Kluwer Competition Law Blog

The Truck Cartel's "Lingering Effects"

Francisco Marcos (IE Law School) · Thursday, October 3rd, 2024

Introduction

The Civil Chamber of the Spanish Supreme Court has already issued forty judgments ruling on appeals against judgments of the Courts of Appeal on claims for damages caused by the truck cartel. The Courts of Appeal have now handed down 4315 rulings on compensation for more than 25,000 cartelized trucks, 95% of them (partially) granting compensation to claimants.

After the second round of Supreme Court rulings in March 2024 (analyzed here), lower court judgments awarding compensation of more than 5% of the purchase price of the cartelized vehicle are exceptional (but see ES:APAL:2024:451, ES:APAL:2024:566, ES:APAL:2024:559 and ES:APAL:2024:568). In addition to the 40 judgments, the Supreme Court has resolved more than 200 cassation appeals (either dismissing them or sending the case back to the Court of Appeal to be resolved in accordance with the doctrine established by the Supreme Court in its first wave of judgments).

Spanish Supreme Court Judgments on Truck Cartel Damages

	ECLI reference
First Round	ES:TS:2023:2492, ES:TS:2023:2472, ES:TS:2023:2495, ES:TS:2023:2473, ES:TS:2023:2475, ES:TS:2023:2474, ES:TS:2023:2476, ES:TS:2023:2477, ES:TS:2023:2497, ES:TS:2023:2478, ES:TS:2023:2479, ES:TS:2023:2480, ES:TS:2023:2493, ES:TS:2023:2494, ES:TS:2023:2496 and ES:TS:2023:4200
Second Round	ES:TS:2024:1287, ES:TS:2024:1285, ES:TS:2024:1286, ES:TS:2024:1288, ES:TS:2024:1289, ES:TS:2024:1291, ES:TS:2024:1292 and ES:TS:2024:1290
Third Round	ES:TS:2024:4003, ES:TS:2024:4004, ES:TS:2024:4005, ES:TS:2024:4000, ES:TS:2024:4001 and ES:TS:2024:4002

Most Recent Judgments

The last batch comprises six judgments handed down on 22 July 2024, in which the Supreme Court confirms the criteria established in its previous judgments: given that none of the expert reports submitted by the plaintiffs or by the defendants in their different versions (by the plaintiffs, *Caballer, Naider, PQAxis, pseudo* or Zunzunegui, and by the defendants, Compass Lexecon, E. CA Economics, and KPMG) are considered convincing, but it is presumed that the cartel was harmful, the overcharge is set at 5% of the purchase price of the trucks plus interest since the acquisition. The judgments also include relevant dicta on damages claims when the cartelized vehicles were acquired through leasing and when the vehicles were acquired after the "official closing date" of the cartel.

'Lingering Effects' of the Truck Cartel

In this post, I will focus on this last point (i.e, the "lingering effects" of the truck cartel), which may be the most controversial, since in relation to compensation for cartelized trucks acquired through leasing, the Supreme Court does nothing more than develop and extend the reasoning already pointed out in its initial judgments of June 2023 (which I analyzed here): trucks' purchases through leasing were also affected by the cartel (already in ES:TS:2024:1290, Legal Ground 2.3) and the harm was suffered from the signing of the leasing contract for the acquisition of the cartelized trucks without the need for the applicant to prove payment of all the leasing instalments. Compensation should not be denied or reduced if the leased trucks were disposed of before the end of the contract (i.e. the payment of the last instalment). Furthermore, the Supreme Court excludes that the leasing financing should affect the computation of interest, correcting the lower court judgements which held that the interest should be calculated from the payment of each instalment: "*the calculation of the interest on the surcharge, at the legal interest rate, must be made from the date of acquisition of each truck in order for the purchaser of the truck to be compensated for the damage caused by the cartel, as required by Art. 101 TFEU and the case law that develops it"* (ES:TS:2024:4000, Legal Ground 6.2) .

Trucks purchased after the 'official date' of the end of the cartel

To date, the appellate courts have been divided in their responses to damages claims on trucks acquired post-cartel, so the Supreme Court's pronouncement on this issue is noteworthy.

According to the European Commission's decisions on the truck cartel, the infringement of Article 101 TFEU would have "officially" ended on 18 January 2011, coinciding with the inspections that were carried out by the EC at the time at their headquarters (par. 63 of the decision of 19/7/16, AT.39824 *Trucks-I* and pars. 438 and 439 of 27/9/17, AT.39824 Trucks II-Scania). However, this determination of the temporal perimeter of the administrative infringement does not prevent the cartel's effects from continuing, potentially extending the civil liability of the truck manufacturers in respect of vehicles purchased after that date. The economic literature widely supports that cartels often have a 'lingering effect', since it normally takes some time for the prices of the cartelized goods affected by the cartel to get back to competitive levels. As the European Court of Justice has said, upholding the Commission's sanction of the Copper plumbing tubes cartel "*if a cartel determines the state of the market at the moment it is agreed, its lengthy duration can make the*

structures of that market more rigid, reducing cartel participants' incentive for innovation and development. A return to free competition will be all the more difficult and protracted, the longer the cartel continues" (judgment of 8/12/11, C-389/10 KME, EU:C:2011:816, par. 75). If that is the case, damages for overcharges paid after the infringement period "officially" had concluded would be undeniable if they are the direct result of the cartel (Ashton, Henry & Maier-Rigaud, *Competition Damages Actions in the EU*, Edward Elgar, 2nd ed., 2018, *para. 14.124).*

Although the Spanish Supreme Court had implied in several of its initial judgments on the case that the effects of the truck cartel spread beyond 18 January 2011 ("*the period between 18 January 2011 (when the collusive period sanctioned by the Commission ends) and 17 July 2016 (the date of the Decision) cannot be considered, for these purposes, as a collusion-free period (…) (…)*As the Commission states in *in point 102 of the Decision, 'given the secrecy in which the infringing practices were carried out, it is not possible in the present case to establish with absolute certainty that the cessation of the infringement has taken place'*", ES:TS:2023:2480, Legal Ground 10.25 and ES:TS:2023:2479, Legal 9.24; ES:TS:2024:4002, Legal Ground 3.2), in the last-mentioned judgment it excludes compensation for two trucks purchased 17 days after the 'official' date of termination of the cartel.

It is true that it is up to the victim to prove the harm and its amount, but, given that the starting point, in this case, is the presumption of harm ('*it may be presumed that the infringement has caused harm to the purchasers of the products affected by the cartel, consisting in the fact that they have paid a higher price than they would have paid if the cartel had not existed',* ES:TS:2023:2492, Legal Ground 6.13, repeated in many other judgments), without the Supreme Court finding any of the expert reports for the identification and quantification of the harm submitted by the plaintiffs to be convincing, it is not clear what their additional evidentiary activity should have materialized in respect of the trucks purchased a few days after the "official end" of the cartel.

By excluding compensation for these vehicles, the Supreme Court contradicts its description of the cartel and its harmful and wide-ranging effects (which, of course, should have an impact on an eventual 'return to normal' of vehicle prices). The difficulty of proving the existence of the damage and its amount (the '*enormous difficulty of quantifying the cost overrun in these cases of the truck cartel*' which the Supreme Court repeats in all but one of its judgments in its second and third batches of rulings) is greater at the beginning and at the end of the cartel (several of the objections to the plaintiff report in those cases focus on the treatment given to the data on prices in the early years of the cartel, and the other that the effects of the cartel lasted beyond 18/1/11, so that neither the infringement nor its effects would have ceased on that date). Those objections may well be related to a misdate of the beginning and end dates of the cartel (which, by the way, generally leads to an underestimation of the overcharge, see Boswijk, Bun & Schinkel, Cartel Dating, J Appl Econ. 2019; 34:26–42).

In my opinion, the same application of the rules of human reasoning and the maxims of experience that inspire the presumption of harm and its estimation by the Supreme Court in the solution given to these disputes should have led to the conclusion of admitting a certain 'lingering' effect of the cartel (certainly 17 days, but probably the whole year of 2011 as explained below) as the only possible solution to safeguard the victims' right to compensation. Not in vain, according to the Supreme Court itself, the difficulty of proving the damage and its amount '*should not prevent the victims from receiving an adequate amount of compensation for the harm suffered […]Another solution would be difficult to reconcile with the legal principle that requires compensation for the*

damage suffered by the unlawful action of another and the effective protection that must be granted to the right of the injured party to be compensated' (Judgment of 7/11/13, *Damages of the sugar cartel II*, ES:TS:2013:5819, Legal Ground 7.3).

The Spanish Supreme Court criticizes that the claimant did not make a specific argument in the claim or in the expert report on the harm and its proof in those two specific vehicles (without admitting it being added after the filing of the claim), however – in practice – given that none of the expert evidence on the quantification of the overcharge during the cartel is considered convincing, it is logical to think that the same will be true for the one carried out with respect to those two specific vehicles.

In substance, it is unclear whether this requirement for a specific treatment of damage claims in the acquisition of these vehicles goes beyond a formal dossier. If, as the Supreme Court states, the truck manufacturers' cartel was "*an infringement of competition law of enormous gravity because of its duration (14 years), its spatial extent (the entire EEA), the market share of the manufacturers involved in the cartel (approximately 90%) and the nature of the collusive arrangements (not only the exchange of information on sensitive competition data but also the discussion and agreements on gross price fixing and gross price increases*" (ES:TS:2023:2492, Legal Ground 6.13, repeated in the subsequent judgments on the case) and presumed to have caused harm, it is difficult that the cartel's overpricing disappeared a few days after the Commission started its investigations.

It is not at all unreasonable to extend the scope of the presumption of harm for some time after the 'official date' of the cartel's closure (as, by the way, the German BGH has done in its judgment of 23/9/20, KZR 35/2019 , par. 36: '*The same can be concluded with regard to the vehicle purchased in 2011 and thus after the end of the cartel, as the price lists of that year were the subject of cartel agreements in the previous year*'). Everything points to the fact that the cartel overcharge of the trucks acquired in 2011 should be presumed, because everything seems to indicate, as the CAT has concluded in its only judgment so far on the matter (which I examined here) that "*It is also common ground that the collusion extended to the timing and passing on of costs for Euro 6 trucks despite the fact that Euro 6 trucks were not sold until 2012, after the Infringement had ended by the dawn raids in January 2011*" (par. *450.5 of judgment of 7/2/23* [2023] CAT 6 , *Royal Mail Group Ltd and BT Group Plc v. DAF Trucks* et al).

Alternatively, as the Court of Appeals of León has held (in relation to a claim for damages for the automobile cartel for a vehicle purchased between three and four months after the 'official exit' by BMW of the cartel): '*prices are not automatically readjusted to the prices that would result from a market with free competition when that market has been distorted, unless it is proved otherwise by whoever can allege it. Distorted prices are not corrected by direct orders from the manufacturer, unless the contrary is proven, but by the evolution of events under conditions of free competition, which does not occur immediately*' (judgment of 10/5/2024, ES:APLE:2024:837, Legal Ground 1 *in fine*).

Likewise, awarding damages in a claim for an IVECO truck bought five months after the official end of the cartel, the Court of Appeals of Cuenca held a similar position '*the defendant has not provided any evidence concerning a modification of its pricing policy as of 18.01.2011, (when it had the evidentiary ease to prove such a point*)" ((judgment of 14/12/21, ES:APCU:2021:575, Legal Ground 2.1.b). A similar outcome was reached by the Court of Appeals of Palencia, awarding compensation for a Renault truck bought four months after the official end of the cartel: "*the harm did not cease to occur on the day on which the collusive practices ceased, but on the day*

on which the prices ceased to be vitiated by those practices, on the understanding that on the date of acquisition of the truck in question, barely four months after the end of those practices, the price was still artificially high, since the defendant has not proved, as it is required to do under Article 217.1 and 7 of the LEC, that from that date the prices were in line with free market prices" (Judgment of 20/9/22*,* ES:APP:2022:470, Legal Ground 7).

At the end, to award damages for trucks acquired in the post-cartel period, the Spanish Supreme Court requires that the plaintiff's expert report, even if it is not considered convincing, has used data from the post-cartel period showing some continuation of overpricing. As indicated in the judgment of the Court of Appeals of Alicante of 17/6/24 admitting the compensation for 14 trucks purchased one week after the end of the cartel, but excluding ten others purchased 2 months later as the PQAXis expert report for the claimant had used some data of January 2011 but no later data. In this case, the Court wove a fine line on the lag effect of the truck cartel based on the 'data footprint of the post-cartel period': "*We must start from the premise that the temporal limitation of the conduct sanctioned by the Commission should not be confused with the determination of the duration of the harm actually caused, without this entailing either a breach of Article 16 of Regulation 1/2003 or the mutation of follow action into non follow-on. What is then necessary is to verify the other elements of the damages action, i.e., whether there is real harm and whether it is causally linked to the infringing conduct. The claim to include post-cartel acquisitions needs to be concretely and specifically accredited. We consider that the overcharge paid in respect of the 14 trucks acquired on 25 January 2011, i.e. seven days after the end of the period fixed for the cartel, has been proved because the expert report of the plaintiff was based on data obtained in January 2011, so that the so-called lag effect or inertia effect has occurred in respect of these 14 trucks and the plaintiff should be compensated for the overcharge paid in respect of the 14 trucks acquired on 25 January 2011. The same is not true in respect of the 10 trucks purchased on 25 March 2011. The applicant had the burden of proving that the effects of the cartel on prices were prolonged after the end of the anti-competitive conduct according to the Decision, and it must therefore suffer the consequences of the evidential gap, and it is not sufficient to state in paragraph 96 of the expert's report that 'prices fell... on average by 3.98%, as a result of the end of the cartel', with the price increase during the rest of 2011 being maintained at 19.95%, as what is relevant is the data analyzed and which must support it, and here we have already said that there is no trace of data from the post-cartel period"* (*Gisbornay SL v. IVECO, Renault & Daimler*, ES:APA:2024:1144, Legal Ground 6).

Using a similar reasoning, the Court of Appeals of Murcia has awarded damages on the acquisition of a MAN truck bought via leasing on 16/12/20 (i.e., after the date on which, according to the Decision, the cartel had ended in respect of MAN): "*we cannot lose sight of the fact that the acquisition in question took place within the period analyzed by the expert report provided (between 17 January 1997 and 18 January 2011), which reveals the existence of overpricing, even if we disagree with its quantification. We can therefore hold in this case that the prolongation of the effects is supported by the available evidence. On the other hand, MAN does not provide any evidence relating to the modification of its pricing policy from 20 September 2010, when this was easily accredited, so that, given the circumstances of this dispute, we cannot deny that DUMATRADE S.L. is the injured party*" (judgment of 25/3/21, *Dumatrade et al. v. MAN Truck & Bus*, ES:APMU:2021:650, Legal Ground 7.3, cassation unadmitted by the Supreme Court order of 12/12/23, judgment upheld). In this case, the theoretical "official date" of termination of the infringement is more artificial (given that MAN was the leniency beneficiary, pardoned by the European Commission a €1000 million fine) is fixed the date of its leniency application (20 September 2010) despite the fact that the leniency application at that time did not automatically

and in any event exclude the end of the participation in the cartel (see par. 12(b) of 2006 Leniency Notice) and that, as with all other infringers, the effects of the colusion on the market may take time to dissipate.

Conclusion

In sum, although the Spanish Supreme Court issued on July 22, 2024, a judgment rejecting the indemnity for trucks acquired post-cartel (17 days after the "official date" of termination of the cartel), considering that in the specific lawsuit the proof of extension of the overcharge in that short period of time was missing, this should not imply that when there is a specific argumentation and quantification of trucks acquired post-cartel, the compensation should not be awarded. This solution, which would extend the compensation of the trucks acquired during 2011, in coherence with the decisions of the German BHG and CAT in similar claims in their respective jurisdictions, would be consistent with the case law of the Supreme Court on the case (presumption of harm and judicial estimation of the damages at 5% of the purchase price of the truck plus interest) in the absence of convincing expert reports from both parties.

** The contributor serves as an academic consultant of CCS Abogados, the law firm representing claimants in the judgments herein commented. The views and opinions expressed in this post are his own, and do not necessarily reflect the position of CCS.*

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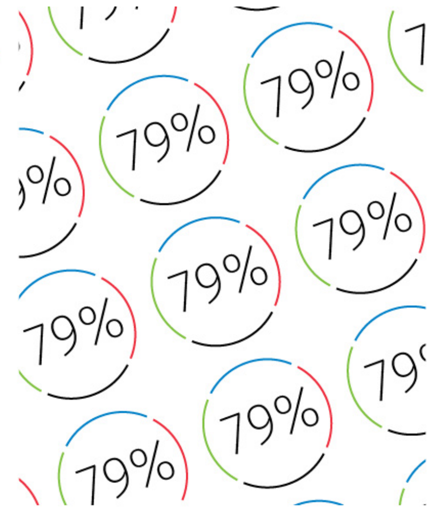

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