Kluwer Competition Law Blog

Disclosure of Evidence in Private Enforcement of Competition Law: Interpretation and Principles (AG Szpunar in C-163/21 PACCAR and Others)

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Recent posts on this blog (here) have already highlighted the role that the adoption of Directive 2014/104/EU (***Damages Directive*** or ***Directive***) and the European Commission's (***EC***) decision in case AT.39824 – *Trucks*, amongst other events, have played as turning points in private enforcement of competition law in the EU. The Directive has led not only to an overwhelmingly high number of damage claims before national courts but also to fascinating questions on the interpretation of the Damages Directive, the intersection between public and private enforcement of EU competition law, and many other aspects that the European Court of Justice (***ECJ***) is gradually clarifying. Slowly but steadily, the Damages Directive arrives at the EU's highest court.

It is in this context that the present proceedings took place. On 15 March 2019, a court of first instance from Barcelona (*Juzgado de lo Mercantil n.º 7 de Barcelona*) was requested to order the disclosure of certain evidence in the context of a damage claim resulting from an infringement of article 101 TFEU. The defendants opposed such a request arguing that the evidence was not available and would require an *ad hoc* or *ex novo* production. According to the defendants, Article 5(1) of the Damage Directive, which allows national courts to order the disclosure of relevant evidence in the defendant's or third parties' control, only refers to pre-existing evidence and, thus, its scope does not extend to evidence that needs to be prepared *ex novo*.

Uncertain about the proper interpretation of Article 5(1) of the Damages Directive, the court of first instance from Barcelona decided to suspend proceedings and request a preliminary ruling from the ECJ on 21 February 2020 (C-163/21 *PACCAR and Others)*. The Spanish court asked whether Article 5(1) of the Damages Directive could be interpreted as including a potential disclosure of evidence whose holder would need to create *ex novo* through the aggregation or classification of information, knowledge or data in its control.

Approximately two years later, on 7 April 2022, Advocate General M. Szpunar (***AG Szpunar***) delivered his Opinion on this matter.

The Application of the Damages Directive to Pre-Trial Disclosure

Even though the Spanish court did not question this point, AG Szpunar introduced his Opinion with a quite lengthy but very interesting discussion on the question of whether the Damages Directive applies to pre-trial requests for disclosure of evidence. This is because it is actually not clear from the literal wording of Article 1(2) whether the Directive applies to requests for disclosure of evidence made *before* filing a damage claim instead of *after*, which could be the case at issue.

Contrary to AG Szpunar's reasoning, Article 5(1) Damages Directive supports different outcomes in the various language versions. While the German reference to "*in Verfahren über Schadensersatzklagen*" suggests that a damages action must have already been brought, the English or French references to "*proceedings relating to an action for damages*" and "*les procédures relatives aux actions en dommages*", respectively, seem to indicate that the Directive also envisages the disclosure of evidence in connection to a subsequent action for damages, but not that disclosure can only be ordered in the context of already lodged damage claims. Once again, the Damages Directive demonstrates the limits of the literal interpretation of European Union law (more on this below).

Yet, AG Szpunar rightfully argued that certain Directive contents seem to support a broader interpretation of its scope. He particularly stressed the role of Article 6(4)(b) of the Damages Directive. Indeed, the proportionality test required to order the disclosure of evidence included in the file of a competition authority requests an assessment of whether the request for disclosure is made in relation to an action for damages before a national court. This indicates that there must also be disclosure requests that do not arise "in relation to an action for damages", i.e. before an action for damages is filed.

In that context, AG Szpunar further highlighted Recital 22, stating 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*" (emphasis added). As a result, it seems that injured parties can get access to at least *some* pieces of evidence that competition authorities have gathered in the context of proceedings under Article 101 or 102 TFEU before filing a follow-on damage claim. It would only make sense that this is equally applicable to requests for disclosure of evidence not in the authorities' file but in the defendant's or third parties' control under Article 5 of the Directive. In addition, AG Szpunar further reflected on Recital 27 and its mention to "*access to the relevant evidence that* [injured parties] *need in order to prepare their actions for damages*", which also seems to support such interpretation. Again, the arguments of AG Szpunar can also be seen in a methodological context. Contrary to the literal interpretation (which might be challenging given the divergences across language versions), an interpretation in light of the recitals is crucial in EU law.

More importantly, AG Szpunar took recourse to an old-reliable interpretative tool and EU law principle: the *effet utile*. He highlighted that a different interpretation of the Damages Directive and the scope of its Article 5 would be against the *effet utile* of Articles 101 and 102 TFEU. Indeed, this could raise insurmountable obstacles for injured parties to be fully compensated, thus lightening the intended deterrent effect of these provisions. In addition, it would also risk having too different national rules on disclosure of evidence across EU Member States, ultimately harming the effective and uniform application of competition law across the EU. These arguments are well-known in private enforcement of competition law and come back to us later. The system of the Damages Directive, dating back to an almost legislative mandate dictated by the ECJ in *Courage*

and, most importantly, *Manfredi*, stresses the role of the *effet utile* for procedural means in private enforcement of competition law, above all disclosure of evidence.

In light of all the above, AG Szpunar concluded that the Damages Directive, in principle, should apply to pre-trial disclosure of evidence. He ultimately left it to the referring court to decide if the respective disclosure request was made in the context of an action for damages or prior to such an action.

Ratione Temporis

On a side note, AG Szpunar supported what some authors have been suggesting in the last years: the procedural (and thus disclosure) provisions of the Damages Directive fall under Article 22(2). Article 22 regulates the temporal application of the Damages Directive and distinguishes between national measures transposing the substantive provisions of the Directive (Article 22(1)), which do not apply retroactively to their adoption, and national measures transposing the remaining provisions – the procedural provisions –, which only apply to damage claims filed after 26 December 2014 (Article 22(2)). AG Szpunar understands that those provisions considered non-substantive are the ones on procedure, such as those contained in Article 5 on disclosure of evidence. With this, AG Szpunar follows the opinion prevailing in the EU competition bubble, which the ECJ will likely confirm.

The Material Scope of Article 5(1) Damages Directive

Coming to the core question of the case. In determining whether Article 5(1) of the Damages Directive could be interpreted as including a potential disclosure of evidence whose holder would need to create *ex novo* through the aggregation or classification of information, knowledge or data in its control, AG Szpunar draws an important distinction between the (i) literal, (ii) systematic, and (iii) teleological interpretations of this provision:

Again, AG Szpunar's recoursed to the **literal interpretation** shows the challenges of this interpretative tool in EU law. In relation to Article 5(1) of the Damages Directive, the first sentence of Article 5(1) refers to the disclosure of evidence *in the defendant's or third parties' control*, while its second sentence contains a more general reference to the disclosure of evidence by the claimant upon the defendant's request. This difference could be understood as intentional, and thus claimants' right to access to evidence would be narrower than that of defendants, only being able to request disclosure of pre-existing evidence.

Again, recitals need to come to the rescue. AG Szpunar stressed that Recital 39 refers to the defendant's right of access to evidence in the claimant's or third parties' control, which in consequence rejects any difference in scope between claimants' and defendants' right to access to evidence as per the literality of Article 5(1). In addition, Recital 14 of the Damages Directive states that "*the evidence necessary to prove a claim for damages is <u>often</u> held exclusively by the opposing party or by third parties*" (emphasis added), leaving the door open to other sources of evidence different than those in the control of the opposing party or a third party.

Furthermore, AG Szpunar refered to the definitions of "*evidence*" and "*pre-existing information*"

contained in Articles 2(13) and 2(17) of the Damages Directive, respectively, and how the Directive uses the concepts of "evidence" and "information" interchangeably, to conclude that the Directive does at least not clearly exclude evidence that would need to be created *ex novo*.

Regarding the **systematic interpretation** of Article 5 of the Damages Directive, AG Szpunar holds that Article 5(3)(b) states that, in determining whether a request for disclosure of evidence is proportionate, Member States shall consider "*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*". This seems to imply that, under certain circumstances, access to evidence might require efforts that go further than the mere exhibition of documents containing information.

Finally, regarding the **teleological interpretation** of Article 5 of the Damages Directive, AG Szpunar carries out a balancing exercise. On the one hand, an extensive interpretation of this provision would respect the *effet utile* of Articles 101 and 102 TFEU, as well as claimants' right to full compensation. However, such interpretation could acutely harm the balance between claimants' and defendants' interests.

Nevertheless, the fact that injured parties *could* be able to access evidence whose holder would need to create *ex novo* through the aggregation or classification of information, knowledge or data in its control does not mean that they *would* be granted such access. Indeed, as clearly reflected throughout the Damages Directive, it is for national courts to determine whether such access is proportionate and necessary in the specific case considering, in particular, the parties' legitimate interests and fundamental rights.

In addition, a restrictive interpretation of Article 5 of the Damages Directive would give rise to unsurmountable obstacles to private enforcement of EU competition law.

In light of the above, AG Szpunar concludes with a balanced outlook. He holds that Article 5 of the Damages Directive should be interpreted as including a potential disclosure of evidence whose holder would need to create *ex novo* through the aggregation or classification of information, knowledge or data in its control, to the extent such disclosure is proportionate and necessary in the specific case. In addition, he continues that nothing on this conclusion should be questioned by the fact that, in enforcing competition law rules, the European Commission can only have access to those documents under the potential infringer's control. Indeed, the investigative powers of the European Commission are not comparable to those of an injured party as a result of an infringement of EU competition law. Furthermore, parties subject to an investigation are obliged to cooperate with the authority actively, whilst defendants in private litigation are not subject to such obligation *vis-à-vis* the claimant.

Conclusions and Outlook

For those unfamiliar with the structure and rules on procedure of the ECJ, the opinions of Advocates General are not binding to the Court. Thus, it remains to be seen whether the latter will embrace AG Szpunar's position in the present case and confirm that Article 5 of the Damages Directive could include a pre-trial disclosure of evidence whose holder would need to create *ex novo* through the aggregation or classification of information, knowledge or data in its control.

If the ECJ decided to follow AG Szpunar's Opinion, that would mean that an infringer of EU competition law could be ordered to disclose certain evidence not readily available and which would require further work to create it, but only to the extent that the national court knowing the matter considered it proportionate and necessary. This is because the rules on disclosure of evidence contained in the Damages Directive are safely protected by the principle of proportionality so that both defendants' and claimants' interests are safeguarded.

A more restrictive approach towards the scope of Article 5(1) of the Damages Directive would mean that parties injured by an infringement of EU competition law would only be able to lodge a damage claim in those instances where the evidence supporting such damage is readily available, which might not always be the case. This would result in an unduly justified imbalance between defendants' and claimants' rights in private enforcement of competition law, ultimately affecting the effective application of Articles 101 and 102 TFEU.

The consequences of a different interpretation of the scope of the Damages Directive more generally should not be overlooked. Indeed, considering that the Directive only applies once the claimant has lodged a damage claim would substantially impact claimants' right to full compensation due to infringements of competition law, as they would not have access to the relevant evidence to substantiate their claims.

In this context, we want to stress the role of the *effet utile* in private enforcement of competition law and EU (procedural) law in general. Many Member States do not know the general concept of (pre-trial) disclosure of evidence outside of specialised EU law obligations. In the context of the Damages Directive negotiations, discussions on including disclosure obligations and the fear of an Americanisation of EU procedural law caused a great deal of ink to flow. Yet, AG Szpunar suggests in paragraph 50 that the possibility to order pre-trial disclosure of documents contributes to the effectiveness of EU competition law. His argumentation illustrates that pre-trial disclosure of evidence may be necessary for EU primary law reasons. An ever-growing number of EU law instruments already includes (pre-trial) disclosure obligations – the Damages Directive, the IP Enforcement Directive and the Collective Consumer Redress Directive. With an additional look at disclosure from the perspective of the effective enforcement of EU law, a general principle of EU (procedural) law might emerge.

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