Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 7 April 2022 [1]

Case C-163/21

AD and Others
v
PACCAR Inc,
DAF TRUCKS NV,
DAF Trucks Deutschland GmbH

(Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona, Spain))

(Reference for a preliminary ruling – Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – Collusive arrangements on pricing and gross price increases for trucks in the European Economic Area – Creation *ex novo* of relevant evidence to quantify the artificial price increase and the damage suffered)

I. Introduction

1. Directive 2014/104/EU [2] seeks to harmonise, inter alia, the rules on the disclosure of evidence in the context of private enforcement of EU competition law. In that context, the ability of the parties to proceedings relating to an action for damages to exercise effectively their rights may depend on the possibility to access relevant evidence. However, such evidence may not always be in the possession of or readily accessible to the party that bears the burden of proof. [3]

2. It is also possible that the relevant evidence may not be in the possession of the opposing party either, because such evidence does not yet exist. In order to comply with a request for the disclosure of such evidence, the opposing party would have to create it *ex novo*, by compiling or classifying information, knowledge or data held by it.

[1] Language of the case: French.

[2] Directive 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).

[3] See paragraph 9 of the Communication from the Commission on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (OJ 2020 C 242, p. 1).

3. This is the background to the present reference for a preliminary ruling, which gives the Court the opportunity to clarify whether, in the light of Directive 2014/104, a party to the proceedings may request that the opposing party be ordered to disclose evidence which the latter must create *ex novo*.

II. Legal framework

A. European Union law

4. Article 5(1) of Directive 2014/104 provides as follows:

'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.

…'

B. Spanish law

5. Directive 2014/104 was transposed into Spanish law by 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 European Union directives in the fields of finance, commerce and health and on the movement of workers) of 26 May 2017 (BOE No 126 of 27 May 2017).

III. Facts and main proceedings

6. On 19 July 2016, the European Commission adopted Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (EEA) (Case AT.39824 – Trucks) (OJ 2017 C 108, p. 6; 'the decision of 19 July 2016'). The defendants in the main proceedings, the companies PACCAR Inc, DAF TRUCKS NV and DAF Trucks Deutschland GmbH were among the addressees of that decision.

7. By that decision, the Commission found there to be a cartel in which 15 international truck manufacturers had participated, in respect of two product categories, namely trucks weighing between 6 and 16 tonnes and trucks weighing more than 16 tonnes, whether rigid trucks or tractor trucks.

8. Although this is not stated by the referring court, it follows from the decision of 19 July 2016 that, so far as concerns the defendants in the main proceedings, the infringement of Article 101 TFEU was established for the period from 17 January 1997 to 18 January 2011.

9. On 25 March 2019, the applicants in the main proceedings, AD and Others, having purchased trucks capable of falling within the scope of the infringement forming the subject matter of the decision of 19 July 2016, requested, pursuant to Article 283a of the Ley de Enjuiciamiento Civil (Code of Civil Procedure), access to evidence held by the defendants in the main proceedings. In that regard, the applicants in the main proceedings argued that it was necessary to obtain certain types or means of proof in order to quantify the artificial price increase, in particular to carry out a comparison of recommended prices before, during and after the cartel period. More specifically, their request concerned access, first, to a list of models manufactured during the period from 1 January 1990 to 30 June 2018, classified by year and by certain characteristics, secondly, to the ex-factory price (gross price) for each model on that list and, thirdly, to the 'total delivery cost' for those models.

10. The defendants in the main proceedings challenged that request, arguing, inter alia, that some of the documents requested had to be drawn up on an ad hoc basis.

11. At a hearing as to the appropriateness of referring a question to the Court for a preliminary ruling, the defendants in the main proceedings stated that requests for disclosure under Article 5(1) of Directive 2014/104 cannot include evidence which does not already exist. As a result, a party cannot be requested to prepare evidence under that article, bearing in mind that, in accordance with the principles of necessity, proportionality and the least possible burden, doing so could involve an excessive burden on defendants which goes beyond what is involved in simply disclosing documents. The applicants in the main proceedings, for their part, argue for a contrary interpretation of that provision.

IV. The request for a preliminary ruling and the procedure before the Court

12. It was in those circumstances that the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona, Spain), by decision of 21 February 2020, received at the Court on 11 March 2021, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 5(1) of [Directive 2014/104] be interpreted as meaning that the disclosure of relevant evidence refers exclusively to existing documents in the control of the defendant or a third party or, in contrast, can Article 5(1) also include the disclosure of documents that must be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it?'

13. Written observations were lodged by the parties to the main proceedings, by the Spanish and Netherlands Governments and by the Commission. No hearing has been held.

V. Analysis

14. By its single question, the referring court seeks to ascertain whether Article 5(1) of Directive 2014/104 must be interpreted as meaning that the disclosure of relevant evidence refers exclusively to existing documents in the control of the defendant or a third party or whether, in contrast, that provision can also include the disclosure of documents that must be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it.

15. Before examining that question, it is necessary to examine, first of all, the admissibility of the present request for a preliminary ruling and, next, the applicability of Directive 2014/104 to the main proceedings.

A. Admissibility

16. The applicants in the main proceedings take the view that the request for a preliminary ruling must be regarded as inadmissible. In their view, that request concerns a hypothetical situation in which an infringer must prepare documents *ex novo*. In the present case, however, such preparation is not necessary in order to comply with the request for the disclosure of evidence at issue in the main proceedings.

17. Without calling into question the admissibility of the present request for a preliminary ruling, the defendants in the main proceedings state that under Article 6(1) of Directive 2004/48/EC [4] it is possible to order the disclosure of evidence which lies in the control of the opposing party. They recall that, according to the Commission, that provision could oblige a party to gather evidence within its organisation, including from separate legal entities which are under its control. [5] According to the defendants in the main proceedings, the same is true as regards Directive 2014/104. However, they argue that, in order to comply with the request made before the referring court, they were not obliged to create documentary evidence which did not already exist but were required to create information *ex novo*.

18. I must point out, with regard to those two arguments, that it is true that the referring court merely states that the request for the disclosure of evidence in the present case relates to documents which, as requested, *may* not already exist and *may* require work to be carried out to prepare them.

19. However, it must be recalled that questions relating to EU law enjoy a presumption of relevance and that the Court is, in principle, bound to give a ruling.

20. Moreover, in proceedings under Article 267 TFEU, since the referring court alone has jurisdiction to find and assess the facts in the case before it, the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it and thus proceed on the basis of the situation which that court or tribunal considers to be established, and cannot be bound by suppositions raised by one of the parties to the main proceedings. [6]

21. It follows that the question referred is admissible.

B. The applicability of Directive 2014/104

22. The issue of the applicability of Directive 2014/104 to the case in the main proceedings does not appear to give rise to any doubts on the part of the referring court and is not discussed by the interested parties in the proceedings before the Court. I shall nevertheless examine that issue in so

[4] Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

[5] 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).

[6] See, inter alia, judgment of 2 April 2020, *Coty Germany* (C-567/18, EU:C:2020:267, paragraph 22).

far as, in view of certain ambiguities as to the circumstances of the case in the main proceedings, there is doubt as to the applicability of that directive *ratione materiae* and *ratione temporis* to the case in the main proceedings.

1. *The applicability of Directive 2014/04* ratione materiae

(a) Overview of the issue

23. The referring court states that the request for the disclosure of evidence was made under Article 283a of the Code of Civil Procedure, following the decision of 19 July 2016.

24. In that regard, I must point out that, according to certain commentators, a request for the disclosure of evidence under Article 283a of the Code of Civil Procedure may also be made before the commencement of an action on the merits.[7] In those circumstances, the party making that request must bring an action on the merits within 20 days.[8]

25. It is not clear from the order for reference whether the request for the disclosure of evidence at issue in the main proceedings was made in the context of proceedings in which the referring court had already been seised of an action for damages. It is clear only that, in support of that request, the applicants in the main proceedings argued that all the requirements necessary for making a reasonable assessment of the plausibility of the intended actions for damages ('acciones de daños que se pretenden ejercitar') had been fulfilled.

26. Without expressly addressing the question whether the request for the disclosure of evidence at issue in the main proceedings was made in the context of proceedings in which the referring court had already been seised of an action for damages, the applicants in the main proceedings state that the proceedings giving rise to the present request for a preliminary ruling are proceedings relating to access to sources of evidence.

27. By contrast, the Spanish Government states that the applicants in the main proceedings have brought an action for damages on the basis of the decision of 19 July 2016. Similarly, the Commission states that, in its view, the referring court raises the question of the interpretation to be given to Article 5(1) of Directive 2014/104 in the context of an action for damages for breach of the competition rules. As for the defendants in the main proceedings, they state, less unequivocally, that the request for a preliminary ruling was made in the context of proceedings for the private enforcement of competition law which arose from the decision of 19 July 2016. They also refer in their written observations to the action for damages of the applicants in the main proceedings ('their action').

28. Even taking into account the written observations of the interested parties, it is therefore not possible to establish unequivocally from the content of the order for reference whether or not the request for the disclosure of evidence at issue in the main proceedings was made before a claim for damages was brought or was made with or subsequent to such a claim.

7 See Marcos, F., 'Transposition of the Antitrust Damages Directive into Spanish Law', *Working Paper IE Law School*, 2018, AJ8-241-I, p. 28. According to this provision of Spanish law and this author, it appears that the period of 20 days starts from the date on which the request for the disclosure of evidence has been received.

8 Pursuant to Article 283a(e) of the Code of Civil Procedure, in the event that no action on the merits is brought, the national court must of its own motion order the party which requested the disclosure of evidence to pay the costs of the proceedings and declare it liable for any damage which it has caused to the person against whom the measures were taken.

29. However, Article 1 of Directive 2014/104, entitled 'Subject matter and scope', states, in paragraph 2 thereof, that that directive sets out rules coordinating, inter alia, the enforcement of the competition rules 'in damages actions before national courts'. Similarly, Article 22(2) of that directive, which concerns the temporal application of national transposition measures other than those transposing the substantive provisions of that directive, sets out their scope *ratione temporis* by reference to a date on which a national court was seised of an action for damages. [9]

30. On the face of it, the scope of Directive 2014/104 thus defined does not seem to cover requests for the disclosure of evidence made before a claim for damages is brought. Some national legislatures [10] and certain academic writers [11] seem to interpret that directive to that effect. According to that interpretation, Member States could, however, introduce rules relating to such requests for the disclosure of evidence. Article 5(8) of that directive allows Member States to introduce, without prejudice to Article 5(4) and (7) and Article 6 of that directive, rules which would lead to wider disclosure of evidence.

31. In view of the uncertainties as to whether the referring court has already been seised of a claim for damages, I must turn my attention to the validity of the interpretation set out in the previous point of this Opinion.

(b) Assessment

32. In some language versions, [12] the wording of Article 5(1) of Directive 2014/104, the interpretation of which is sought by the referring court, is less restrictive and less categorical than that of Article 1(2) of that directive.

33. Similarly, the concept of 'evidence' is defined in Article 2(13) of Directive 2014/104, by making reference, in some language versions, [13] to all types of means of proof admissible 'before *the national court seised of an action*' and, in other versions, [14] to those admissible 'before *the national court seised*', without specifying that an action for damages is necessarily involved (my emphasis).

34. More importantly, the intention of the EU legislature not to restrict the scope of Article 5 of Directive 2014/104 to requests for the disclosure of evidence made with or subsequent to the bringing of an action for damages seems to echo Article 5(3) and Article 6(4)(b) of that directive.

35. Article 5(3) of Directive 2014/104 sets out a number of non-exhaustive criteria for assessing the proportionality of a request for the disclosure of evidence.

[9] According to that provision, 'Member States shall ensure that any national measures adopted pursuant to Article 21, 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'.

[10] See Malinauskaite, J. and Cauffman, C., 'The Transposition of the Antitrust Damages Directive in the Small Member States of the EU – A Comparative Perspective', *Journal of European Competition Law & Practice*, 2018, Vol. 9, No 8, p. 501.

[11] See Kirst, P., 'The temporal scope of the damages directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe', *European Competition Journal*, 2020, Vol. 16, No 1, p. 113, and Petr, M., 'Czech Republic', Piszcz, A. (ed.), *Implementation of the EU Damages Directive in Central and Eastern European Countries*, University of Warsaw Faculty of Management Press, Warsaw, 2017, p. 98. See also, to that effect, but less categorically, Rodger, B.J., Sousa Ferro, M. and Marcos, F., 'A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in sixteen Member States', *Maastricht Journal of European and Comparative Law*, 2019, Vol. 26, No 4, pp. 488 and 489.

[12] In particular, the English- and French-language versions state that Member States are to ensure that it is possible to submit a request for the disclosure of evidence in 'proceedings *relating* to an action for damages in the Union' (my emphasis), while the Polish-language version, in particular, refers to 'proceedings for damages' ('w postępowaniu o odszkodowanie').

[13] In particular the Polish-language version ('przed sądem krajowym, do którego wpłynęło powództwo').

[14] Inter alia the French-language version.

36. Accordingly, Article 6(4)(b) of Directive 2014/104, which concerns the disclosure of evidence included in the file of a competition authority, refers to Article 5(3) of that directive and states that when assessing, in accordance with that article, the proportionality of an order to disclose information, national courts are also to consider whether the request for disclosure is made in relation to an action for damages before a national court.

37. In the same vein, recital 22 of Directive 2014/104 states that, in order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's 'intended action for damages' since it is highly unlikely that that action will need to be based on all the evidence in the file relating to those proceedings. Similarly, recital 27 of that directive refers to 'access [by injured parties] to the relevant evidence that they need in order to prepare their actions for damages'.

38. It follows from Article 6(4)(b) of Directive 2014/104, read in the light of recitals 22 and 27 thereof, that certain evidence relating to the proceedings of competition authorities may be disclosed to a claimant, following its request for the disclosure of evidence under Article 6 of that directive, where the claimant intends to bring a claim for damages. The same must apply so far as concerns Article 5 of that directive.

39. The EU legislature cannot have created a scheme under which a person who has suffered harm caused by an infringement of competition law can make a request for the disclosure of evidence independently of any action on the merits if the documents are in the file of a competition authority, but can make such a request in the context of an action on the merits only if the evidence is not contained in that file. Moreover, the fact that it is a competition authority which initiates proceedings cannot justify such a distinction. In both situations, as follows from Article 5(1) of Directive 2014/104, a claimant must be in a position to support the plausibility of its claim for damages in order to be able to request the disclosure of evidence.

40. I would add, for the sake of completeness, that while it is true that there must, in both those situations, be a link between the evidence the disclosure of which is sought and the intended action of a person who has suffered harm caused by an infringement of competition law, the evidence requested must, above all, be relevant.

41. By contrast, Directive 2014/104 does not seem to establish the procedural relationship which must, technically speaking, exist between a request for the disclosure of evidence and an action for damages (for example, a request for the disclosure of evidence as a measure in substantive proceedings, a request examined in interlocutory proceedings or even a request examined in separate proceedings).

42. Nor does Directive 2014/104 determine when a national court is seised of a claim for damages.

43. Accordingly, even assuming that Directive 2014/104 covers only requests for the disclosure of evidence made in the context of an action for damages, it is possible to take the view that, where a claim for damages must be brought, subject to penalties, within a short period of making a request for the disclosure of evidence in the context of which the plausibility of the claim for damages was supported, or possibly, within a short time after that request has been received, the request for the disclosure of evidence is being made in the context of an action for damages and/or is conditionally commencing such an action.

(c) Discussion of a contrary interpretation and arguments for rejecting it

44. An interpretation of the provisions of Directive 2014/104 contrary to the one presented in point 38 of this Opinion could, on the face of it, be adopted.

45. It could be argued that Directive 2014/104 does not cover, in principle, requests for the disclosure of evidence made before the commencement of an action on the merits. According to that reading, Article 6(4)(b) of that directive covers only those situations in which the national legislature has decided to introduce, in accordance with Article 5(8) of that directive, rules leading to wider disclosure of evidence and, more specifically, allowing the disclosure of evidence to be requested before the commencement of an action on the merits. To the extent that the option of introducing such rules may be exercised by Member States without prejudice to Article 6 of that directive, a Member State is not able to allow a request for the *ex ante* disclosure of evidence, which may escape an assessment of its proportionality, in so far as that assessment makes it possible to protect the interest in the public enforcement of competition rules.

46. However, in the first place, an analysis of the preparatory work for Directive 2014/104 does not support such an interpretation.

47. In the proposal for a directive, the Commission, referring to the results of the consultations, stated that 'respondents welcomed the guiding principle of compensation and the consequential choice not to suggest measures such as US-style … wide pre-trial discovery'.[15] This does not mean that evidence cannot be disclosed under the supervision of a national court before the commencement of the action on the merits, where the claimant is in a position to support the plausibility of its claim for damages.

48. More importantly, according to the preparatory work, the judgment in *Pfleiderer*[16] created considerable uncertainty as to the categories of documents capable of being disclosed, uncertainty which Directive 2014/104 seeks to remove.[17] The request for a preliminary ruling in the case giving rise to that judgment originated in proceedings concerning a request for full access to the file of a national competition authority made for the purpose of preparing an action for damages. It seems that the desire to remove that uncertainty contributed to the fact that that directive refers to the possibility of requesting the disclosure of evidence where an intended claim for damages is to be brought not in the context of Article 5 of that directive, entitled 'Disclosure of evidence', but only in the context of Article 6 of that directive, entitled 'Disclosure of evidence included in the file of a competition authority'.[18]

[15] See, also, Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (SEC(2008) 404 final), to which the White Paper on damages actions for breach of the EC antitrust rules refers. In paragraph 95 of that working paper, the Commission stated that it clearly does not propose a system of overly broad pre-trial disclosure, which may not fit easily with the legal tradition and principles of civil procedure of Member States and which may conflict with the public policy principles of some Member States.

[16] Judgment of 14 June 2011 (C-360/09, EU:C:2011:389).

[17] See Commission Staff Working Document – Impact assessment report, Damages actions for breach of the EU antitrust rules accompanying the 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 (SWD(2013) 203 final), available only in English.

[18] In that vein, recital 22 of Directive 2014/104, which deals with the disclosure of evidence in the file of a competition authority, concerns the situation in which a claimant intends to bring an action. The wording of that recital, which is referred to in point 37 of this Opinion in support of the interpretation put forward here, is clearly inspired by the judgment of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 33), which itself refers to the judgment of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389).

49. In the second place, the link between Article 5 and Article 6 of Directive 2014/104 does not allow the scope of the latter provision to be regarded as broader than that of the former. On the one hand, Article 6 of that directive applies, 'for the purpose of actions for damages', 'in addition to Article 5' thereof. [19] On the other hand, the assessment of the proportionality of the request for the disclosure of evidence by the national courts is carried out in accordance with Article 5(3) of that directive. However, although, in the context of Article 6 of that directive, national courts are required to consider whether the request is made in relation to an action for damages ('national courts shall, in addition, consider …'), that question may, where appropriate, be taken into consideration also when the assessment of proportionality is carried out in the specific context of Article 5 of Directive 2014/104. The fact that the legislature expressly referred to that question in Article 6(4)(b) of that directive indicates its intention to strengthen the link which must exist between a request for the disclosure of evidence included in the file of a competition authority and an action for damages.

50. In the third place, the disclosure of evidence prior to the commencement of an action on the merits may sometimes be necessary in order to initiate such an action. That possibility contributes to the effectiveness of Articles 101 and 102 TFEU. From that perspective, taking the view that, in certain circumstances, a request for the disclosure of evidence prior to a claim for damages also falls within the scope of Directive 2014/104 makes it possible to limit the differences between the national systems of the Member States and to harmonise the rules relevant for the effective implementation of EU competition law. [20]

51. In the light of the considerations set out in points 38 to 43 of this Opinion, it must be concluded that, at least in certain circumstances, [21] a request for the disclosure of evidence which is, technically speaking, made before a claim for damages is brought may fall within the scope of Directive 2014/104.

2. *The applicability of Directive 2014/104* ratione temporis

52. The request for the disclosure of evidence at issue in the main proceedings was made by the applicants in the main proceedings on 25 March 2019, after the date of transposition of Directive 2014/104, which was 27 December 2016, on the basis of the national measures transposing that directive into Spanish law.

53. Moreover, as I have stated in point 8 of this Opinion, it is apparent from the decision of 19 July 2016 that, as regards the defendants in the main proceedings, the infringement was established for the period from 17 January 1997 to 18 January 2011, which precedes the date of transposition of Directive 2014/104.

54. In those circumstances, the answer to the question whether Directive 2014/104 applies *ratione temporis* can be found in Article 22 of that directive.

[19] See Article 6(1) of Directive 2014/104.

[20] See, in that context, the third and fourth sentences of recital 7 of Directive 2014/104, according to which '[the] differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate'. See also, to that effect, recitals 8 and 9 of that directive.

[21] In particular when there is a link between a request for the disclosure of evidence and a claim for damages such as that established in Spanish law, which results inter alia in an obligation to bring, subject to penalties, an action for damages within 20 days. See footnote 8 of this Opinion.

55. According to Article 22(1) of Directive 2014/104, national measures transposing the substantive provisions of that directive are not to apply retroactively. However, that rule does not apply to national measures transposing the 'other' provisions of that directive. As regards the latter transposing measures, Member States are to ensure, in accordance with Article 22(2) of that directive, only that those measures are not to apply to actions for damages of which a national court was seised prior to 26 December 2014. Consequently, those provisions must be applied in proceedings brought before a national court after the date of transposition of Directive 2014/104. That logic of the applicability of the non-substantive provisions of that directive is typical, under national law, for procedural provisions. I infer from this that the reference to 'national measures … other than [substantive provisions]', for the purposes of Article 22(2) of that directive, relates to procedural provisions.

56. The referring court states that the purpose of the request for a preliminary ruling is to gain an understanding of the 'procedural' system for the disclosure of evidence governed by Articles 5 to 8 of Directive 2014/104 and developed in the Spanish legal order in Article 283a of the Code of Civil Procedure. Nevertheless, for the purposes of Article 22 of that directive and given the autonomous nature of the concepts used in that provision, a definitive characterisation of the nature of the provisions which may fall within the scope of that directive must be carried out by the Court.

57. While it may be argued that the provisions of Directive 2014/104 on the disclosure of evidence grant certain rights to economic operators involved in the enforcement of EU competition rules, those rights can nonetheless be exercised only in proceedings before a national court and concern, in essence, procedural measures allowing that court to establish the facts relied upon by the parties to the proceedings. The same applies, at least in certain circumstances, to a request for the disclosure of evidence which is, technically speaking, made before a claim for damages is brought. [22]

58. Consequently, Article 5(1) of Directive 2014/104 is applicable, *ratione temporis*, to the main proceedings.

C. Substance

1. Positions of the referring court and the interested parties

59. The referring court identifies the arguments in favour of the interpretation that Article 5(1) of Directive 2014/104 covers only pre-existing evidence and the arguments against that interpretation.

60. On the one hand, as regards the interpretation that Article 5(1) of Directive 2014/104 covers only pre-existing evidence, it argues, in the first place, that that interpretation is supported by the wording of that provision and by the clarifications set out in recital 14 of that directive. That provision and that recital concern evidence in the possession of the defendant or a third party.

[22] Admittedly, some academic writers consider that a request for the disclosure of evidence made prior to a claim for damages is not procedural in nature, since it confers a right to request the disclosure of evidence in the context of isolated proceedings. See, inter alia, Kirst, P., 'The temporal scope of the damages directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe', *European Competition Journal*, 2020, Vol. 16, No 1, pp. 113 and 114. However, that approach, in contrast to the one which I propose in points 38 to 43 of this Opinion, is based on the premiss that a request for the disclosure of evidence made prior to a claim for damages does not fall within the scope of Directive 2014/104.

61. In the second place, the referring court argues that Article 5(2) of Directive 2014/104 refers to the disclosure of certain evidence or relevant categories of evidence, limited on the basis of facts which are reasonably available. Recital 16 of that directive states that a category of evidence should be identified by reference, inter alia, to the time during which the documents requested were drawn up.

62. In the third place, the referring court notes that Directive 2014/104 refers not to the disclosure of 'information' but to the disclosure of 'evidence'.

63. In the same vein, the Netherlands Government refers to a number of recitals in Directive 2014/104[23] and to the proposal for a directive[24] in order to argue that that directive is concerned only with the disclosure of existing evidence or evidence held by a party to the proceedings or by third parties.

64. The defendants in the main proceedings support that interpretation for the same reasons as those given by the referring court. They add that Article 5(8) of Directive 2014/104 allows Member States to introduce rules which would lead to wider disclosure of evidence. According to the defendants in the main proceedings, the Spanish legislature has not used that option to authorise requests for the disclosure of evidence which does not already exist.

65. On the other hand, the referring court's arguments supporting the interpretation that Article 5(1) of Directive 2014/104 also covers evidence created *ex novo* are based on a teleological and systematic interpretation of that provision. In the first place, according to the referring court, a restriction on the system for the disclosure of evidence could undermine the right to full compensation and the principle of effectiveness. In the second place, the provisions in that directive concerning the costs and expenses of disclosure, as a component of the principle of proportionality for the purposes of examining a request for the disclosure of evidence, might indicate that the party from which evidence is requested is obliged to carry out work to create a new document.

66. The applicants in the main proceedings, the Spanish Government and the Commission support that interpretation, in particular for the reasons identified by the referring court.

2. Textual interpretation

67. In essence, Article 5(1) of Directive 2014/104 provides, in its first sentence, that a person who claims to have been harmed by an infringement of competition law may request the disclosure of relevant evidence which lies in the control of the defendant or a third party. The second sentence of that provision provides that a defendant must be able to request that the claimant or a third party be ordered to disclose relevant evidence, without specifying that such evidence must be evidence which lies in their control.

[23] In making, like the referring court, a reference to recital 14 of Directive 2014/104, which states that '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 … the claimant', the Netherlands Government adds that, in accordance with recital 28 of that directive, national courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence 'that exists' independently of the proceedings of a competition authority. Furthermore, that government refers to recital 39 of that directive, which states that the burden of proof should not affect the possibility for the infringer to use evidence other 'than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties'.

[24] The Netherlands Government refers to the draft of Directive 2014/104, in which the Commission stated that 'disclosure of evidence held by the opposing party or a third party can only be ordered by judges and is subject to strict and active judicial control as to its necessity, scope and proportionality'.

68. A reading of Article 5(1) of Directive 2014/104 may give the impression that requests made by claimants, referred to in the first sentence of that provision, relate only to pre-existing evidence. Indeed, from a literal standpoint, unlike defendants' requests, referred to in the second sentence, requests made by claimants seem to have to relate to evidence which lies in the control of another person.

69. However, that reading is called into question by recitals 15 and 39 of Directive 2014/104 and, contrary to what the Netherlands Government argues, is not supported by recitals 14 and 28 of that directive.

70. In the first place, on the one hand, recital 15 of Directive 2014/104 makes no distinction, concerning the possession of evidence, between requests made by a claimant and those made by a defendant ('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 [and] defendants [must be able to] request the disclosure of evidence by those claimants'). On the other hand, recital 39 of that directive states that the infringer should have the possibility to use evidence 'held' by other parties or third parties.

71. In the second place, recital 39 of Directive 2014/104 is not exhaustive in so far as it refers to 'evidence other than that in [the infringer's] possession, *such as* evidence already acquired in the proceedings or evidence held by other parties or third parties'.[25] In any event, the reference to evidence held by the other party or third parties seems to stem not from the intention to limit the evidence which can be requested but from the intention to juxtapose evidence in the possession of the infringer and evidence in the possession of other persons.

72. In the third place, it is true that recital 14 of Directive 2014/104 states, in the context of the evidence necessary to prove a claim for damages, that evidence is not always but 'often' held exclusively by the opposing party or by third parties. In this instance, that illustration is then used to set out the problem which Directive 2014/104 seeks to address. It is apparent from recital 14 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. In any event, that recital seems rather to point towards an affirmative answer to the question referred.

73. In the fourth place, recital 28 of Directive 2014/104, which concerns Article 6(9) thereof, uses the wording 'evidence that exists independently of the proceedings of a competition authority' to refer to evidence other than that referred to in Article 6(5) and (6) of that directive. It is therefore concerned with any evidence the disclosure of which is not automatically prohibited by that directive, under those provisions, on account of the interest in public enforcement of competition law.[26]

74. In order to provide an answer to the question referred for a preliminary ruling in the present case, it is therefore not sufficient to examine, in isolation, Article 5(1) of Directive 2014/104 and the recitals thereof relating to the issues forming the subject matter of that provision.

[25] My emphasis.

[26] For the same reason, the definition of the concept of 'pre-existing information' in Article 2(17) of Directive 2014/104 contains no useful indicia for the purpose of answering the question referred for a preliminary ruling, other than those relating to the interchangeable use of the concepts of 'information' and 'evidence'. See point 78 of this Opinion.

75. Directive 2014/104 contains a number of definitions which must be used to determine the meaning of its provisions and, in particular, the meaning of Article 5(1) thereof, which concerns the disclosure of relevant evidence.

76. The relevance of the evidence seems to result in the existence of a relationship between the evidence requested and the claim for damages,[27] while the concept of 'evidence', the interpretation of which is essential for the answer to be given to the question referred, is defined in Article 2(13) of Directive 2014/104.

77. According to that definition, the concept of 'evidence' refers to 'all types of means of proof admissible before the national court seised, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored'. On the face of it, that definition therefore seems to use, interchangeably, the three concepts of 'evidence', 'types or means of proof' and 'object containing information'.

78. Moreover, the definition of the concept of 'pre-existing information' in Article 2(17) of Directive 2014/104 adds 'information' to those three interchangeable concepts. That concept is defined as 'evidence' that exists irrespective of the proceedings of a competition authority.

79. The concepts used in Directive 2014/104 and their definition, used in that directive in an interchangeable and inconsistent manner, do not therefore make it possible to give an unequivocal response to the question referred. However, in view of the fact that Directive 2014/104 appears to use the concepts of 'evidence' and 'information' interchangeably, a textual interpretation of that directive does not, in principle, preclude Article 5(1) thereof, in so far as that provision concerns the disclosure of 'relevant evidence which lies in [the defendant's or a third party's] control', being interpreted as meaning that that directive allows national courts to order the disclosure of documents that must be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it. In any event, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part.

3. Systematic interpretation

80. Article 6 of Directive 2014/104, entitled 'Disclosure of evidence included in the file of a competition authority', states, in paragraph 4 thereof, that national courts are to issue orders to disclose information, when deciding on the requests made by parties.[28]

81. Moreover, pursuant to such an order, it is possible, according to Article 5(2) of Directive 2014/104, to order the disclosure of relevant categories of evidence.

[27] See the second sentence of recital 15 of Directive 2014/104, according to which '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'. My emphasis.

[28] According to Article 6(4)(b) of Directive 2014/104, 'when assessing, in accordance with Article 5(3), the proportionality of *an order to disclose information*, national courts shall, in addition, consider the following … (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court'(my emphasis). Moreover, Article 5(7) of Directive 2014/104 specifies, at least in the French-language version, that 'les États membres veillent à ce que les personnes à qui une demande de production de preuves est adressée aient la possibilité d'être entendues avant qu'une juridiction nationale n'*ordonne la production d'informations* en application [de cet article]' (my emphasis). That provision therefore confirms that the concepts of 'evidence' and 'information' are used interchangeably in the context of Directive 2014/104. More importantly, it also confirms that national courts deciding on requests for the disclosure of evidence are to order the disclosure of information.

82. It is true, as the referring court notes,[29] that recital 16 of Directive 2014/104 states that such a relevant category of evidence should be identified by reference to common features of its constitutive elements and mentions, in that regard, 'the time during which [the documents the disclosure of which is requested] were drawn up'. That recital contains several references which, in some circumstances, may be helpful in identifying a relevant category of evidence, but it is not exhaustive. Moreover, it also refers to the object or content of the constitutive elements of a relevant category of evidence. For the purposes of complying with an order relating to a category of evidence thus identified, the person subject to that order must, in principle, carry out a search focussed on the information requested.

83. According to that logic, in accordance with Article 5(3)(b) of Directive 2014/104, when assessing the proportionality of requests for the disclosure of evidence, national courts are required to consider, in particular, the 'the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure'. It follows that the EU legislature has taken into account the fact that, in order to comply with an order to disclosure information, it may sometimes be necessary to perform tasks which go beyond the mere communication of objects containing information.

84. The question therefore arises whether such tasks can consist of a compilation or classification of information, knowledge or data. Since a textual interpretation of Directive 2014/104, in particular on account of the differences between the language versions of that directive,[30] does not make it possible to provide an answer to that question, and since a systematic interpretation merely indicates that that question should be answered in the affirmative, it is necessary to turn now to a teleological interpretation of that directive.

4. Teleological interpretation

85. As argued by the applicants in the main proceedings, a teleological interpretation of Directive 2014/104, which takes into account its purpose, must lead to the conclusion that it is necessary to apply the competition rules effectively and, to that end, to provide injured parties with effective tools to balance the information asymmetry. That directive refers, on several occasions, to its two objectives: the effectiveness of private enforcement of such rules[31] and the fact of remedying any such asymmetry.[32]

86. In favouring the approach advocated by the applicants in the main proceedings, the Spanish Government and the Commission state that access to useful and authentic information is consistent with the need to ensure the effectiveness of Articles 101 and 102 TFEU and with the right to full compensation, reaffirmed in Article 3 of Directive 2014/104.

87. Moreover, those parties argue that, as stated in recital 4 of Directive 2014/104, the need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) TEU and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

[29] See point 61 of this Opinion.

[30] See footnote 28 of this Opinion.

[31] See, above all, Article 1(1) of Directive 2014/104, according to which that directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm.

[32] See recitals 15, 46 and 47 of Directive 2014/104.

88. By contrast, the Netherlands Government argues that requiring a party to the proceedings or third parties, on the basis of Article 5(1) of Directive 2014/104, to produce evidence *de novo* would upset the balance between the claimant's interest in obtaining the relevant information and the interest of the person disclosing the information.

89. However, in so far as it concerns the disclosure of evidence, Directive 2014/104 contains a mechanism for balancing the interests at stake, under the strict supervision of the national courts, above all as regards the relevance of the evidence requested [33] and the necessity and proportionality of the measures relating to its disclosure. [34] To that end, Article 5 of that directive sets out criteria relating to the exercise of that supervision. Accordingly, when exercising that supervision, national courts are required to consider also the legitimate interests [35] and fundamental rights of parties and third parties. [36]

90. More importantly from the point of view of a teleological interpretation: the exclusion from the outset of the possibility of requesting the disclosure of documents that must be created *ex novo* by the party to whom the request for information is made would, in some cases, lead to the creation of insurmountable barriers to the private enforcement of EU competition rules. It is therefore more consistent with the spirit of the objective of Directive 2014/104, which is to remedy the information asymmetry, to recognise the possibility of requesting the disclosure of such documents and to circumscribe the way in which that possibility is applied in practice through the examination of requests for the disclosure of evidence, while according a central role to the national courts.

91. Moreover, in the present case, the defendants in the main proceedings themselves accept that they may be requested to provide sufficiently precise data available in their systems, in compliance with the principles of necessity and proportionality and with adequate protection of the confidentiality of the information. Once that information is disclosed, the applicants in the main proceedings could process it as they see fit in order to substantiate their claim.

92. However, it is possible that the disclosure of a large number of documents, contrary to the requirements of relevance, proportionality and necessity, may result in a procedural obstruction and, in fact, may not remedy the information asymmetry which characterises the private enforcement of EU competition rules. As the applicants in the main proceedings argue, being provided with unprocessed, and possibly very numerous, documents which only imperfectly match the request and are compiled in a manner known only to their author could actually deprive Article 5(1) of Directive 2014/104 of its practical effect. In such a situation, it may be necessary to appoint an expert to carry out the work which the author of the documents could have done himself or herself with less effort and at a lower cost.

93. Consequently, a teleological interpretation of Directive 2014/104 points towards an affirmative answer to the question referred for a preliminary ruling.

[33] See point 76 of this Opinion.

[34] See recital 16 of Directive 2014/104.

[35] According to the second sentence of Article 5(3) of Directive 2014/104, in determining whether any disclosure requested by a party is proportionate, national courts are to consider the legitimate interests of all parties and third parties concerned.

[36] See, to that effect, Article 5(7) of Directive 2014/104, according to which Member States are to ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under that article. See, also, recital 53 of that directive.

5. Interim conclusion

94. In the light of the arguments set out above, having regard to the unsatisfactory result of the textual interpretation and taking into consideration the unequivocal conclusions arising from the systematic interpretation and the teleological interpretation, Article 5(1) of Directive 2014/104 must be interpreted as meaning that the disclosure of 'relevant evidence', within the meaning of the first sentence of that provision, also covers documents which may have to be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it. National courts must, in any event, limit the disclosure of evidence to what is relevant, proportionate and necessary, taking into account the legitimate interests and fundamental rights of that party.

95. In that context,[37] national courts may, for example, take into account the period covered by the request for the disclosure of evidence[38] and the existence of alternatives consisting in an expert or the requesting party compiling or classifying the information provided by the party against whom the order to disclose information was made.[39]

96. That interpretation is not called into question by the remaining arguments put forward by the defendants in the main proceedings and the Netherlands Government.

6. The argument based on the Commission's powers

97. The defendants in the main proceedings state that, in the context of the public enforcement of competition law, the Commission may require that entities under investigation provide only such documents relating thereto as are in their possession.[40] The defendants refer, in that regard, to the case-law of the Court and to the Opinion in *HeidelbergCement* v *Commission*, in which Advocate General Wahl took the view that the notion of 'information' cannot be stretched so far as to mean that undertakings could be requested to complete tasks which belong to the building of a case.[41]

98. I have a measure of sympathy with that argument, by which the defendants in the main proceedings appear to be claiming that, as regards the disclosure of evidence, the rights of a person who has suffered harm caused by an infringement of competition law cannot, in principle, be more extensive than the powers available to the Commission in the enforcement of competition law at its own initiative.

37 In that regard, without formulating a question concerning an assessment of proportionality, the referring court notes that, in the event that the Court of Justice favours a broad interpretation of Article 5 of Directive 2014/104, the answer to be given to the question referred by the referring court will also be important as regards that assessment, since it can afford a means of gauging the extent of proportionality. I shall therefore confine myself to providing examples which, given the circumstances of the main proceedings, may prove useful to the referring court.

38 In the present case, the cartel constituting the fact giving rise to the alleged damage has been established by the Commission as having lasted 14 years in so far as the defendants in the main proceedings are concerned (from 17 January 1997 to 18 January 2011), whereas the applicants in the main proceedings are requesting a list of prices covering a period of 28 years (from 1 January 1990 to 30 June 2018).

39 See point 92 of this Opinion.

40 See judgment of 29 June 2006, *Commission* v *SGL Carbon* (C-301/04 P, EU:C:2006:432, paragraph 41). See, also, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 61).

41 Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2015:694, point 106).

99. However, in the first place, it should be noted that those powers of the Commission include broad powers of investigation [42] and that undertakings subject to investigation are under an obligation to cooperate actively with the Commission.

100. In the second place, the case-law referred to by the defendants in the main proceedings concerned a legal issue different from that raised by the present reference for a preliminary ruling. That case-law concerned the question whether the Commission may request the disclosure of documents which lie in the control of an undertaking under investigation even if those documents may be used to establish, against that undertaking, the existence of anti-competitive conduct. The Court answered that question in the affirmative. It is true that that answer is subject to the condition that the Commission may not require answers which involve an admission by an undertaking of the existence of an infringement. However, it cannot be inferred from this that, *a contrario*, under no circumstances is it possible to request the disclosure of documents resulting from the compilation or classification of information, knowledge or data.

101. In the third place, nor is it apparent from the Opinion of Advocate General Wahl to which the defendants in the main proceedings refer that the Commission cannot, under any circumstances, require the disclosure of such documents. The legal issue analysed by the Advocate General concerned the question whether the Commission is permitted to require undertakings to submit information according to specific and strict instructions. In the case in which that Opinion was delivered, a specific context had arisen which, according to the Advocate General, led to the building of the case being 'outsourced' to the undertaking under investigation. [43] However, even in that context, the Advocate General did not exclude the fact that the Commission might require information which had to be marshalled by that undertaking. [44]

102. Consequently, an interpretation of Article 5(1) of Directive 2014/104 whereby that provision also covers evidence created *ex novo* cannot be limited by a line of argument based on the view that the Commission's powers are more limited.

7. The argument based on the system of penalties

103. The Netherlands Government infers from the fact that Article 8(1)(b) of Directive 2014/104 provides for the imposition of a penalty for the destruction of evidence that only pre-existing evidence can constitute relevant evidence within the meaning of Article 5(1) of that directive.

104. I am not convinced by that argument. While it is not possible to destroy evidence which does not exist, it is nevertheless possible to refuse to disclose such evidence and, where appropriate, to fail to comply with an order to disclose evidence issued by a national court, a situation which is referred to in Article 8(1)(a) of Directive 2014/104. Accordingly, it cannot be argued that that directive does not provide for penalties in respect of evidence which must be created *ex novo* and inferred therefrom that such evidence does not fall within the scope of Article 5(1) of that directive.

[42] See Articles 17 to 21 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

[43] See Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2015:694, point 122).

[44] See Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2015:694, point 117).

105. Without prejudice to the foregoing additional observations relating to the arguments put forward by the defendants in the main proceedings and the Netherlands Government, I maintain the position which I put forward in point 94 of this Opinion.

VI. Conclusion

106. In the light of the foregoing considerations, I propose that the Court answer the single question raised by the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona, Spain) as follows:

Article 5(1) 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 the disclosure of 'relevant evidence', within the meaning of the first sentence of that provision, also covers documents which may have to be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it.

National courts must, in any event, limit the disclosure of evidence to what is relevant, proportionate and necessary, taking into account the legitimate interests and fundamental rights of that party.