

Case C-267/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 June 2020

Referring court:

Audiencia Provincial de León (Spain)

Date of the decision to refer:

12 June 2020

Appellants:

AB Volvo

DAF TRUCKS N. V.

Respondent:

RM

Subject matter of the main proceedings

Appeal brought by AB Volvo and DAF TRUCKS N. V. ('the appellants') against the judgment delivered at first instance in an action for damages for anti-competitive behaviour by which they were ordered to pay compensation to RM ('the respondent').

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, interpretation is sought 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, in particular Articles 10, 17 and 22 thereof, as well as the impact of Article 101 TFEU and the principle of effectiveness in determining the legislation applicable to the main proceedings.

Questions referred

1. Must Article 101 TFEU and the principle of effectiveness be interpreted as precluding an interpretation of national legislation according to which neither the 5-year limitation period established in Article 10 of Directive 2014/104/EU nor Article 17 thereof, concerning judicial estimation of harm, is retroactively applicable, and which establishes retroactive effect by reference to the date of the penalty rather than the date on which the action is brought?
2. Must Article 22(2) of Directive 2014/104 and the term ‘retroactively’ be interpreted as meaning that Article 10 of the directive is applicable to a claim such as that brought in the main proceedings, which, although lodged after the directive and the transposing legislation entered into force, refers to prior facts or penalties?
3. When applying a provision such as that of Article 76 of the Ley de Defensa de la Competencia (Law on the Protection of Competition), must Article 17 of Directive 2014/104, concerning judicial estimation of harm, be interpreted as a procedural provision that will apply to main proceedings in which an action is brought after the entry into force of the national transposing legislation?

Provisions of EU law cited

Article 101 TFEU

Directive 2014/104: Articles 10(3) and 17(1), Article 22(1) and (2) and Article 23.

Provisions of national law cited

Directive 2014/104 is transposed into Spanish law by the Real Decreto-ley 9/2017, de 26 de mayo, 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 No 9/2017 of 26 May 2017 transposing European Union directives in the fields of finance, business and health, and on the posting of workers). Article 3 of the royal decree-law amends the Ley 15/2007, de 3 de julio, de Defensa de la Competencia (Law No 15/2007 of 3 July 2007 on the Protection of Competition), establishing a limitation period of 5 years for actions for damages (new Article 74(1) of the Law on the Protection of Competition) and making regulations governing the burden of proof — which lies with the claimant — in the quantification of damages, where it introduces certain new elements, such as a rebuttable presumption that cartel infringements cause harm (new Article 76(3) of the Law on the Protection of Competition) and the power for the courts to estimate the amount of harm where it is established that harm has occurred but it is practically impossible or excessively difficult precisely to quantify the harm suffered (new Article 76(2) of the Law on the Protection of Competition). In addition, Article 4 of the royal decree-law introduces a provision concerning access to evidence in proceedings for damages for breach of

competition law into the Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Law No 1/2000 of 7 January 2000 on Civil Procedure).

The first transitional provision of Royal Decree-Law No 9/2017 comprises two paragraphs. The first paragraph establishes that the provisions in Article 3 of the royal decree-law (which amends the Law on the Protection of Competition) will not apply retroactively, while the second paragraph establishes that the provisions in Article 4 (which amends the Law on Civil Procedure) will apply only to proceedings commenced after the entry into force of the royal decree-law, which took place on 27 May 2017, meaning that Spain failed to meet the transposition deadline for Directive 2014/104.

Brief summary of the facts and the main proceedings

- 1 During 2006 and 2007, the respondent acquired three trucks under leasing contracts. On 1 April 2018, he brought a follow-on action against the appellants, seeking damages for the harm caused by the anti-competitive conduct of the appellants, who are expressly named as entities to which the penalty imposed in the Commission Decision of 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 — Trucks) ('the Trucks Decision') was addressed. Specifically, in his claim the respondent sought damages of EUR 38 148.71, or such sum as may be deemed appropriate, plus statutory interest and costs, to be payable jointly and severally by the appellants.
- 2 The Trucks Decision is dated 19 July 2016 and was published in the *Official Journal of the European Union* on 6 April 2017. The decision imposes penalties on the main truck manufacturers in the EU market for operating a cartel between January 1997 and January 2011 in breach of Article 101 TFEU.
- 3 In his claim, the respondent sought to rely in the alternative, in the event that neither Directive 2014/104 nor its transposition into Spanish law was deemed applicable, on the general doctrine of non-contractual liability in Article 1902 of the Código Civil (Civil Code) and the relevant case-law, under which the limitation period is 1 year.
- 4 AB VOLVO and DAF TRUCKS N. V. opposed the claim, asserting, among other arguments, that the action for compensation was time-barred because the 1-year period (in an action for non-contractual liability) had elapsed.
- 5 The judgment under appeal upholds the claim in part and orders the appellants to pay compensation in the amount of 15% of the purchase price of the vehicles. That judgment rejects the limitation defence on the ground that, among other considerations, the limitation period of 5 years which, on the date the claim was lodged (1 April 2018) had already been introduced in Article 74(1) of the Law on the Protection of Competition by the royal decree-law which transposed Directive 2014/104, is deemed applicable. The judgment also applies the presumption of

harm referred to in Article 17(2) of Directive 2014/104, which was transposed in Article 76(3) of the Law on the Protection of Competition, since that law is deemed applicable to the circumstances of the case, particularly in view of its procedural nature, as it governs the distribution of the burden of proving harm.

- 6 Similarly, having confirmed the extraordinary difficulty of proving the extent of the harm, the judgment makes use of the courts' power to estimate the amount of harm under Article 76(2) of the Law on the Protection of Competition, which transposes Article 17 of Directive 2014/104, since that provision is deemed procedural in governing the burden of proof.
- 7 In their appeal, the appellants argue that Directive 2014/104 should not be applied retroactively, because the anti-competitive practices penalised by the European Commission ceased on 18 January 2011, and that it is the date on which the facts occurred which is relevant in determining that the rules in the directive cannot be applied retroactively. They believe instead that the applicable provisions are those in Article 1902 of the Civil Code, which require the claimant to prove the existence and amount of the harm. DAF TRUCKS N. V. also maintains that the action is time-barred because the limitation period is not the 5 years provided for in the directive but 1 year, and that this period began to run on 19 July 2016, the date of the press release on the Trucks Decision.
- 8 In opposing the appeal, the respondent relies on Article 10(3) of Directive 2014/104 and Article 74 of the Law on the Protection of Competition taken in conjunction with Article 22 of the directive and the first transitional provision of Royal Decree-Law No 9/2017 as grounds for applying the 5-year period.

Main arguments of the parties to the main proceedings

- 9 The appellants oppose the request for a preliminary ruling, as they consider that there are no issues of interpretation because the directive does not apply in the proceedings.
- 10 The applicant is also opposed to the request for a preliminary ruling, because he believes the directive clearly does apply.

Brief summary of the reasons for the request for a preliminary ruling

- 11 In the main proceedings it is essential to determine the applicable legislation in order to set the limitation period for the action for damages that has been brought and to determine which rules apply to the burden of proof and to judicial estimation of harm. The key point of contention is whether Directive 2014/104 applies to the case (either directly or indirectly), with questions arising over the transitional arrangements.

- 12 While the facts that gave rise to the claim, which constitute an infringement of Article 101 TFEU, occurred before Directive 2014/104 entered into force, the Commission adopted the Trucks Decision on 19 July 2016, that is, between the directive's date of entry into force on 26 December 2014 and its transposition deadline of 27 December 2016 — which Spain failed to meet, given that Royal Decree-Law No 9/2017, which transposed the directive, did not enter into force until 27 May 2017.
- 13 In view of the above, the referring court has **doubts concerning the transitional application of Directive 2014/104 and of Royal Decree-Law No 9/2017, which transposed the directive**, given that the temporal application of the directive is, in general, limited by Article 22, in that the substantive provisions must be transposed in such a way that they do not apply retroactively (Article 22(1) of the directive). However, all the other national measures implementing the directive, that is to say, the procedural provisions, do apply to situations prior to the entry into force of the directive, but only in respect of actions brought after the directive entered into force (Article 22(2) of the directive).
- 14 In that context, the first doubt specifically concerns the interpretation of the term 'retroactively' used in Article 22 of the directive, and whether it refers to the date on which the infringement of competition law occurred due to the collusive arrangements in this case, or whether it must refer to the date of the penalty imposed by the Commission, or alternatively to the date on which the action for damages was brought. The second doubt concerns the interpretation of the concept of 'substantive provisions' and, specifically, whether the limitation period of 5 years laid down in Article 10 should be classed as a substantive provision which would therefore not apply retroactively. In a similar vein, the third doubt concerns the interpretation of Article 17 of the directive, concerning the power to estimate the amount of harm, and whether this constitutes a 'substantive provision' or a procedural provision.
- 15 These doubts over the interpretation of the transitional provisions applicable to Directive 2014/104 also apply to the arrangements established by the first transitional provision of Royal Decree-Law No 9/2017; while it does not adopt the distinction made in the directive between substantive and procedural provisions, it does distinguish between the amendments to the Law on Civil Procedure, which are to apply to actions commenced after the amendments enter into force, and the amendments to the Law on the Protection of Competition which, according to the first transitional provision of Royal Decree-Law No 9/2017, 'shall not apply retroactively'.
- 16 The same doubt over the term 'retroactively' in Directive 2014/104 applies in respect of the terms used in the transposing provision. The question is, therefore, whether the first transitional provision of the royal decree-law must be interpreted as meaning that the amendments to the rules in the Law on the Protection of Competition (limitation, burden of proof and judicial estimation of harm) would apply to actions brought after the royal decree-law entered into force (on 27 May

2017), as in the case of the action in the main proceedings, which was lodged on 1 April 2018, and whether this interpretation is required by the principle of effectiveness as applied to Article 101 TFEU.

- 17 Specifically, **with regard to the limitation period for the action brought in the main proceedings**, Directive 2014/104 established that all Member States were to ensure a minimum period of 5 years for bringing actions for damages for infringement of competition law, and Royal Decree-Law No 9/2017 has fixed the period at that minimum. The period of 1 year established in Article 1968 of the Civil Code as the general rule in actions for non-contractual damages has thus become a period of 5 years. Given that the royal decree-law establishes the principle that the amendments to the Law on the Protection of Competition are not to apply retroactively, the question is what happens in those cases, such as the action in the main proceedings, where the action had not become time-barred at the point when the royal decree-law entered into force, and whether an additional period is available in such cases in order to make it up to the 5 years now stipulated in that law. This question is relevant because the appellants state that the period must begin to run from the publication of the press release on the Trucks Decision (19 July 2016), which would mean that the aforesaid period of 1 year would have expired before the date on which the claim was lodged (1 April 2018).
- 18 The referring court notes that the provisions in Article 10 of the directive are not purely procedural, and that the Spanish legislature was free to classify the limitation period for claims for damages as a provision of substantive law and to include it in the amendments to the Law on the Protection of Competition. It adds that, nevertheless, in the light of Article 22(2) of the directive, such a classification may be called into question after the transposition of Directive 2014/104, because it involves a situation in which the action was not yet time-barred under the legislation in force at the date of the Trucks Decision.
- 19 If the interpretation that the only applicable limitation regime is that of the Civil Code stands, the question is then whether that regime is compatible with Article 101 TFEU and the principle of effectiveness, which establishes that national laws must not make it impossible in practice or excessively difficult to enforce rights conferred by EU law. In that regard, there is also a doubt as to whether the current regime must be interpreted as allowing the bringing of actions that were not time-barred before the transposing legislation entered into force, either by setting a date on which the period begins to run based on the date on which the decision was published in the *Official Journal of the European Union*, namely 6 April 2017, rather than the date of the press release, or on the basis of other transitional rules of domestic law which could render the new period compatible with the previously applicable period and continue the calculation up to the completion of the 5-year period, without ‘resuscitating’ actions that were already time-barred under the former legislation.

- 20 Lastly, with regard to **the power of the courts to estimate the amount of harm, provided for in Article 17 of Directive 2014/104 and the new Article 76(2) of the Law on the Protection of Competition**, the referring court notes that, under the first transitional provision of Royal Decree-Law No 9/2017, the new articles of the Law on the Protection of Competition are not to apply retroactively, in spite of the fact that many of them (such as the presumption of harm or the burden of proof) are more procedural than substantive.
- 21 The standard procedure that applied to actions for non-contractual damages before the Law on the Protection of Competition was amended contains some significant differences, primarily as regards the requirement to prove harm and the quantification of harm (in addition to the limitation periods examined above). Royal Decree-Law No 9/2017 introduces a significant innovation which is relevant to a decision in the main proceedings: Article 76(2) of the Law on the Protection of Competition empowers the court to quantify the harm suffered in those cases where it is extremely burdensome or difficult for the claimant to do so, having regard to the information available. It appears that, where court proceedings for compensation of the harm suffered as a result of an infringement of competition law have been commenced after the Law on the Protection of Competition was amended, the previous substantive law should apply if the infringements took place before the amendments entered into force.
- 22 Now that the judgment under appeal has established the unquestionable difficulty of quantifying the harm, it is important to determine whether Directive 2014/104 applies, and whether the courts can therefore use the power to estimate the amount of harm, which appears to be broader than the flexibility available to the courts under national case-law.
- 23 In that regard, the referring court also has doubts as to the purely procedural nature of Article 17 of the directive, and as to whether the provisions on the burden of proof and quantification of harm, which are directly related to the substantive provisions that apply to the case, must be considered substantive provisions or procedural ones.
- 24 Once again, in the light of Article 22(2) of the directive, this calls into question the freedom of the Spanish legislature to classify those provisions in respect of claims for damages as provisions of substantive law and to include them in the amendments to the Law on the Protection of Competition (Article 76(2)).