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The ECJ's Paccar Ruling: A Welcome Clarification of the Concept of "Discoverable Evidence" in Private Competition Law Proceedings

By Marc Barennes, Bas Braeken, Demi van den Berg[1] and Simon Lelouche[2]

On 10 November 2022, the Court of Justice of the European Union ("ECJ") issued its ruling in case C-163/21 Paccar e.a. In this critical judgment for the victims of competition law infringements, the Court rules, in essence, that requests for the disclosure of evidence may include not only pre-existing evidence, but also documents that would need to be created *ex novo*. The ECJ does emphasize that national courts should assess the appropriateness, proportionality and necessity of the request on a case-by-case basis.

We will briefly sum up the background of the dispute before commenting on it.

Background to the dispute

The Paccar judgment is another preliminary ruling in the context of the many follow-on actions with respect to the European trucks cartel. In 2016 and 2017, truck manufacturers such as DAF, PACCAR and Scania received a fine from the European Commission ("Commission") totalling almost 4 billion euros for the participation in the trucks cartel between 1997 and 2011. In the case at hand, Spanish truck purchasers brought their damages claims before Barcelona's Commercial Court No 7. In the course of this procedure, they requested the disclosure of certain pieces of evidence in order to compare the recommended prices implemented before, during and after the cartel period. This would enable them to establish the overcharge they paid and hence, quantify the damages suffered.

Barcelona's Commercial Court No 7 decided to ask the ECJ whether, pursuant to Article 5(1) of Damages Directive,[3] requests for evidentiary disclosure could include documents that did not exist prior to the request, and may require that the defendant disclose information, knowledge or data in its possession that it would have had to compile or classify. . The ECJ's ruling, which follows Advocate General ("AG") Szpunar's Opinion delivered on 7 April 2022, answers primarily this question. In so doing, it also takes an important stance regarding the role of private enforcement and the temporal application of the Damages Directive.

The ECJ's findings

The importance of private enforcement of EU competition law

Before moving to the substance of the request, the ECJ underlines the importance of private enforcement of competition law and the role of the Cartel Damages Directive therein. In several recent rulings, such as *Skanska*,[4] the ECJ already considered that private damages actions are an integral part of the EU competition enforcement system, set to punish anticompetitive behavior and deter undertakings from engaging in such conduct. In *Paccar e.a.*, the ECJ not only confirms this stance, but also highlights the fact that private enforcement is necessary insofar as public enforcement may be seen as *insufficient* by itself to ensure full compliance with Articles 101 and 102 TFEU (see para 55). In that regard, the ECJ stresses that private competition law enforcement is all the more desirableas it not only allows the person in question to obtain redress for the damages suffered, but also provides a remedy for the indirect harm done to the structure and operation of the market as a

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[3] 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 Text with EEA relevance (OJ L 349, 5.12.2014, p. 1–19)

[4] Judgment of the ECJ, 14 March 2019, Skanska e.a., C-724/17, ECLI:EU:C:2019:204)

whole (para 56). The damages action can thus assist in correcting the deadweight loss the cartel behaviour has created.

The ECJ therefore considers that, beyond the mere role of providing justice to victims, private enforcement also contributes to restoring effective competition on the market. With this finding, the ECJ also reiterates its position in *Sumal*, according to which private enforcement should not be considered as merely accessory to public enforcement, but rather as standing on equal footing in terms of enforcing EU competition goals.

The application ratione temporis of the Damages Directive to discovery rules

In this ruling, the ECJ held for the first time that the discovery rules provided in the Damages Directive are procedural in nature and thus, apply *ratione temporis* to the cases brought before national courts after the implementation of the Damages Directive.

This clarification is all the more welcome considering that the characterization of the rules provided in the Damages Directive is critical to determine whether they will (temporally) apply to a specific case. Whereas Article 22(1) of the Damages Directive provides that *substantive* provisions of the directive may *not* be applied retroactively (before the national implementation of the directive), the second paragraph of that same provision provides that procedural provisions *can* apply in damages actions that are brought before a national court after 26 December 2014 (the date of the adoption of the directive).

In that context, the ECJ finds that Article 5(1) of the Damages Directive is not substantive within the meaning of Article 22(1). It therefore numbers amongst the other provisions covered by Article 22(2) of that directive, it being, for those purposes, a procedural provision. In the case at hand, the damages claim had been brought in 2019, long after the adoption of the Directive in 2014 and its transposition in Spain in 2017. The ECJ concludes that the discovery rules provided in the Damages Directive apply.

While confirming AG's Szpunar Opinion on this matter, the ECJ complements its string of recent cases in which it clarifies which provisions of the Damages Directive are of a substantive nature and which are to be considered procedural (and hence: the temporal scope of those provisions). In *Cogeco* and *Volvo* for example, the ECJ concluded that the limitation period in Article 10(3) of the Damages Directive and the presumption of harm (Article 17(2)) are to be considered substantive in nature. With its *Paccar* ruling, the ECJ now confirms that the rules on the disclosure of evidence are to be considered procedural in nature, and hence, can be applied in cases brought before a national court after 26 December 2014.

The scope of "discoverable" evidence

Pursuant to Article 5(1) of the Damages Directive, national courts should be able to order a defendant or a third party, upon a reasonable request of a claimant,[5] to disclose relevant evidence "which lies in their control". The question lying before the ECJ revolved around whether this provision only relates to documents that already exist or also relates to those documents "that the party to whom the request to disclose evidence is addressed must create ex novo by compiling or classifying information, knowledge or data in its possession."

In essence, while the ECJ finds that the wording of Article 5(1) of the Damages Directive tends to refer only to pre-existing evidence (para. 39), both the context and the purpose of the provision (which it examines at length) is that it should be "applied effectively so as to provide injured parties with tools that are capable of compensating for the information asymmetry between the parties to a dispute" (para. 61) and should not "lead to the creation of obstacles making the private enforcement of EU competition rules more difficult." (para. 62) For this reason, the ECJ finds that Article 5(1) of the Damages Directive must be interpreted as meaning that it also covers those documents which the party to whom the request to disclose

[5] The claimant must present "*a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages".*

evidence is addressed must create *ex novo* by compiling or classifying information, knowledge or data in its possession (para 69).

However, the ECJ emphasizes that this right to obtain access to *ex novo* evidence is not unlimited. Also taking into account the proportionality safeguards under Articles 5(2) and (3) of the Damages Directive, the ECJ stresses that national courts must carry out a rigorous examination of the request before them as regards the relevance of the evidence requested, the link between that evidence and the claim for damages submitted, the sufficiency of the degree of precision of that evidence and the proportionality of that evidence. It is up to the national courts to assess whether the request is likely to impose a disproportionate burden on the defendant or third party concerned, either as a result of the cost or workload that the request would entail (para 64). The national court should take into consideration all circumstances of the case concerned, in particular with regard to the criteria listed in Article 5(3)(a) to (c) of the Damages Directive, such as the period of time in respect of which the disclosure of evidence is requested (para 68).

Hence, it is up to the national courts to examine on a case-by-case basis whether the non-pre-existing evidence sought should be disclosed in light of all relevant considerations. They are not allowed to dismiss such claims on the sole ground that only pre-existing documents are discoverable.

Conclusion

In light of the fact that the evidence needed to prove anticompetitive conduct and quantify the harm is rarely readily available, the significance of the *Paccar* ruling is quite considerable. By ruling that the right to obtain access to evidence is not limited to pre-existing documents, the ECJ fully acknowledges the necessity of alleviating information asymmetries between claimants and defendants in private damages actions, without however authorizing “information fishing”. This appears to be directly in line with the ECJ’s string of rulings adopted over the past five years seeking to facilitate the rights of those victims to obtain justice.