Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 February 2023*

(Reference for a preliminary ruling – Competition – Compensation for harm caused by a practice prohibited under Article 101(1) TFEU – Decision of the Commission finding the existence of collusive arrangements on pricing and gross price increases for trucks in the European Economic Area (EEA) – National rule of civil procedure under which, in the event that the claim is upheld in part, costs are to be borne by each party, except in cases of wrongful conduct – Procedural autonomy of the Member States – Principles of effectiveness and equivalence – Directive 2014/104/EU – Objectives and overall balance – Article 3 – Right to full compensation for the harm suffered – Article 11(1) – Joint and several liability of the undertakings that infringe competition law – Article 17(1) – Possibility for national courts to estimate the harm – Conditions – Impossibility or unreasonable difficulties in quantifying harm – Article 22 – Temporal application)

In Case C-312/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil nº 3 de Valencia (Commercial Court No 3, Valencia, Spain), made by decision of 10 May 2021, received at the Court on 19 May 2021, in the proceedings

Tráficos Manuel Ferrer SL,

D. Ignacio,

v

Daimler AG,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

– Tráficos Manuel Ferrer SL and D. Ignacio, by Á. Zanón Reyes, abogado,

– Daimler AG, by E. de Félix Parrondo, J. M. Macías Castaño, M. López Ridruejo and M. Pérez Carrillo, abogados, and C. von Köckritz and H. Weiß, Rechtsanwälte,

– the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,

– the European Commission, by A. Carrillo Parra, F. Jimeno Fernández and C. Zois, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU, in particular as regards the requirement to compensate in full for the harm suffered on account of anticompetitive conduct arising therefrom, and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between two road haulage undertakings, Tráficos Manuel Ferrer SL and D. Ignacio, on the one hand, and Daimler AG, on the other, concerning an action for damages brought by those first two undertakings seeking compensation for harm suffered as a result of an infringement of Article 101 TFEU, found by the European Commission, which was committed by several truck manufacturers, including Daimler.

Legal context

European Union law

3 Recital 6 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 (OJ 2014 L 349, p. 1) provides:

'To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.'

4 Recital 11 of that directive states:

‘In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the [Court], any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the [Court], the principles of effectiveness and equivalence, and this Directive.’

5 Recital 12 of that directive is worded as follows:

‘This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the [Court], and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. …’

6 Recital 14 of that directive is worded as follows:

‘Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. …’

7 Recital 15 of Directive 2014/104 states:

‘Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. …’

8 According to recital 43 of that directive:

‘Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. …’

9 Recital 45 of that directive states:

‘An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.’

10 Recital 46 of that directive is worded as follows:

‘In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused by the competition law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.’

11 Recital 47 of Directive 2014/104 provides:

‘To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.’

12 Article 3 of that directive, entitled ‘Right to full compensation’, provides:

‘1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.'

13 Article 5 of that directive, entitled 'Disclosure of evidence', provides:

'1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

…

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. …'

14 Article 11 of that directive, entitled 'Joint and several liability', provides in paragraph 1 thereof:

'Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.'

15 Article 17 of Directive 2014/104, entitled 'Quantification of harm', states:

'1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.'

16 Under Article 22 of that directive, entitled 'Temporal application':

'1. Member States shall ensure that the national measures adopted … in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted …, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was [seised] prior to 26 December 2014.'

Spanish law

17 Real Decreto-ley 9/2017, por el que se transponen directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores (Royal Decree-Law 9/2017 transposing EU directives in the fields of finance, business and health, and on the posting of workers) of 26 May 2017 (BOE No 126 of 27 May 2017, p. 42820) seeks to transpose, inter alia, Directive 2014/104 into Spanish law.

18 Royal Decree-Law 9/2017 added Article 283a(a) to Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 establishing the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575) ('the Code of Civil Procedure'), relating to the disclosure of evidence in court proceedings in the context of actions for damages seeking compensation for harm suffered as a result of infringements of competition law. The content of the first subparagraph of paragraph 1 of that provision is identical to that of the first subparagraph of Article 5(1) of Directive 2014/104.

19 Article 394 of that code provides:

'1. In proceedings on the substance, costs at first instance shall be borne by the party which has been unsuccessful in all of its heads of claims, unless the court forms the view, for which it shall provide reasons, that the case raises serious doubts in fact or law.

In order to assess, for the purposes of an order for costs, whether the case raised doubts in law, account shall be taken of the settled case-law in similar cases.

2. Where the heads of claim are upheld or dismissed in part, each party shall bear the costs it has itself incurred as well as half of the common costs, unless there are grounds for awarding costs against one party for vexatious litigation.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 On 19 July 2016, the Commission adopted Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 – Trucks), a summary of which was published in the *Official Journal of the European Union* of 6 April 2017 (OJ 2017 C 108, p. 6). The defendant in the main proceedings is among the addressees of that decision.

21 In that decision, the Commission found that 15 truck manufacturers, including the defendant in the main proceedings, and Renault Trucks SAS and Iveco SpA, had participated in a cartel that took the form of a single continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) concerning collusive arrangements on pricing and gross price increases for medium and heavy trucks in the European Economic Area (EEA).

22 As regards the defendant in the main proceedings, the period during which an infringement was found to have been committed ran from 17 January 1997 to 18 January 2011.

23 On 11 October 2019, the applicants in the main proceedings brought an action for damages against the defendant in the main proceedings based on the latter's wrongful conduct. During the infringement period, D. Ignacio purchased a Mercedes lorry manufactured by the defendant in the main proceedings, while Tráficos Manuel Ferrer purchased 11 lorries, 5 of which were Mercedes lorries manufactured by that defendant, 4 were manufactured by Renault Trucks and 2 by Iveco, with the technical characteristics of the vehicles identified in the decision of 19 July 2016.

24 The applicants in the main proceedings claim to have suffered damage consisting in an overcharge on the vehicles purchased owing to the wrongful conduct of the defendant in the main proceedings. In order to quantify that overcharge, they produced an expert report concluding that there was an average overcharge of 16.35% on the market affected by that cartel.

25 Since some of the vehicles purchased by the applicants in the main proceedings had not been manufactured by the defendant in the main proceedings but by other addressees of the decision of 19 July 2016, on 11 August 2020, that defendant applied for Renault Trucks and Iveco to be joined to the proceedings, arguing that if the proceedings were to take place without those manufacturers, their rights of defence, and its own, would be infringed. By order of 22 September 2020, the referring court dismissed that application and upheld that dismissal by order of 23 October 2020.

26 The defendant in the main proceedings also disputed the merits of the action, in particular by producing its own expert report.

27 Following a preliminary hearing before the referring court, it was agreed between the parties to the main proceedings that the applicants would have access to the data taken into consideration in the expert report submitted by the defendant, with the twofold aim of allowing a more thorough criticism of those data and of leading to a possible reformulation of the expert report produced by those applicants. That access was provided in a data room at the defendant's offices. On 18 March 2021, the applicants in the main proceedings submitted a technical report on the results obtained following perusal of the data at issue.

28 After hearing the parties to the main proceedings discuss their respective expert reports and present their claims at the main hearing held before it, the referring court, by decision of 25 March 2021, decided to suspend the period for giving judgment and requested that the parties submit their observations on the possibility of making a reference to the Court of Justice for a preliminary ruling. The parties complied with that request.

29 In those circumstances, the Juzgado de lo Mercantil nº 3 de Valencia (Commercial Court No 3, Valencia, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the rules laid down in Article 394(2) of the [Code of Civil Procedure], pursuant to which an injured party is to bear a portion of the costs of the proceedings based on the amount of the sums wrongly paid as a surcharge which are returned to him [or her] after his [or her] claim for damages is upheld in part, where, as a premiss for a declaration, it is assumed that there is an infringement of competition law and that that infringement has a causal link to the harm suffered, which is indeed verified, quantified and awarded as a result of the proceedings,

compatible with the right to full compensation of a person harmed by anticompetitive conduct, as referred to in Article 101 TFEU and in accordance with the case-law interpreting it?

(2) 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 anticompetitive 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 [an overcharge] has had access during the course of the proceedings to the data on which the defendant based his [or her] expert report for the purpose of denying the existence of damage eligible for compensation?

(3) 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 anticompetitive 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 [an overcharge] brings his [or her] claim for damages against one of the addressees of the administrative decision [finding the infringement], who is jointly and severally liable for those damages but who did not sell the product or service acquired by the injured party in question?'

Consideration of the questions referred

Preliminary observations

30 First of all, it should be noted that the referring court's questions do not mention Directive 2014/104, but refer to concepts contained therein, such as the right to full compensation for harm suffered as a result of anticompetitive conduct referred to in Article 101 TFEU, the asymmetry of information between the parties, the difficulties in quantifying the harm resulting from such conduct which the national court may face and the joint and several liability of the infringers. In addition, in the grounds of the request for a preliminary ruling, that court raises the question of the temporal application of Articles 3, 5 and 11 and Article 17(1) of that directive.

31 In that regard, it should be observed that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgment of 7 July 2022, *Pensionsversicherungsanstalt (Child-raising periods completed abroad)*, C-576/20, EU:C:2022:525, paragraph 35 and the case-law cited).

32 Consequently, even if, formally, the referring court has limited its questions to the interpretation of Article 101 TFEU, in conjunction with, as regards the second and third questions, Article 47 of the Charter, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. Thus, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, by analogy, judgment of 7 July 2022, *Pensionsversicherungsanstalt (Child-raising periods completed abroad)*, C-576/20, EU:C:2022:525, paragraph 36 and the case-law cited).

33 Next, as regards the question raised by the referring court concerning the temporal application of Articles 3, 5 and 11 and Article 17(1) of Directive 2014/104, it is necessary to draw a distinction based on whether those provisions derive, in the light of the case-law, from Article 101 TFEU itself, in which case they are applicable immediately, or stem solely from that directive, which requires an examination of their temporal applicability in the light of Article 22 of that directive.

The first question

34 As regards the right to full compensation for the harm suffered as a result of anticompetitive conduct, referred to in the first question, it should be recalled that it follows from the principle of effectiveness and the right of any person to seek compensation for loss caused by a contract or conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*) plus interest (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 95).

35 Thus, by recalling, in Article 3(1) of Directive 2014/104, the obligation on Member States to ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm and by defining the latter, in Article 3(2) of that directive, as the right to compensation for actual loss and loss of profit, plus the payment of interest, the EU legislature intended to reaffirm the existing case-law, as is apparent from recital 12 of that directive, so that national measures transposing those provisions must necessarily apply with immediate effect to all actions for damages falling within the scope of that directive, as confirmed by Article 22(2) thereof.

36 It follows that the first question concerns, in essence, whether the right to full compensation for harm suffered as a result of anticompetitive conduct, as recognised and defined in Article 3(1) and (2) of Directive 2014/104 and arising from Article 101 TFEU, precludes a national rule of civil procedure such as that laid down in Article 394(2) of the Code of Civil Procedure, under which, in the event that the claim is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct.

37 In that regard, as is apparent from the considerations set out in paragraphs 34 and 35 of this judgment, the right to full compensation for the harm suffered as a result of anticompetitive conduct and, in particular, of an infringement of Article 101 TFEU does not concern the rules on the allocation of costs in the context of judicial proceedings relating to the implementation of that right, since those rules do not aim to compensate for the harm, but determine, at the level of each Member State, in accordance with its own law, the manner in which the costs incurred in the exercise of such proceedings are to be allocated.

38 Moreover, the EU legislature took care to exclude the issue of costs from the scope of Directive 2014/104, since that question is addressed only incidentally in Article 8(2) of that directive, which concerns penalties in the event of a refusal to disclose evidence or the destruction of evidence, and provides for the possibility for national courts to order the party responsible for that non-disclosure or destruction to pay the costs.

39 That said, it must be recalled that, as regards Article 101 TFEU, the Court's case-law, according to which the rules relating to actions for safeguarding rights which individuals derive from EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraphs 43 and 44).

40 Since an infringement of the principle of equivalence is clearly not at issue in the present case, it is in the light of the principle of effectiveness that it is necessary to examine whether a national procedural rule such as that laid down in Article 394(2) of the Code of Civil Procedure and qualified, where appropriate, by the case-law of the Spanish courts, according to which it is also possible to obtain an order for costs where there is a minor difference between what has been claimed and what has been obtained in the proceedings, renders the exercise of the right to full compensation for the harm suffered as a result of anticompetitive conduct, as recognised and defined in Article 3(1) and (2) of Directive 2014/104 and arising from Article 101 TFEU, practically impossible or excessively difficult.

41 In that context, as is apparent from recital 6 of Directive 2014/104, as regards actions for damages brought pursuant to national measures intended to transpose that directive, the EU legislature relied on the finding that combating anticompetitive conduct on an initiative taken by the public sphere, that is to say, the Commission and the national competition authorities, was not sufficient to ensure full compliance with Articles 101 and 102 TFEU and that it was important to facilitate the possibility, for the private sphere, of helping to achieve that objective (see, to that effect, judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 55).

42 That participation by the private sphere in the financial penalisation of anticompetitive conduct and, therefore, also in its prevention, is all the more desirable because it is capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also for 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 (judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 56 and the case-law cited).

43 It is to attain that objective that the EU legislature – having noted, in recitals 14, 15, 46 and 47 of Directive 2014/104, the asymmetry of information existing between the claimant and the defendant in the type of actions covered by that directive, since, according to recital 14 of that directive, 'the evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant' – required the Member States to lay down measures enabling the claimant to remedy that asymmetry.

44 To that end, Directive 2014/104, in the first place, obliges those States to confer on that party the power to ask national courts to require the defendant or a third party, under certain conditions, to disclose relevant evidence in their possession, pursuant to Article 5 of that directive. In the second

place, that directive requires the Member States to empower those courts, under certain conditions, where it is practically impossible or excessively difficult to quantify the harm, to estimate it, in accordance with Article 17(1) of that directive, where appropriate, if they so wish, with the assistance of the national competition authority, as is apparent from Article 17(3) of that directive. In the third place, that directive requires Member States to introduce presumptions, in particular that relating to the existence of harm arising from a cartel, as provided for in Article 17(2) of that directive.

45 It follows that, unlike Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) – the interpretation of which gave rise, inter alia, to the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), to which the referring court refers – which concerns contracts typically involving a weak party, the consumer, opposing a strong party, the 'professional', who sold or rented goods or supplied services, with the resulting imbalance in bargaining power, embodied in a contractual relationship the limits of which lay, inter alia, in the principle of the prohibition of unfair contract terms being penalised, in principle, by the removal of such clauses, Directive 2014/104 covers actions which concern the non-contractual liability of an undertaking and involve a balance of power between the parties to the dispute, which, as a result of the effect of the national measures transposing all of the provisions of that directive listed in paragraph 44 of this judgment, may, depending on the use made of the tools thus made available to, in particular, the defendant, have been corrected.

46 Consequently, it must be held that that case-law cannot be transposed to a type of dispute characterised by the intervention of the EU legislature giving the claimant, who is initially at a disadvantage, means intended to correct in its favour the balance of power between that claimant and the defendant. The evolution of that balance of power 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.

47 It follows that, as the Advocate General observed in point 68 of her Opinion, as regards proceedings for compensation for harm caused by infringements of competition law, if a claimant is unsuccessful in part, it is reasonable for him or her to bear his or her own costs, or at least part of them, as well as part of the common costs, provided that the origin of those costs is to be attributable to him or her, for example due to the fact that the claimant made excessive claims or due to the manner in which he or she conducted the litigation.

48 It must therefore be held that a rule of national civil procedure such as that laid down in Article 394(2) of the Code of Civil Procedure, read in the light of the case-law of the Spanish courts referred to in paragraph 40 of this judgment, does not render practically impossible or excessively difficult the exercise of the right to full compensation for the harm suffered as a result of anticompetitive conduct, as recognised and defined in Article 3(1) and (2) of Directive 2014/104 and arising from Article 101 TFEU; accordingly, the principle of effectiveness is not infringed.

49 In the light of the foregoing considerations, the answer to the first question is that Article 101 TFEU and Article 3(1) and (2) of Directive 2014/104 must be interpreted as meaning that they do not preclude a national rule of civil procedure under which, in the event that the claim is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct.

The second and third questions

50 By its second and third questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 17(1) of Directive 2014/104 must be interpreted as meaning that a judicial estimation of the harm caused by the defendant's anticompetitive conduct is permitted in circumstances in which, first, the defendant has given access to the claimant to information on the basis of which it had itself drawn up its expert report in order to rule out the existence of harm in respect of which compensation may be claimed and, second, the claim for damages is brought against only one of the addressees of a decision finding an infringement of Article 101 TFEU, which has only marketed part of the goods acquired by the claimant and in relation to which an overcharge is alleged to have been imposed as a result of that infringement. In that context, that court makes the possibility of carrying out such an estimation subject to a finding of an asymmetry of information or to insurmountable difficulties in quantifying the harm.

51 As a preliminary point, it should be recalled that Article 17(1) of Directive 2014/104 constitutes a procedural provision, within the meaning of Article 22(2) of that directive (judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 85), so that the national measures transposing Article 17(1) are, in accordance with Article 22(2) of that directive, applicable to actions for damages brought after 26 December 2014.

52 That said, it must be stated, first, that actions for damages falling within the scope of Directive 2014/104, like actions for civil liability in general, aim to compensate damage as precisely as possible, once the existence of and responsibility for that damage are established, which cannot rule out that certain uncertainties remain when the national court rules in order to determine the amount of the compensation. That is why the mere existence of those uncertainties, inherent in proceedings concerning liability and which arise, in actual fact, from the confrontation of arguments and expert reports in the exchange of arguments, does not correspond to the degree of complexity in the assessment of damages required to allow the application of the judicial estimation provided for in Article 17(1) of that directive.

53 Second, the 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.

54 Consequently, the concept of asymmetry of information, although at the origin of the adoption of Article 17(1) of Directive 2014/104, as is apparent from paragraph 43 of the present judgment, does not, however, take effect in the implementation of that provision, contrary to what is suggested by the wording of the second and third questions. In that regard, as the Advocate General stated in point 86 of her Opinion, even where the parties are on an equal footing as regards the information available, difficulties may arise during the specific quantification of the harm.

55 In this respect, in the first place, it must be observed that the objective recalled in paragraph 41 above presupposed the implementation of tools capable of remedying the information asymmetry between the parties to the dispute since, by definition, the infringer knows what it has done and or has been accused of doing, if anything, and knows what evidence may have been used in such a case by the Commission or the national competition authority concerned to demonstrate its participation in anticompetitive conduct contrary to Articles 101 and 102 TFEU, whereas the victim of the damage caused by that behaviour does not have such evidence (judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 59).

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.

58 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.

59 Subject to that possible effect of Article 5(1) of that directive on the possibility for a national court to estimate the harm pursuant to Article 17(1) of that directive, the circumstance characterising the situation at issue in the main proceedings, namely that the defendant has of itself, after being authorised to do so by the referring court, made available to the claimant the data on which it relied in order to refute that claimant's expert report, is not, in itself, relevant for the purposes of assessing whether it is permissible for the national court to undertake an estimation of the harm.

60 Third, it is open to the party making a claim for damages based on the existence of harm caused by anticompetitive conduct to address that claim to only one of the infringers, given that, according to the case-law, as the Advocate General noted in point 102 of her Opinion, an infringement of competition law involves, in principle, the joint and several liability of all of the undertakings that committed the infringement (judgment of 29 July 2019, *Tibor-Trans*, C-451/18, EU:C:2019:635, paragraph 36).

61 Accordingly, Article 11(1) of Directive 2014/104, in so far as it provides for such a possibility, must be regarded as a provision codifying the Court's case-law and, for the same reasons as those set out in paragraph 35 of this judgment in relation to Article 3(1) and (2) of that directive, is among the provisions of that directive the national transposition measures of which apply immediately.

62 That being so, that possibility cannot deprive the party who has brought an action for damages falling within the scope of Directive 2014/104 from requesting the national court hearing the case to order other infringers to disclose relevant evidence, in accordance with the rules and within the limits defined in Article 5 of that directive, in order to enable that court to determine the existence and the quantum of the harm and, thus, to avoid having to undertake a judicial estimation of that harm.

63 In the present case, two other truck manufacturers penalised by the Commission in the decision of 19 July 2016, Renault Trucks and Iveco, marketed vehicles purchased by Tráficos Manuel Ferrer and could therefore be in a position to supply it with evidence concerning the overcharge caused by the cartel, in order to determine whether, and to what extent, that overcharge was actually passed on in the purchase price of four Renault Trucks and two Iveco trucks. It should be noted, in that regard, that the defendant also has the option, under the last sentence of the first subparagraph of Article 5(1) of that directive, to request that court to order those other infringers to disclose relevant evidence, which might prove particularly useful in a situation in which, as in the present case, the referring court dismissed the application by the defendant in the main proceedings seeking to have two of them joined to the proceedings.

64 Subject to that possible effect of Article 5(1) of Directive 2014/104 on the possibility for a national court to estimate the harm under Article 17(1) of that directive, the circumstance characterising the situation at issue in the main proceedings, namely that the claim for damages is directed against only one of the addressees of a decision finding an infringement of Article 101 TFEU, which marketed only part of the products acquired by the claimant and which were allegedly subject to an overcharge due to that infringement is, in itself, not relevant to assess whether it is permissible for the national court to undertake an estimation of the harm.

65 Consequently, in the light of the foregoing considerations, the answer to the second and third questions is that Article 17(1) of Directive 2014/104 must be interpreted as meaning that neither the fact that the defendant in an action falling within the scope of that directive has made available to the claimant the data on which it relied in order to refute the expert report of the latter nor the fact that the claimant has addressed its request to merely one of the infringers are not, in themselves, relevant for the purposes of assessing whether it is permissible for the national courts to undertake an estimation of the harm, that estimation being based on the premiss, first, that the existence of that harm has been established and, second, that it is practically impossible or excessively difficult to quantify it with precision, which involves taking into consideration all the parameters leading to such a finding and, in particular, the unsuccessful nature of steps such as the request to disclose evidence laid down in Article 5 of that directive.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 101 TFEU and Article 3(1) and (2) 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**

   must be interpreted as meaning that they do not preclude a national rule of civil procedure under which, in the event that the claim is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct.

2. **Article 17(1) of Directive 2014/104**

   must be interpreted as meaning that neither the fact that the defendant in an action falling within the scope of that directive has made available to the claimant the data on which it relied in order to refute the expert report of the latter nor the fact that the claimant has addressed its request to merely one of the infringers are not, in themselves, relevant for the purposes of assessing whether it is permissible for the national courts to undertake an estimation of the harm, that estimation being based on the premiss, first, that the existence of that harm has been established and, second, that it is practically impossible or excessively difficult to quantify it with precision, which involves taking into consideration all the parameters leading to such a finding and, in particular, the unsuccessful nature of steps such as the request to disclose evidence laid down in Article 5 of that directive.

[Signatures]