ACCESS TO INFORMATION IN SPAIN

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03/11/2023

Litigation Siesta?

- The System
- The actors, claimants, defendants, judges
- Background
- Public enforcement
- Current situation
- Future

Trucks

- <2500 2nd instance judgements
- 15 Supreme Court judgements
- 5000 plus First instance (“truckcartel law”)
- 94% positiv, 6% negativ
- 94%= 60% a 5% and 30% a =100% ± 30% of the requested amount

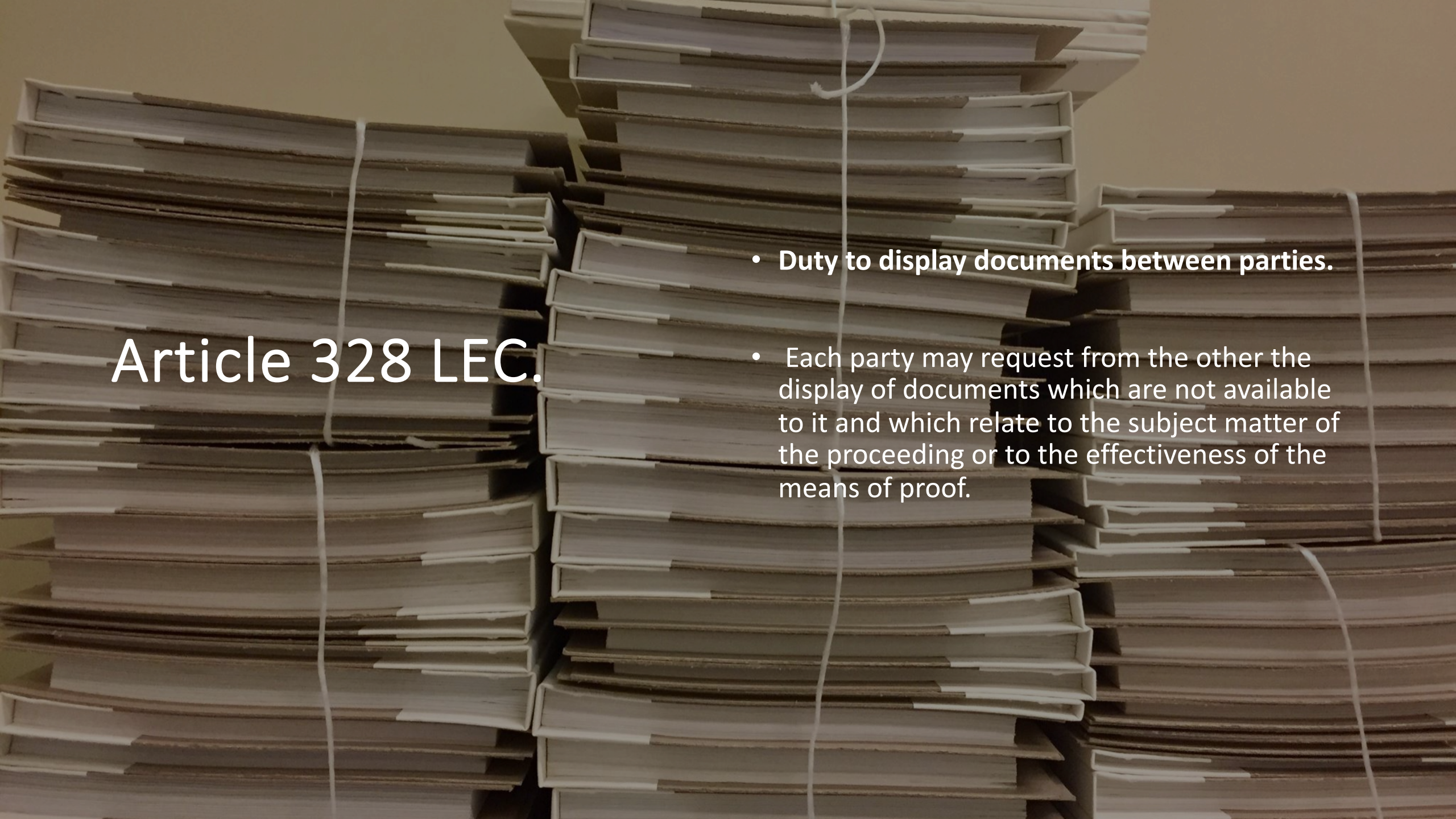
Result: 100% Copy paste, regional Forum Shopping, chaos

BEFORE FILING THE ACTION

- **Article 256 LEC.**
- **Preliminary filing.** (to prepare the case in Court)
- Requesting that the person to be sued exhibit the necessary sources of evidence in his possession to which the lawsuit is to be referred.
- **Specialties by subject matter**

- **Unfair Competition**
- The "*Ley de Competencia Desleal*" (art. 36) refers to the precautionary procedure under the patent law.

- **Damage claims from Competition law infringements**



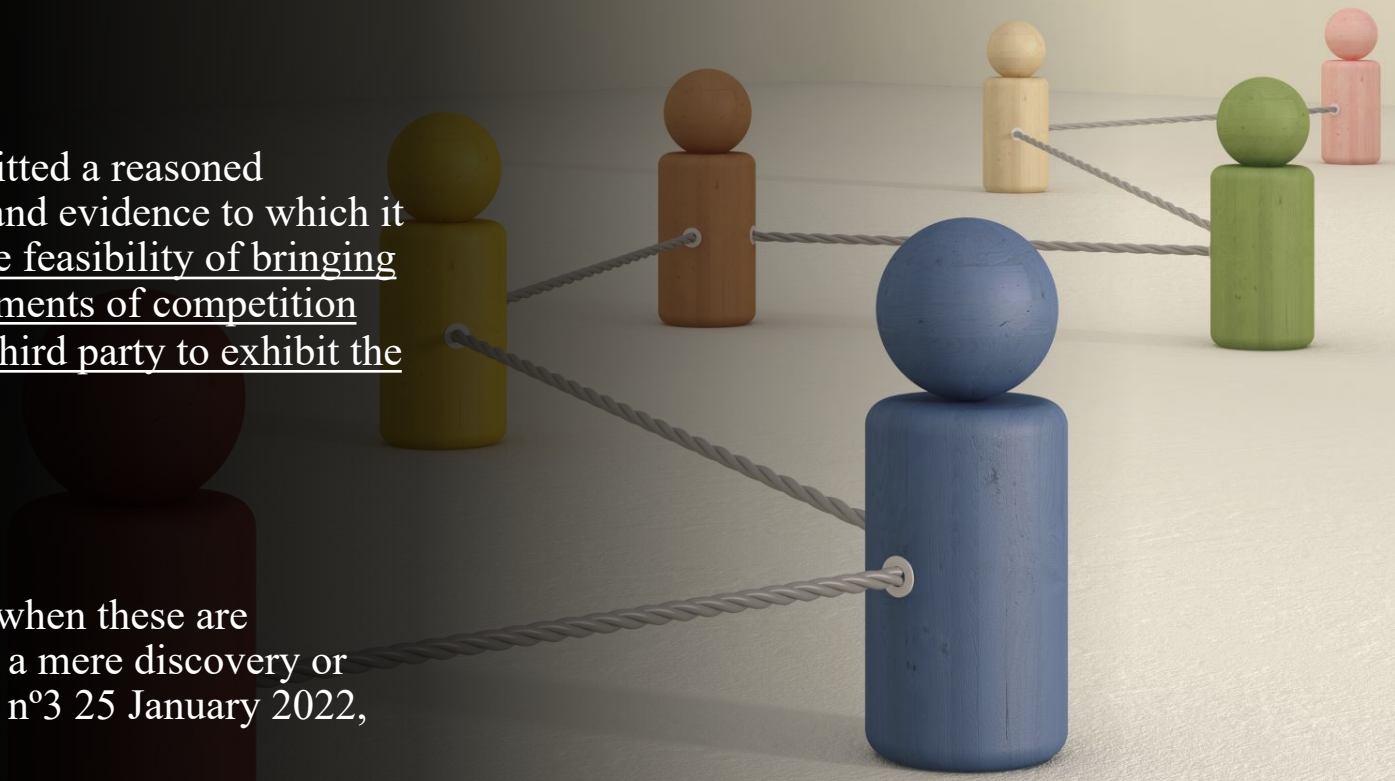
Article 328 LEC.

- **Duty to display documents between parties.**
- Each party may request from the other the display of documents which are not available to it and which relate to the subject matter of the proceeding or to the effectiveness of the means of proof.

283 bis a-f

- Upon request of the plaintiff of having submitted a reasoned statement of reasons containing those facts and evidence to which it has reasonable access, sufficient to justify the feasibility of bringing an action for damages arising out of infringements of competition law, the Court may order the defendant or a third party to exhibit the evidence reasonably available to it.

- Courts have often **dismissed** these requests when these are **indiscriminate** and vague, and intend to act a mere discovery or "**fishing expeditions**". (See AJM Barcelona nº3 25 January 2022, among many others).



The Poisoned Apple (or not)

- 1. Requests of access to estimate *passing on* after denying the harm,
- 2. Offer claimants access to virtual data rooms (and prior to signing an NDA) to obtain all evidence from those VDRs.

- The task of navigating through the data room and finding useful information on a case to case basis proved difficult for claimants.

- Rejecting the offer of accesing the data room led to ulterior dismissals by the Court on applications for the disclosure of evidence.

The digestion of the Apple, Valencia 2020, 89/2020

Thus, the data room ***did not contain adequate information*** *for an orthodox econometric study of the impact of the cartel,* ***as the expert of the defendant herself acknowledged at the main hearing***.

The Apple post Ferrer, post Access to the data room , 3.10.2023, Valencia, 89/2023

The judge cant understand the report of the claimant

The judge considers that the report of the defendant is not valid

The report of the claimant to critizise the report of the defendant after having access to the data **contains a reasonable cuantification based on adequate data (provided by the defendant)**

= **11%**

Supreme Court

- Specific aspects of the the case
- Temporal argument
- Economic argument: litigious interest
- Proportionality
- 15 judgements deal with less then 150 Trucks

STS 12-14.6.2023

the very difficulty of specifying and finding the documentation that could be relevant in practice ***must be related to the existence of a short legal period of 20 days to file the claim*** *after the access to the sources of evidence (art. 283.bis.e.2 LEC).*

Alicante 1.9.2023, 39/2023

At this point, the effort made by the courts has been commendable and worthy of praise. However, the Spanish procedural system cannot expect them to continuously embark on the analysis and validation of highly complex expert reports on economic regression in thousands of cases, given the circumstances. What is intended is a ***collective judicial harakiri.***

Alicante 1.9.2023, 39/2023

The Commission's own Communication (14) stated the following: It is for the applicable law to determine which approach may be considered appropriate in the specific circumstances of a given case to carry out quantification. Some of the relevant considerations - in addition to the standard of proof and the burden of proof under the applicable law - ***are the availability of data, the costs and time involved and their proportionality in relation to the value of the damages claimed.***

Alicante 1.9.2023, 39/2023

*a) The **more serious the infringement of competition law, the lower the standard of proof** required. In particular, it should be low in those cases of infringements which have as their object particularly sensitive parameters in competitive terms and which imply a priori a possible price effect. These would be, for example, cases of direct or indirect price fixing, limiting or controlling production or the market and the allocation of markets or sources of supply. The case of direct price fixing would be paradigmatic.*

*b) The lower the standard of proof, the more diffuse the harm can be found in the market. For example, cartel with harm to the final consumer. **The more diffuse the damage is, the more difficult it will be to prove it given the atomisation of the damage**.*

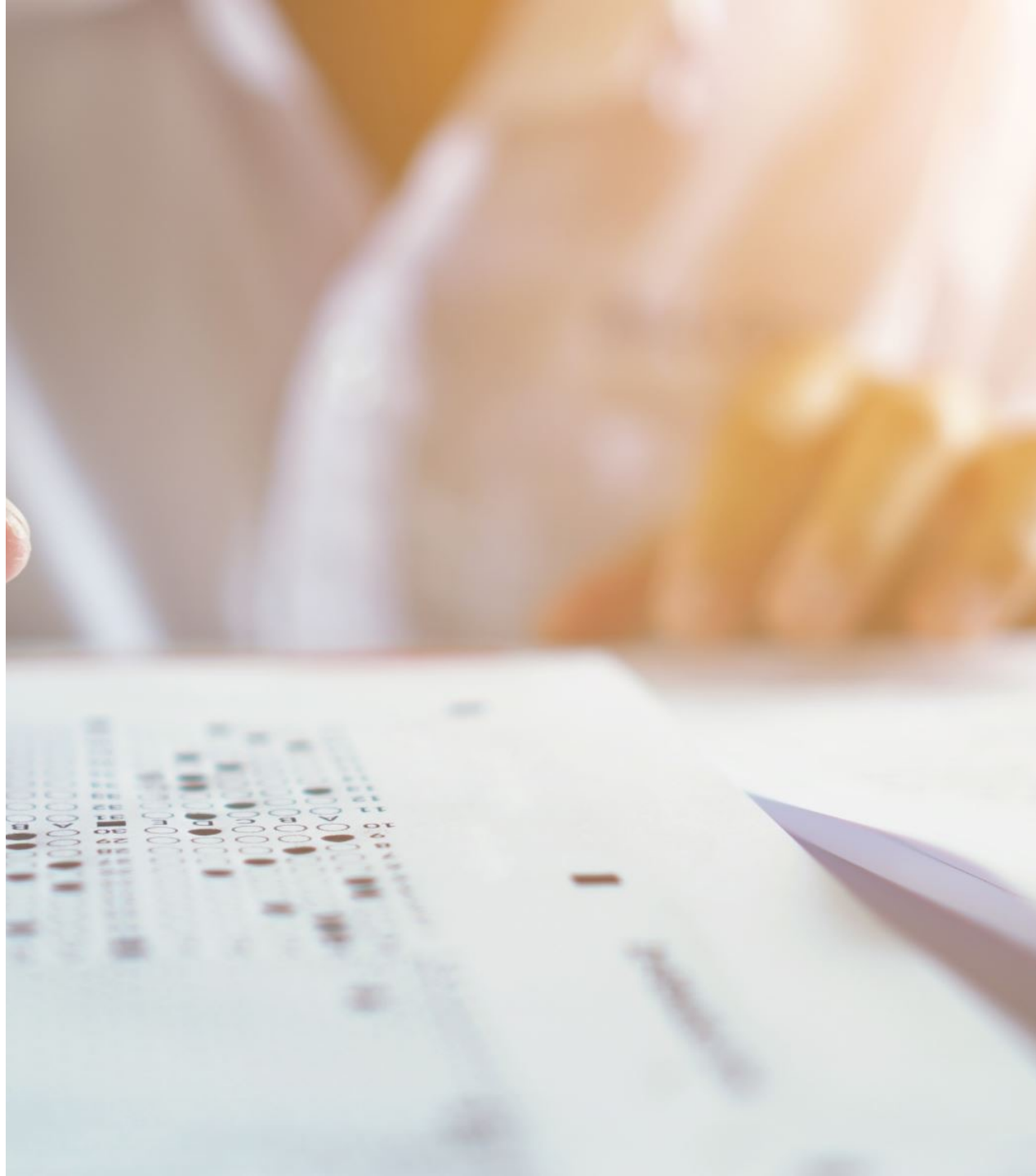
*c) The **nature of the injured parties**. The lower the litigation capacity of the injured parties, the lower the standard of proof should be. Otherwise, litigation costs are increased and access to effective redress is impeded.*

*d) the **relative position of the injured party vis-à-vis the infringer**. The lower the position of the injured party vis-à-vis the infringer, the lower the standard of proof should be.*

*e) the **standard of proof should be significantly higher in the case of collective actions** than in the case of individual actions, taking into account whether the injured party could reasonably have benefited from a collective redress mechanism.*

Alicante 1.9.2023, 39/2023

However, it so happens that, precisely because of the evidentiary effort that has been made by the ***parties, having exhausted all reasonably available evidence,*** *it becomes practically impossible or excessively difficult to accurately quantify the damages suffered on the basis of the available evidence (17.1 Directive). It turns out that then,* ***with two parties completely exhausted, as well as the Court, having faced costly, complex and hardly intelligible economic regression analyses*** *(the complaint about the excess of evidence is made by the Competition Appeal Tribunal itself),* ***it all comes down to 5%. That is, the minimum damage awarded in the case of a meta-study****.*



Access to information of the Competition Authority, AP BCN, 28.4.2022

The annuled decision of the Competition Authority is enough evidence for the information request.

- *Subsidiarily: We consider that, having accepted the relevance and usefulness of the documentation, the subsidiary request should be granted. The documents are correctly identified and are in the possession of the CNMC.* ***They do not fall within the category of prohibited evidence (statements under a leniency programme and settlement submissions).***
- ***The file has been closed and the effectiveness of public enforcement of competition law is not undermined by disclosure. In short, the application complies with the provisions of that provision, It must therefore be granted.***


Thanks!