

## Private Enforcement: Against Information Asymmetry?

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### INTRODUCTION

This text analyses the judgment of the Court of Justice of the European Union (hereinafter ECJ) C-163/21, which invites national courts to weigh the principles of proportionality and necessity of evidence. In this case, the ECJ answered in the affirmative to the preliminary question of whether Article 5(1) of Directive 2014/104/EU (hereinafter the Directive) allows claimants in an action for damages under national law for an infringement of Union or national competition law to obtain from national courts an order for damages. Article 5/1 of Directive 2014/104/EU (hereinafter the Directive) allows claimants in an action for damages under national law for infringement of Union or national competition law to obtain, from national courts, an order for disclosure of evidence which entails for the defendant the ex novo creation of a document from other documents or information in its possession.

The main objectives of this Directive *are to coordinate the effective enforcement of antitrust rules, both private and public, and to level out discrepancies between national rules that lead to an unlevel playing field for the injured party. To this end, it provides for a minimum standard of access to redress across the Union for breaches of its antitrust rules. The application of the Directive should lead to full compensation, but not to overcompensation of the victim - so as not to provide for punitive, multiple or other types of damages.*<sup>1</sup>

The ECJ replied in the affirmative, considering that the literal and systematic elements allow such an interpretation and the teleological element imposes it on the basis of the following main arguments, which will be better explained below: (i) the contributions of recitals 14, 15, 28 and 29, Article 2(13) and Article 5(2) and (3), in particular where it provides that the defendant has to bear the costs of disclosing evidence and (ii) the intended purpose of correcting the information asymmetry between defendants and claimants.

### QUESTION REFERRED TO THE COURT OF JUSTICE

**Are claimants** in an action for damages under national law for infringement of Union or national competition law **permitted to obtain from national courts an order for disclosure of**

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<sup>1</sup> GOTTS, Ilene Knable. The Private Competition Enforcement Review. 8th Edition, Law Business Research. Page 2-3 (our free english translation).

evidence which entails for the defendant the *ex novo* creation of a document from other documents or information in its possession?

#### THE COURT REPLY: ANALYSIS

The doubt arises from the wording of the first part of Article 5(1) of the Directive: *Member States shall ensure that in proceedings relating to actions for damages in the Union, upon request of a claimant who has presented a reasoned justification by submitting reasonably available facts and evidence sufficient to support the plausibility of his claim for damages, national courts may order the defendant or a third party to disclose relevant evidence within their control, subject to the conditions set out in this Chapter* (emphasis added).

The expression *under his control* may be interpreted as meaning that, for evidence to be *under the control* of the defendant, the evidence in question must pre-exist in relation to the claim, which serves as the starting point for the action.

Since the evidence is normally held by the party opposing the claimant, one possible interpretation would be that the defendant may be required to produce only that which he had in his possession from the outset, instead of requiring him to create new documents from the evidence in his possession or to process it. This was, moreover, the defence put forward by the defendant in the national proceedings which gave rise to the question referred.

The ECJ considers the systematic interpretation of Article 2(13), which defines what evidence is and where *no distinction is made on the basis of whether the evidence sought to be disclosed is pre-existing or not*. The ECJ finds corroboration for this breadth of the concept also in recitals 28 (evidence independent from proceedings of a competition authority - PCA) and 39 (evidence other than that in the infringer's possession).

Recital 14 goes on to say: (...) *The evidence necessary to support a claim for damages is often in the sole possession of the opposing party or third parties and the claimant does not have sufficient knowledge of or access to such evidence* (...).

Even Recital 15 explains this clearly. It states that *evidence is important for bringing an action for damages for infringement of Union or national competition law. However, since litigation in the field of Union competition law is characterised by an asymmetry of information, it is appropriate to ensure that claimants have the right to obtain disclosure of the evidence relevant to their claim, without the need to specify individual items of evidence. In order to ensure a level playing field, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by such claimants National courts should be able to order the disclosure of evidence by third parties, including public authorities* (...).

It is, therefore, clear from the combination of Article 5(1) first part, with Recitals 14 and 15 of the Directive that, when referring to under control, what is meant is not the pre-existence or non-existence of the evidence that the national courts are allowed to require from the defendant at the request of the claimant, but its control.

The expression under control used in the article is intended only to refer to the reality that the means of proof in an action for damages for breach of competition law are in the possession of the one who occupies the position of defendant in the action. It is therefore necessary to provide for mechanisms that enabling the claimant to prove the alleged facts, which requires the intervention of the national courts.

It makes no sense to recognise the disadvantaged position in which the claimant finds himself in an action of this kind and, on the other hand, to create rules which place an additional obstacle in the way of his attempt to prove what he alleges and what the Union requires of him.

The ECJ then considers the analysis of Article 5(1) against what is set out in paragraphs 2, specification of the disclosure request, and 3, principle of proportionality. These tell us as follows:

*2. Member States shall ensure that national courts may order the disclosure of specified items of evidence or relevant categories of evidence, characterised as precisely and narrowly as possible on the basis of reasonably available facts indicated in the reasoned justification.*

*3. Member States shall ensure that national courts limit the disclosure of evidence to what is proportionate. In determining whether the disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned.*

The ECJ concludes in this respect that the specificity of the request does not in any way imply that the document pre-exists, as the specific indication of when documents were drawn up is only one of several categories of identification that can be used, not a necessary and unique category.

Moreover, paragraph 3 requires the national court to consider the costs of disclosure in accordance with the principle of proportionality, which implies, implicitly but necessarily, that the cost of disclosing evidence may significantly exceed the cost of simply transmitting pre-existing materials, in particular documents, in the possession of the defendant or a third party.

As regards teleology, the Court emphasises that the *ratio legis* of the directive is precisely to provide for mechanisms to counter that asymmetry of information which is typical in actions for infringement of competition rules. The general rule is, therefore, that national courts may

order, at the request of the claimant, the defendant and a third party, access to relevant evidence in their possession, subject to certain reservations.

*The applicant provides a reasoned justification with reasonably available facts and evidence sufficient to support the plausibility of his claim for compensation.<sup>2</sup>*

The ECJ also says that the asymmetry of information results not only from the fact that the defendants usually hold evidence but also that providing it to the applicant without any processing and in large quantities may constitute a difficulty in accessing the information disseminated by the various pieces of evidence provided.

The ECJ states that *it is important to note that, from a practical point of view, the fact that only raw preexisting documents, possibly very numerous, are provided to the applicant only imperfectly answers his request, whereas, on the contrary, this provision needs to be applied effectively in order to provide injured parties with instruments capable of compensating for the asymmetry of information between the parties to the dispute.*

For that reason, the ECJ holds that it cannot exclude that the defendant may be required to create a new document in which the information held by him is already processed in accordance with the parameters required by the applicant.

It can therefore be seen that there is an attempt here to reconcile and protect different interests, namely, the overriding interest in protecting confidential information, the applicant's interest in obtaining evidence that would otherwise be impossible for him to obtain, and the defendant's interest which, in essence, is related to the onerosity associated with the creation of an *ex novo* document to serve what he understands to be the applicant's exclusive interest.

## **CONCLUSION**

This Directive appears as necessary to encourage private contribution in what is the aim of the European Union: to seek to ensure full compliance with Articles 101 and 102 of the TFEU.

As it became clear that public enforcement alone is not sufficient for this purpose, the need arose to create mechanisms that would encourage private individuals to contribute to this private enforcement of competition law, and this Directive is a mirror image of that.

This objective, says the ECJ, involves correcting the asymmetry of information between injured parties and infringers and the interpretation of Article 5(1) must take this into account.

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<sup>2</sup> NORONHA, João Espírito Santo. 'Private legal litigation and competition law - directive no. 2014/104/EU, of 26 November 2014: disclosure of evidence, effects of national decisions, limitation periods and joint and several liability', in C&R - Competition and Regulation Journal, Lisbon, Jul-Sep 2014. Page 71.



Weighing up the interests at stake, in particular the defendant's interest in not being asked to undertake an excessive task, the ECJ underlines that this is done through the national courts' strict control of the principles of proportionality and necessity of evidence, rather than imposing an *a priori* exclusion of the request.