceptical about the need for legislation, his principal conclusion was, in fact, that there was a need for proper empirical assessment of the potential impact of legislation before it could be enacted.
[467] Recital 1.
[468] Recital 3 (as per *BRT v SABAM*, *Guérin*; n 361).
[469] ibid.
[470] ibid (echoing recital 7 of Regulation 1/2003).
[471] ibid (see *Courage*; *Manfredi,* and the discussion in Ch 4.1 above).
[472] Recital 5.

coordinated in a coherent manner, so as, for instance, to protect certain documents in the competition authorities files, the disclosure of which could jeopardise public enforcement (and, by implication, follow-on private actions).[473] Article 1 of the Directive goes on to confirm its dual aims: (i) to ensure the effective exercise of the right to claim full compensation, and (ii) to coordinate the public enforcement of competition law by competition authorities with private enforcement by national courts. There is no express reference in the Directive to the deterrence goal of private enforcement.[474] By contrast, there is express reference to the public enforcement goal not to dissuade undertakings from cooperating with the competition authorities under leniency programmes or settlement procedures.[475] Moreover, the focus of the review mechanism foreseen in Article 20 of the Directive is apparently concerned more with ensuring the proper coordination between the public and private spheres of application of competition law or the precise application of the pass-on principle to competing claims.[476] In this sense, the goals of the Directive are perhaps rather conservative seen from the perspective of the development of procedural law, which is what concerns us here. Nevertheless, we will turn now to the other key objectives of the Directive, where the procedural aspect is more directly addressed.[477]

The first is the effective legal protection of the Union right to compensation through national remedies and procedures. This principle is expressly affirmed in Recital 4 as a direct requirement of Article 19(1) TEU and Article 47 CFREU. Evidently, those rules would be applicable without the statement in Recital 4. However, their express inclusion does confirm their importance and potential for application in this field - as well as private enforcement of EU law rights generally, of course.

The second additional objective is the creation of a level playing field. One of the key drivers for the adoption of harmonizing legislation in the field of private enforcement of competition law was the huge diversity which had been identified between the different national legal systems and, furthermore, the observation that claims were largely focused on three jurisdictions; namely, the UK, Germany and the Netherlands. As noted earlier, Article 114 (the legal base for the adoption of legislation for the approximation of laws which has as its object the establishment and functioning of the internal market) was one of the dual legal bases for the Directive and the specific goal to create a level playing field is developed in Recitals 8 and 9. Article 1(1) of the Directive goes on to establish as one of its key aims, as part of the goal of full compensation for victims of competition law infringements, 'ensuring equivalent protection throughout the Union for anyone who has suffered harm'. How far that level of equivalence goes remains to be seen. Does it, for instance, extend to the

[473] Recital 6 (see *Pfleiderer*; *Donau Chemie*, and the discussion in Ch 4.2(a)).
[474] On the other hand, the Directive expressly upholds the acquis communautaire (recital 12) which has insisted on the deterrence aspect of private enforcement, as we have seen.
[475] Recital 26.
[476] The Commission produced its first report pursuant to art 20 of the Directive in December 2020 (n 425). It limited its review to reporting on the status of implementation of the Directive, noting that it was too early to assess the impact of the Directive given the length of time needed for many of its provisions to become applicable given the prohibition on its retroactive application and the delays in infringements coming before the court.
[477] Some of these objectives reflect the legal principles and policy objectives we highlighted in the Court's case-law in Ch 4.

level of compensation to be granted in the same case?[478] It is suggested that this may be an area which will evolve over time.

Finally, the policy papers leading up to the adoption of the Directive identify a further objective. It is the objective of ensuring an 'appropriate and efficient use of the judicial system'. Underlining the costly nature of the complex factual and economic analysis required in competition cases, as well as the need to avoid procedural abuses or courts becoming overburdened by claims, the Impact Assessment Report accompanying the 2013 proposal for the Directive highlights the following four distinct elements for consideration:

> – Streamlining handling of antitrust damages cases by the courts by means of economies of scale, in particular by joining or grouping identical or similar claims.
>
> – Reducing the costs of litigation by improving the conditions for settlements: settlements are cost-efficient and, when possible, are to be preferred to court actions. However, as settlements are voluntary, attainment of this objective presupposes the existence of a credible court alternative if no settlement is reached. The credible court alternative will also serve as a benchmark leading to improvement of the quality of the settlements.
>
> – Limiting procedural abuses: while the victims should have better access to the courts, it is important that law-abiding undertakings do not bear the costs and burden of abusive litigation. It is therefore necessary to have appropriate safeguards to prevent such abuses.
>
> – Limiting the risk of multiple litigation on identical or similar issues: relitigation of issues already settled would entail unnecessary costs and delays plus the risks of a diverging outcome. As far as possible, relitigation should therefore be avoided.[479]

We currently face a number of these challenges in the mass cartel damages litigation which has taken off in recent years in Spain. We cannot talk of mass claims being 'streamlined' in Spain, settlements have been largely non-existent and questions of damage and causation are relitigated on the same cases regularly. These questions constitute serious problems which remain largely unresolved today. We will turn to them in detail in Part III and seek to offer a contribution to their resolution in the conclusions to this work.

A key element of the solution to these problems at the EU level was intended by the Commission to be collective redress. The White Paper SWD (as the Green Paper before it) underlined the disincentives to small claimants (individual consumers and small businesses) to bring individual claims, given the disproportionate costs and delays of antitrust damages actions and the uncertainty of outcomes. In addition, it pointed to the procedural inefficiency of national courts having to handle a multitude of scattered low-value individual claims. The Commission's conclusion was that it was, therefore, essential that collective redress mechanisms be made available:

> [C]ompetition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the

[478] See, Green Paper SWD, para 50; Danov, Becker and Beaumont, n 402, p 88: 'some form of harmonization may be justified by the need to avoid the anomaly allowing the different Member State courts to award different amount of damages with regard to the very same type of breach of the very same EU competition law provision'.
[479] Commission, 'SWD – Impact Assessment Report – Damages actions for breach of EU antitrust rules' SWD(2013) 203 final, p 27.

> administration of justice. For the reasons set out above, it is essential that collective redress mechanisms are available for competition law infringements.[480]

Nevertheless, its proposals to include a specific provision on collective redress in the Damages Directive had been shelved by 2011 when the Commission commenced its public consultation on collective redress.[481] Following that consultation, the Commission opted in favour of a broad horizontal soft-law approach and adopted its Collective Redress Recommendation.[482] The recommendation formed part of the package of measures put together by the Commission in June 2013 including the draft proposal for a Directive and the Practical Guide to Quantification.[483] However, the lack of binding rules has meant that, with some notable exceptions, specific and adequate collective redress mechanisms have not generally been made available around the EU.[484] The recent omission of competition law from the scope of the Collective Redress Directive has not contributed to solving this problem.[485]

Now that we have set out the broad policy objectives of the Directive, we will take a specific look at those rules in the Directive which are of particular relevance for the assessment of harm; namely, the new disclosure rules and, of course, the rules on quantification of harm.

5.2. Disclosure

Disclosure is the key procedural measure introduced by the Damages Directive. As we will see in Part III, Chapter 16, it has significant implications for national civil procedural law in Spain, implications which are yet to be fully appreciated.

The disclosure rules are set out in Chapter II of the Directive and entitle parties (both claimants and defendants) to request specific evidence or, importantly, categories of evidence, in the control of the counterparty or a third party. This is broader than general rights which already existed in many civil jurisdictions, including Spain, to request access to specifically identified documents. It does not, however, extend to general 'fishing expeditions' or so-called 'trains of enquiry'. In this sense, disclosure requests must include a 'reasoned justification containing available facts and evidence sufficient to support the plausibility' of the claims (or defence), so-called 'fact pleading', and must be proportionate. In addition, it includes rules to ensure the protection of confidential information and requires sanctions in the event a party does not comply with its disclosure obligations.

Accordingly, the disclosure process required by the Directive is court-managed and directed and is, while broader than most existing regimes, subject to requirements of proportionality and objective justification. Indeed, the Green Paper, warning against the risks of disclosure exercises becoming

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[480] White Paper SWD para 40.

[481] These proposals contemplated not only the possibility of consumer association representative actions and opt-in collective actions, but also, in the 2009 draft proposal for a Directive, which never officially saw the light of day, opt-out collective actions.

[482] n 295. We return to the content of the recommendation in Ch 6.4 below.

[483] Commission SWD, 'Practical Guide – Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the TFEU' SWD(2013) 205.

[484] Exceptions include notably the UK (Consumer Rights Act 2015) and the Netherlands (the 'Wet *Afwikkeling massaschade in een collectieve actie',* or 'WAMCA', which entered into force in 2020).

[485] By contrast, the EU Digital Markets Act provides for the extension of the Collective Redress Directive to collective consumer actions for breach by gatekeepers of its provisions; art 42, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (OJ [2022] L 265/1).

expensive and time consuming, underlined the importance of effective case management to minimise delays.[486] Similarly, the White Paper SWD emphasised the central function of courts in disclosure orders which should 'be subject to strict and active judicial control as to their necessity, scope and proportionality'.[487] This contrasts with standard inter partes disclosure in English common law proceedings.[488]

In this way, the Directive builds on similar broad and balanced provisions set out in Article 6(1) of the IP Directive:

> Member States shall ensure that, on application by a party which has presented reasonably available evidence to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information.

The Commission also makes reference in the Green Paper SWD to the Storme report proposals[489] and the Principles of Transnational Civil Procedure of the American Law Institute and UNIDROIT,[490] as further points of inspiration for the proposals. Today, we should refer to the more recent ELI / UNIDROIT Model European Rules of Civil Procedure; in particular, to Rules 100 to 110 on 'Access to evidence orders'.[491] Those rules set out a similar regime based on principles of proportionality and necessity, reasoned justifications (what the Commission refers to as 'fact pleading' in the SWD) and access to defined categories of evidence. Interestingly, they also include a number of the more detailed rules which appear in Article 283 bis of the Spanish Civil Procedural Law (rules on access to sources of evidence), such as the possibility to request disclosure before or after commencing proceedings, the procedure for disclosure orders or the fact that information accessed pursuant to an order requires subsequently to be formally proposed by the accessing party in order to become evidence in the proceedings.

The key justifications for the introduction of disclosure are summarized in Recital 14 of the Directive.[492] The first is the frequent need for complex factual and economic analysis in competition damages cases. This relates to the finding of the infringement in stand-alone cases and to the determination of damages and the establishment of the relevant causal link, more generally, all of which need to be corroborated by appropriate evidence.[493] The second refers to information asymmetry; that is, to the fact that often many of the relevant facts are in the possession of the defendant or of third persons and are not known to claimants in sufficient detail.[494]

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[486] Para 56.
[487] Para 95.
[488] As noted by the Commission in the Green Paper SWD, para 55, 'in the common law tradition, disclosure is to a large extent conducted by the parties with only minimal supervision by the courts'. Nevertheless, as we shall see in Part II, and the Commission goes on to observe (para 56), the practice of English courts in the competition law context, in particular that of the CAT, has moved to manage and control disclosure more proactively.
[489] n 10.
[490] Published by Cambridge University Press on 12 December 2015 and available at https://www.unidroit.org/english/documents/2005/study76/s-76-13-e.pdf (accessed 27 July 2023). See, in particular, Principles 16.1 and 16.2.
[491] n 303and Ch 3.3 above.
[492] These same factors are identified as grounding the need for better access to evidence in the White Paper SWD, para 87.
[493] See also White Paper SWD, para 65.
[494] ibid para 66.

The Commission had noted in the White Paper SWD that in many Member States (and Spain is one) 'there are strict rules requiring claimants to assert in detail all the facts of their case and to proffer exactly specified pieces of evidence in support of these assertions', and that 'the limited alleviations of these requirements currently applied are insufficient to ensure effective redress in situations of information asymmetry typical in competition cases'.[495] Recital 14 picks up on this precise theme noting that 'strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence *can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU*' (my emphasis added). The operative part of the Directive does not deal directly with this problem by purporting, for example, to amend national pleading rules or introduce an express provision for the amendment of pleadings. However, the clear implication is that a claimant should not be penalized by the fact that it is unable to plead certain facts without first being granted disclosure of related evidence in the hands of the defendant, or a third party, and should be permitted to amend the pleaded case once disclosure has been provided. In principle, there is no reason why similar exceptions should not apply equally to defendants who require access to evidence before fully pleading their case. Accordingly, the introduction of disclosure to the national proceeding may necessarily have an impact on procedure such as to permit the new right to contribute effectively to parties' ability to make out and plead their case.

It is to be recalled, in this context, that the right to disclosure is framed by the underlying principle of the effective protection of EU law rights. As we have seen in Chapter 2.4(c), this principle has led the Court to require national courts to do all they can to ensure access to information which is in the hands of another party where this is necessary to permit the claiming party to make out its claim.[496] Alternatively, if disclosure were not available in such circumstances, the Commission averred in the White Paper that the effectiveness principle would require national courts to 'loosen' the evidentiary requirements imposed on the claiming party.[497] This brings us on to another issue touched on during the policy discussion; namely, whether an alternative solution to increased disclosure would be to alleviate the burden of proof on the claimant or to shift the burden of proof from the party alleging the facts to the party who has the relevant evidence in its possession. In the Green Paper, the Commission recalled the existing operation of presumptions and burden shifting in EU competition law.[498] The general principle was enunciated by the CJEU in *Aalborg Portland* where it held that the production of factual evidence by a party that bears the burden of proving a particular fact 'may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof is discharged'.[499] By way of example of the application of this general principle, the Court has developed the so-called presumption of continuity of unlawful conduct where the evidence demonstrates the existence of specific acts which are 'sufficiently proximate in time for it to be reasonable to accept that that infringement continued

[495] Para 87.
[496] See, for example, *Boiron*, n 203.
[497] White Paper SWD, para 83.
[498] Green Paper SWD, para 83. For an excellent in-depth review of the use of presumptions in EU competition law, see Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement – The EU Approach* (Hart 2019), ch 6. See further Andriani Kalintiri, 'Analytical Shortcuts in EU Competition Enforcement: proxies, premises and presumptions' (2020) 16(3) Journal of Competition Law & Economics, 392.
[499] *Aalborg Portland*, n 193, para 79.

uninterruptedly' between the dates of those acts.[500] Similarly, the Court has developed a presumption of a causal relationship between the participation of an undertaking in unlawful meetings with competitors (where, for example, commercially sensitive information is exchanged) and their subsequent commercial policy on the market. Both presumptions are based partly on the objective of the effectiveness of EU competition law. The Court notes, accordingly: (i) the difficulty of proving all the discrete acts of an ongoing complex infringement where the nature of that infringement is secretive and the evidence is likely by its nature to be disperse and fragmentary (presumption of continuity);[501] and (ii) the requirement that undertakings distance themselves publicly from unlawful conduct in order to escape liability contributes to the detection of infringements and, therefore, to the goal of dissuasion (causal presumption).[502] They are also based on so-called maxims of experience: for example, that if an undertaking receives information from a competitor about its pricing policies, it is likely to take account of that information when determining its conduct on the market.[503]

In 2008, at the time the White Paper was published, the adoption of specific measures of this nature was rejected in light of concerns that overly facilitating the task of claimants may incentivize unmeritorious claims and create an unacceptably high risk of incorrect judgments. It was also observed that a reversal of the burden of proof such that a defendant would be required to show the inexistence of harm to the claimant where an infringement has been proved (as opposed to the claimant having to prove the existence of harm) would not remove the problem for the claimant of quantifying its harm and the corresponding need to be able to have access to information in the hands of the other party:

> Even where victims can rely on the finding of an infringement in the decision of a competition authority, the reversal of the burden is of no real help with respect to the quantification of damages, because without access to the relevant information on how e.g. a price fixing agreement was implemented in the specific case of the claimants, they and courts will often be unable to even roughly estimate a quantum of damage that then has to be rebutted by the defendant.[504]

A more balanced approach was adopted, finally, in the Directive. On the one hand, it introduces the new disclosure regime which seeks to address the information asymmetry between parties (Chapter II, Articles 5 to 8). On the other hand, Article 17 of the Directive on the quantification of harm, while confirming that questions of standard and burden of proof are a matter of national law, nevertheless introduces certain measures to loosen the evidentiary burden on the claimant, including a presumption of harm[505] in cases of cartel infringement, as well as further mechanisms aimed at

[500] This is from the General Court ruling in Case T-43/92 *Dunlop Slazenger* EU:T:1994:19, para 79.
[501] *Aalborg Portland*, paras 55-57.
[502] *Aalborg Portland*, para 84,
[503] Case C-49/92 P *Commission v Anic Partecipazioni SpA* EU:C:1999:356; [1999] ECR I-4125, para 121.
[504] White Paper SWD, para 92.
[505] The precise meaning and scope of the presumption is not the object of this research. It has received much attention elsewhere; see, for example, Pieter van Cleynenbreugel, 'The Presumption of Harm and its Implementation in the Member States' Legal Orders' in Strand, Venegas and Iacovides, *EU Competition Litigation*, n 302, 201; Lena Hornkohl, 'The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overcompensation' (2021) 5 ECLIC 29; Peter van Wijck and Franziska Weber, 'The abstract presumption of harm in the Damages Directive: overconcern of compensation' (2022) 18 1 European Competition Journal 204; and, more generally, Antonio La Pergola and Luca Prete, 'Burden of proof in competition law: An overview of EU and national case law' Concurrences e-Competitions Special Issue Burden of Proof, 29 March 2023.

assisting the claimant, and the court, in the quantification of harm.[506] We will come on to these provisions in the following section. Suffice it for now to observe that these provisions are introduced ostensibly with the objective of ensuring that the rules on standard and burden of proof under applicable national law do not render the exercise of the right to damages practically impossible or excessively difficult (the effectiveness principle).[507] They were introduced as part of the exercise, which was carried out in arriving at the final text of the Directive, of seeking to achieve a balance between facilitating meritorious claims and not inciting an excessive litigation culture. They were, furthermore, adopted in a situation where, finally, collective claims (which would no doubt have benefitted mass claims very materially) had been dropped from the final text.

This question about the relationship between access to evidence (the disclosure rights of parties), on the one hand, and the standards and burdens of proof applied to parties, on the other, is however an interesting one, which remains quite open. It will, no doubt, be hotly disputed, and its resolution will depend on the circumstances of the specific case as well as the nature of the specific facts being alleged. To what extent can it be said that a party effectively has a 'duty' to request disclosure where it requires access to evidence to prove its case? To suggest there is a duty is probably putting the case too strongly, since (unlike under English law) disclosure is framed as a right, not a duty, in the Damages Directive. However, there is no escaping the fact that the approach adopted by a party (i.e., how active the party is, or should reasonably have been, in seeking to prove the facts on which it bases its claim) could impact on the court's assessment of the evidence. On this very point, Commercial Court nº 3 of Valencia in Spain referred to the Court in May 2021 the question of whether the fact that a claimant has not taken advantage of the offer by a defendant to grant it access to the economic model and underlying data used by its own experts should influence the court in the exercise of its power to estimate harm (where such power is predicated on quantification being excessively difficult or practically impossible). Specifically, the national court asked the CJEU (in its second question of three):

> Does the power of the national court to estimate the amount of damages enable those damages to be quantified in the alternative and independently, on the grounds that a situation of information asymmetry or insoluble difficulties regarding quantification have been identified which must not impede the right to full compensation of the person harmed by an anti-competitive practice as referred to in Article 101 TFEU, in conjunction with Article 47 of the Charter, including where the person harmed by an infringement of competition law consisting of a cartel generating a surcharge has had access during the

[506] In particular, art 17 of the Directive. Ch IV of the Directive, in addition, introduces certain rules on burden of proof in relation to passing-on (arts 13 and 14(1)) and establishes a presumption of passing-on in favour of indirect purchasers in certain circumstances (art 14(2)).

[507] art 17(1). As noted by Kalintiri there is certainly scope for EU law further to infuse the concepts of burden of proof and standard of proof under national law both pursuant to the principle of effectiveness (as in *Eturas*) or the principle of effective judicial protection; n 498, pp 215-9. While these comments are made chiefly by reference to the ambit of public enforcement, the author also contemplates an extension into rules of evidence in private enforcement, referring, in particular to Van Cleynbreugel, 'Judge-made standards' (n 149). We have also seen earlier the approach of the Court to assessment of evidence in tort actions relating to defective products where it has underlined the need for national courts to be permitted freely to assess all the evidence presented to it, for the burden of proof not to be reversed too easily without the party in question first producing sufficient evidence and, finally, for the use of presumptions not be allowed to distort these principles (*Sanofi Pasteur*, commented in Ch 2.4(d) above).

> course of the proceedings to the data on which the defendant based his expert report for the purpose of denying the existence of damage eligible for compensation?[508]

We will return in Part III to how the CJEU answered this question in the judgment it handed down on 16 February 2023 in *Tráficos Manuel Ferrer*.[509] We will consider in particular how this, and other rulings of the CJEU related to disclosure, have impacted on Spanish procedural law and practice. Suffice it to say, for now, that through such rulings, the Court has developed (and will continue to develop) what are autonomous concepts of EU law; such as, disclosure or judicial estimation of harm. Understanding those new concepts and their implications for national civil procedure is a fascinating ongoing process in which we find ourselves thoroughly immersed. We are, as yet, I believe, to discover their full extent.

5.3. Quantification of harm

The quantification of harm was identified by the Commission in its policy papers prior to the adoption of the Directive as one of the key focusses for its attention in seeking to ensure the effectiveness of damages actions in the field of competition law. Recital 45 to the Directive observes that the quantification of harm can 'constitute a substantial barrier preventing effective claims for compensation'. The key motive for this difficulty is the complexity of recreating a situation which cannot be directly observed in the market (the 'but for scenario' or 'counterfactual'), precisely because it purports to calculate the price, or other relevant variable, that would have applied in the absence of the infringement. That hypothetical situation will depend typically on a broad set of complex economic and commercial factors relating, for instance to company pricing policy, relevant variables influencing pricing, competitive market dynamics or the specific functioning of the unlawful conduct. In addition, the information on those factors may, in large part, lie in the possession of the defendant (the infringer). The White Paper SWD describes the problem as follows (paragraph 89):

> To establish their damage, claimants have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement, i.e., a hypothetical competitive market. In a breach of contract case, a claimant can normally use market prices at the time of the breach of contract as the benchmark for calculating his loss. However, in a typical competition case, the claimant cannot rely on the prices at the time of the infringement and has to establish what the price would have been in the absence of the restriction of competition. For this purpose, he will often depend on information that is in the sphere of the defendant and possibly their partners in the infringement: for example, notes on the price overcharges agreed secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Also the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market.

Rejecting certain approaches touted in the Commission's Green Paper, the White Paper and the Directive introduced further factors which have increased the already complex nature of the assessment of quantum.[510] The first is the decision for the compensatory nature of damages. Full

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[508] Order of 10 May 2021, ES:JMV:2021:681A, reported and translated in the Official Journal on 20 September 2021, [2021] OJ C382/9.

[509] Part III, Ch 16.

[510] Arguably, this approach was not so much a reaction to the public responses to the Green Paper but did no more than reflect the general principles of EU law. Indeed, they are all factors foreseen by AG Van Gerven in *Banks* (n 308) on the basis of existing EU case law.

compensation, in this sense, refers to 'restitutio in integrum'; i.e., returning the victim to the position in which that person would have been absent the infringement.[511] The Directive expressly rules out 'overcompensation'. Accordingly, it excludes multiple or punitive damages from the scope of compensation under EU or national competition law, despite that possibility having been left open by the CJEU in *Manfredi*.

The second, and related, factor is passing-on. Passing-on reflects, first and foremost, the underlying principle in *Courage* that *any* person should be able to claim for harm caused by anti-competitive conduct.[512] At the same time, that principle requires that harm be allocated at each level of the relevant chain of effects in order to avoid overcompensation at any particular level. Hence, in a simple case scenario, a claim for damages by a direct purchaser of a cartelized product should be reduced by any harm that it has passed on downstream to its indirect purchaser (a consumer), and, in the corresponding claim by that consumer, he or she should be awarded compensation for the harm which has been passed on to him or her by the direct purchaser. It is easy to see how this policy choice adds to the complexity of the quantification of harm.[513]

Passing-on, in addition, brings to the fore the importance of causation.[514] Indeed, passing-on refers to a particular causal nexus: that existing between the infringement and a potential (indirect) claimant. Causation can also play a role in the assessment of harm in other ways. An example is the case of contributory causes, which may break the chain of causation or reduce the amount of harm attributable to a particular unlawful conduct.[515] Despite its importance, the question of causation is not addressed in the Damages Directive.[516] That is, it remains a matter of national law. Nevertheless, causation is far from being left entirely to national law. It is, of course, subject to the twin principles of equivalence and effectiveness, as well as the principle of the full effectiveness of competition law. Indeed, the CJEU has already determined on at least two occasions that certain types of harm are, as a matter of EU competition law, recoverable and, accordingly, cannot be excluded by any national rule purporting to restrict the scope of the tort (for example, on the basis of legal doctrines of remoteness or the like).[517]

More difficult is the question of the requirements as regards the factual evidence of causation or harm (evidentiary standards). In the context of abuse cases, the treatment of such issues has varied materially from one country and case to another.[518] This may well simply reflect factual, or evidentiary,

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[511] art 3(2) Damages Directive.
[512] *Courage*, n 36, para 26.
[513] This risk of excessive complexity was identified in the Green Paper (SWD, s 4) and is the reason which led the US Supreme Court to declare the pass-on defence inadmissible as a matter of Federal US antitrust law in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977) (finding that only direct purchasers suffer antitrust injury and may sue for treble damages under § 4 Clayton Act). For further examples of the complexity which can arise in situations of passing-on, see the Pass-on Study and Pass-on Guidelines (ss I.A and 1.2 respectively). See also the statements of AG Mengozzi in Case C-129/00 *Commission vs Italy* EU:C:2003:319, in relation to the complex set of economic factors which need to be taken into account when assessing pass-on (paras 73-80 of the opinion), cited at para 35 of the judgment, EU:C:2003:656; [2003] ECR I-14637.
[514] See Pass-on Study, para 45.
[515] See, for example, *Mulder*, n 323, paras 33-34 and, generally, Katri Havu, 'Full, Adequate and Commensurate Compensation', n 423.
[516] As expressly noted in recital 11 of the Directive.
[517] *Kone* and *Otis II* (discussed in Ch 4.2(c) above).
[518] See, Assimakis P Komninos, 'Damages Actions in Article 102 Cases' in *EU Competition Litigation*, n 308, 164-165.

differences in those particular cases. The standard of proof is not regulated by EU law, but is left to national law, so this could, in addition, simply reflect that reality.[519] However, it is also possible that these cases reflect such a degree of difference in the evidentiary standards being applied by national courts that a concern about the uniform and effective application of EU competition law potentially arises.[520] This divergence of standards of proof under national law was identified by the Commission in its Report on the functioning of Regulation 1/2003 as an issue which may require addressing (albeit more specifically in the area of NCA procedures).[521] We have also seen the Court provide guidance on some quite detailed elements of the assessment of evidence in *Eturas* (again, in the context of a public investigation) and in *Sanofi Pasteur* (in a tort action for damages).[522] Some have pointed to the objective that like cases give rise to like results and even levels of awards of damages (i.e., in a case relating to the same infringement and in circumstances which are similar). In its explanatory memorandum to its proposal for the Directive in 2013, the Commission continued to identify (as it had done already in the Green Paper in 2005) the divergence of judicial outcomes (including as regards the level of damages) as one of the concerns which justified the need for action at the EU level:

> There is currently a marked inequality between Member States in the level of judicial protection of individual rights guaranteed by the Treaty; this may cause distortions of competition and of the proper functioning of the internal market. The result is an evident disparity in even the content of the entitlement to damages guaranteed by EU law. More specifically, a claim under the law of one Member State may lead to full recovery of the claimant's loss, while a claim for an identical infringement in another Member State may lead to a significantly lower award or even no award at all.[523]

It is perhaps unreasonable to consider that EU law *requires* the damages awarded by different courts on identical cases to be the same. The Directive does not go that far.[524] EU law principles may require certain concepts of harm to be included (or excluded) in the court's assessment,[525] they may require a certain approach to evidence[526] or causation[527] and they may even impose a certain conception of full compensation.[528] However, the CJEU does not, and cannot, operate as an appeal court with the power to review factual assessments and seek to impose coherence in lower court judgments. This is simply not practical.[529] Nor are identical results possible in a world of multiple courts in countries which are furthermore granted 'procedural autonomy'. Nevertheless, it is clearly desirable that there be as

[519] Both under the Directive, see recital 11 and art 17(1), and Regulation 1/2003, recital 5.
[520] For some brief discussion of the 'outer borders' set by EU law, see Havu, 'Full, Adequate and Commensurate Compensation', n 423.
[521] Commission, 'Communication from the Commission to the European Parliament and Council: Report on the functioning of Regulation 1/2003' SWD COM(2009)206 final, paras 203-207.
[522] Ch 4.2(c) above.
[523] Proposal for a Directive (2013), n 444, p 11.
[524] The 'equivalent protection' of rights throughout the Union which the Directive claims to achieve (art 1(1)), refers to a lower level of uniformity than what we are referring to here.
[525] See, for example, *Marshall*, n 78, and *Manfredi*, n 333.
[526] See, for example, *Eturas*, n 216, and *Sanofi Pasteur*, n 220.
[527] See, for example, *Kone*, n 337, or *Otis II*, n 337.
[528] See, for a general discussion of these topics, and related case-law, Havu, 'Full, Adequate and Commensurate Compensation', n 423.
[529] The existence of diverging assessment by courts of the same evidence is a reality even at the national level in individual Member States.

uniform an approach as possible in the application of EU competition law as the Court's ruling in *Sanofi Pasteur* illustrates.[530]

We are faced, therefore, with a legal framework which, at first blush, establishes a truly complex environment within which courts are to address damages claims: (i) a need to establish the actual harm suffered by each (directly or indirectly) affected party, (ii) based on diverging national rules and loose overarching principles of EU law, and, at the same time, (iii) with the goal of endeavouring to ensure effective and equivalent application of competition law throughout the EU. This may leave us somewhat discouraged about the truly challenging task ahead. However, it is at this point that we can look to EU law as sowing the seeds which, with the assistance of practitioners and courts alike, will contribute to the further development of common law and practice in this area.

What has the Union legislature done to assist national courts in this complex environment? First, the Directive adopts three specific measures to assist courts in quantifying harm:

- It provides that national courts should have the power to estimate harm and the passing-on effect (Articles 17(1) and 12(5), respectively).
- It requires NCAs be enabled to provide guidance to courts on quantum, where requested (Article 17(3)).
- It charges the Commission with providing general guidance on the estimation of harm and passing-on (recital 46, by reference to the existing Practical Guide to Quantification, and Article 16, on passing-on).

All three of these measures are predicated on an important prior observation, which introduces a note of practicality to the exercise of quantification. EU law maintains that the hypothetical nature of the exercise of quantification of harm entails that any quantification will be no more than an estimation. It is not a precise science.[531] The Commission's Communication on Quantifying Harm (2013) makes the point in the following terms:

> The quantification of such harm requires comparing the actual position of the injured party with the position this party would have been in without the infringement. This is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement. Quantification of harm in competition cases has always, by its very nature, been characterised by considerable limits to the degree of certainty and precision that can be expected. Sometimes only approximate estimates are possible.[532]

Based on this observation of practicality, the Directive furthermore establishes that the effectiveness of EU competition law requires that national rules on burden and standard of proof, and the way in which those rules are applied by courts, do not make obtaining full compensation 'practically

[530] *Sanofi Pasteur*, n 220, paras 50-51.
[531] For instance, recital 46 of the Directive: 'This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy'.
[532] Commission, 'Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' [2013] OJ C 167/19, para 9.

impossible or excessively difficult' for victims.[533] Rather, they should reflect the difficulties inherent in quantifying harm in competition cases. As a result, the Commission foresaw in its 2013 Communication that national law could provide for rules on the shifting of the burden of proof once the claimant has proved certain factors, for simplified rules of calculation, for the application of presumptions (potentially, refutable or irrefutable) and for national courts to make best estimates of harm or determine harm on equitable grounds.[534]

The Directive itself establishes certain presumptions in favour of claimants. This is the second element of 'assistance' that the Directive offers to courts adjudicating competition damages claims. First, it establishes a refutable presumption of harm in cartel cases.[535] It does so avowedly to correct some of the imbalances, already referred to, which weigh against claimants in proving harm, and based on the general premise that cartels tend to have a negative impact on prices.[536] In addition, a rebuttable presumption of passing-on is established in favour of indirect purchasers where certain conditions are met.[537] Nevertheless, as we have seen, the existence of these presumptions does not resolve the problem of quantification. For this, we need to return to the trio of measures already referred to (which may, to some degree, be assisted by the existence of a presumption of harm). By way of closure, therefore, we will touch on some of the issues for question and development which arise around the roles of the national court and NCA in estimation (pursuant to Article 17), before passing to the Commission's guidance papers on quantifying harm (in our final chapter on soft law).

The court's power to estimate harm under Article 17(1) is subjected to the conditions that: (i) 'it is established that a claimant suffered harm', but (ii) 'it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available'. The first condition will be facilitated in cartel cases by the presumption of harm, but its application will certainly not be without its difficulties (for instance, in cases of contributory causes or complex causal relationships). What types of situations will satisfy the second condition is a truly controversial question which falls to be determined by EU law. Does it require at least some valid rough estimate to be produced? What is the level of the demands on such evidence? Will it depend on the circumstances of the claimant? What is the relevance of disclosure? The CJEU has offered some initial guidance in *Tráficos Manuel Ferrer*[538] but still many aspects of these questions, and precisely how they should be answered, remain unresolved. No easier is the follow-up question of how the court should estimate harm in cases where

[533] art 17(1), first sentence. This is the classic effectiveness formulation. The 2013 Communication, interestingly, uses the term 'disproportionate': 'All these national rules and procedures governing the quantification of harm should be laid down and applied in individual cases in a way that allows parties injured by EU competition law infringements to obtain full compensation for the harm suffered without any disproportionate difficulties' (para 8). As we will see in the next section, the Commission's Practical Guide to Quantification grants central importance to the question of proportionality, in particular the proportionality of the demands placed on the parties, as regards the evidence of harm to be produced, as compared with the value of the damages being claimed.

[534] These are all similar points to those originally identified by Van Gerven in *Banks* some 20 years earlier, by reference to the same CJEU case-law on the quantification of damages under EU law (namely, *Laminoirs* and *Mulder*), where he already underlined the need to allow a degree of discretion to courts in using reasonable approximations as to the amount of harm.

[535] art 17(2).

[536] Recital 47.

[537] art 14(2).

[538] We consider the impact of disclosure in Part III, Ch 16.3. Questions of standard of proof and the substantive conditions for judicial estimation are not the focus of this work, which is concerned rather with the strictly procedural implications of EU law. However, we include a brief note on standard of proof and disclosure following *Tráficos Manuel Ferrer* in Ch 16.4.

the second condition is satisfied. What criteria should the court use? Must it be limited to moderating sums actually quantified in the proceeding? Or is it granted a broader discretion?

The provision in Article 17(3) relating to the assistance by NCAs in quantifying harm was not included in the Directive until the European Parliament introduced its amendments to the Commission's draft proposal in 2014.[539] It had appeared for the first time in the 2007 impact assessment, but apparently more from the perspective of the NCA offering a view on the impact to society of particularly serious infringements with generalized effects as opposed to individualized harm to a claimant (that is, it was formulated as an aspect of the NCA's more natural public enforcement function)[540], and, anyway, was not then incorporated into the Commission's White Paper or proposal for the Directive. The authors of the report doubted, in fact, whether NCAs would be willing or able to dedicate the necessary resources to the task of quantifying harm, except in high stakes cases.[541] How the final version of the provision which found its way into Article 17(3) will be applied is something we will need to observe in court and NCA practice around the EU, and no doubt questions may find their way to the CJEU under Article 267 TFEU. Nevertheless, the application of the provision certainly raises some real challenges. For instance, how should such NCA intervention be incorporated into the civil procedure ensuring respect for the parties' rights of defence? At what stage should that intervention occur, on the basis of what information, and with what right of reply? How will the fundamental right to effective judicial protection be complied with? This principle implies that a court may not delegate its judicial function to a technical expert, for instance. How will this principle be guaranteed in practice? Finally, how will the NCAs define their precise roles in damages proceedings, in each jurisdiction, and what resources will they chose to dedicate to that role?

6. Soft law

The Commission's SWD to the White Paper notes that, unlike other matters such as disclosure or limitation which it considered required specific harmonisation measures (and hence inclusion in the Directive), other matters, such as the calculation of damages, could 'adequately be dealt with via soft-law instruments'.[542] One commentator has observed that indeed the Commission's Practical Guide to Quantification 'could, to an extent, operate as a form of minimum harmonization achieved through soft law if national courts were to follow the parameters established therein'.[543] Others are more sceptical, considering that the guidelines are limited to explaining economic concepts without offering clarity on what is recoverable harm as a matter of law.[544] That criticism is no doubt correct. However, equally, the legal nature of these soft law guidelines and their purpose do not lend themselves to resolving legal questions of that sort. As a general matter of law such guidelines do not have a binding effect on national courts' interpretation of EU law.[545] This is explicitly stated in the

[539] Position adopted by the Parliament on 17 April 2014, EP-PE_TC1-COD(2013)0185.
[540] Centre for European Policy Studies / Erasmus University Rotterdam and Luiss Guido Carli, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios FINAL REPORT', 21 December 2007, p 200.
[541] See, for discussion in a particular national context, Marios C Iacovides, 'Article 17(3) of the Damages Directive and the Interaction Between the Swedish Competition Authority and Swedish Courts' in *EU Competition Litigation*, n 308, 216.
[542] White Paper SWD, para 322.
[543] Albers-Llorens, 'Antitrust Damages in EU Law', n 422, 146.
[544] Havu, 'Causation & Damage', n 465, 191.
[545] See, inter alia, *Pfleiderer*, n 370, paras 21-3, or C-526/14 *Kotnik* EU:C:2016:570, para 44.

relevant instruments.[546] Furthermore, the nature of the questions that will arise in this context are intensely fact-related and it would, accordingly, be difficult for the Commission to try to set out clear ex ante directions in an area which is, furthermore, of national court competence.[547] Nevertheless, the de facto harmonizing effect of soft law is recognised by the CJEU and has been underlined by the Advocates General in a number of cases.[548] For instance, AG Kokott notes in *Expedia*:

> So far as competition-law proceedings at Member State level are concerned, the de minimis notice expressly claims that 'although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81 EV' Such guidance is of decisive importance for the functioning of the decentralised system for the enforcement of competition law established by Regulation No 1/2003. It contributes to the fundamental aim of applying as effectively and uniformly as possible throughout the European Union Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU). At the same time it supports the creation of equal competition conditions ('level playing field') in the internal market and also enhances legal certainty for the undertakings concerned.[549]

So, what can the Commission's soft law guidance offer? In my opinion, its contribution can be of a threefold nature:

- First, without falling into the traps highlighted above, it can perhaps offer some general guidance on the assessment of evidence as per the Court's case-law: limits on the standard of proof that may be required pursuant to the principle of effectiveness, taking into account the inherent difficulties of quantifying harm, or regarding the admissibility of evidence, limits to the use of presumptions, etc.

- Second, it can offer some assistance in understanding the concepts of harm that courts will be faced with assessing, the relevant factors in considering expert evidence and the state of accepted scientific method in quantifying harm (something both the 2013 and 2019 guidelines arguably do fairly completely and well).

- Finally, it can offer guidance on procedural and evidentiary aspects of the quantification of harm.

It is on this last aspect which I would like to focus particularly here since it is one which, while addressed to a certain degree in the guidance, has perhaps not to date received the attention it deserves. In my opinion, it offers the most fruitful avenue for paving a path for de facto harmonisation of certain aspects of national procedural practice and, thereby, for improving the effective and consistent assessment of harm by national courts. Accordingly, we will review the following Commission communications from the perspective principally of what they contribute to procedural and evidentiary questions related to the exercise of quantifying harm in court proceedings: the Practical Guide to Quantification and the Pass-on Guidelines; the Communication on the Protection of

[546] Communication on Quantification, para 12; Practical Guide to Quantification, para 7; Pass-on Guidelines, para 2; Communication on the Protection of Confidential Information, para 8.
[547] This may be contrasted with the Commission defining its own administrative practice (generating as such certain legitimate expectations; Joined Cases C-189, 202, 205-8 and 213/02 P *Dansk Rørindustri A/S v Commission*, para 211; Case C-520/09 P *Arkema v Commission* EU:C:2011:619; [2011] ECR I-8901, para 88; *Expedia*, n 397, para 28).
[548] For example, AG Mazák in *Pfleiderer*, n 370, paras 26-7, or AG Kokott in *Expedia*, ibid, paras 35-7.
[549] Opinion of AG Kokott in *Expedia*, para 37, by reference to the 2001 de minimis notice: Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C368/13.

Confidential Information;[550] and DG COMP best practices.[551] Finally, we will mention the Commission's Communication on Collective Redress, which, as already noted, took the place of the Commission's proposal for the inclusion of rules regarding collective actions in the Damages Directive.[552]

6.1. Quantification Guidelines

The Practical Guide to Quantification, in fact, offers very limited guidance on procedural and evidentiary issues. Nevertheless, we can identify the following three points of interest in the introductory sections of the guide (sections 1.I and 1.II):

- Relevant considerations in assessing expert evidence in light of the effectiveness principle include whether sufficient data is available to the parties (information asymmetry) and whether the burden and costs involved are proportionate to the value of the claims at stake (proportionality).
- The existence of harm must be based on a plausible theory of harm which takes as its starting point the infringement in question and its foreseeable impact on the market, considering available evidence and, in the case of a follow-on claim, the relevant competition authority decision.
- Factual evidence (including contemporaneous documents and witness evidence), where available, may also contribute to the assessment of harm, both as regards its existence and its quantification.

The Pass-on Guidelines do, however, provide some more material insight into the Commission's view on procedural and evidentiary issues. The guidelines also provide some further context to the national courts' power to estimate harm under the Directive. These points, contained in section 2 ('The Legal Context') of the guidelines, in particular in sections 2.2 regarding the court's power to estimate harm and 2.3 on the role of evidence, as regards, notably, the following:

- Procedural indications in a situation where there exist parallel claims at different levels of the supply chain before different courts (or relevant information disclosed in public investigations); offering guidance as regards the provisions of Article 15 of the Directive. The Commission notes that parties should inform courts of such related actions, that courts should make use of procedural mechanisms available to them under national law to avoid inconsistent results (e.g., stays, joinder or collective redress mechanisms), and that parties may wish to consolidate actions at different levels in a single action via the acquisition (assignment) of claims.[553]
- The impact procedural mechanisms to consolidate claims may have on disclosure, in light of the proportionality principle. The Commission notes that 'the joinder of a number of smaller claims may increase the total value of the claims pending before a court to an extent that this court considers the amount of data requested for a more costly expert analysis to be

[550] Commission, 'Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law' [2020] OJ C 242/1.
[551] The specific instruments are identified below, Ch 6.3.
[552] n 278.
[553] Pass-on Guidelines, paras 25-8.

proportionate', whereas otherwise the court might not have considered the disclosure request on an individual small claim to be proportionate.[554]

- The power under Article 12(5) to estimate the pass-on effect as a particular expression of the general power to estimate under Article 17(1) of the Directive.[555] The Commission observes that national courts should not reject submissions on pass-on merely because the party is unable to precisely quantify the pass-on effects.[556] National courts should base their estimation on the information reasonably available and strive for an approximation of the amount of pass-on which is plausible.[557] National courts will frequently have to rely on assumptions in estimating harm (for instance, as regards hypothetical prices, sales volumes or profit) and, in line with the Court's approach in *Mulder*, may have a broad discretion as to the data to apply and how to use that data in the estimation of harm.[558]

- Assumptions used by experts in submissions to the court (and the sensitivity of the results to changes in those assumptions) should be made explicit in line with the EC best practices for the submission of economic evidence (which we return to below).[559] In addition, courts may wish to ask experts to address alternative explanations for their findings, ensure replicability and let the parties comment.[560]

- With regard to evidence generally, the Commission notes that evidentiary requirements will be influenced by whether a presumption applies (pursuant to Article 14(2) of the Directive).[561] It identifies two key types of evidence that may be relevant in assessing a claim of passing-on: (i) qualitative evidence directed to understanding a firm's pricing behaviour (e.g. internal pricing policies, contracts, price regulation or market reports), and (ii) quantitative evidence aimed at measuring the passing-on effect with the use of empirical data (for example, through the use of econometrics).[562] Finally, it refers back to the Practical Guide's indications (noted above) concerning the plausibility of a theory of effects based on evidence of the specific infringement and relevant factual evidence.[563]

- On the specific question of disclosure, the guidance points to the need for court case management of the disclosure exercise, inter alia to ensure compliance with the proportionality principle, and suggests that among the measures that can be used for protecting confidentiality are those contained in the Commission's best practices for the presentation of economic evidence, including the use of data rooms.[564]

This practical procedural guidance has its origin in the work carried out in the Pass-on Study (prepared in 2016 and a precursor to the 2019 Guidelines). The study includes a chapter on 'Guidance to judges

[554] ibid para 29.
[555] ibid para 30.
[556] ibid para 33.
[557] ibid para 34.
[558] ibid para 35.
[559] ibid paras 35, 39.
[560] ibid para 39
[561] ibid para 36.
[562] ibid para 37.
[563] ibid para 38.
[564] ibid paras 39-43.

on managing and assessing evidence related to pass-on' and its so-called '39 Steps', a practical checklist for judges in the assessment of evidence of pass-on.[565] These procedural and evidentiary pointers, while limited, offer some rare practical indicators for courts and parties in the development of national procedural practice in competition law actions.[566]

6.2. Communication on the Protection of Confidential Information

The Commission published its Communication on the Protection of Confidential Information in July 2020.[567] It did so ostensibly to provide guidance to national courts in the context of disclosure requests pursuant to the new disclosure rules under the Directive (Articles 5 and 6). Specifically, the Communication fleshes out the meaning of the requirement pursuant to Article 5.4 that 'national courts have at their disposal effective measures' to protect confidential information which is disclosed. Arguably, the guidance also applies to the protection of any confidential information produced during the legal proceedings, whether it be as the result of a disclosure request or because one of the parties, or their expert, wishes voluntarily to produce information it considers confidential in support of its allegations. This may be the case where economic experts wish to provide access to the underlying quantification model or data upon which the results presented in their report are based or an exchange of models is agreed or ordered as part of the proceedings.

The communication is expressly non-binding and defers repeatedly to the requirements and possibilities of national procedural law. That is, it expressly respects the procedural autonomy of national courts in the treatment of expert evidence. Nevertheless, at the same time, the communication aims to be a 'source of inspiration and guidance for national courts'.[568] Furthermore, there is, of course, a normative sense to the words of Article 5(4). In this sense, the communication must be understood as offering options to national courts to ensure the effective protection of confidential information with the goal of ensuring, in turn, the effective judicial protection of other rights under EU law (including the right to compensation or the right to plead the passing-on defence).

The communication expressly notes that national courts may currently 'have limited resources to handle disclosure requests'.[569] By implication, the Commission is identifying a problem of adaptation of national processes to the demands of a procedure which involves disclosure and offers, in response, a range of possible solutions based on the experience and practices of EU institutions (including the Commission and the EU Courts), as well as national comparative law (in particular, English law). Indeed, it is notable in several points that the Commission identifies the possible need for adaptation of normal court processes and practices to the demands of disclosure of confidential information or for the court to take control of detailed matters relating to such disclosure or to facilitate agreed solutions between the parties. Among the range of mechanisms offered in the communication for addressing these challenges, the confidentiality ring, in its various guises, is of particular interest. The confidentiality ring, in its simplest form, refers to the limitation of the persons who can access certain

[565] Pass-on Study, ss V, VI.
[566] The '39 Steps' have received some limited attention by national courts in Spain; see Part III, Ch 17.2.
[567] n 550.
[568] Communication on the Protection of Confidential Information, para 8.
[569] ibid para 6, in fine.

evidence produced in proceedings, pursuant to an agreement or order.[570] As noted by the Commission, the confidentiality ring may be particularly suitable for the disclosure of quantitative (economic) data such as revenues, prices, or margins and for the management of large volumes of information or documentation.[571] The confidentiality ring may involve the handing over of information contained on an electronic storage device to those within the ring (or inner ring), or the setting up of a so-called data room which, in turn, may be organised either electronically (with controlled remote access, so-called e-disclosure) or physically.[572] In this case, the communications suggests that the physical data room may be located either in the court's premises or outside.[573]

As the Commission notes, and this is worth underlining, such exercises 'may require changes to the usual functioning of the court's logistic or even telematics procedures, or putting in place ad hoc procedures on a case-by-case basis within the boundaries of the applicable national procedural laws'.[574] In addition, they will involve a degree of active and detailed case management by the court to regulate, or agree, even the logistical details of the execution of the confidentiality ring disclosure exercise; for instance: the means of access (e.g. physical or electronic data room), equipment requirements, duration, hours of access, permitted personnel, permitted actions (e.g. downloading or copying rights), etv[575]

In sum, the communication proffers a number of possible mechanisms for national courts to manage disclosure exercises involving confidential information of an empirical or voluminous nature, which are of particular relevance for expert reports quantifying harm, and these mechanisms raise a series of novel procedural issues for national courts, and the national court systems, to address, within the necessary confines of their national procedural laws.

6.3. DG COMP Best Practices

The origin of many of the procedural recommendations we have referred to above can be traced back to the Commission's best practices in the field of antitrust and merger investigations (i.e., in the field of public enforcement), as they relate to the treatment of economic evidence. At certain points, those best practices are expressly referenced in the private enforcement guidelines. At others, while they are not, they provide a (frequently, more complete) backdrop to those more recent guidelines which are directed to national courts. In this sense, the antitrust best practices are a useful source of further guidance.

The best practices in question are: (i) the Commission 2011 notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU;[576] (ii) the accompanying staff working paper on

[570] See recital 18, Damages Directive, or, for example, art 283bis(b)5.3 LEC in the Spanish implementing rules.
[571] Communication on the Protection of Confidential Information, n 568, paras 52-3.
[572] See ibid paras 70-4, 79-82.
[573] ibid para 80.
[574] ibid fn 39, p 7.
[575] See, in particular, ibid para 76-9, 84. For practical experience in Spanish national court proceedings, see Ch 16.3 below.
[576] Commission, 'Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU' [2011] OJ C308/6.

best practices for the submission of economic evidence and data collection ("**Economic Evidence Best Practices**");[577] and (iii) the best practices on data rooms ("**Data Room Best Practices**").[578]

The first, the only document of the three to have been published in the Official Journal, contains reference to the use of data rooms in the context of the Commission providing access to confidential information on the administrative file to interested parties, typically to quantitative data relevant for econometric analysis.[579] This reference is developed in the Data Room Best Practices, where the Commission sets out the more detailed purpose and requirements of a data room. Data rooms form part of the Commission's practice of ensuring the protection of the rights of defence of interested parties in antitrust or merger investigations. In particular, they refer to allowing parties to verify confidential quantitative data relied on by the Commission in the file as well as the Commission's economic analysis based on that data. In this sense, data rooms form part of an exercise in transparency allowing interested parties to verify the empirical basis for the Commission's case and to replicate its economic analysis. They are an exceptional tool which may safeguard rights of defence while protecting confidential information. The details of the data room process are set out in the best practices which, furthermore, include a model set of rules and non-disclosure agreement.

The Economic Evidence Best Practices, like the other best practices, are related to the Commission's administrative practice, concerning in this case the presentation of economic evidence by investigated parties. Nevertheless, it is a tool which largely offers practical guidance of universal applicability. It is worth highlighting a number of these here:

- Economic analysis needs to be framed in such a way that the adjudicating entity (court or administration) can understand and evaluate its relevance and significance.[580]
- This means that economic analysis must meet certain minimum technical standards as regards its generation and presentation, including, for instance, that: (i) the hypothesis to be tested is formulated clearly and on the basis of the facts; (ii) assumptions are explained and are consistent with the characteristics of the relevant market; (iii) the models employed are well established from a scientific standpoint; (iv) the empirical methods and data are appropriate for the analysis being performed (and the source and process of collation of data properly explained); (v) the results are properly interpreted and robust (to relevant changes); and (vi) counterarguments (or possible weaknesses) have been given adequate consideration.[581]
- In addition, the congruence and consistency of the analysis should be assessed against other pieces of quantitative and qualitative evidence.[582]

[577] Commission, 'DG Competition Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, Staff Working Paper' SEC/2011/1216 final.
[578] Commission, 'DG Competition Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' available at https://competition-policy.ec.europa.eu/antitrust/procedures/data-rooms-and-confidentiality-rings_en.
[579] ibid para 97.
[580] Economic Evidence Best Practices, para 2.
[581] ibid paras 2-3; see, also, paras 10, 12, 16-8, 20-3, 40-2.
[582] ibid para 4.

- Furthermore, the analysis should be capable of replication by the other party's or the adjudicating entity's expert.[583] This implies that the analysis should be accompanied by all necessary documentation to permit replication, including the underlying data and programming codes in electronic format.[584]

- Economic analysis which does not meet the standards set out in the Economic Evidence Best Practices will normally be attributed less probative value and maybe none at all.[585]

The overall aim of the Commission is set out at paragraph 15 in terms with which (if applied to civil proceedings) few judges would, I suspect, disagree:

> The goal of these recommendations is to ensure that every economic or econometric analysis developed by any party involved submitted for consideration in a case states to the largest possible extent the economic reasoning and the observations on which it relies and explains the relevance of its findings and the robustness of the results. This should allow the Commission and all interested parties to scrutinise the economic evidence submitted during the proceedings so as to avoid that empirical results that are not robust be disguised as such and key assumptions in theoretical reasoning be presented as innocuous.

6.4. Collective Redress

The final piece of soft law I wish to touch on is that related to collective redress. As already noted, the Union took the decision finally to exclude collective redress from the scope of the Damages Directive, despite the recommendations of the Commission to include it as a key pillar in its Green and White Papers and its draft 2009 proposal. In its place, the Commission published its Collective Redress Recommendation in 2013, which expressly contemplated measures related to competition law claims in mass harm situations. The more recent Directive 2020/1828 is limited, by contrast, to certain representative consumer actions and does not include competition law within its scope. Accordingly, it is the recommendation, which marks the EU framework for collective redress in the field of antitrust.[586]

The aim of the recommendation is to prevent unlawful practices and ensure compensation in situations of mass harm, noting that access to justice may be enhanced where individual actions would be disproportionately costly.[587] At the same time, the recommendation underlines the importance of taking into account the Member States' legal traditions and legal orders (procedural autonomy) and identifies the objective of coordination of good practices, as opposed to the harmonisation of rules.[588] In the context of our discussion so far, three further aspects of the recommendation are worth highlighting:

- The recommendation sets out to avoid some of the perceived abuses of US class action litigation. Accordingly, it recommends against 'punitive damages, intrusive pre-trial discovery

[583] ibid para 5.
[584] ibid paras 33, 46.
[585] Paras 15, 33.
[586] In Spain, for instance, the government already adopted a draft law on collective actions in 2023which aims to transpose Directive 2020/1828, and, among other matters, is intended to cover competition law claims; see Ch 14.3 (Part III).
[587] Collective Redress Communication, recital 9.
[588] ibid recital 4 by reference to point 16 of the European Parliament's Resolution of 2 February 2012 'Towards a Coherent European Approach to Collective Redress' [2012] OJ C 239 E/32.

and jury awards',[589] applies transparency and conflict restrictions to third party funding and rules out contingency fees.[590] It also recommends opt-in, as opposed to opt-out, actions.[591]

- It purports to increase the role of courts in managing the collective redress process. This relates, for instance, to certification.[592] In general, the recommendation underlines the role of courts in 'protecting the rights and interests of all parties involved' and 'in managing the collective redress actions effectively'.[593]

- Drawing inter alia from the principles we have seen incorporated into the field of private enforcement of environmental law (under the umbrella of the Aarhus Convention), the recommendation establishes that national law should ensure collective redress procedures which are 'fair, equitable, timely and not prohibitively expensive' (as well as respecting common principles around the Union).[594]

As noted already, the recommendation has proved ineffective in installing a cohesive collective action system in Europe for competition law claims. It has, furthermore, been surpassed by events, with different more ambitious regimes having been enacted in various Member States, funding having become fairly omnipresent and the need for rationalisation of mass claims all the more urgent. Indeed, it is an area where, in the absence of EU harmonisation legislation, the principle of jurisdictional competition applies. If the EU wishes to ensure greater uniformity in this context and avoid forum shopping, it will need to update its approach to collective actions returning to the underlying goals set out in the earlier policy papers and taking into account the current state of play across the EU. It does not seem that such a change can be imminently expected and rather we will continue to see jurisdictional competition and variety in this area. A more ambitious and perhaps adequate goal would be to develop a pan-European mechanism for collective actions, along the lines of the US Multi-District Litigation mechanism. However, this should be the subject of a separate study.

[589] ibid recital 15.
[590] ibid paras 14-6, 29-30.
[591] ibid paras 21-4.
[592] ibid paras 8-9 (on "Admissibilty").
[593] ibid recital 21.
[594] ibid para 2.

PART II

THE UK EXPERIENCE

Introduction

The reader may be forgiven for asking why the UK system is of interest for our topic. Indeed, since Brexit, EU competition law has ceased to form part of the rules applying in the UK for competition cases.[1] Furthermore, the common law is quite foreign to the legal systems of continental Europe. So, understandably, one could question its relevance for the application of EU competition law by Spanish courts pursuant to the Spanish Civil Procedure Law ("**LEC**"). Nevertheless, there are compelling reasons why the UK system is of interest, beyond the fact that I am myself an English, as well as Spanish, lawyer. The first is that the UK has created a specialised court for competition cases, which now has twenty years of practical experience in this area: the CAT. The second is that the UK has historically been one of the leading jurisdictions of choice for the litigation of EU private enforcement actions and has, indeed, adopted a long-arm reach, one might say 'embrace', of litigants from all around Europe (and the world).[2] The third is that in questions of particular relevance for our subject - such as case management, disclosure and the detailed rules for how economic expert evidence is introduced and considered in legal proceedings - the UK offers an unequalled level of experience. Disclosure is a mechanism that, indeed, has its roots in the common law and the UK collective actions regime, introduced in the CAT in 2015 for competition law claims, offers one of the first such systems in Europe. Finally, the UK system of expert evidence favours party witnesses over court-appointed experts and vests those experts with duties of objectivity. In this aspect, the UK system shares something in common with Spain, unlike other continental jurisdictions such as Germany, Italy or, to some extent, France where court-appointed experts are favoured, and party experts are assumed to be more partial. Accordingly, the UK has a wealth of practical experience and offers useful benchmarks and lessons which will be of value in assessing the way in which the procedural approach to the assessment of expert economic evidence could be dealt with by the Spanish courts. In addition, it should be noted that EU law will, in practice, continue to apply to competition cases brought in the UK for some time and hence the UK will continue to produce relevant comparative case-law.[3]

The UK system cannot, however, be considered normative for continental systems in any way, precisely because of the huge difference in legal traditions. Furthermore, the UK system is by no means perfect and, indeed, illustrates very notable shortcomings; not least, its enormous cost and excessive complexity.[4] Interestingly, it is itself in a process of material

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[1] The UK left the EU on 31 December 2020 and arts 101 and 102 TFEU were disapplied in the UK from that point.

[2] I refer, in particular, to the line of case-law commencing with *Provimi Limited v Aventis Animal Nutrition SA* [2003] ECC 29 which permitted essentially non-UK cases concerning EU competition law infringements to proceed in the UK on the basis that a defendant (with domicile in the UK) formed part of the same corporate group as the infringing company and could reasonably be argued also to have liability for the infringement (thesis since consolidated by the CJEU in *Sumal*, by reference to the EU economic unit doctrine, and applied by the High Court in *JJH Enterprises Limited (trading as ValueLicensing) v Microsoft Corp* [2022] EWHC 929 (Comm)). For the position under English law prior to *Sumal*, see *KME Yorkshire Limited v Toshiba Carrier UK Ltd* [2012] EWHC 731 (Ch) and the discussion in Mark Brealey QC and Kyla George, *Competition Litigation. UK Practice and Procedure* (2nd edn, OUP 2019), paras 5.54-56. As regards the litigation of claims relating to the indirect effects in the EU of a worldwide cartel, see *iiyama v Samsung* [2018] EWCA Civ 220.

[3] Pursuant to the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93), sch 4, pt 6, EU law continues to apply to cases relating to facts arising before Brexit (ie prior to 2021) and, furthermore, EU law is likely often still to be directly or indirectly relevant to new cases having an EU element as shown by *ValueLicensing* (n 2).

[4] The Jackson review of the costs of civil litigation highlighted these problems in 2009, and raised concerns for access to justice, noting that 'the costs of civil litigation continue to rise' and, in some areas of civil litigation costs, were 'disproportionate and impede access to justice' (Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report*

change. That change has been instigated principally by the general reform of the rules of civil procedure in England and Wales which was implemented in 1998[5] pursuant to the Woolf Report[6] and further developed in 2013 following the Jackson Report.[7] It is also seen in the influence of EU procedural law and principles in national law applicable in the UK. Finally, it is reflected in some of the specific reform which was undertaken to implement the Damages Directive into UK law in 2017 (in particular, in relation to disclosure as well, perhaps, as the introduction of a presumption of harm in cartel cases).[8]

It is fascinating to note that this process of reform, both general and specific, is moving the UK courts towards a more 'European' way of doing things.[9] In this way, one can observe that the UK system and its EU counterparts are called to a certain degree of convergence. In the words of Judge Rolf Stürner during the preparation of the ALI/UNIDROIT Principles of Transnational Procedure in 2004:

> The English example is perhaps the most interesting development for our discussion. England is the motherland of common law and common law procedure, but the most recent reforms bring English civil procedure closer to the Continent and indicate a remarkable convergence between the different systems.[10]

Those words take on even greater force twenty years on. On the one hand, the UK continues to need a more controlled and pragmatic use of court resources (a reining-back of certain excesses in the search for substantive justice and truth on any one particular case, or in the use and abuse of procedure). For their part, continental systems like Spain are called to develop greater consistency and quality in the adjudication of complex competition claims, for the reasons I have alluded to in the introduction to this research and we will develop on in Part III. At the same time, both are influenced by the EU legal framework of rules and case-law concerning the effective protection of EU rights, particularly in the area of competition law.

Common to the endeavours of all jurisdictions to improve and converge in this way are, in my opinion, the tools to get there; in particular, active case management. In turn, active case

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(TSO May 2009), foreword and ch 1). These problems continue today, in particular with regard to the scope and cost of disclosure. Indeed, it is widely recognised that the Jackson reforms on disclosure, which were intended to avoid the automatic use of standard disclosure and make disclosure more specific and focussed, failed to work, giving rise to further reforms such as, notably, the Disclosure Pilot for the Business and Property Courts; see Adrian Zuckerman, *Zuckerman on Civil Procedure, Principles of Practice* (4th edn, Sweet & Maxwell 2021), 43, fn 183. See generally on problems of access to justice caused by cost and complexity: Andrew Higgins, 'Keep Calm and Keep Litigating' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

[5] The Civil Procedure Rules 1998, SI 1998/3132 ("**CPR**"). For a detailed presentation, with commentary, of the CPR, see the White Book Service (Sweet & Maxwell) (the "**White Book**").

[6] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

[7] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (HMSO 2010).

[8] The Damages Directive was implemented through the introduction of a new schedule, sch 8A, to the Competition Act 1998 on 9 March 2017 pursuant to the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385). Modifications to the disclosure rules to bring them into line with the Directive were implemented through Practice Direction 31C – Disclosure and Inspection in relation to Competition Claims and, in the CAT, through the adoption on 14 March 2017 of the Practice Direction relating to Disclosure and Inspection of Evidence in claims made pursuant to pts 4 and 5 of the CAT Rules 2015.

[9] Zuckerman, n 4, para 1.58.

[10] Rolf Stürner, 'Anglo-American and Continental Civil Procedure: The English Reforms a Model for Further Harmonization?' in Mads Andenas, Neil Andrews and Renato Nazzini (eds), *The Future of Transnational Civil Litigation* (BIICL 2004), p 11. Dr. Rolf Stürner is emeritus professor at Freiburg University and judge at the Court of Appeals in Karlsruhe.

management implies the proper use and control of the key evidentiary tools in quantifying harm (expert reports and economic information and documentation used to prove harm), on the one hand, and the efficient management of multiple or mass claims, on the other.

These topics will be the subject of the chapters that conform this Part II. The analysis is evidently not intended to be a comprehensive treatment of the underlying topics. It is an exercise aimed to pick out key aspects which will permit us to enter the final stage of our analysis with the necessary context to assess the Spanish system in light of the British experience and go on to make proposals.[11]

7. The Competition Appeal Tribunal

7.1. The institution: a specialist court

The CAT was created on 1 April 2003 pursuant to the Enterprise Act 2002. It is an independent, specialist judicial body[12] with powers both to review the decisions of the UK's competition (and regulatory) authorities (public law) and to hear civil claims for compensation and other remedies (private law). It has its own permanent staff and legal assistants ('référendaires') located in the CAT's own premises.[13] In addition, the tribunal has a President and a flexible panel of 'judges' (panel members) drawn both from the judiciary of the High Court of England and Wales, Scotland's Court of Sessions and the High Court of Northern Ireland, and from other experienced bodies of professionals, including barristers, solicitors and non-lawyer specialists (such as, economists, accountants or industry experts).[14] It can draw on these resources to constitute its tribunal on any particular case.[15] Accordingly, the CAT counts on a highly qualified and flexible panel of judges. The tribunal is funded and supported by the Competition Service, an executive non-departmental public body created to form part of one integrated organisation with the CAT.[16] The Competition Service, in turn, receives funds assigned to it by the Secretary of State for Business, Energy & Industrial Strategy (BEIS).[17] The yearly budget is in the region of £4 to 5 million (which does not include the salaries of non-permanent staff; i.e., CAT panel members).[18] It is, accordingly, not only a specialised, but a relatively well-resourced, court.

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[11] For a full and general analysis of these topics, see, inter alia, Paul Matthews and Hodge M Malek QC, *Disclosure* (5th edn, Sweet & Maxwell 2017); Zuckerman, n 4, Hodge M Malek QC (ed), *Phipson on Evidence* (20th edn, Sweet & Maxwell 2021); Charles Hollander, *Documentary Evidence* (14th edn, Sweet & Maxwell 2021); Tristram Hodgkinson and Mark James, *Expert Evidence: Law & Practice* (5th edn, Sweet & Maxwell 2020). For an analysis of the UK competition litigation regime, see Brealey and George, n 2.

[12] Accordingly, it is a court, not an administrative body.

[13] The CAT, currently, has its, highly modern, premises in Salisbury Square, London. It is also able to hear cases in other locations around the UK (Rule 18 of the CAT Rules). At the time of writing, the CAT had a Registrar, a Head of Registry and six référendaires, as well as other administrative staff.

[14] At the time of writing, the members of the CAT numbered, with the President, 30 judges, 14 lawyers (barristers and solicitors) and 30 academics, economists and other non-legal specialists; a total of 74. Of these, 34 are so-called Chairmen who, along with the President, may preside the CAT panel on any particular case, and 40 Ordinary Members. See, in this regard, s 14 of the Enterprise Act 2002.

[15] As noted in the CAT's Guide to Proceedings 2015, cases are heard by a tribunal of three persons, save in the case of the fast-track procedure, although certain powers may be exercised by the President or Chairman acting alone (see, s 14 of the Enterprise Act and paras 1.11-12 of the guide). The CAT Guide is available at: https://www.catribunal.org.uk/rules-and-guidance (accessed 27 July 2023).

[16] S 13 and sch 3 Enterprise Act 2002. See also para 1.3 CAT Guide.

[17] Pursuant to s 13(5) Enterprise Act 2002.

[18] The Annual reports are published on the CAT's website (the latest being the report for 2021-2022): https://www.catribunal.org.uk/about/publications.

These special attributes were highlighted by Justice Barling (previously President of the CAT until 2013) in a 2015 transfer ruling:

> 15. The 1998 Act recognised that competition law was an area which justified a specialist court to deal, not just with appeals in cases concerning public enforcement of the competition rules, but also with some private law claims for damages. One obvious feature of competition litigation is the almost ubiquitous presence of expert economic evidence, often of a complex and technical nature. Another common feature, related to the last one, is evidence as to the characteristics and dynamics of specific industries and markets. Mindful of these features, Parliament provided for the specialist competition tribunal to have a multi-disciplinary constitution. In this way panels have the potential to include not just lawyers but also, for example, distinguished economists, accountants or industry experts, selected for each case from the members appointed to the CAT by reason of their knowledge and experience in these areas. Expertise of this kind is of considerable assistance in understanding and resolving the difficult issues which are a common feature of competition litigation. [...]
>
> 16. Furthermore, CAT panels benefit from outstanding logistical and legal support provided by the CAT staff and legal assistants ('référendaires'). This is of particular value in lengthy and complex actions.
>
> **Relationship with the High Court**
>
> 17. In one important respect the CAT has the best of both worlds, in that it is also able to tap into the expertise of the High Court in this field. For many years High Court judges of the Chancery Division have been appointed as CAT Chairmen, and have regularly sat in the CAT. In this way the CAT is in a position to draw on the assistance of experienced judges who have heard competition law cases in both the High Court and the CAT."[19]

The CAT was originally granted jurisdiction only for pure 'follow-on' damages claims arising out of an infringement which had been the subject of a decision by the national competition authority[20] or the Commission.[21] This prevented the CAT from accepting claims not based strictly on the binding parts of the relevant regulatory decision,[22] something which provoked significant satellite litigation and limited the attraction of the tribunal.[23] However, in 2015, the Consumer Rights Act extended the CAT's jurisdiction to all claims for damages, whether based on a prior decision or not (i.e., it now had jurisdiction to hear 'follow-on', 'stand-alone' and 'hybrid' cases).[24] The Consumer Rights Act also introduced opt-out collective

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[19] *Sainsbury's Supermarket Ltd v Mastercard Inc* [2015] EWHC 3472 (Ch). The ruling related to a request to transfer the case from the High Court to the CAT pursuant to s 16, Enterprise Act 2002 and the Section 16 Enterprise Act 2002 Regulations 2015.

[20] At the time of the Enterprise Act, the Office of Fair Trading (OFT) and, now, the Competition Markets Authority (CMA).

[21] Normally, claims could not be commenced until the decision had become final against the relevant defendant, although s 47A(5)(B) provided for the possibility that permission be granted by the CAT to commence proceedings earlier.

[22] Sometimes expressed in terms of being based within the 'four corners' of the decision. This said, there is provision (s 58A Competition Act 1998) for findings of fact in a UK NCA decision to be considered binding in the follow-on damages claim even where they do not form part of the dispositive part or recitals necessary to interpret the dispositive part (ie they do not otherwise constitute a formally binding part of the decision).

[23] This extended, for instance, to the question of whether non-addressees of the decision could be sued in the CAT where they formed part of the same economic unit as the addressee; for example, because it was a subsidiary which sold cartel products during the relevant period. This was the subject of the CAT's ruling in *Emerson Electric Co v Morgan Crucible Company plc* [2011] CAT 4 in relation to a strike-out application by a non-named UK subsidiary of one of the companies fined in the relevant Commission decision. This ruling was prior to the TJUE's ruling in *Sumal* and maybe would have turned out differently if the matter had arisen today.

[24] As well as granting the ability of the CAT to grant injunctive relief (save for proceedings in Scotland). These changes were implemented by sch 8 Consumer Rights Act, which amended the provisions of the Competition Act

proceedings (for consumers and businesses), following the notorious failure of the prior consumer opt-in regime created by the original section 47B of the Competition Act in 2003.[25]

With its 2015 reform, the UK Government sought to convert the CAT into a 'major venue for competition actions in the UK' and underlined its ability as a specialised tribunal to handle complex competition cases effectively:

> 4.11. Since its creation, the CAT has built up its expertise in competition cases and has become familiar with competition litigation. There is now a substantial body of CAT case law on many aspects of substance and procedure in this field. The concept of a specialist competition tribunal or court is recognised internationally as a key strength of the UK regime and the CBI[26] has previously cited the model when calling for a European competition court distinct from the General Court.
>
> 4.12. Additionally, the CAT's system of active case management and preparation, as well as the cross-disciplinary expertise of its membership, means that it is well suited to handling complex competition litigation. By concentrating on essential issues, minimising oral hearings and enforcing timetables, the CAT can ensure costs and burdens are kept to a minimum.
>
> 4.13. Extensive discussion with stakeholders has confirmed this view of the CAT, with the majority of lawyers – whether accustomed to representing claimants or defendants – describing it as a good and efficient institution. Academic and business stakeholders, including the CBI, have also acknowledged the CAT's efficiency and strong case management. [27]

The CAT shares competence in private competition actions with the normal first instance courts - namely, the Chancery division of the English High Court or, where the claim forms part of a broader 'commercial claim', the Commercial Court.[28] Unlike the CAT, these normal courts are able to try competition claims as part of a broader set of claims. Nevertheless, we will focus in this chapter on the CAT, since it offers the state-of-the-art judicial solution in the UK and, since the 2015 reforms, has increasingly assumed the leading role in private enforcement in the UK.

1998 relating to private enforcement: ss 47A (general provision) and 47B (concerning collective proceedings) of the 1998 Act and introduced further new sections (ss 47C to 47E).

[25] Introduced by s 19 Enterprise Act 2002, s 47B provided for consumer claims by specified bodies on behalf of two or more consumers. The only specified entity was the consumer association Which? (pursuant to the Specified Body (Consumer Claims) Order 2005, SI 2005/2365) and the only case brought by Which? (in relation to the UK football replica kit cartel) was an infamous failure due to the low number of consumers that opted into the action (only 130 of an estimated 1.2-1.5 million persons affected), making the cost of the claim significantly higher than the damages granted (finally through a settlement): *The Consumers' Association v JJB Sports plc,* Case No. 1078/7/9/07 in the CAT. See, Civil Justice Council Report 'Improving Access to Justice through Collective Actions' (2008), Pt 6, para 22; and Ros Kellaway, Rodri Thompson QC and Christoper Brown (eds), *UK Competition Law – The New Framework* (OUP 2015), para 8.26.

[26] The Confederation of British Industry.

[27] From the consultation document published by the UK Government's Department for Business, Innovation and Skills (BIS) in April 2012: 'Private Actions in Competition Law: A Consultation on Options for Reform': https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform.

[28] CPR 30.8, CPR 58.1 and Practice Direction – Competition Law – Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of the Competition Act 1998 (White Book Sec B). Both courts now form part of the Business and Property Courts (as of 2 October 2017), a new organisational grouping which has sought to install a greater procedural coherence between a number of specialist courts (see CPR 57A). As a result, in the case of competition law, claims will be issued in the corresponding Business and Property Court Competition List. See, Brealey and George, n 2, p 2 et seq.

7.2. Its procedural regime

The CAT has its own procedural rules (the "**CAT Rules**").[29] The CAT Rules are adopted by the Secretary of State, after consultation with the President of the CAT and any other person he or she thinks fit, pursuant to section 15 (and Schedule 4) of the Enterprise Act 2002. The first set of rules was adopted in 2003.[30] The current rules were adopted in 2015, following the entry into force of the Consumer Rights Act 2015 (which, notably, introduced a fast-track procedure and opt-out collective proceedings for damages claims).[31]

The CAT Rules are accompanied by a Guide to Proceedings,[32] which provides a useful layman's guide to how procedure works in practice. In his independent review of the CAT Rules in August 2014, Lord Justice Mummery, recommended the use and development of the guide in the following terms:

> 39. It is now common for courts and tribunals to supplement Rules of Procedure by preparing and publishing, mainly for the benefit of users, a guide to proceedings explaining how the Rules of Procedure work in practice. The CAT issued an excellent Guide in October 2005.
>
> 40. I recommend, for use in conjunction with the revised Rules of Procedure, the preparation and publication of a new "Guide to Proceedings" in the CAT.
>
> 41. The present Guide was constituted a Practice Direction issued by the President of the CAT under Rules 68(2) of the 2003 Rules. In 64 pages it explains the conduct of proceedings in accordance with the 2003 Rules. It also contains general basic information, such as the CAT's contact details and general matters, such as legal representation in the CAT. Having described the setting up of the CAT and its constitution the Guide proceeds chronologically step by step from commencement to conclusion explaining the requirements at the various stages of the procedure under each jurisdiction. It does so in the context of the general approach of the Rules.
>
> 42. A new Guide will be invaluable in giving practical guidance in a concise user-friendly way for both the parties and for their legal representatives on the conduct of proceedings under the revised Rules. Although the Rules and the procedural rulings of the CAT and the court on the interpretation and application of the Rules must take precedence over the Guide, the value of the Guide is that, whereas Rules are prescriptive, it can give guidance by explaining how the Rules operate in practice, as well as providing important items of factual information for the users. Within the parameters allowed by the primary legislation and the Rules a Guide can also be updated more easily than the Rules can.
>
> 43. The Guide also sets the tone of the CAT for the conduct of proceedings and the parties and their representatives. It fosters a shared co-operative litigation culture by emphasising, for instance, that in all matters users are expected to act reasonably and courteously in accordance with the spirit of the both the Rules and the Guide. It is perfectly possible for the parties and their representatives to co-operate on procedural matters without weakening their respective positions on the legal or factual merits of their substantive cases.[33]

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[29] Currently, the Competition Appeal Tribunal Rules 2015, SI 2015/1648.
[30] The Competition Appeal Tribunal Rules 2003, SI 2003/1372.
[31] It also introduced relevant reforms in the field of the judicial review of public authority decisions, but this is not the focus of our attention in this research.
[32] See n 15 above.
[33] Independent report from Sir John Mummery "Review of the Rules of Procedure of the Competition Appeal Tribunal", August 2014.

While CAT proceedings are not directly subject to the CPR, but rather the CAT Rules themselves, the CAT Rules are nevertheless based on the same philosophy as the CPR, many of the rules are modelled on the CPR and the CAT would generally expect to interpret such rules in the same way as the High Court.[34] Notably, the CAT Rules pursue the so-called 'overriding objective' of the CPR, which is incorporated in almost identical terms in Rule 4 of the CAT Rule, 'General principles'.

8. The Overriding Objective

At this point, it is worth digressing to say a word regarding the overriding objective. It forms the backbone to the CPR and the CAT Rules and offers some invaluable insight into the aims of the modern UK justice system and the process of its realisation.[35] This will become a useful reference point as we go forward.

8.1. The aim and scope of the overriding objective

The overriding objective was introduced, following the 1996 Woolf Report, as the very first rule in the new 1998 CPR. It provides an essential interpretative principle for the whole procedural code. It encapsulates its essential aim. It was introduced in reaction to a series of perceived excesses and inefficiencies in the way civil litigation typically took place in the courts of England and Wales under the previous rules (overly adversarial attitudes, disproportionate expense, unwieldy and lengthy proceedings, excessive disclosure, a failure to enforce procedural directions, the use of expert 'hired guns', a failure to narrow down the key issues in dispute, etv).[36] Those problems, in the words of Zuckerman, 'engendered much cost and delay which put civil litigation out of the reach of most ordinary citizens'.[37]

The overriding objective is defined in CPR 1.1(1) as being to enable the court 'to deal with cases justly and at a proportionate cost'. That objective is then expressly defined to include (CPR 1.1(2)):

> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;

[34] Para 3.2 CAT Guide.

[35] It should be noted that our focus on civil procedural rules in the UK will, in fact, be on England and Wales, since separate rules apply in Scotland and Northern Ireland. By contrast, the CAT's jurisdiction (subject of the previous chapter) is the UK and the implementation of EU rules has been carried out by the UK, as Member State of the EU (until Brexit).

[36] See, in this regard, Robert Turner (Senior Master of the Supreme Court), 'The Proactive Judge and the Provision of a Single Transnational Case Management System and its Associated Procedures' in Andenas, Andrews and Nazzini, *The Future of Transnational Civil Litigation*, n 10, p 74.

[37] Zuckerman, n 4, para. 1.1. Many consider that the problem of excessive costs and complexity continue today; see, for example, Higgins, 'Keep Calm', n 4.

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

In addition, CPR 1.3 provides that the parties have a duty to assist the court to further the overriding objective and Part 1.4 imposes on the court the duty actively to case manage cases to further that same end.

8.2. A new theory of justice

As some commentators have observed, the overriding objective marked a revolutionary modification to the theory of justice applying to English litigation, in which procedural justice came to be seen as a necessary part of substantive justice.[38] The overriding objective underlines the nature of the civil justice system as a public service which not only has the aim of providing timely and fair justice at a reasonable cost to citizens (the effective enforcement of legal rights and obligations and the upholding of the rule of law), but also the obligation to use (limited) public resources efficiently, fairly and proportionately. This latter aspect brings to the fore the need to manage court resources on a particular case mindful of the impact on the system as a whole (the proper administration of the justice system), what Zuckerman has termed the 'systemic' concept of justice.[39] This idea can be most clearly seen in CPR 1.1(2)(e) which refers to allotting to a case 'an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'. Sorabji refers to this as the idea of 'collective proportionality' and identifies the primary policy aim of the CPR as the **equitable access to justice**, that is: 'to secure effective access to the justice system by ensuring an equitable distribution of the court's resources among all litigants'.[40] Proportionality serves as a tool in the hands of the court to achieve this end, tailoring the procedure to the demands of the system and other litigants. In the words of Lord Justice Jackson:

> The essence of proportionality is that the ends do not necessarily justify the means. The law facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby imposed upon others.[41]

The importance of these new principles cannot be overstated. They justify limits being placed on the system's endeavour to discover the truth and impart substantive justice in a particular case (which was the aim of the previous Rules of the Supreme Court). This would now occur where the search for truth would become disproportionate, with the prospect that, at times, this could (justifiably) give rise to 'rough justice' or even wrong results:

> A limit is now placed on the amount of resource individuals and the State can properly expend on securing substantive justice in any particular case. The limit operates in two ways. In some cases it requires the court to refuse to allow a claim to proceed to judgment. It thus denies

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[38] See Laws LJ in *Adoko v Jemal,* The Times, 8 July 1999, CA: 'the proper and proportionate use of court resources is now to be considered part of substantive justice itself' (cited in Zuckerman, n 4, p 20, fn 66); Rix LJ in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551who explained that, in the eyes of the fair-minded and informed observer, 'there is not only convenience but also justice to be found in the efficient conduct of complex civil claims' (para 65).
[39] Zuckerman, n 4, para 1.36.
[40] John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms. A Critical Analysis* (CUP 2014), 136. Collective proportionality is a major subject of the book (in particular, ch 7 'Problems of proportionate justice').
[41] Jackson Report, p 36, cited by Sorabji, *English Civil Justice*, ibid, 207.

> substantive justice in its entirety. In other cases – the majority – it restricts the amount of time and money that is spent on litigation. As such, it reduces the court's ability to achieve substantive justice. By limiting, for instance, the nature and extent of evidence placed before the court, the quality of decision-making is necessarily reduced. In both cases, rather than to secure substantive justice, the system is only able to secure proportionate justice. This limit is necessary because it is the means by which the justice system can properly vindicate rights for the majority of citizens. Rationing does not undermine the provision of justice. It is a necessary condition for it to be effected properly by the State.[42]

At the same time, the Supreme Court underlined in *UNISON*[43] that the value of justice cannot be reduced to a public service function concerning solely the immediate utility to courts users (i.e., litigants) but extends to the essential value of the rule of law for society as a whole:

> The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the 'users' who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.
>
> […] the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.[44]

Accordingly, this role of the justice system in ensuring the rule of law should not be lost from view by the insistence on the proper administration of a public service. In *UNISON*, which concerned a new system of court fees for cases before the employment tribunals, this principle meant that any limitation on the right of access to justice should be justified and necessary for the legitimate goal of the proper administration of justice that the fee system sought to achieve (namely, the redistribution of the cost of the employment tribunals). That is, any restriction on access to justice must be proportionate. The Supreme Court held the system was disproportionately restrictive and breached the right to access to justice under both EU law and English law.[45]

To attain the ends heralded by the principles embodying the overriding objective, the CPR introduced new mechanisms to the civil procedural code applying in England and Wales. Principal among them are the active case management powers of the court to organise the process, keep evidence within proportionate bounds (documentary disclosure and expert evidence, in particular), focus issues between the parties at an early stage and bring the case to trial within a reasonable period and without delays. We will return to case management in

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[42] Sorabji, *English Civil Justice*, n 40, 3.
[43] *R (in the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
[44] Paras 66, 71.
[45] The analysis under EU law is contained in paras 105-17 of the judgment. The Supreme Court adopted a familiar EU-ECHR analysis based on balancing the fundamental right to real and effective access to justice, on the one hand, and proper administration of justice, on the other, using the proportionality principle to measure whether the limits of the right imposed by the new fees were justified by these other legitimate goals. We will return to the matter of the influence of EU law principles of effective judicial protection, access to justice and proportionality on national procedure when we address the Supreme Court's position on collective actions in Ch 9 below.

Chapter 10. The CPR also introduced a new case track system which differentiated simple cases from more complex cases and adapted the corresponding processes accordingly.[46] It also incorporated mechanisms to promote out-of-court settlement.[47] Many other rules (for instance, with regard to disclosure or expert evidence) became infused with the new approach.

8.3. Resistance to change: judges and lawyers

It is a point of special interest that the black letter of the new rules was insufficient to bring about the cultural revolution in civil justice which Woolf had considered necessary.[48] Indeed, such radical changes invariably meet with real practical impediments and may ultimately fail. Humans are conservative (and resistant to change) by nature. Courts and lawyers are (perhaps rightly) especially so.

Many judges in the UK illustrated a tendency to interpret the rules of the new CPR with their old mentality, understanding that the objective of their work was essentially the same as before (to strive for substantive justice on the particular case), albeit the legislator had now required that courts curtail certain excesses in terms of the time and cost of proceedings. Lord Justice May, of the Court of Appeal, observed in 2004 that there was some difficulty among both judges and lawyers to embrace the new philosophy with the zeal (or change of mindset) that was necessary for it to work effectively.[49] Indeed, there were a number of rulings by the higher courts which displayed a positive rejection of the new method or, at least, a profound misunderstanding of its purpose.[50] As is well known, a further review was needed ten years later in 2009-2010 by Lord Justice Jackson. This gave rise to further changes to the CPR and, notably, the introduction of the wording 'and at a proportionate cost' in CPR 1.1 (the so-called 'Mark II' version of the overriding objective).[51] In this way, the central place of proportionality within the new theory of justice was cemented.

Conversely, there were some judges who already sought to make these types of modern adjustments in the application of the old pre-CPR rules, the Rules of the Supreme Court ("**RSC**"), introducing a more active management role to their work. This was the case notably of judges at what is now the Technology and Construction Court or the Commercial Court judges in the High Court.[52] The central importance of the judge's attitude to change is, accordingly, clear.

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[46] The CPR creates three standard tracks: (i) the Small Claims Track (CPR 27) for claims for a value of under £10,000; (ii) the Fast Track (CPR 28) for claims over £10,000 but under £25,000; and (iii) the Multi-track (CPR 29) for claims over £25,000.

[47] Such as, for example, the Pre-Action Protocols (White Book Sec C) or the cost consequences of offers to settle (CPR 36).

[48] See generally on the challenges of change, and what follows here, Sorabji, *English Civil Justice*, n 40.

[49] Sir Anthony May, 'The ALI/UNIDROIT Rules of Transnational Civil Procedure in the Perspective of the New English and Welsh Rules' in *The Future of Transnational Civil Litigation*, n 10, 45-6.

[50] See, for example, judgment of the Court of Appeal in *B v B* [2005] EWCA Civ 237 or the House of Lords in *Moy y Pettman Smith (a firm)* [2005] 1 WLR 581, line of case-law which was reversed, inter alia, in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; *Denton v TH White Ltd* [2014] EWCA Civ 906 (in particular, Lord Dyson, Master of the Rolls, para 81: 'judges have adopted what might be said to be the traditional approach of giving pre-eminence to the need to decide the claim on the merits. That approach should have disappeared following the Woolf reforms'); *Prince Abdulaziz v Apex Global Management* [2014] UKSC 64.

[51] Lord Dyson MR, 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme', speech delivered at the District Judges' Annual Seminar, Judicial College, 22 March 2013.

[52] Turner, 'The Proactive Judge', n 36, 76.

At the same time, it has been observed that the overriding objective is not a simple, individual concept but rather a 'multi-dimensional concept' which 'relies on the application of a number of open-textured concepts, each of which have to be weighed in the balance in order to further a wider public policy objective'.[53] As such, it may be more of an 'intuitive skill' of the first instance court, than a 'scientific device',[54] and, accordingly, one that is difficult of review. Indeed, case management involves the exercise by the first instance court of a discretionary power which will not generally be interfered with by the appellate courts, unless clear mistakes of law or fact have been committed.[55] As a result, it implies a *considerable responsibility for judges* and requires of them a considerable effort and understanding. In addition, many have underlined the need for the judge (or court) to take *control of proceedings from their commencement until their end*, implying that, subject only to exceptions, the same judge (or judges) should remain in charge of the proceeding until its completion (what is known in the US as the 'docket system').[56]

This system requires proper management, in order to ensure coherence, as well as efficiency. This refers both to case management by trial judges in the particular case before them, mindful of the impact on the system of their procedural decisions, but also, in the broad sense, to the development and updating of general policies and guiding principles across the system. This calls, on the one hand, for 'judicial leadership'.[57] In the UK, the broader setting of principles for the system as a whole is the role of the appeal courts, through their review of the lower courts' decisions in exercise of their case management powers and discretionary procedural powers, since they are responsible for the administration of civil procedure.[58] It also calls, on the other, for the development of standards and best practices. Zuckerman makes the points clearly as follows:

> Inevitably, court management of litigation is predominantly case-based, but if satisfactory results are to be achieved, it must be guided by general principles which are designed to achieve standards of efficiency. This can only be done if a coherent and robust set of policies and guidelines for balancing desired outcomes against time and resource constraints are developed.[59]
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> Further, it must be remembered that adequate management of the civil justice system also requires an effective judicial leadership to adopt general policies for the proper management and distribution of resources across the system as a whole, and to continually review the performance of the system as a whole and periodically respond to emerging problems.[60]

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[53] Citations from, in turn, Zuckerman, paras 1.34, 1.40, and Sorabji, n 40, 212.
[54] Turner, n 36, 85.
[55] See *Fred Perry v Brands Plaza* [2012] EWCA Civ 224. Note, however, Higgins's proposals to define proportionality with empirical measures, or at least to ensure, save in the case of precedent-value cases, to ensure costs are only a fraction of the value of the case and, in all events, no more than the value of the case (Higgins, 'Keep Calm', n 4, ch 2).
[56] The importance of docketing was underlined by a chapter prepared by practitioners Damien Byrne Hill and Maura McIntosh, 'The Civil Procedure Rules Twenty Years on – The Practitioners' Perspective' in Higgins, *The Civil Procedure Rules*, n 4, p 8. This is not generally a problem that arises in Spain, where case allocation implies the assignment of a particular court with a named judge (subject to exceptional circumstances or a judge being moved from one court to another). In my experience it can be a real problem in other European jurisdictions, however, particularly those where proceedings can be very lengthy.
[57] Zuckerman, n 4, p 19, fn 62.
[58] *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28 paras 6, 8, 17.
[59] Zuckerman para 1.33.
[60] ibid fn 62.

> Dispute management is necessarily fact-sensitive. At the same time, however, case management decisions and the exercise of compliance powers must be broadly predictable in order to enable the parties to know what is expected of them and what they can expect from the court. Furthermore, parties need to understand the exercise of judicial discretion and the court's likely response to problems that may arise. For example, litigants must have some means of predicting, albeit approximately, how the court would respond to their pre-action conduct should litigation commence, to an application for an extension of time or to failure to perform certain process requirements. Of course, discretionary powers cannot be reduced to a set of hard-and-fast rules, capable of mechanical application. But coherent principles, policies and guidelines for the exercise of discretion are both feasible and necessary. [For examples of such principles reference is made in footnote, inter alia, to: ALI/UNIDROIT, The Principles of Transnational Civil Procedure Principles 11, 14 and 17] In the absence of a well-articulated set of standards, management is likely to become unpredictable, which in turn is bound to give rise to wasteful satellite litigation that undermines the efficiency of the civil justice system. Over the years the court has progressively developed principles and policies for the exercise of management and compliance powers. In this regard, there has been a significant improvement in recent years.[61]

The overriding objective also establishes duties on the parties (and, by extension, their lawyers). This duty includes assisting the court to further the overriding objective (CPR 1.3); for example, by providing the court with information relevant to the progress of the case. It also implies the duty of the parties to *co-operate with each other*. This principle of co-operation between the parties, first enshrined in the new French Civil Procedure Code in the 1970s and reflected more recently also in the Model European Rules, has been described by Zuckerman as 'one of the *most significant cultural changes* brought about by the CPR' (my emphasis). I would certainly agree.

The resistance of UK lawyers to embrace the new principle was highlighted by a judge in the Technology and Construction Court still in 2015:

> 44. It is therefore time to say, in the clearest terms, that parties and their solicitors can no longer conduct litigation in a manner which does not keep the proportionality of the costs being incurred at the forefront of their minds at all times.
>
> 45. It is no longer acceptable - if it ever was - for parties to pursue issues or applications that have no real impact on the issues that are central to the dispute. Further, it is no longer acceptable for solicitors to carry on a war of attrition by correspondence, whether instructed to do so or not: it is the parties who are the subject of the duty in CPR 1.3, not merely their solicitors.
>
> 47. Whilst English law is an adversarial process, that goes to the issues in the case: not to every aspect of the procedure. Parties to litigation, in the TCC at least, are expected to conduct that litigation in the manner that is most expeditious and economical. Bringing the right issues to trial in the most economical fashion, and taking steps to ensure that the costs are kept at a level that is proportionate to what is at stake, is to be at the heart of the process.
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> 48. Unreasonableness, intransigence and the taking of every point must in my view now be regarded as unacceptable, because conducting litigation in that way flies in the face of the overriding objective as it is now formulated. These habits must disappear from the landscape of litigation in the TCC. If they do not, offending litigants must expect to bear the costs.

[61] ibid, Ch 11 (chapter revised by John Sorabji), para 11.5.

> 49. If access to justice is to have any real meaning, then the aim of keeping costs to the reasonable minimum must become paramount. Procedural squabbles must be banished and a culture of cooperative conduct introduced in their place. This will not prevent contentious issues from being tried fairly: on the contrary it should promote it.[62]

Encouraging co-operation between the parties is expressly referred to as part of the court's case management powers in CPR 1.4 and the principle permeates many aspects of the procedural regime. For instance, parties are encouraged to engage constructively with each other, even before litigation commences (through the so-called pre-action protocols which relate to matters such as pre-action correspondence identifying and narrowing the issues, access to key information or settlement).[63] The principle entails agreeing as many aspects of the litigation process as possible; for instance, as regards the scope of disclosure or issues for trial.[64] While evidently not extending to a renunciation to the rights of defence, it also entails not taking procedural points in an unreasonable manner; for example, with regard to extensions of time.[65]

All of the foregoing underlines the fact that, while rules are important and necessary, perhaps as important, if not more important, is the mentality, attitude and understanding of those who are applying the rules. It is necessary to bring about a *new and common culture*, among judiciary and practitioners alike. This implies one thing very clearly: the need for *education and training*. In addition, it entails the need for *transparency*, by which I mean the creation of an ecosystem which ensures open access to, exchange and discussion of relevant rulings, practices and proposals for change.

8.4. Further challenges: logistics and the role of technology

The approach of judges and lawyers are not the only problems which were identified as impeding full implementation of the new theory of justice in the UK. Active case management in the era of complex litigation also requires adequate investment; particularly, in the technology necessary for the courts to be able to manage cases actively and efficiently (namely, up-to-date case management and communications computer systems).[66] Case management systems need, inter alia, to provide an easily accessible record of case files as the cases develop, an electronic platform that can be used to file documents, inform the court of relevant procedural issues, seek directions, organise hearings, arrange for reception of submissions, etv[67] The English system after Woolf has spawned, in the place of multiple procedural applications, enormous amounts of correspondence between parties and with the court, which has to be properly dealt with and organised. Complex commercial cases (and competition is without doubt a case in point) also involve large amounts of documents and data, which need to be properly managed by courts. This includes managing the implementation and control of sometimes sophisticated confidentiality arrangements such as confidentiality rings.

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[62] Edwards-Stuart J in *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC).

[63] There is no particular protocol applicable to competition law claims and the CAT Rules do not include a pre-action protocol. However, the general terms of the Practice Direction – Pre-Action Conduct and Protocols and, in particular, para 6, are applicable. On pre-action protocols and their limited application to disclosure in competition actions, however, see Ch 16.3 in Part III below.

[64] See CPR 31.5(5) on disclosure and Commercial Court Guide (2017), para D.5, for an example of the requirement to agree a list of key issues.

[65] See Zuckerman, n 4, paras 1.93-1.99.

[66] Turner, n 36, p 86; May n 49, p 46.

[67] Zuckerman para 11.35.

Transparency between the parties and with the public in general also implies the need for adequate technology and electronic systems (as well as personnel to manage those systems). The CAT operates a Website which, inter alia, implements the tribunal's objective to publicise its rulings, as noted in the CAT Guide:

> The Tribunal website contains a section where the text of all the judgments, rulings and decisions of the Tribunal can be found, subject to excisions for confidentiality. An unofficial summary prepared by the Tribunal Registry will also be available on the Tribunal website, although the parties should note that by its very nature the summary is intended to be a very brief overview of the Tribunal's decision.[68]

The Website also contains information on the current status of cases, a diary of future hearings, a searchable database of all the CAT's judgments and copies of transcripts of hearings prepared and uploaded by the CAT itself.[69]

9. The CAT's Collective Action Regime and the Influence of EU Procedural Law

Before we move on to the three procedural matters of special interest for our topic, it is useful from a general institutional perspective to consider the CAT's new collective action regime introduced in 2015 and the impact EU law has had on that regime, as reflected in the Supreme Court's seminal judgment on 11 December 2020 in *Merricks*.[70] This offers an example of the creation of new mechanisms to permit adequate access to justice and, hence, the protection of EU competition law rights.

9.1. The new collective action regime

It will be recalled that the collective action regime introduced by the Consumer Act 2015 sought to overcome the failure of the Enterprise Act 2002 opt-in regime to provide a viable mechanism of redress for mass consumer claims.[71] The new regime provides for opt-out, as well as opt-in, collective actions, meaning that the class representative need not have an express mandate from each member of the class to bring the action on their behalf (as must occur in the case of opt-in). Indeed, the represented parties need not be named or identified in the statement of claim. Furthermore, the bringing of class actions is not limited to specified or authorised entities. In this sense, the proposal goes further than the Commission's 2013 Collective Redress Recommendation (which, in fact, appeared after the public consultation in the UK on the proposed measures had ended and, as the UK 2002 regime, proved largely ineffective).[72]

The new collective action regime is confined to competition law claims (under UK or EU law) and bestows exclusive competence on the CAT.[73] The CAT must certify collective actions pursuant to a collective proceedings order (CPO) before they can proceed.[74] The criteria for certification are that it is just and reasonable that the class representative represent the class and that the claims are eligible for inclusion in collective proceedings.[75] Eligibility is defined

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[68] Para 7.131.
[69] Paras 9.2 and 9.55 CAT Guide.
[70] *Mastercard Incorporated v Merricks* [2020] UKSC 51.
[71] A point confirmed by the Supreme Court in its judgment of 10 November 2021 in *Lloyd v Google LLC* [2021] UKSC 50 in the context of a representative procedure pursuant to CPR 19.63.
[72] Ch 6.4 above.
[73] Arts 47A(1) and (2) Competition Act 1998.
[74] Arts 47B(4) and (8).
[75] Art 47B(5).

to mean that: (i) the claims raise similar or related issues of fact or law; and (ii) they are suitable to be brought in collective proceedings.[76] A number of criteria for the Tribunal to consider in that context are set out in the CAT Rules, including the costs and benefits of collective proceedings, the size and nature of the claim, whether the claims are suitable for an aggregate award of damages and the availability of alternative forms of redress (such as a competition authority sanctioned compensation scheme).[77] The final judgment will have binding effect on all the members of the class.[78] Aggregate damages may be awarded[79] and, as confirmed in *Merricks*, these need not be quantified by reference to the individual loss of each member of the class. Crucially, the Supreme Court deemed that the new statutory provisions created a new substantive element to the collective tort which was to be proven under Article 47B: *aggregate harm to the class* took the place of aggregate individual losses that would need to be proven if the claims were treated as a bundle of individual actions for damages for breach of competition law.

As noted in the BIS consultation, and recorded in the Supreme Court judgment in *Merricks*, one of the key objectives of the proposed new system was to ensure effective redress for consumers and SMEs where individual claims were not realistically viable given the amounts involved or simply the prohibitive cost of litigation.[80] That is, it was a question of access to justice. As noted by Zuckerman, the collectivisation of claims also empowers typically small or weak claimants to challenge large corporates whose activity may affect large parts of a market:

> Collective action facilitates access to justice for parties who have an actionable right but no means of prosecuting it on their own. This is especially acute where individual claims are too small to be economically viable on their own. By joining forces, a multitude of litigants may command sufficient resources to proceed and the cumulative value of their individual claims may make the litigation worthwhile. Combining into a group also tends to ameliorate resource and power imbalances between opponents, especially where the group comprises claimants suing defendant corporations, which are themselves collective entities with concomitant advantages stemming from their greater resources, economies of scale and access to knowledge and information. Thus, by joining forces with others in the same predicament, individuals can pool resources and expertise, share the risks of litigation, obtain greater publicity and manoeuvre into a better negotiating position.[81]

In this way, BIS also identified a more effective system of redress as a means of making competition law more effective, thereby reinforcing public enforcement and contributing to economic growth.[82]

9.2. Merricks

Merricks has been much commented and it is not my intention to add to that learned discussion.[83] Rather, I wish to focus on one aspect of the judgment and that is the influence

[76] Art 47B(6).
[77] CAT Rule 79(2).
[78] Art 47B(12).
[79] Art 47C(2) permits the CAT to 'make an award of aggregate damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person'. Whether the claim is suitable for an aggregate award of damages is one of the factors the CAT may take into consideration in assessing suitability, pursuant to CAT Rule 79(2)(f).
[80] *Merricks,* n 70, para 20.
[81] Zuckerman, n 4, para 13.30.
[82] *Merricks*, n 70, para 20.

of EU law on the English Court's application of English procedural law in this area. Professor Mulheron has illustrated in detail the marked divergence in the approach to statutory interpretation of the collective action regime and the CAT's certification function by the different UK courts (CAT, Court of Appeal and Supreme Court) and within the Supreme Court itself.[84] I would like to highlight here the fact that EU law had a material influence in the interpretation of the UK statute which the majority of the Supreme Court finally adopted. Notably, the lower court decisions made absolutely no reference to EU law (other than as regards the underlying breach) but based their decisions rather on statutory interpretation under English law, drawing also on a comparison with Canadian law on which the English regime had been modelled.

Mr. Merricks was the class representative for all UK adults (consumers) who between 22 May 1992 and 21 June 2008 had purchased goods or services from merchants, that sold in the UK that accepted Mastercard payments, and claimed to have suffered harm through the effect of excessive interchange fees (set in breach of EU competition law) which had been paid by merchants to their banks and passed on in the prices consumers paid for those goods or services. It was one of the first such opt-out collective actions to have been brought in the UK and, by far, the largest. The size of the represented class was estimated in the claim form to be over 46 million people and the total value of the claim was provisionally estimated at over 14 billion pounds sterling. By any standard, it was a very broad class and the number of claims 'vast'.[85]

The CAT refused to certify the class at the certification stage.[86] It determined that the claims were not 'suitable' for certification. More specifically, the CAT held that the claims were not suitable for an aggregate award of damages, since it considered that such aggregate damages were incapable of adequate calculation. The tribunal based this finding on two considerations. First, it considered that there was a lack of sufficient data to permit the experts of the class to apply their proposed methodology for quantification on a sufficiently sound basis. Second, they found that the methodology was not based in any way on individual loss and, furthermore, since it would not be reasonably possible to calculate individual loss from the aggregate damages award (since there would simply be too much variability across the class as to individual losses), it would not be possible to ensure compliance with the compensatory principle in the distribution of any aggregate damages awarded to the class members.

The Court of Appeal overturned the CAT judgment[87] and, on appeal, the Supreme Court upheld that ruling (albeit with some differences of reasoning). Lord Briggs adopted the

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[83] See, in particular, Rachael Mulheron, 'A priceless opportunity: class actions post-Merricks v Mastercard' (2021) 1 Mass Claims Journal 49. *Merricks* has been applied by the CAT on numerous collective actions which have reached the certification stage since; at the time of writing, five of the resulting CPOs have also been the subject of rulings of the Court of Appeal: *Le Patourel v BT Group plc* [2022] EWCA Civ 593; *LSER v Gutmann* [2022] EWCA Civ 1077; *MOL (Europe Africa) Ltd v Mark McLaren Class Representatives Ltd* [2022] EWCA Civ 1701; *UK Trucks Limited v Stellantis NV (Formerly Fiat Chrysler Automobiles NV)* [2023] EWCA Civ 875; *Evans v Barclays Bank plc* [2023] EWCA Civ 876.

[84] ibid s 5. The Supreme Court was split 2:2, with the deciding vote being attributed to Kerr LJ who participated in the drafting of the majority judgment but passed away just before the judgment was published.

[85] As observed by Sales LJ and Leggatt LJ, *Merricks,* n 70, para 125.

[86] [2017] CAT 16.

[87] For an in-depth analysis of the case following the Court of Appeal ruling see Rachael Mulheron, 'Revisiting the Class Action Certification Matrix in *Merricks v Mastercard Inc*' (2019) 30 King's LJ 396 (cited by the Supreme Court at para 94 of the judgment).

ruling of the majority. As he noted at paragraph 46 of the judgment, the issue for certification related to the quantification of harm (both at the class and individual level), something which the CAT is especially well placed to assess. However, the CAT erred in law on a number of grounds and this vitiated its decision. I would like to focus on two aspects of the Supreme Court's reasoning and their grounding (in part, at least) in EU law: on the one hand, the nature of the quantification exercise, and, on the other, the relative nature of the suitability test (meaning that the right question was not an abstract one but rather whether the claims were more suitable to be brought in a collective proceeding than in individual proceedings) and the fact that only aggregate, rather than individual, loss needed to be proved.

As to the nature of quantification, having noted the applicability of the 'broad axe', or 'broad brush', approach in damages claims under English law, the Court made reference to the soft law guidance of the Commission, citing specifically the Practical Guide to Quantification at paragraphs 16 and 17. As we have seen earlier, that guidance emphasises the necessarily imprecise nature of damages estimation in competition cases (given the need to predict a counterfactual scenario in often complex market situations) and requires that standards of proof as to quantum under national law not make it practically impossible or excessively difficult to make out a competition law claim.[88] The Court furthermore drew attention to the underlying policy goals of EU competition law: deterrence and the effective right to compensation.[89] It concluded that to exact a higher evidentiary burden than the requirements of best-efforts estimation applied in normal individual claims would be to impede the effectiveness of EU competition law.[90]

As to suitability, it is not clear from the wording of the Act that the test was intended to be a relative one. Indeed, as noted by the minority opinion, the wording of the Act contrasts with the Canadian statute which employs the word 'preferable' and clearly implies (by contrast) a relative test. So how did the Supreme Court come down on the side of the relative meaning of suitability (i.e., that it meant 'more suitable than individual proceedings')? Equally, how did the Court determine that the compensatory principle was not a requisite of damages to be awarded under the collective action regime? The answer to both questions has to do with the principle of access to justice, or 'effective judicial protection' in EU law speak, and the principle of proportionality. As we will see, we are referring here to the positive sense of these terms, i.e., when it is necessary to apply a certain procedural mechanism in order to make access to justice attainable (not disproportionate), as opposed to their negative sense, i.e., when restrictions on access to justice should not go further than is necessary to achieve the legitimate goal of the proper administration of justice. The term disproportionate is omnipresent in the Court's reasoning on these points.

In the first place, drawing a comparison with the Canadian statutory regime on which the UK collective regime had been modelled, Lord Briggs noted the underlying theory of justice (overriding objective) of the two regimes:

> Both operate within a civil procedural framework based upon common law principles and which is guided by a similar form of overriding objective: see eg rule 1-3 of British Columbia's Supreme Court Civil Rules, BC Regulation 168/2009. **Both may be said to serve broadly the**

[88] Ch 6.
[89] *Merricks,* n 70, para 53. Both aspects highlighted form part of the principle of the full effectiveness of art 101 TFEU, as we have seen in Ch 4.
[90] *Merricks* para 54.

> **same statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate**.[91]
>
> (My emphasis added)

Lord Briggs also stressed himself the goal of access to justice:

> Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose.[92]

Going on to address the suitability requirement, Lord Briggs recalled that the new system had been created as an alternative to individual actions where it was unsuitable to pursue individual actions.[93] This was, then, a question of the proportionality of bringing individual actions as compared to collective actions in any given case:

> The pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both **burdensome for the court and usually disproportionate for the parties**. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both for the court and for all the parties. In general, although there may be exceptions, defendants are only interested in the quantification of their overall (ie aggregate) liability. For the claimants the choice between individual or aggregate assessment will usually be a **question of proportionality**.[94]
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> (My emphasis added)

As to aggregate damages, the criteria for the Court was again one of proportionality and access to justice:

> A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be **so difficult and disproportionate**, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just.[95]
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> (My emphasis added)

In conclusion, it is my submission that the Supreme Court's decision in *Merricks* on the correct interpretation of the new collective action regime, reflects (and, in part, explicitly applies) EU law principles of effective judicial protection and the full effectiveness of EU competition rules. As the minority opinion showed, a more standard approach to statutory interpretation under English law could have led to a different, more restrictive result (and, hence, to the refusal to certify Merricks's claim). However, this, arguably, would not have been compliant with fundamental EU procedural law principles. The majority view of the Supreme Court (more or less consciously) applied a more European approach. The *Merricks* case, therefore, offers an interesting reference point; an example of the positive requirements of EU procedural law for Member States to provide real and effective procedural mechanisms for redress in cases of mass claims.

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[91] ibid para 37.
[92] ibid para 45.
[93] ibid para 56.
[94] ibid para 57.
[95] ibid para 77.

10. Case Management

10.1. Introduction and comparison with civil law

As with the CPR, the General Principles in the CAT Rules impose an active case management duty on the court (the Tribunal, in this case).[96] Under the more adversarial RSC procedural rules, the English courts left the pre-trial phase of proceedings largely to the parties and their lawyers. The overriding objective and the CAT General Principles, however, impose a duty on the court to organise and direct proceedings from the start in line with the objective of seeking to ensure that each case is dealt with justly and at proportionate cost.[97] This marks a key change in approach and brings UK civil procedures closer to their European continental counterparts, where court control of evidence, issues or deadlines, among other questions, has tended to be considerably more marked:

> The extent of the court's involvement in the litigation process from the outset is such that the adjudicative task may be said to start as soon as the court undertakes responsibility for management of the case. The pre-trial process is no longer devoted to exchange of pleadings and of evidence between the parties. Rather, decisions must be made regarding the extent of disclosure, and what kind of expert evidence to allow and how many experts to hear, and case management decisions such as these are certainly capable of influencing the outcome. Of course, not every case management decision will affect the outcome, but the scope for influential decisions is sufficiently extensive to justify the conclusion that **the adjudication of disputes is now one continuing process, in which the trial is merely the final stage. This represents a very considerable departure from the traditional common law model of civil adjudication and brings English procedure closer to civil law systems**."[98]
>
> (My emphasis added)

At the same time, the system of case management in the CAT is more focussed and coherent than most of its EU cousins. As we will see regarding Spain in Part III of this work, powers for Spanish judges to direct cases, while existing, are piecemeal and not developed in a distinct, coherent set of rules and principles. Moreover, they are applied by many different judges, giving rise to varying practices - even when the case before them may be identical.

Furthermore, continental systems, and Spain is a case in point, do not offer the same flexibility as the UK rules. The Spanish system is (on the face of it) markedly rigid. However, one of the guiding principles of case management, in the sense we are discussing here, is that the process should be *adapted, to the extent reasonable and proportionate, to the needs of the individual case* (taking into account, furthermore, the impact on the system as a whole):

> The whole of the CPR [as the CAT Rules] is imbued with the notion that the process employed is to be adapted to a case's needs, and the court has extensive powers to ensure that the procedural steps taken are limited to those which are necessary to properly dispose of the particular dispute.[99]

In this way, the CAT Rules offer the possibility of different procedural tracks depending on the type of case: normal cases, less complex cases (Fast-track procedure)[100] and collective

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[96] Rule 4(4).
[97] CAT Rule 4(1).
[98] Zuckerman para 1.89.
[99] ibid para 1.60.
[100] Rule 58.

actions (both opt-in and opt-out).[101] Most importantly, in the current context, it contains a series of powers for the court to manage the case from start to finish. These are set out in general terms in Rule 4, in specific terms for private actions in Rules 55 and 56, as well as in other rules providing specific powers for the Tribunal to make directions (for example, as to evidence in Rule 55). The CAT Guide also dedicates a full section to the CAT's case management powers (Section 7). In addition, all these provisions are set within the CAT's unique specialised institutional framework described in Chapter 7 above, which facilitates the development of coherent practices.

One further general observation can be made before we move on to consider in more detail the CAT's rules and practices in the matter of case management in private enforcement actions. It is that case management in the English courts is, in principle, procedural rather than material. That is, the English system respects the parties' autonomy to determine the scope of their case (the object of proceedings) and how they wish to run it, the court intervening principally on matters of process. This contrasts with the faculty of civil judges, in Spain or, notably, Germany, to intervene in certain material aspects of the case.[102] This said, I believe this difference should not be overstated. In this sense, the 'dispositive principle'[103] which characterises party autonomy is common to non-English systems, including the Spanish.[104] Furthermore, the faculty of civil courts to intervene on substantive matters (for example, to suggest to the parties the bringing of further evidence) is not, in practice, much used in Spain to date. If one considers, furthermore, that significantly more information and evidence is placed before the English courts and that the CAT, in particular, has the ability to direct proceedings to the relevant issues and evidence, this point, in practice, takes on less importance. Nevertheless, we will return to this question in Part III, when we address Spanish law and practice.

10.2. Functions of case management

CAT Rule 4(5) establishes that active case management includes:

> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identification of and concentration on the main issues as early as possible;
>
> (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;
>
> (d) adopting fact-finding procedures that are most effective and appropriate for the case;
>
> (e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
>
> (f) ensuring that the main hearing is conducted within defined time-limits.

Accordingly, the focus of case management is on: (i) narrowing issues and evidence, and (ii) planning for trial. Furthermore, these things should be done as early as possible in the proceedings.

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[101] Pt 5 CAT Rules.

[102] See, Schumann Barragán, 'La gestion y la flexibilidad del procedimiento: ¿un proceso civil convergente con Europa?' s 3.1. (Part I). Zuckerman refers to the power of German courts to discuss with the parties what facts and evidence may be necessary and what the legal issues are under the Zivilprovessordnung s. 139, n 4, p 581, fn 26.

[103] J A Jolowicz, *On Civil Procedure* (CUP 2000), 78.

[104] art 216 LEC.

In addition, and in furtherance of the General Principles, the CAT Rules underline the duty of the parties (and their advisers) to cooperate with each other and with the CAT in the conduct of the proceedings.[105]

Finally, the CAT Rules point to the tribunal's power to facilitate settlement through alternative dispute resolution (ADR) mechanisms and underlines the role of technology in active case management.[106]

CAT Rule 53 sets out a non-exhaustive list of directions that the CAT can adopt in the exercise of its case management powers. These include, in addition to setting time-limits to trial, matters such as: amendments to pleadings, expert evidence, confidentiality rings, disclosure, stays, costs or preliminary issues (that is, issues which can be resolved discretely and in advance, which may narrow or eliminate the issues in dispute).[107] In practice, they may relate also to further issues, such as the consolidation of claims, joint case management, a CJEU referral or a strike-out application.

10.3. Case management and procedure

Case management is primarily structured through so-called 'case management conferences' ("**CMC**"). These are hearings before the CAT at which case management decisions can be discussed with the parties and determined (Rule 54). The CAT Rules contemplate a first CMC, normally to be held as soon as possible after the initial pleadings have been filed.[108] The purpose of that first hearing is to give directions for efficient conduct of the proceedings, including fixing a timetable to trial, clarifying the issues of fact and law in dispute, addressing disclosure, expert evidence and confidentiality issues, and facilitating a possible settlement.

It is noticeable, too, that the parties are fully implicated in this work, pursuant to their general duty of cooperation. As a general matter, parties are expected to try to agree procedural directions. Unreasonable conduct in this regard may have cost consequences.[109] The preparations of the first CMC are illustrative of how the process of co-operation is expected to work. Normally, the CAT will send the parties a proposed agenda setting out the principal issues which it wishes to address, and the parties given a deadline to make written submissions in advance of the hearing (and reach any agreements on procedural matters).[110] As noted at paragraph 7.17 of the CAT Guide:

> Parties are encouraged to reach agreement on procedural issues and to indicate in their written submissions the extent of any agreement and the matters which remain in dispute, so that the CMC can be conducted as efficiently as possible. If there is agreement amongst the parties it may be possible to dispense with the need to hold the CMC, and the Tribunal can proceed to make an order embodying agreed directions.

By way of example from the UK Trucks litigation,[111] the first CMC took place in the proceedings relating to the claims brought by a total of 631 companies from the Veolia, Suez

[105] Rule 4(5)(a); Rule 4(7).
[106] Rule 4(6)(a) and (c).
[107] For example, limitation, applicable law or the legal effects of a prior administrative decision.
[108] Rule 54(2) and (3).
[109] The Court of Appeal held in *Denton*, n 50, that, for example, a refusal to grant a limited and reasonable extension of time on compliance with directions for example would meet with 'heavy cost sanctions' and would be considered a waste of court time (para 43).
[110] Para 7.16 CAT Guide.
[111] Relating to claims brought in the UK for damages arising out of the infringement which was the object of the Commission's decision of 19 July 2016 in Trucks / AT.39824.

and Wolseley groups (together, "*VSW*") on 20 and 21 November 2018.[112] The following directions order, dated 21 November 2018, dealt with: (i) the order that the claims of the three groups be case managed and heard together and that evidence in one claim stand as evidence in the others; (ii) amendments to pleadings (for instance, in order that the claimants specify the scope of their stand-alone claims further to having been granted access to the Commission file); (iii) the parties' position on the scope of the binding effects of the Commission decision (in order to consider the matter for resolution as a preliminary issue, as later occurred); (iv) information to be provided by the claimants on the matter of pass-on (to permit the tribunal to assess how this issue might be best managed); (v) the allegations of the claimants concerning the liability of non-addressees of the Commission decision (in order to permit the tribunal to determine how to resolve that matter, as a matter of law and / or fact); (vi) certain staged disclosure and related confidentiality issues; (vii) the claimant's proposal that the defendants use a joint expert (which was rejected by the CAT). A number of the issues discussed were agreed or narrowed between the parties prior to, or at, the CMC. Agreed orders or draft proposals in correspondence between the parties were submitted to the CAT prior to the hearing, with other relevant materials, in the form of hearing bundles, and accompanied by brief skeleton arguments, as per CAT guidelines and standard CPR practice, all with the aim of facilitating the court's work and focussing the issues in dispute. This was the first of three CMC which have taken place in those proceedings to date.

10.4. The case management of mass claims

Follow-on competition damages claims typically relate to horizontal cartels which may potentially have had market-wide effects. Potentially, therefore, there may be a high number of affected parties who may claim to have suffered harm. Such parties may, furthermore, be at different levels of the supply chain, given that EU law permits claims by any affected party whether they be direct or indirect purchasers or suppliers.[113] These situations raise acute challenges for court systems faced with a huge volume of potentially complex cases. How can such claims be managed efficiently and at a proportionate cost? How does one ensure consistency and substantive justice? This is a matter which has challenged the Spanish court system in recent cartel damages litigation, such as the Trucks litigation. Spain is not alone. It is a challenge faced by all systems around Europe. Despite the existence of a collective actions regime, it is also something that the CAT has also had to grapple with.[114] Its experience offers a number of examples of ways in which the Tribunal has sought to address these challenges drawing on its flexible case management toolbox.

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[112] Cases 1292/5/7/18 (T), 1293/5/7/18 (T) and 1294/5/7/18 (T). That CMC was, in fact, a joint CMC held together with the proceedings brought by four other, more advanced, claimants (namely, Royal Mail, BT, Ryder and Dawsongroup) but was not the first CMC in those proceedings.

[113] Indeed, more indirectly affected parties who can establish a causal link will also be able to claim for damages as the CJEU confirmed in *Otis II*, n 337(Part I).

[114] This is so not only because the UK collective action regime is a recent system and progress was held up by the need to clarify the test for certification (question addressed by the Supreme Court in *Merricks* in 2020), but also because opt-out collective actions may not always be a suitable avenue, or may not be the favoured option for some claimants, as we have seen for example in Trucks: *UK Trucks Claim Ltd v Stellantis NV* [2022] CAT 25, on the CPO applications of UK Trucks Claim Ltd (an opt-out claim) and Road Haulage Association Ltd (an opt-in claim); judgment largely approved on appeal by the Court of Appeal *UK Trucks Claim Ltd v Stellantis NV* [2023] EWCA Civ 875. Even within a collective action, case management will be necessary: for instance, to identify and manage common issues and issues which may affect different groups within a class differently (CAT Rule 88 expressly contemplates these case management powers).

It is quite typical in a case of parallel claims for damages arising out of the same infringement for the CAT to use its power under Rules 17 and 51 to consolidate claims formally in one proceeding. Even more frequent, in practice, is the joint case management of parallel claims. A case in point is the set of claims arising out of the fees charged by banks on Mastercard and Visa payment card transactions (the multilateral interchange fee, "*MIF*", litigation).[115]

According to the CAT's ruling on 2 March 2022, there were at that stage pending before the tribunal, or expected,[116] 74 bundled interchange claims on behalf of nearly 3,000 claimants (represented by four different law firms). Further waves of claims of similar dimensions had been issued in the High Court and had the potential also to be transferred to the CAT in the future. All those claims related to claims by merchants who allegedly paid excessive interchange fees to their banks ('acquirers') which had been set pursuant to the card scheme rules of Mastercard and / or Visa in breach of EU and UK competition law. In parallel, a collective action on behalf of consumers who allege that such excessive charges had, in turn, been passed on to them in the prices charged by merchants was also pending before the CAT (the *Merricks* collective proceedings we have already referred to).

At an earlier stage of the case, the CAT (presided by Sir Peter Roth, the then President of the tribunal) adopted a first set of case management directions, pursuant to which the tribunal ordered that the individual MIF claims against Mastercard and Visa which were pending before it at that time be case managed together.[117] It proceeded to order a sampling exercise on the question of liability (that is, the extent to which the various MIF arrangements subject to the claims constituted a breach of competition law). It stayed the other aspects of the claims (relating to causation and quantum). The sampling exercise entailed the parties seeking to agree a manageable number of claimants whose claims would proceed as sample (or a type of 'test')[118] claims. The parties reached agreement on certain aspects of the sampling exercise, on others not, and the exercise was extended to further claims which came before the CAT following the Order.

A newly constituted tribunal, however, ordered a change of approach just over a year later in March 2022.[119] The CAT ordered that, in place of the sampling exercise, all claims pending before the tribunal should be reactivated in full, any further claims be brought into the same single proceeding to the extent feasible, and common issues for trial be identified across the entire group of claims. A macro collective proceeding has hence been put in motion. A process has been set up between the parties to identify and, to the extent possible, agree a list of issues. The CAT wrote to the High Court and the Commercial Court to facilitate all similar claims being transferred and case managed together in the CAT. Lastly, in order to lighten the multi-party process, technology would be used as much as possible to permit participation in virtual hearings and those parties who chose to sit in the side-lines would be allowed to stay their actions. The CAT gave a number of reasons for this material change of approach. It observed that there was still some disagreement among the parties as to how to

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[115] eg, Case 1310/5/7/19 (T) *Dune Group Limited v Mastercard Inc* and related cases, available at: https://www.catribunal.org.uk/cases/13105719-t-dune-group-limited-others (accessed 27 July 2023).
[116] These referred to claims issued in the High Court which the claimant law firm had indicated in correspondence to the CAT that they would seek to have transferred to the CAT.
[117] Order of 2 February 2021 in Cases 1306-1311/5/7/19 (T) and 1349/5/7/20 (T).
[118] As noted in the Civil Justice Council Report, 'Improving Access to Justice through Collective Actions' (2008), Pt 2, paras 2 and 3, English law does not have a statutory or formal 'test' case mechanism, such as that which exists in Austria or Germany. The sampling exercise is a procedural, case management tool.
[119] Order of 16 March 2022.

organise the sampling exercise and the increased number of parties now involved in the litigation would make such agreement more difficult. This also meant that not too much time would be wasted by a change of approach. Above all, the CAT raised the concern that common issues should be resolved once and for all and not be subject to extensive re-litigation and, while recognising the practical force of sample claims for the overall litigation, it felt that this left some uncertainty. The CAT did not rule out sampling to deal with certain issues once they were identified and noted that it would have to take a proactive approach to control disclosure and not let it get out of hand.

By contrast, in the largest of the Truck claims currently pending before the CAT (aside the Road Haulage Association collective action),[120] the sampling approach is being used. This is the case of the VSW proceedings. There, following the third CMC which took place on 4 and 5 October 2021, it was agreed that a number of test claims be agreed (these were subsequently determined by the CAT's Directions Order of 3-4 March 2022). Disclosure and the trial (set for 28 weeks commencing in April 2024) would be limited to those test claims.[121] Conversely, and despite certain concerns around repeating trials on the same facts and law (and the impact of one ruling on another), the CAT decided in Trucks to split the leading individual cases into three separate trials: 1. the *Royal Mail / BT* trial (April-June 2022);[122] 2. the *Ryder / Dawsongroup* trial (March-September 2023);[123] and 3. the *VSW* trial (April–November 2024).[124]

In the current context, it is worth saying a word about the CAT's Umbrella Proceeding Practice Direction of 6 June 2022.[125] This practice direction deals with a matter addressed in Article 15 of the Damages Directive, namely the problem of ensuring consistent decisions in relation to pass-on where related claims are brought at different levels of the supply chain. This issue, as has already been noted, arises in the ongoing MIF litigation before the CAT. The claimants in the individual merchant claims allege that they have not passed on any harm to consumers, whereas the claim of consumers in the Merricks collective action is precisely that harm has been passed on to them by the merchants. Mastercard itself adopts contradictory arguments in the two separate proceedings. The practice direction contemplates the CAT ordering that umbrella proceedings be ordered which would deal with such a matter in the so-called host proceedings as a common (or 'ubiquitous') matter, the resolution of which would be binding in those host proceedings. Indeed, the first use that has been made of this new practice direction has been in relation to this thorny aspect of the interchange litigation. Accordingly, on 4 July 2022, the CAT designated the Merricks collective action and the merchant individual actions[126] as host proceedings subject to umbrella proceedings which would determine the precise method by which pass-on was to be determined in those proceedings.[127] This is, to my knowledge, the first example in Europe of a specific measure adopted to meet the objective set by Article 15 of the Damages Directive. It illustrates the huge benefits of having one specialised court with broad case management powers to address practical problems in real and effective ways.

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[120] Case 1289/7/7/18 *Road Haulage Association Ltd v MAN SE*.
[121] Order of 2 February 2022.
[122] Judgment was handed down on 7 February 2023, *Royal Mail Group Ltd v DAF Trucks Ltd* [2023] CAT 6.
[123] The trial dates were vacated following agreement between the parties.
[124] At the time of writing, the plaintiffs in these cases have dropped most of these actions following an agreement between the parties to the proceedings.
[125] CAT Practice Direction 2/2022 on Umbrella Proceedings.
[126] Such as *Dune*, n 115.
[127] Merchant Interchange Fee Umbrella Proceedings, Case 1517/11/7/22 (UM).

Finally, a discussion of the management of mass claims would not be complete without a reference to their management through the new collective action regime. As underlined by the Supreme Court in *Merricks*, opt-out collective actions may be the only feasible way for multiple small claims to be brought. Accordingly, the availability of properly regulated opt-out (as well as opt-in) collective actions is a necessary part of a comprehensive procedural framework for private enforcement of competition law. The task of the gatekeeper in managing access to that system (the certification of collective proceedings) is key and this now forms a central part of the CAT's case management tasks, albeit in a broad sense.[128] In particular, at the certification stage, the CAT will need to decide not only whether the proceedings can proceed as collective proceedings at all, but also whether they should proceed as opt-in or opt-out proceedings and, in the case of competing claims, which should proceed. The CAT has already adopted decisions on competing opt-out actions (Forex)[129] and competing opt-in and opt-out actions (Trucks).[130]

11. Disclosure

11.1. What is disclosure?

Disclosure, or discovery as it used to be known, has its roots in the common law adversarial system. There the onus is on the parties to identify facts and produce evidence. Moreover, they are to have completed that exercise well in advance of the single, and often lengthy, trial hearing which characterises English proceedings.[131] Given that relevant information will often be in the hands of the opposing party who may not want to give such information willingly, especially if it is detrimental to its case, a compulsory procedure has been devised. Disclosure contributes to achieving fairness between the parties who will be playing 'with all the cards face up on the table'.[132]

So-called 'standard disclosure' in English litigation includes not only the documents upon which each party seeks to rely, but also extends to documents which are adverse to its own case or support its opponent's case.[133] Standard disclosure does not extend to so-called 'train of enquiry' documents (which was permitted pursuant to the *Peruvian Guano*[134] test applied under the previous RSC rules). Parties are required to carry out reasonable searches for documents falling with the scope of standard disclosure[135] and disclosable documents are

[128] Certification is regulated in CAT Rule 79 and is not, strictly speaking, a matter of case management. Specific collective proceeding case management matters are regulated in Rule 88 (above, n 114).
[129] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank plc* [2022] CAT 16, in the so-called 'carriage dispute' between the competing opt-out actions of class representatives Michael O'Higgins FX Class Representative Ltd and Mr Phillip Evans. The CAT refused to certify either of the actions as an opt-out action, deciding rather that the Evans action should proceed as an opt-in action. The Court of Appeal ruled that the action should proceed as an opt-out collective action: *Evans v Barclays Bank*, n 83.
[130] *UK Trucks Claim Ltd v Stellantis NV* [2022] CAT 25. The CAT there decided in favour of the opt-in proceedings and did not permit the opt-out claim to proceed. The Court of Appeal confirmed that decision in *UK Trucks Limited v Stellantis*, n 83.
[131] See, for example, K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998), Ch 18, pts II and V. In competition cases, it is not unusual for a trial to last several weeks or months. This is unheard of in Spain, where a trial will not normally last more than several hours and seldomly will extend to various sessions on more than one day.
[132] See *Naylor v Preston Area Health Authority* [1987] 1 WLR 858, p 967.
[133] CPR 31.6.
[134] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55.
[135] CPR 31.7.

documents 'which are or have been in [the party's] control'[136]. Reasonableness in this context refers to questions of proportionality such as the number of documents involved, the complexity of the proceedings, the expense of retrieval and the likely significance of documents that may be found.[137] Standard disclosure is carried out by the exchange of a list of documents that have been identified during the searches.[138] The list is accompanied by a disclosure statement confirming the compliance with the party's disclosure obligations and justifying any limitations it seeks to apply. Limitations may relate, for instance, to the scope of disclosure (e.g., where elements are claimed to be disproportionate), the searches to be carried out (in light of the reasonableness criteria), or legal restrictions to the right of inspection (e.g., legal privilege). The counter party or parties will then be granted an opportunity to inspect (and obtain copies of) the disclosed documents, typically in a space of 7 days from disclosure[139] and this will normally take place in the respective lawyers' premises.

The requirement within standard disclosure to disclose documents which are unfavourable to the party's own case, or helpful to its counterparty's case, are categories of document which are not generally required to be disclosed in continental civil procedural systems. At most, general civil procedural rules in continental systems contemplate specific disclosure of identified documents which can be proven to be in possession of the counter party.[140] But there is generally no duty to search for documents which could assist your counterparty and parties are essentially entitled to choose the documents on which they seek to rely (and which they must produce in evidence). Indeed, continental lawyers question how such a system of volunteering helpful evidence to your opponent could possibly be consistent with a lawyers' duty to its client or, moreover, be enforced.[141] Nevertheless, under English law, solicitors are under a duty to ensure that their clients are aware of their disclosure obligations (for example, as regards searches) and, inter alia, to take steps to ensure the client preserves disclosable documents from the moment litigation is contemplated (for instance, freezing the destruction of documents under a company's standard document retention policy). If a solicitor becomes aware of a refusal by his or her client to comply with its disclosure obligations, the solicitor may have to withdraw from representing that client or notify the court. Failure of a party to comply with its obligations may, furthermore, lead to adverse cost orders. The concepts clearly raise some cultural challenges.

11.2. Challenges and reform

Problems associated with the excesses of English disclosure have for a long time been recognised and highlighted in the UK (notably, in Woolf's Interim Report in 1995).[142] These problems include the excessive cost of disclosure. They also refer to abuses involving unreasonable requests for disclosure (used as a litigation 'weapon') or the tactic of parties to inundate their opponents with material of marginal relevance. Despite the CPR's focus on proportionality, the problems continued at the time of the Jackson Report in 2009, due largely it would seem to the enormous growth of electronic disclosure since Woolf's

[136] CPR 31.8.
[137] CPR 31.7(2).
[138] CPR 31.10.
[139] CPR 31.15.
[140] For example, pursuant to art 328 of the Spanish LEC.
[141] See, in this regard, Matthews and Malek, n 11, para 1.26.
[142] Sir Harry Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Lord Chancellor's Dept 1995). See, in particular, ch 21. Woolf also refers to the previous Heilbron / Hodge report of June 1993 which identified the costs of discovery as a barrier to access to justice.

review.[143] As a result of the Jackson reforms in 2013, a more tailored approach to disclosure was introduced for multi-track proceedings. CPR 31.5 now required parties to multi-track proceedings to prepare and coordinate disclosure prior to the first CMC, and, importantly, assess its cost. It also allowed the court to adopt bespoke orders. The menu of possible orders made available to the court includes disclosure by issues, disclosure in stages or disclosure of documents upon which the parties rely together with limited specific disclosure from the counter-party.[144] Nevertheless, in practice, judges have reportedly tended by default to continue to order standard disclosure causing concerns about disclosure's enormous cost and perceived excesses to continue.[145]

More recently, in 2019, a Disclosure Pilot was initiated in the Business and Property Courts of England and Wales pursuant to the new Practice Direction 51U. This was adopted as a permanent new mechanism in the Business and Property Courts in October 2022: Practice Direction 57AD.[146] The new practice direction has sought to instil a more proportionate approach to disclosure and avoid the courts' automatic resort to standard disclosure. According to the Chancellor of the High Court, Sir Geoffrey Vos, the pilot scheme represented a (further) 'culture change' to the management of disclosure in proceedings in England and Wales.[147] In the words of the Disclosure Working Group:

> The unanimous view of the Working Group was that a wholesale cultural change is required and that this can only be achieved by the widespread promulgation of a completely new rule and guidelines. There will need to be a change in professional attitudes and a shift towards more pro-active case management by judges. The proposal (in very broad summary) is that there would be no automatic entitlement to search based disclosure and the court would only make an order for what is to be termed 'extended disclosure' if there has been full engagement between the parties before the CMC. An order for extended disclosure would be tailored to the issues in the claim. The new approach is designed to be more flexible than the current Part 31 and to reflect developments in technology.[148]

The new regime scheme contains a number of interesting aspects. First, as in many continental proceedings (and Spain is a case in point), the parties must disclose with their respective statements of case the key documents on which they rely and which are necessary to enable the other parties to understand the claim or defence.[149] This is known as Initial Disclosure. A somewhat weaker version of this requirement is also contained in the CAT Rules.[150] In addition, once proceedings have commenced, the parties must disclose known adverse documents (that is, documents the existence of which they are aware,

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[143] See Jackson Report, 275, 366. Hollander, n 11, para 7-03, identifies e-disclosure as 'the single factor which has more than anything else added to the cost of litigation in recent years'.
[144] CPR 31.5(2)-(8).
[145] See Matthews and Malek, n 11, 23. On the continued prevalence of standard disclosure in commercial litigation, see Jackson LJ, *Review of Civil Litigation Costs: Supplemental Report* (HMSO 2017), 35, and the press announcement of the working group created to review the disclosure rules, 31 July 2018, para 4: https://www.judiciary.uk/wp-content/uploads/2018/07/press-annoucement-disclosure-pilot-approved-by-cprc.pdf. The matter of moving away from courts applying standard disclosure by default towards choosing from a series of disclosure options to further the overriding objective, under CPR 31.5, was something which still required judicial clarification even in 2016; see *Positec Power Tools v Husqvarna* [2016] EWHC 1061 (Pat), a patent case, paras 21-23.
[146] PD 57 AD – Disclosure in the Business and Property Courts.
[147] *UTB LLC v Sheffield United Ltd* [2019] EWHC 914 (Ch), para 75.
[148] 'Proposed Disclosure Pilot Briefing Note', 2 November 2017, para 5; available at: https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf).
[149] PD 57AD.5.
[150] Rule 30.

without it being necessary to carry out a search to discover their existence). This duty forms part of the overall duties of the parties and their lawyers in relation to disclosure. Those duties are set out in clear and broad terms in Practice Direction 57AD.3, extending in the case of legal advisers to the requirement to preserve documents in their control which may be relevant to any issue in commenced or contemplated proceedings. Any disclosure beyond Initial Disclosure is referred to as Extended Disclosure in the Practice Direction. Extended Disclosure refers to additional disclosure in relation to issues which are identified as being appropriate for disclosure and which will, if ordered, be tailored proportionately to the issue, taking into account the sorts of factors which can be seen in the CPR in the context of disclosure searches (CPR 31.7) or more generally in the overriding objective (CPR 1.1).

For an outsider, the rules of the pilot scheme may smack of yet further complexity. However, this is a criticism any continental lawyer might make of the standard disclosure rules themselves and, indeed, the CPR in general. Section A of the White Book itself, dedicated to the CPR, already exceeds 3,000 pages.[151] Be that as it may, many English practitioners initially complained quite strongly that the increased array of tailored solutions offered under the Disclosure Pilot increased, rather than decreased, the cost of disclosure. The system became, they say, more complex and excessively unstandardised.[152] Indeed, it seems that the scheme may suffer from an overzealous regulation which, while laudable, may not be altogether practical or effective. For instance, it seeks to upfront disclosure issues at a procedural moment when such depth of understanding of the case may not be reasonably possible (or necessary) and to design all the details of what is a very variegated process making for an overly complex regime. Nevertheless, the new regime was finally adopted pretty much wholesale with a general consensus, it seems, that the earlier engagement of parties and close judicial control required by the new PD 57AD would be effective in making disclosure a more effective and proportionate exercise and reducing a more drawn-out and reiterative process.[153] Given certain similitudes with the concepts underlying the new EU disclosure mechanism, the new UK regime also potentially offers a useful reference point for continental systems seeking to incorporate and apply the new EU regime.

11.3. The role of case management

Whether the CPR 31 system of disclosure or the new PD 57AD disclosure regime apply to any given case, what is eminently clear is that these modern systems of disclosure in England and Wales rely heavily on case management. As noted by Zuckerman the effective implementation of a proportionate and flexible disclosure regime (as sought by CPR 31.5 and now PD 57AD) 'cannot be completely resolved by rules'.[154] Rather, a 'continuing effort is required by both judges and legal representatives, in order to ensure that a correct balance is

[151] These are contained in White Book, Vol 1, and include the CPR, the PD and other relevant procedural instruments, plus commentary. This does not encompass the procedural guides contained in White Book, Vol 2, which number a further over 3,000 pages.
[152] Byrne Hill and McIntosh, n 56. According to Hollander, para 8-10: 'it is hard to think of a procedural innovation which has encountered greater opprobrium from the profession than the Disclosure Pilot. The profession simply hate it.' Hollander notes that the profession in an overwhelming majority found that the pilot had increased costs and the burden on the court.
[153] See, for example, John Tillman, Emma Childs, Amy Harding, 'English court disclosure pilot made permanent' (Hogan Lovells – Engage. Legal insights and analysis, 3 August 2022) < www.engage.hoganlovells.com/knowledgeservices/news/english-court-disclosure-pilot-made-permanent>.
[154] Zuckerman, n 4, para 15.11.

kept and that the new rules achieve the hoped-for improvements'.[155] Both of the key aspects of case management we have referred to earlier play an important role in this regard if they are to work: (i) active court control, and (ii) good faith cooperation of, and between, the parties.

As to court control, it should be noted that one of the fundamental changes brought about by the CPR in 1998 was that disclosure ceased to be an automatic process between the parties and now required an order by the court. The court is granted broad powers to order different types of disclosure. It may break disclosure down into different pieces (stages or issues). It may choose between various possible types of tailored disclosure order. It must also actively manage the process. At all times, it must act to further the overriding objective. While a court order is necessary, however, it is worth noting for continental readers, that disclosure can still be assumed to occur in commercial multi-track proceedings and a fortiori in any complex competition litigation. That is, it is standard practice (so, this is still very different to 'European' disclosure where disclosure is not currently the norm, but a right and possibility). A separate question is the scope and timing of disclosure, which is something now to be closely managed by the English court. As noted in the previous discussions, this is increasingly to occur earlier (and the exercise thereby 'upfronted').

Party cooperation is the other part of the equation. As already noted, CPR 31.5 provides for a series of obligations as between the parties and a specific party-led process which is to take place prior to the first CMC. The purpose of these requirements is that the scope and cost of disclosure be narrowed and agreed as far as possible by the parties before the court intervenes. Where the parties reach complete agreement under terms which are approved by the court, disclosure may, indeed, be ordered according to those agreed terms without the need for a hearing.[156] This process of cooperation is developed further in Practice Direction 31B to address the specific challenges of electronic disclosure, where cooperation as to the scope of searches, keywords to be used, custodians enlisted, etc. take on an enormous importance.[157]

The problems of the lack of adequate cooperation between the parties is a matter which has warranted judicial chastisement of parties and their lawyers on a number of occasions, including quite recently in the context of the Disclosure Pilot. As highlighted in the Third Interim Report on the monitoring of the pilot prepared by Professor Mulheron, Sir Geoffery Vos has insisted upon the need for parties and their lawyers to change their attitude to disclosure and adopt a cooperative, not an adversarial, approach:

> I do wish to emphasise the need for a high level of cooperation between the parties and their representatives in agreeing the Issues for Disclosure and completing the DRD [Disclosure Review Document]. The Disclosure Pilot is built on cooperation as its terms make clear (see [2.3], [3.2(3)], and [20.2(3)]). This is not intended to be mere exhortation.

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[155] ibid. Zuckerman goes on to add: 'To this end, the court has considerable flexibility in defining the scope of disclosure and managing the process. Indeed, there is a renewed emphasis under the pilot scheme for the court to take on a robust and proactive role in making orders for disclosure as part of its duty to actively manage cases. Depending on the circumstances of an individual dispute, it may direct narrower or broader disclosure, as a whole or in relation to specific issues. The court's discretion in relation to disclosure must be exercised in line with the overriding objective and in accordance with the principles of procedural fairness.'

[156] CPR 31.5(6).

[157] See *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) for an example of the very material negative economic consequences of a failure by a defendant to seek to agree keyword searches with the counterparty and the court's stiff criticism of the same.

> It is clear that some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable, and parties can expect to be met with immediately payable adverse costs orders if that is what has happened. No advantage can be gained by being difficult about the agreement of Issues for Disclosure or of a DRD, and I would expect judges at all levels to be astute to call out any parties that fail properly to cooperate as the Disclosure Pilot requires.
>
> The Disclosure Pilot is intended to operate proportionately for all kinds of case in the B&PCs from the smallest to the largest. Compliance with it need not be costly or time-consuming.[158]

11.4. Competition law

As noted at the beginning of this chapter, the developments in the area of competition law take on a special relevance in the context of our discussion, not only as a factor for innovation in many continental systems but also as a factor of adaptation (and perhaps simplification) for the UK. In the UK, the area of competition law, and disclosure specifically, is marked by the rules adopted pursuant to the Damages Directive: namely, Practice Direction 31C of 31 January 2017 (applicable to cases in the High Court) and the CAT's Practice Direction relating to Disclosure and Inspection of Evidence, adopted on 14 March 2017 (applying to proceedings in the CAT). These rules establish a system of disclosure based on: the principle of proportionality, motivated party requests and reasoned court orders (the key elements of the system contemplated by the Directive). In stark contrast to the heavy and detailed regulation characteristic of CPR disclosure (including CPR 31 and the Disclosure Pilot), these rules offer a light, principle-based framework, more typical of EU and continental European legislation.

The new competition law system for disclosure is being led and developed principally by the active case management decisions of the courts trying competition cases (in particular, the CAT).[159] We turn to this practice now by reference to a number of recent cases, first, in connection with requests for access to the administrative file of the competition authority, and, second, inter partes disclosure.

a) Access to the file

The High Court ruled on a request by four groups of Trucks claimants (VSW and Ryder) for access to the Commission's administrative file in July 2018.[160] The court (Justice Roth) considered the application of the Directive and received submissions from the Commission.[161] The parties' request was for a copy of the whole administrative file save for documents which were either irrelevant for the proceedings (for example, because they related only to countries or products which were not a subject of the claims) or subject to

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[158] *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch), paras 53-55, cited in Prof Rachael Mulheron, 'Third Interim Report - An Analysis of Questionnaire Feedback from Legal Practitioners' 25 February 2020.

[159] A relevant number of competition cases are filed initially before the High Court and then subsequently transferred to the CAT. Trucks is a case in point, as is the MIF litigation. Accordingly, some initial disclosure rulings have taken place in the High Court before the matter was taken up by the CAT.

[160] *Suez Groupe SAS v Fiat Chrysler NV*, *Veolia Environnement v Fiat Chrysler NV*, *Wolseley UK Ltd. v Fiat Chrysler NV, Ryder Ltd v MAN SE* [2018] EWHC 1994. These proceedings, following their transfer to the CAT, were jointly case managed as the *VSW* proceedings, Cases 1292-4/5/7/18 (T), on the one hand, and the Ryder action was jointly managed with that of the Dawsongroup, Cases 1291 and 1295/5/7/18 (T), on the other. The claims were jointly case managed for some time along with the joint *Royal Mail / BT* proceedings, Cases 1284 and 1290/5/7/18 (T).

[161] Copies of the disclosure requests had been served on the Commission pursuant to PD 31C, para 2.4, which gives practical effect to the possibility contemplated in art 6.11 Directive for the Commission to provide observations on any request for access to documents on its administrative file.

legal restrictions (such as, the leniency statement of the leniency applicant, MAN). A similar order had been made in an earlier Trucks case, in favour of the claimant there, Royal Mail, but, by contrast, just prior to the deadline for transposition of the Damages Directive.[162] The Commission considered that the VSW / Ryder request was disproportionate and should not be granted under the Directive. The court disagreed, however, and ordered disclosure in similar terms to the earlier *Royal Mail* order; i.e., access to the whole file save for irrelevant or non-accessible material.

The court in *VSW Ryder* considered the application of the Directive disclosure regime.[163] Justice Roth underlined the purpose and spirit of the new rules, which were aimed to offer proportionate assistance (in the form of access to information) to those seeking damages for competition law breaches where no effective mechanisms had, generally, existed before:

> As European legislation, I think it is important to give the Directive a purposive interpretation. It was introduced in order to enable disclosure to be effected to assist claims for competition damages, particularly in the many jurisdictions across the EU where no disclosure, or no effective disclosure, was possible in civil damages claims (see recital 15), but at the same time was concerned to limit such disclosure so that it is not too expensive, burdensome or intrusive. It was not intended that it should usher in disclosure battles as a tactical game to be engaged in at interim stages of litigation, so as to prevent the effective pursuit of damages claims.

The Directive underlines the need for specificity in requests for disclosure. Article 5.2 defines disclosure as access to 'specific items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible' and Article 6.4(a), the specific rule applying to access to the file, requires courts to consider 'whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a Competition Authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority'. However, the English court did not consider that these requirements mandated only specific disclosure, or very tightly defined disclosure, nor that they excluded more general requests in appropriate circumstances.

On the facts of the case, the court considered that, despite being non-specific, the request was proportionate and could be granted under the terms of the new Directive disclosure regime. It did not amount to a mere 'fishing expedition', something expressly vetted by the Directive. Roth underlined the fact that the infringement in question was of a secretive nature, that the Commission decision was a reduced-form settlement decision (containing limited information on the operation of the cartel) and, furthermore, that the operation of the cartel was relevant for the damages claims. Citing the CAT's earlier disclosure decision in *Peugeot v NSK*,[164] as well as *Royal Mail*,[165] the court agreed that 'it is relevant for the claimants to seek to understand, in as much detail as possible, the way the cartel worked and was implemented and policed', in order, inter alia, to assess the impact of the infringement and the quantum of harm.[166]

The court also considered that it was essential to ensure a consistent approach to similar claims in order to avoid inequality among claimants. While the Royal Mail claim was in

[162] Order of Rose J of 18 December 2016 in *Royal Mail v DAF*.
[163] *VSW Ryder* [2018] EWHC 1994, n 160.
[164] *Peugeot SA v NSK Ltd* [2018] CAT 3.
[165] Order of Rose J of 18 December 2016; *VSW Ryder*, n 160, paras 8, 21-22.
[166] *VSW Ryder*, ibid, para 30.

separate proceedings which had not been consolidated with the proceedings before the court in *VSW Ryder*, the court considered nonetheless that the proceedings before it arose out of 'the same facts concerning infringement' and, in addition, that 'the essential issues for the claimants in seeking to understand how the cartel worked and the potential effect on pricing are identical'. Accordingly, a consistent approach should be ensured.

Finally, the court noted that the disclosure order would not pose material costs to the defendants, since the materials had already been prepared and disclosed by DAF in the *Royal Mail* proceedings. In other circumstances, it may have been appropriate for the defendants to review the file and propose categories of disclosable documents themselves. However, in this case, in light of all the considerations already noted, the court ordered that the defendants' review of the file should be limited to excluding from disclosure only documents, or categories of documents, that they considered clearly irrelevant, providing a reasoned explanation to that effect.

One additional observation in the High Court's ruling is worth drawing to the reader's attention. Rather unusually, Justice Roth dedicated the last part of his judgment to explaining that the order did not prejudge any similar requests in any other jurisdiction. This is perhaps obvious as a matter of law. However, it seems clear that the judge was concerned with the potential practical impact of his decision in other Trucks proceedings across the EU. The decision concerned access to the Commission file, applying the Directive's disclosure rules, in a claim pursuant to Article 101 TFEU. That is, the case had a clear EU relevance. Furthermore, the fact that DAF had already prepared a version of the file for disclosure could become a relevant practical consideration for courts faced with requests for access to the file in any future Trucks proceedings in the EU. Roth underlined one particular factor for consideration, no doubt alerted to the concern by the defendants. This was the issue of confidentiality. He underlined the availability of confidentiality rings in the UK, whereas he was under the impression that such guarantees may not be available in 'quite a number of Member States'. Whether that is really a concern given the obligations on Member States under the Directive must be seriously questionable. Rather, it seems to me that the awareness that decisions on a pan-European case like Trucks, where courts are trying similar claims based on common underlying facts under a common legal framework, have relevance for the overall litigation is an exercise in pragmatism, which is moreover potentially required by the objective to ensure consistent application of EU competition law (including the new disclosure rules).

b) Inter partes disclosure

Beyond access to the file, the main focus of disclosure requests in competition cases is inter partes disclosure relating to both factual evidence, for instance about the operation of the cartel or price-setting, and what might more strictly be termed 'economic disclosure'.[167] By economic disclosure, we refer to economic and financial data required by experts to carry out their analyses of harm (overcharge, undercharge, pass-on, loss of sales, etv): e.g., prices, costs, margins, market shares, profitability, etc. As already noted, factual evidence, will invariably be important for expert analysis in order to determine market dynamics and company behaviour, both in normal 'counterfactual' circumstances and in the allegedly distorted circumstances of the infringement. Accordingly, requests for disclosure of factual

[167] In stand-alone cases, disclosure may also relate to evidence of the existence of the infringement.

evidence may also be relevant for quantification and be driven by the requirements of experts.

By its ruling of 15 January 2020, the CAT set out the broad terms under which it proposed to address disclosure across all the Trucks litigation.[168] While expressly acknowledging the relevance of the CPR rules and practice to its own practice under Rule 60 and the Disclosure Practice Direction, the CAT here set out its own particular approach to disclosure and it is therefore of particular relevance. It began with the following general points of relevance to inter partes disclosure:

> (1) Orders for standard disclosure will not in general be made.
>
> (2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.
>
> (3) A strong justification would be required to make any order along the lines of the 'train of enquiry' test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55 at 63. An example where train of enquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.
>
> […]
>
> (6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.
>
> (7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:
>
> (a) the nature of the proceedings and the issues at stake;
>
> (b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;
>
> (c) the cost and burden of providing such disclosure;
>
> (d) whether the information sought can be obtained by alternative means or be admitted; and
>
> (e) the specific factors listed in r. 4(2)(c).

In sum, the CAT held that disclosure should be specific, relevant and proportionate, rather than standard or general.

Moving to the question of economic disclosure, the CAT recalled the issues in dispute in the proceedings: namely, causation and quantum (i.e., the effects of the infringement in question and, eventually, damages). These were the issues to which any disclosure should be related (not, for instance, the existence or scope of the infringement). It, furthermore, highlighted the nature of the proceedings. By this, it referred to the fact that the estimation of harm (entailing a hypothetical counterfactual or 'but for' scenario) is a necessarily inexact exercise (as averred by the Commission in its Communication on Quantifying Harm); and, in addition, that the principle of proportionality must be obeyed in determining evidentiary

[168] *Ryder Ltd v MAN SE* [2020] CAT 3.

demands and, so, the use and scope of disclosure.[169] Citing extracts from the Commission's Pass-on Guidelines, the CAT noted that proportionality in its adjudication of these matters involved, for instance, taking into account the nature and size of the claim, the availability of relevant data or appropriate methods for quantifying harm in the circumstance of the case before it. Paragraph 42 of those guidelines, cited also by the CAT, underlines the importance of the case management function of the court with regard to ensuring proportionality in the matter of disclosure:

> This principle is important for case management in damages actions resulting from infringements of Article 101 or 102 TFEU. As mentioned above, judges apply national procedural rules and must pay particular attention to the principles of effectiveness and equivalence. However, within the scope of these legal rules, national courts may take into account the costs and benefits of ordering the requested disclosure. For example, this means that national courts may come to the conclusion that the evidence presented by the parties already allows them to estimate the share of the overcharge that was passed on instead of gathering further data.[170]

In light of all the foregoing, at paragraph 40 of the judgment the CAT set out its criteria for dealing with economic disclosure in the Trucks litigation:

> (1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.
>
> (2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.
>
> (3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner. We recognise of course that these are very large damages claims. However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in *Vodafone v Infineon Technologies AG* [2017] EWHC 1383 (Ch), at [31]:
>
> > "*while of course more [disclosure] can be better … it is relevant to ask how much more would it be and how much better would it make the result*."
>
> The decision as to what disclosure to order is appropriate is informed by the views of the economic experts but it is not determined by what data they would like to have or what method they would like to use. It is for the Tribunal to decide.
>
> (4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) read with the governing principles in rule 4 and also the Disclosure PD.
>
> (5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seemed to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is satisfied the documents sought are relevant and that disclosure would be necessary and proportionate. The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.

[169] It will be recalled that a similar message was highlighted by the Supreme Court's ruling in *Merricks* some 11 months later.
[170] Pass-on Guidelines, para 42.

> (6) These actions seek damages for loss on many hundreds of transactions, involving a very large number of vehicles, carried out over an extensive period, and in some of the cases by a very large number of claimants. Further, the Infringement involved contacts and communications between the participants over a 14 year period, with different involvement on the particular occasions. The approach to proof of causation and quantification, both as regards any overcharge and as regards pass-on, will therefore be very different from that which can apply where the claim is for loss on one or two very large transactions concluded following extensive negotiation: cp. *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch). It is unlikely to be realistic in these cases for the issues to be approached by examining each price charged for each transaction subject to the claim and seeking to ascertain how any antecedent exchange of information or coordination between the OEMs may have influenced that price (whether directly or by reference to a gross price). Similarly, as regards pass-on, it would appear to be disproportionate even if it were possible to consider the resale or disposal of each truck that is subject to the claim. **Accordingly, it is important to establish how in practice the issues at trial will be approached, and to do so before and not after vast time, effort and expense is devoted to yet further disclosure**.
>
> (My emphasis added)

This last aspect of the approach to economic disclosure is worth highlighting. It relates, once more, to adapting the evidentiary exercise to the case at hand. Beyond the evidently relevant question of the value of the claim (against which evidentiary demands are to be gauged), the CAT underlines as an additional essential factor the sort of expert analysis which would be appropriate given the facts of the case. The Trucks claims before it (as well as those, foreseeably, to come) concerned a large number of transactions taking place over a long period of time. Accordingly, an individual so-called 'bottom-up' approach was not, in its view, appropriate. The 'bottom-up' approach had been accepted by the High Court in *BritNed*.[171] That case concerned quite different facts. There the effects of a cartel infringement on a few individual contract tenders were the subject of the claim. The claim was a sole individual claim by one claimant (BritNed) against one defendant (ABB). The documentation disclosed included extensive factual evidence around the specific circumstances of the relevant contracts and their relationship with the cartel conduct. Disclosure of economic data was limited to the parties to the proceedings and concerned a limited number of large turnkey contracts. The estimated overcharge was specific to the claimant. In Trucks, given the nature of the infringement,[172] and the potential impact of the conduct on market prices for trucks during a long period, a more aggregate approach was the only realistic (and proportionate) way of addressing the evidence of effects. The overcharge was calculated as a market-wide overcharge.[173] The CAT was not, by this, seeking to exclude witness evidence altogether but considered rather that any such evidence would be of a different, more general and higher level, nature. For instance, witness evidence could be expected to be focussed on accrediting the way in which truck prices were set during the relevant period; in particular, the nature of the relationship between gross and net (transaction) prices.

It is also noticeable how the CAT insists in its judgment on the need to determine early on with the parties and their experts the approach they intend to take to quantifying harm. This would also shape the approach to disclosure. Furthermore, the tribunal requests the experts

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[171] *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch).

[172] Characterised by the exchange of gross list (as opposed to transaction) price information during the course of 14 years.

[173] *Royal Mail*, n 122, paras 336-9. See also paras 86-7 et seq. The parties' experts had agreed to this approach as part of their agree-disagree statement (as to which see, more generally, Ch 12.3(d) below).

to agree on the right approach to the quantification of harm in order to avoid disclosure exercises which may then prove to be useless (or, at least, criticized as such by the respective opposing parties):

> The description of the Infringement in the Decision, supplemented by the disclosure provided to date, gives the parties' experts ample indication of the nature of the collusion between competitors that was involved. We would hope that the experienced experts can therefore agree on the methodology which is appropriate, although they may end up with differing conclusions. If very different methods were to be used, requiring vast amounts of different data, only for one or other method then to be challenged at trial as unsound or unreliable with an invitation to the Tribunal to reject it entirely, that would be conducive to a massive and hugely expensive waste of effort on disclosure.[174]

We will return to the procedural particularities of expert evidence in the next section. However, in the context of disclosure, it is worth bringing to mind the approach of Justice Rose in *Air Cargo*,[175] as the CAT does in its Trucks disclosure ruling. In a CMC in October 2015 concerning inter partes disclosure in relation to the quantification of harm (overcharge and pass-on), Justice Rose expressed concern at the enormous potential cost of disclosure, given the number of parties involved and the scope of the claims (in temporal, personal and geographical terms).[176] Choices had to made: first, around the approach to assessment of harm (whether with an emphasis on economic and financial data or on factual evidence) and, second, around the methodology to be adopted if data was to be exchanged.[177] The judge required that those choices be agreed between the parties' experts before extensive disclosure orders be adopted. Furthermore, the disclosure order addressed the detailed way in which data should be disclosed: the categories of information to be provided, the electronic format, the need for an explanation of the terms used in the data (a 'data dictionary') and a witness statement to be produced describing how the searches had been carried out and the source databases from which data had been extracted.[178]

At paragraph 43 of the Trucks disclosure judgment in *Ryder*,[179] the CAT considered the impact of its disclosure decision on the wider litigation and underlined its objective to ensure consistency. It was referring specifically to the various individual actions already before it, where a consistent approach to quantification was required (subject to very strong reasons justifying a different approach), but the suggestion is that it would be influenced by this decision for the entire UK Trucks litigation that would come before it:

> We of course appreciate that there are several different actions and that the same issues of overcharge and pass-on need not necessarily be approached the same way in all of them.

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[174] *Ryder Ltd v MAN SE* [2020] CAT 3, para 42.
[175] *Emerald Supplies v British Airways plc* [2015] EWHC 2904 (Ch).
[176] The *Air Cargo* proceedings related to trade routes to/from the EEA to destinations all around the world and involved, alongside British Airways (defendant in the main proceedings), 23 other airlines, contribution defendants who had been brought into the main proceedings by British Airways pursuant to CPR Pt 20. The number of transactions relied on just by the lead claimant group exceeded 6 million.
[177] It should be noted that the approach to overcharge and to pass-on is unlikely to be the same. In *Air Cargo*, Rose J reached a position on overcharge disclosure at the October hearing but not on pass-on. As to pass-on, so-called 'preliminary pass-on reports' had been ordered previously in December 2014 where claimants were required to set out their practices and policies on passing on costs to customers and estimating the extent of any pass-on. At the October hearing, Rose J ordered the experts to meet and agree methods and the scope of disclosure for calculating pass-on.
[178] Order of 23 November 2015 (unpublished). I am grateful to one of the parties' legal representatives for providing me sight of this order.
[179] *Ryder Ltd v MAN SE* [2020] CAT 3.

> However, the Tribunal made clear at the outset the importance of ensuring consistency as between the various claims arising out of the Infringement. Our present view is that there would have to be very strong reasons to justify the Tribunal accepting different methods of analysis of the same issues as between the different actions.

A final point of note on the Trucks disclosure ruling is the decision to carry out disclosure in stages. By this it meant that after each stage (or tranche) of disclosure 'the party receiving disclosure should assess those documents and data, with assistance as appropriate from its economic expert, and then frame a subsequent request (if any) in light of, and informed by, the analysis of that material'.[180]

What transpires from the Trucks disclosure ruling is, once more, the central role that active case management has in controlling disclosure related to quantification of harm. This management involves not only the court engaging with expert evidence before it is produced, and disclosure ordered, and doing so on an ongoing basis, but requiring the experts to set out their proposed approaches and to try to reach agreement on the appropriate approaches and methodologies for quantification. Such agreement is not always required, as occurred in the case of *BritNed*, but may be necessary in mass claims like Trucks in order to keep disclosure within reasonable bounds. Furthermore, the facts and context of the relevant case must be taken into account, including the existence of parallel claims. That is, disclosure must always be adapted to the specifics of the case (understood in its appropriate context).

12. Expert evidence

We come now to the key aspect of our subject-matter. Expert evidence assessing the impact of a competition law infringement on the market and on particular persons or groups of persons will, invariably, be one of the key pieces of evidence, if not the key evidence, in a damages case. How such evidence is handled by the court is, accordingly, a vital aspect of the process. Indeed, how this exercise is carried out is likely to influence materially the outcome of a case.

The way the UK system deals with expert evidence in competition cases offers some helpful experience. While, in terms of its dimensions (time, extension and cost), procedural practice in this area in the UK is still qualitatively different to continental systems like the Spanish, and will remain so, nevertheless it shares a number of common features. Underlying concepts in the UK and Spain as regards the respective roles of judges and experts, indeed, resonate to a surprising degree, and we find a useful symbiosis. Furthermore, as we have already seen, courts in the UK and the EU have to apply the same underlying concepts and rules. The quantification of harm is commonly considered a matter of reasonable estimation (taking into account the circumstances of the particular case; i.e., proportionality); the guidelines of the Commission are of relevance in the court's exercise of assessing evidence of harm; the courts have to apply presumptions and have the power to estimate themselves the damages suffered; all have available rules on access to information based on a common legal base (the EU disclosure rules); and all have to ensure the effective judicial protection of EU rights and

[180] ibid, para 46, by reference to *Peugeot SA v NSK Ltd* [2017] CAT 2, para 7. Disclosure in stages, it is to be recalled, is one of the menu options included in CPR 31.5.

the respect for the principles of effectiveness and equivalence as interpreted by the CJEU.[181] We have already seen how these common principles have been invoked by the English courts in cases such as *Merricks* (in the context of certifying a mass claim under Article 101 TFEU) and the UK Trucks litigation (in the context of determining the correct approach to disclosure).

Our brief review of rules and practice in the UK (in particular, in the CAT) will encompass the following broad issues: (i) the role of experts (scope of expert evidence and duties of experts); (ii) the role of the judge; and (iii) process. The key legal instruments of reference for our topic will be: CPR and PD 35 (Experts and Assessors), the Civil Justice Council Guidance for the Instruction of Experts in Civil Claims 2014, the CAT Rules (in particular, Rules 53 to 55) and the CAT Guide (in particular, paragraphs 7.65 to 7.69).

12.1. The role of experts

a) What qualifies as admissible expert evidence?

The bringing of expert evidence requires permission from the court[182] and should be restricted to what is 'reasonably required to resolve proceedings'.[183] The CAT Guide adds that: 'It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues'.[184] The court has the power not only to admit or reject expert evidence but to determine its scope by giving directions as to the issues on which it requires expert evidence.

Justice Roth addressed the approach that should be taken to the admission of expert evidence in competition cases in some detail in *Phones 4U*, a ruling adopted in the High Court in October 2021.[185] The case was a stand-alone case relating to alleged collusion between the three major mobile network operators in the UK at the time to exclude the claimant from the market for the retail sale of mobile lines. The claimant, a mobile telephony retailer, sought permission from the court to call expert evidence on market dynamics in the UK mobile sector with the aim of proving that the mobile operators' behaviour (in terminating resale agreements with the claimant) reflected collusive behaviour (and not normal competition on the merits). So, this was not evidence relating to quantification of harm, but rather to the proof of the underlying infringement. As noted by the court, this was ultimately a question of fact. Nevertheless, the court considered that the expert evidence should be admitted on a somewhat more limited basis than that proposed and gave directions in that sense at the end of its ruling. The court's reasoning sets out the principles to be applied in assessing the criteria for admission of expert evidence.

The requirement for admission of expert evidence has two aspects under English law. First, the evidence must be admissible, by which is meant that 'there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question

[181] As noted above, n 1, Brexit signalled the end to the application of EU law in the UK, and of the CJEU's jurisdiction, but EU law will continue to apply for some time and the jurisprudence of the CJEU will continue to have relevance.
[182] CPR 35.4.
[183] CPR 35.1, applied by reference in para 7.65 CAT Guide.
[184] Para 7.65.
[185] *Phones 4U Ltd (in administration) v EE Ltd* [2021] EWHC 2879.

which the Court has to decide'.[186] This condition was clearly fulfilled according to Justice Roth, and generally would be in competition cases: 'An economist, and similarly a chartered accountant, clearly has the requisite expertise for various issues, and evidence of economic experts is of course regularly admitted in competition cases'.[187] Furthermore, it is necessary that the proposed expert 'has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving' any of the relevant issues.[188] That is, the expert must have the necessary accredited expertise.

Secondly, the expert evidence must be 'reasonably required to resolve proceedings'. By 'reasonably required' it is meant that a person (i.e., the court) without instruction or experience in the area of proposed expertise would be unable to form a sound judgment on the matter before it without the assistance of witnesses possessing special knowledge or experience in the area; or, at least, that the court would be assisted by such expert evidence. [189] On this point, the court in *Phones 4U* noted that the evidence need only be relevant to issues which would be of assistance (that is, they would be helpful) to it in determining the case, provided that, in keeping with the overriding objective and in light of the circumstances of the case, it would be proportionate to admit that evidence.[190] Applying these principles, the court determined that the expert evidence would be of sufficient assistance to it on issues relevant to determining the question of whether there had been collusion between the defendant mobile operators and was satisfied that it was proportionate provided it was limited to precise questions related to normal competitive market dynamics. While this evidence would not offer direct factual evidence of the existence of collusion, it would assist the court in *interpreting factual evidence* and to reach conclusions consistent with expert understanding of the market and, therefore, which would be most plausible and accurate.

This brings us on to an important consideration. What is the proper scope of expert evidence? Experts give evidence on areas of their expertise, typically in the form of expert opinion on the interpretation of certain facts within that area of expertise.[191] They do not and cannot give factual evidence (although their opinion should be consistent with factual evidence in the proceedings). Nor can they give an opinion on questions which are a matter of law. These distinctions may not be so simple to draw in practice.

As is well documented, factual evidence provided by a witness invariably involves inferences based on perceived facts.[192] That is, the witness necessarily interprets events based on his or

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[186] *RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), Hildyard J, para 14.
[187] *Phones 4U*, n 185, para 13.
[188] *Barings plc v Coopers & Lybrand (No 2)* [2001] Lloyd's Rep Bank 85, para 45.
[189] See, *Barings Plc v Coopers & Lybrand*, ibid; *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, paras 43-47, citing the South Australian Supreme Court authority *R v Boynthan* (1984) 38 SASR 45.
[190] The court relied on Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch), paras 63-69.
[191] Other types of expert evidence can be identified (for example, that which is necessary to explain technical subject or the meaning of technical words or to give factual evidence which requires expertise to be interpreted or understood), see, for example, Hodgkinson and James, n 11, para 1-011.
[192] See Law Reform Committee, *Evidence of Opinion and Expert Evidence* (17th Report, Cmnd 4489, 1970), para 3: 'Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical sense were treated in the law of evidence [as] if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe', cited in Hodgkinson and James, n 11, para 1-033. This recognition was then incorporated expressly into s 3(3) of the Civil Evidence Act 1972: 'It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts

her own basic experience or common sense. A drink may be affirmed by a witness which drank it to be coffee because he or she knows what coffee looks, smells and tastes like. This example may be easily distinguished from an expert who draws on a body of specialised scientific knowledge to interpret other aspects of the facts (for example, verifying through appropriate tests that the coffee contained poison). However, more complex examples may occur where the distinction is less clear. In the area of competition law, where effects on markets are being assessed, witnesses may frequently be testifying to complex factual situations which they are able to interpret with certain authority given their knowledge and experience of the market or industry in question.[193] This may, as a matter of English law, be treated as (highly qualified) factual witness evidence, rather than expert evidence. Examples include: statements by a chartered accountant who had participated in the preparation of accounts which allegedly evidenced the impact of anticompetitive conduct on that business;[194] evidence brought by a company employee who purported to testify to the compliance of certain charges, which he was responsible for setting, with sectorial regulation;[195] or the statements of a number of employees evidencing the way in which prices were formed in their industry.[196] In this sense, the prohibition on opinion evidence (to which expert evidence is an exception) cannot be so simplistically applied and the distinction between witness evidence containing non-expert opinion and expert evidence properly understood is not so clear. Indeed, at times in practice, it seems that the categorisation may depend on how the parties chose precisely to present the evidence, something that will affect both the rules applicable to the evidence and the weight to be attributed to it.[197]

b) Factual evidence and experts

As noted earlier, expert evidence should be soundly based in the facts of the case. This is a principle underlined by the Commission's Practical Guide to Quantification and is a sound general principle of judicial assessment of evidence.

This question assumed a significant role in the CAT's first judgment in the UK Trucks litigation, *Royal Mail*.[198] Indeed, it was central in the court granting less evidentiary weight to the defendant party-appointed expert's report, precisely because the expert had failed properly to consider relevant factual evidence. Two matters of factual evidence were key. First, DAF had offered no evidence (potentially from witnesses who had participated) to explain why it had engaged in information exchanges with its competitors or how that information had been used internally in DAF's pricing processes.[199] Secondly, witness evidence (from a DAF UK employee) indicated that there existed a causal relationship between DAF gross (list) prices and UK net (transaction) prices.[200] In these circumstances, it was not open to the defendant's expert to speculate that the infringement had no effects, in the face of an evidentiary presumption (in light of the findings in the Commission's Truck

personally perceived by him, is admissible as evidence of what he perceived'. It is, for example, common now in construction cases for factual witnesses to provide opinion on facts they have witnessed based on their experience: eg *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd* [2008] EWHC 2220, paras 668-72.

[193] So-called 'testigo perito' (witness expert) under art 370 Spanish LEC; see later Ch 17.1(a), Part III.

[194] *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2011] CAT 44, paras 5-7.

[195] *British Telecommunications plc v Office of Communications* [2010] CAT 17, paras 109-11.

[196] *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11, para 28.

[197] As occurred in the ruling on admissibility of evidence in *2 Travel*, n 194.

[198] n 122

[199] ibid paras 103-8.

[200] ibid paras 120-9.

decision) that such an infringement was 'very likely to have had negative effects on transaction prices':[201]

> DAF's expert evidence on the theory of harm is based on speculation as to how the Infringement would have worked within DAF and then draws conclusions on such speculation as to how the Infringement would not have had an effect on prices. We think that any such theory would be more soundly based on what actually happened factually within DAF in terms of how the information was used and how the Infringement managed to continue over such a long period, presumably for the mutual benefit of all the Cartelists.[202]

In *Sainsbury's* (one of the very first merchant cases in the MIF litigation), the CAT also found that it could not place much weight on the expert evidence provided by the parties' two testifying economists because they did not base their evidence on a sufficiently sound understanding of the underlying facts.[203] Indeed, those facts were, in the CAT's opinion, better presented by factual witnesses, who included experienced professionals from the payments industry that worked for the parties. The CAT, accordingly, placed considerably more weight on that evidence than the expert evidence. The judgment, in fact, criticised the parties quite strongly for not having addressed this issue by ensuring that the economists agreed an underlying set of facts upon which to base their economic analyses. One of the judges on that case, the current CAT President, Sir Marcus Smith, has made the point even more forcefully outside of the courtroom:

> It is at a fundamental level wrong for an expert to give evidence in relation to an industry in respect of which that expert has no specific expertise.[204]

The issues in question there related, in particular, to determining realistic counterfactual scenarios as regards what would have happened to interchange fees in the payments market in the absence of the infringement: how would fees have been agreed and at what levels? In the words of the CAT itself, this exercise was speculation based on the evidence available: 'what would have happened in the counterfactual world is a necessarily hypothetical questions, and not a factual one … at the end of the day, the process we are engaged in is one of evidentially based speculation'.[205] In that context, the CAT felt more confident with the predictions as to market dynamics of those with experience in the industry and, even then, adopted a number of its own conclusions as to what it concluded would have happened in the hypothetical counterfactual scenario.[206]

Sainsbury's was a particularly complex case in terms of the underlying facts which, in themselves, required a degree of expertise. A further point has been highlighted by Sir Marcus Smith: namely, that expert evidence assessing the effects on markets of anti-competitive behaviour can raise particular challenges in the assessment of what are the relevant facts.[207] Whereas, with most types of expert evidence, the underlying facts to be assessed will be common and relatively clear (for example, evidence by an orthopaedic surgeon called to opine on whether a hip operation was negligently performed), expert

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[201] ibid para 116.
[202] ibid para 108.
[203] n 196.
[204] Marcus Smith, 'Lawyers come from Mars, and Economists come from Venus – or is it the other way round? Some thoughts on expert economic evidence in competition cases' (2019) Competition Law Journal 1.
[205] *Sainsbury's*, n 196, para 180. See also para 219.
[206] This was a matter of criticism by Mastercard in its appeal.
[207] Smith, n 204.

evidence of market effects *involves the experts selecting the relevant data they choose to use* in their analyses, normally from a number of alternatives. Furthermore, the selection of data (the underlying facts for the expert's analysis) will involve a process first of determining what information is available (and where), of obtaining that information (whether by extraction from public or privately available sources or by requests for disclosure from others) and of verifying its accuracy. This introduces a whole further level of complexity to this type of expert evidence as regards: **what are the relevant facts?** It is something that courts have to be aware of and, where appropriate, deal with. We will return to some relevant issues of process in this regard below (both in the UK and later, in Part III, in Spain).[208]

c) Experts and legal opinion

The *Sainsbury's* case touches on the other limitation on expert evidence we have alluded to earlier: legal opinion. Indeed, the second criticism levelled at the parties and their experts in that case was that they had not proceeded from a correct understanding of what were the legal principles which they should have assumed as the framework for their expert evidence. This can also be a complex issue, however. A number of complicated mixed questions of law and fact may arise in competition cases, and the MIF litigation offers quite an extreme example. Indeed, a whole series of legal questions affecting the expert evidence produced were appealed all the way up to the UK Supreme Court, involved lengthy and costly argument over a period of three to four years and gave rise to a final ruling which corrected numerous errors of law by the lower courts (as well, to be fair, as confirming other correct interpretations of the law). So, for instance, the Supreme Court set out its interpretation of the rules applying to proof of pass-on as a matter of English law, correcting the position adopted by both the CAT and the Court of Appeal, and established that the evidentiary standard for establishing the fulfilment of the conditions of exemption under Article 101(3) was a matter of EU law.[209] The parties at first instance could, accordingly, be forgiven for not knowing precisely what the applicable rules should be. Be that as it may, the fundamental principle is that questions of law are to be determined by the court and are not properly the subject of expert evidence (and, as such, should be ignored or at least treated as mere submission).[210]

d) The use of court-appointed experts

There is an additional important limitation on expert evidence. Expert evidence cannot usurp the function of the court to adjudicate the case; that is, it cannot determine the outcome of the case (what is sometimes called the 'ultimate issue'). In competition damages cases, the question put to the expert (for instance, the quantification of an alleged overcharge) may be the central issue which the court has to determine in a cartel follow-on damages claim. Accordingly, the degree to which the court's decision will be shaped by such evidence, and can be properly assessed by the court, is extremely important. We will look below at how courts in the UK address this challenge.[211] I would like here to touch on a related question: namely, the use of court-appointed or single experts and the extent to which the nomination

[208] See sections 3(c) and (d) of this chapter, and Ch 17.1(c), Part III, below.
[209] See *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, paras 226 and 128 respectively.
[210] See also *Bookmakers Afternoon Greyhound Services v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), a competition case, paras 287-288, where the court permitted expert opinion even on legal matters, but alerted that this was not the expert's role and that these aspects of their testimony would be treated merely as submissions.
[211] S 3.6.2.

of a single expert may entail a solution or, on the contrary, an illegitimate delegation of the court's decision-making function to a third party. The issue has raised hot debate in the UK and experience tells me that such concern has some real basis which merits attention.

Since the derogation of the RSC in 1998, it is no longer possible in England for the court to appoint directly an expert, but the CPR introduced instead the new concept of the single joint expert.[212] The single joint expert was proposed by Lord Woolf in the interest of increasing impartiality of expert evidence, reducing cost, augmenting the chances of settlement and levelling the playing field between parties of unequal resources.[213] He had particularly identified the problem of partial 'hired guns' who were used by deep-pocketed defendants to obtain an unfair advantage in litigation. He also criticised the emergence of a multi-million pound litigation support industry which had grown up among professions such as accountants or architects.[214] As the title to his report suggests, Woolf's concern was with access to justice, which he opined was being impeded to poorer litigants in England and Wales. At the same time, he questioned whether the traditional adversarial system (with opposing party expert witnesses) was the best way to achieve a just result or better, for that matter, than the court-appointed expert system typical of some continental legal systems (such as exist in Italy and Germany):

> 8. The traditional English way of deciding contentious expert issues is for a judge to decide between two contrary views. This is not necessarily the best way of achieving a just result. The judge may not be sure that either side is right, especially if the issues are very technical or fall within an area in which he himself has no expertise. Nevertheless, he hopes to arrive at the right answer. Whether consciously or not, his decision may be influenced by factors such as the apparently greater authority of one side's expert, or the experts' relative fluency and persuasiveness in putting across their arguments.
>
> 9. In continental jurisdictions where neutral, court-appointed experts are the norm, there is an underlying assumption that parties' experts will tell the court only what the parties want the court to know. For the judge in an inquisitorial system, the main problem is that it may be difficult for him to know whether or not to accept a single expert's view. There is no suggestion, however, that he is inevitably less likely to reach the right answer than his English counterpart.[215]

Woolf's proposals met with strong opposition from the legal profession concerned with the risk of de facto delegation of decision-making to the expert when the court has no other opinion on which to rely.[216] Zuckerman summarises this concern in the following terms:

> It is almost inevitable that a single joint expert will have a compelling influence, especially in complex areas which are impenetrable to laypersons. There is therefore a serious risk that the expert would in practice usurp the court's function and become the real arbiter.[217]

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[212] CPR 35.7.
[213] Woolf Report, Ch 13, para 21.
[214] Ch 13, paras 7 and 2 respectively.
[215] Ch 13, paras 8-9.
[216] See Ch 13, para 16 of the Woolf Report where Lord Woolf suggests that there was a (misplaced) general reluctance by many members of the legal profession to give up their adversarial weapons. See further Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008), ss 6.2.4 and 6.3.4. My own experience of court-appointed experts in certain continental jurisdictions (namely, Italy and France) has taught me that courts will invariably adopt acritically the decision of the court-appointed expert.
[217] Zuckerman, n 4, Ch 21, para 21.85.

Concerns also related, inter alia, to the perceived lack of quality (expertise) of court-appointed experts on the continent, the inability to test the expert's opinion under cross-examination or the fact that parties still instructed their own experts, hence not leading to a reduction of cost but in fact an increase.[218] These concerns were partially attenuated in the final proposals, incorporated into the CPR, which established the model of the single joint expert. Pursuant to those rules, the single joint expert is to be appointed by agreement between the parties, receive joints instructions from the parties or (failing agreement) separate instructions, and may be cross-examined.[219] Furthermore, the parties would still be free to call their own experts save in exceptional circumstances.[220]

The matter of court-appointed experts, and to a lesser degree the CPR single joint expert, poses questions in connection with the parties' right to a fair trial pursuant to Article 6 ECHR. It has been accepted, in principle, that the court appointment of a single expert does not infringe the right to a fair trial.[221] Nevertheless, this is not an unfettered right. Parties must be granted an adequate and equal opportunity to participate in the process (for example, in the determination of the instructions to the expert, in the expert's process of deliberation or in testing the expert's conclusions).[222] Such participation must be real and effective and not simply nominal. Problems that arise in practice include: the lack of suitable qualification of the appointed expert, the lack of sufficient argument before the court as regards the instructions to be given to the court-appointed expert, the lack of court supervision of the expert process in order to ensure due process or the absence of cross-examination as regards the expert's conclusions before the court.[223] It is averred that the CPR single joint expert process offers certain guarantees as to that right, but this is something which may not always be the case in a court-appointed expert process.[224]

The circumstances in which a single joint expert may be imposed by the court under the CPR will depend on the circumstances of the case. Although Lord Woolf sought to make the single expert the default option in certain circumstances (in particular, cases of a lesser value or difficulty),[225] in a complex piece of commercial litigation, as competition law claims generally are, it is likely to be a very exceptional measure; indeed, the risk may be high of this resulting in an effective delegation of the court's adjudication of the central issue in

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[218] Interim Report, Ch 23, para 21.

[219] Para 47 of the 2014 Guidance for Experts notes that single joint experts will not normally give oral evidence. This is in keeping with the statements of Lord Woolf in *Peet v Mid Kent Area Healthcare NHS Trust* [2001] EWCA Civ 1703, para 28. However, the court has the discretion to direct cross-examination exceptionally. The possibility of party experts being called on the same issues is not excluded, either (*D (A Child) v Walker* [2000] 1 WLR 1382 CA).

[220] Zuckerman, n 4, para 21.92 et seq.

[221] *CB v Austria*, App no 30465/06 (ECtHR, 4 April 2013); *Brandstetter v Austria* (1993) 15 EHRR 378.

[222] See, Zuckerman para 21.88 and ECtHR judgments *CB v Austria* (ibid, paras 37 and 43); *Mantonavelli*, n 184 (Part I) paras 33-6.

[223] On the virtues of cross-examination in finding the truth, see R Jacob LJ, 'Court Appointed Experts v Party Experts: Which is Better?' (2004) 23 Civil Justice Quarterly 400. By way of contrast: Geoffrey Davies, 'Court Appointed Experts' (2004) 23 Civil Justice Quarterly 367. See also *Phipson on Evidence*, n 11, paras 33-86.

[224] *Mantonavelli*, n 184 (Part I), para 36. The effective participation by the parties in the process is especially important in circumstances where courts in continental jurisdictions, which use court-appointed experts, may tend to rubber stamp the expert's conclusions (as noted n 216 above).

[225] See, on this, PD 35.7. Single joint experts are the default option in small or fast track proceedings. Further instances where a single joint expert may be preferred include the determination of a discrete fact (eg a measurement), quantification of harm (but not, I would suggest, in a counterfactual scenario typical of competition claims where quantification is far from straightforward and matters of causation may also be involved), or where there is unlikely to be a range of expert opinion on the issue (i.e. scientific opinion is largely unanimous on the question).

dispute.[226] In practice, parties will normally agree to bring their own party expert evidence and such agreements are unlikely to be opposed by the court.[227] Even where one of the parties has sought to propose a single expert, this has met with resistance in the CAT concerned not to limit the parties' rights of defence; for example, in a case where it considered the complexity of the claim and the need to address issues of causation weighed against the appointment of a single expert,[228] or in another where it was deemed too early in the proceedings for the parties to identify the relevant issues.[229] Nevertheless, recently, the CAT has for the first time ordered the designation of a joint expert on behalf of all (three) defendants in a case referred to an alleged cartel for certain car parts; the reason being not so much one of cost savings (not considered a decisive question in the case in point) but rather the convenience of having one single defendants' report given the claimant's proposed method for quantifying damage.[230]

e) Duties of the expert

There is one final aspect of the regulation of the expert's role in English litigation which merits attention. It refers to the duties of the expert (as well as mechanisms for controlling the quality, above all impartiality, of expert evidence). Experts owe an overriding duty to the court in England and Wales. This duty is set out in CPR 35.3:

> (1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

According to CPR 35.10, the report must include a statement to the effect that the expert understands and has complied with their duty to the court.[231] Experts are to state the substance of material instructions on the basis of which the report was written.[232] The report should be addressed to the court and should include a statement of truth in the following form:[233]

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
>
> I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Practice Direction 35, which is mandatory for experts, sets out more broadly the general requirements of expert evidence and the form and content of the report. It includes the following indications:

> 2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

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[226] See, on this generally, Zuckerman, n 4, paras 21.86-7.
[227] See *Phipson on Evidence*, n 11, 33-60.
[228] *2 Travel*, Case 1178/5/7/11, CMC 18 April 2011, pp 10-15 of the transcript.
[229] *Peugeot v NSK* Case 1248/5/7/16, CMC 11 October 2016.
[230] *PSA Automobiles v Autoliv AB* Case 1435/5/7/22 (T), [2023] CAT 66.
[231] CPR 35.10(2).
[232] CPR 35.10(3).
[233] PD 35, 3.1 and 3.3.

2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

2.3 Experts should consider all material facts, including those which might detract from their opinions.

2.4 Experts should make it clear –

(a) when a question or issue falls outside their expertise; and

(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

Furthermore, the Practice Direction requires experts to have regard to the 2014 Guidance for Experts, which provides further details elaborating on the same fundamental principles.

Many of these rules were already developed under pre-existing common law; notably in the much-cited case *The Ikarian Reefer*:[234]

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

In sum, expert evidence must be independent, objective, impartial and transparent (including reference to all underlying facts and assumptions, both favourable and unfavourable).

There exist a number of sanctions in the event of material non-compliance by an expert with the rules applicable to expert evidence under the CPR. If non-compliance causes costs to the

[234] *National Justice Compañía Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 68, 81-2.

instructing party or the opposing party, these may be personally recoverable against the expert. Misconduct may be referred to the expert's professional body and be subject to disciplinary proceedings[235] or, in extreme cases, give rise to sanctions for contempt of court (a fine or imprisonment).[236] Of perhaps greater practical sanction, however, is the negative impact that expert evidence falling below acceptable standards may have on the expert's own professional reputation. This risk is accentuated in English proceedings (and made more real, as a result) by virtue of lengthy cross-examination at trial, the real possibility of public admonishment by judges in their judgment or the ability of third parties to access reports which have been referred to in court. It is further accentuated in the context of a specialised court, specialised counsel and expert bars (which exist in and around the CAT, for example). Finally, of course, the evidence of an unreliable expert witness is unlikely to be given any weight by the judge.

Royal Mail is a case in point where the independence of a party-appointed expert was put into question. The trial involved cross-examination on this question (focussed on the instructions received by the expert and the information provided to him by the client). The judgment dedicates a full section to the court's assessment of the issue.[237] The CAT states that the defendant's expert had been insufficiently transparent about his involvement in advising the client during the administrative stage of proceedings (the Commission's investigation) and about the information provided to him by DAF concerning the reasons for the exchanges of information with its competitors. The tribunal concluded that Professor Neven could have become 'too aligned' with the views of his client, in particular as to the possible effects of the infringement (theory of harm), and that this may have influenced his 'surprising' conclusion that it was implausible that the infringement had effects on truck prices in the UK.[238] This undermined the credibility of the expert's evidence[239] and was no doubt a factor, together with a series of other considerations, which moved the court to reject the contention that the infringement had not had any effect on prices.[240]

On the experts' evidence of quantum of harm, the CAT also considered in *Royal Mail* that both experts had been overly influenced by the position of their respective clients and criticised their inability to reach agreed positions on key matters in their calculations or at least recognise weaknesses in their own approach.[241] The court, indeed, considered that the experts had failed in their duty to the court:

> The tendency of both experts to defend their positions without acknowledging the inherent difficulties in their own approach was disappointing and inconsistent with their primary duty to assist the Tribunal.[242]

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[235] See, para 90 of the 2014 Guidance. Cases include *Pearce v Ove Arup Partnership Ltd* (Copying) (2002) 25(2) IPD. Dwyer has suggested that a more effective option than referral to professional bodies would be for an official system of experts to be created enabling registration and accreditation of experts and the possibility for misconduct and breach of civil procedural rules and principles to be reported by judges to the system's supervisor (Dwyer, n 216, 362-3).
[236] *Liverpool Victoria Insurance v Zafar* [2019] EWCA Civ 392.
[237] *Royal Mail*, n 122, paras 237-257.
[238] ibid, paras 254 and 256 respectively.
[239] ibid para 257.
[240] Those factors referred to above in section 12.1(b) related principally to factual evidence concerning central questions in the case; namely, the reasons for the information exchange and the relationship between gross (list) prices and net (transaction) prices.
[241] *Royal Mail*, n 122, paras 476 and 480.
[242] ibid para 476.

The CAT itself has recognised that these risks of a lack of independence or objectivity are perhaps flaws in the adversarial system of expert evidence and, indeed, the tribunal considered that they had been inadequately respected in *Royal Mail* to the detriment of the adjudication of the case.[243] Accordingly, proper attention to this aspect of party-appointed expert evidence is crucial to its health and merit as the favoured mode of expert evidence.

We can conclude by recalling that that these duties of experts in UK civil litigation are of similar importance in Spanish litigation where party-appointed experts are the normal mode of presenting expert evidence and not dissimilar expert duties apply.[244] There is no doubt some difference as regards the level of intensity of the duties, of compliance or of sanctions for non-compliance, as compared to the UK. However, the essential conception and terms of those duties are very similar, such that the lessons learned in the UK are of great relevance.

12.2. The role of the judge

a) The non-delegable function of adjudication

We should begin this section by reiterating a point made earlier: fact-finding and legal decision-making are the task of judges. They cannot be delegated to a third party, such as an expert. As the Court of Appeal famously held in *Liddell v Middleton*: 'we do not have trial by expert in this country: we have trial by judge'.[245] In England and Wales, this gave rise to the so-called 'ultimate issue rule', whereby experts were not permitted to provide an opinion on the final issue to be decided in the proceedings. While that rule is no longer operational, it being possible for experts to give their views in a way that addresses the ultimate issue, they can never supplant the court's decision-making role:

> Thus, while on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court, expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert.[246]

Professor Dwyer has put the concept forcefully from a constitutional law and fundamental rights perspective:

> This delegation of fact-finding authority is constitutionally dangerous. In English law, this delegation is without prerogative or statutory authority, and therefore offends the public law maxim delegatus non delegare potest ('a person to whom authority is delegated cannot further delegate that authority to another'). Under Art. 6 of the European Convention, a court trying a dispute has no power to delegate its judicial role of deciding the case to another person.[247]

In this sense, expert evidence is an exception to the rule that only factual evidence is admissible since opinions (inferences from fact) formulated by witnesses, instead of judges, would usurp the court's function. Dwyer notes that expert evidence characteristically involves the drawing of inferences using a specialist set of generalizations which are based on experience in the relevant area of expertise; what we refer to, in legal terms, as presumptions. She identifies certain risks with the acceptance of such presumptions by

[243] ibid para 235.
[244] art 335(2) Spanish LEC. See further Ch 17.1 in Part III below.
[245] *Liddell v Middleton* (1996) PIQR P36 CA, 43. For a case where this principle has been invoked by a court to reject uncontroverted expert evidence which did not gain the court's conviction, see *Griffiths v TUI UK* [2021] EWCA Civ 1442, para 40.
[246] *Kennedy v Cordia (Services) LLP*, n 189, para 49.
[247] Dwyer, n 216, 307.

courts. First, scientific generalizations are subject to revision and change over time as science develops (this is the nature of scientific method). So, by definition, they are not immutable. Secondly, accepting such presumptions risks courts effectively delegating to an arbitrary selection of experts, without appropriate political debate, the resolution of certain questions of inference from facts, making the civil justice system technocratic.

This situation clearly raises tension with the court's judicial function and entails a risk of de facto delegation. However, it is a risk that is admitted by modern society and judicial systems because there is an assumption that it is worth taking owing to the likely benefits to the courts. Moreover, it is thought that the risk can be adequately controlled through procedural mechanisms relating, for instance, to the requirements for expert evidence (or its admissibility) and its testing by reference to contradictory (or confirmatory) evidence given by experts in the same field.[248]

However, is this the case? Let us look more closely at what the judicial assessment of expert evidence in the sphere of competition law involves. How do courts in the UK assess such evidence? What tools can they use? Is it effective?

b) Judicial assessment of contradictory expert evidence

It is frequently the case in competition litigation that experts present diametrically opposed evidence. Taking the example of cartel damages litigation, courts in the UK (as elsewhere) will typically be presented with evidence by opposing witnesses where one expert, for the claimant, estimates material harm (typically, an overcharge of 10% or more),[249] while another, for the defendant, estimates negligible harm or none at all (a 0% overcharge). This has been the case, for instance, in recent cartel damages claims in London, such as *BritNed*[250] or the Royal Mail and BT claims against DAF for damages in Trucks.[251] This has occurred despite the duties of the experts to the court under English law and without the suggestion that any of the experts had breached those duties.[252] So where does this leave us?

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[248] See, in this regard, Hodgkinson and James, n 11, para 1-032. For this reason, Dwyer goes on in the section just cited to express a preference for party experts over single experts: 'The risk of this delegation occurring is lowest when the expert role employed is that of the party expert, since the tribunal is required to decide between experts rather than simply deferring to an expert opinion. Within the context of party expert use under the CPR, there are at least two epistemological advantages to the court receiving evidence from party experts. The first advantage is that the court is able to receive more than one expert point of view. This is particularly important where there exists a range of opinions. Although an expert is required in her written report to advise the court if there is a range of opinions on the matter in issue (CPR r. 35 PD 2.2(6)), it might be difficult to see how someone who is attached to one point of view, for whatever reason, could advise dispassionately on other points of view, which she has already rejected. This rejection may be quite vehement. The second advantage is that experts may be challenged to think through their opinions more thoroughly if they are aware that what they say will be open to challenge by their peers. This provides a form of peer review of the expert's opinion.'

[249] See, in this regard, statistical information presented in the Practical Guide to Quantification, para 142.

[250] Claim by electricity grid operator, BritNed, against ABB for damages allegedly arising out of the power cables cartel, before the High Court, *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch).

[251] Cases 1284 and 1290/5/7/18 (T) before the CAT, giving rise to the first judgment in the UK Trucks litigation on 7 February 2023, *Royal Mail Group Ltd v DAF Trucks Ltd* [2023] CAT 6.

[252] *Phipson on Evidence* observes that such a scenario is quite possible in the application of statistical methods of quantification to complex situations: 'In any case where significant use is made of statistical evidence, particularly in the interpretation of complex scientific evidence, statisticians are likely to produce the findings of one or more statistical models of varying complexity, potentially giving a range of results. It is therefore possible for two statisticians each to produce valid statistical models of a case, but to come to different conclusions.', n 11, para 34-01.

In answering these questions, let us start by returning to the question of scientific generalizations (presumptions), now in the specific context of competition damages quantification. Dwyer observes that where a matter in dispute turns on objective criteria, there may be greater justification for submitting adjudication of those questions to objective, scientific criteria or measurement (without prejudice to the court's decision-making prerogative).[253] Subject to the difficulties of converting scientific evidential standards to legal standards,[254] this stands to reason. What scientific presumptions exist in this area, however? This, as we shall see, is not an easy question to answer.

In the first place, we must refer to the presumption contained in the Damages Directive that cartels cause harm. That is a legal presumption. It is based on a number of considerations, including the difficulty of quantifying harm or the existence of information asymmetry as between the parties. These are policy, not scientific, considerations. Nevertheless, the presumption of harm is also influenced partly by statistical evidence that cartels generally have a negative impact on prices.[255] It is averred that the majority of experts would not dispute that affirmation. Indeed, it is one of the reasons that such infringements are treated as the most serious infringements of competition law and attract the highest penalties. Accordingly, the presumption of harm could also perhaps be considered a quasi-scientific presumption. Even then, it is not a necessary presumption and admits of rebuttal. The position of the English courts is that, in any case, the presumption does not necessarily assist claimants in practice given that they still have the burden of proof of the quantum of harm and the English courts anyway adopt a pragmatic 'broad brush' approach to quantification of harm.[256] Nevertheless, it is averred that the presumption of cartel harm does influence the judicial function, even in the UK, for reasons we will come on to.

Second, there exists a certain body of experience emanating principally from competition authorities and, more broadly, the antitrust community, as regards the correct methods for quantifying harm. This includes, first and foremost, the Commission's Practical Guide on Quantification or the Pass-on Guidelines, but also the DG COMP best practices on the presentation of economic evidence.[257] These are, therefore, standards which have been granted a seal of approval by the authorities, vesting in them, in consequence, an additional status. The scientific consensus in these instruments relates largely to questions of what are legitimate methods for calculating harm and what methodological rules such methods should follow. It is suggested that they are largely shared by the scientific community. However, although these guidelines have normally followed extensive public consultation processes, their development as 'scientific' standards does not, as such, respond to a

[253] Dwyer, n 216, 64.

[254] The difficulty of interpreting statistical evidence of harm used in toxic tort cases according to legal standards is addressed by Dwyer, ibid, 151-5, where she refers to the English case of *XYZ v Schering Health Care* [2002] EWHC 1420 (QB) and the problem for the judge of interpreting statistical measures of probability (namely, confidence intervals) according to legal principles. We will return to this matter in the context of regression analysis used in competition law cases by reference to *BritNed* where this was an issue addressed by the court. Toxic tort cases offer an interesting example of an area where statistical analysis of the probability of harm is used in preference over individual causal evidence of a more factual nature, and perhaps offers an interesting benchmark for mass tort claims also in the competition sphere.

[255] See, eg, Practical Guide to Quantification, para 142, and Oxera Study, pp 88 et seq. There were further motivations for the inclusion of the presumption in the Directive as we have seen in Ch 5.3 above.

[256] See *BritNed*, n 250, para12(6), approved by the Court of Appeal, [2019] EWCA Civ 1840, para 42 and confirmed by the Supreme Court in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, para 218.

[257] See Ch 6.3 above. In Spain, the CNMC adopted its own quantification guide on 11 July 2023: CNMC, 'Guía sobre Cuantificaión de Daños por Infracciones del Derecho de la Competencia' G-2020-03. See, further, Ch 17.2(a) below.

politically transparent process (one of the concerns raised by Dwyer) and may be vulnerable to powerful lobbies. Indeed, which scientific community are we referring to when we talk about science in this area? In fact, there is no easily identifiable scientific community. There is no self-regulated body of experts acting in the area of competition analysis (save, obliquely, for the case of accountants). There are enormous economic interests in having certain standards blessed by the authorities and this is not something one can play a blind eye to. The Commission itself is careful to note that the methods set out in its guides are not exhaustive, nor its recommendations binding, and that knowledge in this area develops. Accordingly, while the value and importance of these guidelines is not open to doubt, courts should be prepared (as they generally are) to adopt a healthy degree of scepticism and criticism as to any pretence of absolutism in the scientific method of damages quantification. In this regard, *Phipson on Evidence* makes the following observations as regards statistical evidence:

> Because statistics is an established and widely accepted mathematical discipline, there may be a tendency for the court or jury to view its conclusions as always being the objective products of rigorous, objective processes. However, although the mathematics that underlies statistics is objective, the application of statistics to answer "real-world" questions is very much a subjective exercise. Statisticians have access to a range of methods and techniques for the collection and analysis of data, and must therefore make informed decisions about which methods and techniques are appropriate for which types of data set, and to address which types of question.[258]

This brings us on to our second point in answering the question of how courts can go about the difficult job of appraising expert evidence: namely, the judicial method in the assessment of expert evidence of harm. While, as we have seen, a certain body of quasi-scientific standards exists in the area of quantification of harm, they clearly have their limits and are, anyway, not determinative of the question: 'What was the overcharge?' Indeed, as already noted, courts are regularly faced with two experts who may largely share their underlying beliefs as to the possible methods for quantification (although this is not necessarily a given) and how such methods should, in general terms, be implemented - i.e., they would not normally dispute the Commission's practical guidance. Nevertheless, they come up with quantifications which give very contradictory results. What tools can the court use to assess such contradictory evidence?

Courts are, of course, limited in their ability to establish the truth. Their knowledge of events is mediated by the parties: the evidence that those parties are able to produce in proceedings and the theories and argument they put forward as to how that evidence should be interpreted. Moreover, the judge is required to provide finality on a given matter in a limited amount of time. Court assessment is not an open-ended exercise. The court may also be conditioned by certain socio-political limitations, such as the proportionate allocation of resources, to which we have already referred at length. Certain balances have to be struck and compromises accepted in the interest of the sound administration of justice. For its part, the exercise of estimating harm in competition cases is based on a hypothetical assessment of what would have happened in a market absent the infringement; a situation which, *per se*, does not exist. Accordingly, it is not possible to speak of one true answer. Nevertheless, truth is and must be the goal of proceedings and, within the limitations we have indicated, judicial decision-making seeks to justify its belief as to the truth in a

[258] *Phipson on Evidence*, para 34-01.

particular case.[259] Indeed, the answer which approximates us most to the truth (supports understanding and reasoning best) will arguably have a quality and integrity (a beauty) to it which will be more compelling to the observer than other interpretations of events.[260]

According to the rationalist tradition in evidence scholarship which underlies our western systems of justice, judges use probabilistic inferential reasoning to assess available evidence. Final findings should be capable of justification on the basis of what Dwyer refers to as the 'evidential matrix of the case'.[261] Broken down, this concept encompasses the following aspects: (i) individuated propositions; (ii) evidence (both basic experiences and generalizations, including scientific generalizations); (iii) inferential relationship between evidential atoms, which is probabilistic by nature; and (iv) the need for holistic coherence (the theory or story of the case).[262] Dwyer concludes that there is no reason why this same method of appraisal of evidence of fact cannot be used in the assessment of expert evidence, since expert evidence uses the same method in essence as factual evidence (requiring rationalist interpretation of facts, albeit with the assistance of a basis of specific experience in the field of knowledge in question). At the same time, she recognises certain limitations based, essentially, on the difficulties of understanding experts (given, for instance, their specialized language, concepts and methods).

This rationalist approach to the judicial assessment of expert evidence can be seen, unsurprisingly, also in the area of competition damages litigation in the UK. An economist with experience in appearing as an expert before the courts in the UK in competition cases, Cento Veljanovski, has described the court's role in assessing complex statistical analysis (econometrics), even that of a specialized court like the CAT, in the following terms:

> [T]he court should not be required to act as academic peer reviewing econometric evidence for potential publication [the court is not an expert] but assessing whether the econometrics is coherent, competent, and most importantly fits with the other evidence at trial[263]

That is, judicial assessment submits evidence to the test of rational coherence (inferences properly drawn from facts) and overall coherence with the full story of the case. A judge will assess contradictory statistical models, inter alia, by making an informed judgment on the way data has been collated for the model and on what assumptions have been employed.[264] The ruling of the High Court in *BritNed* offers a practical case in point.

c) BritNed

BritNed concerned a claim for damages for alleged overcharges suffered by BritNed in its purchases of submarine cables from ABB as a result of a long-running international bid-rigging cartel. A number of aspects of the judge's assessment of the expert evidence of the quantification of harm are worth highlighting in the context of our discussion:

(i) Legal principles

Justice Marcus Smith began his judgment by setting out some underlying English legal principles for the assessment of harm in competition cases:

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[259] What Dwyer has referred to as epistemological belief as opposed to ontological truth (n 216, 27).
[260] Edward R Tufte, *Beautiful Evidence* (Graphics Press 2006).
[261] Dwyer, n 216, 51.
[262] ibid.
[263] Cento Veljanovksi, *Cartel Damages – Principles, Measurement and Economics* (1st edn, OUP 2020), 281.
[264] *Phipson on Evidence* para 24-01 in fine.

- The quantification of harm must be based on evidence before the court.[265]
- The court will be pragmatic in its approach given the nature of the quantification exercise, which is based on assessing a hypothetical, not real, situation (something that would have happened in the future if something else – the illicit conduct – had not happened in the past), and the complex nature of the economic effects being assessed; indeed, it will necessarily involve an element of estimation and assumption.[266]
- That pragmatic approach, known in English law as the 'broad brush' (or, alternatively, 'broad axe'), must be 'used to *paint a canvass that is a consistent and rational portrait of circumstances* in which the claimant and the defendant operated, so that the central question (what would have happened, had the tort not been committed) is answered in its context' (my emphasis added).[267] On this last point, the court drew an analogy with the theory of harm articulated by competition authorities to ascertain the existence of a competition law infringement. Indeed, it is usual (and, indeed, necessary) that damages reports include the expert's theory of harm; that is, the coherent story of how, in the expert's opinion, the infringement came to occasion harm to the claimant.

(ii) Factual evidence

Factual evidence, in particular witness evidence, had a vital role in the court's assessment of the expert evidence and the outcome of the case. This evidence related to the particular circumstances of the BritNed tender process, including the central role of certain ABB personnel who apparently had no knowledge of the cartel agreements and adopted pro-competitive behaviour in the bidding process. This suggested to the court that the cartel would not have been so effective in exacting an overcharge from BritNed in this particular bid (as opposed to the general impact the cartel may have had over time across the market).

(iii) Data

The parties disagreed about the data to be used in the damages assessment. The choice of data was critical to the outcome of the case.

ABB's expert used the company's own cost data for his analysis. The claimant's expert considered that data not to be reliable and, instead, chose to calculate proxy values for costs based on publicly available data (e.g., as regards the cost of copper). The court sided with the defendant expert. It considered that the use of the real ABB cost data was preferable to the use of proxies and that the unreliability of the ABB data had not been accredited. This issue was central in the court's conclusion that the defendant expert's model was reliable, whereas the claimant's was not.[268]

Another important issue was the lack of available information from suppliers other than ABB (other members of the cartel). Disclosure from such third parties was not

[265] *BritNed*, n 250, para 12(9).
[266] ibid paras 11, 12(6).
[267] ibid para 12(8)(c).
[268] ibid paras 414-7.

requested as it was considered disproportionately expensive. This limited the available dataset. ABB project bids offering data points numbered only 15 projects during the cartel period and around 50 in the period afterwards. This also made it very difficult to perform an analysis of competitive market prices based on the overall market, as opposed to just ABB. It was BritNed's view that ABB's post cartel prices (frequently unsuccessful bid prices) were above the competitive level and, therefore, understated the effect of the cartel. BritNed's expert attempted to address this by using publicly available information on competitive winning bids in the post cartel period. However, this was rejected by the CAT, and confirmed on appeal, due to the lack of full information on those competitive bids (as regards, for example, their costs) which impeded a robust margin analysis. That situation had arisen, however, precisely because of the lack of third-party disclosure.[269]

(iv) Correct method and implementation.

The court carried out an extremely detailed review of the opposing experts' models. It levelled a number of criticisms at the choice of assumptions used in the claimant expert's model and rejected the model as being unreliable. The model involved a comparison of prices over time ('during and after' the cartel) which used multilinear regression analysis to take into account factors which influence price over time. The criticisms of the model focussed on the expert's inclusion of comparator projects in her dataset which the court considered insufficiently similar to the BritNed project (they related to underground, as opposed to submarine, cables),[270] the calculation of an average overcharge (BritNed's expert compared ABB's post cartel prices with all its available prices during the cartel, as opposed to the price only of the BritNed project) and the inclusion of certain variables in the model which the court considered inadequately justified or implemented (namely, a variable seeking to capture the effect of order backlog and a time trend included to capture any long term changes in pricing over time, such as inflation or cost efficiencies). The court found the model to be overly complicated and considered that the calculation of an average overcharge was not determinative of the effect on the BritNed project given the wide variance of effects which were apparent from the limited data available. It also found the results of the model to be insufficiently certain. For instance, the model was disproportionately sensitive to modifications (such as the removal of certain variables or data) as illustrated by the rerunning of the model by the defendant expert.[271] In addition, the confidence interval of the results was, in the court's view, very broad, ranging from an overcharge of 0.32% to 38.71% (around the estimated 21.84% overcharge).[272]

By contrast, the court considered the defendant expert's report to offer 'a reliable tool for assessing the overcharge'. This expert chose to use a simple margin analysis comparing ABB's margin on the BritNed submarine project during the cartel with ABB's margins on projects after the cartel, both projects it won and those it did not. The analysis was based on ABB's final bidding prices and direct costs, supplied to the

[269] See paras 142-4 Court of Appeal judgment, [2019] EWCA Civ 1840.
[270] One of the reasons the expert included such projects was to increase the size of the dataset which she admitted being at the lower end of what was necessary for the sort of regression analysis she had chosen (*BritNed*, n 250, para 313).
[271] ibid para 378.
[272] However, note the criticism of the judge's appraisal of this issue in Veljanovski, n 263, 250-1.

expert by ABB. The court considered that the model captured the (lack of) effects of the cartel on the specific BritNed project, which the factual evidence had indicated to be subject to particular circumstances in the negotiation process.

In this way, the court applied rational assessment to the expert evidence. It tested the underlying propositions of each expert (their key assumptions), the evidence relied on (including price and cost data), the inferences drawn (the internal logic and results of the models) and the coherence with the overall context (in particular, factual evidence from witnesses). It dedicated significant time to the hearing of the expert evidence (six days in total) and set out its reasoning extremely fully (72 pages of the judgment just on the issue of overcharge). As we have seen, it gave particular weight to the factual evidence that the pricing of the BritNed project was not directly influenced by the cartel.[273] The court could be criticised for having got it wrong. Indeed, such judgments are invariably the object of criticism particularly by experts who consider the judge has misunderstood the expert evidence or simply got it wrong. It could also be accused of imposing excessive requirements on the claimant by rejecting the attempt to calculate a post cartel competitive margin based on public information alleging that there was insufficient information on competitors' costs, when this was due to the disproportionate nature of such disclosure. Indeed, BritNed complained on appeal that the court had erred on the side of excessive evidentiary demands, and under-compensation, and it should have proceeded on the basis that the cartel must have had an effect since the BritNed contract had, in fact, been the subject of a cartel market-sharing agreement. Nevertheless, according to the Court of Appeal, the High Court was entitled to conclude, on the basis of the evidence available, that there had been no demonstrable overcharge and reject this part of the claim.[274]

d) Judicial estimation

This brings us on to our third and final point in the consideration of how courts deal with the assessment of evidence of harm in competition cases. The uncertainty inherent in the quantification of harm does not necessarily ground the rejection of competition claims. Indeed, as a matter of law, it does not. The Damages Directive offers a further provision to address this problem and that is it the faculty of judicial estimation recognised in Article 17(1). The exercise of that function may, in turn, be influenced in cartel cases by the presumption that cartels cause harm (as has notably occurred in Spain). In *BritNed*, Justice Marcus Smith suggested that the presumption of harm had no influence in English cases (proposition with which the Court of Appeal agreed)[275] and, while he did not expressly exercise the Directive faculty of judicial estimation, would presumably consider judicial estimation to be part and parcel of the English judicial practice of 'broad brush' or 'broad axe' assessment of evidence of quantum, which he did carry out in *BritNed*. While perhaps not exclusive to competition law, the faculty of judicial estimation is a particularity of competition law and, in my opinion, one of special relevance in the convergence of European legal practice in this area. Accordingly, it is of particular interest to see how the court in *BritNed* wielded its broad axe to estimate harm itself.

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[273] There is, indeed, no hierarchical superiority granted to expert evidence, it rather being a question for the court to assign the appropriate weight, as it considers, to each piece of evidence: see, Hodgkinson and James, n 11, para 12-010. Indeed, courts will require expert evidence to be coherent with facts.

[274] The appeal court is required to exercise restraint in its review of the first instance's court's assessment of evidence and should not replace its own assessment unless the court's findings are unsupported by the evidence or are manifestly incorrect.

[275] Para 42 of the Court of Appeal judgment in *BritNed*, n 256.

As noted, the High Court rejected the claimant expert's report and accepted rather that of the defendant to the effect that there was no overcharge in the prices applied by ABB to the BritNed contract. This was based on comparing the ABB margin on the BritNed contract with the company's margins on its post cartel submarine project bid prices, where no discernible decrease in margins was perceptible. However, the court's analysis did not stop there. I am putting a gloss on this, but in my view the court was, in fact, at this point very much influenced by the consideration that the cartel would have had an effect in the market and, therefore, on the BritNed contract, even if it was not discernible in ABB's margins. Accordingly, the court sought to find another way to quantify harmful effects. It did so by assessing the so-called 'baked-in inefficiencies' of the ABB winning bid for the BritNed project which was the subject of the claim.[276] This harm was not claimed as such by the claimants. It related to certain additional costs which, in the judge's view, had been incurred by ABB in the project (namely, by using excessively thick copper cables) which, in a normal competitive environment, it could not have incurred without the risk of losing the project and, by implication, could not have passed on to BritNed in the price of the project. They referred therefore to a certain 'softening' of the market caused by the infringement. The judge averred that this extra cost was a direct harm to BritNed and made a rough estimate of its amount, on the basis of contemporaneous documents and with the assistance of the experts, as a 15% excess in the cost of copper used.[277] This translated into a monetary sum of an approximate 2% overcharge.

This rough and ready calculation contrasts quite strongly with the approach to the parties' overcharge estimates to which we have referred to above and, as noted, was not a damage that the claimants had alleged. Indeed, it does seem to reflect a conviction on the part of the judge that some harm must have been suffered by the claimant (perhaps of a more indirect nature) and that an award of compensation should be granted. For this reason, it could be seen as an example of how the presumption of harm had a practical effect in the proceedings and of how, faced with an absence of sufficiently convincing evidence of positive harm, the court resolved the situation by using its power to estimate harm itself.

As a matter of English law, the court cannot, in principle, replace its own theory for that of the experts and it must in any case test any such theory with the witnesses and reason it fully.[278] This was one of the criticisms raised by Mastercard on its appeal of the CAT's judgment in *Sainsbury's*.[279] Smith J himself noted at paragraph 12(9) of the judgment in *BritNed* that a number cannot simply be 'plucked from the air' but must be grounded in evidence before the court. In this way, the court was at pains to provide a rationalised basis for the compensation awarded to BritNed, grounded in evidence. It should certainly be applauded for so doing. However, the nature of this exercise as essentially a rough and ready estimation based on a presumption of effects (as well as limited available evidence) should not, in my opinion, be overlooked.

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[276] The exercise is summarised by the Court of Appeal, ibid paras 118-9.

[277] *BritNed*, n 250, paras 451-3. The experts provided their input via their joint response of 24 August 2018 to the court's questions just prior to adopting its judgment.

[278] See, Hodgkinson and James, n 11, para 12-006. This is a rule based on *McLean v Weir* (1977) 3 CCLT 87 but one which the author considered now to be more nuanced. The court in *BritNed* did carry out such a verification of its proposed alternative quantification with the parties' experts during the course of the proceedings.

[279] See para 177 et seq of the Court of Appeal's judgment in *Sainsbury's* in relation to the High Court's factual findings concerning the counterfactual scenario, [2018] EWCA 156 (Civ).

A final reference should made here once more to *Royal Mail*. There the CAT rejected both quantifications of harm submitted by the parties' experts and, applying the 'broad axe' approach, concluded on an overcharge figure more or less in the middle of the two: namely, 5 per cent.[280] It did so on the basis that the estimations contained opposing positions on critical issues and, following its assessment of those issues and the rest of the factual and witness evidence produced, considered the answer must be somewhere between the two estimations.[281] As such, the resolution on overcharge was based not so much on a free-standing judicial estimation but rather on a moderation of the results produced by the experts taking into account all the relevant factors before it.

12.3. Process

a) Introduction

It has been said that, by comparison with the English common law system, there is a certain 'fact aversion' inherent in continental legal systems. By this it is meant that the focus of continental judges (and legal training) is more on legal principle than on the detailed assessment of fact. Although an exaggeration, there is certainly some truth in that. The eminent professor of Italian civil procedure, Taruffo, has himself referred to the conceptual difficulty that Italian lawyers appear to have in thinking of judges as engaging in problems using common sense, experience and science rather than legal norms.[282] The extensive reasoning in English judgments addressed to the analysis of facts and the distinction of facts and argument between different cases, compared to the limited attention to facts and case-law in continental judgements, are illustrative of this point. Dwyer puts it in the following terms, by reference to the French and Italian systems:

> There is more than a grain of truth in the notion that, while French or Italian law students learn articles of codes as the sources of the law, English law students learn stories. Those stories are rich in facts, albeit facts selected to suit the eventual principle.
>
> […] There is virtually no attention to intermediate facts [in Italian and French statutes and courts]. This may in part be the result of a legal education which is focused on legal principles rather than facts of cases when at university, and then entry directly into the judiciary, without spending time as a lawyer, dealing with the factual detail of cases for a client.[283]

It would be overstating it to say that Spanish courts are indifferent to intermediate facts. That is not true, certainly not in the adjudication by most commercial courts of competition cases. Nevertheless, my experience tells me that the legal tradition in Spain does share these essential continental traits. I would, therefore, suggest that EU law in the area of competition damages poses challenges and questions for the Spanish system, precisely because it suggests a closer attention to detailed facts and evidence, a concern for consistency in the application of EU competition law and an increased role for judges. This is so, above all, due to the broader powers of disclosure introduced by the Damages Directive, but it can also be seen in the detailed technical guidance to judges as to the assessment of expert evidence, as

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[280] *Royal Mail*, n 251, paras 484-6.
[281] ibid para 479.
[282] Michele Taruffo, 'Senso comune, esperienza e scienza nel ragionamento del giudice' in *Sui confini: scritti sulla giustizia civile* (Il Mulino 2002), 121–55, cited in Dwyer, n 216, 220. An explanation of how this came about, noting in particular the historic appearance of a strong common law legal profession in England since the Middle Ages as compared to the more academic and administrative character of legal practice in continental jurisdictions at the time, can be found in Zweigert and Kötz, n 131, s 18.I.
[283] Dwyer, n 216, 219-20.

well as in the courts' faculty to estimate harm themselves. That is, the EU system seems to invite a closer and more forensic approach to facts and evidence by the court, something which is more characteristic of the UK system than continental adjudication.[284]

It is at this point that we come to the question of process; the process of bringing expert evidence into the court procedure and in front of the judge. Dwyer has suggested that a key ingredient of the answer to the conundrum of contradictory expert evidence is indeed procedural; in particular, as a mechanism for reducing the divergence of views to a minimum before judicial assessment occurs:

> The court will ultimately fall back on the limited epistemic competence … but in many cases it will be possible to reduce or resolve the divergence before undertaking the assessment. The main means by which the court may achieve this is in the shaping of appropriate procedural provisions. [285]

It is also my view that an adequate adaptation of procedure is central to ensuring the adequate assessment of expert evidence in line with the requirements (and standards) of EU law and the goal of consistency in its application. Indeed, it is a central tenet of this research that the adaptation of national procedure in the area of private enforcement of competition law is both a central element on the path to better judicial resolution of claims and, at the same time, a demand of EU law.

In this context, the English experience of detailed fact-finding based on broad disclosure, intense expert scrutiny and active case management can certainly offer some useful experience for us. Specifically, we look now at four procedural aspects of trying expert evidence in the UK. These are: admissibility; access to information; pre-trial engagement between experts; and procedure at trial.

b) Admissibility

It is commonly stated that, as matter of English legal practice, judges are accustomed to address potential weaknesses or defects in expert evidence more by way of attributing it less evidentiary weight (even ignoring it) than by refusing to admit the evidence to the proceedings.[286] This has been confirmed by the current CAT President:

> Generally speaking, the approach of our civil and commercial courts to evidence is pragmatic and sensible. We abandon – or at least do not give pre-eminence to – technical rules of evidence, which govern what evidence may and what evidence may not be admitted. Instead, we let the judge see and consider just about anything that the parties consider relevant.
>
> Thus, submissions are directed not to technical legal questions relating to the admissibility of evidence, but why greater weight should be attached to certain evidence (in contrast to other evidence). On the whole, this is an approach that works very well.[287]

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[284] At the same time, the continental principle of proportionality and role for presumptions also play a key role in the EU legal framework. In this sense, the English system is also required to adapt. We have seen that already. Accordingly, a proper balance needs to be struck between fact-finding and the search for truth, on the one hand, and the proportionate resolution of cases based also on certain political goals and balances, on the other.

[285] Dwyer, n 216, 134.

[286] See, for instance, Hogkinson and James, n 11, para 3-001 or *Phipson on Evidence*, n 11, paras 33-78, in particular pp 1308-9. For an example of the approach of the CAT, see *Enron v English Welsh & Scottish Railway* [2009] CAT 36, paras 74-80.

[287] Smith, 'Lawyers come from Mars, and Economists come from Venus', n 204, p 4.

Accordingly, questions as to the reliability of expert evidence normally go to the weight to be given to the evidence and will be tested in cross-examination. Similarly, potential conflicts of interest may not necessarily give rise to the exclusion of the expert evidence, provided the expert has the necessary professional credentials and is aware of his or her duty to the court.[288] Nevertheless, such conflicts of interest should be disclosed to the court as early as possible,[289] may be subject to cross-examination[290] and will almost certainly go to weight.[291]

This said, there has been some suggestion recently that a strengthening of admissibility rules may be appropriate to increase the efficiency of adjudication and the quality of expert evidence. Marcus Smith himself, in the same article just cited, has suggested that it may be time to require questions of fact of relevance to expert evidence to be agreed or addressed in advance if such so-called 'hearsay' evidence is to be admitted in proceedings.[292] Dwyer has identified admissibility of expert evidence, along the lines of the US *Daubert* test,[293] to be a potential tool for weeding out expert evidence which does not satisfy basic standards, albeit not without serious reservations.[294]

c) Access to information

As a matter of English law and CAT procedure, experts will, in principle, be provided access to the same underlying information (i.e., that which each respective expert seeks to rely on). This is a somewhat different point to disclosure in the narrower sense we have been discussing earlier and may be understood by continental lawyers.[295] By that, we have been referring to requests for access to information in the hands of others which is necessary as evidence to be used by the parties for making out their case, or by their experts for compiling their reports. Here, we are referring to the information which is relied on by experts in their own reports (which may have been obtained pursuant to a disclosure order from the other side or may have been made available by the party the expert is representing without the need for a court order). This information refers, in particular, to the underlying data collected from original sources for use in the experts' analyses (sometimes referred to as 'raw data'), as well as datasets which have been produced further to treatment necessary to organise or 'clean' the data for the expert's analysis ('cleaned data'). It may include databases and computer codes pursuant to which the process of extraction, selection and cleaning has taken place. In addition, we may exceptionally be referring to access to the expert's model itself, which may have been run using statistical software (such as, STATA).[296]

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[288] Contingency fees will normally be a motive for expert evidence to be excluded, however: *R v Secretary of State for Transport ex parte Factortame* [2002] EWCA Civ 932, para 73.
[289] *Factortame* ibid para 70; 2014 Guidance for Experts, para 16e.
[290] See *Phipson on Evidence*, para 33-33.
[291] See, for instance, *Bank of Ireland v Watts Group* [2017] EWHC 1667 (TCC).
[292] This was, it seems, one of his takeaways from *Sainsbury's* arising from his criticism that the experts had based their opinion on uncertain facts about the payment industry as to which they were not experts. Hearsay evidence refers to a written or oral statement made otherwise than by a witness giving their own first-hand evidence in proceedings, which is tendered as evidence of the matters stated (see s 1(2) Civil Evidence Act; CPR 33.1).
[293] *Daubert v Merrell Dow Pharmaceuticals* 509 US 579.
[294] Dwyer, n 216, 341-7.
[295] See Ch 16.1 below.
[296] For an example of a case where full access was granted in judicial review proceedings concerning an appeal of a competition authority decision based on an economic model assessing competitive conditions in the market for privately funded healthcare services see *HCA International Ltd v Competition Markets Authority* [2014] CAT 11.

It is a fundamental principle of the CPR that the parties should be placed on 'an equal footing'.[297] Indeed, it is an element of standard disclosure that parties should disclose all documents on which they seek to rely. 'Document', according to CPR 31.4 means anything in which information of any description is recorded and, therefore, includes data recorded on a computer system.[298] Furthermore, it should be noted that the preparation of expert reports normally occurs after disclosure in the proceedings, such that the latter determines the way in which expert reports are then produced (i.e., on the basis of the prior open sharing of relevant data).

Additionally, CPR 31.14(2) and CAT Rule 61 provide that a party may request disclosure of any document mentioned in an expert report which has not already been disclosed. The guide to expert evidence in the Business and Property Courts provides explicitly that copies of materials that have been the object of the expertise (e.g., analyses, measurements or survey reports) and any unpublished sources, unless they have been provided during the disclosure process, should be produced with the expert report.[299]

CPR 35.6 provides for a party to put written questions to the counter-party's expert upon receiving the report, with a view to clarification of the report. The response will be considered a part of that expert's report. Finally, CPR 35.9 provides that the court may direct a party who has access to information which is not reasonably available to another party to prepare and serve a document recording the information. Zuckerman notes that this provision is intended to ensure the parties are on an equal footing in accordance with the overriding objective and may include not only factual information but may extend even to a party providing an expert opinion:

> In order to ensure that parties are on an equal footing, as demanded by CPR 1.1(2)(a), CPR 35.9 gives the court the power to direct a party who has access to information which is not reasonably available to another party to prepare and serve a document recording the information. For example, in a claim for injury sustained during hospital treatment, the claimant may seek information about similar injuries sustained in the same hospital. Such information will often be factual, but may also consist of expert opinion (in this example, the CPR 35.9 document might include the views of the hospital's staff on the causes of other similar incidents).

While access to information used in expert reports may not always be necessary where data used is public or where the model is relatively simple, access to this underlying information facilitates exact replication of the counter-party's model, verification of its accuracy and testing of its response to adjustments (for example, to the modification, removal or addition of certain variables) particularly in the case of more complex econometrics. A case in point is *BritNed*.[300]

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[297] CPR 1.1(2)(a).

[298] Disclosure refers, in a broad sense, to evidence of all types which a party seeks to rely on in proceedings (including expert and witness evidence). Indeed, it may surprise continental readers to pick up a standard textbook on disclosure like Matthews and Malek, n 11, and find that it includes witness evidence and expert evidence as aspects of disclosure alongside documentary disclosure (see ss 1.06 and 1.07 Disclosure of information).

[299] H2.28 of the Commercial Court Guide, 11th ed. (2022). This reflects one of the principles established in *The Ikarian Reefer* (n 234).

[300] n 250.

d) Pre-trial engagement

CPR 35.12 empowers the court to require experts to hold discussions among themselves in order to identify the issues in the proceedings and to try to reach agreement on particular issues before trial. The court may also direct them to prepare a so-called joint statement indicating the issues on which they agree, the issues on which they disagree and the reasons for their disagreement. Those conversations will normally be without the presence of legal advisers (although the lawyers will tend to draw up the agenda for those discussions) and, absent agreement to the contrary, the parties will not be allowed to refer to the content of discussion at trial.

The mechanism of discussions between experts is commonly utilised in competition cases. Let us take by way of example *Royal Mail*. There the court ordered (after the first CMC) the following itinerary for the expert evidence:[301]

- The experts should, by 12 April 2019, hold discussions in the absence of legal representatives to: (a) identify the issues between them; (b) explain their respective proposed approach and methodology in relation to addressing the issues; and (c) where possible, reach agreement on those issues.
- The experts' main reports were then to be exchanged by 13 May 2019, with any reports in reply to be exchanged by 12 July 2019, and any additional supplemental reports to be exchanged by 2 August 2019.
- The experts were, by 27 August 2019, to hold a further discussion in the absence of legal representatives to: (a) identify and further narrow the issues remaining between them; and (b) where possible, reach agreement on those issues.
- The experts should finally, by 27 September 2019, prepare and file a joint statement to the court showing: (a) those issues on which they are agreed; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.

Many times, engagement between experts may serve as a basis for determining the nature and scope of expert evidence to be produced by them. This, in turn, permits the court to order proportionate disclosure for use in estimations in the knowledge that the models will not later be challenged by the parties as being irrelevant or inappropriate. As noted earlier, this was the case in *Royal Mail*, where the parties' experts reached broad agreement on the approaches to be adopted and the underlying data to be used.[302] A further case in point is the *Air Cargo* litigation before the High Court in London, referred to earlier.[303] Based on agreement between the parties' experts as to the appropriate methodology for assessing the impact of the air cargo cartel on freight transport prices (during and after multiple regression analysis), and the agreement of the parties not to request factual disclosure (such as internal communications among the cartelists) to address overcharge, the court there agreed to a broad order for disclosure of transaction data from all parties. The judge made clear that, without such agreements from the parties, she would not have considered such broad (and expensive) disclosure to be proportionate and would not have acquiesced to the order.

[301] Order of the High Court of 13 June 2018, Case HC-2016-003442, paras 28-31.
[302] See n 173.
[303] *Emerald Supplies*, n 175.

The view among practitioners seems to be positive as regards the use of these inter-expert discussions to narrow down issues between experts, although clearly they have their limits in their ability to resolve central issues which separate the experts and are likely to be decisive to the case (which will, indeed, be the principal focus at trial):

> The general view among partners is that procedures for expert evidence are working well. The introduction of joint meetings under the CPR is generally seen as helpful, as it can help to identify the real issues in dispute between the experts and potentially narrow those issues (over 80% of partners have experienced this). Some however describe the impact as limited, saying that while some genuinely bad points may be dropped as a result of this process, the narrowing of issues is not generally substantial.[304]

In the *National Grid* case arising out of the gas-insulated switchgear cartel, reportedly the pre-trial engagement between experts allowed the number of economic issues in dispute to be reduced from 150 to 50 without any intervention from the court, and they were able to settle on an agreed approach to modelling, with remaining discrepancies relating essentially to the treatment of available evidence in relation to pass-on.[305]

It is averred that this sort of process does, however, rely heavily on the ability of the experts (as appropriately supported by their party's lawyers) to carry out constructive and sensible discussions. For this, it may be necessary for there to be sufficient common ground between them as to the fundamentals of assessment of harm. They may also need to be on a par in terms of experience or background so that one party does not feel intimidated by the other or adopt an inappropriately defensive (or aggressive) attitude. Depending on the profile of the experts instructed, this may or may not be a problem. In addition, they need to be sufficiently independent from their instructing clients and abide by their duties as experts.

Indeed, concerning complex economic evidence in competition cases there is likely to be serious disagreement on critical technical issues.[306] In *Royal Mail*, these issues of disagreement were the difference between completely contradictory results and the court was unable to reach any final conclusion on overcharge on the basis of either of the expert reports. Accordingly, the agree/disagree exercise was not only long, complex and costly but largely ineffective. As noted earlier, the court attributed this partly to the experts being excessively influenced by the positions of their respective clients in that case; hence, the central importance of the experts' respect for their duties in making party expert evidence work. The extent of the experts' ability to agree on key material issues will, in all events, certainly be dependent on the circumstances of the case, the experts' attitudes and profiles, and the court's ability to focus the process of engagement. We should be realistic about this. It may, generally but not necessarily, be easier to have experts agree, in advance, the possible approaches to estimation on a given case and / or the relevant data to be used.

e) Trial

The presentation of expert evidence at trial is also case managed by the court in English High Court proceedings or the CAT. In this way, according to paragraph 11.3 of Practice Direction 35, the court may set an agenda for the taking of expert evidence at trial, or direct that the parties set an agenda subject to approval by the court. The agenda should be based on the

[304] Hill and McIntosh, n 56, p 16.
[305] *National Grid Electricity plc v ABB Ltd*. The case settled before trial and there is no merits judgment on the case. The information here was provided to me by advisers involved in the case.
[306] See, *Royal Mail*, n 251, para 235.

areas of disagreement which have been identified by the experts in their joint statement made pursuant to CPR 35.12(3). As further explained in paragraph 11.2 of the Practice Direction, evidence may be given and experts cross-examined on an issue-by-issue basis. This is the more traditional way of proceeding. In addition, paragraph 11 foresees the possibility for expert evidence to be given concurrently using a method known colloquially as 'hot-tubbing'.[307]

'Hot-tubbing' involves the opposing experts appearing in the courtroom together to give their evidence simultaneously. Something commonly used in construction litigation, it was used for the first time in a competition case by Sir Peter Roth in *Streetmap* (an abuse of dominance case).[308] It was also used in *Royal Mail*.[309] Normally, it involves significant court direction and only residual questioning from the parties' counsel.[310] It may involve the experts asking questions of each other.[311] In this sense, it is a less confrontational and more collaborative means for ascertaining the position of the experts and testing disagreements. Importantly, it requires significant preparation by the court, in order for the court to be able to direct the debate and make the right questions.[312] Indeed, the ability of the court to get to a position at trial to direct the expert evidence adequately will be decisive in determining whether hot-tubbing would be appropriate (something which will depend, inter alia, on preparation time, the complexity of the issues and the judge's own familiarity with the type of expert issues to be tried). In addition, it may be necessary to give consideration to the personalities involved and their respective peer status.[313]

Paragraph 11.4 of the Practice Direction describes the standard envisaged process for hot-tubbing in the following way:

> (1) the judge will initiate the discussion by asking the experts, in turn, for their views in relation to the issues on the agenda. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert's own questions of the first expert;
>
> (2) after the process set out in (1) has been completed for any issue (or all issues), the judge will invite the parties' representatives to ask questions of the experts. Such questioning should be directed towards:
>
> (a) testing the correctness of an expert's view;
>
> (b) seeking clarification of an expert's view; or

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[307] 'Hot-tubbing' was introduced to PD 35 in 2013 as part of the Jackson reforms. It has its origins in Australia.
[308] *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (Ch).
[309] See n 251, para 234. By contrast, full cross-examination by parties' counsel was permitted on issues where, in particular, factual inconsistencies were at stake: paras 236-7.
[310] The role of lawyers for the parties varies in practice but is likely to be more controlled by the court to avoid repetition or unhelpful lines of argument on issues the court feels have been satisfactorily addressed already (as occurred, for instance, in *Streetmap*; see the Civil Justice Council's Civil Litigation Review Working Group Report 'Concurrent Expert Evidence and "Hot-Tubbing" in English Litigation since the "Jackson Reforms"', 25 July 2016, p 21). At the same time, it is important that parties' rights of defence are adequately ensured.
[311] This occurred in *Streetmap* as noted in the Civil Justice Council 2016 report, p 18.
[312] Civil Justice Council 2016 report, pp 40-1.
[313] It is possible that a more junior expert be deferential in the presence of a more senior colleague, or there may be antagonism between the experts which may not be conducive to productive concurrent evidence. See, in this regard, Hodgkinson and James, n 11, para 8-009 and the discussion in the Civil Justice Council 2016 report, pp 41-2.

(c) eliciting evidence on any issue (or on any aspect of an issue) which has been omitted from consideration during the process set out in (1); and

(3) after the process set out in (2) has been completed in relation to any issue (or all issues), the judge may summarise the experts' different positions on the issue and ask them to confirm or correct that summary.[314]

As noted, this process may, in practice, be varied by the court. This is not, therefore an exhaustive or limiting description of concurrent expert evidence.

Another mechanism whereby courts can engage with experts, and which appears in the context of 'hot-tubs', is a so-called 'teach-in'. This is a mechanism whereby judges may seek to be instructed in a neutral way on the matters subject to expert evidence either by a third party 'teacher' or by the experts themselves. It is intended that such sessions should be explanatory and divulgatory and not an occasion for advocating or testing points in issue. This mechanism may be of use in the context of 'hot-tubbing' as a means to get the trial judge up to speed on technical issues before hearing the expert evidence.

A variation on the 'teach-in' was used by Justice Marcus Smith in *BritNed*. There the court adopted a hybrid approach to dealing with expert evidence at trial. It will be recalled that their methodologies were entirely different. To address this situation, the court required the experts to give their evidence in two steps at trial. First, the experts were to give an explanation (a 'teach-in') of their respective methodologies. Second, they were submitted to cross-examination. Smith described the process as follows:

> The experts gave evidence in two stages. Before any factual evidence was called, I indicated that it would be helpful if each expert could provide a neutral explanation, under oath, of their working methodology. This came to be referred to as the "teach-in" and it took place on Day 3 (9 February 2018), after the parties' oral openings, which took place on Days 1 and 2 (7 and 8 February 2018). The experts were then cross-examined, for just over two days each, on Days 9 to 13 (19 to 23 February 2018).[315]

A further tool used by Smith J in *BritNed* was to direct written questions to the experts after trial, before emitting judgment, as regards certain alternative calculations. The judge subsequently drew on the experts' joint written response to justify the calculation of harm ('baked-in inefficiencies') which he finally used in the judgment.[316]

It is surely in the context of this greater engagement of judges with the experts that specialized courts enjoy a particularly advantageous position. The greater familiarity of judges with the expertise being presented, and the presence even on an expert on the panel of judges (as occurs in the CAT), undoubtedly enables them to engage more easily with the evidence before them and direct exchanges. They are also able to concur among themselves when the court is made up of a panel. These are, no doubt, factors in favour of such courts. At the same time, it should be recalled, as noted earlier, that is not the court's role to carry out a peer review of expert analysis but to judge pursuant to criteria of judicial assessment, and specialized courts will need to take extra care to ensure they do not cross that line and impress their own technical expertise on the case in place of that of the testifying experts.

[314] This process may be varied by the judge.
[315] *BritNed*, n 25050, para 75.
[316] *BritNed*, n 250, paras 74, 451-3.

PART III

THE CHALLENGES OF COMPETITION LITIGATION IN SPAIN

13. The emergence of a new theory of justice?

13.1. Introduction

Competition damages litigation has increased exponentially in Spain over the last six to seven years since the implementation of the Damages Directive. It has been characterized by mass follow-on cartel litigation; notably, arising out of the Trucks, Automobile Manufacturers and Milk cases.[1] The most complete example to date is the Trucks litigation and it offers a paradigmatic example of some of the key challenges that the Spanish civil procedural system faces in this new era of EU competition litigation.

The Trucks litigation

In the Spanish Trucks litigation, we have witnessed the filing of thousands of damages claims (mainly small claims brought by road haulier businesses run by individuals or SMEs) before commercial courts all around Spain. Over the period of around 5 or so years, these claims have worked their way up through the first instance (Commercial Courts) and second instance (Provincial Appeal Courts) and, finally, to review by the Civil Chamber of the Supreme Court.[2] The litigation has also involved, to date, seven preliminary references to the CJEU.[3]

The Trucks litigation in Spain has been characterized, I would venture, by the creeping development of common legal criteria by the Spanish courts as cases have been decided and judicial resolutions shared and peer reviewed. In this sense, while there has been some attention to case-specific issues and the cases have been dispersed among many different courts and proceedings, one can perceive a concern on the part of the Spanish system as a whole to try to offer a coherent response to the common problems the litigation poses (for example, on central issues such as the existence of harm or the standard of proof required of claimants and defendants). That is, one can perceive a certain tendency towards a conception of the process as one of adjudication by the system as a whole, where judicial criteria are not developed in an isolated fashion in separate proceedings but, rather, are developed piecemeal over the whole judicial process. Indeed, empirically one can find a high level of cross-reference between court decisions and even cross-pollination of approaches (for instance, on the minimum level of overcharge to be set through judicial estimation or on what constitutes a sufficient discharge of its burden of proof by the claimant). This is perhaps

[1] Following on, respectively, from the European Commission's decisions of 19 July 2016 and 27 September 2017 in Case AT.39824 - *Trucks*, and the CNMC's decisions of 23 July 2015 in Case S/0482/13 – *Fabricantes Automóviles* and 11 July 2019 in Case S/0425/12 *Industrias Lácteas 2*.

[2] For more detailed information see, among others, Francisco Marcos, 'El sobreprecio del cartel de camiones tras las sentencias del Tribunal Supremo: ¿más allá de la estimación mínima del 5%?' Almacén de Derecho, 10 July 2023, 'Trucks Cartel damages claims: thousands and odd judgments issued by Spanish appeal courts', Working Paper IE Law School, 7 October 2022, https://ssrn.com/abstract=4255889, and 'Jurisprudencia menor sobre los daños causados por el cártel de camiones' Almacén de Derecho, 21 January 2022; and Gustavo Martín Martín, 'Quantifying damages in cartel cases: the Spanish Courts approach to the Trucks cartel' (2021) 2 Mass Claims Journal 125. The first Supreme Court judgments were adopted on 12, 13 and 14 June 2023; see, for all, STS 947/2023, 14 June 2023, ES:TS:2023:2480.

[3] Cases C-30/20 *Volvo I* EU:C:2021:604; C-882/19 *Sumal* EU:C:2021:800; C-267/20 *Volvo II* EU:C:2022:494; C-163/21 *Paccar* EU:C:2022:863; C-312/21 *Tráficos Manuel Ferrer* EU:C:2023:99; C-285/21 *Dalarjo SL v Renault Trucks SASU*, ATS, 28 February 2023, [2023] OJ C 179/9; C- 632/22 *AB Volvo v Transsaqui SL,* ATS, 7 October 2022, ES:TS:2022:13837A, pending.

a natural response to what is, in essence and in practice, a common (and, indeed, novel) problem often concerning the same litigants.[4] It is also, in my opinion, significant.[5]

This 'systemic' dynamic that can be detected in the Trucks litigation has not avoided some evident 'systemic' problems, fruit of the institutional structure and legal framework within which judges and parties operate in Spain.[6] The first concerns the inherent contradiction of seeking to deliver a substantially common response through a system of multiple decision-makers, dispersed geographically and on different levels, who are dealing with separate proceedings and are independent.[7] The second is the clamorous inefficiency of a process which has involved the repetition of what are, frequently, almost identical cases (at least, in terms of the facts and evidence produced). The third relates to the excessive speed of adjudication or, to be more precise, the limited time that has been dedicated by courts to fact-finding and the assessment of complex economic evidence on individual cases. The fourth relates to the divergence of judicial criteria fruit of the large number of competent courts engaged in the litigation. This divergence has, primarily, had a material element which takes the form, for instance, of highly divergent damage awards granted by different courts on the basis of the same facts and evidence, as well as varying approaches to the standard of proof. It has also had a procedural aspect, with courts adopting materially different approaches to questions such as case management or disclosure. Finally, it comes in the shape of a new and exceptional judicial tool becoming the standard means for resolution of disputes. Indeed, it cannot escape our attention that the quantification of harm in the majority of cases in the Spanish Trucks litigation has not been determined by expert evidence but rather by the court itself estimating the harm.

Proposals for change

All the above-mentioned problems can be attributed, in part, to the constraints of the Spanish procedural system. Indeed, concerns with the impact that the mass private enforcement litigation in Trucks was having on the Spanish court system did not take long to emerge and receive the attention of policymakers. The first Covid-19 lockdown (March to June 2020), during which proceeding timetables were frozen and court activity effectively suspended,[8] offered the first opportunity for a period of necessary reflection about these challenges. This gave rise to a number of proposals, both of a procedural practice and legislative nature, all aimed to address the perceived systemic problems.

[4] The Trucks litigation has been characterized by the presence of groups of claimants represented by the same lawyers and with the same expert. For their part, the defendants are just six corporate groups, represented each by the same lawyers and experts, who are, furthermore, jointly and severally liable for any harm caused by the joint infringement. All of the claims are based on a binding Commission decision establishing the existence of an infringement of competition law, such that, from an evidentiary standpoint at least, the cases are focused on the question of damage and causation. Thus, despite the existence of thousands of damages claims, many cases are based on identical or similar evidence.

[5] I have highlighted the risks of looking to a third party reference outside of the proceedings to resolve the problem in Hitchings, 'Daños Antitrust: ¿Cómo Conseguir una Mayor Coherencia y Eficacia', n 400 (Part I), 120-4.

[6] Such systemic problems have been widely identified by commentators. See, eg, Francisco Marcos, 'Acumulación de las acciones de indemnización de daños causados por el cártel de los fabricantes de camiones' Almacén de Derecho, 31 August 2019.

[7] The independence of judges is enshrined in art 117 CE.

[8] Royal Decree-law 16/2020 of 28 April, on procedural and organizational measures to address Covid-19 in the area of the Administration of Justice.

The first proposal came in the form of an internal Commercial Court paper.[9] The paper, 'Propuesta para la ordenación de procedimientos sobre el Cártel de los Camiones',[10] observes that a high number of damages claims had been filed in the commercial courts around Spain in connection with the Trucks cartel and that a 'large part of those claims, albeit in the name of different claimants, have been filed by the same legal representation and with the same criteria for quantification of harm based on the same expert report'. The courts were mindful of the huge inefficiency of dealing with essentially identical cases in hundreds (even thousands) of separate, repeated proceedings and the risk of contradictory judgments which that entailed. They were also mindful that other proceedings of a more urgent nature (for instance, insolvency proceedings) were to be granted priority once the lockdown ended, pursuant to the Government's emergency Covid-19 law.[11] Finally, they underlined the objective of achieving a certain consensus among commercial courts in the management of parallel claims to avoid contradictory approaches. The paper, accordingly, makes proposals for common criteria for managing Trucks claims jointly, or in a coordinated fashion, with the ultimate aim of offering 'a greater efficiency, agility and legal certainty in their processing'. The specific proposals for coordination involved commercial courts either managing separate but parallel proceedings filed before them on a joint timetable with joint hearings (including the trial) or formally joining such proceedings before them into one single proceeding (with one final judgment).[12]

A second example came with the Spanish General Judiciary Council's 'Plan de Choque'.[13] The plan set out a battery of proposed legislative measures to address the challenges to the judicial system posed by the health crisis generally. It included a series of court organization measures and a specific measure relating to the joinder of parallel competition law claims. The document identifies the Judiciary Council's concerns with the huge increase of mass litigation (including the Trucks litigation) and the huge strain this was putting on Spanish court resources (something heightened by the pandemic). Notably, the document highlights a concern to ensure that, in this scenario, litigants receive equal treatment from the courts, both in a procedural and a material sense. Failure to do so, it averred, would jeopardise legal certainty, as well as the right to judicial protection in a reasonable time.[14]

The Spanish Government subsequently adopted its own proposals for a response to the situation provoked by the Trucks litigation some months after the Covid-19 lockdown, in December 2020: namely, its Pre-Draft Law on Measures for the Procedural Efficiency of the Public Service of Justice.[15] The Draft Law on Procedural Efficiency was adopted in April 2022

[9] The paper was produced during the Covid-19 standstill period. Its precise date and authorship are unknown. The document was not published in any publicly accessible location but was informally made available and circulated outside the circle of Commercial Court judges.

[10] 'Proposal on how to order Trucks Cartel proceedings' in English.

[11] art 14, Royal Decree-law 16/2020.

[12] The paper also offers suggestions on how these coordination mechanisms could be applied in a more flexible manner in order to adapt the civil procedure to the demands of the case. We will return to these proposals when we come on to assess the possibilities for case management in Ch 15 below.

[13] 'Emergency Action Plan'. The plan was put together following a consultation process, involving courts, associations of judges, professional bodies and experts. The final proposal dated 6 May 2020 was approved by the board of the Judiciary Council on 16 June 2020 and published on the council's website: https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-Pleno-del-organo-de-gobierno-de-los-jueces-aprueba-el-plan-de-choque-del-CGPJ-para-la-reactivacion-tras-el-estado-de-alarma.

[14] p 8 of the document.

[15] Anteproyecto de Ley de Medidas de Eficiencia Procesal del Servicio Público de Justicia, of 15 December 2020, https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/APL%20Eficiencia%20Procesal.pdf.

and put to Parliament (but not approved).[16] In the following legislature, the Spanish Government approved part of the measures as part of its "ominibus" law of December 2023.[17] As the title itself indicates, the reform was intended to address procedural efficiency. In contrast to the position of the General Judiciary Council, the executive considered that the principal cause of the Spanish judicial system's 'chronic problems' was not so much structural (i.e., a lack of resources, albeit undoubtedly that was also a cause) but how those resources were employed. Two of the reform's key proposals for greater efficiency in matters of civil procedure were, hence, to promote alternative dispute resolution (mediation and negotiated settlements) – that is, reduce the demand for judicial resolution - and employ the mechanism of test claims in cases of mass individual consumer actions relating to standard contract terms.[18]

13.2. Public policy goals of Spanish justice

There are a couple of interesting matters of principle which emerge in the policy proposals we have mentioned in the previous section. They are: (a) justice as a public service; and (b) equal treatment. The two questions are inter-linked. It would be premature and, indeed, imprudent to suggest that these questions represent a new theory of justice, as the title to this chapter does somewhat impudently. First, because they are not exactly new; nor, in the way I present them, are they consolidated principles of Spanish procedural law. Nonetheless, they are points which I consider particularly worthy of mention when considered in the context of our subject-matter and of some of the legal and policy considerations we have been discussing in the previous chapters concerning EU and English law. We develop the two concepts further below.

a) Justice as a public service (quality and efficiency)

With the expression justice as a public service, I am referring to a modern idea of justice considered as a service which is guaranteed by the State (in that it is provided largely at its cost) in order to serve the interests of citizens and the society at large, and which is to be assessed and reformed (in part, at least) by reference to what it delivers to citizens. It is a conception which can be detected in recent years and one that is evolving.

Before we proceed, a word of caution needs to be raised around the concept of public service when we are talking about the system of justice. While justice may be considered a public service, it is a separate State power which is *not at the service* of the other organs of the State (i.e., the executive or legislative). Its independence from outside influences must be guaranteed. Concerns that the rhetoric of public service be used to subjugate the judicial power to the interests of the Government or Parliament in breach of these fundamental

[16] Proyecto de Ley de Medidas de Eficiencia Procesal del Servicio Público de Justicia, BOCG nº 97-1, 22 April 2022, p 1.

[17] Royal Decree-law 6/2023, 19 December, approving urgent measures for the execution of the Plan for Recovery, Transformation and Resilience in public service matters of justice, public administration, local government and patronage. See, Title VII of Book I of the law. Article 103 is the provision modifying aspects of the Spanish civil procedural law.

[18] Finally, only the latter were included in Royal Decree-law 6/2023, the other measures remaining pending at the time of writing (specifically, the Draft Law on measures in matter of efficiency of the Public Service of Justice and collective actions for the protection and defence of rights and interest of consumers and users, published on 22 March 2024). The huge rise in mass consumer litigation in Spain during the last decades (and, hence, the need for action) related, in particular, to standard contract terms in mortgage loans and other banking agreements, and their breach of EU consumer law (principally, Directive 93/13), is notorious.

constitutional principles have been aired by authoritative voices in the Spanish legal world[19] and have arguably increased over recent times. Those warnings must be borne in mind and heeded, also in the area of law we are studying; for instance, when we consider initiatives concerning court specialization or training.

At least two aspects of the public service nature of justice can be identified in the proposals we have referred to: on the one hand, quality of justice, and, on the other, efficiency. We will focus, first, on the aspect of the quality of justice.

Quality of justice

The quality of justice is a concern which was aired already in the early 2000s, following the 2001 State Justice Reform Pact, as can be seen very clearly in the very first statement in the preamble to the 2003 Act on the Remuneration of Judges:

> The State Pact for the Reform of Justice, signed on 31 May 2001, has initiated an ambitious legislative programme under the umbrella of the objective of modernising the Spanish Administration of Justice and achieving a high level of quality in the provision of a public service that is fundamental for coexistence and the protection of citizens' rights, whose agile and efficient operation is essential for the realisation of the Rule of Law enshrined in Article 1.1 of the Constitution.[20]

Quality of justice is not referred to primarily as a concept to be measured in a quantitative sense; such as that which may be used by the European Commission in its EU Justice Scoreboard based on objective parameters aimed to measure, inter alia, the accessibility of court proceedings (e.g., court fees and recoverability of costs), resources (e.g., budget, number of judges and training programmes) or digitalisation. Rather, we refer here, above all, to quality of justice in the qualitative sense of providing improved and effective justice through a better process and, ultimately, better judgments. A better process involves placing the judge in a better place to understand the case and the position of the parties (bringing the judge closer to the litigants). Better judgments are those that serve to resolve more effectively the legal problems of citizens and, at the same time, offer reference points for society at large making the law clearer, more predictable and, in consequence, more effective. The provision of justice of an adequate quality can hence be seen as an idea which develops the constitutional right to effective judicial protection.

Quality of justice, in this qualitative sense, is an objective of prime concern of the drafters of the 2000 Civil Procedure Law, as can be seen from the following excerpts from the preamble to the law, based on the underlying objective of judicial effectiveness:

> The right of all to effective judicial protection, expressed in the first paragraph of Article 24 of the Constitution, coincides with the desire and social need for a new civil justice system, *characterised precisely by its effectiveness*.
>
> [...]

[19] See, in particular, Andrés de la Oliva Santos, 'Sobre la Calidad de la Justicia en España' International Journal of Procedural Law 1 (2011) Nº 1, 19. Later in this section, we will refer to one of the particular concerns raised by Professor de la Oliva, namely the excessive delegation of process management into the hands of administrative staff who are not accountable to the judge – a matter of central importance for our topic and the recommendations we wish to make. The other major concern raised by Professor de la Oliva in his article is the excessive politization of the General Judiciary Council over recent years.

[20] Ley 15/2003, de 26 de mayo, reguladora del régimen retributivo de las carreras judicial y fiscal; my translation.

> The effectiveness of civil judicial protection must entail bringing justice closer to the litigant, which does not consist of improving the image of justice, in order to make it appear more accessible, but rather in structuring the procedural work of the courts so that *each case is better followed and known by the court*, both in its initial approach and for the eventual need to purge the existence of obstacles and lack of procedural requirements - there is nothing more ineffective than a trial with an acquittal in the first instance -, and in the determination of what is truly controversial and in the practice and assessment of evidence, with orality, publicity and immediacy.
>
> *Effective civil justice means, finally, better judgments, which, within our system of sources of law, constitute solid references for the future and thus contribute to avoiding litigation and to reinforcing equality before the law*, without reducing freedom of judgement and the necessary evolution and change in jurisprudence.
>
> [...]
>
> In the drafting of a new civil and common procedural law, *it is not possible to be unconcerned with the correctness of judgments and decisions and to approach the reform with a reprehensible quantitative and statistical reductionism, only concerned with cases being resolved, and resolved in the shortest possible time*. Because prompt and truly effective judicial protection is necessary and because it is possible to achieve it without reducing guarantees, this Law drastically reduces formalities and appeals, but, as has already been said, it does not disregard what is reasonable to foresee as a logical and justified manifestation of the dispute between the parties and so that, at the same time, *the procedural moment of passing judgement is duly prepared*.[21]
>
> (My translation, emphasis added)

One of the implications of delivering effective justice of an adequate quality is that the reduction of deadlines, while essential in ensuring efficiency (undoubtedly, one of the greater achievements of the Spanish 2000 Procedural Law), is not an absolute goal. It is not sufficient of itself to ensure effective justice and may, indeed, jeopardise procedural guarantees and the quality of justice. This is evident and has been recognised by commentators, such as the French Professor of Procedural Law, Soraya Amrani-Mekki:

> Justice requires time and that time cannot be reduced unlimitedly, without curtailing the most elementary guarantees.[22]
>
> (My translation)

Delivering a just solution requires *sufficient time and opportunity* for the court to become familiar with the case and for the parties to assess and contradict the evidence and arguments which have been put forward by their counterparties.[23] This may be of particular

[21] Recitals I and II, LEC.

[22] Second International Congress of the Association of Procedural Law Professors of Spanish Universities, 'Justice: guarantees versus efficiency?' (Valencia 2019). The quote comes from the contribution of Soraya Amrani-Mekki, 'Garantías frente a eficiencia. ¿Es lo racional siempre razonable?' in Fernando Jiménez Conde and Rafael Bellido Penadés (dirs), *Justicia: ¿Garantías versus Eficiencia?* (Tirant lo Blanch 2020), 43.

[23] A similar view is expressed by Mª Jesús Ariza Colmenarejo and Piedad González Granda, 'Deber de colaboración de las partes y evolución en los roles del juez y las partes en el proceso civil' in Piedad González Granda and Mª Jesús Ariza Colmenarejo, *Justicia y Proceso: una revisión procesal contemporánea bajo el prisma constitucional* (Dykinson 2021), 401: 'the objective should focus on the idea of higher quality judicial protection and better protection of the rights of individuals' (my translation), referring, in turn, to José Bonet Navarro for whom the objective of the court's assessment should be: 'to find a way in which the determination of the factual elements in the judgment can be technically carried out under the most optimal conditions, so that these elements are close

relevance where the subject-matter of the case is of a technically complex nature, as in the matter of competition law. As we have seen, in proceedings in England and Wales this objective is achieved by aiming to ensure the full and equal participation of the parties in the proceedings and opportunity to submit evidence: 'ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence'.[24] With the Spanish procedural reforms of 2000, one of the central aims was, indeed, to improve the perception of parties that the judge has properly considered and understood the case, such that they be, in a subjective sense, more 'satisfied' with the final decision because it is pertinent to the issues in dispute (a subject of complaint under the prior, largely written, civil procedural rules, which were characterised by an 'absent judge').

Finally, we cannot leave the subject of the quality of justice without mentioning the essential role of the quality of the judges who impart justice. Alongside the procedural framework within which they work, the recruitment, statutory rights, training and general satisfaction of judges are, of course, absolutely pivotal to the quality of justice the system can offer.[25] Indeed, it is one of the central tenets of this research that judges can achieve much to improve the current system using existing legal and procedural instruments, and how we can help to ensure that the judges taking decisions in our subject-matter are able and prepared to carry out their tasks is a further consideration to keep in mind (for instance, connecting with proposals around specialization and training).

Efficiency

In the discussion of quality standards in justice, we can see the beginnings of a broader concept of justice as a public service which is concerned, also and increasingly, with efficiency; that is, with the efficient and proportionate use of public resources. Efficiency refers not just to the efficiency of the way in which specific proceedings are processed (what may be referred to as 'procedural efficiency' or '*economía procesal*') but the efficiency of the justice system as a whole. This conceptual tendency can be seen clearly in the procedural efficiency reform. Referring in its title to justice as a 'public service',[26] the reform formulates justice in terms of delivering an efficient and operative service to citizens which adequately addresses their needs for justice. These ideas were promulgated eloquently in the very first recitals to the draft law[27]. Much more briefly, the reform approved in December 2023 focussed attention on "the need to introduce efficient mechanisms which are essential to face the increase in litigiousness" and "measures to accelerate proceedings"[28].

Interestingly, while not followed on this point in the final version of the law adopted at the end of 2023, the draft law also identified the duties of parties and lawyers to cooperate in the

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to reality, at least when this is the will of the parties' (my translation) in 'Algunos problemas concretos sobre aspectos generales de la prueba en el proceso civil', Diario La Ley, nº 7256, 6 October 2009, p 8.

[24] CPR 1.1(1)(a).

[25] See, de la Oliva Santos, n 19, pp 22-3 and his conclusions, pp 48-49; in addition, Andrés de la Oliva Santos, 'El "Factor Humano" en la Justicia' (2006) 12 nº2 Revista Ius et Praxis 255.

[26] Schumann Barragán refers to the description of the administration of justice as a public service as being indicative of a 'new paradigm' in the conception of civil procedure, 'La gestión y la flexibilidad de procedimiento?', n 102 (Part II), 121-2.

[27] N. 15; see, for example, recital I: "In the words of modern constitutionalism, this public service requires both social legitimacy and efficiency. Legitimacy as the degree of trust and credibility that the justice system must have for our citizens; and efficiency as the system's capacity to produce efficient and effective responses".

[28] Real Decreto-ley 6/2023, n 17, recital II (my translation). But see more recently the Draft Law on measures in matter of efficiency of the Public Service of Justice and collective actions for the protection and defence of rights and interest of consumers and users, published on 22 March 2024.

attainment of justice, the latter expressly by reference to their ethical duties to seek consensus and not incite litigation pursuant to the Lawyers' Professional Conduct Code and the General Lawyers Statute. These duties were primarily posited in connection with the promotion of mediation and negotiated settlement, which is another one of the civil procedure law's central policies for reducing litigiousness and, thereby, reducing the courts' excessive workload.

It will not escape the reader that this move towards a rhetoric of public service (the aim to deliver effective justice efficiently and adapted to the needs of citizens) and, even, the (for now, timid) invocation of the duties of parties and their lawyers, are reminiscent of the UK's overriding objective for civil procedure established in 1998. It will be recalled from Part II that the aim of the English CPR is to 'deal with cases justly and at a proportionate cost', taking into account the impact across the system of individual cases (collective proportionality). The system is conceived as a public service which must be adequately and efficiently managed to deliver a proportionate system of effective justice. The regime seeks to deliver equitable access to justice, finding the right balance between the complementary aims of efficiency and justice; in the words of John Sorabji, securing 'effective access to the justice system by ensuring an equitable distribution of the court's resources among all litigants'.[29] We are, in the words of de la Oliva Santos, in the realms of realism; how best to organise and manage the real resources available in order to deliver effective justice.[30]

'Good administration of justice'

The balance between efficiency and effective judicial protection of an adequate quality can perhaps helpfully be found in the concept of the 'good administration of justice', which forms part of fundamental rights law at the European level. The term finds its place, for instance, in the reasoning of the European Court of Human Rights pursuant to Article 6(1) of the Convention.[31] For its part, the general principle of 'good administration' is included in Article 41 CFREU and includes the rights of citizens, in their dealings with the public administration, to impartiality, transparency, equitable treatment and reasoned decisions, as well as the right to be heard.[32] It is averred that this general principle applies equally in the dealings of citizens with the public administration of justice,[33] albeit it also finds concrete expression in other more directly applicable fundamental rights such as the fundamental right to effective justice consecrated in Article 47. The concept 'proper' or 'sound' or

[29] Sorabji, *English Civil Justice*, n 40 (Part II), 136.

[30] Andrés de la Oliva Santos, *El Papel del Juez en el Proceso Civil* (Civitas 2012). The question of realism, so wisely reflected in this short seminal work by Professor de la Oliva Santos, is key to any sensible assessment of the challenge faced by the Spanish system and central to our analysis of possible recommendations for the way ahead; see, in particular, ch 5, pp 64-65.

[31] eg *Arribas Antón v Spain* App no 16563/11 (ECtHR, 20 January 2015) para 46; *Barras v France* App nº 12686/10 (ECtHR, 17 March 2015) para 29.

[32] See, Tridimas, *The General Principles of EU Law*, n 119 (Part I), 410-5.

[33] In this context, the public administration of justice refers clearly to the functions of the administrative staff (civil service) charged with assisting courts in their work. More broadly, it refers to the activity of the judges themselves of administering justice, pursuant to art 117 CE. On this subject and the controversy around the increasing politization of the judicial office and its controversial assumption of judicial powers (in particular further to changes in the law in the period 2009 to 2015), see Marco de Benito Llopis-Llombart, *Justicia o burocracia* (Civitas 2017) and Enrique Vallines García, '¿Es inconstitucional la "nueva oficina judicial"? A propósito del Libro Justicia o Burocracia', Revista Española de Derecho Constitucional, 112 (2018) 387.

'harmonious' administration of justice is also employed by the EU legislature in a number of ASFJ legal instruments. It appears eight times in the Brussels I Regulation.[34]

The term 'good administration of justice' is also employed in national procedural legislation: for instance, in the Spanish General Judiciary Act and (albeit sparingly) in the Civil Procedural Law, which includes reference to the possibility for a court exceptionally to permit evidentiary exercises to be carried out, or hearings held, outside the court's own courtrooms in the interest of the good administration of justice.[35] In the recent Spanish proposal for representative consumer actions, which creates a whole new procedure within the Civil Procedural Law for such actions, the concept of 'buena administración de justicia' is mentioned no less than seven times by reference to the exercise of discretion by the presiding judge in the adoption of a series of procedural decisions.[36] The concept also appears in the ELI/UNIDROIT Model European Rules in the context of certain aspects of case management. For instance, the 'good administration of justice' appears as a central justification for the imposition of duties of procedural collaboration on the parties and their lawyers in Rule 3 of the model rules.

Beyond the content given to the principle by Article 41 CFREU or by the ECtHR, or the CJEU, the term does not have a precise meaning.[37] What we see, however, is an increasing use of the concept and, it is suggested, it offers a potentially helpful vehicle for defining the balance between justice and efficiency which has become a central concern of modern justice conceived (at least in part) as a public service. It also potentially vests in judges increased discretionary powers in the adoption of a series of procedural decisions and, therefore, to adapting the procedure to the demands of the case. This, in turn, involves increased engagement of the judge with the parties and the proceedings, which contributes to the quality of justice, in the sense highlighted earlier of achieving decisions which are pertinent to the dispute at hand.

Finally, it is perhaps worth recalling that, as a matter of EU law, in line with the rule of reason expressed for the first time by the Court in *van Schjindel* and *Peterbroek*, the attainment of this balance (achieving a good administration of justice) is not prescriptive as to the means to be employed and is not one which necessarily requires modifications of particular procedural rules, which may be central aspects (and even achievements) of national civil process. Rather, it requires the consideration of the process as a whole, in order to gauge whether and how these ends can be properly catered for during the course of proceedings.

b) Equal treatment

Spanish law does not apply a rule of precedent. Courts are independent[38] and essentially free to determine the cases before them by applying the law to the facts of each particular case,[39]

[34] Recitals 16, 21, 23, 24; arts 33(1)(b), 33(2)(c), 34(1)(c), 34(2)(d) Regulation 1215/2012.
[35] arts 129(3), 131(2) LEC.
[36] Anteproyecto de Ley de Acciones de Representación para la Protección de los Intereses Colectivos de los Consumidores, adopted on 20 December 2022 and published by the Ministry of Justice on 9 January 2023: https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/Anteproyecto%20de%20Ley%20acciones%20representativas.pdf; more recently, the provisions contained in the Draft Law on measures in matter of efficiency of the Public Service of Justice and collective actions for the protection and defence of rights and interest of consumers and users, published on 22 March 2024.
[37] See, Tridimas, *The General Principles of EU Law*, n 119 (Part I). For a full list of CJEU cases, see Curia Digest of Case-Law, s 1.04.
[38] art 117(1) CE.

subject only to consolidated jurisprudence of the Supreme Court.[40] However, these basic principles do not signify that courts can decide cases regardless of decisions taken by other courts. They, in fact, do not. This has a practical aspect, of course; i.e., the wish of a lower court not to have its decisions overruled on appeal by the higher competent courts. More fundamentally, however, it reflects constitutional rights of citizens to equality before the law,[41] to reasoned, non-arbitrary judicial decision-making,[42] to legal certainty[43] and to effective judicial protection.[44] In addition, without prejudice to the parties' rights not to be bound by decisions in proceedings to which they have not been party (and the concomitant right to have the evidence and arguments they put forward assessed by the presiding court in its case),[45] the court system forms a unity[46] and, furthermore, the social function of justice requires that judgments establish coherent rules which, after all, are to be obeyed. As already seen, equal treatment is identified as a fundamental objective of the justice system in the Spanish Civil Procedural Law.[47]

Equal treatment in the private enforcement of competition law

The issue of equality before the law has arisen a number of times already in the context of the private enforcement of competition law. Notably, it was raised by the Supreme Court in the Spanish Sugar Cartel case in the context of prior decisions by the administrative law courts relating to the judicial review of the same underlying national competition authority decision which was being invoked before the civil courts as the basis for the liability for wrongful conduct in the follow-on damages actions. There, the Supreme Court applied the Constitutional Court's case-law to the effect that facts cannot, without sufficient reasoned justification, exist and not exist at the same time before different Spanish jurisdictions (in that case, the administrative law courts and civil courts, respectively), even though the strict rule of res judicata does not apply.[48]

In the Trucks litigation, the principle of equal treatment has been invoked to refer to a different situation; namely, the position regarding almost identical facts invoked before, either, one and the same civil court (or court demarcation), or, of different civil courts (i.e., courts from the same jurisdiction but in different geographical locations). In the context of

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[39] See, eg, Mª Jesús Ariza Colmenarejo, 'Una revisión del estado de las fuentes del Derecho Procesal' in González Granda and Ariza Colmenarejo, *Justicia y Proceso*, n 23, 88.

[40] Jurisprudence is defined in art 1, Spanish Civil Code, which sets out the sources of law in Spain, para 6, as follows: 'Jurisprudence will complement the legal system with the doctrine that, in a reiterated manner, the Supreme Court establishes when interpreting and applying the law, custom and the general principles of law'.

[41] art 14 CE: 'The Spanish are equal before the law'.

[42] arts 120(3), 9(3) CE.

[43] art 9(3) CE.

[44] See, for instance, the analysis of José Martín Pastor, 'Técnicas para evitar pronunciamientos contradictorios sobre unos mismos hechos, y jurisprudencia constitucional sobre la vinculación de un proceso posterior a la declaración de hechos probados de un proceso anterior', in Jiménez Conde and Bellido Penadés, *Justicia: ¿Garantías versus Eficacia?*, n 22, ch 46.

[45] Rights deriving from art 24 CE and art 47 CFREU.

[46] The principle of unity of jurisdiction is consecrated in Article 117(5) CE.

[47] As highlighted by the General Judiciary Council in its 2020 Emergency Action Plan, n 13, equality refers not only to the resolution of similar cases in a similar way but also to the processing of cases in a similar way. Both of these elements have a procedural content: the latter clearly so; the former because equality is ensured primarily though procedural means, some of which we will come on to discuss below.

[48] STS 651/2013, 7 November 2013, ES:TS:2013:5819 (*Sugar II*), LG 3 (with reference to STC 192/2009, 28 September 2009, and others), without prejudice to the possibility that different courts reach a different interpretation of the same facts based on the particular legal perspective from which the court is applying the law.

mass litigation, like the Trucks case, with repetition of similar cases before dozens of commercial courts, these types of situation are, of course, the order of the day. The strength of the equality principle, as a matter of Spanish law, is not the same in the two settings. In the first, similar cases before the same court, there is a stronger, albeit not absolute, rule, to the effect that a court should be consistent in its application of the law to similar situations, subject to adequate and justified reasons justifying a change. This stronger manifestation of the principle can also be seen in the powers vested in first instance Judges' Councils,[49] or in Sections of the Appeal Courts, to adopt agreements unifying criteria in their interpretation and application of the law, as well as coordinating certain judicial practices.[50] Not without harsh criticism from respected commentators jealous of the underlying legality principle,[51] recent times have nevertheless seen further proposals for greater use of these faculties to unify criteria.[52] In the second scenario, similar cases before civil courts in different territorial demarcations, the equality principle is given a weaker sense, that of offering a force of persuasion, force which may be more or less strong depending on the auctoritas (in particular, jurisdictional level) of the court in question.[53]

Notably, in the Trucks litigation the Appeal Courts of Pontevedra and Valencia, which are among the courts to have adopted the first and the highest number of rulings (in practice, providing a reference point for other courts), have both made reference to the principle of equality in their judgments. So, for example, the Pontevedra court has used the following formulation:

> The Decision has generated a phenomenon of mass litigation, which to date has already resulted in dozens of judgments of this provincial body, handed down on the basis of factual hypotheses identical or substantially coinciding with the one now before us. In this situation, we consider it obvious that respect for the general principle of legal certainty, which requires a foreseeable judicial response to identical problems, makes it necessary to reason in the same way with regard to the general determination of the subject matter of the proceedings, the determination of the applicable legal framework, as well as the elements necessary for the success of the action brought by the plaintiff, in a context of mass litigation. Respect for art. 14 of the Constitution imposes the same requirement, logically without prejudice to the judge's obligation to analyse the peculiarities of each case, to assess the specific means of proof brought to each proceeding, and to give an individualised response to the specific arguments put forward by each litigant.[54]

For its part, the Court of Appeal of Valencia has used the following formulation and been extremely exhaustive in citing its own case-law and that of other appeal courts around the country in its reasoning:

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[49] Judges' Council are meetings of judges belonging to the same jurisdiction in the same territorial demarcation under the presidency of their Dean (arts 166 et seq of the Framework Judiciary Law).
[50] arts 170(1), 260(1) LOPJ, respectively.
[51] See, for instance, Juan Francisco Herrero Perezagua, 'Legalidad, jurisdiccionalidad y funcionalidad de las formas del proceso' in Juan Francisco Herrero Perezagua and Javier López Sánchez (dirs), *Aciertos, excesos y carencias en la tramitación del proceso* (Atelier 2020) 17, 32; Ignacio Diez-Picazo Giménez, 'Comentario al artículo 742' in Ignacio Diez-Picazo Giménez, Andrés de la Oliva Santos, Jaime Vegas Torres and Julio Banacloche Palao, *Comentarios a la Ley de Enjuiciamiento Civil* (Civitas 2001), cited by Herrero Perezagua, 29; Michele Taruffo, 'El precedente judicial en los sistemas de *Civil Law*' 45 Ius et Veritas, December 2012, 88.
[52] For example, in the General Judiciary Council's 2020 Plan of Action (see Measure 2.10).
[53] As observed by José Antonio Díaz Cabiale, *La Eficacia Material y Procesal de la Sentencia Civil más allá de la Cosa Juzgada* (Tirant lo Blanch 2018), 191.
[54] SAP Pontevedra 192/21, 30 March 2021, ES:APPO:2021:558.

> The appeal before us raises - beyond the particular issues affecting the legal procedural relationship between plaintiffs and defendant - legal problems already examined by this Section in actions for damages in the truck manufacturers' cartel.
>
> As we have pointed out in other proceedings that respond to the phenomenon of mass litigation (takeover bids for shares in certain banking institutions, allocation of costs in mortgage loans, ...) and in particular in this area of the truck cartel (e.g. Judgment of 23 January 2020, ROJ: SAP V 292/2020 - ES:APV:2020: 292), the question is not trivial, "as we understand that in accordance with the principle of legal equality resulting from Article 14 of the Constitution, when the cases being prosecuted respond in a mimetic way to the same pattern, the response must be coherent, so that, in the face of identical factual circumstances, the consequences are the same, as the Constitutional Court has stated (S n. 23/81 of July 1981, S. n. 23/81, S. n. 23/81, S. n. 23/81, S. n. 23/81 of July 1981). No 23/81 of 10 July , 11/82 of 29 March, 60/84 of 16 May, among others), and the various Chambers of the Supreme Court (SS of the 3rd Chamber of 28 April and 19 November 1986, 2nd Chamber of 22 April 1983 and 5 July 1985, among others)". This doctrine is also echoed by the Provincial Court of Pontevedra in cases similar to the present one, following its ruling of 28 February 2020, reiterated in other subsequent rulings.
>
> For this reason, and in order to avoid unnecessary repetition, as far as it is applicable to the specific litigation on which we are now deciding, we will refer to the pronouncements relating to each of the applicable legal criteria, following the parameters used in them. However, the application of the principle of equality must be understood without prejudice to discerning what is the same from what is different in each case, and the review of the specific allegations of the parties and the evidence produced in the proceedings (456.1 LEC), given that this Chamber has been holding that each case needs its own examination, with a decision adapted to its particularities.[55]

Equal treatment and Spanish civil procedure generally

The avoidance of contradictory court decisions is, naturally, a concern of the Spanish legal system which manifests itself in the Spanish Civil Procedural Law. For instance, it can be seen in the procedural mechanism of joinder, as well as in the legal rules of res judicata, lis pendens, or so-called 'prejudicialidad'.[56] Where parallel proceedings have already been brought in another EU Member State, national courts, in addition, have the power, pursuant to Article 30 of the Brussels I Regulation, to stay related actions (or even decline jurisdiction). In the more specific context of the private enforcement of competition law, Article 434 LEC provides the court discretion to stay civil proceedings pending the determination of an investigation by a competition authority into the same underlying infringement.[57]

For its part, Article 15 of the Damages Directive (transposed into Spanish law by Article 80 LDC) sets out a concrete application of the general rule for related actions under Article 30, Brussels I Regulation. Specifically, it applies to the case of claims brought at different levels of the supply chain in relation to damages arising out of the same competition infringement.

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[55] SAP Valencia 802/2021, 22 June 2021, ES:APV:2021:2523 (my translation).

[56] Pursuant to the rule of 'prejudicialidad civil' (art 43 LEC), the court may order the stay of proceedings where, in order to resolve the case before it, the court must decide on an issue which is the main object of other pending proceedings. This rule, which was the object of the preliminary reference in Joined Cases C-381/14 and 385/14 *Sales Sinués v Caixabank SA* EU:C:2016:252 and was translated in the English version of AG Szpunar's opinion, EU:C:2016:15, as 'precedence' (see, inter alia, para 27).

[57] In the context of investigations and decisions of the Commission into EU competition law infringements, this matter is also regulated by art 16(1) of Regulation 1/2003 and, before that, was the subject of case-law of the CJEU in *Delimitis*, n 372 (Part I), and *Masterfoods*, n 359 (Part I).

Recital 44 of the Directive takes this a step further and declares that 'National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level', whether that be for cross-border or purely national cases. This aspect of the Union legislator's objectives does not, however, find expression in Article 15 itself, which merely refers generally to the possible application of Article 30 of the Brussels I Regulation without prescribing any particular procedural mechanism to ensure consistency (whether by way of joinder or stay or any other means). The rule in Article 15 refers rather to national courts simply taking 'due account' of related actions at different levels of the supply chain, including the judgments adopted in such related actions. The EU's desire to foment consistent decisions is apparent; as is, however, the tension which this policy objective faces with each individual's fundamental right to access to justice, not to mention the uncertain legal value and effect attached by national law to judicial precedents in parallel cases:

> This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context.[58]

Returning to the key procedural mechanism in this context - joinder (specifically, the joinder of actions by the claimants in a single claim) -, the criteria under Spanish law is one of connexity as to the underlying facts and cause of action.[59] The Supreme Court has recently determined a relatively open interpretation of this rule precisely with the aim, in a context of increased mass (particularly, consumer) litigation, of avoiding contradictory judgments in separate proceedings. This can be seen in its landmark 2015 judgment in *Bankinter* in relation to mass consumer banking claims for alleged breaches of transparency and information requirements in the sale of certain financial products:

> In conclusion, what is decisive is not whether or not there are different legal relationships with certain differing aspects, but whether or not there is a connection between the disputed issues which are the subject of the joined actions in their factual aspect with relevance to the claims brought, which justifies the joint hearing of the actions brought and thus avoids the existence of unjustifiably discordant judgments.
>
> [...]
>
> These are cases in which it is not justified that the actions be processed in different proceedings, and that in each of them the examination of the same defendants, the same witnesses or the same experts on substantially identical facts has to be repeated, with the increase in cost for the parties (and specifically for the plaintiffs who are not allowed to join their actions) of having the experts who have issued the report (and the witnesses) appear in each of the different proceedings, if they claim compensation for the costs of having to come repeatedly to be examined in the trials in the different courts hearing the individual actions), and the risk that the experience of the previous statements in the litigation in the first instance may in some way have a negative influence on the examination in the subsequent litigation, both on the active side of the interrogator and on the passive side of the person being examined.

[58] Recital 44 Damages Directive.
[59] art 72 LEC.

> This joint processing also avoids the risk of lawsuits in which the factual basis for the actions brought is substantially common, giving rise to judgments that resolve the issue differently from one another.
>
> This treatment of the question is explained by the reasons that justify the figure of the subjective joinder of actions, including procedural economy and the avoidance of contradictory judgments.[60]

The Supreme Court's judgment in *Bankinter* not only identifies the objective of avoiding contradictory judgments as a justification to support its broad interpretation of the joinder rules. In addition, it invokes two further practical observations of a policy nature: first, that the repetition of cases with the same evidence is inefficient and costly, and, secondly, that the repetition of such evidence could risk 'contamination' between different proceedings. The 'contamination' risk has been an evident - and, indeed, unavoidable - reality in the Trucks litigation and is likely to occur in any mass litigation characterized by fragmented proceedings. It is, in fact, impossible that what has occurred in one trial in one proceeding not be in the mind of the judge (and parties) and influence in the next proceedings, when that second (or third, or fourth) set of proceedings has often taken place on the same day (or consecutive days) and with the same expert witnesses and lawyers discussing the same expert report. The Appeal Court of Valencia in the Trucks litigation has coined the term 'déjà vu' to describe this very situation.[61] The arguments of inefficiency and contamination are powerful policy considerations.[62]

What is more, (positive) contamination has been considered by some as a necessary principle of adjudication; i.e., that which has been decided in a previous case by the same court in practice (although not in law) binds the court to the same result in following cases (the narrow application of the equality principle we have referred to earlier):

> 51.- In this case, I am going to maintain this evidential assessment, which will lead to the claim being upheld, for the following reasons:
>
> (i) Because I have already had occasion to uphold in another decision subsequent to the one reproduced, despite the submission then of the same report to the broader and more intense criticism of another expert team (Judgment of 13 March 2020). Therefore, I have accepted the validity of this expert opinion in two decisions prior to the present one, in different evidentiary scenarios, for the purposes assimilated to those provided for in art. 222.4 LEC.[63]

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[60] STS 564/2015, 1 October, ES:TS:2015:4170, LG 3.3 (my translation).

[61] SAP Valencia 866/2020, 29 June 2020, ES:APV:2020:3516, LG 6 (my translation).

[62] Purificación Martorell Zulueta, Magistrate at the Valencia Appeal Court has observed the existence of a consequent 'saturation with this systematic repetition of the explanation of the reports, clarifications and criticisms' and that 'the system of atomisation put in place, in the absence of efficient collective complaint mechanisms, generates distortions of various kinds, from the saturation of commercial bodies, to the trivialisation of the work dynamics (pleadings not always adapted to the particular case and decisions whose content is systematically repeated), to the disparity of solutions in the assessment of the damage arising from the same conduct, the inefficiency contrary to the principle of procedural economy, and the economic costs it represents for litigants, among others' (my translation); 'Pluralidad de Reclamaciones' in Silvia Gómez Trinidad and Wolfgang Wurmnest (dirs), *Práctica judicial ante las reclamaciones de daños por infracciones de Derecho de la Competencia* (Wolters Kluwer 2021), 155, 161-2.

[63] SJM3 Valencia, 15 September 2020, ES:JMV:2020:5922; art 222(4) LEC refers to the res judicata effect of prior judgments on a later judgment which depends on a question determined in the first: 'The res judicata ruling in the final judgment that has put an end to a proceeding shall bind the court of a subsequent proceeding when it appears in the latter as a logical antecedent of its object, provided that the litigants in both proceedings are the same or the res judicata extends to them by virtue of a provision of law'. This rule is not applicable to the case in

That approach was not condoned by the corresponding appeal court, however.[64]

Convergence with Common Law: the influence of EU law and the increased role of judges

As many have observed (notably, Professor Taruffo), there is a certain convergence between civil and common law systems in this whole area.[65] In the common law (England and Wales, for instance) there is a rule of precedent.[66] There is not in civil law countries like Spain.[67] However, the underlying *goals* of precedent are shared by continental systems. These goals are, in the first place, the fundamental principles of equality before the law and of legal certainty. In addition, the objective of economic efficiency has come to reinforce the argument for equal treatment in recent years, given the phenomenon of increased mass litigation. This argument is based on the idea that uniformity and predictability in judicial resolution reduces litigiousness by setting out the basis for settlement or the withdrawal of meritless claims.[68]

There are further reasons influencing in this convergence. They include the cross-pollination of legal systems around the world. This can occur for different historical reasons or because legislators look to neighbouring systems for tried and tested methods for the resolution of common problems of modern justice, something which is fomented by globalisation.[69] In the context of our study, of greatest direct force is, however, the unifying effect of EU law. We have seen this in earlier chapters, both from the perspective of the influence of EU law on national law through the imposition of standards for the enforcement of EU law rights, and also from the perspective of the impact on English law of EU law concepts and interpretative principles in the English courts' application of competition law.

It is important to recall, furthermore, that national judges arguably take on a greater role as protagonists in the application and interpretation of EU law than under purely national law. Pursuant to Article 4(3) of the TEU, national courts are under the direct duty to enforce EU rules and make those rules effective by interpreting national rules (including rules of procedure) to the extent possible in line with their spirit and objectives (where necessary, with the assistance of the CJEU under Article 267 of the Treaty). Those EU rules are, furthermore, frequently of an open-textured and principled nature, requiring as such a greater role of interpretation by the national judge.[70]

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point but is applied by analogy by the judge to consider himself effectively bound by his prior assessment of the same evidence (the claimant's expert report) in an earlier case between different parties.

[64] The Valencia Appeal Court considered that the argument could be properly overlooked given the res judicata provision is not directly applicable; SAP Valencia 989/2021, 20 July 2021, ES:APV:2021:3123, LG 6.12.

[65] Taruffo, 'El precedente judicial', n 51.

[66] Albeit, as observed by Taruffo, the rule of precedent is not only notoriously unrigid but also, in practice, marked by the application of many exceptions; Michele Taruffo, 'Un Vértice Judicial Abstracto' (2018) AFDUAM 77.

[67] See Julio Banacloche Palao, *Aspectos fundamentales de Derecho procesal civil* (4th edn, Wolters Kluwer 2018), 194-5.

[68] ibid 91-2.

[69] See Raúl Nuñez Ojeda and Nicolás Carrasco Delgado, *Derecho, proceso y economía* (Marcial Pons 2022), 117, by reference to Prof Taruffo. The UK's CPR is a good example of this cross-pollination; itself a first example of an attempt by the British legislature to codify its civil procedural rules and also an inspiration, in turn, for continental systems, such as the Dutch; as noted by CH van Rhee, *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008), 11-12. See, generally on the topic of convergence among procedural systems: Mauro Cappelletti, *El Proceso Civil en el Derecho Comparado. Las grandes tendencias evolutivas* (Olejnik 2018).

[70] On the changing role of civil law judges, see, Alessandro Fabbi, 'New "Sources" of Civil Procedure Law: First Notes of a Study', in Loïc Cadiet, Burkhard Hess and Marta Requejo Isidro (eds), *Procedural Science at the Crossroads of Different Generations* (Nomos 2015), 88-9, where the author refers to the CJEU's principled approach to procedural law as: 'rewriting the position of [Italian] judges and their interpretative function, as the principle of

The increased role of national judges as interpreters of EU law, in turn, makes for a greater importance of reasoned assessment in the application of the law, in order to safeguard legal certainty and ensure equal treatment before the law. This point brings us to a certain convergence also in thinking as regards judicial resolution. That thinking, for instance, identifies detailed judicial assessment based on a close attention to the particular facts of a case as offering the necessary nexus between individual judicial decisions resolving a concrete case and their capacity to have a precedential impact on later decisions. Accordingly, the art of adequate reasoning in judicial assessment is something which has been underlined as providing a justification for the desirable goal of uniformity in judicial resolution in a system, such as the Spanish, which is without a rule of precedent (and applies, rather, a rule of legality):

> As has been pointed out, the judge should never be a creator of law; his power is to resolve the specific case on the basis of the postulates established by law. Henceforth, he will resort to the tools that the legal system places at his disposal, but understood as a mechanism of argumentation and reasoning. Therefore, the basic premise in this concept may be that similar cases must logically be followed by similar solutions. This is not so much because of the imperative character that previous pronouncements may have, but because they follow criteria of logical reason. In this sense, the judicial technique of drafting judgments is essential, in which the identification of the factual basis is decisive in the finding of similar cases.[71]

This is, indeed, an interesting place for us to have reached. It will be recalled that we dedicated some time to the matter of judicial assessment and reasoning in our preceding section on English law (by reference, in particular, to the work of Professor Dwyer). English law, by virtue of the rule of precedent, is marked by a close attention to the facts.[72] The suggestion of the foregoing is that a greater attention to facts and reasoning derived from the facts, may need to impregnate judicial assessment further also in Spain, precisely in order to contribute to the desired goal of uniformity in decision-making in mass litigation situations. This is, I would suggest, in line with the spirit and goals of the Damages Directive and, accordingly, of particular relevance in the field of the private enforcement of EU competition law.

13.3. Interim conclusion

This lengthy digression on the concepts of justice as a public service, delivering quality and efficiency, and of equality as underlying objectives of modern justice in an era of complex mass civil litigation offers a useful framework for our consideration of the challenges posed by the private enforcement of EU competition law to the Spanish procedural system. It also highlights the central role of judges (and, to a certain degree, the parties themselves) in addressing these challenges.

14. Institutional organization: specialization

One of the ways to address the challenges of the increasing technical complexity in matters brought before the courts in modern society (such as, competition law) is specialization; first

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effectiveness, under-cutting legislative supremacy, requires civil law judges to make choices that are similar to those made by judges in the common law world'.

[71] Ariza Colmenarejo, 'Una revisión del estado de las fuentes', n 39, 90 (my translation).

[72] Taruffo has highlighted that approximately 90% of the reasoning in English Supreme Court judgments is dedicated to an analysis of the facts of the case; Taruffo, 'El precedente judicial', n 51, 90.

and foremost, specialization of the courts,[73] but also specialization of procedures. Specialization of judges should not be at the expense of their sound and continuing grounding in law generally, however, and means, in practice, that specialized judges should perhaps be pooled from those judges who are best prepared all-round as judges and have the necessary prior general experience.[74]

14.1. The Spanish commercial courts

Specialization was the key consideration for the Spanish legislator in the creation of the commercial courts of first instance in Spain in 2003 (or, to put it more precisely, the extension of their new competence in matters of insolvency to other areas, including industrial and intellectual property, company, transport, insurance, and competition law).[75]

According to the recitals to the new law:

> The complexity of the social and economic reality of our times and its repercussions on the different branches of the legal system make it advisable to make decisive progress in the process of specialisation. To this end, the commercial courts are entrusted with other competences in addition to insolvency matters, thus opening up a path for the future that should bear significant fruit in the process of modernising our justice system.[76]

The recitals to the 2003 law went on to identify a number of further specific objectives justifying the creation of the new specialized courts for the range of commercial matters attributed to them: (i) *quality*: the delivery of judicial decisions of quality in areas of technical complexity would be achieved by assigning judges with specific and deep knowledge of the subject-matter in question to determine all cases on that matter within the relevant geographical demarcation; (ii) *speed*: greater speed in decision-making would be achieved by judges who, given they know the subject-matter well, could thereby assess and decide cases with greater agility; and (iii) *consistency*: greater 'coherencia y unidad en la labor interpretativa de las normas' would be attained, contributing to greater legal certainty, since the specialized courts would make it possible to 'alcanzar criterios más homogéneos, evitándose resoluciones contradictorias en un ámbito de indudable vocación europea'. These objectives echo the underlying principles of quality and efficiency we have highlighted in the previous section. The reference to the goal of consistency in the application of EU law reminds us once more of the relevance of the EU framework and its objective of uniformity.

At least one commercial court was established in each province of Spain pursuant to the 2003 judicial reform, located normally in the provincial capital. The courts were granted jurisdiction over the whole province. In the more important cities, there could be several commercial courts. At the time of writing, there are a total of 18 commercial courts in Madrid and 12 in Barcelona, the busiest judicial centres by some margin. The total for the whole of Spain (fifty provinces, plus the North African autonomous cities of Ceuta and Melilla) is currently over ninety.

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[73] As is noted by Amrani-Mekki, n 22, 46.
[74] This warning is sounded by, among others, de la Oliva Santos in 'Sobre la Calidad de la Justicia', n 19, 37.
[75] Organic Law 8/2003 of 9 July on the Insolvency Reform, amending Organic Law 6/1985 of 1 July on the Judiciary ("**LOPJ**"). Initially, in matters of competition law, the commercial courts' competence was limited to the application of EU, as opposed to national, competition law. This was amended, to include national competition law as well, in 2007, pursuant to Organic Law 13/2007 of 19 November.
[76] Recital II LOPJ (my translation).

Further specialization of the commercial courts within any given province in which there was more than one, was also permitted and contemplated by the 2003 reform.[77] This gave rise, notably, to the agreement of the General Judiciary Council in November 2011 to create sub-specializations within the commercial courts in Barcelona, including two courts specialized in unfair competition and competition law to which all such matters would automatically be assigned. This further specialization formed part of a pilot programme whereby the commercial courts in Barcelona would operate as a collegiate tribunal organised into specialized sections (such as that for competition and unfair competition law just mentioned).[78] A similar programme has since been implemented also in Seville.[79] The generalized use of specialized sections of collegiate tribunals for competition law cases, using this model, was advocated by the General Judiciary Council in its 2020 Emergency Action Plan.

While, without legislative reform, the operation as a collegiate tribunal of the first instance commercial courts does not sanction the adoption of collegiate decisions (adjudication remaining the exclusive competence of each individual autonomous judge), it has permitted the so-called 'common deliberation' of cases (as well as certain organizational coordination).[80] 'Common deliberation' refers to the practice of the relevant section of judges within the 'commercial tribunal' to meet to discuss cases, particularly those of a certain complexity or relevance, to define common criteria of adjudication - in particular, of a legal nature. Each judge is then autonomous in adopting the relevant judgment on the case he or she is charged with deciding. The judge will, however, need to justify separation from the common criteria established in the section should he or she chose to adopt a different stance.[81] The Barcelona Commercial First instance Tribunal has also developed procedural protocols setting out for courts users and the public at large how certain matters would be dealt with procedurally by the relevant courts.[82] In these ways, the collegiate operation of the courts contributes to the goal of unifying criteria within a particular demarcation as is contemplated in the General Judiciary Act.[83]

According to Justice Fernández-Seijo, one of the judges involved in the creation of the Commercial First Instance Tribunal in Barcelona, this court specialization contributed to

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[77] art 98(1) LOPJ as amended by Law 19/2003 of 23 December.

[78] The proposal to create collegiate tribunals at first instance reached the stage of a draft law which was put to Parliament in August 2011, but never reached the statute books: BOCG nº 144-1, 2 August 2011.

[79] Agreement of the General Judiciary Council of 4 February 2016; see press release: https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Sala-de-Prensa/Archivo-de-notas-de-prensa/-El-CGPJ-aprueba-el-plan-piloto-de-Tribunal-de-Instancia-Mercantil-de-Sevilla.

[80] By organizational coordination, we refer, for instance, to the sharing of administrative resources or the employment of additional substitute judges to provide increased resources to the courts (eg, the assignment of 14 judges to 10 courts in Barcelona; see, José María Fernández-Seijo, 'Justicia mercantil y tribunales de instancia' Almacén de Derecho, 31 May 2017). With regard to similar arrangements in Seville, see the General Judiciary Council press release of 4 February 2016 (n 79).

[81] An example of this can be seen in the litigation arising out of the CNMC's decisión of 25 March 2013 in Case S/0316/10 – *Sobres de Papel* (Envelopes): SJM3 Barcelona, 6 June 2018, ES:JMB:2018:228, para 13: 'The legal issues resolved herein were submitted for consideration by the Competition Section of the Commercial Tribunal of Barcelona, composed of the Honourable Judges Mr. Eduardo Pastor Martínez (rapporteur), Mr. Manuel Ruiz de Lara and Mr. Raúl N. García Orejudo (coordinator), within the framework of the protocol of the Statute of the Commercial Tribunal of First Instance of Barcelona, approved pursuant to agreement of 15 July 2014 of the Permanent Commission of the CGPJ and revised by Agreement of the Permanent Commission CGPJ of 18 February 2016.'

[82] eg, the Mobile World Congress 2020 Protocol or the Protocol on Business Secrets.

[83] art. 170(1).

better and more effective adjudication, and the collegiate approach permitted greater legal certainty for both judges and parties:

> By specialising the courts, judges were guaranteed a more in-depth knowledge, knowledge that allowed them to deal with the most complicated cases with greater rigour. This critical mass of cases made it possible to provide more effective responses, reducing procedural times, especially in the adoption of interim measures. The collegiality in the taking of certain decisions generated greater security both for the judge who had to decide, given that he had the opinion of his colleagues, and for the parties to the proceedings, who were aware of the principles of interpretation common to the different courts.[84]

The pilot exercise in Barcelona was supported by an intense judicial training programme for commercial judges, which supplemented the centralized training already offered to judges by the Judiciary Council.[85]

The area of intellectual property offers an example of a yet further step in court specialization. Following legislative reforms,[86] the General Judiciary Council adopted an agreement in 2016 to concentrate all industrial property cases of a civil nature in three territorial demarcations (Madrid, Barcelona and Valencia) and designate the specialized courts in each.[87]

The specialization of courts at first instance level is mirrored by the creation of specialized sections within each of the provincial appeal courts ('Audiencias Provinciales'). Until recently, this has entailed the existence of one specialized section dealing with all matters heard by the commercial courts. Following the latest reform to the Judiciary Framework Law in 2022, a new specialized commercial section of the Madrid appeal court for IP, unfair competition and competition law (Section 32) was created in February 2023 and became operative as of 31 March 2023.[88]

14.2. Impediments to effective specialization

Despite the recognition of the value of specialization as a means to foment more effective resolution of complex matters such as competition law, which can be seen in these aforementioned court organization measures, there are other ways in which the court system is organized in Spain which work, often incongruously, in quite the opposite direction. The first arises in the area of consumer mass claims; the second relates to the rules for the remuneration of judges; and the last concerns the way in which the EU and national territorial jurisdiction rules impact on specialization. As will become clear, I am referring to specialization in a broad sense; not just the attribution of specialized competences to a particular court or set of courts, but also the substantive and effective specialization of judges which such formal attribution seeks to achieve, but is not of itself sufficient to do. If we revert to the objectives set out in the 2003 Law creating the commercial courts, we can see some of the broader underlying objectives of specialization, which include deeper

[84] Fernández-Seijo, 'Justicia mercantil y tribunales de instancia', n 80.
[85] ibid.
[86] art 118 Law 24/2015 of 24 July on patents, applicable also to trademarks, pursuant to Law 17/2001 of 7 December, and industrial design, pursuant to Law 20/20013 of 7 July.
[87] Agreement of the General Judiciary Council of 21 December 2016, BOE nº 315, 30 December 2016, p 91616, as later modified by agreements of 2 February 2017, BOE nº 44, 21 February 2017, p 11460, and 18 July 2019, BOE nº 182, 31 July 2019, p 83027.
[88] Agreement of the Permanent Commission of the General Judiciary Council of 8 February 2023 pursuant to arts 80(3) and 82bis(3) LOPJ, BOE nº 39, 15 February 2023, pp 23429-30.

technical knowledge and greater consistency by concentrating a particular subject-matter on a smaller number of judges. These are important considerations to keep in mind.

a) Consumer law

In the area of consumer law, a certain dynamic emerges which is, indeed, contrary to that of specialization since it grants greater weight to the simplicity (or ease) of litigation for the unsophisticated claimant (a consumer) than to providing for a more specialized treatment adapted to the material complexity of the cases themselves. Accordingly, the Supreme Court has held in the damages litigation arising out of the Spanish Automobile Manufacturers' Cartel[89] that the fact that a case is brought by a consumer (typically, an end user purchasing a motor car) is the decisive factor for the purposes of determining the type of procedure to be followed.[90] By contrast, the fact that the claim is based on a breach of competition law and may involve complex expert evidence concerning the assessment of effects and the quantification of harm is not considered decisive. This means that, in the case of an individual consumer claim arising out of the Automobile Manufacturers' Cartel, the claim will typically have to follow the fast-track procedure ('juicio verbal') meaning a shortened 10 day time-limit for the defence, only one hearing at which evidence will be both proposed and heard, and no right to appeal if the amount claimed is below a certain amount.[91] This is, with all due respect, a strange choice to have been made by the Supreme Court and one that seems to revitalize previous arid discussions around whether a follow-on damages claim was a competition law claim which, as such, should go to the specialized commercial courts, or just a 'simple' claim for damages which could and should be processed by the normal courts of first instance; a discussion which was resolved definitively in favour of the commercial courts by an amendment to the General Judiciary Act in 2022.[92]

In its draft proposal for the new consumer representative actions regime put out to public consultation in early 2023, the Spanish Government proposed to grant jurisdiction for the new actions to the ordinary civil courts of first instance.[93] Unlike Directive 2020/1828, which the draft proposal purported to implement, the proposal did not expressly exclude competition law from its ambit and, accordingly, appeared to include collective actions for any wrongful conduct affecting a group of consumers, including therefore competition law.[94] Hence, collective consumer claims arising out of conduct breaching competition law would be heard not by the commercial courts, which hear all other competition actions, but by the ordinary civil courts. The draft proposal purports to address this by providing for the specialization of certain ordinary first instance courts to hear the consumer collective actions.[95] Nevertheless, it is not clear how such specialization would come about or whether the new courts would profit from incorporating commercial court judges with prior experience in competition law. Indeed, it is not obvious that the common denominator of the claimant being a consumer offers an adequate criteria for specialization, albeit limited to

[89] CNMC Decision 23 July 2015, S/0482/13 - *Fabricantes Automóviles* (Automobile Manufacturers), n 1.
[90] ATS 180/2022, 13 October 2022, ES:TS:2022:13976A; ATS 212/2022, 13 October 2022, ES:TS:2022:13977A.
[91] art 455(1) LEC.
[92] art 86bis(2) LOPJ as amended by art 1(6) of Organic Law 7/2022 of 27 July 2022. This had become the standard view of the courts before then anyway.
[93] Proposed art 834(1) LEC, n 36.
[94] ibid proposed art 828(1) LEC and recital II. This is the view of Fernando Gascón Inchausti, one of the members of the working commission set up to prepare the draft law, as expressed in his article 'Algunas claves del Anteproyecto de Ley de Acciones de Representación de los intereses colectivos de los consumidores' Almacén de Derecho, 17 February 2023.
[95] ibid proposed art 834(2) LEC.

collective actions. If approved, the rule of competence, may, in my view, generate a dynamic directly opposed to the positive process of specialization brought about in recent years in the area of competition law and could reduce the quality, and heighten the risk of inconsistency, of competition law decisions by the civil courts. In addition, the draft law foresees that the fast-track procedure will be used for representative declaratory actions or cease and desist orders (as opposed to actions for damages)[96] whereas, again, in the field of competition law, this may be entirely inadequate; for example, if the court needs to establish itself the existence of a competition law infringement.

b) Remuneration of judges

In the matter of the remuneration of judges, the system which currently applies in Spain is also unsupportive of specialization. It is also arguably unjust.[97]

The annual objectives for judges are established by the General Judiciary Council pursuant to Law 15/2003.[98] Those objectives are defined by reference to a target number of hours of dedication. Those objectives are used as the basis for the calculation of additional variable remuneration for judges. Compliance by judges with their objectives is, then, calculated on the basis of a set benchmarks (reference values) for different types of judicial activity; notably, the number of decisions of a particular nature each judge adopts in any one year.

Judicial objectives, at the time of writing, were defined and set by Regulation 2/2018, based on statistics collected by the General Judiciary Council in 2017. For litigation of the type a judge may be faced with in a competition claim, involving voluminous and complex submissions and evidence, the benchmarks set in that regulation will surprise many who are not familiar with the Spanish system. For every judgment adopted by a court at first instance in a competition case, the regime allocates just 8.5 hours. That allocation refers to the time estimated for the whole process (including the study of submissions, hearings and drafting of the judgment). It does not include incidental matters, such as a jurisdiction challenge (for which, for example, only a further half an hour is allocated). This allotted time will be increased by just a further 15% in the event the case involves multiple parties or joinder.

As is evident, these benchmarks are not conducive to a judge spending much time on any individual case (any time beyond 8.5 hours on an individual competition claim will not count for the purpose of a judge's compliance with his or her annual objectives) or concentrating claims in one proceeding through the use of joinder. Nor is the time allotted to each proceeding pursuant to these benchmarks anywhere near the amount of time that would be necessary to carry out a proper, considered assessment of a typical competition case. Admittedly, the economic impact of variable remuneration is not huge[99] and there is provision for judges to make requests for the adaptation of the benchmarks in the event of matters requiring 'special dedication' (for example, due to their material complexity or the amount of time required for their processing). Indeed, there are, thankfully, numerous examples of judges not allowing their case management to be determined by such economic considerations. Nevertheless, the objectives are not conducive to judges spending

[96] Proposed art 841(1) LEC.
[97] The system of 'productivity' criteria for the remuneration of judges is strongly disputed, for instance, by Prof de la Oliva Santos, 'Sobre la Calidad de la Justicia', n 19, 25.
[98] Law 15/2003, of 26 May, Reguladora del Régimen Retributivo de las Carreras Judicial y Fiscal.
[99] Variable remuneration is limited to only 5% to 10% of the judge's annual fixed salary and is awarded when the judges exceed their objectives by at least 20%.

extra time on complex cases, even if that were justified, or to 'complicating' proceedings further by joining several cases together. This may well explain, in part, the decision of most judges to process individual cases without joinder or, at most, to coordinate parallel cases which still end in separate decisions (rather than one single decision).[100]

Hence, the current Spanish system for the remuneration of judges is not conducive to judges dedicating more time to a particular case, even where the case needs it, and this contributes to the fragmentation of litigation (involving, in turn, an inefficient use of judges' time). These dynamics are, accordingly, unfavourable to the effective specialization of judges in a particular complex field, such as competition law, since specialization requires sufficient time for the judge to become an expert in that field.[101]

c) Concentration of proceedings

Finally, one way to achieve de facto specialization of courts is to have parallel claims brought before the same court by way of concentration or consolidation. This can be achieved by way of the joinder of claims brought before different courts (a mechanism seldom used, in practice) or by the concentration by claimants of their claims before one single jurisdiction. The latter is dependent on the rules of jurisdiction. As it happens, however, EU and national jurisdiction rules for tort claims, as those have been interpreted by the courts, have not facilitated such concentration. Indeed, the jurisdiction rules have favoured a rule which grants territorial jurisdiction to courts located close to the claimant (typically, where the claimant bought the relevant products affected by the competition infringement or, in national consumer claims, at the claimant's domicile)[102] and have thus fomented the fragmentation, rather than the concentration, of claims; the CJEU indicating that concentration is, rather than an aim of the jurisdiction rules, a matter for national court organization, organization which may, it concedes, legitimately involve the specialization of a limited number of competent courts.[103]

14.3. Procedural specialization

We will end this section with a brief reference to procedural specialization. Indeed, specialization can be brought about not just by specializing specific courts but procedurally, by creating specialized procedures for specific subject-matters. There are essentially only two standard procedures for civil cases under Spanish law, however: the ordinary procedure and a simplified version (the verbal or fast-track procedure). These are the procedures that apply for competition law claims.[104] Despite the procedural specificities that may arise in

[100] Indeed, one can see that the repetition of similar cases is a way for the judge partly to correct the defects of the system since he or she can benefit from aggregating time across the overall set of cases. For example, ten competition claims filed by the same lawyers with the same expert reports against the same defendant with its own identical expert report signifies that the remuneration system will allocate an overall 85 hours to that set of cases, time which, given the economies of scale involved in repeating the same cases, will better reflect the work involved. This is all the more the case if the judge organizes joint hearings for the parallel cases.

[101] One of the proposals of the Judiciary Council's 2020 Emergency Action Plan (n 13) was, indeed, to modify the productivity rules under Law 15/2003 to take into account the specificities of competition litigation, as well as mass litigation generally.

[102] See, *CDC Hydrogen Peroxide*; *Tibor Trans*; *Volvo I* (n 391 (Part I)); ATS, 26 February 2019, ES:TS:2019:2140A and ATS 23/2019, 19 March 2019, ES:TS:2019:3430A (Trucks); ATS, 13 October 2022, ES:TS:2022:13977A (Automobile Manufacturers).

[103] See Ch 2.4(a) above and, for further discussion, Hitchings, 'RH v AB Volvo', n 181 (Part I), including as regards the opportunities opened up by the CJEU's ruling in *Sumal* for the concentration of claims.

[104] One of the aims of the 2000 reform in Spain was to reduce the procedural fragmentation which had arisen prior to its adoption and hence focus all civil cases on two standard procedures (see Banacloche, *Aspectos*

competition cases (for instance, due to the disclosure rules, or the measures for coordinating civil cases with the public work of competition authorities, or other requirements of EU law), the implications of which we will address further in the following sections, there is no specific procedure as such for competition cases, but rather one of the two standardized processes which commercial courts apply to the majority of proceedings brought before them (with the exception of insolvency proceedings).

At this point, however, we should mention again the draft proposal for representative actions concerning the implementation of Directive 2020/1828 into Spanish law.[105] That proposal sets out a whole new procedure incorporating a new section, and nearly sixty new articles, to the Civil Procedure Law. It involves several procedural novelties, including a certification phase and the possibility of split proceedings to deal with liability and quantum in a collective claim for damages. It also adjusts time-limits and bestows a number of discretional procedural powers on judges. As the preamble to the draft law explains, the legislator considered that a new special procedure was required, in particular for collective actions for damages, given the 'impossibility of fitting the necessary procedural pieces' into the existing standard procedures.[106] As noted already, the broad scope of application of the draft law suggests that the new procedure will apply to competition law cases brought on behalf of consumers; albeit the proposal fails to cater for the specificities of competition law in a number of respects (including the fact that it does not vest jurisdiction for such claims in the commercial courts but to the courts of first instance).[107] Accordingly, the draft law may herald a new specialized procedure for competition law claims where they are brought on behalf of the collective interests of a group of consumers, but it remains to be seen if it does finally and in what form. Clearly, if the new regime does apply to competition law, it represents a very relevant development for our subject-matter.

14.4. Interim conclusion

The institutional regime for the private enforcement of competition law in Spain is based on recognition of the need for specialization of the courts (at least, within a selection of commercial law matters, and, potentially, as part of sub-specializations, including IP and competition law). However, there are aspects of the regulation of the judiciary and judicial procedure which currently pose a material limit to the full effectiveness of that specialization. It is my view that, taking special attention to preserve their absolute independence, further specialization of courts and judges, such that competition cases can be managed by a limited group of appropriately resourced, specially-prepared and experienced judges (ideally 20 or so), would be optimal. The creation of a smaller, select group of judges facilitates learning through doing, focused training and the coherent development of practice. It also facilitates appropriate coordination and communication with other specialized jurisdictions in the EU. The further specialization of courts and judges should be accompanied by the adaptation of procedures to the specificities of this type of litigation (that is, a certain procedural specialization). This latter question, of central importance to this research, will be

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Fundamentales de Derecho Procesal Civil, n 67, 483). Nevertheless, specificities arise in numerous areas (such as in the area of company law, defamation, intellectual property or unfair competition,) and, exceptionally, specific specialized procedures exist (such as in the case of insolvency proceedings, regulated by Royal Legislative Decree 1/2020 of 5 May 2020).

[105] n 36.

[106] Recital II.

[107] Proposed art 834 LEC, as already commented at Ch 14.2(a) above.

relevant to the following three chapters: namely, case management, disclosure and expert evidence.

15. Case Management

15.1. General principles

Spanish procedure is marked by the principle of legality, set out in Article 1 of Law 1/2000 on Civil Procedure ("**LEC**"):

> In civil proceedings, the courts and those who attend and intervene before them shall act in accordance with the provisions of this Law.[108]
>
> (My translation)

The law sets out the rules of formal procedure and that form is the guarantee of legal certainty and equal rights of defence.[109] In this sense, it is generally agreed by Spanish commentators that the judicial process (unlike alternative forms of dispute resolution) cannot be designed by private agreement.[110] The Spanish civil procedural code sets out, in the words of one of the collaborators who assisted Professor de la Oliva Santos in the elaboration of the proposals for reform, an 'agile, simple and effective' civil process.[111]

The civil process under the 2000 law can be described not only as simple, but also as fairly rigid. Certainly, it is, by design, relatively inflexible. Civil procedure is guided by the principle of party disposition, whereby it is the parties which determine the scope of the dispute and determine the evidence to be proposed for admission.[112] Equally, the procedure is marked by tight, non-extendible and preclusive time-limits for pleadings and the production of evidence.[113] In this way, the statements of claim and defence are normally the only (substantive) written pleadings. The parties must file these main pleadings at the very beginning of the process accompanied by all documents on which they seek to found their action.[114] The defence must be filed within twenty working days of the statement of claim

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[108] Echo itself of the constitutional guarantee of judicial independence and the rule of law established in art 117 CE.

[109] Herrero Perezagua, 'Legalidad, jurisdiccionalidad y funcionalidad', n 51, 17.

[110] ibid, p 19.

[111] Julio Banacloche Palao, 'Las líneas generales de la nueva Ley de Enjuiciamiento Civil' Tribunales de Justicia 1, January 2000, 3.

[112] The principle is set out in recital VI: 'The new Civil Procedure Law continues to be inspired by the principle of prayed justice or of party disposition, from which all reasonable consequences are drawn, with a view not only to the fact that, as a rule, civil proceedings pursue the protection of rights and legitimate interests of certain legal subjects, to whom the procedural initiative and the configuration of the object of the process correspond, but also to the fact that the procedural burdens attributed to these subjects and their logical diligence to obtain the judicial protection they request, can and should reasonably shape the work of the jurisdictional body, for the benefit of all.' (my emphasis added). The rule can be clearly seen, for instance, in the provisions relating to the principles of party disposition and consistency set out, respectively, in art 216 ('Civil courts shall decide matters on the basis of the parties' submissions of facts, evidence and claims, except where otherwise provided by law in special cases') and 218(1) LEC ('Judgments must be clear, precise and congruent with the claims and with the other demands of the parties, duly adduced in the lawsuit').

[113] The general rule of preclusion is set out in art 136 LEC: 'Once the time limit for the performance of a party's procedural act has expired, or the deadline passed, preclusion will occur and the opportunity to perform the act in question will be lost.'; art 134(1) LEC establishes the general bar on time extensions: 'The deadlines set out in this Law are non-extendable' (my translation). There is a force majeure exception to the rule against the extension of deadlines (art 134(2) LEC).

[114] art 265(1) LEC: 'The documents on which the parties rely in support of their right to the legal protection they seek' (my translation).

being served upon the defendant (ten days if the fast-track procedure applies) and that deadline is not capable of extension.[115] Furthermore, there is no provision for the strike-out of claims or the hearing of substantive preliminary issues. These strict rules reduce the risk that proceedings become delayed by various rounds of allegation, by satellite litigation, by the presentation out of time of evidence or procedural objections, or by the ordinary availability of time extensions.[116]

At the same time, the LEC also established a greater role for the first instance judge than ever before. We have already noted the aim of the new law to bring the judge into closer contact with the dispute at hand. This involves determining procedural impediments to admitting a claim at commencement where these have been identified by the Court Clerk ('Letrado de Administración de Justicia'), clarifying the scope of the controversy which is the object of the proceedings and determining the evidence to be heard, and, finally, the judge's full involvement in the hearing of evidence at an oral trial. After the initial written pleadings, the ordinary procedure is marked by two key procedural stages. Both are oral hearings which are directed by the judge: one (the preliminary hearing or 'audiencia previa') for addressing procedural exceptions, determining the scope of the controversy and disputed facts, and deciding on the admission of evidence, and the other (the trial or 'juicio') for hearing oral evidence (witnesses and experts) and final legal arguments. This engagement of the judge in the oral hearing of evidence and party submissions is specifically required by Article 137 of the 2000 procedural law and reflects the underlying principles of immediacy and orality which the law consecrated.

In addition, the 2000 law granted first instance judgments provisional enforceability. This is significant and reflects the decision of the legislator to bestow greater confidence on the work of judges at first instance and invest it with greater practical consequence:

> The new Civil Procedure Act represents a decisive choice in favour of confidence in the Administration of Justice and the importance of its administration in the first instance and, consequently, it considers sentences handed down at this level of jurisdiction to be provisionally enforceable, subject to reasonable conditions and exceptions.[117]
>
> (My translation)

In the words of Professor de Benito Llopis-Llombart, drawing on the prior work of José Vicente Gimeno Sendra (Magistrate of the Spanish Constitutional Court 1989-1998 and Professor of Procedural Law), the process created by the new Spanish law of civil procedure:

> [I]mplies, finally, the reception in our country of the trend inaugurated by Franz Klein in 1895. It puts the judge in contact with the litigation from the very beginning. Orality is enshrined as a basic, non-negotiable principle of civil procedure [...] The free assessment of evidence is strengthened, [...] The examples are innumerable: the judge is now - as he was already in other parts of Europe - the central figure of civil procedure: a *magnus iude*x.[118]
>
> (My translation)

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[115] arts 404, 134 LEC, respectively. It is possible for the deadline for the filing of the defence to be suspended in certain limited circumstances; notably, in the event the defendant files a jurisdiction challenge within ten days of being notified with the claim (art 64 LEC).

[116] See Enrique Vallines García, *La Preclusión en el Proceso Civil* (Thomson Civitas 2004), 149, noting the general objective of the good administration of justice to 'reduce the length of proceedings to the minimum time absolutely necessary at the cost of not permitting cases to be prolonged capriciously'.

[117] Recital XVI LEC.

[118] de Benito Llopis-Llombart, *Justicia o burocracia*, n 33, 68-9.

At the same time, as already noted, Spanish civil procedure is marked by the legality principle and by restrictive rules as regards submissions and the production of evidence, and by the preclusive effect of a party's failure to comply with the strict time-limits imposed. In addition, failure to comply with essential rules of procedure will ground the nullity of proceedings, provided that the infringement has caused a breach of rights of defence.[119] Nor are there any general case management provisions in the Spanish law, as exist under English law; the judges' powers being set out specifically in concrete provisions of the law. In this sense, Spanish judges were not granted, either in law or, much less, in spirit, the fact-finding powers granted to Austrian judges pursuant to Klein's reforms in the late 1890,[120] and less still the scope those have since taken on in Austrian and German law.[121] Nor are they granted the general power to extend time-limits.[122]

Finally, in addressing the general case management powers of Spanish judges, it is obligatory to introduce a reference to the notorious problem of the bureaucratization of justice which has occurred over the last twenty years in Spain, effectively undermining the objective of bringing the judge closer to litigants and proceedings. As explained by several authoritative commentators, including de la Oliva Santos and de Benito,[123] the reforms creating the body of 'lawyers of the administration of justice' and the 'judicial office' have dejudicialized the administration of justice in important procedural aspects (such as the admission of claims or the decision to hold a disclosure hearing) and taken it out of the control of the judges.[124] In essence, the court administrative staff has been granted extended powers in procedural matters and been partially emancipated from the control of the judge, responding instead to the authority and instructions of the Ministry of Justice. These important matters of organization may have a real impact on the ability of judges to manage cases actively in the area of private enforcement of competition law. Accordingly, they are relevant in considering the way forward.

15.2. Specific powers to case manage

So, what is the scope of the Spanish judge's ability to manage the process? We will now turn to consider specific aspects of case management which are of relevance for the processing of competition claims, in order more concretely to assess the current possibilities and limitations for Spanish judges. These are: (a) the management of parallel claims; (b) the duties of the parties and their lawyers; (c) time-limits and stays; (d) preparation for trial; and (e) the power of parties to agree the process.

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[119] art 225(3) LEC.

[120] For a distinction of the Spanish regime from the Klein reforms (at least insofar as the latter referred to material, as opposed to formal, case management), see Juan Montero Aroca, *Los principios políticos de la nueva Ley de Enjuiciamiento Civil. Los poderes del juez y la oralidad* (Tirant lo Blanch 2001), 53-4.

[121] See, in this regard, Schumann Barragán, 'La gestión y la flexibilidad de procedimiento', n 102 (Part II), 130-4.

[122] Klein's reforms were more in line with the Spanish LEC in this regard, establishing tight time-limits with preclusive effects, as explained in more detail by C H van Rhee, 'The Development of Civil Procedural Law in Twentieth Century Europe from Party Autonomy to Judicial Case Management and Efficiency', in C H van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008), 13-7.

[123] de la Oliva Santos, *Sobre la Calidad de la Justicia*, n 19, 38-43, and de Benito Llopis-Llombart, *Justicia o burocracia*, n 33. See also, Vallines García, '¿Es inconstitucional la "*nueva oficina judicial*"?', n 33, and Julio Banacloche Palao, 'El proyecto de nueva oficina judicial: ¿hacia un nuevo proceso administrativizado?' (2009) Diario La Ley, 7251.

[124] The reforms were implemented through Law 19/2003 of 23 December, Law 13/2009 of 3 November and Law 7/2015 of 21 July, amending Organic Law 6/1985 on the Judiciary.

a) Management of parallel claims

As noted already, commercial judges and the Judiciary Council expressed real concerns during the Covid-19 lockdown in 2020 about the inefficiency that the processing of thousands of separate, but almost identical, Trucks claims was posing for the commercial courts. This gave rise to a proposal of the Judiciary Council to modify the rule on joinder of proceedings in Article 76 LEC and to proposals by some of the judges themselves to use the existing joinder tool more proactively or, at least, to hear parallel claims together.[125] The Judiciary Council's proposed amendment was not adopted by the Government in its subsequent proposals for reform (the Draft Law on Procedural Efficiency) or, later, in Royal Decree-law 6/2023.[126] A number of the commercial courts have, however, adopted some of the proposed practices. Indeed, the commercial courts have become more receptive over time to requests by claimants themselves to have various claims joined together against one of more defendants (joinder of actions) or to have claims processed together. Some courts have gone further and employed more expansive case management initiatives; notably, the so-called 'Barcelona Protocol'. We consider these developments below.

Joinder and joint processing of proceedings

The Judiciary Council's proposal to amend Article 76 of the Civil Procedural Law had as its aim to promote uniformity in the treatment of hundreds of very similar claims, avoid contradictory decisions and reduce the courts' workload. The Council observed that this was a way to adapt the civil procedure to the specificities of the claims; claims which were characterised by 'new procedural mechanisms' (an allusion to the new disclosure rules) and 'sophisticated economic evidence'.[127] It would also permit a more profound assessment of those claims (and so, by implication, greater quality of adjudication). Furthermore, joinder would protect the rights of defence of the parties by avoiding the risk of contradictory judgments.

On the face of it, the Council's proposed amendment was considered necessary because the application of Article 76 as it then stood (and remains today) was, in its view, insufficient ground for the joinder of parallel trucks proceedings. Closer inspection of the proposal reveals that the concern of the Council was perhaps more of a practical, than a legal, nature and that it considered the amendment necessary in order, above all, to make the joinder mechanism more of an effective reality. Indeed, Article 76(1)2º (which requires the existence of a connection between parallel claims or the risk of contradictory judgments if they were to proceed separately) would arguably found the joinder of damages claims based on the same competition infringement where the same remedy in damages was sought.[128] Moreover, Article 75 foresees that such joinder could be instigated ex officio by the court (not just by the parties). However, the Council indicates that the decision is not a 'clear' one and is one that requires, therefore, the exercise of discretion by the court. In order, therefore, to make the decision simpler or more automatic (and, by implication, more effective), the Council

[125] Measure 3.22 of the Action Plan.
[126] n 16-17.
[127] ibid.
[128] As noted by Prof Gascón Inchausti, the contradiction need not necessarily relate to a problem of technical incompatibility (such as in a case of prejudicial decisions or res judicata) but refers also to contradictory reasoning, which is of course a considerably broader concept; Fernando Gascón Inchausti, 'Acumulación de acciones y de procesos civiles' in Julio Banacloche Palao (ed), *Colección 20 años LEC 2000* (Wolters Kluwer 2019), 132.

sought to include a new and specific provision in Article 76(2) which would require joinder to be ordered in cases of private civil actions based on the same competition infringement and, in particular (beyond any discretion it would seem) where the claims are based on the same method for quantifying harm, brought by the same legal team and against the same economic undertaking.[129] There is a clear sense here from the Judiciary Council, therefore, that, unless the courts were obliged to use the joinder mechanism in certain clear circumstances, they were unlikely to do so, the joinder mechanism would be ineffective and the objective of reducing the courts' workload and increasing uniformity would be foiled. There is also maybe an indication of a certain lack of confidence in the system to exercise discretionary powers in a more expansive way (the way that the Council considered appropriate), as well, no doubt, as the awareness on the part of the Council of the economic disincentive to joinder posed by the judges' remuneration rules.[130]

Despite the absence of legal reform of the joinder rules (since the proposed amendments to Articles 75 and 76 did not reach the statute books), we have seen, nevertheless, that there has, in fact, been a movement among the judiciary towards a somewhat more enthusiastic adoption of concentration mechanisms. This manifested itself, for instance, in the Commercial Court proposals that surfaced during the Covid-19 lockdown, to which we have already made reference. Joinder was one of the proposals for action tabled in that document. Its authors expressed the view that the *ex officio* joinder of proceedings pursuant to Articles 75 and 76(1)2º was a viable alternative in the circumstances of the Trucks claims (at least, as in the Judiciary Council's proposal for amendment, in the case of claims filed by the same legal team, using the same expert report, against the same defendant). This would be consistent with the flexible approach to the joinder of actions (pursuant to Article 72 LEC) being advocated by the Spanish Supreme Court since the *Bankinter* case and, increasingly, by the appeal courts already in Trucks.

By way of example, the Court of Appeal of Baleares, building on earlier rulings in particular by the Appeal Court of Zaragoza,[131] has advocated a receptive approach to joinder of actions in a case which involved claims by twelve companies against five (jointly and severally liable) defendants (trucks manufacturers) for damages arising out of the same infringement (the trucks cartel). The court emphasized that the criteria was a broad one, not requiring identity of facts or actions, but rather a common basis, since the underlying goals of the joinder mechanism (which courts should have in mind in interpreting the rules) were procedural efficiency and the avoidance of contradictory decisions. It is notable that, in addition, the Baleares Provincial Court referred to a further argument based on the underlying intention of the Damages Directive as reflected in the recitals to the Spanish implementing legislation; namely, the objective of establishing effective procedural mechanisms which would enable private damages actions in equivalent conditions around the territory of the whole Union:

> As a corollary to the foregoing, it is appropriate to quote from the explanatory memorandum of Royal Decree Law 9/2017 of 26 May, which transposes Directive 2014/104/EU of 26 November: "The European Union enacted this Directive *with the aim of establishing effective procedural mechanisms that make it possible to claim damages caused as a result of infringements of competition law*, since, in the absence of such procedural channels,

[129] The latter is a reference to the concept used in art 101 TFEU and determined to be applicable to private damages actions by the CJEU in *Sumal*, n 246 (Part I).
[130] See Ch 14(2)c above.
[131] eg AAP Zaragoza, 19 December 2019, ES:APZ:2019:2091.

> experience has shown that compliance with the material rules suffers, and this even in spite of the existence of a specific sanctioning law.
>
> It lays down rules designed to remove obstacles to the proper functioning of the actions that can be brought, which ensure the promotion of effective competition in the internal market and equivalent protection throughout the Union for all those who have suffered harm as a result of the competition infringement."[132]
>
> (My emphasis added, my translation)

This reference to the Directive's aims to create a level playing field and effective procedural mechanisms as an interpretative tool by Spanish judges in determining how to use existing national mechanisms to manage parallel claims is worth highlighting. Other than Article 15 (in connection with the coordination of claims brought at different levels of the supply chain), the Directive does not offer any reference to mechanisms for coordinating parallel claims (and, indeed, the initial proposal for a collective action mechanism was removed from the final text of the Directive).

In a later case, the Court of Baleares also accepted the use of joinder to have cases, which corresponded to different regional courts according to Article 7(2) of the Brussels I Regulation, to be concentrated before the Commercial Court of Palma de Mallorca, pursuant to national rules on territorial jurisdiction, since it was the court where the highest number of trucks had been sold.[133] The court again invoked policy considerations in support of an expansive application of the rules applying to joinder:

> On the other hand, Spanish legislation, unlike that of other EU countries (Portugal, Holland), does not currently provide for "collective" actions in antitrust proceedings such as the one brought by the plaintiffs, so it will have to be assessed in each case whether joinder is feasible.[134]
>
> (My translation)

It is, indeed, interesting, in light of these two rulings, that some Spanish courts may be prepared to apply this sort of teleological interpretative method to the national rules.

The rule on joinder of proceedings is not identical to the rule on joinder of actions we have been discussing here, and, arguably, the former is somewhat narrower. It may, too, be for this reason that the Judiciary Council felt the need for a clearer specific rule for the joinder of proceedings. The Commercial Courts' 2020 paper also recommends that courts seek party agreement to the joinder of proceedings. Indeed, the agreement of the parties to the joinder of proceedings is expressly foreseen in the civil procedural rules as grounding the mandatory ordering of the joinder of proceedings by the court.[135] An example of joinder of proceedings in the Trucks litigation is the so-called 'Barcelona Protocol' (subject to which we will return shortly).[136] Nevertheless, with this very notable exception, the use of joinder of proceedings by the courts has not been a much-used measure in the Trucks litigation.

The preference of courts who have sought to concentrate the processing of Trucks cases has not been joinder, but the second option identified in the Commercial Courts' 2020 paper;

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[132] AAP Baleares, 12 February 2021, ES:APIB:2021:5A.
[133] AAP Baleares, 3 March 2023, ES:APIB:2023:6A.
[134] Ibid.
[135] art 83(2) LEC. This is subject to satisfaction of the basic conditions for joinder under art 77; in particular, that the court where the proceedings are to be joined has objective (subject-matter) jurisdiction to hear both proceedings.
[136] See, "Propuesta para la ordenación de procedimientos sobre el Cártel de los Camiones", n 9.

namely, the joint hearing or processing of claims. Oviedo Commercial Court nº 1 explained this preference in a number of procedural orders adopted in the Trucks litigation in September of that year.[137] The Oviedo court considered that the joinder of various proceedings, giving rise to one single judgment, could jeopardise the rights of defence of the parties given the time-limits for filing an appeal.[138] Furthermore, it considered the practical difficulty of joining proceedings relating to a same claimant group as potentially causing delay if the court sought to ensure, as it would have, that all relevant claims (past and future) be joined together.[139] Accordingly, the court ordered joint processing of the claims in the following terms:

> Once the transfer has been completed, this court has opted to adopt a common position - insofar as it transcends the parties to these proceedings and extends to all those currently pending before this court on the same matter - which consists of proceeding with a coordinated procedure which, although lacking regulation in the LEC, is not alien to other regulations - e.g. Insolvency Act - and which in practice will result in a concentration of hearings in order to:
>
> (i) avoid repeated journeys for professionals,
>
> (ii) facilitate procedural management,
>
> (iii) reduce processing times, and
>
> (iv) to try to avoid - wherever possible, without undermining procedural guarantees and the time required for the taking of evidence, presentations by counsel, etc. - the repetition of procedural acts.
>
> Thus, each procedure will retain its autonomy, without prejudice to the fact that part of the preliminary hearing and/or of the trial may be reproduced in those parts that coincide, by joining the DVD of another previous procedure.[140]
>
> (My translation)

This joint processing meant that the claims which were pending before Commercial Court nº 1 of Oviedo at the moment the order was adopted, and had been filed by the same legal representation against the same defendant, would be heard together (first, a joint preliminary hearing and, then, a joint trial). This, then, gave rise to a series of parallel judgments, including, for example, the judgment of 12 April 2021 of Oviedo Commercial Court nº 1 in Case 245/2019 concerning a number of claims against the same defendant.[141] While an eminently practical solution, it should be noted that this joint processing is not, however, without its legal uncertainties. Not explicitly foreseen in the law, there is no provision, for instance, to share one recording between different proceedings and, although

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[137] eg, AJM1 Oviedo, 3 September 2020 (unpublished). Prior to adopting the orders, the Oviedo court granted the parties the opportunity to make written submissions on the possible options for case coordination that the court was considering. That is, the case management measures adopted were not agreed with the parties, but they were subject to prior party allegation and they were fully reasoned when they were, then, adopted.

[138] This argument is debatable. It is not clear to me that it is easier to prepare several separate appeals of essentially identical judgments or one appeal of one judgment which deals with the situation of several claimants. In the circumstances of the Trucks case, save for any particular circumstances of claimants, the latter would almost certainly require less work.

[139] In the case of the Barcelona Protocol, this issue was addressed by agreeing with the parties' lawyers a cut-off date for the proceedings (already filed and to be filed) that would form part of the coordinated process and, in principle, the rest of claims (filed later than that date) would, by agreement, be stayed.

[140] AJM1 Oviedo, 3 September 2020 (unpublished).

[141] SJM1 Oviedo, 12 April 2021, ES:JMO:2021:3265. This case had been heard together with five other cases, giving rise therefore to six separate judgments.

this is not to my mind an important objection in abstract, one can imagine situations where the delimitation between what evidence is relevant to which proceedings could become confusing if not very carefully managed by the court.

The Bilbao and Barcelona experiences

Two particular and more 'creative' examples of case management in the Trucks litigation are worth particular attention. The first was adopted by Commercial Court nº 1 of Bilbao to deal with all CETM cases before it in one sitting, measure which was, however, annulled on appeal by the Provincial Court of Vizcaya and the proceedings reverted back to the first instance court. The second, the so-called 'Barcelona Protocol', was adopted by the Barcelona Commercial Tribunal of First Instance in agreement with the relevant parties and, at the time of writing, is still in the process of execution.[142] The use of the word 'creative' in the area of Spanish civil procedural law is liable to generate an immediate negative reaction, but I do not use it in a pejorative sense. We will consider the strengths and weaknesses of these examples in the light of the applicable rule and principles.

The Bilbao court chose by a number of orders in early 2021 to case manage together the Trucks proceedings pending before it which had been filed by claimants represented by the same law firm against each of the five truck manufacturer defendants which had been the object of the Commission's settlement decision in July 2016. As we shall see, the orders altered the civil process in a number of relevant ways. The court adopted these measures conscious of the fact that it was altering the process set by law. It considered, however, that the measures did not compromise the rights of the defence of the parties. Furthermore, the judge considered the measures were justified as a means to deal with the mobility restrictions which were in place as the result of the Covid-19 pandemic (it will be recalled that we were, at that time, at the height of the pandemic and at the beginning of the vaccination programme). The specific measures adopted by Bilbao Commercial Court nº 1 were as follows:

(i) The oral preliminary hearing ('audiencia previa') was replaced by simultaneous written submissions by the parties (allegations and evidence), to be filed within ten days of the order.

(ii) The court indicated that it would admit all the documents submitted with the statement of claim and defence and the parties' respective expert reports.

(iii) The trial would be replaced by an oral hearing at which the experts would provide their expert witness evidence. That oral hearing would be split into two sessions: one for the claimant experts and another, one week later, for the defendant experts.

(iv) The oral hearing for expert evidence would be followed by written conclusions to be filed consecutively by each side within a time-limit of ten days. Those written conclusions should indicate any procedural objections which had been raised in due time and form during the course of proceedings for the court to resolve.

[142] The first judgments were handed down in early 2024; see, for example, SJM3 Barcelona 6/2024, 12 January 2024 (as yet unpublished).

(v) The court would resolve any procedural objections or appeals which had been raised in due time and form during the course of proceedings, prior to adopting its judgment on the merits.

This alteration of the process raised a number of concerns of due process for the defendants which they duly denounced during the course of the proceedings. These alleged breaches of due process were, then, the subject of appeals to the Court of Appeal of Vizcaya of the final judgments which had all awarded damages against the defendant manufacturers. In the defendants' view, the procedure which had been followed by the commercial court had breached fundamental procedural rights of the parties and should be declared null and void. There was little doubt that the court had breached elemental aspects of Spanish civil procedure; in particular, the necessary orality and immediacy of the preliminary hearing ('audiencia previa') (Article 137 LEC) or the requirement to deal with procedural and evidentiary issues at that moment of the process (Articles 414 to 430 LEC). In addition, the appeal court considered that the first instance court had erred in limiting the trial to the hearing of expert evidence, in splitting the trial into two sessions separated by a week and in having the conclusions presented in writing afterwards, thereby contravening the requirement of the unity of the act of hearing of evidence (Article 290 LEC).[143] However, in the view of the Vizcaya court, these breaches were not necessarily sufficient to merit the exceptional sanction of the nullity of the proceedings. For this, it would be necessary that the rights of defence of the parties had been materially prejudiced by the court's actions (Article 225(3) LEC):

> [T]o this effect, the Constitutional Court has pointed out that the relevant breach of rights of defence for the purposes of nullity of proceedings does not always occur when any procedural rules are violated, but only when this violation has practical consequences consisting of the deprivation of the right of defence and real and effective harm to the interests of the person affected by it (STC 48/1986 of 23 April). Said defencelessness is something different from merely procedural defencelessness, and must have a material significance, producing an effective harm to the fundamental right recognised in article 24 of the Constitution (STC, 118/1983 of 13 December and 102/1987, of 17 June), furthermore requiring that said defencelessness must not find its motive in the procedural position of the person who claims to have suffered it (STC 68/1986 of 27 May, 54/1987 of 13 May and 34/1988 of 1 March).[144]

The position of the Appeal Court on the question of prejudice to the defendants' rights of defence was dismissive of the Bilbao first instance court's (and claimants') assertions that there had been no such prejudice since the defendants had been able to make out their case fully and present and test the relevant evidence. For the Appeal Court of Vizcaya, the breach of such elemental aspects of the civil process as those that had occurred *inherently* gave rise to a breach of the defendants' rights. Put another way, the civil process determined by law had built in a series of guarantees which could not be materially altered by the judge without necessarily and materially reducing the parties' fundamental procedural rights. Specifically, these included - in the case before the Vizcaya Appeal Court - limiting the defendants' opportunity to formulate so-called complementary allegations or raise new facts, to specify the terms of the dispute or to propose evidence in reaction to that proposed by the claimants, all elements of the preliminary hearing foreseen by the 2000 procedural law and require presence at a hearing. In addition, the appeal court held that the combined hearing

[143] We will return to some of these issues when we turn to the trial below, Ch 15.2(d).
[144] *UMBE 94 SAL v Daimler AG*, AAP Vizcaya 743/2022, 30 June 2022, para 20 (my translation).

of expert witnesses from six parties in relation to a variety of proceedings did not allow the defendants to exercise fully their rights of defence; for example, by posing specific questions of particular relevance to each proceeding. By implication, there was simply too much evidence relating to too many different cases to allow for a proper examination of that evidence by the parties' lawyers in one combined hearing.

The Appeal Court put its position in the following terms (with my emphasis added):

> *There is no legal basis for applying a procedural regime different to the general regiume which applies*, disregarding rules of public policy, such as procedural rules. Furthermore, this form of ruling causes defencelessness to the party that invokes it, the defendant Daimler AG, in accordance with art. 24.1 of the EC, understood as a hindrance or substantial limitation in the defence of rights and interests and a breach of the balance between the parties, with an effective and real impairment of the right of defence, with the consequent prejudice to the interests of the affected party (SSTC Plenary of 17-04-2012, STC 79/2012). The failure to hold the prior hearing in the manner provided for by law has caused the defencelessness alleged against Daimler AG, as it prevents it from carrying out procedural acts such as formulating supplementary allegations or new facts, specifying the terms of the debate, proposing further evidence in view of the disputed facts and the position adopted by the opposing party. Admission in the manner in which it was made deprives the parties of accrediting, in accordance with the law, any other relevant facts for the resolution of the origin and quantification of the damage claimed. The order of organisation of the proceedings, which set two days for the ratification of the expert reports, on 7 September 2021 for the ratification of the plaintiffs' experts, and on 14 September for the ratification of the defendants' experts, prejudices the rights of defence of the parties, as six experts will have to ratify one day and five experts another day, and be subjected to questions from twelve lawyers, restricting the possibility of asking pertinent questions or questioning on the particularities of each of the cases to be resolved.[145]

Accordingly, this case denotes a rejection of procedural adaptation by the courts and a solid defence of the legality principle. The consequence was that all the relevant proceedings had to return to the point at which the case management orders had been adopted and the proceedings resume with the normal (oral) preliminary hearing. It is an indicator of the clear resistance that can be expected by attempts to modify the form of the civil procedure established by law, at least in its central components; for that is, precisely, what guarantees the parties' fundamental procedural rights. It is, however, noticeable that, on certain points of flexibility which had been introduced by the Bilbao court to the process (with the notable exception of the requirement for a full oral preliminary hearing), the judgment adopts a position which would not necessarily or ordinarily give rise to the nullity of proceedings (for instance, the holding of separate trial sessions or the hearing of expert evidence on behalf of various parties at once or the written submission of conclusions).[146] That is, there is no real suggestion in general practice that such elements of flexibilization of the procedure would necessarily normally compromise fundamental rights of defence.[147] In this sense, the appeal court's judgment should not necessarily be taken as a veto to all procedural adaptation. Indeed, I believe that would be incorrect.

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[145] ibid para 28 (my translation).

[146] See below on the trial, Ch 15.2(d).

[147] Furthermore, it is not so clear on the face of the ruling what was the real and material (as opposed to abstract or theoretical) impact of some of the procedural modifications on the rights of defence of the defendants. In that regard, it would be interesting to review the rerun proceedings to see which the alleged breaches of fundamental rights translated in reality into material allegations or evidence which the parties had not been able to make or propose in the first invalidated proceedings.

The second notable example of case management in the Trucks litigation is the so-called 'Barcelona Protocol'. Pursuant to this protocol, proceedings brought by the largest claimant group aggregated via the National Road Hauliers' Association (CETM), represented by the same law firm, were joined together and, what is novel, certain procedural matters were agreed (and set out in a protocol) adapting the process to the nature and volume of those joined claims.[148] There were a total of over 450 such claims (of the approximately 620 filed before the Barcelona Commercial Courts) relating to nearly 3,000 trucks and for an estimated claim value of over 50 million €, which were to be processed in just eight joined proceedings. The essential characteristics of the protocol were party agreement and flexibility. The protocol did not purport to be a proceeding 'à la carte' but did involve the material modification of certain central aspects of the ordinary civil procedure; in particular, the procedural calendar. So, the protocol addressed, inter alia: the identification of the relevant claims pending against each manufacturer at a certain defined cut-off date; the allocation of each group of claims to a different Barcelona commercial court pursuant to objective rules determined by the Tribunal; notification and translation of documents; jurisdiction; time-limits for written submissions and expert evidence; the timetable to trial (including disclosure); amendments to expert evidence; arrangements for the trial; and time-limits for clarification and appeal.

The Barcelona Protocol is still in the implementation phase and it would be wise to wait to see its final outcome before we judge on the merits, or otherwise, of the project. Certainly, from my point of view, it offers an interesting experience, a laudable attempt to address the demands of complex mass competition law litigation, seeking solutions, more in line with the principles of good administration of justice and party cooperation, through the use of the traditional joinder mechanism. However, this has not prevented it from encountering real practical difficulties. For example, it seems that, over time, the protocol has lost momentum and proceedings have not followed the proposed process as closely as originally envisaged. And we will come back to another problem, that of what I call "outlier" cases, when we come on to discuss time-limits and stays.[149] Above all, due to the significant delays in the protocol's execution, the first decisions under the protocol were not handed down until the beginning of 2024. As a result, the long-awaited outcome of these cases has had no material impact on the development of judicial criteria in the Trucks litigation in Spain to date; not only at the level of the commercial courts in other territorial demarcations around Spain but also at the appeal court and Supreme Court levels, where judgments have, in the meantime, been adopted and criteria defined.

b) Duties of parties and their lawyers

The 2022 Draft Law on Procedural Efficiency referred in its recitals to the fundamental lawyers' duty of 'concord', duty which is granted the same status in the Spanish Lawyers'

[148] The general aims and scope of the protocol, as reflected here, were the subject of a public presentation at the third edition of the Madrid Competition Litigation Seminar which took place on 9 September 2021, by García Orejudo J, presiding judge of Commercial Court nº 7 Barcelona and president of the Competition Section of the Barcelona First Instance Tribunal. It is expected that further details may become public with the publication of the first judgments in 2024.

[149] The problem of "outlier" cases refers to the fact that certain CETM claims, although falling within the material scope of the Barcelona Protocol, were filed later and tried separately to judgment well before the collective proceedings; see section 15.2(c) below.

General Statute as the defence of their clients' fundamental rights.[150] Although this reference was not included in the final text of Royal Decree-law 6/2023, it should be remembered that lawyers carry out a public function as participants in the administration of justice and the duties of concord and defence of the rights of their clients are to be shaped to that public end.[151]

Spanish legislation recognizes a duty of procedural good faith on the part of lawyers (and the parties they represent).[152] This rule is set out most fully in Article 247 LEC and is accompanied by the power for the court to impose fines (currently, of up to 6,000€). The traditional view of this rule, as expressed for instance by Professor Montero Aroca, is that it sets out a prohibition of bad faith conduct or the abusive use of procedure, as opposed to a positive duty of collaboration.[153] To date, this is probably a fair assessment of its use in practice.

Nevertheless, another view, more in keeping with the modern concept of the duties of parties and their lawyers in civil procedure, considers that the tenet reflects a broader concept which, indeed, finds expression in a number of concrete provisions in the 2000 Law. So, for instance, a manifestation of that general principle is the requirement that the allegation of procedural nullity be raised via the appeal of the relevant decision (and not delayed)[154] or the requirement that parties produce the documents on which they seek to rely with the statement of claim or defence (as the case may be) so that the counterparty is fully informed and can defend itself properly.[155] Indeed, consideration of the conduct of the parties (in particular, as regards sources of evidence which are in their possession) is something that may, by law, influence the court's assessment of evidence and the parties' discharge of their evidentiary burdens. This is so, not only on the basis of the specific rule regarding the availability of evidence for each party which is set out in Article 217(7) LEC,[156] but also of the underlying duty of cooperation and good faith applying to the parties (understood in a positive sense).[157] This is a topic which has received attention in the context of the new procedural regulation for private enforcement litigation since the Directive was implemented (in particular, given the availability of disclosure) and is something we will return to. Suffice it for now to note that the Spanish antitrust disclosure rules include fines for non-compliance which multiply tenfold the existing fines available to the court under the general rule on good faith under Article 247 LEC.[158]

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[150] Draft law of Procedural Efficiency, n 15, art 1(2) Royal Decree 135/2021 of 2 March, adopting the General Spanish Lawyers' Statute. Note also the duties of cooperation with the administration of justice (art 30) and loyalty and truthfulness to the court (art 36).

[151] See art 3 of the Spanish Lawyers' Rules of Professional Conduct (2019).

[152] See art 11(1) LOPJ; art 55 Royal Decree 135/2021.

[153] Juan Montero Aroca, *El Proceso Civil* (2nd edn, Tirant lo Blanch 2016), ch 8.

[154] art 240(1) LOPJ and art 227(1) LEC.

[155] art 265 LEC. This requirement is expressly referred to in recital X: 'En los momentos iniciales del proceso, además de acompañar a la demanda o personación los documentos que acrediten ciertos presupuestos procesales, *es de gran importancia, para información de la parte contraria*, la presentación de documentos sobre el fondo del asunto' (my emphasis added). For a full account of specific expressions of the good faith principle in the LEC, by reference to case-law available at the time, see Joan Picó i Junoy, *El Principio de la Buena Fe Procesal* (2nd edn, Bosch 2013), ch II and pp 396-496.

[156] art 217(7) LEC reads: 'In applying the provisions of the preceding paragraphs of this article [regarding burden of proof], the court shall bear in mind the availability and ease of proof for each of the parties to the litigation'.

[157] See, Ariza Colmenarejo and González Granda, 'Deber de colaboración de las partes', n 23, 398-400. The authors point not only to art 247 LEC but also to the duty of cooperation with the courts under art 118 CE.

[158] art 283bis(h) LEC regulates the matter of non-compliance and fines in relation to disclosure.

In addition, party cooperation is a central idea which lay behind the newly-created preliminary hearing which became part of the ordinary procedure with the 2000 law.[159] The preliminary hearing offers the opportunity to the judge and the parties, inter alia, to remedy formal errors, clarify the scope of the proceedings, identify the matters in dispute and determine the evidence to be tried. Its aim has been described as:

> [S]et itself out as the remedial scenario par excellence, in a framework of collaboration between the judge and the parties for the improvement of the process. In the preliminary hearing we find, in fact, the largest arsenal of remedial tools in our entire procedural system.[160]

Professor Picó i Junoy holds that the concept of good faith is an undefined concept which depends on the social and constitutional context of the time. As such, it is to be developed case-by-case by judicial application of the principle to the facts (i.e., case-law).[161] In the words of the Spanish Supreme Court:

> Indeed, this Court has reiterated that the requirement to adjust the exercise of rights to the guidelines of good faith is a principle that informs the entire legal system and requires the rejection of those attitudes that do not conform to honest and fair behaviour (S. 11 December 1989). The exercise of rights in accordance with the rules or requirements of good faith (art. 7.1 of the Civil Code; and for procedural purposes, arts. 11.2 LOPJ and 247 of the Civil Procedure Act 1/2000) is equivalent to subjecting oneself to the ethical imperatives demanded by the social and legal conscience of a given historical moment, an imperative immanent in the positive order (Sentences 4 March 1985, 5 July 1989, 6 June 1991). It implies the need to take into account the ethical values of honesty and loyalty (Judgments 21 September 1987, 8 March 1991, 11 May 1992, 29 February 2000), i.e. the ethical imperatives demanded by the social conscience (Judgment 11 May 1988).[162]
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> (My emphasis added, my translation)

If the concept of good faith should be judged in its historical context, taking into account the ethical values of society at a particular time, the greater procedural relevance granted to party cooperation in the recent Model European Rules, or in the reforms in England and France, is perhaps not irrelevant. Indeed, it seems inevitable that this international tendency will influence on the approach to civil procedural rules in Spain sooner or later, as the Draft Procedural Efficiency Law, indeed, already indicates.[163]

An aspect of the principle of procedural good faith is that a party should not go against its own prior acts where those acts have generated a legitimate expectation in others that it will act in a certain manner. This is the doctrine of 'actos propios' in Spanish law.[164] In this regard, for example, Joan Picó i Junoy has observed that some first instance courts are known to have prescinded with the oral preliminary hearing (substituting it with a written submission) where the defendant has not made an appearance and is in default, adding that, while this is against the requirements of the 2000 Procedural Law, there is no case-law on the point since the claimant who has accepted the court's decision to eliminate the oral hearing, by making

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[159] arts 414-430 LEC.
[160] Alberto José Lafuente, 'Pero, ¿todo es subsanable?' in Herrero Perezagua and López Sánchez, *Aciertos, Excesos y Carencias*, n 51, 251 (my translation).
[161] Pico i Junoy, *El Principio de la Buena Fe,* n 155, 72-3.
[162] STS 189/2001, 1 March 2001, ES:TS:2001:1582, LG 5.
[163] n 14-16
[164] See Luis Diez-Picazo, *La doctrina de los propios actos* (Bosch 1963); Pico i Junoy, *El Principio de la Buena Fe*, n 155, 125-30.

the requested written submission and not objecting to the absence of the oral hearing, has thereby lost the standing to challenge a decision which it has itself accepted.[165] More generally, the provision allowing parties to request the declaration of nullity of procedural acts (Article 240(1) LOPJ and Article 227(1) LEC) requires that this be done using the available mechanisms for appeal or procedural challenge.

While no doubt with caution, there is potential for application of the 'actos propios' doctrine to defend the procedural efficacy of party agreements not to exercise certain procedural rights (for example, to bring certain procedural challenges or substantive appeals). This is, reportedly, a consolidated doctrine under German law, known as the exceptio doli processualis.[166] It is one which finds its justification in the protection of the rights of defence of a party who, relying legitimately on the procedural undertakings of a counter-party not to bring a certain procedural challenge, could unwittingly discover itself to be barred (by virtue of rules of procedural estoppel or 'preclusion') from submitting new allegations or evidence to the proceeding if that undertaking were not respected. That is, it is an application of the principle of legitimate expectation ('actos propios'), which is generally recognized in Spain. Here, however, it refers to expectations generated by the extrajudicial conduct of the parties (an agreement or undertaking), something which is at best untested under Spanish law. Under German law, a procedural challenge or appeal made in breach of such an agreement would be held inadmissible for breach of this exception based on good faith and legitimate expectations.[167]

c) Time-limits and stays

Strict time-limits and the rule of procedural estoppel are central characteristics of the procedural regime established by the Spanish procedural reform in 2000 and ones which have contributed to legal certainty and agile proceedings. This said, it may be possible exceptionally, by virtue of Spanish or EU law, for courts or parties to permit or obtain extra time for the submission of allegations or evidence.

Relaxation of strict time-limits

Under Spanish law, we can contemplate two situations: the first arises where the consequences of procedural estoppel are not in fact enforced and procedural acts are allowed out of time (a situation alluded to earlier) and the second where there is a suspension of time-limits pursuant to express provisions of the procedural law.

While form is central to Spanish civil procedural law, this concept is distinguished from a strict formalism which can be contrary to effective justice.[168] This means that not all breaches of procedural form will give rise to the vitiation of the affected proceedings or pertinent

[165] Xavier Abel Lluch and Joan Picó i Junoy (dirs), *La Audiencia Previa* (Bosch 2010), 21-3. Given this is a situation of a lack of procedural controversy (since the defendant is absent), some have, indeed, considered that the oral hearing loses its raison d'être and need not take place (by implication, fundamental procedural rights are not put at risk); see Carlos Vázquez Iruzubieta, *Comentarios a la nueva Ley de Enjuiciamiento Civil* (1st edn, Dijusa 2000), 589, cited by Abel Lluch and Picó i Junoy, ibid, 21. The situation would be different where the rights of defence of the absent defendant have been wrongly breached (eg, because it was not properly served with the claim or notified of the preliminary hearing).

[166] Guillermo Schumann Barragán, *Derecho a la tutela judicial efectiva y autonomía de la voluntad: los contratos procesales* (Marcial Pons 2022),173 et seq.

[167] ibid 174.

[168] See, Baldomero Andrés Ciruana, *La Invalidez de las Actuaciones en el Proceso Civil* (Tirant lo Blanch 2005), 200, by reference to art 240(1) LOPJ (art 227(1) LEC) requiring the finality of a procedural rule to be considered before nullity can be considered an appropriate remedy.

procedural acts – something we alluded to earlier. Nevertheless, time-limits have a strict and rather clear regulation in the 2000 LEV[169] They are expressly stated to be incapable of extension and failure to comply with these time-limits is stated to give rise to the 'preclusion' of that procedural step for the party in default.[170] This said, the legal consequences of non-compliance with a time-limit are perhaps not as automatic as they might at first sight seem.

In his book on the concept of preclusion written in 2004, Professor Vallines avers that the breach of time-limits falls within the specific rule of Article 242 LOPJ (Article 229 LEC) which provides that judicial acts carried out after the deadline established in the law may only be annulled when this derives necessarily from the nature of the deadline in question.[171] He observes that, in consequence, submissions made out of time would, as a general rule, require to be annulled for the rule of preclusion to bite in practice, which demands in turn that such submissions be the subject of action by the counter-party requesting the court to rule that the submission is out of time and inadmissible.[172] He further avers that this is in line with the general principle of the parties' power to dispose of proceedings and entails the possibility that they may actually concert to avoid the strict application of the rules of preclusion should they choose to:

> This conclusion is logical if preclusion is viewed from the point of view of the dispositive principle. Indeed, as we have seen in III.1, the essential basis of preclusion is legal certainty; legal certainty for those who litigate and for the courts that hear the disputes. Well, as is well known, in civil procedure the procedure and its object are conceived as a "thing of the parties" (dispositive principle). And so it is not unreasonable for the legislator to sacrifice the requirements of certainty with regard to the court when the parties (the domini litis) agree to it; and, consequently, for the law to allow the parties to be able, to some extent, to dispose of the effectiveness of the preclusions produced. And this disposition takes place precisely whenever the exercise of a precluded power is not opposed by the rest of the litigants (to whom the preclusion gives legal certainty). A sort of tacit agreement then arises between the parties which removes the effects of estoppel.[173]

Accordingly, his proposition (in application of Article 242 LOPJ) is that, in absence of a party request, courts are, in principle, not required ex officio to reject submissions which have been made out of time, not even as a consequence of the declaration pursuant to Article 136 that a certain time-limit has passed and procedural estoppel come into effect. At the same time, however, Vallines then argues that, in counter to this initial proposition, the law contains many specific provisions which expressly contemplate the ex officio declaration of the inadmissibility of procedural acts performed out of time, after the relevant time-limit has expired, thus modifying the general rule established in Article 242, which thereby becomes

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[169] They are also relatively short: for instance, only twenty working days for the filing of a statement of defence in ordinary procedures (art 404 LEC) or of the appeal of a first instance judgment (art 458(3) LEC) and only ten working days in a fast-track procedure (art 438 LEC).

[170] art 134(1) and 136 LEC, respectively.

[171] This is not a position that is shared by many commentators who consider rather that Article 242 LOPJ is referring uniquely to failures by the courts (as opposed to the parties) to meet time-limits set by the law, and these are not generally considered to be a cause of nullity. See, eg, Andrés Ciruana, *La Invalidez de las Actuaciones*, n 168, p 166.

[172] It should be noted that the ability for parties to invoke the nullity of a submission made out of time by its counter-party may be justified, even without the need for a material breach of that party's rights of defence (per art 225(3) LEC), on the basis of the rule in art 227(1) which permits a party (not the court) to request the annulment of a procedural act on the ground that it was made in breach of the essential procedural requisites for that act to attain its objective. Such a rule should be applied in an abstract (as opposed to material way) according to Andrés Ciruana, *La Invalidez de las Actuaciones*, n 168, 206.

[173] Vallines, *La Preclusión en el Proceso Civil*, n 116, 306 (my translation).

the exception rather than the rule. It should be noted, nevertheless, that many of the provisions referred to by Vallines, which expressly required the court to reject particular procedural acts made out of time, have been derogated since the time that he wrote his work on the matter. Accordingly, while there is still an express requirement on the court to hold documents submitted out of time to be inadmissible (Article 272 LEC), which is certainly a key provision for our purposes, there is no longer such a requirement concerning the submissions that used to be required by an appellant to inform the court of its decision to appeal a judgment (so-called preparation of the appeal). This could potentially give greater weight now, therefore, to his initial proposition based on Article 242 LOPJ.

The more nuanced position described by Professor Vallines is not the concerted view of commentators. Most simply consider that the rules of time-limits and preclusion warrant no exceptions and should be applied ex officio by the court (giving rise to the inadmissibility of acts preformed out of time).[174] Accordingly, this matter is, at the very least, unclear. Indeed, what most commentators would perhaps agree on is that the rules concerning the consequences of the breach of procedural rules (in particular, the regulation of nullity) merit clearer regulation.[175]

What the 2000 procedural law does explicitly contemplate is that the parties, in the clearest expression of their underlying right to dispose of the proceedings as they choose, may agree to the stay of proceedings. This possibility is regulated in Article 19(4) (as well as Article 179(2)) LEC. Specifically, Article 19(4) provides that the proceedings will be suspended upon the request of the parties provided that the period of the stay is not more than sixty days. Stays are explicitly foreseen in the case that the parties agree to submit the controversy to mediation.[176] Article 179(2) LEC refers to the recommencement of proceedings following a stay and provides that the proceedings may remain in abeyance while neither of the parties request recommencement (until such time as they do or the proceedings expire for elapse of time).[177] In practice, therefore, a stay in the advancement of the procedure may be effective for a longer period.

What we have been describing so far refers to the power of the parties to obtain an extension to the timetable for proceedings and not to any inherent case management power of the courts themselves. Spanish courts do not, themselves, have a general power to stay proceedings or extend time-limits. So, what, if anything, can the courts do? Aside the court itself promoting cooperation by the parties to achieve these ends, as in the example of the Barcelona Protocol, there are two limited possibilities which merit mention. The first arises in connection with joinder, the second in relation to civil precedence ('prejudicialidad'). In addition, EU law may offer further legal bases for moderating national time-limits – we will consider these briefly too.

Stays related to joinder

In the case of joinder, the 2000 law does contemplate the possibility for stays to be put in place. Nevertheless, court powers in this regard are limited. A general power to stay

[174] eg Andrés Ciruana, *La Invalidez de las Actuaciones*, n 168, p 166.
[175] See, Vallines, *La Preclusión en el Proceso Civil*, n 116, 306 and Andrés Ciruana, ibid, 116-7.
[176] art 415 LEC, further to its amendment pursuant to Law 5/2012 of 6 July 2012 on Mediation in Civil and Commercial Matters.
[177] art 237 LEC provides that first instance proceedings expire if there is no procedural activity for a period of two years.

proceedings is in the gift of the parties and not the courts. Pending an application for joinder of proceedings before different courts, the courts are, however, permitted to stay those proceedings which have reached the stage before trial.[178] In addition, as is logical, the courts are obliged to hold off emitting judgment when a joinder application is pending, since otherwise the application would become otiose.[179] In practice, it would be normal for a court which is contemplating the joinder of a number of parallel claims pending before it, to seek to avoid progressing those cases in advance of its decision so as to try to move the parallel cases as quickly as possible to a joint timetable. Indeed, once it has ordered joinder, the court will then stay the more advanced proceedings to bring all the joined proceedings into line.[180]

As was noted by Commercial Court nº 1 of Oviedo in the Trucks litigation in its observations cited earlier on joinder, it is not entirely possible to avoid individual 'outlier' decisions to the extent that any claims which are not part of the scope of the joinder accordingly fall outside the scope of the stay and procedural coordination. Indeed, while it seems to have been the intention of the courts and parties pursuant to the Barcelona Protocol for the agreed process to cover all claims filed or to be filed by the lawyers representing the CETM group up until a certain cut-off date and to stay other future claims, even then this agreement has apparently not been sufficient to prevent the risk of 'outlier' claims proceeding individually and reaching judgment before the collectively case managed claims. Indeed, the risk became a reality, with at least one case brought by the CETM group against the trucks manufacturers reaching judgment (both at first instance and on appeal) in Barcelona in 2022 before the collective case had reached even the preliminary hearing stage, arguably prejudicing the broader process.[181]

Stays and EU preliminary references

A second interesting example of courts agreeing to a stay of proceedings can be found in cases of mass litigation in which a material and relevant question concerning the application of EU law arises. In those circumstances, where a court decides to raise a preliminary reference to the CJEU pursuant to Article 267 TFEU, the proceedings to which the reference relates are, of course, stayed (by virtue of Article 23 of the Statute of the CJEU). This is automatic However, the Spanish courts have also, on occasions, decided to stay other related proceedings more generally where a preliminary issue has been the object of a reference to the CJEU by another court and is relevant to the proceedings before them.

This occurred in the context of consumer banking litigation arising out of the so-called mortgage 'floor clauses' ('cláusulas suelo').[182] Those clauses were declared null and void pursuant to EU law by the Spanish Supreme Court in May 2013 and, again, in March 2015, but without retroactive effect.[183] The limited temporal effect of that nullity was subject to referrals by lower Spanish courts to the CJEU, however. The CJEU then, in December 2016,[184]

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[178] art 88(2) LEC.
[179] art 81 2nd para, LEC.
[180] arts 84(2), 92 LEC.
[181] *Gruas Transportes y Carretillas El Rayo Amarillo SL v Iveco SpA* SJM3 Barcelona, 22 January 2021, ES:JMB:2021:562; SAP Barcelona, 18 July 2022, ES:APB:2022:7669.
[182] 'Cláusulas suelo' were clauses used by banks in the standard terms and conditions of mortgage loans which impeded the reduction of interest rates to real market levels where rates had sunk beneath the minimum levels established in the contract.
[183] STS 241/2013, 9 May 2013, ES:TS:2013:1916; STS 138/2015, 25 March 2015, ES:TS:2015:1279 (*Cláusulas Suelo*).
[184] Joined Cases C-154, 307 and 308/15 *Gutiérrez Naranjo v Cajasur Banco SAU* EU:C:2016:980, on referral from Commercial Court nº 1 of Granada and the Appeal Court of Alicante.

corrected the position of the Spanish Supreme Court, thereby opening up a right for consumers to recover the unlawful element of any mortgage loan payments made before March 2013, provided their claims had not become res judicata in the meantime.[185] During the period prior to the CJEU's judgment, the Supreme Court took the decision to stay further appeals before it pending the outcome of the referrals without raising a further preliminary reference of its own. In doing so, the Supreme Court determined that the pending referrals from the lower courts had a direct connection with the object of the appeal before it (constituting, by implication, a preliminary issue), and that the appeal should, therefore, be stayed for the following essential reasons: (i) the question of EU law was relevant and unclear, and should therefore normally be the subject of a reference pursuant to Article 267 TFEU, given the Supreme Court is the court of final instance; (ii) it, however, made no procedural sense to raise a further referral to the CJEU on the same matter as this would simply cause further delays in the referral process already ongoing before the CJEU; and (iii) given the CJEU's judgment on the existing referrals was expected to be handed down within a reasonable period of time, the stay would not cause any prejudice to the parties.

In subsequent banking litigation (this time, around default interest terms in mortgage loan agreements), this approach was adopted at a lower level, this time by the Appeal Court of Seville pending a referral to the CJEU made by the Supreme Court, in an order which was adopted by all the relevant sections of the Appeal Court with the objective of unifying the criteria to be applied in these cases at the appeal level in the Seville area.[186] Applying the same reasoning as the Supreme Court in its Order of April 2016, the Seville Court ordered the stay of the particular proceedings before it and set out the criteria to be adopted by the Appeal Court on future cases of a similar type. Like the Supreme Court in *Cláusulas Suelo*, the Appeal Court was the court of last instance in the case in point and was obliged itself to raise a referral but, for the same reasons of procedural efficiency, it chose, rather, to stay and await the resolution of the existing referral.

Examples of a broader nature also exist. That is, some courts, while not being of final instance, have chosen to stay proceedings before them on the basis that a relevant preliminary reference from another Spanish court was already pending before the CJEU. They have done so on the basis of a flexible, or analogical, interpretation of the civil precedence rule under Article 43 LEC. One first instance court has relied directly on the CJEU's doctrine set out in *Masterfoods* grounded in the duty of sincere cooperation of national courts pursuant to Article 4(3) TEU.[187] Most courts have, however, rejected such requests for stay on the ground that they are not supported by the rule of civil precedence under Article 43 LEC or by any other existing procedural rule.

This situation changed with the adoption of Royal Decree-law 6/2023 which incorporated a specific rule into the LEC, Article 43 bis, second paragraph. This rule expressly allows for the discretionary stay of proceedings by a court on the ground of a preliminary ruling question that has been raised by another court and which is "directly linked to the subject matter of the litigation before" that first court. For political reasons, however, the future of that

[185] For an excellent description of the circumstances of the case, see Carlos Fidalgo Gallardo, 'La prejudicialidad europea: Cuestiones Prejudiciales y Suspensión de Procesos Civiles', (2022) 56 Revista General de Derecho Procesal.
[186] AAP Sevilla (Sections 2, 5, 6 and 8), 23 March 2017.
[187] This is reported by Fidalgo Gallardo, n 185, who identifies the Seventh First Instance Court of Barcelona as having adopted this position.

provision at the time of writing was uncertain, so the question of whether the general power to stay is covered by the procedural law remains shrouded in some uncertainty.

There are strong reasons, from the perspective of procedural efficiency and the good administration of justice, for avoiding cases proceeding when there exists a matter of EU law of direct relevance to the outcome of the case which is pending resolution by the CJEU, even if it arises in separate proceedings. However, despite the opposition of most courts and legal commentators to applying Article 43 LEC more broadly, without prior legislative amendment, I would like to suggest that, at least as a matter of EU law, that restrictive position could possibly be reconsidered, in light of the arguments already alluded to. It should first be noted that the decisions of the CJEU have effects generally (erga omnes), not just in the proceedings which the referral relates to; that is, the CJEU's decisions declare the correct interpretation of EU law at a given time, which must be followed and applied by national courts.[188] Accordingly, the full effectiveness and uniformity of EU law require national courts to apply national procedures in a way which will not prejudice the outcome of a CJEU referral, even if brought by another court, in keeping with their duty of sincere cooperation and, where necessary, to disapply opposing national rules (or, even, provide for an appropriate alternative procedural mechanism, where none exists). Where there is a risk that the national decision become final, because there is no possible appeal or no guaranteed right to appeal, the effective judicial protection of the affected party's EU law rights could be impeded, in breach of Article 19 TEU and Article 47 CFREU, if the proceedings are not stayed before the position under EU law is declared by the CJEU. It would, of course, in theory be open to each and every court to raise its own preliminary reference, but in the context of mass litigation involving hundreds or thousands of proceedings that is clearly not desirable since it could cause endless delay and inefficiency, in grave detriment to the very rights Articles 19 and 47 seek to protect.

The central question, then, becomes one of whether the resolution of a particular matter of civil law by the CJEU in separate proceedings is truly determinative of the case before the national civil court.[189] Care is clearly needed to avoid this being used as an unjustified delay tactic by parties, which could jeopardise access to justice. There is an additional practical issue: for this to work well[190], adequate transparency mechanisms need to be in force to ensure courts and parties are sufficiently aware of relevant referrals and their scope. In all events, it is submitted that, in the Spanish Trucks litigation, some inefficiency may have been avoided by a sensible use of this possibility of staying specific proceedings where they depended on the outcome of one of the preliminary references submitted to the CJEU.

Time-limits and EU law on "sufficient time to defend"

EU law may exceptionally offer further grounds for courts to extend time-limits. The rules applying to service and enforcement of judgments in cross-border cases include protections of the rights of defence which have an autonomous EU law meaning and may, in practice,

[188] Lenaerts, *EU Procedural Law*, n 2 (Part I), 244-6. As a matter of Spanish law, the precedential value of the rulings of the CJEU was incorporated expressly into the General Judiciary Act in 2015 (art 4bis(1) introduced by Organcic Law 7/2015). The exact theoretical classification of these binding effects is a matter of academic debate. See further, inter alia, Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (CUP 2014), 243-53; Andrés de la Oliva Santos, Ignacio Diez-Picazo Giménez and Jaime Vegas Torres, *Curso de Derecho Procesal Civil II* (4th edn, Cerasa 2021), 365-6; the seminal opinion of AG Werner in Case 112/76 *Manzoni v Fonds national de retraite des ouvriers mineurs* EU:C:1977:133; [1977] ECR 1647, 1661-3.

[189] In the words of the new art 43bis(2) LEC: 'directly linked to the subject-matter of the litigation' (my translation).

[190] Even pursuant to art 43bis(2) LEC.

affect the time permitted to defendants to act. In particular, defendants have the right to receive the statement of claim in a language they understand[191] and to be granted sufficient time from the date of proper service to defend themselves.[192] These provisions were the object of intense debate between courts and parties during the first phase of the Trucks litigation in Spain; for instance, concerning which documents should be translated by the claimants into what languages and when defendants were entitled to reject service. On certain exceptional occasions, courts have been known to approve ad hoc time-limits for the filing of the defence to take into account the effect of the EU procedural guarantees on a particular set of circumstances of notification.[193]

On the basis of the foregoing, it is not inconceivable that the CJEU could be called one day to consider the compatibility with EU law of time-limits for filing a defence in a complex competition law case.[194]

d) Preparation for trial

A brief word should also be said about the courts' direction of proceedings to trial. It is here where they are at greater liberty to act, procedurally speaking.

Date and sessions for trial

The dates for hearings, including the trial, are set by the courts themselves.[195] The LEC does include time-limits from the preliminary hearing for the celebration of the trial but the breach of that time-limit (as in the case of the time-limit for the preliminary hearing following filing of the defence)[196] does not ground the nullity of proceedings and it is more common, in practice, for these time-limits to be breached than not.[197] In this sense, there is in practice scope for judges to adapt timelines to the needs of the case and of the parties and this is one of the matters that should be discussed at the preliminary hearing when the court is considering the date for trial, its length and number of sessions. In principle, the trial should

[191] art 8 Regulation 1393/2007 (now art 12 Regulation 2020/1784) grants defendants a right of refusal of service where a document is not translated into a language the defendant understands or the language of the country in which the defendant is located. The defendant had one week (now two weeks under the new Service Regulation) within which to exercise that right and the time for filing its defence will not begin until that time has expired (see Case C-7/21 *LKW WALTER Internationale Transportorganisation AG v CB* EU:C:2022:527). In the case of the statement of claim, the defendant may also have a right to the translation of further documents annexed to the statement of claim on which the claimant wishes to rely; as determined by the processing court in the State of origin (Case C-14/07 *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* EU:C:2008:264; [2008] ECR I-3367; Case C-21/17 *Catlin Europe SE v OK Trans Praha spol sro* EU:C:2018:675).

[192] The requisite of sufficient time is formulated as a guarantee which is to be checked by the court of origin in situations of default. For instance, art 19(1) Regulation 1393/2007 (art 22 Regulation 2020/1784) provides that judgment should not be given where the defendant has failed to enter an appearance, unless service has been properly effected and the defendant granted sufficient time to defend, and, in similar terms, art 45(1)(b) of the Brussels I Regulation provides that enforcement of a judgment may be refused where the defendant has not entered an appearance in the relevant proceedings and was not granted sufficient time to defend itself. For further consideration of this subject, see Iñigo Quintana, 'Plazos procesales y derechos del demandado en el Derecho UE y el Derecho español' Almacén de Derecho, 7 November 2022.

[193] eg, AJM1 La Coruña, 19 November 2018, conceding an extension of 20 days of the deadline for filing the defence in lieu of the translation of all exhibits by the claimant.

[194] I would venture that the 10-day period for a full defence to be filed with supporting documents under the fast-track procedure could well fall foul of such a review if it ever happened in a case presenting sufficiently extreme characteristics. Indeed, it is worth noting that the deadlines for representative actions were rightly extended in the version of the draft collective actions law published in March 2024 (n. 336).

[195] art 429(2) LEC.

[196] art 414(1) LEC.

[197] See, Fernando Gascón Inchausti, *Derecho Procesal Civil. Materiales para el Estudio* (4th edn, 2022/2023, Universidad Complutense de Madrid); available online (copyleft): https://hdl.handle.net/20.500.14352/3101, 92.

conform to the principle of 'unity of act', meaning that, even if it is to continue for a number of days, these should be consecutive.[198] Nevertheless, there are reasons that this may not be possible and, indeed, it seems an area, in particular where there is party agreement, in which flexibility will, in practice, be possible, as well as desirable.

The role of the 'audiencia previa'

The 'audiencia previa' was a creation of the 2000 procedural law which, as already noted, had as its primary objective to bring the court into greater contact with the dispute brought before it. It has to be an oral hearing and be directed by a judge (normally, but not necessarily, the trial judge).[199] More particularly, in the case of more complex cases (which would follow the ordinary procedure as opposed to the fast-track procedure, 'juicio verbal') the aim of the 'audiencia previa' is, first, to allow the judge to detect (and, if possible, remedy) certain procedural obstacles to a decision on the merits, before the judgment is handed down.[200] This could include the decision on the joinder of actions, on the necessary intervention of third parties or questions of res judicata and lis pendens.[201] The 'audiencia previa' also allows the court and the parties the opportunity to focus the debate to be had at trial. This includes the possibility for the parties to clarify or complement orally the positions set out in their statements of claim and defence, without materially modifying those positions.[202] It also involves the parties, with the court's assistance, determining the facts which are in dispute and which should, therefore, be the object of evidence.[203] The next stage is the proposition and admission of evidence, at which point the judge is permitted exceptionally to identify to the parties the facts in dispute in relation to which he or she considers there may be insufficient proposed evidence and how this insufficiency might be remedied.[204] Finally, the court will set the date for trial, it being possible, exceptionally and where properly justified, for the trial to take place on various consecutive dates or in separate sessions.[205]

The preliminary hearing offers a unique opportunity within the Spanish ordinary procedure for the judge to engage with the parties and their lawyers in connection with the proceedings, before trial and judgment, and thereby to focus the proceedings correctly both procedurally and materially.[206] For this reason, the act should be an oral hearing with presence of the judge and the parties.[207] In the right environment, supported by appropriate specialization of courts and the collaboration of parties, the hearing could offer greater opportunity for case management in complex cases.

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[198] See arts 184, 290 LEC.
[199] arts 137(2), 414 LEC.
[200] art 416 LEC.
[201] arts 419, 420, 421 LEC respectively.
[202] art 426 LEC.
[203] art 428 LEC.
[204] art 429(1) LEC.
[205] art 429(7) LEC.
[206] The use of the word 'unique' is not strictly correct. In the following section, we will consider the role the disclosure hearing could take on in the case management of competition cases. In the proposed collective actions regime, the certification hearing will also take on a key importance.
[207] Following, Covid-19 it was normal for preliminary hearings to be held by videoconference, something permitted by art 19, Royal Decree-law 16/2020 of 28 April.

Ensuring a judgment on the merits

One of the reasons for the creation of the preliminary hearing was to prepare a dispute for trial and facilitate an effective judgment on the merits, in particular in cases of certain complexity.[208] The recitals to LEC note the well-known adage: 'Nada más ineficaz que un proceso con sentencia absolutoria de la instancia' which can be translated loosely as 'There is nothing more useless than a full first instance procedure which ends in a judgment rejecting the claim for procedural grounds'. By this, in essence, it is meant that the effort of running a whole first instance proceeding may be futile if it ends in rejection, particularly, it should be added, if the claim contained material formal defects (which determined the rejection of the claim or could have been remedied) or if the case required greater definition of the material issues in dispute before a trial could usefully take place and the evidence be heard.[209] Accordingly, the correction of procedural defects, the clarification of issues in dispute and the assessment of the relevance of proposed evidence are key tools which the preliminary hearing offers to the court.

It should be recalled, however, that there is no general provision in Spanish law for courts to deal with preliminary issues separately (before final judgment)[210] or, for that matter, to order a strike-out of a claim. That is, it is not possible for the court to resolve discrete material issues of relevance to the final outcome of the case via interim decisions (then appealable to higher courts), as is possible in many other European jurisdictions (including the UK). Such preliminary issues may be influential or decisive in the final outcome of the case and even cause the rejection of claims without the judgment entering into the substance of the case or assessing evidence which has been heard at trial - such as may occur, for example, if a limitation defence is upheld. The preliminary hearing regulated in the Spanish Procedural Law does not extend to such matters.

I would like to make two final points concerning the possibility of judges to use the preliminary hearing as a means to achieve the objective that judgments resolve the merits of the case. The first refers to an example of a failure of the system to deliver a judgment on the merits in a private enforcement case, which is of some current relevance for antitrust private enforcement in Spain. The second refers to the use of CJEU preliminary references as a means to address preliminary issues of material relevance to the case which have an EU law substance.

A handful of judgments in Spanish private enforcement litigation have rejected damages claims on the ground that the relevant competition authority decision establishing the underlying infringement to which the claims related was subject to appeal and not, therefore, final when the civil claims were filed.[211] Notably, by judgment of 20 January 2022, Commercial Court nº 1 of Oviedo rejected a claim brought by an Asturian dairy farmer for

[208] Fernando Gascón Inchausti and Diego Palomo Vélez, 'La audiencia previa al juicio en el modelo procesal civil español', (Sept 2007) 1 Revista Hispano-Chilena de Derecho Procesal Civil 51, s 3.1.2.

[209] This principle reflects the procedural rights of the parties to a judgment on the merits and one that is favourable to the claimant if the claim is founded. Such rights, recognised as a matter of Spanish procedural law, have been developed and constitutionalized under the guise of the fundamental right to access to justice and an effective legal remedy. See, inter alia, Gascón Inchausti, *Derecho Procesal Civil*, n 197, 54-66.

[210] Procedural defects, in particular lack of jurisdiction, may be determined but not preliminary issues of a substantive nature. It is possible for the court to stay proceedings where a relevant preliminary issue is the object of separate pending proceedings (arts 41, 43 LEC) or in order to refer preliminary issues of EU law to the CJEU (art 267 TFEU).

[211] This has occurred, for instance, in connection with Milk and Automobile Manufacturers claims.

damages allegedly arising out of the conduct of certain dairy companies in the Spanish market for the purchase of raw milk which had been the object of an investigation by the CNMC which terminated in an infringement decision (in 2019). That decision was appealed by the dairy companies to the Audiencia Nacional and the judgments had not been handed down when the claim was filed (in 2020).

The Oviedo court's judgment, of just over two pages, is based on one sole ground: 'The Impossibility that the Claim Succeed'.[212] It is a clear example of a case which involved a full first instance ordinary procedure (oral hearing and trial on the merits included) lasting the best part of two years, which was, in fact, largely futile, because the claim was destined to fail from the start.[213] Why was the claim destined to fail? According to the court, the claim was framed as a 'pure follow-on action', whereby the court meant that the proof of the infringement giving rise to the harm rested entirely on the CNMC's decision and the claimant had not requested the court itself to declare the existence of the infringement in its statement of claim.

Without access to the pleadings, it is difficult to judge, but I question whether the court's assessment on this point was correct or consistent with the right to a judgment on the merits. First, the decision seems to deny the ability for civil courts to assess the existence of the infringement as a prior question to the assessment of harm without the claimant expressly needing to make such a request.[214] Second, it seems also to deny the civil court's competence (shared with the administrative law jurisdiction) to determine the existence of breaches of competition law.[215] Indeed, it is striking that the court did not consider it could determine the existence of the infringement (despite the evidence of the same provided by the CNMC's decision, which, while not definitive, offered an undeniable element of proof); nor that it could take any measures at the preliminary hearing stage to have the claimant rectify the statement of claim or the evidence it proposed in order to permit it to assess the merits of the case; nor that it could have stayed proceedings pending the outcome of the administrative law appeals.[216] The result was a first instance ruling determining the rejection of the dairy farmer's claim and removing the claimant's opportunity to have its claim for damages considered on the merits.

This brings us onto the second point: preliminary references. The one valve available to national courts for dealing with preliminary issues of a substantive nature in cases based on EU competition law is the Article 267 TFEU procedure. The Article 267 procedure has permitted the Spanish courts, for instance, to ask the CJEU to interpret issues of EU law relating, among others, to the applicable limitation rules, disclosure or the standard of proof. What is more, the answer of the CJEU, while formally limited to responding on a prior question of interpretation of EU law and leaving it to the national court to apply that interpretation to the case, has at times been determinative of the underlying case. Clearly the use of preliminary references needs to be cautious, particularly at first instance, given the

[212] The title to LG 2.
[213] 'La demanda está condenada a su fracaso desde su inicio', LG 2.
[214] Spanish law does not adopt a formalistic approach to the dispositive part of the statements of case (petitum); see, STS, 14 July 2016, ES:TS:2016:3449, LG 3. For an example of a case where the claimant requested an award of damages but the court assessed the full elements of the tort (illicit conduct, fault, causation and harm) see SJM5 Madrid, 11 November 2005, *Conduit Europe SA v Telefónica de España SAU*, ES:JMM:2005:70; upheld by SAP Madrid, 25 May 2006, ES:APM:2006:6773.
[215] As per arts 1, 6 Regulation 1/2003.
[216] art 434 LEC foresees the faculty of a stay in the period between trial and judgment to await the outcome of a competition investigation.

delay it can cause in the proceedings in question (and, potentially, even more widely, as we have seen) and the ability of higher courts to make such a reference in due course if needed. On the other hand, in terms of the overall resolution of litigation applying EU law, the definitive opinion of the CJEU may be key and, indeed, it may, at times, be more efficient for lower courts to ask the CJEU, than wait.

e) Party agreement to alter the course of proceedings

At this point, I would like to make a brief final reflection related to case management. It refers to the general power of disposition that the parties have over the process.

The Commercial Courts' 2020 paper on case management identified party agreement as a central part of the case coordination mechanisms advanced in that paper (not only in relation to joinder, but also to joint case processing):

> The consent and collaboration of the parties avoids the risk of nullity of proceedings (art. 225 3º, 227.1 and 228.1 LEC) and facilitates the effectiveness of coordination.
>
> Both in the joinder of proceedings and in coordinated proceedings, the agreement of the parties is essential to allow the application of the mandatory rules to the case in a flexible and adapted manner, making possible certain modifications (e.g. in terms of time limits, summons, etc.) required by the specific case. In addition, there are varying circumstances between the judicial districts that may allow for certain agreements or improvements on the strict legal regime of joinder of proceedings. These improvements are based on agreements of the boards of judges or with the legal practitioners.
>
> There is no reason why such improvements to the strict legal regime of joinder of cases cannot be applied in these judicial districts.[217]
>
> (My translation)

These recommendations referred, above all, to agreements between the court and the parties on the joinder of proceedings (under the joinder rules in the LEC) and the consequent adaptation of the proceedings in what the document itself calls "flexible joinder". This question relates not to the legal efficacy of the agreement as between the parties themselves, which would be a matter of private law. Rather, it refers to a matter of the public law implications of the agreement; the implication of the agreement within civil procedure.[218] The initial and simple answer to that public law question is that parties do not have a general right to dispose of the civil procedure by agreement unless the law so provides, and that is not the case in Spain.[219] Accordingly, as a general rule, Spanish litigants

[217] "Propuesta para la ordenación de procedimientos sobre el Cártel de los Camiones", n 9.

[218] For an in-depth analysis of this subject, see Schumann Barragán, *Derecho a la tutela judicial efectiva*, n 166, in particular, ch IV which addresses the so-called 'Negocios Procesales' (Procedural Arrangements) and where the author discusses the efficacy of such arrangements in the procedure. Such procedural arrangements can extend to agreements to modify the normal order of the civil procedure; for example, by extending time-limits (p 148). The focus of this book is, however, more specifically on private agreements between parties, their legality and their effects on the procedure (as well as between the parties themselves) and is not so much concerned with case management agreements involving the parties and the court itself. This is an important distinction.

[219] By contrast, there is express legal provision in some countries for the parties to agree aspects of the procedure; as is the case, for instance, in France where there is express provision in the civil procedural law for the agreement with the parties of procedural calendars or Brazil where the 2015 Civil Procedure Code established cooperation as a procedural principle, expressly allowed for procedural contracts and agreements with the judge on procedural calendars; see, Fabbi, 'New Sources', n 70, and Juliana Pondé Fonseca, 'The Changing Role of Courts between the Privatization of Adjudication and the Privatization of Procedure' in Loïc Cadiet (ed), *Approaches to Procedural Law: The Pluralism of Methods* (Nomos 2017), 147.

cannot modify the civil procedure by agreement, except for certain limited discrete procedural acts to the extent that there is express provision in the Civil Procedure Law for the parties to determine particular aspects by agreement. This is the classical position set out by Schumann Barragán in his recent work on this area:

> The recognition and admissibility of procedural business does not imply, it must be emphasised from now on, a privatisation of the process. And certainly not a subversion of public order and the principle of procedural legality. Each procedural system, depending on a legislative policy decision, grants a greater or lesser scope of operation to the autonomy of the will. It is within this sphere of autonomy granted to the individual that procedural transactions take place. Procedural transactions start from and are necessarily integrated in the positive procedural order, they do not aspire in any way to subvert it.
>
> In our procedural system, the principle of legality applies (art. 1.1 LEC). Procedural transactions must necessarily take place within this framework. Only when the procedural rule itself grants legal effectiveness to the autonomy of the will to influence the organisation of the process or the action of the court will these procedural transactions be valid and effective.[220]

At this point, it may be appropriate, however, to introduce a more nuanced and pragmatic approach into our analysis and to look more closely at the area of party autonomy which is recognized or, as a matter of fact, may be permitted by Spanish civil procedure. Not all procedural rules have the same value and, as noted earlier in our discussion of the case before the Vizcaya Appeal Court, not every breach of procedural rules, even essential rules, entails nullity. Furthermore, the consequences of a breach of a rule of procedure may vary depending on the precise provisions of the law regarding those consequences, or, where action is required on their part, on the enforcement attitude adopted by the parties or the court. If the consequence of procedural breach is not automatic (i.e., it requires enforcement), the question then becomes whether such agreements can be, de iure or de facto, procedurally effective; that is, legally enforceable or, at least, in practice applied. The distinctions that can be drawn between different types of procedural infringement (breach) and the possible consequences of those breaches (enforcement) may be particularly relevant where the parties have agreed with the court to their modification. Let us consider these distinctions further.

The breach of some essential rules may be sufficient of themselves to provoke their automatic nullity. Such is the case of the requirement of immediacy already referred to whereby the presiding judge on the case (who is to emit the judgment) must be present at

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[220] Schumann Barragán ibid 150 (my translation). For a jurisprudential expression of this classical position see, inter alia, SAP Valencia 433/2021, 20 April 2021 (Trucks), ES:APV:2021:1209, LG 3.2.1: 'Procedural rules are of necessary law, as stated in the Order of the Granada Court of Appeal of 9 November 2012 (ES:APGR:2012:840A) when it states that the Courts must ensure compliance with them (rules of necessary law or "ius Cogens"), or when it says that the breach of essential formalities gives rise to the notion of defencelessness in its material sense, causing a real attack on the right of defence. Or the Madrid High Court in its Judgment of 2 January 2006 (ES:APM:2006:151) when it states that procedural legislation is necessary law, that is, it does not have the character of a dispositive rule. Or when in the Order of 6 July 2002 (ES:APM:2002:1339A) it teaches that the parties cannot arbitrarily alter the public procedural order, in reference to the rules of necessary law not available to the litigants. (Along the same lines, the Order of the Valencia Court of Appeal of 23 July 2001, ES:APV:2001:533ª, or the Judgment of the Burgos Court of Appeal of 7 July 2000, ES:APBU:2000:1061). And connected to the above, it should be remembered that the jurisdictional function does not include the creation or substitution of existing procedural channels, the production of law (Judgment of the Supreme Court of 4 December 2001), nor, consequently, the repeal of positive law (Articles 1 and 2 of the Civil Code)' (my translation).

the evidence hearing.[221] Other breaches of essential rules will require, in addition, that they entail a material and non-remediable incursion into the party's rights to defend itself through the presentation of legal arguments and production of evidence;[222] that is, they require a breach of the party's fundamental procedural rights for nullity to arise.[223] This was the approach adopted, for instance, by the Court of Appeal of Vizcaya as regards the replacement of the oral preliminary hearing with written submissions. There are, thirdly, a series of imperative procedural rules which are not, on the face of it, capable of variation by the court or the parties (such as the rules on time-limits or the rules on the allocation of cases between competent courts of the same territorial demarcation) but the infringement of which may or may not have automatic consequences since that would require, first, action by the parties (or the courts).[224] Fourthly, there are rules which are expressly in the gift of the parties (such as the filing of an appeal, the joinder of actions or the withdrawal of a claim). These clearly can be the object of agreement that can effectively impact in the progress of the procedure, as we have seen already in the case of joinder. Fifthly, there are formal matters of a secondary nature, which are left unregulated in the law and may, therefore, permit of certain case management by the court (such as, concerning the way in which the trial will be run and the modes of presentation that may be used by witnesses or experts). Finally, there are other rules of a formal nature the breach of which may not be decisive and which the court is expressly allowed (and obliged) to permit of remedy.[225]

Clearly, the trickiest categories are the second (breaches requiring, in addition, the violation of rights of defence) and third (breaches of imperative rules which require action by the parties, or the court, to become effective). As to the second category, however, it is hard to see how such arrangements could be seen to raise a problem of protection of fundamental rights to the extent that they increase the protection of the rights of defence by granting greater time to the parties to exercise those rights.[226] This leaves the thorny question of the third category, which raises a challenge to the principle of legality. There are clearly many who would object strongly and in principle to any arrangements which attempt (albeit with agreement of the courts and parties) to modify central tenets of the procedural law, since these are the very guarantees of due process.[227] However, as we have seen in the previous sections [in particular, section c) on time-limits and stays], the law allows for more loopholes than one might perhaps expect.

To conclude this section, it is perhaps worth introducing a couple of broader policy considerations, from the standpoint of the court and the parties respectively, which may offer avenues for positive development of this sort of initiative in the future. First, from the perspective of the courts, we have already noted the tendency in recent times for certain

[221] art 137(4) LEC provides for the automatic nullity of acts carried out in breach of these rules (something which is reinforced, in practice, by the requirement that hearings be recorded pursuant to arts 147 and 187 LEC).
[222] This is the rule under art 225(3) LEC.
[223] For a full discussion from a fundamental rights perspective, see Schumann Barragán, *Derecho a la tutela judicial efectiva*, n 218, ch II.
[224] So, for instance, the breach of the allocation rules should be denounced by the parties as soon as they are able (art 68 LEC). The failure so to act would, accordingly, consolidate the breach of the rules of case allocation.
[225] Pursuant to art 231 LEC. The right to the correction of formal errors has been recognized constitutional status under art 24(1) CE (the right to effect judicial protection); see, for example, Gascón Inchausti, *Derecho Procesal Civil*, n 197, 63.
[226] It is true that the process has suffered considerable delay as compared to other Trucks cases. However, these delays, while certainly regrettable, do not seem to have reached the realms of undue delay from the perspective of access to justice.
[227] See, for a recent statement in this sense, Herrero Perezagua, n 51, 17-20.

courts to develop unified criteria for action which are tendered as soft law guidance to litigants, and which litigants can expect to be followed. This offers greater legal certainty to citizens and perhaps offers an umbrella for initiatives such as the Barcelona Protocol or broader initiatives such as the commercial court 2020 proposal to case manage the Trucks litigation. As for the standpoint of the parties, we potentially enter here into the realm of the parties' duties of procedural good faith a subject which, undoubtedly of a controversial nature and currently of a limited scope, we have considered in section b) above. While still undeveloped in Spain, these two policy considerations fit squarely within the frame of the modern idea of good administration of justice to which we have referred earlier and towards which procedural practice and rules should, in my opinion, tend. At the same time, these considerations need to be balanced with the need to protect parties' rights of defence and equal treatment before any Spanish court, which implies a need for coherent and accountable developments in judicial practice.

15.3. Interim conclusion

The ability of the courts to manage cases proactively is limited, in law and in practice, in Spain. This is uncontroversial. Nevertheless, this general assessment of the situation does allow of certain exceptions of potential relevance in the area of EU competition law. Making such exceptions count may involve the court's intervention in the process from an early stage - including at the moment of service (to ensure compliance with EU procedural requirements) or when faced with a number of parallel proceedings before it or different courts (joinder) or at the pre-trial hearings with the parties (notably, both at the preliminary hearing and, potentially before that, the disclosure hearing). Collaboration with and by the parties (supported by lawyers and, at times, experts), who have certain rights to dispose of proceedings (and duties to contribute to the good administration of justice), may contribute in this sense. Moreover, in my view, these are aspects of a modern justice system in complex matters which must, and inevitably will, increasingly influence this area of legal practice.

16. Disclosure

16.1. Implementation and practice in Spain

The disclosure rules in the Damages Directive (Articles 5 and 6) were implemented into Spanish law by means of an amendment to the Civil Procedural Law, introducing into the general section on evidence[228] a new section entitled 'Access to Sources of Proof in Proceedings for Claims for Damages for Breach of Competition Law'.[229] The new regime is

[228] Book II, Title I, Ch V LEC.

[229] For further discussion of the new provisions, see, inter alia, Lluis Caballol Angelats on art 283bis in Silvia Gómez Trinidad (dir) and Lluis Caballol Angelats (coord), *Resarcimiento de daños por la infracción de las normas concurrenciales en el Real Decreto-ley 9/2017 de transposición de la Directiva 2014/104/UE* (Marcial Pons 2021), 95, 129; Raúl García Orejudo, 'El acceso a las fuentes de prueba' in Gómez Trinidad and Wurmnest, *Práctica judicial antes las reclamaciones de daños*, n 62, 233; Victor Manuel Moreno Catena, 'Algunas cuestiones sobre el acceso a fuentes de prueba en reclamaciones de daños por infracción del derecho de la competencia' in Gómez Trinidad and Wurmnest, ibid, 249; Purificación Martorell Zulueta, 'Aspectos Procesales I: Acceso a las fuentes de prueba' in Juan Ignacio Ruiz Peris (dir) and Teresa Palomar (coord.), *Problemas actuales en las acciones de compensación de daños por infracción de las normas de competencia* (Aranzadi 2019), 77; Eduardo Pastor Martínez, 'Cuestiones sobre el acceso a las fuentes de prueba: la perspectiva judicial' in Juan Ignacio Ruiz Peris (dir), *Daños, Comercio Electrónico y Derecho Europeo de la Competencia* (Tirant lo Blanch 2019), 191; Fernando Gascón Inchausti, 'El acceso a las fuentes de prueba en los procesos civiles por daños derivados de infracciones de las normas de la competencia' La Ley Mercantil, nº 38, 1 July 2017; Piedad González Granda, 'De las dudas del legislador y otras

contained in eleven new provisions, new Articles 283 bis a) to 283 bis k) LEC As its title indicates, despite initial proposals to extend the new provisions to all types of civil proceedings,[230] Articles 283 bis a) to 283 bis k) were limited to the area of competition law; in particular, claims for damages. It has since been extended to apply to proceedings concerning business secrets, pursuant to EU Directive 2016/943,[231] and its extension to representative consumer collective actions has been proposed in the Spanish draft law of December 2022, in conformity with the requirements of Directive 2020/1828.[232]

The new legal base did not bring about the derogation of the existing legal bases in the Spanish Procedural Law for parties to access evidence in the hands of another party; neither, generally, as is logical, nor specifically in the area of competition damages claims, despite the introduction of the new regime. This means that, in practice, while a certain priority may be granted to the new specific rules in competition damages claims (lex specialis), where existing rules for requesting pre-action disclosure (so-called 'diligencias preliminares'),[233] or the disclosure of specific documents,[234] may apply, they may still be used. Indeed, some courts have tended towards a cohesive interpretation of the overall set of rules in light of the content and spirit of the new regime.[235]

The use of the new disclosure provisions is still fairly limited in Spanish private enforcement litigation but is by no means immaterial:

- *On the claimant side*, some successful requests for access to the competition authority file have been made; for example, in the Decennial Construction Insurance litigation[236] or in relation to claims for damages arising out of the Cardboard Packaging Cartel.[237]

  Notably, in the Trucks litigation, one funded claimant group initiated a series of pre-action disclosure proceedings, requesting access to the defendants' economic data in order to assist their expert in the preparation of a report quantifying harm.[238] That information was not, however, used to quantify harm in the expert reports subsequently filed with the follow-on damages claims.[239] In part, I would venture that

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cuestiones relativas a la novedosa regulación de las fuentes de prueba en los artículos 283.bis.a) y ss., de la Ley de Enjuiciamiento Civil' Diario La Ley, nº 9030, July 2017.

[230] See, Gascón Inchausti, 'Aspectos procesales', n 302 (Part I), and 'El acceso a las fuentes de prueba', n 229.

[231] art 18 Law 1/2019 of 20 February on Trade Secrets.

[232] Proposed art 838 LEC.

[233] art 256 LEC.

[234] Pursuant to arts 328-330 LEC.

[235] See, García Orejudo, n 229, 240 et seq with reference to case-law of the Barcelona Appeal Court.

[236] See, e.g. *Realia v Asefa,* SAP Madrid 19 May 2022, ES:APM:2022:8315.

[237] *Grupo Danone v Cartonajes M Petit* AJM10 Barcelona, 23 November 2020, ES:JMB:2020:334A, confirmed on appeal by AAP Barcelona, 28 April 2022, ES:APB:2022:4486A, concerning a pre-action disclosure request filed by the claimant. For an example of a request for access to the file made during a proceeding for damages, see *Unison Rights SA v SGAE* AJM3 Barcelona, 1 December 2021, ES:JMB:2021:4168A.

[238] See, eg, AAP Valencia, 4 December 2019, ES:APVA:2019:1445A; AAP Granada, 24 September 2020, ES:APGR:2020:947A; AAP Valladolid, 19 October 2020, ES:APVA:20201101A; AAP Vizcaya, 4 November 2020, ES:APBI:20220:543A; AAP Burgos, 19 April 2021, ES:APBU:2021:369A.

[239] According to judgments in the subsequent damages actions, the claimants' expert did carry out an analysis with the disclosed data which gave material overcharges but considered the data was insufficient to carry out a robust analysis and that, since the results referred to prices for the sale of trucks by the manufacturer to their national wholesale companies, it was not necessarily indicative of prices to dealers (or, for that matter, one would add, to customers). As a result, it seems that this analysis was not presented in the reports which relied on a different analysis based on a sample of net prices to customers. See, inter alia, SJM1 San Sebastián, 4 October 2021, ES:JMSS:2021:13673.

there may have been procedural reasons for this; notably, delay and the difficulty of making use of the disclosed data for the purpose intended by the claimants (i.e., for quantifying harm).

Pre-action disclosure permits of appeal under the Spanish rules and execution of the order may be stayed in the meantime[240]. The application of these provisions caused delays in excess of one year and, indeed, of up to 18-24 months, in the Trucks example I am referring to. In the context of first instance litigation which may take a similar amount of time, it is suggested that such delays for the claimant to obtain disclosure may be disproportionate.

In addition, a number of restrictions (of both a legal and practical nature) may have undermined the utility of the disclosure in this case. First, the Spanish rules require the beneficiary of the disclosure order to file its damages claim within twenty days of the order being completed (failure to do so giving rise to negative legal consequences for the claimant).[241] That is a short period, as was noted by the Supreme Court in its Trucks rulings in June 2023.[242] Secondly, access to the disclosed materials was typically offered via a data room and during a limited period of time (for example, one to two weeks) in order to preserve the confidential (or, at least, sensitive) nature of the data in question. This type of access, as opposed to a full download of data, makes it more difficult for the experts to carry out their own quantitative analysis. Thirdly, the requests were very broad and granted the claimant experts access to huge and complex datasets (relating to pricing and costs of sophisticated businesses during lengthy periods of time), which undeniably would have accentuated the relevance of the two limitations I have just referred to.[243] Finally, the whole process was undoubtedly made more difficult because the requests were made individually, or at least by small groups of claimants, against individual defendants,[244] thereby generating extra costs and the need for similar exercises to be repeated (inefficiently) dozens of times. All of these factors may have contributed to the claimants deciding to take a different approach to quantification of harm and not rely on the disclosed materials (in hindsight, making the whole costly exercise rather worthless).[245]

- *On the defendant side*, disclosure has been sought in private damages litigation in order to make out a pass-on defence or to obtain access to the underlying data and model used by the claimants in their damages report in order to rebut or replicate it.

  In terms of pass-on, disclosure requests have frequently been rejected as being disproportionate, in particular, where they have extended to broad categories of economic data concerning the claimant's downstream business and pricing.

[240] art 283bis(f)1.
[241] art 283bis(e)2.
[242] See, for all, STS 947/2023, 14 June 2023, ES:TS:2023:2480, para 20. It should, however, be noted, as underlined by Caballol Angelats, that the 20 day period does not begin until the court has adopted an order declaring the end of the disclosure exercise, order which depends on a prior request by one of the parties (art 283bis(g)4), n 229, 143.
[243] See, in this regard, the observations made by AG Kokott as regards the practical limitations that can arise in a data room exercise, *Tráficos Manuel Ferrer*, n 3, paras 91-2.
[244] This reverts us to the difficulties with joinder of claims discussed earlier.
[245] We will return to the question of pre-action disclosure requests below, when we address the procedural impact of disclosure in Spanish proceedings and consider the place of pre-action requests.

Procedural issues have contributed to the difficulty of such requests. The fragmented nature of the litigation and the relatively low value of individual claims contributes to courts considering that requests for the information necessary to carry out a meaningful empirical analysis of pass-on rates are disproportionate.[246] On other occasions, more confined requests have been granted, albeit the resulting exercise may not have been very fruitful. Even more often, the pass-on defence has been rejected outright, and the disclosure request accordingly denied too, on the basis that the defendant's production of evidence (expert report) which found the inexistence of an overcharge was incompatible with the proposition that further evidence could demonstrate the pass-on of any (hypothetical) overcharge;[247] in what constitutes, to my mind, a basic misunderstanding of the pass-on defence and the methods for its estimation.

We will return to the second category of requests, concerning the data used by the opposing experts, in chapter 17.1(b) below.

Generally, the documentation and information disclosed pursuant to the new disclosure mechanism has not had a material impact on proceedings (in particular, in cases of mass litigation). What is more, the reference to disclosure performed during proceedings, where it has occurred, is, on many occasions, entirely lacking in the final judgment, and the procedural orders resolving disclosure requests are not always available (or, at least, easy to find). That is, there is a lack of transparency as to the courts' approach, which is unhelpful for litigants, impedes the coherent development of case-law and hinders legal certainty.

Exceptionally, discrete claimant documents have persuaded the court of the effective (total or partial) pass-on of harm through the claimant's own downstream transactions giving rise to a reduction in the damages suffered. This has occurred on limited occasions in the Trucks litigation in the case of the resale by the claimant of the truck which was the object of its damages claim, the courts holding in certain exceptional circumstances that the defendant had established sufficiently that part of the overcharge had been passed on in the resale price.[248] By contrast, in the Decennial Insurance Cartel follow-on litigation, the harm caused to the claimants (real estate companies) – namely, the overcharge that was found to have existed in compulsory construction insurance premiums during the cartel period - was held by the Madrid Court of Appeal to have been *fully* passed on to consumers in the claimants' downstream housing prices, reducing the final harm suffered to zero.[249] The defendants were able to persuade the court, partly on the basis of documentation relating to downstream pricing which was disclosed by the claimant, that the overcharge had been fully passed on and, furthermore, on the basis of economic analysis of demand elasticity during the period, that there was no negative impact on the claimants' volume of sales.

[246] Even in cases under the Barcelona Protocol, such requests have also been rejected, however; see, AJM3 Barcelona, 28 October 2022 (unpublished). For methods to estimate pass-on rates, see the Commission's Pass-on Guidelines and the Pass-on Study.

[247] See, for instance, AJM1 Santander, 14 May 2021, ES:JMS:2021:1849A.

[248] The argument of pass-on by virtue of resale in the second-hand market has largely been rejected on the grounds that defendants have not provided evidence of a sufficient causal link with the infringement; by contrast, resale to the seller manufacturer or its dealer network has been treated differently. See, for an overview of this matter: SAP Valencia 318/2023, 24 May 2023, ES:APV:2023:1891, LG 6.1.

[249] SAP Madrid, 19 May 2022, ES:APM:2022:8315, LG 6.

As one Commercial Court judge has observed, there is a need for a more coordinated and coherent approach to disclosure by the Spanish courts.[250] I concur. Indeed, there are discordances in the approach of courts as regards not only the material scope of disclosure, but also procedural matters, such as when disclosure should occur, what impact, if any, it should have on the procedure, and even which is the correct legal base for its application. So, for example, some courts have chosen to treat disclosure requests as a matter under pre-existing rules on document exhibition (Articles 328 to 333 LEC), others under the new rules;[251] the request can be discussed in a separate hearing, before or after the filing of the defence, or at the preliminary hearing, or even in writing between pleadings and the preliminary hearing. The variations are numerous. This is not to mention, finally, the question of what impact disclosure may have on the evidentiary burden required of the parties; in particular, following the CJEU's ruling in *Tráficos Manuel Ferrer*.

It is our objective to provide some recommendations for how a more coherent approach to disclosure could be modelled in Spanish private enforcement proceedings. In order to do so, it is necessary, first, to go back to basics and, recalling the EU law origin and purpose of the new disclosure provisions, address a number of key prior questions which frame our discussion and help to focus any solution. These are the following:

(i) What is the nature and scope of the right to disclosure established under the Damages Directive?

(ii) What is the impact of that EU instrument on Spanish civil procedure?

(iii) What, finally, is its impact on the standard of proof required by Spanish courts?

16.2. An EU right to disclosure

It is important to observe that the provisions on disclosure in the Damages Directive create an EU law instrument; and a procedural instrument, at that. While, certainly, the implementation of these provisions into national law is nominally a question of national procedural autonomy; nevertheless, the nature, essence and contours of the right to disclosure are a matter of EU law and, given it is matter of procedure, of EU procedural law. This shapes the way in which disclosure has to be understood and introduced into national procedure and, accordingly, offers a very clear example of a significant incursion of EU law into the traditional sphere of national procedural autonomy.

Three recent rulings of the CJEU are illustrative of this point.

The first is *Paccar*.[252] This case concerned a preliminary reference from Commercial Court nº 7 of Barcelona relating to one of the first of the group of pre-action disclosure requests in the Spanish Trucks litigation which we have referred to earlier. The court asked the CJEU for an interpretation of Article 5(1) of the Directive; namely, whether disclosure as defined in that provision extended to the aggregation and classification of certain requested information, thereby requiring the addressee of the disclosure order to create ex novo a document (set of

[250] García Orejudo (Barcelona Commercial Court nº 7), 'El acceso a las fuentes de prueba', n 229, 249, where he calls for a document of unification of criteria to be adopted by the Commercial Courts (perhaps along the lines of the Trucks proceeding proposal during the Covid-19 lockdown) or by agreement of the Junta Sectorial de Jueces or in meetings of specialized commercial judges.

[251] See Victor Moreno Catena, n 229, for an analysis of the differences between the pre-existing regime under arts 265, 270, 328-333 LEC and 283bis LEC.

[252] Case C-163/21, *Paccar*, EU:C2022:863.

information) for disclosure to the requesting party, or not (i.e., disclosure was limited to the provision of access only to pre-existing information). Answering the question in the affirmative, the CJEU's judgment sets out its interpretation of the rules based firmly on the underlying objectives of the instrument in ensuring the effective application of EU competition law, thereby delimiting a markedly distinctive EU law instrument. The key elements of its reasoning can be summarized as follows:

- Disclosure in the Directive is aimed to correct the asymmetry of information existing between the parties; permitting, for instance, a claimant to access the information in possession of the defendant which was used by the competition authority to determine its participation in anticompetitive conduct.[253] Underlying this objective is the principle of equality of arms.[254]

- The right contributes in this way to the effective application of competition law, where private enforcement plays a complementary role to public enforcement by imposing further monetary sanctions for infringements, permitting not only direct harm to victims to be compensated but also indirect negative effects (for example, to consumers) to be remedied.[255]

- Disclosure requests need not be for specific pieces of evidence (precisely because the instrument is aimed to correct a lack of knowledge about the evidence in possession of the other party or a third party) and may relate to categories of information.[256]

- At the same time, the right is accompanied by checks and balances aimed at avoiding abuses.[257] These include the need for orders to be sufficiently specific and proportionate and for requests to contain a proper justification of why the requested disclosure is necessary and related to a plausible damages claim. These checks and balances are subjected to the strict control of the national courts, who accordingly assume a central role in the determination of how disclosure should be used (and are to guarantee it is effectively, but not abusively, used).

- On balance, the Court holds that the defendant should be required to aggregate and classify data (which is proportionate, necessary and relevant, as determined by the national court) in order to ensure the practical effectiveness of the disclosure exercise and avoid situations of data dumping (voluminous information, perhaps from different sources, provided without any prior processing).[258]

Balance is central to EU disclosure under the Directive. Indeed, it is interesting to note that a similar concern to avoid a party disclosing large volumes of fundamentally irrelevant data,

[253] See, ibid paras 32, 45-6, 59; recitals 15, 47 Damages Directive.
[254] ibid paras 46-7. Accordingly, a defendant is also permitted to request disclosure of information; for instance, related to pass-on – information which is typically in the hands of the claimant and not the defendant.
[255] ibid paras 55-6, 62. Interestingly, the Commission and the Spanish Government defended furthermore that not only the effet utile of art 101 TFEU required the availability of disclosure mechanism but also the effective judicial protection of parties' rights pursuant to art 19 TEU and art 47 CFREU (invoked explicitly in rec 4 to the Directive); see, opinion AG Szpunar *Paccar* EU:C:2022:286, paras 86-7.
[256] Paras 46, 48-9.
[257] Paras 51-2, 64.
[258] Para 61. This should be distinguished from requiring a defendant to process and/or analyse data in order to determine the existence of effects or quantify harm (ie coming up with an expert report), thereby discharging the burden of proof incumbent on the claimant; which, of course, does not form part of the scope of a disclosure under the Directive (as confirmed in para 66 of the judgment).

the review of which may be time consuming, costly and largely pointless, is framed under English law by way of rules and duties for parties to avoid disclosing irrelevant materials.[259] The CJEU, however, adopts a more purposive approach, requiring the defendant to carry out a prior filtering exercise to ensure that the information disclosed is useful and can be made sense of by the other party. Central too is the role of the national judge in determining that balance, in accordance with the principles set out in Article 5 of the Directive. Indeed, the judge is charged under the Directive with applying open and undetermined concepts (pursuant to Articles 5 and 6) to the specific facts of each case and exercises, as such, a broad discretion not so typical of traditional Spanish procedural mechanisms.[260] The judge required by the EU disclosure mechanism is an 'active judge'[261] who will need to 'come out of his or her comfort zone'[262].

The second case is *RegioJet*.[263] This concerned the relationship between parallel public and private enforcement actions concerning the same infringement and, in particular, the question of access to evidence and disclosure in the two parallel settings. The referral was made by the Supreme Court of the Czech Republic in relation to a damages claim brought by RegioJet (a provider of competitive rail transport services on certain Czech rail routes) arising out of alleged abusive behaviour on the part of the incumbent Czech public rail transport operator, Ceské dráhy. That allegedly anticompetitive conduct was, at the same time, subject to administrative investigation: initially by the Czech national competition authority (ÚOHS), but then by the European Commission which commenced its own investigation into alleged predatory pricing behaviour by the Czech State operator in connection with the same underlying facts (giving rise to the suspension of the ÚOHS investigation in accordance with the provisions of Article 11(6) of Regulation 1/2003). The questions before the CJEU related to a disclosure order, originally made by the Prague court of first instance that was hearing RegioJet's damages claim but subsequently appealed up to the Czech Supreme Court. That order required Ceské dráhy to disclose evidence of relevance for RegioJet to make out its damages claim. The question of interest for us here is the first question posed by the Czech Supreme Court. Pursuant to that question, the court asked whether the fact that a public enforcement investigation was pending at the time of the disclosure order (and, indeed, the Prague court had decided, subsequently, to stay the civil proceedings in light of that pending investigation) prevented disclosure going ahead pursuant to the rules of the Directive. The CJEU held that it did not, and that disclosure could proceed in parallel. Its reasoning is, again, insightful and illustrates the way in which disclosure is conceived as an EU procedural tool within an overall scheme for the effective application of EU competition law:

- The judgment highlights the points on effectiveness and information asymmetry already identified in *Paccar*.[264]
- It also underlines the fact that the burden of proof of the existence of an infringement of competition law lies, pursuant to Article 2 of Regulation 1/2003,

[259] See Part II, Ch 11, and Xènia Fuguet Carles, 'La disclosure: aspectos a aprender en España de la experiencia inglesa', InDret, 1.2023, 339, by reference to parties' disclosure duties pursuant to new 57AD CPR.
[260] Broad discretion does not mean of course uncontrolled discretion and the judges are required to justify and motivate adequately the use of that discretion to ensure the proper control.
[261] Moreno Catena, n 229,269.
[262] Gascón Inchausti, 'Aspectos Procesales', n 308 (Part I), 152.
[263] Case C-57/21 *RegioJet as v Ceské dráhy as* EU:C:2023:6, consulted in its French version.
[264] ibid paras 41-2, 48, 54.

with the party or authority alleging the infringement; a matter which, in the absence of a prior binding finding of infringement by a competition authority, the civil court was called to determine in the civil case (even if it be simply as an incidental question to the main claim for damages, the existence of an infringement being a prerequisite for the latter).[265] By implication, this underscores the need for disclosure to be made available to private parties (as well as for competition authorities to have powers to obtain evidence as part of their investigations).

- The court goes on to explore the relationship between public and private enforcement of competition law and the respective powers to obtain access to evidence in each ambit. The judgment underlines the complementary roles of the two spheres of enforcement and confirms the rule that both proceedings (the Commission investigation and the civil damages action) should proceed in parallel and a coherent approach be adopted to access to evidence in the two.[266] This parallel competence is subject only to the court's discretion to stay pending the outcome of the Commission's investigation in order to avoid contradictory rulings, in accordance with Article 16(1) of Regulation 1/2003, but the ordering of disclosure would not constitute in itself the adoption of a contradictory ruling which could accordingly proceed.[267] Furthermore, the judgment notes that Article 6 of the Damages Directive addresses the balance which needs to be achieved between the interest of competition authorities, on the one hand, and private litigants, on the other, in obtaining access to relevant information and evidence - doing so by prohibiting access to certain materials contained in the administrative file (such as leniency materials) and limiting access to other materials in certain periods (in particular, access to some materials is limited during the period of the public investigation before the authority adopts a decision).[268]

- Finally, the judgment reiterates the need for court control of disclosure in accordance with the principles set out in Articles 5 and 6 (relevance, precision, proportionality, etv), noting that the fact that the proceedings were stayed and the Commission investigation ongoing may be relevant factors in determining the application of those criteria.[269]

The third and final case is *Tráficos Manuel Ferrer*.[270] This concerned another referral from Spain on the Trucks litigation, this time from Commercial Court nº 3 of Valencia. The referral concerns a number of issues related to the exercise by the court of its power to estimate harm pursuant to Article 17(1) of the Directive. It is of particular interest in setting out the relevance of disclosure to this question and to private enforcement proceedings, more generally. In my view, it confirms the central role of disclosure to the regime designed by the EU regulator and the need for national courts and systems to take proper note of its implications for their national procedure. We will focus here on what the judgment has to say directly about the role of disclosure under the Directive. We will consider what the

[265] ibid paras 50-1.
[266] See, ibid paras 49, 52, 64-6. The full competence of the court to apply arts 101 and 102 TFEU is a consequence of their direct effect; confirmed by recital 7, arts 1, 6 Regulation 1/2003; recital 6 is cited by the Court as the specific basis for requiring a coherent approach to access to evidence.
[267] ibid paras 62 and paras 69-70, respectively.
[268] ibid paras 66-9.
[269]ibid paras 72-7.
[270] Case C-312/21, *Tráficos Manuel Ferrer*, EU:C:2023:99.

judgment also has to say about the more procedural implications for Spanish civil proceedings in the next section. Both aspects offer key contributions to our debate and confirm some of the propositions already voiced in earlier sections of this research on the basis of underlying considerations of EU law, generally, and the Directive, specifically.[271]

The judgment in *Tráficos Manuel Ferrer* observes that the disclosure rules in the Directive form part of a package of measures contained in the Directive which are aimed at correcting the asymmetry of information that exists as between the claimant and a defendant in a competition damages claim, and thereby achieve procedural equality between the parties. These measures, identified in paragraph 44 of the judgment, are: (a) disclosure (Articles 5 and 6); (b) judicial estimation (Article 17(1)); (c) the support of the national competition authority in quantifying harm (Article 17(3)); and (d) the presumption of harm in cartel cases (Article 17(2)). The CJEU emphasizes, furthermore, that disclosure is the central part of this package of measures and, indeed, of the overall regime created by the Directive. Its use by the claimant could be relevant in determining issues such as the award of costs or the exercise by the court of its faculty to estimate harm (and, possibly, as we will come on to below, the standard of proof). A number of paragraphs of the judgment merit quotation for their relevance to our subject (the first, 46, in connection with the award of costs and paragraphs 56 and 57 in connection with judicial estimation):

> 46. […] The evolution of that balance of power [between claimant and defendant] and, specifically, the question whether or not the claimant relied on the tools made available to it – in particular as regards the possibility of requesting that court to order the defendant or a third party to disclose relevant evidence which lies in their control, in accordance with the first subparagraph of Article 5(1) of Directive 2014/104 – depends on the conduct of each of those parties, assessed by the national court seised of that dispute at its absolute discretion
>
> [...]
>
> 56. In the second place, in order to remedy the finding of that asymmetry of information, the EU legislature therefore adopted a set of measures listed in paragraph 44 of the present judgment, which, it is important to emphasise, interact, since the need to undertake a judicial estimation of the harm may depend, in particular, on the result obtained by the claimant following a request for the disclosure of evidence pursuant to the first subparagraph of Article 5(1) of Directive 2014/104.
>
> 57. In the third place, **because of the key role of that provision within that directive, it is for the national court, before proceeding to estimate the harm, to determine whether the claimant has made use of it**. If the practical impossibility of assessing the harm is the result of inaction on the part of the claimant, it is not for the national court to take the place of the latter or to remedy its shortcomings.
>
> (My emphasis added)

Accordingly, the CJEU in this judgment has set disclosure centre stage in private actions (as, to my mind, was in fact already apparent from the procedural model set out in the Directive itself). Whether the CJEU goes as far as requiring claimants to make use of disclosure, at least as a pre-condition to establishing the practical impossibility of quantification of harm and hence to the ability of courts to estimate harm themselves under Article 17(1) of the Directive, immediately became a matter for intense debate, both among commentators and

[271] See, Part I.B, Ch 5.2.

in subsequent national judgments.[272] Some, notably the Appeal Courts of Madrid and Valencia, considered it one factor among many to take into consideration and one which is, by no means, decisive.[273] The Supreme Court subsequently confirmed that view, albeit perhaps in a more nuanced fashion.[274]

The referring court, Commercial Court nº 3 of Valencia, is more deferential in its attitude to the CJEU's ruling in *Tráficos Manuel Ferrer*, suggesting that the approach of the parties to disclosure should be considered before the national court can entertain the possibility of estimating the harm itself pursuant to Article 17(1) of the Directive, without it amounting to an absolute pre-condition.[275] Other factors may have a role to play, such as the principle of proportionality (in particular, the cost of disclosure - and of complex expert quantifications - as compared to the value of claims) or a series of practical difficulties which were identified by the Supreme Court in its June 2023 rulings.[276]

Despite this, it is clear, in my opinion, that EU disclosure has come to stay and that national systems need to address it. Indeed, we are only at the very beginning of appreciating its true consequences for national law in this area.

16.3. The impact of disclosure on Spanish procedure

a) Introduction

We come now to one of the central issues for our research. If, as the CJEU has confirmed, disclosure is a central part of the private enforcement regime created by the Directive (of application to proceedings commenced after 26 December 2016) and its essential characteristics are defined directly by EU law, this raises a key and urgent question: how does this EU procedural instrument fit into national procedure? This question is not resolved in the Directive, being left, in principle therefore, to the sphere of national procedural autonomy.

The answer in an English context was rather simple and involved merely introducing some of the controlling provisions contained in the Directive (such as, the proportionality and specificity principles) into the existing disclosure regime.[277] However, in the Spanish context, where such a regime did not exist and pre-existing rules on access to evidence were

[272] In terms of commentaries, see, for instance, the immediate and contrary reactions to the CJEU judgment of, first, Lena Hornkohl (who considers disclosure is a pre-requisite for judicial estimation), 'Of Adequate Cost Rules, Judicial Damages Estimation, and Fundamental Principles of Antitrust Damages Actions – Tráficos Manuel Ferrer, C-312/21', Kluwer Competition Law Blog, 17 February 2023; second, Francisco Marcos (who denies disclosure is a pre-requisite for judicial estimation), 'Tres claves para la estimación judicial del daño antitrust indeminzable tras la STJUE Tráficos Manuel Ferrer' Almacén de Derecho, 22 February 2023.

[273] SAP Valencia, 23 February 2023, ES:APV:2023:502; SAP Madrid 3 March 2023, ES:APM:2023:4338; SAP Madrid 9 March 2023, ES:APM:2023:5572. Both courts applied a judicial estimation of harm (at 5%), without considering the failure of the claimants to make use of disclosure to be relevant. See, similarly, SAP Pontevedra, 27 March 2023, ES:APPO:2023:482.

[274] STS 947/2023, 14 June 2023, n 2, LG 10, paras 18-9.

[275] *Tráficos Manuel Ferrer v Daimler*, SJM3 Valencia, 10 March 2023, in particular paras 48-9.

[276] STS 947/2023, 14 June 2023, LG 10, paras 18-20.

[277] As we have seen in Part II, the English system was, in fact, already embarked on a similar track to control the excesses of broad disclosure and make it more proportionate, pursuant to the goals of the 'overriding objective' of the new 1998 procedural rules.

considered insufficient,[278] the story is very different. As observed at the time of the adoption of the Directive:

> While many of the concepts in the Directive are very familiar or already well dealt with in Spain, the Directive offers a welcome opportunity to create some greater transparency and effectiveness in Spanish procedures with the particular beacon of the new disclosure provisions. […]
>
> The Directive provides for the possible disclosure of evidence from defendants and third parties. This is a significant novelty.[279]

Some years later, Professor Moreno Catena underlined too the novelty of the new EU disclosure regime which was incorporated into the Spanish system via Article 283 bis a) et seq LEC:

> These precepts incorporate a procedural regulation that is certainly novel in its approach and of great relevance in its consequences [...].
>
> surely what deserves to be emphasised with greater emphasis is their impact on the balance between the parties in the process [...].
>
> These measures of access/exhibition of sources of evidence have been incorporated into the LEC, causing a real turning point in a matter as important as the due preparation of the process by the future plaintiff, and also providing, with the access to sources of evidence held both by the opposing party and by a third party, instruments that attempt to guarantee the effective *equality of the parties*, improving the guarantee of the *adversarial principle* and imposing certain conditions in the interests of greater *procedural loyalty*.[280]

It is worth highlighting very briefly, before we move on, that the constitutional principles of procedural and evidentiary equality (which form part of the right to a fair trial under Article 24 of the Constitution), and the duty of parties to cooperate with the courts (Article 118 CE), already required that sources of information in the hands of one party may have to be produced by that party to the court in order to enable the truth of certain propositions advanced by that party in the proceedings to be verified:

> [W]hen the sources of evidence are in the possession of one of the parties to the litigation, the constitutional obligation to collaborate with the Courts in the course of the proceedings (art. 118 EC) means that it is that party who must provide the required data, so that the judicial body can discover the truth.[281]

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[278] See, Martorell Zulueta, 'Aspectos Procesales', n 229, 79; Paul Hitchings, Miguel Angel Malo and Luis Loras, 'Considerations concerning the implementation of the EU competition law damages directive in Spain', Concurrences 2-2015, 25.

[279] Hitchings, Malo and Loras, ibid, 25, paras 1-2. The article goes on to make some recommendations on how disclosure could be incorporated procedurally into the Spanish process; see p 26, para 5.

[280] Moreno Catena, n 229, pp 251, 253-4 (my translation). The emphasis is the author's, but I share the opinion that those highlighted principles are of central importance for our topic.

[281] STS 460/2017, 18 July 2017, ES:TS:2017:2815, concerning a man's unjustified refusal to have a DNA test carried out which would have permitted the adjudicating court to verify if he was the father of a certain child. That case applies a judgment of the Constitutional Court, which established the obligation of a party to disclose sources of information in its possession in order for evidence produced in the proceedings to be granted the weight that party sought to give it; in that case, this referred to the underlying data of a report emitted by a public authority (the Social Security authority) which had been produced in the proceedings as evidence supporting the authority's defence that the claimant, a particular citizen, had not paid certain social security dues (STC 227/1991, 28 November 1991). The translation is mine. I am grateful to Purificación Martorell Vilueta for bringing this case to

Accordingly, in truth, the EU competition law disclosure rules (and Article 283 bis a) et seq) develop an underlying right (and a concomitant duty) of Spanish constitutional law and are, by no means, anathema to the system, albeit they no doubt broaden and positivize that right; for instance, by incorporating the concept of 'categories of information', more familiar to common law systems.

This being said, at the time of writing, over six years on from the date of the Spanish implementing legislation, there have been limited (albeit notable) attempts by the Spanish courts to take seriously the procedural implications of the new disclosure regime in competition damages cases. Some have blamed this, in part at least, on an inadequate transposition of the Directive into national law; including, notably, the Appeal Court of Valencia, which observes that Article 283 bis 'merely copies its contents without further reflection or adaptation to other existing disclosure instruments in our legal system'.[282]

However, while any legislation is capable of being improved and there are certainly elements of the rules which are in hindsight inadequate or incomplete,[283] I would suggest that this criticism is not entirely fair. Not only is the task of adapting the disclosure mechanism to national procedure a complex one, which requires time which the legislator lacked, but also the implications of disclosure, in my opinion, require a rather close understanding of the practical implications of the mechanism for private enforcement proceedings and this requires judicial experience (and, again, time). What is more, disclosure necessarily involves the exercise of case-specific judicial discretion and is not appropriate for detailed prior regulation. For these reasons, we were in favour of the decision finally taken to limit the new mechanism to competition damages cases and not to extend it to all civil proceedings (even if a more general approach would, no doubt, have been more coherent from the perspective of fundamental procedural rights).[284] Indeed, I believe there is a lot that can be done with the rules as adopted pursuant to the 2017 implementing regulation. This is one of the central propositions of this study.

b) Key aspects of the new Spanish disclosure regime

We should start our analysis of the Spanish implementing rules by addressing what procedural issues *were* determined by them. Beyond the implementation into Spanish law of the provisions of Articles 5 and 6 of the Directive, which we need not repeat here for readers already well versed in those provisions, there are two aspects of the Spanish regime which I would single out for mention. The first is the decision to allow disclosure to be requested either *before or during* the course of proceedings. Specifically, Article 283 bis e) 1 establishes that:

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our attention in her article of 2019, 'Aspectos Procesales', n 229. We will return to this interesting case when we come on to the question of the production of underlying data relied on in expert reports.

[282] SAP Valencia, 17 November 2020, ES:APV:2020:4230, LG 4.2.1 (my translation). Professor Moreno Catena is more explicit in his criticism of the Spanish implementing legislation, considering that the Spanish legislator failed to carry out a proper and considered reflection of how to adapt the new disclosure mechanism to Spanish civil procedure in its process of transposition of the Directive, n 229, 254. The author attributes this failure to the pressure on the Spanish legislature to implement the Directive in time - it will be recalled that Spain was nearly 6 months late in implementing the Directive.

[283] One of the central criticisms is that the new system was introduced without derogating the pre-existing system, thus creating, in the area of competition law, a potentially confusing set of rules. This is certainly some truth in this point, although, as noted earlier, courts have worked to give the whole system coherence.

[284] Hitchings, Malo and Loras, n 278.

> Measures of access to sources of evidence may be requested before the proceedings are instituted, in the statement of claim or during the pendency of the proceedings.
>
> (My translation)

The second is that the proposal and admission of evidence obtained through disclosure is subjected to the normal rules on *time-limits and preclusion* applicable under the Spanish Civil Procedural Law, as confirmed in the recitals to the implementing regulation:

> [A]ccess to sources of evidence does not relieve the litigant of the burden of timely and properly proposing relevant evidence [for admission].
>
> (My translation)

We will now consider the implications of these two aspects of the Spanish regime further in this section (and the implications of the CJEU's ruling in *Tráficos Manuel Ferrer* in the next section) at some length. In addition, we will first consider briefly the nature and role of the disclosure hearing regulated in Article 283 bis f), which, in my scheme of things, offers an important further instrument for the case management of competition claims.

The disclosure hearing

Article 283 bis f) provides that upon receipt of a disclosure request, the court will summon the parties (including a third party if it is a third-party disclosure request) to a hearing, in principle within 10 days. In terms of the procedure to be followed at that hearing, subsection 3 of that article provides simply:

> At the hearing, the interested parties may present their case, making use of any evidence at their disposal, which will be admitted and used if it is useful and pertinent.
>
> (My translation)

Accordingly, the hearing foresees the possibility for the parties to make oral submissions and call evidence, according to the general rules for the production and admission of evidence. By default, the hearing is subject to the general rules on public hearings in the Civil Procedural Law and, in particular, Article 185.[285] That rule provides for the parties to make concluding remarks once evidence, admitted by the court, has been heard. In practice, therefore, the hearing should entail: (i) oral submissions by the parties (of greater substance in the case of the party against whom the request for disclosure is directed, since this is the first opportunity that party has to make submissions on the request, there not being a prior written response); (ii) proposal of evidence and decision of the court as to its admission (with possible oral appeals during the hearing); (iii) hearing of evidence; and (iv) oral concluding submissions by each party.

Parties have been known to call expert witnesses to these hearings - for instance, in order to explain further the reasons why data requested is necessary and proportionate. Subject to ensuring the opposing party sufficient time to defend itself (which should possibly involve requiring the parties to announce such evidence, and to submit any relevant document or report in advance of the hearing, as occurs with expert evidence in normal hearings), this strikes me as a sensible course to follow. What is more, one can envisage the disclosure hearing, with the support of parties and where appropriate their experts, becoming an opportunity for the court to engage at an early stage with the scope of economic evidence

[285] See Martorell Zulueta, 'Aspectos Procesales', n 229, 110.

and thereby enable some proactive case management of this central aspect of these types of proceedings. We return to this point in Chapter 17 below on expert evidence.

Pre-action disclosure vs. disclosure during the course of proceedings

The availability of disclosure in the pre-action phase (before a writ of claim is filed) has been referred to by some Spanish commentators as the standard or default procedural solution for disclosure in private enforcement cases under Spanish law.[286] That is, disclosure is perceived as a means for preparing a claim, which is then subject to the normal strict requirements established by Spanish procedural law for the written statement of case and the production of evidence to be produced with the writ of claim at the beginning of the case (Article 265 LEC). In this way, disclosure offers the claimant a means to access a broader base of evidence not initially available to it (such as, for example, transaction data or evidence of the infringement, lying in the hands of the defendant) before it files a claim for damages, thereby allowing the claimant to set out its full claim and evidence at the beginning of the case in compliance with the requirements set out in article 265 LEC.

It is averred that this conception of the EU disclosure mechanism is perhaps reflective of a more traditional Spanish procedural mindset,[287] but that it is an overly restrictive interpretation of the conception contained in the Damages Directive, and, for that matter, in the Spanish implementing legislation. Certainly, the Directive does not exclude the possibility of pre-action disclosure. This was expressly confirmed by Advocate General Szpunar in *Paccar* by reference in particular to Recitals 22 and 27 of the Directive which foresee the possibility of parties accessing evidence on the file in relation to 'intended actions for damages' or 'that they need in order to prepare their action for damages'.[288] However, it is my opinion that in fact the EU legislator sought to put the emphasis on disclosure to be performed during the course of proceedings, or at least to allow a degree of flexibility and possibilities to parties in this regard. This is based on the following arguments:

- The wording of Article 5(1) ('in proceedings relating to an action for damages') clearly contemplates disclosure occurring during the course of proceedings, albeit, following *Paccar*, the term does not exclude pre-action disclosure where the request is related to an action for damages which will be filed subsequently before a court.
- As observed by the CJEU in *RegioJet*, Regulation 1/2003 and Article 6 contemplate civil claims for damages proceeding simultaneously with public enforcement proceedings, including the possibility to order the disclosure in the civil proceedings of documents on the administrative file. Again, it is not clear that this would prevent such disclosure occurring pre-action, indeed it would not, but one can perhaps perceive again the mindset of the CJEU in this judgment.

[286] See, in particular, Moreno Catena, n 229, 257-9, 264-5.
[287] It will be recalled that, aside limited document disclosure provisions in the LEC (arts 328-330), the main ground for access to evidence in the Law is pursuant to art 256 LEC ('preliminary diligences') which was the key mechanism though which the disclosure rules under Directive 2004/48 were implemented into Spanish law (Law 19/2006 of 5 June). That mechanism is a mechanism of pre-action disclosure.
[288] Opinion AG Szpunar, *Paccar*, n 255, paras 32-43. The two recitals in question relate to art 6(4)(b) of the Directive which, itself, is not determinative of the relevant moment (using the term 'in relation to an action for damages before a national court'). For its part, the Court ignored this question and responded to the request for interpretation of art 5 remitted by the Barcelona referring court in connection with a pre-action request for disclosure, implicitly accepting that the requirement under art 5(1) that the request be 'in proceedings related to an action for damages' was fulfilled.

- Finally, and most clearly, Recital 14 of the Directive, which sets out the underlying justification for the disclosure provisions, and to which we have already referred earlier, warns that: 'strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU'.[289]

Indeed, Spanish law has introduced the disclosure provisions under the Directive into the section on general provisions for evidence in the Civil Procedural Law and not in the provisions for pre-action disclosure, reinforcing the stated aim in Article 283 bis e) to allow disclosure before the claim is filed, with the claim or during the course of proceedings. This interpretation has, furthermore, received support in the *Tráficos Manuel Ferrer* judgment, which in its paragraph 58 contemplates an iterative approach to disclosure and production of evidence, borne out of the specificities of this type of litigation, a subject to which we will return shortly.

Furthermore, pre-action disclosure poses a number of difficulties and disadvantages, which, to my mind, advocate for prioritising the use of disclosure during the course of proceedings, rather than before a claim is filed. First, while there is certainly discrepancy among commentators on this matter,[290] it seems that the pre-action disclosure provisions were not intended for use by a potential defendant in a future damages actions. That is, the ability for defendants to access information in the hands of the claimant, which is expressly recognized in Recital 15 and Article 13 of the Directive (the latter by reference to the pass-on defence), would not seem to be available to the defendant before an action is brought. The key reason for this is that the condition for pre-action disclosure - to the effect that the party requesting access must file a writ of claim within 20 days of the disclosure exercise finishing - does not, on the face of it, apply easily to a defendant.[291]

The second reason is the timing problem we have already referred to; namely, the difficulty for a claimant to put together a claim and expert report within twenty days of the disclosure exercise finishing. It may be that the effective period is materially longer than twenty days, given that the commencement of that period requires first a request by a party and an order from the court. In addition, the claimant may be able to argue that it could not produce the expert report prior to filing and, thereby, avail itself of the exception under Article 337(1) LEC (which allows for later filing where it is not in fact possible to file the expert report with the claim).[292] However, the experience on the Trucks case suggests, as we have seen, that these practical matters did influence in the decision of the claimants to forego using data accessed in the pre-action disclosure process and file claims instead with an expert quantification based on publicly-available data.[293] The Supreme Court's observations in its June 2023

[289] See Ch 5.2 above (Part I).
[290] For a contrary position, see Martorell Zulueta, n 229, 82, and Caballol Angelats, n 229, 130: 'Despite the literal wording of the provision, its wording does not prevent the potential defendant from also making use of this option before the claim has been filed' (my translation).
[291] Unless it were for a negative declaratory action based on the alleged full pass-on of any potential harm. The requirement that the applicant file a writ within 20 days of disclosure being completed is contained in art 283bis(e)2 and is the reason generally invoked for considering that a potential defendant does not have standing to make a pre-action disclosure request; eg, González Granda, n 229, s 3 B) b).
[292] Recognising that the 20-day period is short given the complexity of analysing data and quantifying harm, Martorell refers expressly to the possibility of invoking the exception under art 337 LEC, n 229, 102.
[293] See Ch 16.1 above.

judgments as to the difficulties of pre-action disclosure would seem to add further inertia to this position.[294]

The third reason is connected to the principle of equality of arms, which the disclosure rules seek to ensure by addressing the asymmetry of information typical of these types of case.[295] It seems to me that, as a general proposition, it is intuitively more favourable to ensuring the equality of arms that the consideration of disclosure requests take place before the court in the context of proceedings which have already been started, thereby allowing the court to be better placed to understand the context of the requests and, therefore, their relevance, usefulness and proportionality to the claim filed or the defence being run. In this sense, I also consider it is rather a fallacy to suggest that, should a defendant wish to request the disclosure of evidence to prove the pass-on defence, the deadline for filing a defence should necessarily be stayed.[296] While clearly there could be exceptions, normally - if a defendant has a plausible pass-on defence - it should be able to make out the key grounds of that defence on the basis of available facts about the claimant's industry and of economic theory since, otherwise, it would not be able to justify a disclosure request in the first place. Save for exceptional circumstances (for example, pricing policy documents or contracts which reveal a clear pass-on of relevant costs, which can anyway be invoked in oral argument and form part of the evidence that the court will consider in its ruling), it will then normally be necessary for the defendant to provide the disclosed materials (factual evidence and data) to its expert in order for the expert to analyse the pass-on effects and that report can be produced at a later stage of proceedings. Accordingly, the time for disclosure would sit most comfortably after pleadings, when the essential arguments in the case have been defined in the written statements of case. While this position is not defended directly by Professor Moreno Catena in his analysis of the disclosure rules (indeed, he seems to consider pre-action disclosure of being of greater use and posing less procedural challenges than disclosure during the course of proceedings), nevertheless, he recognizes explicitly the benefit of judges having a proper understanding of the full case in order to exercise his or her discretion in ordering disclosure:

> This undoubtedly calls for an active judge, *knowledgeable of the situation at stake, capable of assessing with his own criteria the scope of what he is being asked to do, in a highly complex matter such as the damages derived from anti-competitive actions*, as well as the interests that transcend the mere claim and also the extent and limits of the precautionary and guarantee orders that he can make.[297]
>
> (My translation and emphasis)

This to my mind, and for the reasons already given, points to a preference for disclosure during rather than before the main proceedings. As already noted, it also permits converting the disclosure hearing into a meaningful part of the court's management of cases, which I consider to be of special interest and relevance.

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[294] STS 947/2023, 14 June 2023, n 2, LG 10, para 20.

[295] Moreno Catena emphasises this underlying motivation of the new disclosure provisions, n 229, 253-4. See also the lengthy statements by the CJEU in *Tráficos Manuel Ferrer*, n 272, in particular paras 43-4, 55.

[296] This proposal was made by the Spanish Competition Association (AEDC) and was picked up by a number of commentators; including: Gascón Inchausti, 'El acceso a las fuentes de prueba', n 229, para 30; González Granda, n 229, 12; Caballol Angelats, n 229, 133.

[297] Moreno Catena, n 229, 269.

This is also the view of the courts in the UK.[298] While pre-action disclosure is technically available in English proceedings, as noted in Part II, its use in competition claims (and other types of complex commercial litigation) is scarce, and the usual time for disclosure is after close of written pleadings.[299] The reasons for this are varied and relate, for instance, to the time involved in such a process (delaying as a consequence the main proceedings, maybe excessively) and the costs of the disclosure exercise, which the applicant will have to cover (as opposed to their treatment as costs in the case if disclosure occurs during the main proceedings).[300] These are, by the way, points which were not considered by the CJEU in *Paccar*, the Court largely ignoring the specificities of the request (namely, the fact that it had been filed pre-action) or the real cost implications of searching for the sort of information which was the subject of the request.[301] The reasons for preferring disclosure during the proceedings also include the point we have raised earlier: namely, the need for the judge to be in a position to understand well the facts in issue in the case, something which will not become clear until after pleadings.[302]

This is not to say that pre-action disclosure may not have a place in certain limited circumstances in Spanish litigation. This may occur, for example, where a claimant needs access to specific evidence, for instance on an administrative file, in order to be able to plead out its case. However, for the reasons given, this is likely to be the exception rather than the rule and not what, I believe, the Directive foresees as the default option.

Impact of rules on procedural estoppel ('preclusión')

Let us turn then to the specific and, to my mind, generally preferable scenario for disclosure in competition damages cases; that is, during the proceedings and, more specifically, once the written pleadings have been produced by both parties. It is here that we meet with the second aspect of the Spanish rules which I have highlighted earlier: the application of the strict time-limits and rules of preclusion under the Civil Procedural Law to evidence which, following disclosure, the parties wish to have admitted to the proceedings.

Spanish law distinguishes between sources of proof ('fuentes de prueba') and means of proof ('medios de prueba').[303] The latter refers to proof which is admitted by the court into proceedings and, as such, can form an element upon which the court relies to adopt its decision; what we would refer to as evidence in English law. Admission as evidence occurs in Spanish proceedings at the preliminary hearing. Sources of proof refer to the material sources existing outside of the proceeding which can be accessed by the parties through a process of investigation - for example, identifying a person who has knowledge of particular

[298] Indeed, while appreciating the interesting ideas she advances on the topic, I consider that Fuguet Carles, 'La disclosure: aspectos a aprender en España de la experiencia inglesa', n 259, grants excessive importance to pre-action disclosure and protocols, at least in a competition law setting, since pre-action disclosure is not materially relevant to competition damages actions in the UK.
[299] Brealey, n 2 (Part II), 251, 9.04.
[300] These are points identified by Charles Hollander in his review of the status of disclosure twenty years after the Woolf reforms: 'Disclosure. Should We Have Stayed with the RSC?' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020) 155, 158-9.
[301] As to the latter, it is, in my opinion, revealing that the CJEU seems to underestimate the cost involved in providing disclosure of pre-existing materials when it refers to the 'mere transmission of physical media' (para 53). It is possible that the Court is unfamiliar with the costs of searching for relevant information. As to the former, nowhere in the judgment is reference made to the implications for the order of the request being made pre-action.
[302] Brealey, n 2 (Part II), 9.06 by reference to the leading case *Black v Sumitomo Corporation* [2001] EWCA Civ 1819.
[303] Juan Montero Aroca, *La Prueba en el Proceso Civil* (7th edn, Thomson Reuters 2012), 146-8.

facts - and need to be produced into proceedings to become means of proof (or evidence) in accordance with the applicable rules of evidence - for example, by calling that person to appear before the court to provide witness evidence. The Spanish disclosure rules under Article 283 bis are referred to as rules on 'Access to Sources of Proof' and regulate the possibility to identify relevant sources of proof (such as, specific documents or data or, as required by Article 5(2) of the Directive, 'categories' of proof) which are in the possession of the counterparty or a third party, with the assistance of the court. Such sources, once identified and accessed, may then be proposed as evidence at the appropriate time in the legal proceedings. This latter step of proposing the proof as evidence in proceedings is subject to the normal rules and time-limits on submission, proposal and admission of evidence.

Let us recall briefly what those rules are:

LEC provision	Procedural rule
Submission, proposal and admission of evidence	
Article 265	Documents which the parties rely on to found their cause of action or defence are to be submitted with the statement of claim and defence, or the relevant archives where information is contained are to be designated if this is not possible
Article 269	Failure to submit a document at the right time gives rise to their inadmission (*documentary preclusion*)
Article 270	An exception to the documentary preclusion rule is granted for new evidence, or evidence which comes to the notice of party at a later date through no fault of its own, or evidence contained in designated archives
Article 271	In no event may documents be admitted after trial, subject to the specific provisions for so-called "final diligences" pursuant to Article 435 (*final documentary preclusion*)
Article 272	If a document is submitted after the established procedural deadlines, the court will not admit it to proceedings.
Article 286.3	New evidence may exceptionally be proposed at any time during proceedings before the deadline for emitting judgment has commenced (following trial) where this is justified by new facts, or facts of new knowledge, which have been admitted by the court
Article 426.5	In ordinary proceedings, the parties may submit documents or expert reports at the preliminary hearing which are justified by complementary allegations, clarifications or new facts (or facts of new knowledge) which have been admitted at the preliminary hearing
Article 435	In ordinary proceedings, in exceptional circumstances (new facts, facts of new knowledge, failure to hear admitted evidence at trial through no fault of the relevant party, or rehearing of inconclusive evidence in certain exceptional situations), new evidence may be proposed, admitted and heard after trial and prior to judgment
Expert reports	
Article 336.3	A claimant must submit any expert report on which it seeks to rely with the statement of claim, unless it can justify that it could not wait to file the claim before obtaining the expert report
Article 336.4	A defendant must submit any expert report on which it seeks to rely with the statement of defence, unless it can justify the impossibility to obtain the report in the deadline for submitting its defence
Article 337	Expert reports which, for reasons justified pursuant to Article 336, were not submitted with the statement of claim or defence, must be filed at least 5 days before the preliminary hearing (or within thirty days in the case of an abbreviated proceeding, 'juicio verbal')
Article 338	Expert reports which become necessary as a result of allegations raised in the defence (or of complementary allegations raised during the preliminary hearing), may exceptionally be submitted at least 5 days before trial (or the hearing, in an

	abbreviated proceeding)
Article 426.5	In ordinary proceedings, the parties may submit new expert reports at the preliminary hearing which are justified by complementary allegations, clarifications or new facts (or facts of new knowledge) which have been admitted at the preliminary hearing
Article 427.3	In ordinary proceedings, expert reports which become necessary as a result of complementary allegations or clarifications admitted at the preliminary hearing can be submitted at least 5 days before trial, in accordance with Article 338
Pleadings	
Article 286	New facts, or facts of new knowledge, may exceptionally be alleged at any time during proceedings before the deadline for emitting judgment has begun (following trial)
Article 400	Parties may make no further pleadings (written or oral) after the submission of the statements of claim and defence, respectively, save for the case of new facts (or facts of new knowledge) or complementary allegations admitted at the preliminary (*pleadings preclusion*)
Article 412	The parties are precluded from amending the object of the proceedings, as set out in their statements of claim and defence, save in the case of complementary allegations admitted at the preliminary hearing (*amendment preclusion*)
Article 426	In ordinary proceedings, parties may, at the preliminary hearing, make complementary allegations, or make clarifications of their pleadings, without materially altering their positions, provided these do not affect the rights of defence of the counter-party and provided they are admitted by the court
Article 436.1	Parties may submit written allegations concerning the results of the final diligences performed under Article 435

In the context of disclosure in competition damages actions, these rules need, however, to be interpreted in light of the spirit and objectives of the Damages Directive. In this regard, we have already noted that Recital 14, which sets out the underlying rationale for the new EU disclosure rules, envisages that strict rules on pleadings and submission of evidence at the commencement of an action may unduly impede the effective exercise of the right to damages for breach of EU competition law. This would suggest that, to the extent possible, Article 265 and the preclusionary rules under Articles 269, 271, 400 and 412, should be interpreted restrictively, and the exceptions under Articles 270, 336, 337, 338, 426, 427, etc. LEC more expansively, in order not to impede the ability of the parties either to produce evidence further to disclosure or to develop their case, whether by virtue of oral arguments based on that evidence or by the production of expert evidence based on that same evidence. At the same time, the interpretation of national procedural rules cannot be realized in such a way as to contravene those very rules (contra legem interpretation) and the Spanish civil procedure introduced in 2000 created rather a rigid system the objective and benefit of which was to create the simple, predictable and relatively quick Spanish civil process we know today. There is clearly, therefore, a delicate tension to be managed. The Damages Directive does not imply a material change to the nature of the main, one-off, written pleadings to be filed at the commencement of Spanish proceedings nor ignoring the strict rules on preclusion. This would clearly be contrary to the essence of Spanish procedure and the principle of procedural autonomy. However, the story does not end here. For that, we must consider the implications of *Tráficos Manuel Ferrer*, and particularly paragraph 58 of the CJEU's judgment.

c) Paragraph 58 of *Tráficos Manuel Ferrer*

The CJEU's statement at paragraph 58 of the *Tráficos Manuel Ferrer* judgment reads as follows:

> In the present case, the situation is different, given that the defendant, on its own initiative, after having been authorised to do so by the referring court, made available to the claimant the data on which it relied in order to refute the latter's expert report. In that regard, it should be noted, first, that such a disclosure is such as to support the exchange of arguments both on the actual existence of harm and on its amount and, therefore, that it benefits both the parties, which may refine, amend or supplement their arguments, and the national court, which has in its possession, by means of that expert report and a second opinion informed by the making available of the data on which it is based, evidence enabling, first, to establish that harm has actually been suffered by the claimant and, next, to determine its extent, which is such as to avoid it the need to have recourse to a judicial estimation of that harm. Second, making those data available, far from rendering the request for disclosure of evidence provided for in the first subparagraph of Article 5(1) of Directive 2014/104 irrelevant, may, on the contrary, guide the claimant and provide it with information concerning documents or data which it considers essential to obtain.[304]

There are four aspects which we can identify in the Court's reasoning:

(i) the offering of access by one party to information underlying the economic model used by that party's expert to quantify harm makes a positive contribution to the assessment of the existence and quantum of harm in damages proceedings;

(ii) such additional information transparency, on the one hand, permits the accessing party to fine tune, modify or complete their pleadings;

(iii) such additional information also grants the court with additional elements upon which to determine the existence and extent of harm; and

(iv) finally, such additional information allows the accessing party to focus further requests for disclosure of evidence.

These statements envisage a procedure which is somewhat iterative and certainly not rigid. As such, they raise some important questions under Spanish procedural law, which it is suggested may not have been considered, let alone adequately addressed, by the CJEU in the referral proceedings. These relate to the strict rules concerning the submission of evidence, the amendment of pleadings and relevant time-limits. Certainly, there is no reference to these provisions of Spanish law in the judgment or in the opinion of the Advocate General.[305] Nor is there any reference to the case-law related to these issues, which had in fact arisen on a number of occasions prior to the referral; notably, at the Appeal Court of Valencia. To broach these questions fully and focus more precisely what the relevant issues are, therefore, it is necessary to recall some of the background to the events surrounding the *Tráficos Manuel Ferrer* referral, which are entirely absent from the judgment.

The background to Tráficos Manuel Ferrer: the use of data rooms by commercial courts

Defendants in the Trucks litigation have found the Spanish courts generally to be sceptical about the manufacturers' party expert reports which found that the infringement had not in fact had an impact on the sales prices of trucks sold in Spain during the infringement period.

[304] *Tráficos Manuel Ferrer*, n 272.
[305] Nor for that matter in the observations of the Spanish Government or the Commission.

One of the reasons for that scepticism, albeit not the principal one,[306] has centred on the data used by the experts in those reports; namely, detailed transaction data (including costs and prices on individual truck sales) which was provided by the manufacturers to their experts to prepare their assessments. So, for example, the Appeal Court of Pontevedra in its reference judgment on the CETM claims (the first in Spain), shared the first instance judge's doubts about the reliability of the defendant's data used in its expert report and this was one of the reasons for rejecting that report:

> To this we add the criticism rightly made in the judgment of the court of first instance that the data used to construct the econometric model used in the report were produced unilaterally by the defendant itself, not obtained by contradiction, and therefore their veracity cannot be tested.[307]

In time, the manufacturers began to adopt the practice of offering access to the data underlying their reports to claimants. They did so in a novel and, if I may say so, creative fashion.[308] This involved proffering controlled access to the information via an electronic data room, invoking a mechanism employed by the European Commission in administrative proceedings to provide access to the investigated parties to confidential information (including, in particular, data and economic models employed by parties, third parties or the authority itself in the course of the Commission's investigations in order to assess or predict the effects of a given conduct or proposed merger).[309] In this way, the truck manufacturers sought to offer a greater degree of transparency to the data used in their expert report and allow the counterparty's expert the opportunity to verify the data and the calculations derived from them in the defendant expert's report. At the same time, this mechanism offered the benefit of limiting to the maximum the perceived risk that high volumes of sensitive economic data could be made more widely available by individual parties to whom access were granted once they had the information in their possession (i.e., the risk of leaks). The underlying objective of the defendants was to have the courts grant greater weight to the defendant expert reports by removing some of the scepticism about the data used to reach their results. In some (limited) places, this was a successful strategy; notably, for example, the judgment of the Commercial Court nº 1 of Oviedo of 12 April 2021:

> The plaintiff questions the veracity of the data, which, being internal, could have been manipulated. This line of defence must be firmly rejected, not so much (which is also the case) because it involves questioning accounting data which have been transferred to annual accounts subject to audit, but because the plaintiff could have had access to them and has refused to do so. The opinion of E. CA Economics describes the internal and external audit

[306] The principal objection raised by Spanish courts has been that the proposition that the infringement had not caused any rise in truck prices was incompatible with the nature of the infringement as described in the Commission's decision.

[307] *Luis País Barros v Renault Trucks SAS*, SAP Pontevedra 513/20, 6 October 2020, ES:APPO:2023:482, para 53 (the translation is mine). The view of the Supreme Court is less suspicious of the use by the defendants of their own data: see STS 947/2023, 14 June 2023 (Trucks), LG 10, para 25.

[308] The word 'creative' is not used pejoratively. The author was legal counsel for one of the defendants in these cases.

[309] Reference is made, inter alia, to Commission, 'Notice on Best Practices for the Conduct of Proceedings concerning Articles 101 and 102', [2011] OJ C 308/06, paras 97-8; the Economic Evidence Best Practices; and the draft Commission, 'Notice on the Protection of Confidential Information by National Courts in Private Enforcement Proceedings'. We will return to this matter further in Ch 17.5 below when we turn more specifically to the subject of expert evidence. The data room mechanism was first approved for use in Spanish antitrust private enforcement proceedings in an earlier decision by the same court; SJM3 Valencia, 4 June 2019, ES:JMV:2019:48A. This hearing was one of the first to be held in relation to the series of pre-action requests for disclosure of truck manufacturer price and cost data to which we have referred earlier.

> process to which the data supplied by DAIMLER have been subjected (paragraph A1.1.3, pp. 222 et seq.). There is not the slightest indication that the data have been manipulated ad hoc for these legal claims or were manipulated already since 1999 ad cautelam, in the hypothetical case that the cartel was discovered and a defensive strategy had to be devised in the future. The manipulation of these data is not credible; so many variants have been examined by the experts and it is so difficult to foresee how a possible falsification would affect an econometric study that we cannot even conceive that the data (which number in the hundreds of thousands) have been manipulated by the manufacturer (neither ex ante nor ex post), basically because a layman would not know how to alter the data to obtain the desired econometric result; nor is it possible to conceive that the alteration comes from the experts, who have taken an oath or promise in the terms required by the LEC [...]. *What cannot be admitted, as contrary to procedural good faith, is to sow doubt about the origin of the data or the cleaning process and then refuse access to the information that could eliminate or confirm it*.[310]
>
> (My emphasis added, my translation)

One of the first places where this 'transparency' mechanism was approved by the court was in Commercial Court nº 3 of Valencia. These first cases (in 2019 and 2020), and the Valencia Appeal Court's review of them, are the direct precursors to *Tráficos Manuel Ferrer*.[311]

In all the relevant cases, the judge, at the preliminary hearing stage and at the request of the defendant truck manufacturer, admitted the production of the defendant expert's economic model (including the underlying data and the commands used to process that data) in a data room for a defined period (5-10 working days) in conditions of access determined in the order (persons who could access, what operations they could perform and what outputs they were able to extract from the data room). The data room was to be set up outside the court premises (usually in the offices of the defendant's lawyers or expert). The claimant's expert was also granted the opportunity to submit a further report, following the data room exercise.

The first instance judge in those cases (Justice Pastor), in fact, approved the defendants' proposals for access to data in somewhat broader terms to those offered. Indeed, Justice Pastor adopted the proposed data room measure for two distinct purposes. The first was that offered by the defendants; i.e., to permit a verification of their model and underlying data by the opposing expert. The second was to allow the claimant's experts, in addition, the possibility to perform a second quantification of the alleged overcharge, but this time on the basis of the defendant's data. The latter was, in my opinion, the primary purpose of the exercise from the judge's perspective: i.e., to invite the claimants to produce a better estimation of harm using the manufacturers' own data (better in two senses: first, than its own estimation which had been considered unsatisfactory by the court in earlier cases, and, second, than that of the defendant's expert which, using the defendant's own data, calculated a zero overcharge – absence of harm – and had been rejected by the court which considered such an outcome to be incompatible with the facts of the case; notably, the

[310] SJM1 Oviedo, 12 April 2021, n 130, LG 6.5.

[311] See, eg, SJM3 Valencia, 10 December 2019 (Volvo), ES:JMV:2019:4122; SJM3 Valencia, 12 February 2020 (DAF); SJM3 Valencia, 28 February, 22 October and 18 November 2020 (Daimler); and SAP Valencia, 17 November 2020, ES:APV:2020:4230: SAP Valencia, 22 February 2021, ES:APV:2021:585; SAP Valencia, 20 April 2021, ES:APV:2021:1209; SAP Valencia, 11 November 2021, ES:APV:2021:4186. For discussion of a number of these cases, see Hitchings, 'La prueba pericial económica en los procedimientos de reclamaciones de daños' Almacén de Derecho, 12 May 2021 [an English version of the article is available at: www.hitchingsco.com/actualidad in the section Documents].

nature of the infringement). It was not the defendant's primary purpose, however - which, as already noted, was to provide greater transparency and, therefore, weight to its own expert's report.

The claimant's response to this dual-purpose opportunity was considered of relevance by Justice Pastor in determining whether the conditions for judicial estimation were satisfied.[312] The first instance judge posited that, if the claimant's approach to this opportunity to access the defendant's data were negative, evasive or excessively passive, this would preclude the judge from exercising his faculty to estimate harm. Put another way, it would entail that the condition for judicial estimation (that is, the practical impossibility or excessive difficulty test under Article 17(1)) be considered not adequately demonstrated on the facts of the case. Indeed, in circumstances where the judge considered that the claimant had failed adequately to take the opportunity to access and assess the defendant's data,[313] the court rejected those claims; claims which, in similar cases, it had previously partially upheld.[314]

The background to Tráficos Manuel Ferrer: the Valencia Court of Appeal's rejection of data rooms

The use of the data room mechanism was rejected by the Court of Appeal of Valencia on appeal. As a result, the judgments of Commercial Court nº 3 were overturned in those cases where the first instance court had dismissed claims on the grounds of the passive approach of the claimant to the defendant's offer of data room access. The appeal court's judgment contains an extensive exposition of its grounds for rejecting the use of the data room mechanism, averring in essence that, in the terms proposed by the defendant, such a mechanism does not have a place within the confines of the Spanish LEC. It is worth unpacking those reasons in detail, since they are objections which need to be addressed if the more iterative and interactive process envisaged by the CJEU (paragraph 58 of *Tráficos Manuel Ferrer*) is to gain any real traction in Spanish national proceedings.

The Valencia Appeal Court notes, in the first place, that neither party had made a request for disclosure, as such, during the proceedings (nor, as a result, had a disclosure hearing, in the terms foreseen in the Spanish implementing legislation, taken place). The offer of access to data was, rather, a unilateral offer to disclose made by the defendant. Specifically, the offer was made by the defendant's expert at the moment of filing the economic report shortly before the preliminary hearing. That offer was then repeated by the defendant's counsel at the preliminary hearing as part of their proposal for evidence, including the expert report, in preparation for trial (pursuant to Article 429(1) LEC).[315] However, under Spanish law, the

[312] It should be recalled that these were cases where the court considered that the original claimant report did not satisfy the standard of proof necessary to quantify harm, but that the existence of harm had been adequately evidenced whereas no adequate alternative quantification had been offered by the defendant. In previous rulings the court had decided, in those circumstances, that harm should be judicially estimated, at a 5% overcharge (see, eg, SJM3 Valencia, 20 February 2019, ES:JMV:2019:34, para 95). This approach, approved by the Valencia Court of Appeal (SAP Valencia 1679/2019, 16 December 2019, ES:APV:2019:4151) set the tone for the position that was to be adopted by the majority of Spanish courts in the Trucks litigation, and received approval of the Supreme Court in its June 2023 rulings.

[313] It should be noted, in this regard, that the duty on the claimant to take advantage of the offer was interpreted by the court to involve at the very least attending the data room and, furthermore, making use of the data put at its expert's disposition to carry out some additional analysis of some kind.

[314] eg SJM3 Valencia, 10 December 2019 and 12 February 2020 (n 311).

[315] In other similar cases, Pastor J has invoked the court's power under art 429(1) LEC to indicate that the evidence proposed by the parties was, in his opinion, insufficient and that the claimant should, indeed, take up the opportunity being offered and extend its expert report. We will return to the use of that power in the following chapter on expert evidence.

proposal of evidence is in the gift of the parties (Article 282 LEC). As a result, a request for disclosure is a matter for each party to determine autonomously without it being possible for the court or the counter-party to impose its use on that party (notwithstanding that, as we will see in the next section, the use of disclosure could be relevant in assessing the party's disposal of its burden of proof).

The appeal court found, secondly, that the data room mechanism, at least in the way it had been conceived at first instance in the cases in question, was not a mechanism that was contemplated within the scheme of the Spanish civil procedural rules, nor was it compatible with basic tenets of those rules. First, the court notes that the mechanism has its origins in the access granted to parties during a Commission infringement investigation in order to protect the rights of defence of those parties, carried out furthermore in the premises of the Commission under its supervision, and that its application in civil proceedings was not, therefore, a given.[316] In addition, the court considers that an exercise of this type, organised outside the premises of the court and without its direct supervision, does not fit easily with the rules and guarantees contained in the Spanish Civil Procedural Law which, inter alia, require the presence of a judge in the taking of evidence (Article 137(1) LEC – the principle of 'immediacy'), the presence of the court clerk as public guarantor of procedural acts (Article 145 LEC) and the clerk's role furthermore as judicial custodian of evidence and of the proceedings file generally (Articles 146 and 148 LEC). The appeal court added that this, indeed, made its adjudication of this aspect of the proceedings difficult because it had no record of what had occurred in the data room, other than the indirect accounts given by the respective party experts at trial.

The position of the Court of Appeal was, third, that there was no legal basis for proposing an extension of the claimant's expert report at that stage of proceedings (preliminary hearing). First, the exceptions grounding the filing of a further report, strictly delimited in Articles 426 and 427 LEC and relating essentially to adjustments to pleadings (so-called 'alegaciones complementarias') which have exceptionally been admitted at the preliminary hearing, did not apply to the situation in question. No such adjustments had been requested, let alone admitted. Second, the claimant would not be able to propose the extension of the expert report without first seeing the data underlying the defendant's report; that is, it could not be required to make a 'blind' proposal for a further report based on further information it had not yet seen. In essence, the Court of Appeal avers that it was procedurally too late to propose evidence at the preliminary hearing based on information which did not (at that stage) form part of the proceedings. Indeed, the court underlines the underlying premise in Spanish proceedings; namely, that the parties' case is, subject to exceptional circumstances, to be set out completely (and irrevocably) in the first (and only) written statements of case.[317]

Fourth, the Court of Appeal denied that the rules for the submission of expert opinions and, more particularly, the rules governing the materials which should accompany the expert report (Article 336(2) LEC), required the exhibition of the data underlying an economic quantification model, nor justified their unilateral, unrequested exhibition at a later stage of proceedings. Referring to a previous judgment of 23 January 2020,[318] the Court highlights

[316] The court refers, in this context, to the Commission's Best Practices for Competition Proceedings (para 97); the Commission's Best Practices on Data Rooms; and the Commission's Communication on the Protection of Confidential Information in Civil Proceedings (then in its draft form) in the section on confidentiality rings.
[317] art 412 LEC.
[318] *Llacer y Navarro SL v AB Volvo and Renault Trucks SAS*, ES:APV:2020:292.

that, in its view, it is not necessary to disclose the underlying data with the expert report if the expert believes there are adequate reasons for not doing so. In the case in question, the defendant's expert had considered it inappropriate to disclose the underlying dataset given the high number of observations it contained (13,360, to be exact), the sensitive nature of that information and the perceived risk that the information could be leaked to third parties. Rather, in the court of appeal's opinion, the counterparty has the possibility in that situation of requesting the exhibition of data as part of the expert's testimony at trial under Article 347(1)1 LEC. However, in this case, no such request had been made. It is worth noting as an aside that the Supreme Court, in the appeal of the 23 January 2020 judgment, observed that the use of client data in the expert analysis was a valid approach (by implication, even if the data was not supplied with the report, as this was the case) unless there was some suggestion that the selection of data made by the expert were biased and could affect the results.[319]

Fifth, the Appeal Court adds that the defendant had not adequately justified why the information concerned was of a confidential nature and, therefore, why the special protection of the data room it proposed was, in fact, justified in the first place. It should be recalled in this regard that the data related to a period of fifteen years or more ending in around 2016, some three to four years prior to the litigation.[320]

Finally, the Court of Appeal found that the offer made by the defendant in this case would have created an imbalance between the parties since the cost to the claimant of the measure proposed was disproportionate to the value of the claim and because it was offered under terms laid down unilaterally by the defendant (including the signature of a non-disclosure agreement with a very material penalty clause in case of default by the claimant). This was the court's so-called 'poisoned apple' argument, which, in time, became the name by which this first judgment has become known.

The Valencia Court of Appeal did not totally exclude the possibility that a data room could be a useful tool in the right circumstances, however. This might occur, to the court's mind, where the information in question was truly confidential and where the other party requested disclosure of that information at the appropriate time (which the court indicates to be, in fact, prior to filing its claim).

As can now be rather clearly seen, the description of disclosure set out by the CJEU in paragraph 58 of the *Tráficos Manuel Ferrer* judgment faces some serious challenges in the rulings of the Valencia Appeal Court. However, they may not be as unassailable as may seem at first sight. The specific objections which the Valencia Appeal Court's rulings (and the LEC) pose to paragraph 58 can be loosely summarised, I believe, as follows: (i) the disclosure of underlying data and economic models is not considered necessary (or especially helpful) in Spanish proceedings; (ii) if party experts wish to produce such information, they must disclose it together with their report at the right procedural moment and (subject only to justifiable confidentiality concerns) produce the information directly into proceedings (i.e., as an annex to the report); (iii) such underlying information is unlikely to have a great deal of use for the court in assessing and quantifying harm and its exposition in proceedings should

[319] STS 947/2023, 14 June 2023 (Trucks), n 2, LG 10, para 24 in fine.

[320] According to the Commission, pursuant to case-law of the General Court information dating from 5 years or more will normally be considered historical and lose the classification of confidential information; Commission, 'Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law OJ' [2020] C242/1, para 22.

normally take the form of operations using the database being performed at trial in response to questions by the party's lawyers (or in a hot-tub); (iv) the counter-party cannot be required to request disclosure of that information, or any further information based on its review of that information (a 'train of enquiry' request); (v) if that party does chose to request disclosure of this nature, it must do so at the appropriate procedural moment (which would normally be pre-action or, at the latest, in the written statement of claim or defence, or prior to the preliminary hearing in any case); (vi) while harbouring serious reservations, the court does not altogether discount the possibility that, in appropriate circumstances, the access to information pursuant to a disclosure request be provided via instruments like a data room, provided the relevant information can then be adequately used and proposed as evidence (e.g. a new expert report based on identified and verifiable data, which forms part of the proceedings file) respecting the applicable time-limits regarding the proposal of evidence; and (vii) any consideration of a party's use of disclosure or access to underlying data must take into account the principle of proportionality (that is, the cost of the exercise as compared to the value of the claim).

The implications of Paragraph 58 for Spanish procedure

So, where does this leave us? Does paragraph 58 of *Tráficos Manuel Ferrer* permit of application in Spanish proceedings? Should it? I would reply with a guarded yes to both questions. It is possible to conceive of a process whereby, respecting the rules and restrictions on pleadings and the production of evidence under Spanish law, disclosure can be incorporated into the process (in the period between written statements and the preliminary hearing) and parties (and their experts) allowed the possibility, under the strict control of the court, to access economic data and other relevant evidence in the hands of the opposing party (or third parties), for that data and evidence to become part of the evidence in proceedings and for it to be employed in the production of expert report extensions, all subject to these additional steps being proportionate and justified in the specific circumstances of the case.

In addition, it is, I believe, the duty of our courts so to facilitate disclosure in our process following the *Tráficos Manuel Ferrer* judgment and to do so in a way which respects the principles of transparency, equality and contradiction (emanations of the underlying principle of effective judicial protection) which are, furthermore, at the heart of the EU soft law measures on access to data used in economic evidence, as well as the relevant case-law of the Courts of the EU.

Accordingly, without transgressing the restrictive rules set out in the Civil Procedural Rules and the central role of the principle of legality (which together have contributed to the agile and predictable process which characterizes the Spanish civil procedure we know today following the 2000 Act), it is and should be possible to ensure that disclosure be adequately incorporated into our proceedings in a way which facilitates the production and assessment of expert evidence of a complex technical nature. Indeed, I would at this point emphasise that the rules on production of expert evidence (and, in particular, any disclosure or access to information relating to underlying data) should be applied in a way which is consistent with good scientific practices in this area and this, in some circumstances, requires an adjustment in the practice of many Spanish courts. For now, it is worth observing in this regard that, in my opinion: (i) the application of the test under Article 336 LEC, regarding the production of materials relied on by an expert in the preparation of his or her report, in the context of complex calculations in competition cases (in particular, econometrics) requires a degree of

transparency which permits of proper verification and replication of those calculations by a counter-party; and (ii) it is seriously questionable whether the faculty for parties to ask an expert at trial to perform operations using the data underlying the report (Article 347(1)1º LEC) can offer adequate opportunity for contradiction of the report, unless that party has been granted the possibility to access that underlying information itself in advance of the trial.[321]

I will set out the precise terms in which I think the Spanish civil process could be configured respecting all these considerations in the final part of this research. For now, let us note that we do, in fact, already have a few practical examples of proceedings where elements of the more iterative approach have been embraced by a handful of Spanish commercial courts.

d) Some examples of the new approach in Spanish court practice

The first example is the Barcelona Protocol to which we have already alluded. Pursuant to the protocol, disclosure was to be requested by the parties by the time the statement of defence was to be filed and, following the disclosure hearing (which was to be the next procedural step), disclosure would take place as ordered by the court and, if ordered, would (it was foreseen) involve the opening of parallel data rooms for a period of 60 days. There was then provision for any further expert reports to be produced 20 days before the preliminary hearing which was itself to take place 90 days after the end of the disclosure phase, allowing 70 working days (approximately 3 months) for the preparation of those reports. To my knowledge, disclosure has largely not occurred in the way that was originally foreseen and the scope of requests was, anyway, narrowed by the time they were made. This seems to have been a result of the time that elapsed between the negotiation of the protocol (2019-2020) and the decisions on disclosure some two years later, towards the end of 2022.[322] By the time disclosure came to the courts, the litigation had evolved significantly, including with regard to CETM cases before the majority of courts around Spain, making the exercise less significant than it would have been at an earlier stage.

For the second example, we must return once more to Valencia. This also concerns a case in the Trucks litigation and a claim brought by a claimant from the CETM claimant group. Omitting the numerous procedural and substantive questions which are of less specific relevance to this discussion, the evolution of the proceedings as regards the production of expert evidence can be summarized in the following way: (i) the claimant submitted its expert report with its statement of claim and the defendant its own report five days before the preliminary hearing (until this point, business as usual, therefore); (ii) at the preliminary hearing, the defendant requested access to the data used in the claimant expert's economic model, as well as the codes (or commands) used in that model to process that data and arrive at the results presented in the report, as well as the submission of a further expert report to report on the findings of the data room exercise; (iii) the defendant also offered access to its own expert's economic model in a data room, but this was rejected by the

[321] See, in this regard, the observations of AG Kokott in *Tráficos Manuel Ferrer*, n 272, paras 91-5, where she underlines the need, when assessing the effectiveness of data access in correcting information asymmetry, to consider the way in which data access has in fact been provided, as well as the volume and informative value of that data. She notes that 'This may concern circumstances such as whether a claimant is provided with a very large amount of data in difficult-to-access formats within a short period of time, the extent to which those data can be used, and so forth' (para 91).

[322] eg AJM3 Barcelona, 28 October 2022 (unpublished). This decision was focused entirely on the question of evidence of downstream pass-on by the claimants and rejected that request.

claimant on the basis that the underlying data used by the truck manufacturer's expert was not reliable (something criticised by the court in its judgment); (iv) admitting the defendant's request, the court ordered a data room to be set up by the claimant's experts in the offices of the claimant's legal counsel in the proceedings for a period of 5 working days and the data room should include the 'data necessary to allow the defendant's expert to replicate the synchronous model of the expert report, along with the software employed in its execution and other elements of work considered reasonable'; (v) the claimant submitted a further expert report which included a printed list of the commands used in its original model and a series of explanations of its model responding to criticisms levelled by the defendant's expert in its report – while admitted at first instance in the interest of a 'criteria of procedural flexibility', the Appeal Court ruled that this report was extemporaneous and, as such, should be excluded from the proceedings; (vi) the data room exercise took place and the defendant's expert produced a further report based on its findings which permitted the development of aspects of its critique of the claimant's report; (vii) the court held, nevertheless, that the report extension did not alter its assessment of the expert evidence and upheld the claimant expert's quantification in its entirety; and, finally, (viii) the court also ordered at the preliminary hearing that evidence requested by the defendant in order to calculate the rate of pass-on of the cost of the relevant trucks in the claimant's downstream prices for transport services be partially produced (in more restricted temporal, objective and material terms than those requested by the defendant) but that exercise did not prove fruitful and the defence was not made out.[323]

The third example comes from the same court, but this time in the context of the follow-on litigation arising in Spain out of the Spanish competition authority's decision concerning the Automobile Manufacturers' Cartel.[324] There, Justice Pastor ordered a data room to be set up by the defendant's party-appointed experts along similar lines to previous orders. On this occasion, he required, in addition, that the defendant (Toyota) make supporting documentation available in the data room so that the claimants and their experts could verify the transaction data used by the defendant experts against underlying documentary evidence. As we will see later, in our section on expert evidence, the judge also took the unusual step of inviting the parties' experts to attend the preliminary hearing in advance of adopting the data room order. He did so with the objective of seeking their assistance in assessing whether the expert evidence produced by the parties to date was sufficient to elucidate him on the issue which that evidence was intended to address (i.e., the existence and quantification of damages to the claimant) and, if necessary, what further steps might be taken to clarify further the evidence on this issue. The data room was not ultimately executed, however. According to the judgment, this was a result of the obstructionist attitude of the claimant. The court accordingly withdrew the order, declaring that it would take the attitude of the parties into account when deciding the case. The claimant's approach to the data room ultimately prejudiced its claim, which was rejected for lack of sufficient evidence of quantification. In particular, the claimant was penalized for its negative attitude to the opportunity offered to it by the data room to deepen its economic analysis of harm; attitude which the court tainted with bad faith (in breach of its duty of procedural

[323] For an account of all the foregoing, see: AJM3 Valencia, 3 March 2020, ES:JMV:2020:21A; AJM3 Valencia, 28 May 2020, ES:JMV:2020:391A; SJM3 Valencia, 15 September 2020, ES:JMV:2020:5922: SAP Valencia, 20 July 2021, ES:APV:2021:3123.
[324] SJM3 Valencia, 21 October 2022 (Automobile Manufacturers), ES:JMV:2022:9610; LG 6-8.

good faith under Article 247 LEC).[325] It should be noted, however, that the claim was for a relatively frugal 2,864 € (overcharge on the one Toyota car acquired by the claimant, a consumer, during the infringement period), which puts into perspective the demands of the court on the claimant and evidently raises issues of proportionality.[326]

A further discrete example can be found in the judgments of Commercial Court nº 1 of Oviedo.[327] There, Justice Muñoz Paredes found that the failure by claimants to take up the offer of a data room in which the defendant experts would make available their model and underlying data to the counter-party experts, was an important consideration in denying their argument that the analysis presented by the defendant experts was based on unreliable data. Accordingly, no data room actually took place in those proceedings, but it was considered a valid procedural mechanism by the court.

These examples all have their shortcomings. Indeed, none can be said to have been a particularly successful example of disclosure shaping the respective litigation in any meaningful way. That is not, I believe, the case. Furthermore, disclosure while accepted or ordered was frequently not, in fact, executed in practice, or at least not as fully or completely as was originally proposed. These examples do, nevertheless, indicate possible avenues that can be explored and improved, and as such have the considerable merit of opening horizons. Indeed, it is my opinion that, within the proper bounds set by the Spanish procedural system, judges have an important role to play in developing legal practice in this area, with the necessary support of collaborative parties, and these examples offer some light to our path.[328]

e) Proportionality

Our analysis of the topic of disclosure would not be complete without a brief comment on the principle of proportionality, which is central to the EU disclosure regime. Indeed, proportionality forms part of the underlying EU goal that the EU competition rules should be effective and, accordingly, that national rules on standard and burden of proof should not be applied in a way which makes the compensation of antitrust harm practically impossible or excessively difficult.[329] In this regard, it is important that disclosure, as conceived by the EU institutions, not become an impediment for damages claims, rather than a facilitator, and here one cannot ignore the cost implications of disclosure.

We have noted a number of times that proportionality should be gauged by reference to the value of a claim. In the context of the fragmented, low value, litigation characteristic of Spanish private enforcement claims to date, this is, of course, relevant. This means that an adaptation to the demands of *Tráficos Manuel Ferrer* and other elements of EU law needs also an adaptation of the means to concentrate claims, in order to make the value at stake in proceedings higher and disclosure more proportionate. The two should, in my view, go on in

[325] ibid paras 163-5, 178-9.

[326] The court was apparently influenced in its negative appraisal of the claimant's attitude by the broader context of the claim and, in particular, the fact that the expert report had been prepared for a group of claimants, including the claimant, further to internet advertising and, apparently, with the support of third-party funding. See paragraphs 181 and 182 of the judgment, which seem to taint the behaviour of the claimant's representatives as close to unethical, a strong judgment which evidently I am not able to evaluate.

[327] See, for example, SJM1 of Oviedo, 12 April 2021, ES:JMO:2021:3265; SJM1 Oviedo, 27 February 2023, ES:JMO:2023:144, paras 216-22.

[328] This is something to which Pastor J has alluded at length and with clarity in a number of his more recent rulings; notably SJM3 Valencia, 21 October 2022 (Automobile Manufacturers); paras 44, 62-6, 178-9.

[329] As is explicitly stated in art 17(1) of the Damages Directive.

parallel, without pause, however; and courts should endeavour (with the collaboration of parties) to seek to find ways to address this issue in the context of situations of mass litigation (for example, using joinder, test claims or the like, as discussed in Chapter 15 above).[330]

Finally, in this context, thought may usefully be given to considering means to facilitate proportionate disclosure measures even in the current era of largely fragmented claims. As is well known, many claimants form part of groups of claimants represented by common legal and expert teams, which in turn utilize a single common dataset as a basis for quantifying the harm to the whole group, and who share their economic interest in the case to some degree with third parties (funders) or the legal team itself (through the mechanism of contingency fees). In this sense, even where those claims are not in fact joined or processed before one and the same court, it may be relevant to consider whether it may be legitimate and proper that disclosure be performed and considered in a more common and pragmatic fashion. I am referring to the possibility of extending the effects of the exercise of providing access to underlying data in one proceeding to other parallel proceedings, so avoiding the need for unnecessary repetition of this exercise by the same experts with regard to the same economic models and data. This may require party agreement. Could such agreement be reasonably withheld, however? This may depend on the circumstances of the case, but many times where the exercise is an identical one, maybe there is no such reasonable justification. Without agreement, would it be possible for a court that agrees to the disclosure measure to order that it be realized by means of access being provided to the evidence already produced in other proceedings?[331] If we are referring to an extrajudicial data room exercise, would it be possible for a party to propose for admission as evidence information its expert has accessed in a data room performed in other proceedings or, where a court orders access to information under Article 283 bis, for it to be permitted that the expert use the results of its previous exercise in another proceeding without having to repeat the exercise? We will consider some of these options in the following chapter on expert evidence and in our final proposals.

f) Interim conclusion

EU disclosure under the Damages Directive is destined to have a real impact on Spanish civil procedure in competition damages litigation. We are only just beginning to see a small glimpse of its true implications. It is averred that the goal of Spanish judges (supported by the necessary collaboration of parties) should be to apply Spanish procedural rules to the extent possible in order to ensure that disclosure take place in a moment of the civil procedure and in such a way that permits parties proportionate, transparent and effective access to necessary categories of information and sources of evidence (in the hands of the opposing party or third parties) under the court's active control. In addition, they should to the extent possible enable the parties to propose the necessary evidence (including expert evidence based on such information or other sources) at the right procedural moment, while ensuring the protection of the parties' rights of defence and the principle of procedural equality.

[330] Of this, the Barcelona Protocol offers an example of an attempted solution, which may not convince everyone, but has the merit of trying to address just this central problem.

[331] There is provision to access to court proceeding files in art 141 LEC, where a party can demonstrate a legitimate interest.

How this might currently be achieved under our existing procedural framework will be the subject of our recommendations in the final section of this research. However, as already noted, the disclosure hearing takes on, in this context, a vital case management role, to date largely overlooked by courts.

16.4. The impact of disclosure on the standard of proof

I would like to offer a final brief reflection in relation to disclosure and national procedural autonomy; namely, on the question of the impact that the new EU disclosure rules may, or may not, have on the standard of proof required by Spanish courts to prove harm in EU competition law damages cases.[332]

As confirmed by Article 17(1) of the Damages Directive, the standard of proof (in this case, of harm) is a matter of national law, subject to the principle of effectiveness.[333] The principle of effectiveness precludes claims being rejected where it proves practically impossible or excessively difficult 'precisely to quantify the harm suffered *on the basis of the evidence available*' (my emphasis). In such situations, Article 17(1) provides that courts should be empowered to estimate harm. In cartel cases, the claimant is assisted by a presumption of harm in the terms of Article 17(2) and Article 17(3) provides for the possibility for courts to request assistance from NCAs with respect to quantification, matters to which we will return in the next section. As established by the CJEU in *Tráficos Manuel Ferrer*, these provisions, supported notably by the new disclosure provisions, address the inequality existing between parties as regards access to the type of information which may be necessary to quantify harm (so-called information asymmetry). Does this mean that the parties' approach to disclosure may have an impact on their ability to meet the standard of proof required? Does the availability of disclosure raise the standard of proof, somehow?

The matter does not end here. In the current context (disclosure), we should also consider a secondary aspect of the standard of proof and that is: what type of evidence must the parties produce to satisfy the requisite standard of proof? On this, EU law has much to say whenever EU law is engaged; for instance, as regards discharging the presumption that undertakings act on the basis of information exchanged with competitors (i.e., the presumption of causal connection between a concerted practice and market conduct) or proving the elements necessary for the granting of an exemption under Article 101(3) TFEU. [334] Could it maybe shape too the evidentiary standards required to estimate harm in competition damages cases? The sorts of methods that are considered appropriate to quantify harm, and how those should be implemented and assessed, are indeed the subject of soft law guidance from the Commission (and Spanish competition authority). We will return to the relevance of such guidance for the courts' assessment of economic evidence in the next section. For the purposes of the question we are considering here (the impact of disclosure on the standard

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[332] It is not the purpose of this study to address the question of standard of proof in Spanish law, except to the extent that is relevant to the procedural questions of more central relevance for our topic. There is a paucity of works addressing the specific question of standard of proof in competition private enforcement; however, see, for example: Javier Pérez Fernández, 'Estándares de prueba del daño en las acciones de responsabilidad civil contra cárteles bajo derecho español y de la UE' Working Paper IE Law School, 11 March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728898.

[333] This is a general principle of EU competition law; see Case 74/14, *Eturas*, EU:C:2016:42, paras 30-2.

[334] For the presumption of causality, see, inter alia, Case C-74/14 *Eturas* EU:C:2015:42, paras 33 et seq. As regards art 101(3) TFEU, see Joined Cases C-501, 513, 515, 519 *GlaxoSmithKline Services Unlimited* EU:C:2009:610; [2009] ECR I-9291, para 102, and *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, paras 116, 119.

of proof), we should ask ourselves whether disclosure is a relevant factor in considering the sorts of evidence which can, and should, be offered by the parties' experts.

In Spanish law, the standard of proof is that which is sufficient to gain the conviction of the judge who is called to assess the expert evidence on the basis of a so-called 'healthy criticism' ('sana crítica') – what could be translated as a sound assessment - of the evidence considered as a whole.[335] In the area of competition law, given the hypothetical nature of the exercise of predicting what would have happened in absence of the antitrust infringement in question (the 'counterfactual' or 'but for' scenario), the Supreme Court in its *Sugar II* ruling of 7 November 2013 embraced the idea of a certain 'flexibility' in the legal standard required by judges in assessing expert evidence of harm (echoing the Commission's statements in its 2011 Communication on the Quantification of Harm).[336] This was recently confirmed by the Supreme Court in its Trucks rulings in June 2023, noting the similarity with estimating loss of profit and the dictates of CJEU case-law.[337]

As regards the evidentiary standard for an expert's estimation of harm, this was famously coined by the Supreme Court in *Sugar II* in the following terms: 'a reasonable hypothesis which is technically founded on the basis of verifiable and non-erroneous data'.[338] For their part, defendants were required, in a case where the existence of harm was established by virtue of the findings of the prior regulatory decision, to offer their own better founded alternative quantification of harm which, by implication, should satisfy this same evidentiary standard and to a higher degree.[339] In addition, should they wish to advance a pass-on defence, they should prove that all or part of the harm suffered had been passed on, which implied establishing not only that the overcharge had been passed on in higher downstream prices but also that the higher prices had not reduced the claimant's profits by virtue of a consequential loss of sales (the so-called 'volume effect').[340]

What is the role of disclosure in meeting these evidentiary standards (if any)? *Sugar II* offered two indications on this front. The first relates to the evidentiary test for a valid estimation of harm. As just recalled, the final element of the test set by the Supreme Court was that the underlying data used in the estimation should be 'verifiable and non-erroneous'. This is not, of course, a requirement to request disclosure from the counter-party but surely confirms that expert estimations should be based on data which, if not disclosed, is at least available for verification. However, there is no indication as to whether the claimant should be expected to utilize disclosure. On the facts of the case, this was not necessary for the claimants to satisfy the standard of proof of the quantification of harm since their expert report was deemed sufficient in that regard.

The second indication by the Supreme Court in *Sugar II* is more properly an indication that a party may need to make use of disclosure mechanisms, in this case in order to make out a pass-on defence. The defendants' failure to request evidence lying in the hands of the claimants, or indeed to make any real attempt to evidence pass-on, was provided by the Supreme Court as justification for rejecting the pass-on defence, overruling the previous

[335] art 348 and 218(2) LEC respectively. We will return to this in the section on the judicial assessment of expert evidence.
[336] *Nestlé España SA v Ebro Puleva SA* STS 651/2013, 7 November 2013, ES:TS:2013:5819.
[337] See STS 947/2023, 14 June 2023, LG 10, paras 14-6 and, on the principle of effectiveness, para 21.
[338] *Sugar II*, n 323, LG 7.3.
[339] ibid LG 7.3.
[340] ibid LG 5.4.

judgment of the Madrid Appeal Court on that point. In determining the evidentiary standard required of the defendant to prove the pass-on defence, the Supreme Court referred to the Court of Justice's case-law relating to the recovery of taxes and duties exacted by Member State administrations in breach of EU law. In particular, it noted that that case-law sought to avoid the unjust enrichment of the claimant so that, accordingly, the defence required the defendant to prove not only the passing-on of the overcharge, but also the lack of resulting harm (taking into account, in addition, the volume effect).[341]

Since the Sugar Cartel case, a further relevant element has appeared in the reasoning of the Spanish courts in their assessment of a party's compliance with the standard of proof of harm and that is the concept of 'reasonable evidentiary effort', notably in the Barcelona Court of Appeal's judgments in the Envelopes Cartel.[342] Such a standard is, in reality, a subsidiary standard of proof. It is not the standard of proof required for an estimation of harm to be adopted wholesale, or largely, by the court; what we might term the 'primary standard of proof'. Rather, it is a lower standard of proof employed to distinguish estimations of harm which, while insufficient to gain the conviction of the court, offer evidence enough to justify the court estimating the harm itself (i.e., judicial estimation), from those estimations that do not satisfy even that minimum threshold, such that the claim should be rejected entirely; what we might term the 'secondary standard of proof'. This lower secondary standard of proof has, in reality, been used as a proxy for the 'practically impossible or excessively difficult' effectiveness condition for judicial estimation now reflected in Article 17(1), albeit in a particular context: that where harm was deemed to exist on the basis of the findings of a prior regulatory decision. However, disclosure was not considered of relevance in determining that minimum evidentiary effort.

The Sugar Cartel and Envelope Cartel cases pre-dated the Damages Directive and the new disclosure provisions, of course. That is not the case for the follow-on actions relating to the so-called Trucks or Automobile Manufacturer Cartels, which commenced after the disclosure rules became part of the applicable Spanish civil procedure rules. Nonetheless, the availability of the new disclosure mechanism has not provoked a perceivable alteration in the approach of the Spanish courts to evidentiary standards. Indeed, it is noticeable that, even since the transposition of the Directive, a number of courts have advocated for the existence of a higher burden on the defendants (as compared to the claimants) to quantify the effects of their anti-competitive conduct, based on the Spanish rule which requires courts to take account of the availability of evidence and ease of proof for the respective parties,[343] precisely because the relevant data for quantifying harm tends to be in the possession of the defendants.[344] That is, the availability of disclosure for the claimants to gain access to that information has had no material impact on the standard of proof required, courts underlining rather the availability of evidence to the respective parties in a situation without inter partes or third party disclosure. It is, of course, true that the principle of proportionality has influenced this position in a context of highly fragmented litigation where a disclosure exercise may present claimants with a disproportionate cost as compared

[341] For a fuller discussion of that case-law and the rules and requirements for evidencing pass-on developed therein, see the Pass-on Study, ch 2.
[342] CNMC Decision of 25 March 2023 (Expte. S/0316/10 *Paper Envelopes*).
[343] art 217(7) LEC.
[344] See, eg, SAP Valencia, 23 January 2020, ES:APV:2020:292, LG 6.2; SAP Barcelona, 17 April 2020, ES:APB:2020:2567, para 41; SAP Pontevedra, 6 October 2020, n 294, para 18(g); SAP Málaga, 1 July 2021, ES:APMA:2021:1238, para 43.4.

to the value of the individual claim being considered. Indeed, this was confirmed by the Supreme Court in Trucks, even in the case of a relatively large individual claimant.[345] However, there is not, as yet, any clear indication that larger joined cases may merit a different approach from the Spanish courts (although time will tell).

Indeed, even since *Tráficos Manuel Ferrer*, the approach of Spanish courts seems to have continued largely unaltered. Admittedly, the courts have been somewhat more at pains to explain why they consider the condition for judicial estimation under Article 17(1) is satisfied; i.e., why they consider that the claimant has done enough to show that more precise quantification was too difficult or why this is simply objectively evident.[346] Nonetheless, the approach to standard of proof is still marked principally by a consideration of the respective efforts of the parties to offer a reasonable quantification of harm, the satisfaction of a certain minimum standard by the claimant being deemed sufficient to justify judicial estimation (in cases where the existence of harm has been deemed proven) even where the claimant expert's estimation is nevertheless found wanting. The Supreme Court set out its own evaluation of the matter in its June 2023 Trucks rulings, also concluding that disclosure could not be required of the claimants in those particular cases, and harm could and should be judicially estimated (i.e., the secondary standard of proof was satisfied). The court highlighted the following factors in arriving at that conclusion: (i) the potential scope and complexity of documentary disclosure given the length and geographical scope of the cartel and the existence of a leniency application; (ii) the disproportionate cost of such an exercise as compared to the value of the claim; (iii) time pressures for filing (given pre-existing limitation rules and the rules on pre-action disclosure); and (iv) the uncertainty around the approach of Spanish courts to quantification at the early stages of the litigation. With all due respect, the Supreme Court's assessment displays a certain misunderstanding of what disclosure might have been needed to quantify harm and the extent to which the exercise could have been adapted to the demands of the case (and the experts). Indeed, the court's attention seems to be focused on broad access to the file and not to any specific economic disclosure as such (i.e., data). This said, it is undeniable that disclosure in such a case could be complex and costly, such that the proportionality of the exercise is a very important consideration. And the court's repeated observation that claimants were not in a position to understand the evidentiary standards that would be required of them at the early stage of proceedings when they filed their claims, although surprising to my mind, is nonetheless possibly a positive concession that standards could develop over time, as the courts' practice in competition litigation develops. We propose to take the court seriously on that.[347]

A couple of nuances can be made to the foregoing. First, as we have already seen, the availability to the claimant in the proceedings of additional data, because access to the underlying data used in its expert report has been offered by the defendant (provided that has been done in a procedurally appropriate manner), could influence the court's assessment of the expert evidence, weighing the balance in favour of the defendant where the claimant is deemed to have made insufficient use of that information (or vice versa in the

[345] STS 947/2013, 14 June 2023 (Trucks), LG 10, para 20. The claimant in that case was a transport company which had purchased 108 trucks during the infringement period.

[346] See SAP Valencia, 23 February 2023; SAP Madrid 3 and 9 March 2023; SAP Pontevedra, 27 March 2023 (n 264).

[347] At the time of writing, the second wave of Supreme Court rulings was about to be handed down. Specifically, the voting and ruling dates were set for February 2024. These cases concern proceedings brought by plaintiffs from the CETM group, so their resolution, among other issues, of the standard of proof question will be particularly interesting.

opposite situation). This has happened only very occasionally, however, and at first instance. It is not a position that has been upheld by any appeal court to date. Second, while by no means obvious, it can perhaps be acknowledged that in the consideration of the compliance of an expert's quantification of harm with the standard of proof required by Spanish judges for its approval (what we have termed the 'primary standard of proof') the use of disclosure is a relevant factor to consider. Indeed, following *Tráficos Manuel Ferrer*, the Spanish courts have had to acknowledge that the use of disclosure is a relevant factor in determining compliance with the secondary standard of proof, which they apply as a pre-condition for judicial estimation, although they have not considered it decisive in the context of the Trucks litigation (i.e., claimants have not been expected, much less required, to make use of disclosure). One can see, however, that in the context of the higher primary standard of proof applied by the Spanish courts a party may need to make use of disclosure (or, at least, try to) if the failings of its own expert's report could be reasonably and proportionately addressed by accessing available evidence in the hands of the counterparty or third parties. In this regard, the formulation employed by the Court of Appeal of Murcia concerning the requisites for a valid estimation of harm strikes me as helpful, potentially contemplating just this point in relation to disclosure:

> [I]t must be weighed and adjusted to the circumstances of the case, according to the evidence in the proceedings; that is to say, having regard to the evidentiary effort made by the parties, taking into consideration all the circumstances that may surround the case, such as the asymmetry of information, the greater or lesser availability or accessibility of the data, the costs and time required to process them in proportion to the value of the damages claimed, or the degree of difficulty, since the impact of the conduct may not have been felt with the same intensity throughout the duration of the cartel and probably not uniformly in all the national markets affected.[348]

As already pointed out, the consideration of the use of disclosure (and its relevance, therefore) is clearer in the context of the pass-on defence in Spain. Here (pass-on used as a shield by the defendant)[349] no presumption of pass-on applies and it is expected that the defendants should offer cogent evidence of pass-on, beyond just economic theory, which may frequently require access to evidence in the hands of the claimant (and, possibly, third parties). Where documents accessed through disclosure (or other means) show that the harm has been partly or wholly passed on, this has enabled defendants on occasions to make out the pass-on defence (wholly or partly).[350] Where the disclosure requested is rejected as disproportionate, as has occurred frequently where the defendants have sought access to large amounts of data for the purposes of carrying out an empirical analysis of pass-on, this, in the absence of other valid evidence, entails usually the dismissal of the defence.[351] This assessment of pass-on is no doubt influenced by the context of much of the litigation in question; namely, follow-on cartel litigation where a presumption of harm applies, the value of the claims is low and the strength of the parties is imbalanced.[352] However, one might nevertheless ask whether the approach to the standard of proof for

[348] SAP Murcia, 25 March 2021, ES:APMU:2021:650, LG 3.8 (my translation).
[349] See Pass-on Study, paras 14, 64; Pass-on Guidelines, paras 18-19.
[350] See *Realia Business SA v ASEFA SA Seguros y Reaseguros*, SAP Madrid 377/2022, 19 May 2022, ES:APM:2022:8315.
[351] As has occurred in Trucks as regards downstream pass-on, other than in certain instances of resale (see Ch 16.1 above).
[352] Although note, on the latter, the position of the CJEU in *Tráficos Manuel Ferrer*, n 272.

pass-on, and the related question as to the use of disclosure, justifies being different to that for proof of harm or whether both matters should be approached in a similar fashion.[353]

Finally, we should dedicate a brief word to the other aspect of pass-on which was touched on in the *Tráficos Manuel Ferrer* judgment and which has its relevance, for instance, in the Trucks litigation. That is the question of upstream pass-on or pass-on invoked as a 'sword' by an indirect purchaser (or supplier) claimant to establish that it has suffered harm as result of the infringement. The Spanish courts have presumed the existence of a causal link between the Trucks cartel infringement (centred principally on the exchange of information between manufacturers on gross list prices) and the purchase of new trucks by end users from independent or dependent truck dealers. This is based on a number of factors, including the presumed relationship between list prices and final prices, the specifics of pricing in the trucks market (or the motor vehicle markets, more generally), the presumption contained in Article 14(2) of the Damages Directive or even statements by the Court of Justice in other unrelated cases.[354] The presumption of a necessary causal relationship between gross list prices and net prices, effected through the medium of discounts which existed both during and after the cartel, was confirmed by the Supreme Court in its June 2023 rulings, referring inter alia to the Amsterdam District Court's position on this matter in its judgment of May 2021.[355]

In terms of quantification, however, a number of courts have found that an analysis of the alleged overcharge at the level of gross list prices cannot, given the evidence furnished by the truck manufacturers on the unstable relationship between those prices and transaction prices over time, be applied as an automatic proxy for the final overcharge.[356] What has not, to my knowledge, occurred is that any party has used data on that relationship to quantify a pass-on rate as regards increases in gross list prices and corresponding net price increases, whether by the defendants using their own data (or other evidence) or the claimants, by requesting disclosure of such data (or other evidence). Nevertheless, on this point, paragraph 53 of the *Tráficos Manuel Ferrer* judgment indicates that this may be a matter on which evidence could or should be furnished:

> [T]he very wording of that provision limits the scope of the judicial estimation of the harm to situations in which it is practically impossible or excessively difficult to quantify it, once it has been established that the claimant suffered that harm, which may correspond, for example, to particularly significant difficulties in interpreting the documents disclosed as regards the proportion of the passing on of the overcharge resulting from the cartel on prices of products acquired by the claimant from one of the parties to the cartel.[357]

So where does the foregoing leave us with regard to the question we had posed ourselves at the beginning of this section: i.e., what is the impact of disclosure on the standard of proof? I would suggest that the answer to this question is the least addressed, and least clear, of any

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[353] The UK Supreme Court supported the latter view in *Sainsbury's v Mastercard*, n 334, paras 219-26. The matter has not been tested before the CJEU.

[354] The fullest analysis of this issue (excluding the questionable reference to unrelated cases which have been cited by other courts around Spain) can perhaps be found in the judgments of the Appeal Court of Madrid (Section 28); see, for example, SAP Madrid, 9 March 2023, ES:APM:2023:5572, LG 4.

[355] Judgment of the Amsterdam District Court of 12 May 2021, NL:RBAMS:2021:2391, referred to in STS 947/2023, 14 June 2023, n 2, LG 10, para 10.

[356] See, eg, SAP Murcia, ES:APMU:2021:650, LG 5, para 3.4; SAP Madrid, 13 January 2023, ES:APM:2023:40, LG 5, pt 2. For a contrary position, see SAP Málaga, 1 July 2021, ES:APMA:2021:1238.

[357] *Tráficos Manuel Ferrer*, para 53, n 272.

related to this matter. It seems to me that, subject to the key conditions of necessity and proportionality (it may not be necessary or proportionate for an expert to seek access to information in the hands of the other party or a third party), disclosure is relevant to the standard of proof. However, that relevance is dependent in turn on disclosure becoming incorporated adequately to the national procedure and, so, is intimately related to our previous question. The role of judges will, again, be key in this process and will depend also on the right cases coming before them in the right procedural conditions.

17. Expert evidence

We return, finally, to our central topic of expert evidence in the quantification of competition harm. We will address here the same questions under Spanish law as we did previously in the context of English law; namely: (i) what is the role of experts? (ii) what is the role of the judge? and (iii) what is the process?

17.1. Role of experts

a) The nature and scope of expert evidence

Expert reports offer one of the types of evidence that can be admitted in civil proceedings in Spain.[358] The object and purpose of such evidence is defined in Article 335(1) LEC:

> When scientific, artistic, technical or practical knowledge is necessary to assess facts or circumstances relevant to the case or to acquire certainty about them, the parties may bring to the proceedings the opinion of experts who possess the corresponding knowledge or request, in the cases provided for in this law, that an expert opinion be issued by an expert appointed by the court.
>
> (My translation)

Accordingly, as under English law, expert evidence is a means of assisting the judge in interpreting facts the appraisal of which requires certain specific technical expertise or knowledge. As has been noted by Professor Montero Aroca, such appraisal may involve the determination of a secondary fact which requires of technical or scientific determination or measurement (such as a DNA test) or, as is typically the case in the type of expert evidence with which we are here concerned, the offering of opinion evidence on how to interpret certain facts using necessary specialist knowledge.[359]

In our case, expert evidence refers typically to assessing the impact on markets, or identified parties, of anti-competitive (or allegedly anti-competitive) conduct and, in particular, to quantifying harm. That is, it is proffered as a means of evaluating central facts in issue, such as the existence or the extent of any harm provoked by unlawful conduct. This type of evidence is opinion evidence (in the English law sense of the term). Indeed, it involves assessing what is a hypothetical, not a real or observable, situation: namely, that which would have happened in the future if unlawful conduct in the past had not occurred;[360] the counterfactual or 'but for' scenario. As the Commission's Communication and Practical Guide to Quantification observe, there are considerable limits to the degree of certainty and precision that can be expected from such evidence. No single 'true' value of harm can be determined, but rather only best estimates based on assumptions and approximations.

[358] art 299 LEC.
[359] Montero Aroca, *La Prueba en el Proceso Civil*, n 303, 338-40.
[360] ibid 335-6.

Accordingly, the facts in dispute which the expert report evaluates are not facts about which certainty can be reached, but rather only opinions and approximations to the truth (or estimations). Hence such expert evidence 'offers the greatest difficulties' for courts.[361] At the same time, that expert evidence may in turn be based on the appraisal of secondary or accessory facts (such as relevant economic data) on which certainty may be achieved – a point which may have its relevance as we will see in due course.

The scope of expert evidence and its limits

As under English law, the expert report cannot assess, much less determine, legal issues (as opposed to factual issues).[362] Accordingly, the expert cannot provide admissible evidence on whether a certain conduct entails a breach of Articles 101 or 102 TFEU, whether it is a 'by object' or 'by effects' infringement, what is the legal test applicable or what constitutes sufficient evidence for the court of any particular given fact (although, as we have seen, it is important that the expert understands the legal criteria and standards which will be applied by the court to assess the weight of his or her expert evidence). Nor can the expert provide evidence on the correct legal interpretation as regards the scope or effect of a prior regulatory decision.[363]

Neither can the expert determine issues in dispute which are to be determined by the court in judgment, such as the existence and extent of harm in a civil damages case. This, as we will develop further below, would be to usurp the court's judicial function. The point, applied to the specific situation of expert reports estimating harm, has been made clearly by the Barcelona Appeal Court in the Envelopes Cartel case:

> The expert opinions of the parties, through which they seek to quantify the damage, cannot fulfil a function that goes beyond providing the court with those "maxims of acquired human experience" through which to be able to make the most appropriate judgment of logical inference to which we have referred. However, they do not replace the judge's judgment with that of the expert, but rather have a more modest purpose, namely to help shape the judgment that the judge has to form, and which in these cases constitutes the essence of his judgment.[364]

An expert who is proposed in order to evaluate the existence of harm in a particular case must have the necessary expertise to carry out that task. As we have already noted in the context of the English interchange litigation brought by Sainsbury's, the knowledge required in any given case cannot be neatly defined and may vary. There, together with the ability to assess economic data and execute a counterfactual estimation of harm, it was necessary to have an understanding of the functioning of what was a complex industry (the payments industry). The court criticized the lack of industry understanding demonstrated by the economists providing expert evidence and, as a result, placed greater reliance on factual witness evidence on certain issues of relevance to the expert evidence. Accordingly, the first condition of expert evidence (that the expert have the necessary expertise to assess certain facts) is not so simple to apply in practice. In Spain, the same problems arise.

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[361] SAP A Coruña, 9 March 2016, ES:APC:2016:417, LG 2, concerning the quantification of harm in a claim for breach of contract. On this distinction, see also, the observations by the presiding judge, Jose Luis Seoane Spiegelberg (by then, Magistrate of the Supreme Court), 'La prueba pericial en la jurisprudencia del Tribunal Supremo' in Joan Picó i Junoy (dir), *La Prueba Pericial a Examen* (Bosch 2021), 76-9.
[362] Montero Aroca, n 303, 333, by reference to, inter alia, STS 696/2008, 29 October 2008, ES:TS:2008:6007 ('*Emule*').
[363] Purificación Martorell Zulueta, 'Análisis procesal del informe sobre cuantificación del daño' in Juan Ignacio Ruiz Peris (dir), *Competencia, Compensación de Daños y Mercados Digitales* (Tirant lo Blanch 2022), 261, 283.
[364] SAP Barcelona 51/2020, 10 January 2020 (Envelopes), ES:APB:2020:201, para 55 (my translation).

Spanish law provides for a particular category of witness evidence called the witness expert ('testigo perito'),[365] which contemplates the possibility for factual witness evidence to be provided at trial by a person who also has particular expertise which allows him or her to interpret witnessed facts with greater understanding and insight than a normal layman. This may provide a means to offer industry insight to the court of certain relevant facts and thereby greater assistance to the court in its assessment of relevant issues. This is what we have referred to as highly qualified witness evidence in the context of English proceedings such as *Sainsbury's*. Such evidence, where it is considered primarily as witness evidence, can as such only be provided orally at trial and without a written expert report. Accordingly, it may be preferred by parties to submit an expert report to provide evidence necessary to understand the workings of a particular industry which may be relevant to understanding the impact of a certain conduct in the market, as in the case of the payments market in *Sainsbury's*.[366]

From 'extrajudicial' documents to party-appointed expert evidence

Interestingly, party expert evidence is frequently referred to by Spanish jurists as 'extrajudicial' evidence.[367] Such an expression may surprise non-Spanish readers. It reflects the fact that, pursuant to the previous 1881 civil procedural rules, such evidence would have been prepared prior to the filing of a claim at the party's initiative and based on factual evidence available to it before filing. Such evidence was not granted the status of expert evidence. Rather, it was treated like other documentary evidence submitted as supporting evidence by the parties with their statements of claim or defence. At times, this could be complemented by oral testimony by its author at trial which was considered as mere witness evidence. The classification as 'true' expert evidence was reserved to court-appointed expert evidence.

The 2000 Civil Procedural Law ushered in a fundamental change in this regard in Spanish proceedings.[368] Under the 2000 Act, expert reports prepared at the parties' initiative were granted the consideration of true expert evidence for the first time and, furthermore, they replaced court-appointed expert evidence as the normal, or primary, form for such evidence. Expert reports are, in principle, to be submitted with the initial written proceedings (statements of claim and defence) alongside any fundamental documents on which the parties seek to rely. As noted, this also means that there is no real prior control of the choice of expert, as occurs more readily in the case of a court-appointed expert.

In my opinion, this background context to the concept of party-appointed expert evidence may explain the traditional understanding of expert evidence in Spanish law, even today, as evidence primarily prepared independently by each party outside the confines of the judicial procedure (and before it commences) rather than evidence which is produced and developed within the proceedings. It is the thesis of this research that this approach must inevitably adapt to reflect the new procedural demands and developments which influence the presentation of expert evidence in EU competition law proceedings. Indeed, in my view, such a process is already and irreversibly underway.

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[365] art 409 LEC. For a useful discussion of the witness-expert, see Xavier Abel Lluch and Joan Picó i Junoy (dirs), *La Prueba Pericial* (Bosch 2009), 54-61.

[366] See, the discussion in Ch 12.1(a) above.

[367] See, eg, STS 702/2013, 15 December 2015, ES:TS:2015:5619, LG 3.1.

[368] See, inter alia, the judgment of the Spanish Supreme Court of 15 December 2015, ES:TS:2015:5619, LG 3.1, and Seoane Spiegelberg, 'La Prueba Pericial en la Jurisprudencia del Tribunal Supremo', n 361, 55.

Necessary expertise

As in English litigation, the expertise of the expert to provide evidence on a particular question will become a matter to be considered by the court in deciding what weight to grant to expert evidence, rather than a question of admissibility.[369] The lack of relevant expertise of an expert to provide given expert evidence is seldom, if ever, a matter which is assessed at the admission stage in Spanish proceedings. The choice of expert is rather one for the parties and the expert report will be admitted as evidence provided it can be considered relevant and of use in resolving the issues in dispute in the proceedings.[370]

It can occur that the question of whether submitted expert evidence did finally satisfy the requirements to constitute pertinent expert evidence is addressed in judgment and evidence which has been admitted, but which fails the necessary test, is, in fact, ignored. Notably, this was the position of the minority in the Madrid Court of Appeal's judgment of 6 May 2022 in the Trucks litigation. This judgment is of particular importance for two reasons. First, it was a judgment adopted by the full chamber of the commercial section of the appeal court (Section 28) with a view to establishing unified criteria on key issues for the adjudication of cases in the Trucks litigation. Second, conversely and ironically, the minority view, expressed in an opinion annexed to the judgment (a so-called 'voto particular'), was inked by two prominent competition law judges - namely Justice Arribas and Justice Galgo - who have since taken on even greater prominence in the application of competition law by virtue of being assigned to the newly created specialized sub-section of the appeal court for competition matters.[371] That is, the judgment contains an inherent and important tension on a central matter in the assessment of expert evidence and does not, therefore, resolve the matter. The two magistrates who signed the minority opinion considered that the expert evidence offered by the claimant in that case did not, in reality, constitute expert evidence at all, since it did not involve an interpretation of the facts using a method which required any expert knowledge. Indeed, it could have been offered by the claimant based on an appraisal of simple facts in its statement of claim. In their view, accordingly, the expert evidence should be granted no weight as such:

> Contrary to the majority view, we do not consider that the expert evidence provided by the plaintiff offers a reasonable valuation of damages based on any of the methods accepted in economic theory.
>
> It is not that it is not sufficiently precise or that it naturally introduces hypothetical variables, but rather that, in reality, the evidence can only apparently be qualified as true expert evidence and only apparently uses a method accepted by economic theory, namely that of diachronic comparison in the same market.

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[369] Xavier Abel Lluch, *Las Reglas de la Sana Crítica* (La Ley 2015), 132.

[370] The expert report is implicitly admitted together with the underlying documents submitted with the statement of claim upon formal admission of the claim (or, similarly, the defence) without any formal judicial decision to that effect; see Abel Lluch and Picó i Junoy, *La Prueba Pericial*, n 365, 34; Montero Aroca, *La Prueba en el Proceso Civil*, n 303, 367. Counter parties have potentially the ability to object to the report being admitted at the preliminary hearing pursuant to art 427(2) LEC (albeit the possibilities to have the report inadmitted would be rather exceptional); Carlos de Miranda Vázquez, 'El pronunciamiento de las partes sobre los dictámenes periciales presentados: una reflexión crítica', (2009) 2 Justicia Año 315. It is at the preliminary hearing that, in truth, admission of expert evidence occurs, determined by the judge by reference to the general parameters of pertinence and utility (arts 281, 283, 429(1) LEC) and the specific requirements of art 335(1) LEC.

[371] These two magistrates have since been assigned to the newly created sub-specialization section of the Madrid Appeal Court, Section 32, which is dedicated to competition, unfair competition and intellectual property matters, pursuant to the Agreement of the Permanent Commission of the General Judiciary Council of 8 February 2023 (BOE nº 39, 15 February 2023, p 23429).

> We say that the plaintiff's expert opinion can only apparently be qualified as expert evidence because for its preparation, in the part we are now assessing, no special scientific, technical or artistic knowledge is required (article 335 of the Civil Procedure Act) and the result could have been offered directly in the claim because the report is limited to comparing the purchase price with that of the requested quotation, deflated to the date of acquisition by applying an inflation-correcting index.[372]

There is another example from the Trucks litigation. Many of the first round of claims filed by individual claimants in Spain were supported by an expert report prepared by an industrial engineer with no experience in competition economics or counterfactual economic assessment of harm.[373] Many of the first cases that reached the Supreme Court and were the subject of the June 2023 rulings were based on this report. The report does not contain any counterfactual assessment of harm, relying purely on general statistics about the impact of cartels from a so-called meta study - the Smuda report[374] - to estimate the impact of the infringement as it referred to truck prices. That expert report has invariably been rejected by the Spanish courts as being insufficient to quantify harm in a particular case. However, in general, the report has nevertheless been deemed sufficient discharge of the claimant's burden of proof to allow the court to exercise its faculty judicially to estimate harm. This position was confirmed by the Supreme Court in its June 2023 rulings.[375]

It is my submission that the expert report in question could quite properly have been rejected as expert evidence. While there are aspects of the Trucks litigation which involve questions of an engineering nature (such as the relevance of the conduct relating to the manufacturers' adaptation of truck engines to new EU environmental law standards), and this was a secondary question addressed in those first reports, the principal question broached related solely to the impact in truck sales prices of the conduct relating to exchange of truck price information. Arguably, therefore, it would have been appropriate to consider this evidence inadmissible as expert evidence or grant it no weight whatsoever as regards the discharge by the claimants of their burden of proving the quantum of harm, since the expert witness did not have the necessary expertise for the matter of hand. The latter, softer, position was adopted recently by Commercial Court nº 1 of Oviedo in its judgment of 29 May 2023.[376]

Finally, a particularly stark situation can be found in *Conduit*.[377] There the evidence provided by a court-appointed expert was entirely ignored at first and second instance, no reference to that evidence appearing in either judgments. It is averred that express motivation of the reasons to reject that evidence should have been provided in order, at the very least, to assist the parties and litigants generally to understand the criteria applied by the courts.

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[372] SAP Madrid 331/2022, 6 May 2022 (unreported) (my translation).
[373] That expert recognized, for instance, having no knowledge of the standard programme used in econometrics (STATA); see SJM3 Valencia, 20 April 2021, LG 2.1.
[374] Dr Florian Smuda, 'Cartel overcharges and the detriment effect of EU Competition Law', ZEW – Centre for European Economic Research Discussion Paper nº 12-050 (2012), available at: https://ssrn.com/abstract=2118566.
[375] See, STS 947/2023, 14 June 2023, ES:TS:2023:2480.
[376] SJM1 Oviedo, 29 May 2023, ES:JMO:2023:1874, paras 179-80.
[377] SJM5 Madrid, 11 November 2005, ES:JMM:2005:70; upheld SAP Madrid, 25 May 2006, ES:APM:2006:6773.

b) Facts and evidence on which the expert relies

An interesting and central question which arises in the context of expert evidence is: what are the facts on which the expert relies? This question may, in turn, be broken down into two further sub-questions:

(i) What are the underlying facts and evidence which the expert report must properly take into consideration?

(ii) What are the facts and evidence which the expert uses in carrying out his or her analysis (or calculations); more specifically, in our case, in estimating the effects of a competition infringement?

Underlying facts

The first question has received greater and clearer consideration to date in competition damages actions in Spain and is, therefore, simpler to deal with. Consistent with the approach of English courts, and with EU guidelines, expert evidence should be consistent with the underlying facts of the case.[378] In Spanish law, this reflects the requirement on the court to take into account facts both individually and as a whole - that is, together with all facts which have been subject to evidence, or admitted, in the proceedings.[379]

Of particular relevance in the context of competition private enforcement litigation is the evidence of the underlying competition infringement; notably, the evidence on the competition authority's file or the regulatory decision itself in a follow-on case. Courts in Spain have largely rejected expert evidence in cartel follow-on cases (such as, Spanish Sugar or Trucks) where that evidence has found that no harm has been caused by the infringement since such a conclusion is considered to be incompatible with the findings in the regulatory decision as to the nature and scope of the infringement. The principle was first established by the Supreme Court in its *Sugar II* decision in November 2013:

> In a case such as the one under appeal, in which the defendant has carried out an unlawful conduct which is harmful, it can generally affirmed be that it is not sufficient that the expert report submitted by the party responsible for causing the harm be limited to questioning the accuracy and precision of the quantification made by the expert report prepared at the request of the injured party. Rather it is necessary that the defendant's expert justify a better founded alternative quantification, especially bearing in mind the obstacle that the provisions contained in articles 209.4 and 219 of the Civil Procedure Law pose for reserving the liquidation of harm to the moment of judgment execution. Any other solution would be difficult to reconcile with the legal principle that damages suffered as a result of the wrongful act of another be compensated and the effective protection that must be granted to the right of the injured party to be compensated.[380]

The Supreme Court's judgment made it clear that, in a case with facts similar to the Spanish Sugar Cartel, a mere critique by a defendant's expert would generally be deemed insufficient to rebut a claimant expert report where that report satisfied the minimum requirements for quantification. Rather, the defendant expert would be required to offer a better-grounded alternative quantification of harm. Could that alternative quantification be zero? The implications of the Sugar ruling were, I suggest, that on the facts of that case the answer was

[378] See Practical Guide to Quantification, para 13.
[379] art 218(2) LEC which sets out the requirements for reasoning of judgments.
[380] STS 651/2013, 7 November 2013, LG 7.3.

no. Whether this would be possible on the facts of another case is, perhaps, an open question.

The majority of the rulings of lower courts in the Trucks litigation have found that a zero overcharge, even where this is based on empirical analysis by the defendant's expert, is not credible and such expert evidence has accordingly been granted no weight. This conclusion is based largely on the nature of the infringement as described in the decision, economic theory and statistical evidence on the harm caused by cartels on prices in the market.[381] The Supreme Court in its June 2023 rulings was less clear in this sense and seems to leave open the possibility of the defendant proving the inexistence of harm, or a zero overcharge, at least in theory. On the facts of the cases before it, no such evidence was found to have been provided. The only case where an alternative quantification of harm was furnished by the defendant, the Supreme Court found the evidence wanting because the data did not cover all the infringement period (omitting the first six years of the 14-year cartel period) and because, in the opinion of the court, the during and after comparator was potentially vitiated by post-cartel effects (i.e., the possibility that prices were affected beyond the end of the cartel period).[382]

This does not mean that the particular facts of a case may not need to be considered in assessing the causal relationship between the infringement and any particular claimant or claimant group, as the Appeal Court of Barcelona made clear in its January 2020 Envelopes ruling, anticipating similar statements of the CJEU three years later in *Tráficos Manuel Ferrer*. Hence, as noted earlier, a number of Spanish courts have found fault with attempts to calculate the estimated overcharge in Spanish truck prices on the basis of an estimated gross list price overcharge.[383] Similarly, the judgment of 21 October 2022 of Commercial Court nº 3 of Valencia in the Automobile Manufacturers' Cartel case[384] and a number of judgments in the EURIBOR case[385] have rejected expert evidence for wrongly assuming an adequate causal relationship between the particular facts constituting the infringement in those cases and the alleged harm to the claimant.

Facts used by the expert in analysis

The second question, by contrast to the first, is largely unresolved by the Spanish courts and raises some interesting questions. It will be recalled that Article 335(1) LEC refers to the purpose of the expert report as being to 'evaluate relevant facts or circumstances in the matter'.[386] What are those facts and circumstances? Do such facts and circumstances have to be evidenced in proceedings? As we will see, the answers to those questions are uncertain, variable and in a state of flux.

We should begin from the so-called 'golden rule' for expert evidence in civil proceedings. According to this rule, set out by the Supreme Court in a much-cited judgment of 12 April

[381] See, among many, SAP Valencia, 16 December 2019, n 299, LG 1; SAP Madrid 43/2022, 28 January 2022, ES:APM:2022:796, LG 6; SAP Madrid 331/2022, 6 May 2022 (unreported), LG 4.
[382] See, STS 947/2023, 14 June 2023, n 2, LG10, para 25.
[383] See section 16.4 above.
[384] ES:JMV:2022:9610.
[385] See, eg, SAP Barcelona, 15 July 2022, ES:APB:2022:7680, claims related to Commission Decision of 6 April 2016 in Case AT.39914 – *Euro Interest Rate Derivatives*.
[386] Alternatively, obtain certainty about those facts or circumstances where that is possible but, as already noted earlier, the sorts of matters which are the object of expert evidence in competition claims are not normally of this second, more objective type.

2000, the object of expert evidence should be facts and data which have been produced into the proceedings. This rule was adopted in connection with expert evidence, concerning an object at the centre of an industrial property dispute, which was rejected, in the Supreme Court's view rightly, due to the uncertainty which existed around the evidence concerning that object which had been produced by the claimant with its claim:

> [E]xpert evidence must be based on facts or data produced into proceedings in order to be technically evaluated and assessed. This constitutes the golden rule of expert evidence in the civil jurisdictional area; and in the present case the Court "a quo" has acted very correctly when it has discarded from the expert activity in the instance, the valuation of drawers intervened during a notarial act without absolute guarantees of reality and accuracy, and that were not, moreover, delimited as the object of the expert evidence.[387]

According to some, this means that the expert report must be limited to the facts and data which have been produced by the parties into the proceedings and the expert cannot introduce different facts into proceedings to those which have been alleged by the parties.[388] Put another way, the expert is not an alleger of facts.

This basic rule permits of certain nuances, however. In the first place, while parties are precluded from submitting those documents and evidence which found their legal action (or defence) from the moment of filing their statement of claim (or defence),[389] and expert reports cannot be used as a backdoor for the submission of such evidence out of time,[390] this strict rule of preclusion does not apply to evidence relating to secondary or accessory facts which could, accordingly, be the object of the expert's analyses. According to Professor Gascón Inchausti, fundamental facts (or facts which found the action) 'are those that fit exactly within the factual basis of the applicable rule so as to resolve the object of the proceedings', whereas accessory facts 'are those that do not fit exactly with the applicable rules, but refer rather to secondary aspects of the matter in issue, but which could end up being equally relevant for the final outcome of the case'.[391] Ultimately, however, what must be considered a fundamental fact is a question of the rights of defence and effective judicial protection of the parties.[392]

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[387] STS 371/2000, 12 April 2000, ES:TS:2000:3079, LG 1.

[388] This is notably the view of Joan Picó i Junoy, for example in *La Prueba Pericial en el Proceso Civil Español* (Bosch 2001), 50-1, or his followers from the Barcelona school, such as De Miranda Vázquez, 'El pronunciamiento de las partes', n 370, 332-3; Juan Antonio Andino López, 'Inadmisión de hechos o documentos inéditos introducidos a través de la prueba pericial (una conducta poca ética)' in Pico i Junoy, *La Prueba Pericial a Examen*, n 361, 456.

[389] arts 265, 269 LEC.

[390] Andino López, 'Inadmisión de hechos', n 388.

[391] Gascón Inchausti, *Derecho Procesal Civil*, n 225, 273-4. Professor Gascón adds that fundamental facts are ordinarily introduced in evidence by the parties, whereas accessory facts may be introduced (proposed) by the court itself (notably, under art 429(1) LEC, subject to which we will return below). He does not specifically refer to introduction by the expert, however. Professor Vegas Torres has made the distinction in the following terms: "[N]ot all facts that may be of interest in civil proceedings have this character of "fundamental". There are also "accessory" facts, because they are not directly subsumable in the factual assumption of the applicable rule, but which are also of interest in civil proceedings: facts that constitute an indication or basis for inferring, by means of presumptions, fundamental facts, or those that provide elements of judgment for the evaluation of evidence, for example. These accessory facts can be taken into account by the judge even if they have not been formally alleged by the parties, provided, however, that they have been part of the procedural debate and do not appear by surprise in the judgment, to avoid the breach of the rights of defence of the party to whom they are detrimental."; Jaime Vegas Torres, *La fijación de los hechos en el proceso civil*, Estudios Jurídicos 2007, Centro de Estudios Jurídicos del Ministerio de Justicia.

[392] We will return to this point in section 17.3(b) below.

Such secondary facts may, accordingly, be submitted to proceedings at a later moment, subject to the general rules on preclusion,[393] and there seems to be no reason why they should not be admitted by way of documents or other evidentiary elements annexed to the expert report, even where such report is submitted after the parties' written statements.[394]

Secondly, it is inevitable that experts may require to access further information in order to carry out their investigations and produce an opinion. This point seems increasingly to be recognized by qualified commentators, such as de la Oliva, Ramos Méndez or Abel Lluch,[395] the latter noting in 2014 that it was accepted by the then most recent doctrine that the expert does not have necessarily to limit the application of his or her technical expertise to evaluating facts previously produced by the parties, but may also introduce relevant secondary facts him or herself into the proceedings.[396]

Finally, we should make reference once more to Article 336(2) LEC, which provides as follows:

> The reports shall be formulated in writing, accompanied, where appropriate, by other documents, instruments or materials suitable for presenting the expert's opinion on what has been the object of the expertise. If it is not possible or convenient to provide these materials and instruments, the written report shall contain sufficient information about them. The report may also be accompanied by such documents as are deemed appropriate for a more accurate appraisal.

The wording of this provision is on the face of it open and non-prescriptive, apparently allowing the expert to determine on the basis of possibility and convenience what 'documents, instruments or materials' it is appropriate to submit with the report in order to permit its proper exposition and the court's correct assessment of it.

It is perhaps worth observing, first, that this provision would seem to confirm what we have been positing until now; that is, that there may be documents and information which will have been used by the expert in his or her work or analysis, but which may not form part of the fundamental facts and evidence submitted to the proceedings by the parties. Secondly, the loose wording of Article 336(2) LEC suggest that experts are not faced with a strict requirement to produce such underlying materials with their report at all. That was the position of the Appeal Court of Valencia interpreting the data room cases referred to earlier. Arguably, the Supreme Court's rulings in Trucks in June 2023 provides some support for that position (but does not seem determinative).[397] This is perhaps striking to a common lawyer or, indeed, to an EU competition lawyer; for whom it would be standard practice that experts

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[393] art 271 LEC provides for that being at trial, subject to the admission of post-trial 'final diligences' ('diligencias finales') pursuant to art 435 LEC.

[394] See, for an example, STS 737/2014, 22 December 2012, ES:TS:2014:5721, concerning the submission of an accountant's report as a document annexed to the party's expert report which was submitted into proceedings after the filing of the statement of claim (and, accordingly, after the moment fixed for the submission of documents founding the action by art 265(1) LEC). The Supreme Court considered this document properly admitted in proceedings since it deemed the document to constitute 'indirect evidence' for the action, but not direct evidence of a fact which was constitutive of the legal action being exercised (LG10). This class of complementary or accessory documents, which may be produced after the deadline for constitutive documents, is also the view, among others, of Magistrate Méndez Tomás, '¿Puede aportarse al informe pericial un documento nuevo en el proceso, si es necesario para elaborar el dictamen (arts. 336.2 y 270 LEC)?' in Abel Lluch and Picó i Junoy, *La Prueba Pericial*, n 365, p 402.

[395] Francisco Ramos Méndez, *Enjuiciamiento Civil* (Atelier 2008), 795; Xavier Abel Lluch, 'El estatuto jurídico del perito' in *Tratado Pericial Judicial* (La Ley 2014), 63; Andrés de La Oliva Santos, *Derecho Procesal Civil* (Madrid Centro de Estudios Ramón Areces 1991), 353.

[396] Xavier Abel Lluch, *La valoración de la prueba en el proceso civil* (La Ley 2014), 132.

[397] STS 947/2023, 14 June 2023, n 2, LG 10, para 24 in fine.

disclose and share underlying data and materials used in their analyses, including also the software codes used to specify and run an economic model.

The approach to expert evidence of the Spanish courts

At this stage, it is worth recalling the traditional understanding of party expert evidence in Spain to which we have alluded earlier. To my view, this may help to explain the instinctive approach of Spanish courts. As noted, expert evidence was originally extrajudicial evidence based on each party granting access to information in its possession (or available from third parties) to a chosen expert to produce an expert opinion on a relevant fact in issue in the proceedings to be brought. Even under the 2000 Civil Procedural Law, as we will see below, the process of evaluation of that evidence, now granted the status of expert evidence, does not, in principle, involve any real degree of engagement between the experts or any sort of iterative process, but rather a separate assessment of alternative analyses followed, at most, by the possibility of joint testimonies at trial (so-called 'careo', which is similar to the English hot-tubbing).

A few examples of this approach in the context of the Trucks litigation may serve to make the point more clearly. In a number of early cases, one of the defendant truck manufacturers requested to be granted access to the data and commands[398] underlying the claimant expert's report quantifying harm (in particular, the report produced by CETM). The requests were based on the disclosure provisions under the new competition damages regime (Articles 283 bis a) et seq) and were justified on the grounds that the claimant's report contained insufficient information and explanations to allow the defendant's expert accurately to verify and replicate the calculations and results presented in the claimant's report. Such requests were invariably rejected by the courts, partly on the ground that the requested information was already largely available to the defendant,[399] but also on the principal ground, of special interest for our discussion, that the requests were incompatible with the nature and purpose of expert evidence under the Spanish procedural rules. The first court to consider the matter was Commercial Court nº 1 of Pontevedra, which dealt with the request as follows in its order of 26 July 2019:

> [W]e may note that the rule [Article 283 bis a)] always refers to sources of evidence on factual elements that, directly and in themselves, may be relevant or decisive in the process, but never to what may constitute information, technical information, or statistics that experts or experts may use as a starting point for their assessments.
>
> It is also necessary to take into account art. 335 of the LEC, on the object and purpose of the expert report, when it states that these reports will be incorporated to the process if "scientific, artistic, technical or practical knowledge is necessary to evaluate facts or circumstances relevant to the matter or to acquire certainty about them" (sic). In other words,

[398] By commands, we refer to the computer software codes containing instructions which are used by the experts to treat the original data collected by them for their analysis (provided to them, typically, by their client, or obtained from public or other third party sources), both in terms of 'cleaning' that data (correction of errors, elimination of outliers, homogenization of data from different sources, categorization of data, etc.) and of making their final calculations, typically employing a number of additional (e.g. supply and demand) variables collected from other sources (and also sometimes treated). In a STATA-based statistical model, such codes (or instructions) are contained in ".do" files. See the CNMC's Guide on the Presentation of Economic Evidence, p 5.

[399] CETM's experts had annexed to their report a paper copy of the databases which had been used in their analyses; added to which, one of the databases was based on information on gross list prices extracted from transport-sector magazines. Part of the dispute among the parties concerned the alleged lack of clarity of those paper copies and the consequent difficulty of digitalizing the information accurately for use by the defendant experts.

> the expert report is the means to introduce in the process certain specialized knowledge that helps to better appreciate relevant facts or circumstances. The expert report is not configured as a mere means of criticism of another report provided by the opposing party. This means that the expert report of each party must contain its own verifications and evaluations on what needs to be studied by an expert, but it is not foreseen that it can consist merely of a criticism or disproval of other reports, unless such disproval results from the outcome of the verifications made by the expert.
>
> In view of the above, it follows that what Daimler is requesting here is not really access to a source of evidence in order to be able to introduce certain relevant factual data into the proceedings, but rather that it is requesting that the defendant provide the databases used by its experts, so that Daimler's experts can criticize their report and, furthermore, so that they can carry out their work more easily. It is as if, in the case of a chemical analysis of water carried out by a biologist at the request of a party, the opposing party were to request that he also carry out this analysis for it, so that its expert could criticize it, and also provide him with the statistical studies or doctrinal articles that he took into account to draw up his conclusions, in order to facilitate the work of his expert. In this case, if Daimler sustains a different thesis from the one that results from the expert's report in the lawsuit, when it affirms that there was no overcharge in the sales of the trucks acquired by the plaintiff; therefore, what it should do is to provide an expert's report based on its own study of the market from which this affirmation could result; For this purpose, it must use the databases it deems appropriate (that is, it must make its own "measurements") or, if it wishes, it may try to access on its own the same databases used by the plaintiff to offer a different explanation of the same, but it cannot expect the plaintiff itself to do this work, since this is outside the provisions of the Law.[400]

This decision was followed by a series of similar decisions by, among others, the Commercial Courts of San Sebastián, Valencia and Zaragoza.[401]

In its order of 2 October 2019, Commercial Court nº 1 of San Sebastián observed, as regards the request for access to the commands employed in the claimant expert's econometric model, that:

> [I]t is not in the spirit of the measure that the expert has to provide the other party [so that] his expert can make a counter-report on each and every operation, formula or sequence of data that he has used to extract results or projections, but he is free to put in the report the explanation that he deems appropriate, which will be at the expense of the possible criticism for lack of traceability and assessment of the court, which will have to take into account both the content of the report and the criticisms that the other party may make regarding its traceability or credibility in terms of formulas, methods and results.

In its order of the same day, Commercial Court nº 4 of Valencia made the following observations about the nature of expert evidence:

> Certainly, art. 347 LEC contemplates among the functions of an expert the criticism of the opinion issued by the expert of the opposing party; therefore, any action carried out by ECA Economics to contradict the bases and operations carried out in the [plaintiff's] report is admissible, but this premise does not mean that such action can only be carried out if ECA Economics has the same databases and all the commands applied by the plaintiff's experts; Rather, the independence and professionalism of the experts must be respected, carrying out the expert order in accordance with the provisions of Article 335 LEC and pointing out the

[400] AJM1 Pontevedera, 26 July 2019, ES:JMPO:2019:69A.
[401] AJM1 San Sebastián, 2 October 2019; AJM4 Valencia, 2 October 2019; AJM1 Zaragoza, 15 November 2019 (unpublished).

> limits of their report due to lack of information or knowledge. In view of the foregoing, this second request of the defendant must be rejected, on the understanding that replicating exactly the model constructed by [the plaintiff's] expert, in order to see if there has been any material error in its use, lacks all usefulness and relevance for the present lawsuit. In this regard, it should be recalled that according to Article 336.2 LEC, the expert's report shall be accompanied by the documents, instruments or materials suitable for presenting the expert's opinion, and that Article 347.1.3 LEC allows the defendant's counsel to ask the plaintiff's expert about his method, premises and conclusions and other aspects of the report.

In sum, the position of these courts, representing certainly the majority view at the time, was that each expert should carry out its own estimation of harm based on its own choice of available documentation and information which it considered necessary to carry out that task. Issues such as the lack of transparency of a particular report's sources and calculations could be an object of criticism and cross-examination at trial and be considered by the court in determining the weight to be granted to that report in its decision. However, there was no obligation to present the other party with access to the data used by experts in their report, nor to make it available to the court, nor any concomitant right on the other party to require such access. It will, indeed, be recalled that the position of the Valencia Appeal Court on this matter, applying the loose language of Article 336(2), was that experts are not under any obligation to produce data with their reports and could legitimately chose not to do so; for example, for practical reasons (for instance, if the information is extremely voluminous) or in light of commercial concerns (for example, if the information is commercially sensitive client data).

At the same time, it is recognized that these issues may become relevant when determining what weight the court should give to expert evidence in its final judgment. In the Trucks litigation, this has meant, for instance, that little or no weight has been granted by many lower courts to defendant expert reports because inter alia they were not accompanied by the underlying data used in those reports.[402] Similarly, the failure by the claimant's party-appointed expert to submit underlying documents which support (provide the evidence of) the data used in the analysis has, on occasions, undermined the weight given to the report where, for instance, the expert acting for the defendant has been able to point to relevant anomalies in the data.[403]

The position of the Supreme Court seems similarly to be that the question of underlying data is not material (and by implication need not be produced into proceedings), unless it can be shown that experts have not been impartial in their selection of data and this has distorted results making them untrustworthy. Nevertheless, the court's assessment of this issue in the first rulings has been somewhat cursory as it was not a major issue in the first round of 15 cases which reached it on appeal. Indeed, it could be asked whether the criterion outlined by the Supreme Court does not imply, in certain circumstances, the need for a certain level of transparency regarding the data used (and their use and manipulation) in order to allow for their verification.

It is particularly notable that the courts have not, in general, attached any real benefit to the suggestion that experts could or should work off the same common data sources, much less

[402] By way of example, see SAP Valladolid, 6 July 2021, ES:APVA:2021:957. The Supreme Court has, by contrast, rejected the suggestion that internal economic data (as opposed to public) should be rejected as a matter of principle; STS 947/2023, 14 June 2023, LG 10, para 24.
[403] eg SJM1 San Sebastián, 4 October 2021, ES:JMSS:2021:13673, LG 5.

agree what those should be. Indeed, they conceive this as contrary to the nature and purpose of expert evidence in Spanish civil proceedings. Some of this, no doubt, has its origin in the way in which party expert evidence has traditionally been conceived and the way in which, even now, it is introduced into the process. We will return below to the subject of process to analyse in greater detail what limitations the current procedural rules for expert evidence pose and to consider what scope exists for adapting the application of those rules to cater for the sort of expert evidence courts are faced with in competition damages claims. However, for now, it is worth making an observation as regards what I perceive to be a possible error in the conception of what that type of evidence generally entails; i.e., what the object of the expert exercise is.

Let me return to the example given by the Pontevedra court in the passage cited above: the carrying out of a test on the chemical composition of a sample of water. It seems to me that this simile is misconceived. In a competition damages case, the object of the expert evidence is, typically, the quantification of harm (or, more generally, the assessment of the impact of a competition infringement, alleged or proved). As noted earlier, this exercise is not an exercise in precise scientific measurement of an existing or identifiable object, such as a sample of water. (If it were, one would anyway expect that such object should be part of the evidence in proceedings and available for inspection by either party). It is an exercise of opinion as to a hypothetical situation (an estimation) based on observations about how a given market works. The ways of carrying out that task are, while not infinite, potentially numerous, involving the expert in assessing the object of the exercise (e.g., the existence and extent of harm) by reference not to that 'fact' directly (since it is not directly identifiable) but to other secondary (or indirect) verifiable facts (e.g. transaction data) which are the real object of the analysis he or she will perform.[404] Those secondary facts, therefore, take centre stage in the expert analysis. As such, as in the case of the water sample, it seems necessary (or preferrable at least) that such facts become part of the evidence in proceedings.[405]

As regards the commands used by the experts to construct their model and make the corresponding calculations, the answer is not so evident and, understandably, such a request will have come as a bit of a surprise to judges, not to say at times be perceived as an inappropriate use of the disclosure mechanism.[406] However, aside the question of the appropriate legal base for such a request, it is important to note that the 'measurements' adopted by the expert are not similar to the scientific test carried out to determine the chemical composition of a sample of water. The measurements carried out by an expert in a competition case (again, because they involve estimating or simulating an unidentifiable, hypothetical and normally complex situation, as opposed to an identifiable, directly

[404] SAP Barcelona, 10 January 2020 (Envelopes), ES:APB:2020:201, para 54, the Appeal Court of Barcelona referred to such secondary facts which serve the experts as factors on which to base their hypothesis for calculating harm (i.e., the counterfactual scenario) as 'indirect', as opposed to 'direct', evidence: 'it is reasonable to think that there will be no direct means of proof, but indirect means of proof, that is to say, data or indications that allow us to make the judgment of inference to which we have referred' it is reasonable to think that there will be no direct means of proof, but indirect means of proof, that is to say, data or indications that allow us to make the judgment of inference to which we have referred'. it is reasonable to think that there will be no direct means of proof, but indirect means of proof, that is to say, data or indications that allow us to make the judgment of inference to which we have referred'.

[405] In what format the evidence should be submitted (whether in paper copy, readable pdf or not, or in electronic format) is a further question, to which we will return in Ch 17.3 below.

[406] eg, AJM1 Pontevedra, 18 September 2019 (unpublished), rejecting the defendant's appeal of the previous AJM1 Pontevedra, 25 July 2019, considered that the original request was not in fact admissible under art 283 bis and should have been rejected out of hand (or not admittted).

measurable object) involve that expert making a series of important assumptions and choices as to how to process the data he or she has collated to carry out his or her calculations. Those assumptions and choices may or may not be sufficiently clear on the face of the report and may be key to understanding the validity and robustness of the estimation of harm; and, therefore, to the court's assessment of the evidence. A further example from the Trucks case may help to appreciate this point. The defendants were able, in time, to unpick the steps adopted in the econometric models used by the experts instructed by the CETM claimant group as the basis for their report and persuade some Spanish courts that the claimants' experts had committed relevant methodological errors. This process of rebuttal and replication needed well-resourced expert teams, time, repeated proceedings and cross-examination, as well as the granting of access to the underlying models in certain courts, in order to allow these details to be properly aired and understood. Furthermore, this is not a task that the judges themselves can easily perform without the assistance of the opposing experts, nor should they be expected to, given the complexity of the techniques used.[407] The methodological errors that were identified proved central to the decision of a number of Spanish courts to reject that report as adequate evidence of the overcharge alleged to have been caused by the Trucks cartel in Spain. Accordingly, one can appreciate that these methodological choices (reflected in the model commands or codes) are of importance for the case.

It is worth observing, finally, that the position described until this point is not comprehensive of the Spanish commercial courts. There are a handful of courts which, with time, have been receptive to requests for access to the data and codes used in the opposing party's expert report. These include, to my knowledge: Commercial Court nº 3 of Valencia, Commercial Court nº 14 of Madrid and Commercial Court nº 1 of Córdoba, and the list is steadily increasing.

Conclusions

Let us now try to bring these various strands together to assess the question we have posed ourselves; namely, what are the facts which form the object of the expert report and to what extent do they need to be evidenced in proceedings? We have witnessed a mixed scene. However, it is perhaps possible to summarise the current position under Spanish law as interpreted by the courts as follows:

- The expert report cannot introduce fundamental facts which have not already been produced into the proceedings (such as, for instance, underlying facts concerning the alleged infringement or the economic transactions which have served as a vehicle for harm allegedly suffered by the claimant) and, in answer to our first question above, its analysis should be consistent with such facts.

- The expert may rely on further facts which are necessary in order to provide the opinion he or she has been asked to provide (for instance, concerning the quantum of harm in those underlying transactions), such as, in particular, transactions from a comparator market which it wishes to use as a benchmark in its estimation. Depending on the facts, these may be considered secondary or accessory facts from

[407] The Court of Appeal of Pontevedra in its judgments on the CETM report noted this difficulty, observing that 'two econometric formulas are constructed using the selected data, which are inaccessible for the layman' (SAP Pontevedra, 6 October 2020, ES:APPO:2020:1845, para 44).

a formal perspective, but may constitute fundamental facts - this being, ultimately, a question which should be assessed from the perspective of rights of defence.

- The expert is not apparently obliged by Article 336(2) LEC to produce evidence of such secondary facts as evidence in proceedings, but only to provide indications and explanations which the expert considers sufficient to permit the adequate exposition and assessment of the report. Nevertheless, the lack of adequate transparency may persuade the court to grant less evidentiary weight to that report – in particular, if it can be shown that the expert has engaged in non-impartial selection of data and this has distorted its results. It is suggested, further, that a proper construction of Article 336(2) LEC based on rights of defence, equality of arms and EU law and practice should, in fact, require such secondary facts to be produced into proceedings (subject to which we return in section 3 of this chapter, below) .

- The expert is not obliged to produce other materials which are relevant in the production of the report, such as criteria (e.g., computer codes or assumptions used to interpret data), or other accessory information (such as demand and supply variables), which are used in constructing the estimation model and making the calculations of harm. Some of these elements may constitute accessory facts. Others are not facts at all, but rather steps in the scientific calculations of the expert. The lack of transparency as to these elements may be a factor which influences the court's assessment of the evidence. Indeed, it seems likely that transparency is, in fact, a factor which may contribute to a court being able to assess (and, so, grant weight to) the methodology used by the expert, whereas without such transparency this may be more difficult or, even, impossible.

c) Court-appointed experts

Court-appointed experts are permitted and provided for in the Spanish civil procedural rules, but they do not currently play a role in competition damages litigation. Rather, while the Spanish procedural regime is technically a "mixed" or "dual" model for expert evidence, it is in practice far closer to the adversarial expert system known to English courts, and quite unlike that of other continental systems (such as Italy, France or Germany) where court-appointed experts play a leading, indeed a decisive role, in the matter of expert opinion.

As noted already, the 2000 Civil Procedural Law brought about a fundamental change to the regulation of expert evidence by granting party-appointed expert reports the category of expert evidence. In effect, this made party expert evidence the default method for producing expert evidence,[408] save in situations of legal aid.[409] Article 335(1) LEC contemplates the alternative of court-appointed expert evidence too, making the system a so-called dual system. However, this has not to date proved a normal solution for parties to choose, certainly not in competition cases, for the reasons we will now briefly consider.

First, the preamble to the Civil Procedural Law indicates the priority role granted to party-initiated expert evidence in line with the general rogatory principle (party initiative) which underpins the new law:

[408] See, inter alia, Picó i Junoy, *La Prueba Pericial en el Proceso Civil*, n 388, p 22, and Rafael Orellana de Castro, 'Un estudio crítico sobre los diferentes sistemas de designación de peritos y sobre las listas de peritos de la LEC' in Joan Picó i Junoy (dir) and Carlos de Miranda Vázquez (coord), *Peritaje y Prueba Pericial* (Bosch 2017), 104.
[409] Those who are entitled to so-called 'free assistance' are entitled also to have the court appoint an expert to prepare a report without charge to the relevant party (art 335(1) LEC in fine).

> With the necessary exceptions for civil proceedings in which a public interest is to be protected, this Law is coherently inclined to understand expert opinions as a means of evidence within the framework of a proceeding, in which, with the exceptions already mentioned, the court is not required and responsible for the investigation and verification of the veracity of the relevant facts on which the claims for protection formulated by the parties are based, but rather it is on the parties that the burden of allegation and proof falls. And, for this reason, party-appointed expert reports are introduced to the law and the appointment by the court of an expert is reserved for cases in which this is requested by the parties or is strictly necessary.[410]

In the words of Professor Abel Lluch, the 2000 Act configures the court-appointed expert as being 'optional, subsidiary and contingent'.[411] One of the central reasons that the Act effectively bestowed on party-appointed expert evidence a primary role in the new regime is that its submission must coincide with the initial written statements of case (the parties being precluded from producing expert evidence thereafter except in exceptional circumstances). Accordingly, the parties must take a decision at the outset of the case whether they wish to submit expert evidence themselves or not, losing the right to propose their own expert at a later stage if they do not do so.

There are also considerable advantages for parties in terms of control and certainty with submitting expert evidence which has been prepared at their own initiative, and which the parties accordingly lose if they do not submit such evidence at the start of proceedings. Among other reasons: (i) the expert will be selected by the instructing party for the relevant expertise and experience which that person (or expert team) can offer in the particular circumstances of the case; (ii) the fees will be negotiated and known; (iii) the expert's opinion can be canvassed before the report is finalized and submitted, such that if it is unfavourable to the instructing party, that party may decide to change strategy (or expert); (iv) the expert can provide ongoing technical support to the appointing party, for example as regards the preparation of the statements of claim or defence (as applicable), of evidentiary proposals or requests for disclosure, or of the examination and cross-examination of experts at trial.[412]

By contrast, the use of court-appointed experts poses a number of well-known disadvantages to litigants in Spain. These include, first and foremost, the lack of guarantees around the technical ability of the court-appointed expert to carry out the specialized task which is required and, even, that the report will be of any real practical use for the resolution of proceedings. These uncertainties derive from the way in which experts come to be appointed by the court, according to a so-called 'lista corrida' system. Pursuant to Articles 340 and 341 LEC, the court-appointed expert must normally have an official qualification in the relevant subject-matter and be included in a list to be provided yearly by the relevant professional bodies or institutions to the courts. These are not filters guaranteeing of knowledge and expertise in certain specific areas. Subject to party agreement on the expert

[410] Recital XI LEC.

[411] Abel Lluch, *La Prueba Pericial*, n 365, 105.

[412] See, further, Rafael Orellana de Castro, 'La prueba pericial por designación judicial a debate: ¿qué problemas plantea en la práctica y cuáles son sus soluciones?' in Picó i Junoy, *La Prueba Pericial a Examen*, n 361, 97. As to point (iii), it is worth noting that the distinction between technical consultant and testifying expert which exists under English civil procedure rules (in particular, as regards disclosure of the instructions and draft opinions for experts) do not apply in Spain and may accordingly weaken the rule concerning the expert's impartiality somewhat in Spain.

to be appointed,[413] the nomination will then be determined by order of inclusion on the court's relevant list. The control of this system is furthermore weak, unclear and inadequately regulated.[414] Indeed, according to information available on the Judiciary Council's website, the situation varies enormously from one autonomous community to another, in terms of organization, use and cost. Information is, however, only patchy at best.[415] The categories of expertise vary and tend to be broad. Of potential relevance to competition damages claims, there are categories for accountants and, only sometimes, a separate category for economists. In addition, the number of experts is very high. According to Orellana de Castro, himself an eminent judicial expert, the number of judicial experts in Cataluña alone in 2017 was over 7,000.[416] This implies that the random selection of the expert from the relevant list will likely be somewhat of a lottery.

These considerations led the Supreme Court in *Sugar II* to offer a steer away from the use of judicial experts in competition cases, given the high level of expertise required:

> The existence of discrepancies between party experts and the absence of expert evidence on behalf of a court-appointed expert (which is difficult due to the "running list" system provided as a general rule in the Civil Procedure Law and the extreme specialty of the object of the expertise), reasons expressed by the first instance judgment to justify such reduction, are not adequate arguments to justify by themselves such reduction. [417]

As already noted above, the use of a court-appointed expert in the *Conduit* case (at the claimant's request) had no impact at all on the outcome of the case and was, indeed, completely ignored in the final judgment.[418] I would venture that the main reason for this was the rather obvious lack of the necessary training and expertise of the appointed expert to provide a well-founded expert opinion on the subject-matter at hand (the damages caused to Conduit as a result of Telefónica's exclusionary abuse). Accordingly, this amounted to time and resources entirely lost for the claimant in that case and, arguably, a failure by the system to provide a workable regime, despite the right being recognized to parties in the statute books.

Additional drawbacks are associated with court-appointed experts. These include: (i) the tendency to nominate a single court-appointed expert (established as a default rule in Article 339(6) LEC); (ii) the rather cumbersome and slow process for nominating an expert; (iii) the uncertainty around fees; or (iv) the difficulty for parties to engage with the expert, and (I would add) the potential for abuses, since there is no regulated process for the expert's contact with the parties, nor any court control of the same.[419]

One of the potential advantages of court-appointed experts, by contrast, is that they are not dependent on any of the parties, since they have not been appointed by them. Indeed, there seems to have been a tendency, particularly in the early years of the application of the 2000

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[413] This is foreseen under art 339(4) LEC, where the parties agree to request the court to appoint one common expert for the proceedings, and under art 341(2) LEC in the unusual situation where there is only one potential expert in the relevant subject-matter, in which case this nomination will, in principle, require the consent of the parties.

[414] See, for example, Orellana de Castro, 'La prueba pericial por designación judicial a debate', n 392.

[415] https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Actividades-de-apoyo-a-los-organos-judiciales/Actividad-Pericial-Judicial/.

[416] Orellana de Castro, 'La prueba pericial por designación judicial a debate', n 392.

[417] STS 651/2013, 7 November 2013, *Sugar II*, LG 7.4.

[418] See para (a) above.

[419] See, further, Orellana de Castro, 'Un estudio crítico', n 408.

Procedural Law and given a certain inertia from the previous regime of court-appointed only expert evidence, for courts automatically to associate greater impartiality and, therefore, credibility to court-appointed experts over party-appointed experts precisely because a party could (and would) choose not to present unfavourable evidence prepared by an expert instructed by it, whereas it has no such control over court-appointed expert evidence.[420] With time, however, this proposition has apparently lost some force. First, it is the case that both party-appointed experts and court-appointed experts are sworn to impartiality when they emit their reports – a subject we will come on to shortly. Secondly, the Supreme Court's jurisprudence on the evaluation of expert evidence has focused on the rational and reasoned assessment of evidence according to the so-called criteria of 'sana crítica' (literally, healthy criticism, or sound assessment), where the mode of expert designation does not play a central role.[421] Indeed, beyond perhaps subject-matters of a relatively simple or mainstream technical nature, the theoretical impartiality of a person who has little concrete technical expertise in the matter at hand is rather emptied of significance since the expert is not able to assess the relevant facts and evidence with any real cohesion or authority. Indeed, many commentators, and I would agree, consider that it is more helpful to promote the effective adversarial presentation and rebuttal of expert opinions between real and experienced experts, than request a single opinion from a person who is unsuitably prepared to provide such an opinion on the matter at hand.

Is there any role for court-appointed experts, then, in Spanish competition litigation? I would say that, currently, the answer is basically no and that our priority should be on improving the conditions for adversarial party-appointed expert evidence. This said, any such role, if it is to be granted to court-appointed expertise, needs to be properly framed and delimited. This requires work, although it is not an impossible task. First, in current conditions, court-appointed expert evidence should not, in any event, replace party-appointed expert evidence. It will normally be important that court-appointed expert evidence is properly contrasted with the opinions of other experts to ensure the court is enabled to perform a proper assessment of the evidence and achieve an adequate approximation to the truth of the facts in issue. In this sense, it should be noted that the ability of parties to request the appointment by the court of an expert when they have already presented expert reports prepared by experts appointed by them is not without some uncertainty.[422] Nevertheless, the majority opinion considers this is possible, where such evidence is necessary and would be useful, both from the perspective of fundamental procedural rights and given the possibilities for such a 'third' opinion to be proposed in certain expressly determined circumstances in the law.[423]

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[420] See, Orellana de Castro, ibid 109-14; and, by way of examples, SAP Cantabria, 1 July 2005; SAP Baleares, 3 October 2006; SAP Huelva, 1 October 2009; STS, 15 December 2015, ES:TS:2015:5619, LG 3.3, 3.5; STS 125/2016, 3 March 2016, ES:TS:2016:799, LG 7.4.

[421] We will address this matter in Ch 17.2 below.

[422] This is because art 335(1) LEC describes the two types of expert evidence in the alternative.

[423] See, for example, Picó i Junoy and Abel Lluch, *La Prueba Pericial*, n 365, pp 95-101 and, in the same publication, Joan Picó i Junoy, 'La prueba pericial de parte y la de designación judicial, ¿son compatibles, esto es, pueden las partes en la demanda o contestación aportar un dictamen privado y solicitar la designación judicial del perito?', 299. As to the possibilities to request a judicially-appointed expert during the proceedings: arts 339(3), 427(4) LEC. The *Conduit* case is an example in the competition sphere where the parties produced reports by experts appointed by them and the claimant requested in its statement of claim, in addition, the appointment by the court of a further expert (pursuant to Article 339(2) LEC). Another example is the first commercial court ruling which was handed down on the merits in the Trucks litigation: namely, the judgment of Commercial Court nº 1 of Zaragoza of 13 December 2018, ES:JMZ:2018:4752.

The second point to consider was raised by Commercial Court nº 1 of Zaragoza in its judgment of 13 December 2018; namely, how to ensure the appointment by the court of an expert with the necessary expertise. There, faced with the plaintiff's decision to withdraw its request for the appointment of a court-appointed expert alleging the lack of assurance that such an expert would have the necessary experience, Judge Rincón noted:

> The plaintiff, in spite of the forcefulness of the defences and especially of the expert reports presented against it, waived the appointment of an expert at the preliminary hearing, alluding to the complexity of the report and the inadequacy of the list provided by the LEC, an argument that is not acceptable given that articles 340 and 341 provide solutions for these cases, including the possibility of requesting Professional Associations to appoint professionals with knowledge and experience in the field.[424]

Accordingly, in the judge's opinion, and despite the cautionary words of the Supreme Court in *Sugar II*, it would be possible to apply the existing procedural rules to achieve that goal (i.e. of appointing an expert with sufficient expertise). The judge seemed to be suggesting a greater degree of flexibility might be applied by, for instance, requesting a specific expert, or list of experts, from professional bodies perhaps on a more ad hoc basis. In my opinion, this requires a greater degree of institutional engagement between the judiciary and professional bodies on a more ongoing basis than that which currently exists, in order for both sides to attain a greater mutual understanding of their respective needs and capacities and thereby ensure that the experts offered are truly appropriate.[425] Alternatively, and in the meantime, it seems that only if there is the will of parties to seek agreement on an appropriate expert could the prospect of nominating a third court-appointed expert offer a realistic option in competition cases.[426]

Finally, there may be a discrete role for court-appointed experts in the matter of confidential information. Not a role that has as yet been explored by the courts in Spain, nevertheless it is contemplated in Article 283 bis b) 5.5º (which refers generally to the use of experts to protect confidential information) as interpreted by the European Commission in its Communication on the Protection of Confidential Information.[427] It is not immediately obvious why a confidentiality ring limited to party-appointed experts and external lawyers would not normally be sufficient to protect confidentiality, but perhaps in certain circumstances of extreme sensitivity this role may be of utility.

d) Duties of experts

The 2000 Civil Procedural Law imposes duties of impartiality and objectivity on experts, whether they be party-appointed or court-appointed. These duties are, furthermore, supported by mechanisms whereby the parties can challenge the independence or impartiality of the expert.[428]

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[424] SJM1 Zaragoza, 13 December 2018, ES:JMZ:2018:4752, p 6.

[425] This point is also made by Carmen Vázquez, 'Cómo mejorar la regulación sobre la(s) prueba(s) pericial(es)? Un marco para incentivar la comprensión judicial de las afirmaciones periciales', in Picó i Junoy and de Miranda Vázquez, *Peritaje y Prueba Pericial*, n 408, 284-5.

[426] This alternative is contemplated in art 339(4) LEC.

[427] Communication on the Protection of Confidential Information, n 568 (Part I), para III.D.

[428] art 219 LOPJ and arts 124-8 LEC provide for the challenge to a court-appointed expert ('recusación'), which can give rise to the expert being replaced; art 343 LEC provides for the objection to a party-appointed witness ('tacha'), which can be taken into account by the court in assessing that expert's evidence without it leading to their disqualification.

The importance of these duties of all experts is underlined in the preamble to the law:

> [All experts are required to take an oath or promise to act with the utmost objectivity and impartiality, and this Law contains provisions for all of them to submit their reports to explanation, clarification and supplementation, with full contradiction.[429]

They are set out specifically in Article 335(2) LEC:

> When rendering the opinion, every expert shall state, under oath or promise to tell the truth, that he or she has acted and, if applicable, will act as objectively as possible, taking into consideration both what may favor and what is likely to cause prejudice to any of the parties, and that he or she is aware of the criminal penalties he may incur if he fails to perform his or her duty as an expert.

This provision includes, therefore, the requirement that the expert include a sworn declaration in the report whereby he or she declares: (i) to have acted, and to act in due course, with the utmost objectivity; (ii) to have taken, and to take, into account both factors that favour and factors that prejudice the parties; and (iii) to be aware of the criminal penalties of breaching his or her duties as an expert.

These requirements of impartiality and objectivity are not dissimilar to the rules that apply under English procedural law. This is a distinctive feature of the Spanish regime which differentiates it from many of our continental neighbours and approximates us to our common law friends. However, as has already been noted, the Spanish system lacks detailed supporting regulation, and perhaps the culture currently, to make these requirements as effective as one might wish. The party appointing an expert is free to choose not to use an expert if it transpires that the expert's opinion is not favourable to that party's interests. This is a factor which Spanish courts are aware of and which can make them sceptical about the impartiality of expert evidence presented by party-appointed experts. Indeed, the level of confidence of Spanish judges in the impartiality of party-appointed experts seems, in general, to be quite low, although I am not certain that such general concerns apply necessarily to many of the experts active and prominent in the area of EU competition damages litigation in Spain.

As we have seen in earlier chapters, English law has a stronger regulation of these questions and certainly the quality of expert evidence is, as a general proposition, higher. Nevertheless, the challenge of impartiality is a real one also in the UK and one that has been the object of criticism by the Competition Appeal Tribunal.[430] It is a general truth that, in competition damages claims, judges are typically faced with reports which are entirely and vastly contradictory, despite assessing the same underlying facts. While this does not necessarily reflect a problem of impartiality, nevertheless it is a telling tendency. In my opinion, there are two key avenues to address this issue and ensure that expert duties have a greater positive impact on the process:

- The first is in the hand of judges. Judges must be, and must be seen to be, more demanding in their treatment of experts. This includes requiring minimum standards in the production of expert evidence (and potentially declaring inadmissible, or of no evidentiary weight at all, expert evidence which does not meet minimum standards) and being more transparent in the assessment of the way in which a particular

[429] Recital XI LEC.
[430] See Ch 12.1(e) above.

expert has performed. What is more, the experts should be named in the judgment (the practice of hiding the personal names of testifying experts in Spanish judgments is curious and is not apparently justified given the open nature of court hearings). The reputational impact of such declarations in judicial rulings should, indeed, not be underestimated and may be more effective than any positive norms.

- The second is to require proper professional standards and ethics in the engagement of opposing experts. Collaboration and good faith is, in my view, essential in ensuring that processes concerning complex technical matters can be effective in permitting judges to take good quality decisions, and is inherent in the experts' duties under the Spanish civil procedural law. In this point, I am consciously advocating for a system which, while based on the adversarial and rogatory principles, requires at the same time a necessary degree of collaboration among parties, experts and the judge, to assist in an adequate approximation to the truth and, as a result, a minimum quality of judgments. As the Model European Rules testify, the principle of cooperation is fast becoming a central part of the DNA of modern and effective civil judicial systems.[431]

17.2. The role of the judge

a) The non-delegable function of judicial assessment of expert evidence

Pursuant to the Spanish Constitution, the exercise of jurisdictional power is vested exclusively in the Spanish courts.[432] Furthermore, expert evidence is classified under Spanish procedural law as one of the means of evidence that can be produced in civil proceedings, the expert providing technical assistance to the judge (and the proceedings generally) on the evaluation of factual matters of a technical nature, as opposed to the expert assuming a role as authoritative adviser to the court (as occurs for instance under Italian law in the case of court-appointed 'consulente técnico').[433] Accordingly, as in the UK, the opinion of experts cannot usurp the jurisdictional power of the courts by determining itself issues which are to be determined by the judge in judgment. This, as we have seen, is of special importance where the subject-matter of expert evidence is of a particularly technical nature and the risk of usurpation of the court's powers is accordingly higher.[434] This is undoubtedly the case for expert evidence in competition cases concerning, for instance, the quantification of harm.

These principles mean that, faced with expert evidence, the courts have a degree of liberty in their evaluation of that evidence and are not bound by it. They may choose to follow it (where it is unanimous), prefer one opinion over another (where the opinions are contradictory), reject some parts of each opinion and accept others, adopt a different opinion, or reject the evidence entirely.[435] This said, the court's evaluation is subject to the requirement that judges do not wield their jurisdictional power arbitrarily, that they motivate

[431] For a discussion, by contrast, of the historical scepticism about collaboration and the scope for abuse of power, see Montero Aroca, *La prueba en el proceso civil*, n 303, 45-7.
[432] art 117(3) CE.
[433] See Seoane Spiegelberg, 'La Prueba Pericial en la Jurisprudencia del Tribunal Supremo', n 361, 68, and Picó i Junoy, *La Prueba Pericial en el Proceso Civil Español*, n 388, 43-4, to whom the former refers.
[434] See, for example, Montero Aroca, *La Prueba en el Proceso Civil*, n 303, 336: 'In this function of evaluation or assessment of the facts, there is an obvious risk that the expert may replace the judge in performing the jurisdictional function of declaring the existence of the factual assumption that determines a legal consequence, a danger that is increasing every day as legal relations become more and more technical and the knowledge of judges is more insufficient to establish the certainty of the facts'.
[435] See, Abel Lluch, *La valoración de la prueba*, n 396, 131; STS 87/1994, 10 February 1994, ES:TS:1994:730, LG 4.

their decisions properly and that they apply reason and logic, taking into account the relevant facts and law.[436] These conditions are captured globally in the concept of 'sana crítica' (sound assessment) with which expert evidence must be appraised by courts according to Article 348 LEC.

The position was set out in a complete and balanced manner by the Supreme Court in a judgment concerning expert evidence related to medical negligence:

> An uncontested value cannot be attributed to the conclusions of medical opinions, since the function of the expert is to assist the judge, illustrating the circumstances of the case, but without depriving the judge of the power to assess the expert's report (SSTS, among many others, 30 March 1984 and 6 February 1987), which is subject to the limits inherent to the constitutional principle of the prohibition of arbitrariness, to the legal mandate to respect the rules of logic that are part of the common sense of persons and to the obligation to give reasons for rulings.
>
> These powers of appraisal are inherent to the exercise of the jurisdictional power and are justified by the possible hermeneutical discrepancies arising from the relative level reached by science, from the different degree of knowledge that the different experts have on the subject, from the possibility of the opinion being more or less rigorously adjusted to the scientific method and formulating conclusions that can be appreciated from the point of view of their possible refutation or general acceptance and statistical frequency, and from the need for the judge to consider the contributions of the experts in their connection with the social reality that must be taken into account in the interpretation of the rules (article 3. 1 CC) and from the point of view of its legal significance in harmony with the principles and values that inform the legal system as a whole (STS of 23 May 2006).[437]

One interesting point to raise in this regard relates to the possible intervention of the competition authority, the CNMC, as amicus curiae to assist the court in the quantification of harm in competition cases before the courts. The CNMC has the faculty, on request, to inform as regards the criteria for quantifying harm.[438] There have been some discrete and limited attempts to do this, notably in a case before Commercial Court nº 1 of Oviedo in the Trucks litigation.[439] However, the authority has rightly been cautious about intervening in such a way and would need to avoid exercising the function in such a way as to become a de facto deciding third party expert, something which might risk usurping the court's function.[440] It is averred that the more appropriate and productive role for the CNMC, as the European Commission, in civil litigation related to competition law is to provide input on more substantive matters concerning the proper interpretation of the competition rules (definition of relevant markets, restrictions of competition, and the like). The process whereby such amicus curiae intervention should take place within proceedings also requires some thought and clarification in order to ensure transparency, consistency and the safeguard of the parties' rights of defence. This is not currently adequately addressed.

[436] art 218(2) LEC; art 120(3) CE.
[437] STS 1377/2007, 5 January 2007, ES:TS:2007:171, LG 4.
[438] Pursuant to art 5(2)b), Law 3/2013 of 4 June creating the CNMC and art 76(4) LDC.
[439] See AJM1 Oviedo, 28 October 2021 (unreported).
[440] See further, Hitchings, 'Daños Antitrust', n 400(Part I), 121-3; Francisco Marcos, '¿Puede la CNMC calcular el daño causado por el "cártel de los coches"?' Almacén de Derecho, 24 November 2021.

b) The judicial assessment of expert evidence

As has been noted elsewhere, the focus of judicial attention to expert evidence is on its evaluation. That is, courts are centred on the assessment of expert evidence; both in terms of the interpretation of its scope, weight and content as presented to the court (in the written report and orally at trial) and, above all, in terms of the reasoned determination in judgment of the evidentiary weight the court attributes to that evidence in determining the relevant facts in dispute. Courts are not so much focussed on prior questions of process; such as, minimum standards for a report to be admissible as expert evidence, engagement with experts before trial, or access to (or determination of) underlying facts or information. This is fruit of the underlying procedural principle that such evidence should be produced at the beginning of proceedings in order to allow parties to understand the case against them from the start. By contrast, process is the central theme of this research and our prime area for proposals and recommendations (subject we will broach further in section 3 below).

The assessment of expert evidence is performed by courts according to the so-called 'rules of healthy criticism' (Article 348 LEC). The concept is an open one. In the words of the Spanish Supreme Court in 1991 it refers to 'the rules of elemental logic or the common rules of human experience'.[441] Acknowledging the increasing role of scientific or technical opinion in modern disputes, Professor Abel Lluch has defined the term more recently as 'the non-legal rules derived from logic, experience and science, which serve to found a reasoned assessment of the evidence and permit its subsequent review by a superior court'.[442] The concept reflects a rational conception of judicial assessment where: (i) evidence is perceived as an element in permitting the court to ascertain the truth of certain facts; (ii) judicial inferences based on evidence should follow the tenets of logic and probability; (iii) decisions should be reasoned and capable of review (by courts and society at large).[443] Echoing observations we made in an earlier chapter about judicial assessment in civil and common law jurisdictions, Professor Abel Lluch identifies the need for greater attention to facts in Spanish judicial decision-making in order to comply with the legal requirements on judges to motivate properly their decisions[444] and, by implication, assess evidence adequately. This is, in my opinion, one of the key ideas we need to take on board and one which should shape our proposals for improving the quality of judicial decisions in the area of competition law in Spain.

The criteria of healthy criticism does not equate precisely to the common law concept of standard of proof, although it may serve as a proxy.[445] Rather than establishing an objective minimum threshold which evidence must satisfy to establish the likelihood of the truth of the facts it purports to prove (e.g., the common law 'balance of probability' test), it offers a series of tools, an overall method, for the rational evaluation of evidence. Clearly, that evaluation must carry the conviction of the judge, but the rule does not focus the attention so much on the level of that conviction (unless the decision is clearly arbitrary or unsustainable) but rather on the method the judge uses to get there. It should also be distinguished from related concepts in the assessment of evidence such as: minimum evidentiary effort, which in turn is linked to discharging the party's burden of proof, and

[441] STS 715/1991, 15 October 1991, ES:TS:1991:5386, LG 2.
[442] Abel Lluch, *La valoración de la prueba*, n 396, 29.
[443] See ibid pp 22-3.
[444] ibid p 191 et seq.
[445] ibid p 28. As noted earlier, the questions of standard or burden of proof are not the object of this research.

which, in addition, may be influenced by the nature of the case (for instance, due to the difficulty or unavailability of evidence, or because the fact to be proved requires, for other reasons, that the demands on evidence be more flexible). It is suggested that the differences in practice are not so marked, in particular when it comes to the assessment of evidence of quantification of harm where English law applies the 'broad brush' test. The difference lies rather more in the nature of the process and the level of factual evidence made available in proceedings.

When it comes to the assessment of expert evidence quantifying harm in a competition case, courts are faced with a particularly challenging task. First, the technical nature of the information which is the object of the experts' analyses and the technical manner of the process of reasoning used to reach their conclusions, make assessment qualitatively more difficult for a judge.[446] Secondly, they are typically faced with two entirely contradictory assessments. These challenges are common to most types of expert opinion. In addition, however, as the European Commission has emphasised, the area of quantification of competition harm is marked by the necessarily hypothetical nature of the exercise and by the inherent difficulties of determining with precision what would have occurred in a given market absent the infringement; for example, how prices would have evolved. This is a point to which Spanish courts have conceded enormous importance, particularly in circumstances where they consider some impact in the market can be assumed to have occurred.

A lot has been said by more authorized commentators about the criteria that may and should form part of the court's 'healthy criticism' of evidence, both generally and in the case of expert evidence in particular.[447] According to the consistent case-law of the Spanish Supreme Court these include, in particular: (i) the reasoning used by each expert; (ii) the majority opinion of the testifying experts; (iii) the means and instruments used by each expert to reach their conclusions (including the underlying data analysed); (iv) the professional competence and objectivity of each expert.[448] The list is not exhaustive by any means. The concepts have been further developed in the case-law of lower courts such as, notably, the Appeal Courts of A Coruña, Madrid and Bilbao.[449] It is not my aim, nor would it be appropriate, to expound these ideas at length here. For the sake of our discussion, I would, however, like to identify from those sources some of the more relevant factors for our subject-matter adapting them to the relevant considerations for the type of expert evidence with which courts are faced in competition cases:

First, the criteria for assessing evidence should be considered globally. No one criterion is necessarily determinative, the balance between different criteria being itself a matter for the judge to assess in a reasonable and motivated fashion.

Secondly, the qualification and specialization of the expert are relevant factors in considering the weight that should be granted to expert evidence. Those factors should be assessed in

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[446] ibid p 129.

[447] See, inter alia, Martorell Zulueta, 'Análisis procesal del informe sobre cuantificación del daño', n 363, 263; Seoane Spiegelberg, 'La prueba pericial en la jurisprudencia del Tribunal Supremo', n 361, 65-79; the various works of Xavier Abel Lluch on the subject including: 'Criterios orientadores de la valoración de la prueba pericial' in Picó i Junoy and de Miranda Vázquez, *Peritaje y Prueba Pericial*, n 408, 211, *La Valoración de la Prueba*, n 396, 129-41, and in *La Prueba Pericial*, n 365, 137-59; Jordi Nieva-Fenoll, *La valoración de la prueba* (Marcial Pons 2010), 285; Picó i Junoy, *La Prueba Pericial en el Proceso Civil*, n 388.

[448] See, inter alia, STS, 15 December 2015, n 396; STS 615/2016, 10 October 2016, ES:TS:2016:4631.

[449] Respectively, SAP A Coruña, 9 March 2016, n 344; SAP Madrid, 29 February 2012, ES:APM:2012:3431; SAP Bilbao, 28 May 2009.

real practical terms and by reference to the particular facts of the case and the nature of the opinion required. Arguably, where the expert clearly lacks the necessary specific preparation for the task at hand, the evidence should be rejected.

Thirdly, the object of the report should be made clear and explained. This refers, for example, to: who is the claimant and how has it been affected by the infringement; what heads of harm have been assessed (direct costs such as an overcharge, loss of profit, etv); for what period (e.g., whether lingering effects have been considered); where relevant, how pass-on has been assessed (both upstream, if an indirect purchaser, and downstream of the claimant, where not a consumer); and whether and, if so, how harm has been individualized to the situation of the claimant(s) and, if it has not, the reasons for that.

Fourthly, expert evidence should be considered together with the rest of evidence produced in proceedings.[450] It has already been stated that expert evidence should be consistent with other underlying facts, for instance about the infringement or the relevant market. This may be assisted by an expert incorporating into the report an explanation of how the particular infringement in the particular circumstances of the case would, in the expert's opinion, have caused harm (sometimes referred to as a 'theory of harm'). It will be relevant that the expert refer to relevant sources of evidence which have been used to substantiate this explanation (for example, regulatory decisions, witnesses, documentary sources) and, potentially, identify further sources which may be considered of use to substantiating the expert's case.

Fifthly, the expert should apply an appropriate method to calculate harm.[451] In the context of assessing the impact of a competition infringement, this involves, in the words of the Spanish Supreme Court in *Sugar II*, the expert identifying a 'reasonable hypothesis' for the counterfactual (for example, an appropriate comparator market). The method should also be 'technically founded', meaning, I would venture, that the counterfactual should be properly implemented and executed. As a general rule, the court must test the expert evidence for internal coherence.

Sixthly, the expert's estimation model may also be gauged by reference to compliance with recognized standards.[452] In particular, the Commission's Practical Guide to Quantification of Harm offer useful benchmarks for courts to assess the appropriateness of a given model as well as relevant considerations to evaluate its correct implementation. These guidelines have recently been complemented by the CNMC's own national guidelines.[453] Guidelines are not binding, however, and should not be viewed without a degree of healthy scepticism by courts. The guidelines may be further complemented by relevant scientific doctrine in areas of relevance to a particular case where such doctrine can be established to be generally accepted.

Seventh, the expert should use accurate and verifiable data to support its analyses (as required by the Supreme Court in *Sugar II*). The data should not only be reliable but also fit for the purpose for which it is used. The level of aggregation of the data and the availability

[450] As required generally by art 218(2) LEC and confirmed in the specific matter of competition law damages actions by reference to the prior regulatory decision in a follow-on action by the Supreme Court in *Sugar II* and in the following case-law of the lower courts generally.
[451] Method is one of the matters on which an expert may expressly be called to testify at trial pursuant to art 347(1)3º LEC.
[452] See, for instance, Nieva-Fenoll, *La valoración de la prueba*, n 447, 295-6.
[453] CNMC Guide on the Quantification of Harm for Breach of Competition Law (G-2020-03, 11 July 2023), available at: https://www.cnmc.es/sites/default/files/4802305.pdf.

of data sources (or limitations thereof) are relevant considerations, which should be explained. The origin of data and the processing that has followed until its use by the experts in their calculations (so-called, cleaning) should be properly explained and evidenced.[454] Where necessary, it should be supported by appropriate evidence of the underlying documentary or other source of evidence (which should be produced at the right time into proceedings).

Eighth, the expert report and testimony should be sufficiently transparent in all relevant aspects of the work performed such that the objectivity and reliability of the evidence can be gauged. This relates, for instance, to explaining and setting out adequately the process followed to choose a given method for quantification and select relevant data (or reject others), the assumptions used in the model and their relevance, and the level of confidence or margins of error in the conclusions reached. Underlying information necessary to understand and replicate the quantification model (including, in particular, underlying data) should normally be produced into proceedings in electronic format and made available to the parties' respective experts, subject to any necessary protections for commercial or other reasons. Proportionality will also be a relevant consideration in this respect.

Ninth, the report should be clear, well-structured and concise, removing lengthy technical details of a secondary nature to annexes, and presenting results in an understandable fashion.

Tenth, the impartiality of the expert should be a matter of consideration. This is a difficult matter to pin down. However, relevant factors may include, for instance, the solidity of the expert's response to questions at trial (and whether the expert has sought to be evasive in responses), the relationship with the instructing party or the terms of engagement.[455] Courts should be receptive to counsel, within reason, questioning about the bases for an expert's instructions.

Finally, a number of considerations of a general nature have to be borne in mind depending on the facts of the case, such as: the extent to which harm should be presumed, the difficulty and proportionality of estimating harm, the availability of evidence and data to quantify harm and the dynamic of mass litigation.

In my opinion, it would be helpful to try to systematise the criteria, or questions, that judges should normally assess when evaluating expert evidence in a competition case, and the above perhaps offers an initial contribution. It is certainly notable that judges seek to use such tools where they have been made available and find them helpful. Notably, the courts in Valencia have made reference on a number of occasions to the '39 Steps: a check-list for judges' contained in the Pass-On Study in considering what are relevant factors in assessing economic evidence of harm.[456] Those steps were designed more particularly for the discrete question of assessing evidence of pass-on and, accordingly, many of the questions covered are not relevant for the quantification of an overcharge. This may have initially caused some confusion since, to date and to my knowledge, pass-on has not formed an empirical part of

[454] This may require proper accreditation by a third party of the chain of custody from the original database. See, further, Abel Lluch, 'Criterios orientadores de la valoración de la prueba pericial', n 447, 228 et seq.
[455] Success fees are incompatible with the requirements of art 335(2) LEC.
[456] The 39 Steps were the subject of a presentation by Vilata J, Commercial Court nº 1 Valencia, at the EU Competition Law training programme organized by the University of Valencia in September 2019, '39 Pasos. Directrices del estudio de 2016' in Ruiz Peris (dir), *Daños, Comercio Electrónico y Derecho de la Competencia*, n 229, 237. They have been referred to by Pastor J, Commercial Court nº 3 Valencia, in some early decisions in Trucks.

the quantification of harm in any Spanish case.[457] Nevertheless, they do offer some valuable considerations of a general nature for courts and, above all, their invocation by judges underlines the utility and need for such practical instruments or check-lists.

The CNMC's new Guide on the Quantification of Harm contains a non-exhaustive check-list of technical questions of methodology that judges, experts and parties may use to verify the reliability of expert quantification of harm.[458] They do not include considerations of a more legal nature.

It is not my opinion that judges should be capable themselves of determining questions of a technical nature. This is the task of the experts and the very reason for their intervention in civil proceedings pursuant to Article 335 LEC. Rather, the judge evaluates the technical evidence produced by experts according to normal principles of logic, common sense and, where possible, formal scientific standards, and uses it to assist him or her in adjudicating the case. This is, of course, the general view.[459] Accordingly, it is not necessary for a judge to be an expert, for example, in econometrics and it would, arguably, be counter-productive even to try to train judges in econometrics. Judges will not become as expert as the experts and their task is another one. This said, one can see that a familiarity with the terms used by experts will assist them in their task of adjudication, for which appropriate training may be very useful.[460] However, it is vital that the independence of judges be guaranteed, the voicing of a plurality of opinions be ensured and that judges be aware of the important economic interests that exist in this field of law. Accordingly, training should have a clear purpose, be of a high quality, and comply with principles of transparency and plurality. Case specific exercises, such as the teach-in exercise used in the *BritNed* proceedings referred to earlier in Chapter 12, may also have a part to play since they permit experts from both sides to elucidate their science and techniques in a clear and transparent environment under the direction of the court.

This said, there is one aspect of adjudication in competition damages cases which raises some delicate questions. That is, judicial estimation. This matter is not the object of this research. Suffice it to say for our purposes that there continues to be some considerable uncertainty around what the exercise involves and what may constitute a valid estimation by the judge.[461] The Supreme Court noted in the Envelopes case, when rejecting the admissibility of the appeal filed before it by the defendants, that the court there had not exercised the faculty of estimation under Article 17(1) (the case pre-dates the Directive) but rather had moderated the estimations of harm based on the evidence before it (including in

[457] That is, no empirical quantification has included an adjustment for either upstream or downstream pass-on. Exceptionally, the Appeal Court of Madrid did accept the pass-on defence as a ground for reducing the harm claimed to zero on the basis of quantitative and qualitative evidence to the effect that pass-on of the overcharge had occurred and would have been total (*Realia*, SAP Madrid 377/2022, 19 May 2022, n 350).
[458] CNMC Guide, n 453, s 2.6.
[459] For the discussion of the difference between the judge as expert among experts ('iudex est peritus peritorum') and as the guardian of the rationality of the experts ('iudex est custos peritorum') see, inter alia, Carlos de Miranda Vázquez, '¿Es realmente el juez peritus peritorum?' in *Derecho Probatorio Contemporáneo. Prueba científica y técnica forenses* (Univerisdad de Medellin 2012), 295.
[460] A point made by Jordi Nieva-Fenoll, 'Repensando Daubert: elementos de convicción que debe tener un buen dictamen pericial' in Picó i Junoy and de Miranda Vázquez, *Peritaje y Prueba Pericial*, n 408, 98-9.
[461] See, for differing positions, Jaime Concheiro, 'La cuantificación y la estimación judicial del daño en ilícitos antitrust. ¿Son lo mismo?' Almacén de Derecho, 10 March 2023; Francisco Marcos, 'Tres claves para la estimación judicial del daño antitrust indemnizable tras la STJUE Tráficos Manuel Ferrer' Almacén de Derecho, 22 February 2023.

particular evidence from the administrative file).[462] In Trucks, the Supreme Court did not engage with the reasoning of the lower courts which had justified their estimation of a 5% overcharge.[463] What we can say for certain, whatever the true confines of judicial estimation, is that the more judges can be assisted in that exercise by the evidence produced in proceedings, the better. Otherwise, the exercise may risk becoming arbitrary.

c) Court initiative in the production of expert evidence

Pursuant to the adversarial principle (Article 216 LEC), expert evidence is at the behest of the parties, whether that be, as normally, through production of a party-appointed expert report with the statement of claim or defence or because one of the parties, or both, has requested a court-appointed expert at the appropriate time. Failure to produce a report with the statement of claim will possibly entail the rejection of the claim for lack of evidence and this is not something that the court can seek to remedy itself by permitting production out of time of the evidence which is wanting. We have seen, indeed, in the Zaragoza judgment in trucks that the judge was not able to force on the claimant the nomination of a court-appointed expert, albeit the judge clearly thought one was necessary for the claimant given the insufficiency of the party-appointed expert report in the face of the reports presented by the defendants.[464] This is consistent with the declared intention in the preamble to the 2000 law that expert evidence would no longer be part of the court's duty of discovering the truth but would become a matter of party initiative, thereby converting party-appointed expert reports into the norm in civil proceedings.[465]

There is, however, a provision in the 2000 law which vests judges with certain initiative as regards the proposal of evidence in civil proceedings. It is contained in Article 429(1) of the LEC. The rule provides that, once the facts in dispute have been determined, and the parties have proposed evidence in relation to those facts, the court is permitted to make the parties aware of any facts as to which it considers that the evidence proposed may be insufficient and, in addition, to indicate what additional evidence it considers appropriate, granting the parties the opportunity to complete or modify their proposal for evidence accordingly. Given the fundamentally passive role of Spanish judges under the 2000 Law, this provision is not, in general, interpreted broadly and, in practice, is sparingly invoked. The majority consensus is that the court's faculty under Article 429(1) cannot be used to remedy faults in the parties' proposal of evidence.[466] It cannot, for instance, permit the parties to escape the preclusion rules applying to the production of evidence. Hence, if what is lacking is a pre-existing document which could have been filed with the claim or defence, this provision cannot remedy that problem. Equally, it is generally considered that new expert reports, or amendments of existing reports, cannot be submitted unless that is justified by one of the specific exceptions referred to in the law, such as the introduction of new facts or of new

[462] ATS, 10 May 2023, ES:TS:2023:5577A.
[463] See STS 947/2023, 14 June 2023, n 2, para 23.
[464] SJM1 Zaragoza, 13 December 2018, ES:JMZ:2018:4752.
[465] Recital XI LEC.
[466] See Abel Lluch in *La Prueba Pericial*, n 365, 117-24; and, generally, Montero Aroca, *La Prueba en el Proceso Civil*, n 303, 528-40. For a more liberal approach to the faculty, which contemplates the possibility for the judge to order an expert report out of time, see Berta Pellicer Ortiz, 'La sugerencia judicial de prueba del articulo 429 LEC' in Joan Picó i Junoy, Xavier Abel Lluch and Berta Pellicer Ortiz (dirs), *La Prueba Civil a Debate Judicial* (La Ley 2018), 52-61; Jorge de la Rúa Navarro, 'La facultad del art. 429.1, II y III LEC y la preclusión probatoria. ¿Puede el juez proponer medios de prueba cuyo momento procesal ha precluido (ej. dictámenes y documentos)?' in Xavier Abel Lluch and Joan Picó i Junoy, *Problemas Actuales de la Prueba Civil* (Bosch 2005).

allegations.[467] Furthermore, it must be at the party's request (save for exceptions specifically contemplated in the law). Hence, Justice Rincón, the Zaragoza judge, was acting in accordance with these constraints under Article 429(1) when he suggested that the claimant make use of the opportunity to request the appointment by the court of an expert (as correctly requested in the statement of claim) but did not himself order that evidence, since it was at the behest of the party.

This is the majority position in the matter and was extensively set out by the Appeal Court of Valencia in the series of data room cases we have referred to earlier in our disclosure section:

> [R]egarding the power contemplated in Article 429. 1 in its third and fourth paragraphs (judicial appreciation of evidentiary insufficiency and suggestion of supplementation or modification of the proposed evidence) we will limit ourselves to indicate that said rule must be subject to restrictive interpretation, as pointed out by the Judgment of Section 11 of the Barcelona Court of Appeal of 18 April 2017 (ES: APB:2017:3584) when it reasons that the provision has to be put in line with the principle of prayed justice or dispositive principle of Article 216 of the LECand framed within its fair limits, within the systematic interpretation of the regulations. The Court of Appeals of La Rioja in its ruling of January 31, 2005 affirms that it cannot be used to correct the lack of evidence or evidence inadequately proposed by the parties. The Court of Cordoba in its decision of December 15, 2003, in addition to emphasizing the discretionary nature of the precept, states that "it would be neither reasonable nor feasible (or rather impossible) for the State, through the courts, to be the one to take care -with the corresponding responsibility- of verifying the certainty of the facts and their assertions, with an evidentiary adequacy to that effect. And in judgment of February 26, 2018 (ES:APCO:2018: 102), citing other Provincial Courts, that "from a general perspective, said precept must be applied with singular care, since an immediate application of the same may lead to the breach of the most elementary principle of judicial impartiality, since indicating without more, and as the appellant claims, which facts may not be accredited and the evidence necessary for this not to happen, although it may favor one of the parties, undoubtedly harms the other, who may, in its procedural strategy, play, precisely, with the fact that the basis of the claim is not accredited by the party to whom it corresponds".
>
> The Madrid Court of Appeals, in its Judgment of March 7, 2006, states that article 429 of the LEC "does not impose on the Judge the obligation, at the time of the preliminary hearing, even in its final phase, to indicate to the parties the evidence to be proposed, nor when the fact is uncertain and disputed, to indicate to them what their evidentiary activity should be, thus substituting the principle of contribution of the parties, since correctly understood what it means is that he may indicate the fact or facts of the disputed facts that could be affected by the insufficiency of evidence, but not when the parties knowing and being aware of the facts in dispute have deployed evidentiary activity in order to do so, with the amplitude they have considered necessary, so that in this case if the Judge intervenes indicating the practice of other evidence that he considers convenient, we say, in addition to that proposed by the parties with the amplitude they have considered convenient and in legitimate defense of their interests, he would be breaking the referred principle and losing the objectivity, guarantee of impartiality.[468]

In this sense, these judgments were quite critical in their assessment of the first instance court's attempts to case manage expert evidence at the preliminary hearing. Specifically, at those hearings, Commercial Court nº 3 took the opportunity upon hearing the parties' proposals for evidence to indicate perceived weaknesses in the expert evidence before it,

[467] See, for example, Xavier Abel Lluch in *La Prueba Pericial*, n 365, 121.
[468] SAP Valencia, 20 April 2021, ES:APV:2021:1209, LG 3.2.1 (my translation).

suggest that disclosure of underlying data used by party experts take place and permit further amendments to the reports to be filed following that exercise. Aside the question of whether these procedural steps complied with Spanish procedural rules (on which, as we have seen, the Valencia Appeal Court was of a strongly negative opinion), the superior court also considered that the judge had clearly acted beyond his powers and had infringed the central rogatory principle in his use of Article 429(1) LEC. I personally can sympathsise with the commercial judge's concern with trying to achieve more engagement with the experts, deepen the evidentiary analysis and, thereby, improve the quality of the process. Indeed, that attitude of the judge has received a notable vote of confidence in paragraph 58 of the *Tráficos Manuel Ferrer* judgment to which we have referred earlier. The CJEU there advocates a more iterative process for expert evidence, the engagement between experts and the access to underlying data; precisely the objectives the Valencia judge was seeking to achieve.[469] At the same time, I am not sure that Justice Pastor found the right solution within the bounds of the law on that occasion. I think he did not. Nor do I think he addressed adequately the problem of proportionality, notably in the Toyota case in 2022.[470] We will try to in our final proposals.

17.3. Process

It is my thesis that the key to improving the quality of justice in competition litigation, also in the question of expert evidence, is one of process. While my assessment of the right solutions to the problem differs markedly, I share this view with, among others, Professor Vázquez for whom the problem of judges is not so much cognitive but of being adequately informed. [471] Accordingly, the answer to the problem lies primarily in procedural instruments and a process which permit judges a proper comprehension of the expert evidence.

We will consider process in this final section relative to expert evidence. First, we will consider the current constraints of the Spanish civil process as it applies to expert evidence. Second, we will address the extent to which the Spanish civil process permits of greater flexibility, transparency and engagement as regards the treatment of expert evidence.

a) Conditions for the production of expert evidence

As already noted, the production of expert evidence in Spanish civil proceedings is subject to strict time-limits. The basic rule is that reports should be produced by the parties with the statement of claim or defence. There are, however, a number of relevant exceptions, which may permit later production or amendments or extensions, at up to eleven different moments of the process.[472] The regulation of these exceptions is to say the least untidy, leading Picó i Junoy notoriously to describe the system as a veritable experts' labyrinth ('labyrinthum peritiae').[473] With regard to our subject-matter, the relevant moments for the possible production of expert reports at first instance can be summarized as follows:

[469] SJM3 Valencia, 15 September 2020, ES:JMV:2020:5922.
[470] SJM3 Valencia, 21 October 2022, ES:JMV:2022:9610.
[471] Vázquez, '¿Cómo mejorar la regulación sobre la(s) prueba(s) pericial(es)?', n 425, 278.
[472] See, Joan Picó i Junoy, 'La dinámica de la prueba pericial' in Xavier Abel Lluch (coord), *Tratado Pericial Judicial* (Bosch 2014), 79, 89 et seq.
[473] Picó i Junoy, *La Prueba Pericial en el Proceso Civil*, n 388, 17. As the author observes in his introduction to the publication, the new procedural regulation of expert evidence received a good dose of criticism from the academic community when it was adopted; pp 21-3.

(i) Filing with the statement of claim or statement of defence.[474]

(ii) Filing at a later date but before the preliminary hearing (or the single hearing in an expedited proceeding, 'juicio verbal').[475] This will be possible if the party can justify in its initial written statement of case that it was impossible to produce the report at that time and announced its intention to file a report. The report should be filed as soon as it is ready and, in all events, at least five days before the hearing takes place. This situation frequently arrives (the exception applying more often than the rule) in the case of defendant expert reports in competition cases, as well as other complex litigation. This is because the period for filing the defence (twenty days) is likely to be objectively insufficient to prepare an expert report. The exception could also conceivably arise for a claimant where it has requested pre-action disclosure to information needed in the preparation of the expert report, given the short deadline for filing the claim once disclosure has occurred (also, twenty days).[476] It should be noted that expert reports are invariably filed at the last possible moment (i.e., just five days before the relevant hearing), not 'as soon as the report is available'. Given that the amount of time that may elapse between filing of the defence and the hearing may vary from as little as one month to as much as a year or two from one proceeding to another, the standard practice of filing the report five days before the hearing, such that the period for preparing the report may vary from one month to as much as a year or more, is at the least concerning. On occasions, it may reflect a will by the parties improperly to take advantage, or abuse even, of the procedural rules (on others, it may be a huge challenge to submit in the time available).

(iii) Filing a report at the preliminary hearing where this is justified by new facts which have arisen since the filing of written submissions, or by facts which only became known to the party after the event, or by new submissions (complementary allegations) introduced at that stage of proceedings (for instance, if this is justified by the defendant introducing new issues in its defence which were not contemplated in the claim).[477] This situation overlaps with the next situation, (iv).

(iv) Filing a report after the preliminary hearing but before trial, where this is justified by new arguments raised in the defence or new submissions made at the preliminary hearing.[478] There is an uncertain overlap between this situation and that contemplated under (iii) and, therefore, an apparent inconsistency as to time-limits. In this case, (iv), the report should be filed as soon as it is ready and, in all events, at least five days before the trial takes place. In practice, as under (i), parties seek to exhaust the full period creating a very short reaction time for counter-parties and their experts to prepare for trial as regards the content of that additional report. It is possible, in addition, for the parties to request a court-appointed expert report in the same circumstances.[479]

[474] arts 265(1), 336(1) LEC.
[475] arts 336(3), 336(4), 337 LEC.
[476] art 283bis(e)2. See n 282 above.
[477] art 426(5) LEC.
[478] art 338, 426(3) LEC.
[479] art 427(4) LEC.

(v) Filing a report after trial and before judgment, where this is justified by new facts or facts of new knowledge, as so-called 'diligencias finales'.[480]

The application of the exceptions is limited in practice. They are to be justified on the basis of the strict grounds provided for in the law and must be admitted by the court. Amendments to expert reports are, accordingly, rarely permitted. The Supreme Court has clarified that the exceptions are not to be used to permit report extensions or amendments the aim of which is, in fact, to reply to the counter-party's written case (or the evidence on which it relies, including expert reports) or correct errors in the original report, unless the terms of the case as set out in the original claim have been materially altered:

> The purposive and systematic interpretation of these articles leads to the conclusion that they exclude the following cases: (i) the correction of omissions, oversights, inaccuracies or any irregularities in the submission of the expert report or in the content of the expert report submitted with the claim to prove the facts constituting the causa petendi [cause of action], since otherwise it would make no sense for the LEC to have established a general rule of preclusion in articles 336.1 LEC and 265.1.4. º LEC, and the principles of contradiction, rights of defence and equality of arms in the proceedings, which require that the parties have knowledge from the beginning of the proceedings of all the substantial elements on which the opposing party bases its claim, would not be respected, and (ii) the formulation of a disguised reply to the facts alleged in the statement of defence, since article 427.2 LEC places in the preliminary hearing the moment in which the parties have the opportunity to express their views on the reports submitted and to request their extension, and articles 426.1 and 428.1 LEC also place in the preliminary hearing the moments in which the litigants can make complementary allegations in relation to the opposing arguments determine and establish the disputed facts.[481]

That is, unless the terms of the legal action have altered due to new issues raised in the defence, or new relevant facts, a new report will not be permitted. In the cited case, a construction dispute, the claimant had attempted to submit a new expert report at the preliminary hearing to rebut allegations made in the defence (and the expert report submitted with the defence) which attributed the cause of the alleged building defects to problems of architectural design, rather than to defective execution attributable to the construction company. The rebuttal report was held to be out of time and was not admitted as evidence in the proceedings. It is not surprising, therefore, that the Valencia Appeal Court should have ruled that a rebuttal report introduced by the CETM claimants after the preliminary hearing and without prior court permission, was inadmissible (overruling the decision taken by the commercial court at trial to admit the evidence).[482] As a result of this traditionally strict approach of the Spanish courts, an interesting question that arises for claimants is whether they should anticipate a possible pass-on defence in their statement of claim and expert report. The answer to that question may depend on whether, depending perhaps on the particular circumstances of any given case, pass-on is considered a necessary part of the quantification of harm or a defence.

It is worth adding a brief note on the correction of expert reports (fe de errata), which is a discrete type of amendment. The aforementioned position of the Supreme Court may suggest that corrections would not be allowed after the time-limit for their filing. However, in practice, my experience is that corrections of numerical or similar errors may be permitted

[480] art 435(1) LEC.
[481] STS 176/2011, 14 March 2011, ES:TS:2011:1798, LG 5A.
[482] SAP Valencia, 20 July 2021, n 323, LG 6.

provided they are not material. The position is, however, highly unclear. Corrections may be permitted at the preliminary hearing, by analogy perhaps with the provision for minor corrections of allegations foreseen in Article 426(2). Alternatively, they have been known to be made in writing, at least 5 days prior to trial (by analogy with the provisions for approved report extensions) or even proposed at the trial itself verbally. A legal base for these late corrections could arguably be found in Article 347, which regulates the activity of the expert at trial and foresees the possibility for the expert to perform demonstrations of complementary calculations not presented in the report before the court and answer questions about possible extensions of the analysis contained in the report.[483] However, it seems to me that these rules are not designed for this type of situation. Issues related to detailed corrections about calculations or underlying data cannot be adequately addressed orally at trial nor verified in any meaningful way at that stage. They would need to be the subject of prior exchange in writing in good time for trial. For this to work properly and respect the rights of defence, this presupposes furthermore that there is real transparency in the underlying data used by each of the experts, something not currently guaranteed in the way in which expert evidence is typically produced into Spanish proceedings.

It will be recalled that another of the essential conditions for the production of expert evidence, as all evidence generally, is that it must be presented before the presiding judge (the so-called principle of 'immediacy') in one public, oral and adversarial hearing (the trial in the ordinary proceeding). Accordingly, the judge who is to emit judgment, and the opposing parties (represented by their lawyers), must be present at the expert's testimony, normally at trial.[484] Exceptionally, the evidence may be heard in a separate hearing, prior to the trial, provided the same conditions of immediacy, orality, publicity and contradiction are met.[485] Furthermore, the court clerk is charged with keeping a record of the hearing.[486] This was another of the reasons given by the Appeal Court of Valencia for objecting to the use of a data room in the judgments referred to earlier, since that exercise took place outside the court, without the judge's presence (or even that of the court clerk) and, therefore, without the normal procedural guarantees for the hearing of evidence. The court preferred as the appropriate legal base once more Article 347 - the provision that regulates the expert's testimony at trial. The court contemplated that the necessary additional demonstration of the calculations and data employed by the expert in reaching his or her conclusions set out in the report could take place at trial. However, similarly to the case of corrections, it is not realistic to think that such matters of technical detail can be properly aired and tested at trial or can substitute the parties' experts being granted prior access to the relevant information in adequate conditions to permit proper analysis. It is, furthermore, the case that the Spanish procedural rules do not entirely exclude other alternatives for access to sources of proof outside of the courtroom; indeed, in limited circumstances, the option is expressly contemplated. We will come on to these alternatives now, as we address the possibilities in Spanish civil proceedings for a greater degree of flexibility in the treatment of expert evidence.

[483] See Martorell, 'Análisis procesal del informe sobre cuantificación del daño', n 363, 273-4.
[484] art 137(1) and 289 LEC.
[485] art 290 LEC.
[486] arts 145-7 LEC.

b) Possibilities to 'flex' the existing process – compliance with the adversarial principle (equality of arms)

The existing Spanish civil process allows, in my opinion, for certain adaptation to the demands of private enforcement litigation. That is, it allows already for its interpretation and application more in line with the letter and spirit of EU law, as well as with best practices in the matter of the presentation and assessment of expert evidence. We will develop these ideas here.

The central role of the adversarial principle

First, it is important to note the central place that the adversarial principle plays in Spanish civil procedure. By this, we refer to the need to ensure the ability of each party, in conditions of equality, to contradict the arguments and evidence of the other party. The adversarial principle finds its roots in the fundamental rights of due process, of defence and to effective judicial protection which are enshrined in the Spanish Constitution, in the European Convention of Human Rights and in the EU Treaties.

Applying these fundamental procedural rights, the Spanish Constitutional Court has held it necessary, for instance, that underlying data be made available where it is necessary to verify the content of a report submitted in evidence:

> Finally, in view of the nature of the evidence used by the INSS, we must also declare that the plaintiff's right to a process with all the guarantees of art. 24.2 of the Constitution, in relation to the violation of the right to judicial protection, has been infringed. In effect, the documents provided by the INSS, in which it is certified that it is not possible to access the contribution report because "the data is inaccessible", are of the legal nature of what is doctrinally known as "evidence by report" in which factual data and statements of science extracted from pre-constituted documentary antecedents and found in files, books or records of public or private entities are incorporated to the process. Well, in this situation, in which the sources of evidence are in the possession of one of the parties, the constitutional obligation of collaboration with the Judges and Courts in the course of the process (art. 118 of the Constitution) determines as a logical consequence that, in evidential matters, the party issuing the report is especially obliged to provide the process with fidelity, accuracy and completeness of all the required data, so that the judicial body can discover the truth, since otherwise the principle of equality of arms in the administration or execution of the evidence would be violated.[487]

Applied in the specific context of so-called 'evidence by reports' (which refers to the situation where a report is requested, normally of a public or private institution, as regards records in its possession which are of relevance to a case), these principles clearly have a read-across to expert evidence of harm in competition cases.

Indeed, the adversarial principle finds specific expression in the Spanish civil procedural rules governing expert evidence, and the related case-law. The following are relevant examples:

- While not generally considered a formal requirement for the presentation of an expert report, Article 336(2) does establish a principle of transparency as regards the documentation and materials which have been used by experts in the preparation of their reports. This extends to data, evidently. The objective of the principle is both to

[487] STC 227/1991.

facilitate the report's proper presentation and exposition by the relevant experts, but also to assist the court in its evaluation of the report. The principle finds further expression in Article 347 LEC. Article 347(1)1 echoes Article 336(2), allowing the expert the opportunity to perform further calculations or 'operations' at trial using the same materials or data which underlie the report. Again, this is aimed to facilitate the expert's full exposition of the report. For their part, Articles 317(1)3 and 347(2) allow the parties' lawyers and the court respectively to formulate questions at trial aimed at clarifying, inter alia, the premises and bases for the expert's conclusions. As noted earlier, finally, the scope and quality of the data used to reach expert conclusions constitute relevant elements in the court's evaluation of the weight it should grant to a report pursuant to the rule of healthy criticism under Article 348. Read together, these provisions confirm the importance attached, therefore, to underlying data used in an expert's analysis and of the need for a demonstrable coherence of the results attained by the expert with that data.

- There is specific provision in Article 336(5) LEC for experts to be granted access to places and objects which are relevant for the preparation of an expert report. This provision was introduced in 2015 as a means of remedying a situation where access to an important element of proof in the possession of the counterparty or a third party was, without justification and in breach of the principle of procedural good faith, denied to the other side. Typically, this might occur in a case of personal injury (situation which is specifically contemplated in Article 336(5)) or disputes relating to physical places or objects (such as in the case of a real property or a construction dispute). Nominally, the right is recognized to defendants and not claimants. However, in practice, in line with the principle of good faith, it may potentially be used by claimants, in particular where other pre-action alternatives are not adequate.[488] The access of experts to places and objects which are relevant for the preparation of a report is also recognized in Article 345 LEC which regulates the rights of parties to intervene in such expert 'operations'. Ostensibly intended for the case of a judicial expert, whose access to the relevant object of the expertise may be essential in order to be able to perform the task entrusted to him or her by the court, it may also apply to cases where party-appointed experts are employed (again, principally on grounds of procedural good faith).[489] While these provisions are not generally used to obtain access to economic data in the hands of the counter-party or a third party they, again, reflect the underlying principle of equality of arms which permeates the procedural rules.

Accordingly, as is to be expected, the adversarial principle is central to Spanish civil process and applies fully in the context of equal access to evidence.

Second, the principle has a specific and notable development in the area of EU competition law, of course. The quintessential rules on equal access to proof are contained in the new disclosure provisions of the Damages Directive introduced into the civil procedural law via Article 283 bis a) et seq LEC. The objective of those provisions is to correct the asymmetry

[488] See, for instance, the SAP Girona, 15 June 2022, ES:APGI:2022:732, LG 4.

[489] See SAP Barcelona, 24 May 2004 (a medical negligence case), ES:APB:2004:6673, LG 5: 'The essential procedural good faith to be observed by all the intervening parties in a proceeding (art. 247.1 LEC) required that, in fair reciprocity, the injured plaintiff should comply with the request she received at the end of March 2003 to go to Dr. Lidia's office in order to obtain the corresponding opinion of the defendant (telegram page 313)'.

typically existing between parties in competition cases. And they clearly extend to economic data in the hands of the opposing party, or a third party, where such information is relevant and necessary for the expert's assessment (for instance, as regards the existence of an infringement, its effects or the quantification of the harm it has caused). Article 283 bis a) includes in its list of possible objects of a disclosure request the prices applied at the different levels of the supply chain potentially affected by an infringement. It is also noteworthy that, in connection with the execution of a disclosure order which involves the inspection of documents (including, implicitly, data), Article 283 bis g) 2 contemplates the possibility that a party be accompanied to the inspection by an expert. The use of experts to analyse data disclosed in competition proceedings can be seen in the data room exercises referred to earlier and is illustrative of the relevance of expertise in disclosure exercises (both in determining its proper scope and in assessing the information disclosed). As we have already noted, the EU disclosure rules have important implications for the Spanish civil process, ushering in a more iterative process to that currently regulated in the Spanish civil procedural code.

It is worth highlighting two further specific aspects of expert evidence in competition litigation, which contribute to our assessment of the procedural implications for our subject-matter and build on the discussion around disclosure. Both are related and constitute a development on the basic adversarial theme we have identified. They are also eminently matters of common sense. The first comes from the Spanish Supreme Court's now famous formulation concerning that which is required of an expert report to be considered a valid quantification of harm; namely, that it 'formulate a reasonable hypothesis' which is, at the same time, 'technically founded on the basis of verifiable and non-erroneous data'. This latter part of the formulation confirms the importance of underlying data used in the quantification of harm in determining the weight that a court should grant to a given expert report, and furthermore the need, not only that the data used not contain material errors, but also that it be verifiable; that is, that it can be checked. Given the technical nature of this exercise, and the huge volume of data typically employed, this question again requires the involvement of an expert (the counter-party's expert, in this case).

The soft law best practices of the European Commission (and their national counterpart in the CNMC) on how such expert evidence should be presented offer some helpful practical guidance on how to achieve this verifiability of data. Indeed, they address directly the way in which complex models and datasets should be presented (to the administrative authority, in this case) in order to permit verification of their accuracy and coherence. We have referred to these earlier: electronic access to dataset(s) and models, including a traceable record of the collection, cleaning and manipulation of data from source to the final dataset(s) used. In turn, the satisfaction of these essential criteria are pertinent to determining the evidentiary weight that will be granted to such expert evidence by the competition authority. It will also be recalled that an element of the court's consideration of expert evidence in accordance with the rule of healthy criticism is the extent to which the evidence complies with applicable scientific standards or best practices. Such best practices are clearly consolidated as a matter of the administrative process of competition authorities in the EU and objectively they contribute to achieving the Supreme Court's stated principle that data should be 'verifiable'. Subject to other considerations of a logistical nature or of cost and proportionality, it seems evident, therefore, that civil procedure should also tend immediately to the encouragement at least of these practices, and, then indeed, move toward their standard incorporation to competition cases.

By way of preliminary conclusion, we can affirm then that Spanish civil process embraces the adversarial principle and the need for equal access to underlying data used in technical reports, both generally and, even more acutely, in the realm of competition law. The experts themselves have a particular role to play in making this principle effective given the invariably technical and complex nature of data.

Aspects of flexibility in the LEC

We have indicated that the Spanish civil procedural rules offer some room for flexibility in this regard. What specific matters are we referring to? In essence, we are defending that the Spanish civil procedural rules can and should be interpreted, where possible and without compromising the essential principles inspiring their architecture, in a way which permits the effective presentation and evaluation of expert evidence. Given its technical nature and the difficulty for courts to interpret complex expert evidence of an economic nature (and, in particular, assess frequently diametrically opposed findings), it is especially important that the parties, and their experts, are granted the opportunity (within legal, practical and proportionate bounds) to check the opposing sides' models, calculations and underlying data, and thereby offer the judge reasons and argument to assist him or her in discriminating between opposing reports and thereby enable the judge to discern the good from the bad, or the better from the worse.

There are a number of provisions in the civil procedure concerning expert evidence where such an approach may be possible and, indeed, helpful. For instance:

- Submission of underlying data and materials (Article 336(2) LEC)

  We have already addressed this matter in detail above, in the context of the facts and evidence relied on by an expert. The foregoing considerations in relation to the adversarial principle provide further support for a purposive interpretation of Article 336(2) and greater demands being made on the transparency of materials used by experts.

- Late submission of expert reports (Articles 336(3), 336(4) and 337(1) LEC)

  It seems evident to me that the rules applying to the late submission of expert reports need to be applied in a manner which is more coherent with the nature of the type of evidence used in competition cases, in order to ensure the effective satisfaction of the adversarial principle and access to justice, as well as substantive compliance with the principle of procedural good faith contained in Article 247 LEC. In this regard, it should be recalled from the early days of the Civil Procedural Law, when expert reports had in all events to be filed 'before' the relevant hearing, that this provision had to be interpreted in a way which permitted the counter-party sufficient time to comprehend the report and defend itself.[490] That is, it was not sufficient to offer a mere formal compliance with the deadline. The original rule was amended to require a late expert report to be filed 'as soon as it becomes available' and at least five days before the relevant hearing.[491] In practice, the five-day default rule has become the norm and the requirement to submit the report as soon as it

[490] See, for instance, SAP Lleida, 8 May 2005, ES:APL:2005:974, LG 1, albeit the example is a very extreme one (a technical engineering report filed less than an hour before the main hearing).
[491] With Royal Decree-law 6/2023, a special time limit has been introduced for oral proceedings, namely 30 days from the claim or defence (art 337(1) of the LEC, amended by art 103.59 of the Royal Decree-law).

becomes available is seldom, if ever, mentioned. That is, in practice, parties hold back this key piece of evidence as long as they possibly can, at times precisely in order to limit the ability of their counterparty to react. This is not conducive to effective and fair justice where, as is often the case, the report is long and complex and based on voluminous underlying materials and data. It is averred that the practice should, in consequence, be guided away from the default rule towards a more reasonable time period in light of the circumstances of the case and the principal rule of earliest availability. In this sense, Royal Decree-Law 6/2023 has rightly introduced a discretionary power to extend the deadline for the submission of the expert report in the case of abbreviated proceedings ('juicio verbal') 'when the nature of the expert evidence so requires and there is a justified cause'. So, this idea is already in the LEC. This discretion may raise further concerns about legal certainty, certainly, but it is a necessary evolution in this field, to which we will return.

In this regard, too, it seems to me that the justifications which are provided by parties to satisfy the court that it is not possible to submit the report with the statement of claim or defence – typically, in the form of a brief, general letter from the experts - are normally inadequate. It seems to me, furthermore, that such letters are an opportunity, if properly used, to set out as clearly as is reasonably possible, the reasons for the delay, what method the expert proposes to use, with what data and within what period. This would inform the judge more fully not only on the need for a delay, but also a delay of how long and with what purpose. The identification of relevant data also contributes to setting the framework for any disclosure requests. It is also suggested that with this information, the Court Clerk is in a position to fix a date for the submission of the report which would satisfy the availability test and provide at the same time certainty. This could, for example, be contained in the order fixing the date for the preliminary hearing.[492]

- Report extensions and amendments (Articles 338, 426(5), 427(2), 427(3) and 286 LEC)

  There are two key situations in which the law clearly permits the submission of a further expert report after the initial submission with the statements of claim or defence: (i) in the case of *new issues* being raised in the defence or at the preliminary hearing, and (ii) in the case of new facts arising or coming to the notice of a party for the first time. The former, subject to my comments on this earlier,[493] could for instance arise where a defendant has raised a pass-on defence in its statement of defence, and this could justify a further expert report from the claimant. As to new facts, the question arises whether this covers the situation of new data following disclosure or whether the provision is aimed rather at facts of more direct relevance to the outcome of the case (as opposed to what we have deemed secondary facts) as is foreseen in Article 286 LEC. Be that as it may, it seems clear that parties should, in practice, be permitted to produce an expert report based on data disclosed to it during the course of the process, which is relevant for their expert opinion, since otherwise the disclosure exercise would be rendered ineffective and the equal rights of defence compromised. How should that be framed? In the first place, files or supports containing data which has been disclosed may be proposed as evidence at the preliminary hearing. Second, an expert report may, in addition, be proposed to

[492] art 414(1) LEC.
[493] See Ch 17.3(a) above.

interpret the result of using that disclosed data in order to refine and amplify the calculations already carried out in the initial report, either on the ground that the data constitutes facts of new knowledge for the party in question[494] or, perhaps preferably, on the basis of the general provision that parties may propose extensions of expert reports on specific aspects (in this case, on the newly disclosed data).[495]

Having considered some reasons and possible areas for flexibility in the treatment of expert evidence, there are two further matters on this topic which I wish to touch on before we finalize our discussion. The first relates to expert engagement with the process beyond the traditional submission of reports and oral testimony ('ratificación') at trial. The second relates to the organization of the trial itself as regards the hearing of expert evidence. We turn to these two matters in the following two final sections of this chapter.

c) Pre-trial engagement

We have already indicated the important role that experts may play in a competition damages case. The key piece of evidence on a central issue, the quantification of harm, will invariably be the expert reports. That evidence can often be based on complex analysis of voluminous technical data (such as prices, costs and other economic variables). The process we have begun to sketch in this chapter based on the exigences of EU (primary and secondary) law and practice, points to a more iterative and involved process which foments a greater degree of access and exchange of proof, including data (subject always to the limits of proportionality). In this context, experts play an important role in opining about what data is relevant to the case, what disclosure should be requested and what quantification methodologies may be possible or advisable in light of the circumstances of the case (including, importantly, the available data). As indicated above, experts will have to be involved in the related disclosure exercise and this is expressly contemplated in Article 283 bis g) 2.

Traditionally, in Spanish proceedings, the expert's role, beyond the preparation of the report and testimony at trial, will be to advise his or her client on issues and evidence of relevance to the case, which fall within his or her area of expertise. The party-appointed expert will be involved in advising on any request for disclosure of economic data or other materials necessary for their analysis (or in relation to requests by the counterparty) and in assessing the economic arguments in the counter-party's legal submissions and, above all, expert report, in preparation for trial. However, this is work carried out behind the scenes between the client, its lawyers and the expert. Unlike in the UK system, there is no real engagement with the experts from the other side or with the court, at least until trial. The question arises, however, whether it would be possible and, indeed, desirable for there to be greater involvement of the experts in the process: either amongst them, with or without the supervision of the court, or directly with the court.

This is not something regulated in the Spanish Civil Procedural Law. Nonetheless, it does seem that there are a number of points in the civil procedure where experts could assume a more proactive (and 'public') involvement in the process itself and, in the right circumstances, this may be highly desirable. Let us consider some that come to mind:

[494] arts 426(5), 286 LEC.
[495] art 427(2) LEC.

- Requests for economic disclosure

A party may request access to disclosure prior to filing the claim, in the statement of claim or at any time during the course of proceedings. For reasons already explained, it seems more appropriate that requests for disclosure occur during the course of proceedings. However, this is not a decisive factor in our current context, since we are concerned with what the expert's potential involvement in that request could be and this will be similar regardless of the moment of the request.[496] A disclosure request has to be proportionate and justified. Where a disclosure request concerns information which the expert seeks with a view to developing his or her expert opinion, it is evident that the substantive reasons for the request will be driven by the expert (even if those reasons need to be framed legally by legal counsel in an appropriately drafted disclosure request). It may then be appropriate that the request be supported by evidence from the expert as to those reasons, why the information is necessary, for what purpose and why it is proportionate. This could take the form of a supporting statement or letter and, potentially, be further supported by a declaration at the disclosure hearing (subject to which we will return below).

- Article 337 letter

As noted earlier, the expert letter submitted by the defendant to justify the impossibility for the expert to produce the report with the statement of defence is normally overly brief in its explanations, it being deemed sufficient that the expert has stated that he or she has not been able to produce the report in time, by reference at most to the general difficulties of processing large volumes of information or the complexity of the quantification exercise. It is averred that this letter could be used to instruct the court and the other party as to the intended object and scope of the report (including details on data to be employed, methodology or methodologies to be used and estimated timings), and this would not only provide a more adequate basis to determine the compliance with the impossibility test but also provide a framework for the expert evidence and possible disclosure requests. Indeed, it is likely that, if the defendant requires access to extra data, the statement of defence will have included the corresponding disclosure request by way of 'otrosí' (a procedural request incorporated to the end of the brief, after the pleas) and this will be so indicated in the letter.

Indeed, it seems desirable that greater substance be vested in this procedural step since this will permit the judge to be better versed as to the expert issues in play from an earlier stage and better placed to assess disclosure. In this way, the experts can contribute to the court having a greater ability to manage the case effectively and efficiently in the context of the more iterative process which we are alluding to. Indeed, in the typical example I have given, it would be of utmost importance for the judge to understand how any disclosure requested by the defendant's appointed expert would fit into the work already to be performed by the expert on the basis of existing data available to the defendant and thereby be better placed to consider its necessity and proportionality.

[496] The context of the disclosure request will vary depending on whether the requesting party is the claimant or the defendant, in that the former (except in a case of pre-action disclosure) will likely have already produced a report (unless the report depends entirely on prior disclosure), whereas the defendant likely has not. This may affect the nature and scope of the request, certainly. This said, one normally finds that each party, including the defendant, will produce its first, main analysis based on the information available to it, in the usual way, such that disclosure will more often than not be relevant to second rounds of reports, following the presentation of statements of case.

- Disclosure hearing

The next stage in the process following disclosure requests is the disclosure hearing. Ideally, this will occur once and only once (i.e., disclosure requests should all be included at the stage of statements of case), and hence the importance of some of what has gone before which would permit the court to have sight of all the parties' intentions in this regard from an early stage.

As already indicated, it may often make sense that, if economic disclosure is being requested, the justification be supported by evidence from the requesting party's economist. While this may take the form of a statement or letter (similar to the Article 337 letter), it would also be appropriate for the expert to appear before the court to face questions from the counterparty and the court itself, and thereby ensure the protection of both side's rights of defence. Indeed, it would also be appropriate in those circumstances that the other party's expert be permitted to provide his or her own evidence at the hearing as to the necessity and proportionality of the request. Indeed, ideally, one could imagine cross-requests being put forward and considered together in one hearing with views from both parties' experts. For this to occur, some adjustments are required to current practice. First, it is necessary that the courts adopt a more coherent approach to the procedure at the disclosure hearing. This varies considerably from court to court. Some follow a full mini-trial process (opening submissions by the parties, proposal and admission of evidence, hearing of admitted evidence and concluding remarks),[497] while others follow a simpler process, asking for oral submissions from the party's lawyers: brief confirmation of the request (or none at all), a full oral response by the requested party and, possibly but not necessarily, a brief reply by the requesting party. Some courts may ask the requested party to make its response in writing.[498] The parties are entitled to propose and have evidence heard at the disclosure hearing.[499] This may include expert testimony on the specific matter of the request submission. However, in the case of the requesting party, this should arguably be preceded by a written report which should be filed with the request or at least five days in advance of the hearing (since otherwise such evidence could be considered out of time) and, in addition, the requesting party should include a request that the expert testify at the hearing.[500] In the case of the requested party, since the defence is oral and presented at the hearing, such requirements may not apply (although procedural good faith may suggest that prior communication to the counter-party could at least be recommendable).

- Court intervention, prior meetings and party agreement

Up to this point all the procedural possibilities we have mentioned fit within a fairly standard conception of the Spanish civil procedure as contemplated in the existing law, albeit adapted to the specifics of an advanced competition damages case. However, let us consider also the use of some of the other mechanisms and practices employed in English competition law proceedings which have proved effective in fomenting the effective case management of expert evidence and related disclosure.

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[497] That is, they apply the procedure for trial in verbal proceedings under art 443 LEC as occurs in other scenarios (eg, in the procedure for the certification hearing in the proposed new collective actions regime).
[498] See also the discussion on this variety in Ch 16.1, above.
[499] art 283bis(f)3.
[500] This would be by application of art 337 LEC.

The first possibility to be considered is that the court itself request to have the party experts present at the disclosure hearing in order to assist the court in properly evaluating the methods proposed and the disclosure requested.[501] It is not evident that the court has the power to do this under Spanish rules. It will be recalled that the principle of party initiative in the proposal of evidence is sacrosanct and the court's power under Article 429(1) LEC limited. However, courts have been known very occasionally to make a similar type of request and if framed merely as a request for guidance to the court in taking its own disclosure decision, rather than an imposition to produce evidence, as I believe it was in the Automobile Manufacturers' Cartel case in Valencia we have referred to earlier, arguably there is nothing stopping the court doing so.[502] And while, equally, there is nothing requiring the parties or their appointed experts to oblige the court, one can appreciate that it would take a bold expert to deny the court its privilege and, indeed, forego the opportunity to try to persuade the court as to his or her view of the relevant matters in issue. At the same time, it permits the court to adopt a more proactive role in the management of the case, which is, I believe, for the reasons discussed in an earlier section, both necessary and proper in complex litigation such as this.

In addition, one can see that there could be a good deal of sense in the experts meeting before the hearing to consider the options available for their expert reports and trying to reach some consensus on the way forward before they appear before the judge. Such meetings never occur in practice in Spain and are not contemplated in the procedural rules. They fit well in the more flexible setting of English proceedings. In a Spanish setting, they would almost certainly be considered rather as a sign of weakness. Before we reject this eventuality entirely, however, we should consider the last aspect of the English approach to these situations and that is the ability of the parties to agree the scope of disclosure or at least agree parts of the requests and submit what remains to the judge for a decision. There is nothing to prevent a party in Spanish proceedings from informing the judge at the disclosure hearing that it is in agreement with the disclosure request or part of it and, in those circumstances, it seems unlikely that the court would impose another solution unless there were strong reasons for doing so. What is more, there is nothing preventing a party voluntarily providing disclosure to the other party without the need for a court order. It may take a very confident party in today's Spanish litigation culture to take such a bold and collaborative approach. However, one can see that there could be strategic advantages to being open. Aside strategic considerations, can the courts foment a change of culture in this sense? Would they like to see it happen? If the answer is yes, what can the courts do? I would suggest that there is nothing preventing courts from encouraging the parties to consider what can be agreed - indeed, party agreement is a core underlying principle of the civil procedural rules.[503] Indeed, latest adaptations to Spanish and EU procedural law have underlined the importance of alternative means of dispute resolution and have promoted mediation and other forms of reaching consensual solution to disputes. The rules applying to the first hearings in civil proceedings, indeed, now require the court, as the very first step, to raise the possibility of agreement or mediation to resolve matters in dispute.[504] Accordingly, an approach to disclosure which sought to promote agreement among parties would not

[501] It is perhaps worth noting, in passing, that this is perhaps a further reason for disclosure requests to be processed during (rather than before) the proceedings, when both parties' experts are already instructed.
[502] See SJM3 of Valencia, 21 October 2022, ES:JMV:2022:9610 (see Ch 16.3(d) above).
[503] See, for instance, the provision on the agree/disagree position of the parties relating to the issues in dispute at the preliminary hearing, art 428 LEC.
[504] See, arts 414(1) and 443 LEC as modified in 2012 and 2015 respectively.

only not be culturally foreign to the Spanish system but, in fact, reinforce the new DNA which must now impregnate proceedings, the court's case management and the parties' attitudes. It would, therefore, make a good deal of sense to contemplate and promote such attitudes.

d) Trial

We come finally to the trial. As in English proceedings, the trial constitutes a central part of the civil process in Spain. It is an occasion where the credibility and coherence of the expert's evidence can be tested, and the judge and parties granted the opportunity to formulate direct questions, thus contributing to the court's critical assessment of the evidence and the weight it should be granted.

We will consider here briefly some procedural questions relating to the organization of the trial which, in my mind, contribute to the efficacy of the exercise. Clearly, there is no magic solution and even a well processed trial may be inadequate in revealing the truth or something close to it, as we have seen in the CAT *Royal Mail* proceedings.[505] However, within reason and subject to the central question of proportionality, there are a number of aspects which can, in my opinion, contribute to the exercise being as useful as possible.

The first and foremost requisite for trial is that the time dedicated to the exercise be sufficient. In my opinion, trials in Spain tend to be too short to allow proper consideration of expert evidence. This is generated by factors relating to the hugely fragmented nature of litigation to date, the low value of claims and the unhelpful incentives for courts. These are not matters that can be overlooked lightly (and we will return to the matter in our final concluding section). They have a real and understandable impact. The result, in all events, is that an overly short time is spent on any given trial. Furthermore, it is then done so many times over on the same or similar evidence in parallel proceedings and the courts develop their criteria not robustly in one case, but rather bit by bit and over time in an inefficient and ultimately unfair fashion.[506] A more desirable situation would be for trials to be concentrated in fewer, longer sessions, which allowed courts a greater opportunity to assess and test evidence and take more considered decisions. This implies procedurally, that the court when fixing the date and sessions for trial[507] should take more care to consider the time necessary for hearing evidence and ask for the parties' opinion in that regard. Regrettably, this does not occur too much in practice. Most importantly, adequate time should be allocated to the expert evidence, if necessary over more than one session. We have mentioned the example of the Oviedo commercial court which has adopted the practice of concentrating a number of trials in one sitting and dedicating greater time over separate sessions to hearing the evidence. There is no doubt that this allows for a deeper consideration of the evidence and can improve the quality of decision-making.

It should, next, be possible for the experts to present aspects of their reports using visual or audiovisual instruments at the court. The graphical presentation of results and their verbal explanation can be particularly useful tools for ensuring proper exposition and comprehension. This again rarely occurs and courts are not that amenable, whereas, by

[505] Ch 12, Part II, above.
[506] Unfair because later cases are frequently predetermined by prior ones, or (and this occurs less often, precisely because of the concern of courts to provide equal solutions to equal problems) because a later case is decided differently just because it came later and not because the evidence or arguments were different.
[507] This is the last step in the preliminary hearing (art 429(2) LEC).

contrast, in competition proceedings before the administrative review court overseeing the decisions of the CNMC (the 'Audiencia Nacional'), the use of such instruments is now standard practice. It is clear that infrastructure issues may complicate matters somewhat, particularly while competence in competition law is still distributed among so many local courts. However, where there is willing, my experience shows that parties are able to find workable solutions; for instance, by being permitted to bring their own instruments and aids to court, used under the court's control and supervision.

The ability to hear expert evidence simultaneously and allow the experts to respond to each other's testimony (so-called 'careo') is an interesting tool which is often permitted in practice in Spain and has had some material use in competition cases. It does allow for experts to rebut each other and pick up points and reveal inconsistencies or inadequacies (or even consensus) which the lawyers or judge are not always so well placed to do. That is a clear benefit. In my opinion, to be truly effective, however, simultaneous hearing of experts needs to be properly managed. That is, it needs to be utilized in a similar fashion to the more formalized format known as 'hot-tubbing' prevalent in Common Law systems and having its origin in Australian civil procedural practice. This means that the court needs to take a certain lead in the exercise both to set out how the process should run and itself to intervene in the exercise.[508] And this brings us on to the last point I would like to raise: the court's ability to intervene, after questioning by the parties' lawyers has finished, to ask its own questions to the expert and require explanations about the report.[509] It is, in my opinion, to be encouraged that judges engage with the expert evidence, something that will be helped if they have begun to take a role in case managing the evidence form an early stage (as discussed earlier). Clearly, there can be a reluctance to do so where the court is at pains to understand the evidence or insufficiently familiar with the pleadings and reports. However, there can be no doubt that the more the judge exposes him or herself to a dialogue with experts the more inconsistencies and weaknesses with the expert evidence may be clarified or misunderstandings of technical issues clarified by the judge. Clearly, it helps to have more experience in the matter as with this grows greater confidence. However, even the specialized CAT with all its resources, has had no problem with asking experts to enlighten them on relevant technical issues at the very beginning of the trial through a so-called 'teach-in'.

[508] This may, in turn, raise the need for practical protocols to be developed among commercial courts to try to homogenise practice, although this is a broader issue and challenge which we will return to in our conclusions.
[509] art 437(2) LEC.

PART IV

CONCLUSIONS AND RECOMMENDATIONS

Introduction

We come now to consider the conclusions of our analysis and present our recommendations for how to improve the adjudication of actions for the private enforcement of EU competition law in Spain, by reference to our particular focus of attention: the quantification of harm. It will be recalled that our starting question was: what is the impact of EU law on national procedure in this area? We present our answer to that question mindful of: (i) the EU legal framework, both generally and in the specific area of competition law (the focus of analysis in Part I of our study), (ii) the lessons to be learned from the UK's private application of EU competition law over the last 20-30 years (subject of Part II); and (iii) the Spanish experience of antitrust private damages claims over these past few years and the possibilities offered by Spanish law for adapting procedures and practice to the needs and exigences of EU competition law (Part III).

Two principal lessons can be drawn. First, national courts have a central role to play as those who directly enforce EU law. Second, procedure is key in ensuring the ability of judges to carry out that role and the judges themselves must be involved, within clear legal limits, in managing the progress of that procedure according to the specificities of the case. A corollary has also appeared: the parties (through their lawyers and experts) must collaborate with the court to this end. Indeed, the EU regime for private enforcement has ushered in a new paradigm in court procedure.

This new paradigm has yet to have been properly appreciated, much less fully applied, in Spain, however; and that is the case too in other EU Member States. It is the aim of this research to offer a contribution to addressing why and how that situation can and should change.

We will set out findings succinctly in the following two final chapters: 18. Conclusions; and 19. Recommendations.

18. Conclusions

18.1. National judges as EU judges

The remedies and procedures applicable to the EU law right to damages for breach of competition law, as developed by the CJEU and the Damages Directive, are incomplete. Nevertheless, they establish a 'blueprint' which the Member State institutions, including, first, the national legislature, and, second, the courts, are charged with adapting to the national legal context. Following the transposition of the Directive into Spanish law through the adoption of Royal Decree-law 9/2017, this is primarily now the task of the Spanish commercial courts and appeal courts.

The EU framing of national procedural autonomy

Herein lies a delicate balance for the national courts to achieve. On the one hand, the EU has established a stated respect for national legal traditions and for the Member States' procedural autonomy to determine how to organize their local procedural system and enforce EU rules. On the other hand, that adaptation to the reality of local judicial organization and procedural culture must be realized in a way which achieves the objectives which have been set by the EU. In the middle sit the national judges who, when applying directly effective EU competition law (Articles 101 and 102 TFEU) in private actions, are acting as EU judges. As such, they are charged with ensuring effective compliance with a rich

tapestry of EU norms and principles; and may, in consequence, be required to interpret national law in conformity with that body of law, disregard incompatible national case-law, disapply rules of national law or even offer legal recourse where none exists under national law.

The relationship between the two levels in the EU legal order is an evolving one. To the extent greater harmonization is required to ensure the effective application of EU law, the CJEU and the EU legislature may be called to act.[1] The Damages Directive is a case in point. The EU acted to harmonise certain minimum rules and standards for private antitrust enforcement to try to ensure a level playing field across the EU.

Notably, from the standpoint of procedural law, the Directive introduced a new disclosure mechanism, as well as the faculty for judges to estimate harm. These mechanisms are EU law instruments with their own autonomous EU meaning which must be adequately incorporated into the national system and then understood and applied by national judges. The CJEU has determined further the scope and procedural implications of these mechanisms, notably in two Spanish referrals.[2] The second, *Tráficos Manuel Ferrer*, has confirmed the central impact that disclosure is destined to have on civil procedure in competition actions in Spain, as in other parts of continental Europe. Indeed, disclosure is, in my view, a key factor in assessing the impact of EU law on civil procedure in competition claims. It is the one 'hard' procedural law emanating from EU law in this area and its incorporation into national procedure has a necessary impact on process, the implications of which are yet to have been properly appreciated.

The blueprint for damages actions set out in the Damages Directive forms part of a broader canvass of EU law which permeates that blueprint and must be borne in mind by Spanish commercial courts when they carry out their task. This includes both sector-specific EU competition law and fundamental principles of EU procedural law.

National courts as enforcers of competition law

National courts form part of a decentralized system for the enforcement of EU competition law, together with the European Commission, national competition authorities and national courts in other Member States. This system forms a complex whole aimed at achieving the fundamental EU competition policy objectives and is tied together with carefully crafted checks and balances. National courts are tasked with ensuring the protection of private law rights deriving from EU competition law, including compensation for damages, for any legitimate party which can establish jurisdiction before them. The direct effect of EU competition law, and its effective private enforcement by the courts, constitutes a cornerstone of the EU legal order and, through it, national courts play a complementary, not a subsidiary, role to public authorities in the enforcement of the competition rules.

The objective of the combined action of courts and authorities is to ensure the public policy goal of effective competition throughout the EU and the uniform application of EU competition law, whether this be before the courts or public authorities, or whether the affected party appear before a court in Barcelona, Milan, Dortmund or Paris. These underlying principles are central to the proper interpretation and application of EU competition law and are to be informed by their stated purpose and context, as most directly

[1] In line with the underlying EU principle of subsidiarity (art 5 TEU).
[2] Case C-163/21 *Paccar* EU:C:2022:863; Case C-312/21 *Tráficos Manuel Ferrer* EU:C:2023:99.

reflected in the recitals to the relevant instruments (notably, Regulation 1/2003 and the Damages Directive). Soft law developed by the EU Treaty's guardian and competition policy-maker, the European Commission (and, within the Commission, DGCOMP), offers additional guidance in their proper and uniform interpretation.

The development of EU procedural law and its application to our subject-matter

A positive body of fundamental EU procedural rules and principles, emanating from different areas of EU substantive law (including competition), has spawned over recent times reflecting a certain constitutionalization of procedural rights in the EU treaties and the CJEU's concern for coherent standards of legal protection to apply across all EU policy areas.[3] They include as a golden thread the central right to effective judicial protection;[4] that is, the ability for private parties to invoke their EU law rights before a court and to have those protected, without impediment, by means of a judicial resolution on the merits in a reasonable time (the right to a judgment under Spanish law).

The foregoing describes a certain Europeanisation not only of substantive competition law, but also of procedural law in this area, as we have seen in the First Part of this study. We can rightly speak of EU procedural standards and instruments to which, under the overarching umbrella of common and incisive EU legal principles and policy goals, national courts must seek to conform their own national procedures when applying EU competition law.

As has become clear along the selective path we have taken through the applicable EU legislation, soft law and case-law, some of these rules and principles are of particular relevance to our topic. Their relevance has been further confirmed by the practical experience of national courts in applying EU competition law, the subject of Parts Two and Three of this work. They include, notably: (i) the sovereign and non-delegable role of the judge in assessing evidence (including expert evidence); (ii) the need for effective judicial control of the admission and use of evidence; (iii) the procedural principles of adversarial proceedings, equality of arms and effective protection of the rights of defence; (iv) the role of disclosure and evidentiary transparency (between the parties and with the judge) in ensuring compliance with these principles; (v) the role of the burden of proof, the standard of proof and presumptions to allow for a fair, reasonable and proportionate balance in the assessment of evidence; and (vi) the utility of specialised courts in developing uniform practices and contributing to the proper administration of justice in certain complex matters.

All these issues become even more important in the context of a technically complex subject-matter (such as competition law) where, in addition, expert evidence may play a decisive role in the determination of some central facts in dispute - facts that, typically, are hypothetical and based on probabilities. In this context, it is easy for a court, if it is not granted the necessary procedural tools, to feel insufficiently sure about how to interpret the evidence - what weight to give it, how to decide between opposing positions, etc. - and runs the risk, in short, of becoming captive to the opinions of one or another expert.

Towards the development of best practices

The way in which this is achieved by national judges is legitimately constrained by the basic principles of the domestic judicial system (for instance, the dispositive or preclusive

[3] art 7 TFEU.
[4] art 19 TEU and art 47 CFREU.

principles of the Spanish Civil Procedural Law) and the intensity of conformity varies depending on the intensity of EU harmonization. Indeed, recent policy has made a clear choice to prefer the promotion of best practices and standards over intrusive harmonisation legislation. This is not to water down the relevance of EU law on civil procedure but rather to take a realistic, respectful and effective approach. The impact of EU law is substantial and should not be underestimated. Indeed, concepts of EU law have even shaped the practice of UK courts quite noticeably in this area, for instance regarding the quantification of harm in collective and individual actions.[5] This reflects a fascinating convergence between common law and continental legal systems which is occurring and can be observed, partly as a result of the influence of EU law.

The final guarantor of the whole system is, of course, the CJEU. Where necessary, national courts may refer questions to the CJEU pursuant to Article 267 TFEU to seek clarification on how they should apply EU law to a given situation. The referral mechanism is central in setting the right limits and guides to national litigation. Properly used, it assists the court system in providing an effective response to the challenges of competition actions (something which requires a more systemic approach to that currently employed, in particular as regards the appropriate use of stays). At the same time, the CJEU reference is definitely not a panacea. The preliminary reference process causes delay and, by virtue of being case-specific and judge-led, is unavoidably unsystematic. Accordingly, national courts need additional support to be placed in a position to address their role as EU judges effectively. In the absence of a workable harmonised legislative solution, the development of an adequate web of good practices (and a judicial system which permits) is of central importance.

18.2. The procedural challenges of competition litigation

As already noted, competition law is by nature technically complex, in terms of both the applicable rules and the types of evidence typically relied on. Expert evidence of economic harm, or concerning the existence of anti-competitive conduct or effects, may involve the use of difficult concepts and large amounts of detailed economic information. Judges are frequently faced with diametrically opposed expert opinions, not only in terms of what is the right answer, but also as to which are the right premises to employ and what are the relevant facts and data.

Where a case is characterized by multiple claims (mass litigation), the challenges of adjudicating such complex cases are amplified. We have witnessed this in Spain in the context of the Trucks litigation, where real concerns have been raised about the quality of judgments, the efficiency of the process and the equal treatment of litigants (independently of where they bring their claims).

How to achieve the policy goal of efficient justice?

The quality of judgments is important. The decisions adopted by courts, to the extent that they convey subjective and objective authority, both generate confidence in citizens and also serve as a reference to society (and other courts) as regards the judicial response that can be expected to a given problem. This, in turn, promotes economic dynamism and growth, on the one hand, and promotes uniformity, predictability and less litigiousness (i.e., settlements), on the other. While the Spanish court system's response on Trucks has much to

[5] *Merricks* [2020] UKSC 51 and *Britned* [2018] EWHC 2913 (Ch) respectively.

its credit (including, its speed, pragmatism and general consistency on many substantive matters), it has failed to deliver a clear judicial response in an effective manner. Indeed, it has involved the relitigation of issues hundreds of times over, in many different fora, before reaching a point at which litigants, in the words of the Supreme Court, could be expected to know what to expect on quite basic questions, such as what constitutes a valid expert estimation to discharge the burden of proof.[6] This has been inefficient. Furthermore, it has done so dedicating insufficient time to individual cases. Courts have precipitated in their response to the claims, adopting too many decisions too fast and without sufficient attention to facts, arguments and evidence. These problems have been caused partly by the procedural rigidities and the inadequate incentives of the Spanish civil process (for both litigants and courts), as those have been traditionally conceived.

The efficient use of limited public resources, including the justice system, is a priority of public policy. It is not an absolute principle and must be balanced with the need to deliver fair and effective justice of an adequate quality and to guarantee judicial independence from State and Government interference. However, the efficient use of public resources by sharing those limited resources in a just and equitable manner will, in fact, contribute to effective justice. The balance is captured in the English CPR overriding objective of 'enabling the court to deal with cases justly and at proportionate cost'. The Commission has itself highlighted the objective of 'appropriate and efficient use of the judicial system', advocating the streamlining of antitrust damages cases and warning against the risks of multiple relitigation of the same issues.[7]

These considerations bring us to one immediate preliminary conclusion: it is preferable to assess fewer cases in more depth, and take more time in doing so, in order that the resulting decisions may offer greater precedent value and at the same time promote judicial efficiency and consistency. To this end, EU law offers instruments to assist judges and parties alike including, in particular, the new disclosure mechanism. It also offers a series of best practices and guidelines on how to apply competition law and gauge the strength of expert evidence, albeit such soft law is not binding and is subject to development and peer review. These instruments point to an increase in the level of sophistication in the processing of cases before the Spanish courts; notably, as regards the administration and assessment of evidence. Indeed, it is one of our central theses that Spanish courts are called (if not legally bound) to increase the attention to detailed factual assessment and judicial reasoning when adjudicating EU competition law cases. This is a key aspect of the convergence of continental systems with their common law cousins to which EU law is contributing.

An ideal balance: case management, procedural concentration and access to justice

This preliminary conclusion has procedural implications. The first is increased active case management by the courts. The second is the concentration of cases before less, more specialized courts.

Complex litigation of this sort invites closer involvement of courts in the management of the process and the administration of evidence. This entails judges exercising more judicial discretion in procedural matters and forms part of the common-sense exercise by judges of

[6] For all, STS 947/2023, 14 June 2023, ES:TS:2023:2480, LG 10, para 19.
[7] In the 2013 policy papers accompanying the proposal for the Damages Directive (Ch 5.1 above).

judicial power. Used properly, it will not compromise fundamental procedural guarantees.[8] The Spanish courts of appeal ('Audiencia Provinciales') may have a role to play in ensuring the respect for these guarantees, by assuming judicial leadership in the development of basic principles of case management (similarly to what occurs in the UK). Case management relies, too, on party collaboration, which assists the judge in adapting the process to the needs of the case. Parties thereby take on a greater responsibility in the procedure and their procedural conduct becomes a relevant consideration for judges in taking procedural decisions. Case management and party cooperation are a reality of modern judicial activity and form the cornerstone not only of the CPR and CAT Rules in the UK, but also of relevant international references, such as notably the 2020 ELI/Unidroit Model European Rules.[9] The draft Spanish Law on Representative Actions, published in 2023 during the XIV legislature, is another good example.[10] It is littered with references to the term 'good administration of justice', by which it refers to the criteria for various procedural decisions to be adopted by the court and permit of a necessary degree of procedural flexibility to cater for the demands of a specific case.

The concentration of cases in less proceedings before less courts has evident benefits for the efficiency and quality of justice. Concentration may be achieved by different mechanisms including the parties themselves joining different cases before one court, or court specialization. It is significant that the CJEU should have indicated on a number of occasions now that court specialization and concentration in matters of technical complexity, such as competition law, contribute to the good administration of justice. This position has been expressly supported by the French and German Governments and by the Commission.

All of the foregoing must, finally, be viewed through the prism of the principles of proportionality and of access to justice. Making procedures more tailor-made to the demands of competition cases risks increasing cost and delays. This is, of course, something that judges must take into consideration in administering justice to ensure individual parties with small claims are not denied effective access to justice at a reasonable cost. However, it is averred that, in general terms, a systemic approach to the challenges of EU competition claims, in the terms proposed, would offer better equitable access to justice for all, including such claimants.

19. Recommendations

We turn now to our specific recommendations for how to address the challenges posed to the Spanish judicial system and civil procedure by EU law on the private enforcement of the competition rules. Our objective can perhaps be formulated by reference to our own 'overriding objective' in the following terms:

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[8] Burkhard Hess, 'Judicial discretion' in Marcel Storme and Burkhard Hess (eds), *Discretionary power of the judge: limits and control* (Kluwer 2003), 45, notes that case management decisions focussed on strictly procedural matters are usually subject to limited appellate review (except where such decisions have strong implications for the outcome of a case) but that the exercise of judicial discretion is subject, in all events, to fundamental procedural guarantees, such as proportionality, fair trial, impartiality and the right to be heard (pp 52-4).

[9] As well as, before that, the failed European Parliament Minimum Standards Directive, n 10 (Part I).

[10] Pre-draft law on representative actions for the protection of collective consumer interests, approved on 20 December 2022 and published by the Ministry of Justice on 9 January 2023. See, more recently, the Draft law on measures in matter of efficiency of the Public Service of Justice and collective actions for the protection and defence of rights and interest of consumers and users, published on 22 March 2024

To enable Spanish judges to act in accordance with EU procedural law and standards in the consistent and effective application of EU competition law, including in situations of mass litigation.

These recommendations are based on the foregoing discussion in the previous chapters and aim, above all, to be realistic.[11] They intend to address the real situation and challenges for courts and judges in Spain, who those judges are and what their strengths and weaknesses, difficulties and satisfactions, are, to build on what exists and make viable proposals to improve that situation based on our real experience of what can work and what cannot, and (largely) without the need for legislative reform.

At the same time, we have spoken earlier of the new paradigm that EU law in this area has ushered in. I would venture that, with some exceptions, this paradigm has not yet been truly understood or assimilated by the Spanish system. Accordingly, this signifies the need for a cultural change in legal practice by practitioners and courts alike.[12] As the experience of the CPR reforms in the UK has shown, this change is not automatic or simple. It demands willing, patience, a process, and adequate mechanisms to educate and convert the main stakeholders involved. It also requires convinced advocates for change who can lead such a process for change.

What follows are two sets of proposals, first, of a general institutional nature, and second of a more specific procedural nature. They all form necessary parts of a whole and should be read and interpreted as such.

19.1. Institutional proposals

a) Court specialization

The attribution of EU and national competition law cases to specialized commercial courts in Spain has been positive. The commercial courts should, accordingly, be granted exclusive competence also for the new representative actions when the law is adopted.

The number of commercial courts is, however, high (around 90) and the number of judges hearing competition cases, therefore, also high (around 70). The further sub-specialization in a more reduced number of judges should continue to be sought. This has been achieved successfully in Barcelona (5 of 12 courts) and Madrid, at both the first instance (7 of 18 courts) and appeal level (the creation of the new Section 32 of the Madrid Provincial Court).

Ideally, in order to create a manageable group of judges from the perspective of training and the development of best practices, the number of judges should be reduced; perhaps to around twenty. To achieve this, the attribution of competence in competition law matters should be concentrated in a smaller number of commercial court centres, according to the model that has been implemented in the area of IP law. Given the nature of competition litigation, with a strong focus on technical expert analysis of economic evidence, the proximity to the claimant is, in general, not normally relevant. Certainly, this factor is much less important than the specialist competence of the judge.

[11] de la Oliva Santos, *El papel del juez*, n 30 (Part III).

[12] See, inter alia, Gascón Inchausti, 'Aspectos Procesales', n 308 (Part I), 152: 'A correct application of the established regime will force many actors in the process - and especially judges - to "get out of their comfort zone" in terms of how to deal with many of the decisions that will necessarily arise in the preparation or during the development of the litigation; I believe that therein lies the risk, but also the opportunity, for an effective implementation in our country of the system of private enforcement of competition law.' (my translation).

The reduction in the number of competent courts will facilitate the development of best practices across the full set of competent courts (building on what currently happens with the publication of unification criteria by specific courts). Such practices need to be properly debated (internally and then publicly) and published. This will assist in ensuring greater uniformity, certainty and rigour in procedural practice. The key areas for focus should be disclosure and case management.

The development of collegiate tribunals, as has occurred in Barcelona and Seville, contributes positively to the development of coherent practice in competition law and the efficient use of resources. These mechanisms are only contemplated currently at a local level. Nevertheless, they would still contribute positively to the national model of limited specialized courts foreseen here.

The impact of court incentives on the proper processing of competition claims is negative and foments judges spending insufficient time on the consideration of complex issues and evidence. It is vital that existing exceptions for the adaptation of benchmarks in matters requiring 'special dedication' be applied in competition cases to ensure proper time is dedicated to their processing.

In the event legislative reform were contemplated in this area, Spain could usefully draw on international experiences in the creation of specialized courts, such as in the UK or Portugal, or in court concentration, such as in Italy.[13] A focus of our attention here, the CAT offers an efficient and high calibre forum for the litigation of competition cases, which is good for competition and for business. The flexible methods used in the UK to organize and finance the CAT are of particular interest and could offer inspiration for the creation of a specialized court in Spain. While one organization, the CAT has a number of locations, a limited central staff and draws on judges from the wider UK commercial court system. As well as competence in civil matters, the court also has competence to review the decisions of the national competition and regulatory authorities and, as a result, depends on the Ministry for Economy.

b) Training

The training of judges in EU and competition law occurs in different fora in Spain but has its limitations. Internal judicial training programmes organized for commercial courts by the General Judiciary Council, normally twice a year, are generally imparted by the commercial court judges themselves, without contact with practitioners or jurists from other jurisdictions. EU-funded programmes for the training of EU judges in competition law provide access to a broader scope of experiences by virtue of the presence of speakers and judges from other countries, including speakers from private practice.[14] Nevertheless, the quota of attendees at such events is limited and the participation of Spanish commercial court judges has also been relatively low. There have, in addition, been numerous further ad hoc conferences, seminars and courses on the private enforcement of competition law. The quality of such events varies enormously and, regrettably, they can be used as opportunities to attempt to persuade judges of the merits of a particular party's position on matters in

[13] As well as other methods, such as the transfer of proceedings, as occurs in the Netherlands.
[14] In Spain, these courses have been organized, notably, by the University of Valencia and the University of Barcelona.

ongoing proceedings. This can create, if not situations of direct conflicts of interest for judges, at least, situations of considerable discomfort, which should be avoided.[15]

Accordingly, there is a need for more systematic and higher quality training programmes for competition law judges in Spain. It is important that such training programmes count, discretely, on the practical experience of practitioners, since Spanish judges are excessively removed from private practice.[16] Any such engagement must be careful to ensure transparency as to any professional interest of the practitioners involved and be based on objective merits. The rich experience from around the EU and the UK should also be drawn on and will assist in the desired uniform application of EU competition law. Academia and other stakeholders should also be involved, while always taking care to ensure appropriate disclosure of relevant professional interests.[17]

Given the complementary nature of their work, it is advisable that some judicial training be coordinated with the Spanish competition authority, the CNMC. This could broach such matters as access to the administrative file, CNMC intervention at disclosure hearings, amicus curiae interventions and quantification of harm. In addition, it might cover general instruction on respective procedures, a matter on which there is generally considerable ignorance on both sides.

The Association of European Competition Law Judges (AECLJ) offers an excellent platform for exchange of experiences among competition judges in Europe and offers a hub for training courses.[18] Spain has recently enlarged the group of judges that attend their bi-annual meetings to include a selection of commercial judges, which is essential. That group should be renewed on a rolling basis. The learnings should be shared among all competition judges in Spain.

Training and education will be easier to manage cohesively and effectively if court specialization measures are adopted. If the number of judges were smaller and more manageable, and that number more focussed on competition law, the possibilities to advance will be hugely increased. The CAT again offers a reference. The Tribunal has its own director of training who coordinates training activities and its own educational resources (library and support staff).

c) Transparency

An important matter which is related to effective training and education is transparency. It is currently difficult readily to access relevant decisions on the private enforcement of EU competition law in Spain (and, indeed, the EU). Most Spanish judgments are communicated by courts to the central judicial database (CENDOJ).[19] However, it is not comprehensive. Neither is there any way of knowing when a new competition law judgment has been handed down (other than via other sources such as personal contacts with lawyers involved

[15] de la Oliva Santos has also identified the risk of excessively tight relationships of regional authorities and administrative bodies with judges through somewhat bogus training activities; 'Sobre la calidad de la Justicia', n 19 (Part III), 34.

[16] Irene Andreu Mora and Carlos-R. Puigcerver Asor, 'Las dificultades de la armonización: la escasa aplicación del Derecho Europeo procesal' in Andrés de la Oliva Santos and María Pía Calderón Cuadrado (dirs), *La Armonización del Derecho Procesal tras el Tratado de Lisboa* (Aranzadi 2012), 151, 193. Judges have not generally practiced as lawyers before, either, given the direct, public exam, system for access to the Spanish judiciary.

[17] Academics in Spain may dedicate part of their work to providing professional advice on private matters.

[18] See https://www.aeclj.com/events-courses.

[19] https://www.poderjudicial.es/search/indexAN.jsp.

or social networks). Judgments are, as a matter of law, to be notified to the CNMC,[20] and DGCOMP,[21] but this generally does not occur in practice. In addition, procedural orders (such as disclosure orders or other relevant procedural decisions) are not generally published. Amicus curiae observations of the CNMC are not published by the Spanish competition authority either. This contrasts with the practice of DGCOMP.[22]

Given the intense and fragmented activity in private enforcement in Spain, this situation raises a real problem. It is not conducive to the coherent development of law and practice. Much of what is going on is simply not known to the majority of lawyers and, I would venture, judges. This information should, however, be public and available to all.

The CNMC should insist on compliance with the requirement on courts to notify it with judgments and consider comprehensive publication of judgments on a continuing basis on a specific, searchable and intuitive competition website.[23] Ideally, this should be coordinated with the General Judiciary Council to ensure complete information. Judges should be encouraged to be more forthcoming also with the communication to CENDOJ of procedural orders, for inclusion also on the competition website.

Likewise, DGCOMP should coordinate with AECLJ to ensure notification of national rulings and resume its database of national judgments which has been paralyzed for some years.[24] Any such activity should be appropriately coordinated with national Spanish initiatives. This requires, accordingly, the identification of contact points in AECLJ, in the CNMC and in CENDOJ to permit such coordination.

The CNMC should publish its amicus curiae interventions. It should also elaborate protocols on how it proposes to intervene in national civil proceedings, its practice on access to the file, intervention in disclosure hearings and protection of confidential information. These should be published on the CNMC website, which should include a section on private enforcement of competition law.

d) Case management

In Spain, there exists no general case management power for judges (despite proposals by the General Judiciary Council during the Covid-19 lockdown to include a provision in the joinder provisions of the Civil Procedural Law). Nevertheless, there is limited scope for case management under existing rules and judges should be encouraged to manage competition proceedings in a more proactive and effective way. For this, judges will need to assume contact with proceedings at an earlier stage, in particular to consider the approach to multiple claims, and should use the occasion of disclosure hearings and preliminary hearings as an opportunity to guide the administration of evidence and the process to trial. This is in keeping with the basic principle of ensuring increased contact of the judge with the process which was introduced under the 2000 Spanish Civil Procedural Law.

A closer involvement by judges in procedural management of competition cases from an early stage requires the full involvement of Court Clerks ('Letrados de la Administración de

[20] art 212(3) LEC.
[21] art 15(2) Regulation 1/2003.
[22] See https://competition-policy.ec.europa.eu/antitrust/national-courts_en.
[23] The CAT website offers a good benchmark: https://www.catribunal.org.uk/judgments and https://www.catribunal.org.uk/cases.
[24] This is something AECLJ and DGCOMP are currently working on: https://www.aeclj.com/noticeboard.

Justicia') in coordination with the judge. The principle that parties (and their lawyers and experts) should collaborate with the court should form part of procedural considerations and negative attitudes admonished, and not advantaged, accordingly. Greater weight should, therefore, be given to the demands of procedural good faith.[25]

It is highly recommendable that courts elaborate and publish practice guidelines concerning how they propose to handle the case management of competition litigation cases, bearing in mind the specific demands of such cases. This will contribute to coherent practice and legal certainty. In order to ensure legal certainty and equal treatment, efforts should be made to promote best practices at a national level. This will be facilitated by reducing the number of commercial courts applying competition law and promoting training fora. In addition, the appeal courts may assume a role of judicial leadership in developing the basic principles which should shape the courts' exercise of case management powers.

e) Collective actions and the concentration of claims

Joinder and other mechanisms for processing individual claims together, or testing central issues common to multiple claims, will assist in the management of situations of mass (alleged) competition harm. As such, they should be facilitated by courts. Experience has shown, however, that collective actions are also a necessary mechanism for permitting the efficient processing of mass claims. On many occasions a single, well managed opt-out collective proceeding will provide the only means of effective access to justice, particularly when individual harm is relatively low.

The future representative actions should, as proposed, cover breaches of competition law. The commercial courts should be granted jurisdiction to hear collective competition law claims, instead of the ordinary first instance civil courts as originally proposed. The specialization of a select group of courts for such claims, within the commercial courts, would be appropriate.[26] Given their complexity, the default procedure for competition cases, whether for declaratory relief or damages, should be the ordinary declaratory procedure and not the fast-track verbal procedure as currently envisaged for declaratory actions. In due course, a collective mechanism should be made available also for non-consumer (i.e., business) claims.

Finally, the new collective action regime, if approved, should offer the opportunity for courts to develop their practice of exercising judicial discretion in procedural matters given the greater scope contemplated in the draft law. This relates, for instance, to disclosure (which forms part of the EU collective action regime) and case management powers generally. The draft law may offer an opportunity for the legislature to take on board some of the proposals set out in this research; for instance, aimed at incorporating disclosure more satisfactorily within the civil procedure and adapting to the demands of expert evidence.

19.2. Procedural proposals

We come now to our proposals for change to the processing of competition claims. They are not conditioned on a change to the law. Rather, they are recommendations of how to apply existing procedural rules in a way which is consistent with the dictates and spirit of EU law. If applied, they would contribute positively to achieving the goals of efficient, fair and effective

[25] art 247 LEC.

[26] As was foreseen for competent first instance courts under draft art 834(2) LEC in the pre-draft law for consumer representative actions published by the Government in 2023, n 10.

justice of a higher substantive quality. We set out below, more or less chronologically, the specific proposed elements of the procedure as we envisage it.

a) Statements of case

It is suggested that, in order to assist the court in managing parallel claims, where a claimant forms part of a claimant group being represented by the same legal counsel, it should, where possible, disclose this fact in its statement of claim. It should set how it is proposed that the multiple claims will be dealt with from a procedural perspective (i.e., joinder, test claims, separate claims, etv), why this method has been chosen and how it will contribute to the good administration of justice. If possible, such proposals should be agreed in advance with the other side prior to filing and the agreed arrangement explained to the court. Clearly, such suggestions are not mandatory, but it is averred that they are in the spirit of collaboration and procedural good faith which parties should adopt.

A Spanish claimant is not obliged to set out its proposals nor to make contact, even, with the defendant prior to filing a claim and it may have legitimate reasons not to. However, in practice, it is common for there to be inter partes correspondence prior to filing; for example, because the claimant wishes to interrupt limitation. For its part, a defendant is not obliged to accept a claimant's procedural proposal – for instance, to join claims - and is entitled to raise any legal objections it has in its statement of defence. However, if the parties agree to the joinder of actions in one same statement of claim or to the joinder of separate proceedings originally filed separately, such agreement essentially removes any obstacle to such joinder (subject only to legal impediments). Equally, if the parties can agree to other types of mechanism (e.g. test claims or joint processing of claims), this will assist the court in determining the right way to treat the case or proceed, since the court will be better placed to understand its context and relevance.

It is suggested, in addition, that claimants should disclose the existence of third-party funding if this has been put in place to finance the cost (or part thereof) of the claims. This idea, which is included as a mandatory requirement for collective claims for damages in the Spanish proposal for the draft representative actions regime,[27] would address some of the sense of mystery and uncertainty which currently shroud such undisclosed arrangements. Again, greater transparency is likely to be of benefit to the court and the proceedings.

Any requests for disclosure should be included, by way of 'otrosí',[28] in the statements of claim and defence. They should be supported by expert declarations (contained in a letter submitted as a document with the corresponding statement of case) if the disclosure requested relates to information or materials requested by the expert to prepare their expert report. We will elaborate on further elements of what we will call 'Expert Declarations' below.

The statements of claim and defence should include, by way of 'otrosí', any requests in relation to protection of allegedly confidential materials submitted with those statements, which the party wishes not to be disclosed by the court or the counterparty to any third party. This will enable the court clerk to be aware of such matters and, if necessary, raise the issue to the judge for a decision.

[27] ibid proposed art 844(1)(f) LEC.
[28] This refers to an ancillary procedural request included at the end of the statements of claim or defence, after the requests for relief (petitum).

The statement of claim should also include, by way of 'otrosí', a request that, upon admission, the corresponding order admitting the claim be notified to the CNMV[29] I would recommend that where the statement of claim includes a disclosure request relating to documents contained in the administrative file of a competition authority, this fact should be included by the court clerk in the notification to the CNMC, and the details of that request be placed at the authority's disposal should it wish to exercise its rights to make submissions concerning the proportionality of such a request.[30]

Finally, it is suggested that there may be collaborative ways to avoid initial procedural fights related to the service of claims abroad under the EU Service Regulation and the time-limit for filing of a defence. Where the parties can agree to what translations are needed, into which language, and where and how service should be affected, they may also be able to agree a time-limit for filing of the defence. Procedurally, this could work as an agreement for the defendant to make a voluntary appearance within the time agreed, less the standard twenty days envisaged by the law for filing the defence, and not object to the agreed means of service.[31]

b) Expert reports

The way in which expert evidence is produced and managed in antitrust private enforcement proceedings must be adapted to the characteristics of the subject-matter and be aimed at assisting the judge in evaluating that evidence, together with the rest of the evidence available, to determine the issues in dispute. This means that, as appropriate and proportionate in the circumstances of the case, proceedings should contemplate a process which enables the proper rebuttal of expert analyses, access to reasonably necessary information in adequate conditions and the submission of report extensions where this is justified. Specific measures to achieve this follow.

The statements of claim and defence should include a declaration from the respective party-appointed expert explaining summarily the methodology (or methodologies) proposed and the corresponding data requirements (the "*Expert Declaration*"). The Expert Declaration should be incorporated as a document with the statement of case (for example, in the form of a letter) in the way typical of a justification for the late filing of an expert report.[32] The Expert Declaration should be incorporated by reference in a clearly marked section of the statements of case; by way of 'otrosí' if there is a related disclosure request. The situation will be somewhat different depending on the party since the claimant will normally produce a report with the statement of claim whereas the defendant will not. In the case of the claimant, the Expert Declaration will accordingly reflect what has been carried out in the submitted report and may be brief.[33] Nevertheless, a brief summary will be of use for the court. The declaration would also be the place to justify any further needs for data the expert has and for what purpose (i.e., to execute what methodology and why it is necessary) – i.e., a justification for a disclosure request – and any corresponding proposed report extension (or even first report). In the case of the defendant, the Expert Declaration will need to justify, in

[29] Pursuant to art 404(3) LEC.
[30] Pursuant to art 283bis(i)11.
[31] art 166 LEC; see, further, Ch 15.2(c). The possibility to avoid this issue by effecting service locally via a local subsidiary is currently pending a referral by the Spanish Supreme Court to the CJEU (Case C- 632/22), n 3 (Part III).
[32] art 337(1) LEC.
[33] Exceptionally, it will need to justify why it has not been able to produce an expert report and what data is required from the other party in order to prepare it.

more detail than currently occurs, the reasons for needing more time to produce the expert report. Accordingly, it should contain a clear and reasoned explanation of the proposed methodology (or methodologies), the data to be employed and the time needed to carry out the task. Where relevant, it should also include any proposed request for disclosure together with the corresponding motivation of its scope and purpose.

Underlying data which experts employ in their analysis can normally be considered indirect evidence of facts which themselves should, as a rule, be produced into proceedings. Depending on their importance in founding a party's case and protection of parties' rights of defence, those facts may be classed as primary facts (for example, relevant transactions on which an overcharge is claimed), direct evidence of which needs to be adduced at the time of filing the statements of case, or as secondary or accessory facts (for example, transactions used in a counterfactual analysis) evidence of which should be adduced in accordance with general rules on preclusion. Underlying data itself should normally be produced into proceedings with the corresponding report, where necessary accompanied by model codes.[34] The way in which that data has been selected, collated, aggregated, processed and cleaned, should be clearly explained by the experts (ordinarily in an annex). Evidence should be provided regarding the verification of the accuracy of the data. Failure to produce relevant information which is necessary to permit the counter-party's expert to verify the robustness of the analysis and replicate it will ordinarily cause the court to grant less weight to the report. Underlying data should be produced in a way which is accessible to counter-party experts in accordance with best practices. Accordingly, electronic databases should be provided (rather than, for example, paper copies of printed datasets).

If a party considers underlying data used by experts to be confidential, it should make an application to the court for confidential treatment to be granted to the information by way of 'otrosí' in the statements of case. In order to promote transparency between parties to litigation, courts should, in general, be quite open to grant such measures; for instance, declaring the evidence produced in the proceedings to be confidential.[35] Orders should clearly indicate the consequences in terms of costs and penalties that a breach would incur. If confidentiality is sought also from the counterparty, such a request would justify a delay in underlying data being produced into court. Such requests for confidentiality should be processed by the court clerk, an opportunity to make allegations granted to the opposing party, and the matter resolved by the court in good time on the papers once the statements of case have both been filed. Information more than five years old should not normally be considered confidential nor certainly merit protection from parties to litigation. Where courts consider that confidentiality is justified, protection of data should normally be granted by way of a confidentiality ring, which limits access to specific named persons (legal counsel and experts).[36] Exceptionally, where justified by specific circumstances (such as the extreme sensitivity of the information or perceived risks of breaches),[37] the court may order that the confidentiality ring be executed by means of a data room. The conditions for access to the data room should be adequate to permit the counter-party's expert to perform the tasks of verification he or she wishes to make, to the extent those are approved by the court. This means the expert should be granted sufficient time in the data room and rights to extract

[34] Pursuant to art 336(3) LEC interpreted in line with best practices for the production of economic evidence.
[35] art 283bis(b)5.3 LEC.
[36] art 283bis(b)5.6 LEC.
[37] As to the latter, the existence of mass claims and parallel claimant groups may be one relevant factor to consider.

relevant samples and / or calculations. Where a party-appointed expert wishes to be granted access to information used by a counter expert which has not been disclosed with the report, nor was intended to be (that is, it is not subject to a confidentiality request), the corresponding party may make such a request by way of a disclosure request.

The defendant's expert report should be filed with the statement of defence or as soon as it is available. The justification provided in the Expert Declaration will motivate the causes of any delay in filing and provide a reasoned explanation of the process and time required for the final production of the report. This explanation should be used by the court clerk, at the appropriate time, as a guide to fixing the date for the preliminary hearing and a date, in advance of that hearing, by when the report should be filed.[38] The default rule of five days should be the exception rather than the rule. The court should be mindful of ensuring that the counterparty is granted adequate time in advance of the hearing to allow its own appointed expert to review and process potentially long reports and large datasets. The relevant timings may be further informed by the discussions at the disclosure hearing.

Courts should be amenable to report extensions where new information has become available to one of the parties during the course of the proceedings and the party has justified the need for that report. This will, in particular, be the case where relevant information or data has been made available further to disclosure (whether by order of the court or because a party - normally, the defendant - has produced an expert report with the new data). The request for extension will be made formally at the preliminary hearing. However, where possible, it should have been anticipated in the corresponding disclosure request and supporting expert declaration. The parties and their experts may also be able to agree to certain extensions as part of an agreement on disclosure, albeit the admission of an extension will require a court decision. The extension report, if admitted by the court, should be filed at the preliminary hearing or once it is available and with sufficient time prior to the trial, as properly justified to the court at the hearing. Similarly, to the case of filing of the defendant's expert report, the court should fix an appropriate date for the trial and for the prior filing of the report, to permit the report to be prepared in time and the defendant's expert time to review it in preparation for trial.

The use of court-appointed experts in competition private enforcement cases is not encouraged in current circumstances. Appointment should currently require agreement between the parties as to the person to be appointed or the qualities and experience that person should possess. In the future, the General Judiciary Council should try to develop a specialized list of experts in broad public consultation with relevant bodies and authorities. The existing court list and ad hoc solutions are inadequate and should be avoided. If court-appointed experts are used, it is suggested that they should be appointed as third experts, without replacing the party-appointed experts. The scope of their instructions and their access to information from the parties should be carefully defined (after hearing the parties) and controlled by the court.

c) Disclosure

Disclosure should be incorporated into the civil procedure with the objective of ensuring its effective use in accordance with the demands of the Damages Directive. This should normally occur within proceedings, following the statements of case. This would facilitate

[38] Pursuant to art 404(1) LEC.

the judge's assessment of requests by both parties and have the benefit of fully pleaded cases.

If the statements of case include admissible disclosure requests, the parties should be called to a disclosure hearing.[39] The court should indicate in the notification if it requests the experts to be present at the hearing. It should, alternatively, request that the parties themselves indicate at least five days in advance of the hearing if they wish, themselves, to call their experts or the opposing experts. If third parties are the object of the request, they should also be called.[40] If the request relates to access to the administrative file of a competition authority, the CNMC should also be notified of the hearing in order to permit it the exercise of its rights to make submissions. In the interest of procedural efficiency, the hearing of opposing requests should be heard at one and the same hearing.

The disclosure hearing offers the court an opportunity for active case management of expert evidence. The judge should engage with the parties, and their experts if they have been called, as regards their proposed analyses and related data requirements. That is, based on the Expert Declarations, the judge should seek to understand what data each side has at its disposal and proposes to use (or has already used), as well as the methodologies they seek to execute. It should also address the appropriate method for executing any disclosure and the times required both for that exercise and for any further analysis by the corresponding experts. These matters should be addressed in the corresponding disclosure requests and supporting Expert Declarations and be the object of submissions (and evidence) at the hearing.

Confidentiality issues should also be broached with regard to any further data to be disclosed following disclosure requests. The means chosen by the court to protect confidential information should be adequate to the purpose for which disclosure has been granted and this should also be addressed in the request and supporting Expert Declaration and be the object of submissions (and evidence) at the hearing.

It is recommended that the parties and their experts endeavour to agree issues in advance of the hearing. This may extend to the scope of disclosure, the means for its production and confidentiality. To the extent that sources of evidence (data or documents or other materials) have already been disclosed in prior separate proceedings involving the same experts, the parties may agree that such sources of evidence be used and proposed in evidence at the appropriate time in the proceedings (preliminary hearing), thereby avoiding a repetition of the same disclosure exercise. The court should ask the parties at the commencement of the disclosure hearing if they have been able to reach agreement on any issues related to the disclosure requests and, if so, on which. The final order should cover all matters, whether agreed or not.

d) Preliminary hearing

The preliminary hearing should be called upon completion of the disclosure exercise, or upon filing of the statement of the defence if there have been no disclosure requests. The hearing should be called as soon as possible but with enough time for: (i) the defendant to file the report of its party-appointed expert; (ii) the plaintiff to review that report; and (iii) the analysis of any disclosed data and materials to have been completed.

[39] art 283bis(f).
[40] ibid.

The court should make use of its powers to address the parties about amicable settlement of the dispute. It should ask the parties what steps they have taken to try to settle. In particular, where the parties have made manifestations in their statements of case around multiple claims, they should be invited to express whether there is any consensus as to the preferred method to run the cases in the interest of the good administration of justice and of reaching an overall resolution of the cases. The position expressed by the parties has no immediate legal force but will assist the court in framing certain further case management decisions (for instance, on stays, on the scope of evidence to be admitted, the length of the trial or costs).

Where relevant, the court should consider with the parties a stay of the proceedings on one of the following possible grounds: (i) where there is agreement of the parties to request or accept the joinder of other more recent parallel proceedings until those other proceedings have advanced to the same procedural stage; (ii) the existence of pending parallel proceedings in the event that the parties agree to stay in the interest of the good administration of justice; and (iii) the need for a preliminary reference to the CJEU on a question which is material to the outcome of the case (a stay being automatic if a reference is made or, alternatively, may be agreed where the parties are prepared to await the CJEU's judgment or, arguably, may be imposed by the court).[41] These issues should be dealt with once the procedural impediments to proceedings, if any, have been addressed.[42]

Requests for report extensions should be considered in line with earlier considerations. To the extent that relevant economic disclosure has been ordered, it would ordinarily be appropriate to permit reasonable extensions in order to ensure the effectiveness of disclosure.

In advance of the hearing, the court should endeavour to identify what it considers to be the key issues in dispute on which it wishes to hear evidence at trial ("*Key Issues*"). The court may find it helpful to consider the check-list of relevant considerations included in Chapter 17.2(b) of this research (or those related more specifically to the assessment of expert evidence in the CNMC Guide). The judge should identify the Key Issues to the parties during the phase of determining the issues in dispute and it will also assist in framing the preparation for trial.[43]

After proposal and admission of evidence, the court should consider whether, exceptionally, there are any issues on which the intervention of the CNMC or the Commission would, in the court's view, be necessary. This could relate, not to the quantification of harm, but to other questions relating to substantive concepts of competition law. The parties should be asked for their views before a decision is taken. Aside from this faculty, the court should only very exceptionally consider making its own suggestions for evidence.[44]

The court should consider preparations for trial with the parties and allow them to make their reasoned views heard before taking a decision, in particular as regards the estimated time needed for the taking of evidence and the way in which they propose to have evidence

[41] The legal situation is uncertain and has been the subject of a legislative reform expressly to empower courts to stay proceedings if they consider that a pending preliminary reference from another court may directly affect the outcome of the proceedings: the new Article 43a of the LEC introduced by Royal Decree-Law 6/2003 (see chapter 15.2(c) above).To the extent possible, competent courts should endeavour to adopt a coherent approach to this question. The lead can helpfully be taken by the courts of appeal.
[42] art 416 et seq LEC.
[43] arts 428(1), 429(1) LEC.
[44] art 429(1) LEC.

heard (for instance, if they consider hot-tubbing appropriate or whether they wish to use visual aids). The length, number of sessions and dates for the trial should be determined in light of those views and all other relevant considerations, including: the complexity of the case, the scope of the evidence to be called or the relevance of the proceedings for multiple claims. If possible, the court should provide indications on whether hot-tubbing will be used and in what format, and whether concluding remarks should be oral at the trial or in writing following trial. The court should also indicate its approach to visual aids.

e) Trial

The court should prepare to ask direct questions to the expert witnesses on any of the key evidentiary issues it has identified as relevant for determining the case which still require clarification following questioning by the lawyers. Where a hot-tub ('careo') has been chosen, the judge should remind the parties how he or she wishes to manage the process. It is recommended that the judge use the hot-tub as a means to structure expert evidence around Key Issues and he or she direct the hearing to achieve that end. The hot-tub will require prior preparation by the judge.

At the end of the hearing, the judge should consider whether it is necessary to stay proceedings prior to judgment in the event there is a pending competition authority investigation (or, possibly by analogy, equivalent decision under review by the appeal courts) which is material to the case.[45] Before taking a decision, it should allow the parties to make submissions in their concluding remarks (if they have not already made submissions on the question at an earlier occasion).

f) Costs and penalties

The courts should seek to develop greater demands on litigants by interpreting the concept of procedural good faith in line with a modern concept of party (and lawyer) collaboration in the good administration of justice. The consequences of a breach of those standards should be applied by judges in the context of the award of costs or penalties (for example, in disclosure orders or in final judgment).

[45] art 434(3) LEC.

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