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Alert | Antitrust Litigation & Competition Regulation

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CJEU: Evidence Disclosure in Follow-On Claims May Require Parties to Create New Documents

Go-To Guide:

- CJEU judgment regarding private enforcement and reinforcement of effectiveness of injured parties' rights
- The Court indicates that disclosure of evidence created ***ex novo*** may be required from parties
- Possible impact on burden of disclosure in EU Member States – lodging private damage claims may be easier

CJEU Judgment

On 10 November 2022, the Court of Justice of the European Union (CJEU) issued its preliminary judgment interpreting Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 (EU Damages Directive). The EU Damages Directive governs actions for damages for infringements of EU competition and Member State national laws.

This judgment relates to a follow-on damages claim following the European Commission's decision regarding a cartel infringement by truck producers, whereby the European Commission fined the producers EUR 2.93 billion for colluding on pricing trucks and passing on the costs to consumers to comply with European emission standards.

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Thereafter, to establish the artificial price increase resulted from the cartel, in a follow-on damages claim applicants requested access to certain evidence allegedly in defendants' possession. Defendants objected to this request, stating that some of the evidence did not yet exist and needed to be created for this purpose. In connection therewith, the referring court requested the CJEU to determine whether the EU Damages Directive distinguishes between pre-existing and newly created evidence.

Background – Disclosure of evidence

The EU Damages Directive sets out certain rules relating to the assessment by national courts of damages claims based on alleged infringements of EU or national competition law and related to the aims of private antitrust enforcement and how private enforcement complements public enforcement.

Since the evidence necessary to prove a claim for damages may not be accessible to or known by the claiming party, there is often an information asymmetry in follow-on damages claims. To remedy this asymmetry, claimants must be able to obtain the disclosure of evidence necessary and relevant for their claim. Pursuant to Article 5(1) EU Damages Directive, EU Member States should ensure the relevant party discloses such reasonably available relevant information in its control, by way of order of the relevant national court.

In each case, the national court should consider – before ordering a party to disclose evidence – whether the request is proportionate and in the legitimate interests of all parties and third parties concerned. In particular, the following should be considered in accordance with Article 5(3) EU Damages Directive:

> *"(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;*
>
> *(b) 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;*
>
> *(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information."*

In short, national courts should balance the legitimate interests of all parties and have the discretion to order a party to disclose certain information.

Analysis – CJEU Judgment

Essentially, the referring court's preliminary question related to the interpretation of the wording "*readily available facts and evidence*" and "*which lies in their control*" of Article 5(1) EU Damages Directive and whether this only refers to evidence which already exists or also to evidence that needs to be created *ex novo* specifically for the disclosure request (e.g., by compiling or classifying information, knowledge or data in its possession).

The CJEU reiterated the objective of the EU Damages Directive, which is to enable the private sector to help ensure full compliance with EU competition law (i.e., Articles 101 and 102 Treaty of the Functioning of the European Union). To achieve this objective, certain tools are necessary to remedy the information asymmetry, since the claimant in private enforcement actions generally does not have access to evidence

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relating to the infringement and/or participation in anticompetitive conduct, while the defendant generally knows which evidence or information would be required.

In connection with the above, the CJEU considered that Article 5(1) EU Damages Directive should be interpreted by taking into account the fact that:

(i) the claimant should not merely have access to unprocessed, pre-existing and potentially numerous documents, as this provision should effectively be applied to provide injured parties with tools to offset the information asymmetry;

(ii) the exclusion of the claimant's ability to request disclosure of evidence created *ex novo* could lead to obstacles in relation to private enforcement, whereas the EU Damages Directive in fact aims to facilitate such private enforcement;

(iii) the order to create new documents would not upset the balance between the claimant's interest in obtaining relevant information and the defendant's interest in being protected from 'information fishing'; and

(iv) the mechanism of paragraphs 2 and 3 of Article 5 EU Damages Directive ensures the balancing of interests by the national courts, since they are required to conduct a thorough examination in relation to "*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*" (para. 64).

Therefore, the CJEU concluded that national courts must – when assessing whether an order to create *ex novo* evidence is appropriate – take into account the principle of proportionality and all relevant circumstances of the case in question as regards the defendant's workload and costs, subject to strict compliance with paragraphs 2 and 3 of Article 5 EU Damages Directive. National courts must limit the disclosure of evidence to what is relevant, proportionate and necessary, taking into account the legitimate interests and fundamental rights of that party.

Conclusion and (possible) implications

In its judgment, the CJEU recognizes the information asymmetry between claimants and defendants in follow-on damages claims and further reinforces the effectiveness of injured parties' rights. In some cases, the EU Damages Directive may require parties to disclose evidence created *ex novo*, not only pre-existing documents, since this may be less burdensome, less time-consuming, and more cost-efficient for all parties involved. The CJEU has considered the aims of private antitrust enforcement and how private enforcement complements public enforcement.

According to the CJEU, the EU Damages Directive should provide parties with the ability to request evidence disclosure and, in order to ensure actions for damages for infringements of EU competition law and the full effect of EU competition law, to request new document disclosures (in addition to pre-existing documents). This judgment could, therefore, have an impact on the burden of disclosure in EU Member States and may enhance private enforcement for injured parties despite not having (all) the necessary information available to the claimant. Claimants now have a tool to gather evidence more efficiently, as they are able to lodge a claim for damages even if the evidence supporting such damages is not readily available. By interpreting the EU Damages Directive in such way, the CJEU changes long-established principles for civil procedure in certain jurisdictions by establishing procedures similar to discovery – and

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where parties may even be required to produce evidence which has not existed yet – even in civil law countries which did not previously have such procedures.

Interestingly, the CJEU considered not only the wording of the EU Damages Directive (*i.e.*, its literal interpretation) but also its context and objectives. In his opinion, Advocate General Szpunar also suggested such an approach when he wrote about the *effet utile* principle. This principle is an old interpretative tool which plays an important role in both private enforcement of competition law and EU procedural law in general. Considering that several EU procedural law regulations already provide for pre-trial disclosure obligations, the CJEU judgment may in fact go beyond competition law enforcement and have broader use in disputes.

Notably, the judgment in question is not the first ruling on the Trucks cartel case. The CJEU has already ruled on jurisdictional issues (C-30/20 (*RH vs Volvo*) and C-451/18 (*Tibor Trans*)), the method of calculating the limitation period for actions for damages under competition law, the power to estimate the amount of harm (C-267/20 (*Volvo, DAF Trucks*)), as well as on liability of enterprise group members for other group entities' anticompetitive conduct (C-882/19 (*Sumal SL v Mercedes Benz Trucks España SL*)). The European Commission's decision in *Trucks* is considered the basis for numerous courts' clarifications of the EU Damages Directive and has had a significant impact on private antitrust litigation. This aligns with the growing number of court judgments in Europe concerning cartel damages claims in general. According to European Commission statistics, such claims rose from 2014 to 2020 from 50 to 299.

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