

Anonymised version

Translation

C-163/21 – 1

Case C-163/21

Request for a preliminary ruling

Date lodged:

11 March 2021

Referring court:

Juzgado Mercantil 7 de Barcelona (Spain)

Date of the decision to refer:

21 February 2020

Applicants:

AD and Others

Defendants:

PACCAR Inc

DAF TRUCKS NV

DAF Trucks Deutschland GmbH

Juzgado Mercantil 7 de Barcelona (Commercial Court No 7, Barcelona, Spain)

[...]

[...] [Particulars of the court, proceedings and parties]

ORDER

(QUESTION REFERRED FOR A PRELIMINARY RULING)

Barcelona, 21 February 2020.

[...] [Particulars of the judge and proceedings] In accordance with Article 19(3)(b) of the Treaty on European Union (TEU), Article 267 of the

Treaty on the Functioning of the European Union (TFEU) and Article 4*bis* of the Ley Orgánica del Poder Judicial (Basic Law on the Judiciary; ‘the LOPJ’), it has become necessary for the Court of Justice to interpret Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, and the following question is referred for a preliminary ruling for that purpose. [Or. 2]

Factual background

Subject matter of the dispute. Positions of the parties

1 On 25 March 2019, counsel for AD and 44 other applicants, as purchasers of trucks concerned by the Decision of the European Commission of 17 July 2016 applied for access to evidence held by PACCAR Inc, DAF Trucks N.V and DAF Trucks Deutschland GmbH, under Article 283*bis* of the Ley de Enjuiciamiento Civil (Law on Civil Procedure; ‘the LEC’), which transposes into internal law Articles 5 to 8, on the disclosure of evidence, 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.

2 The request is specifically for access to the following evidence:

1) LIST OF MODELS MANUFACTURED

A list of models manufactured by DAF between 1 January 1990 and 30 June 2018 classified by year and by the following characteristics, commonly used by official bodies in Spain for the purpose of classifying vehicles and issuing national statistical data:

Medium trucks: from 5.9 to 13.9 tonnes

Medium heavy trucks: from 14 to 18 tonnes with engine power:

From 170 HP to 230 HP

From 231 HP to 300 HP

Heavy trucks above 18 tonnes with engine power:

From 200 HP to 300 HP

From 301 HP to 360 HP

From 361 HP to 420 HP

From 421 HP to 500 HP

2

From 501 HP to 700 HP

Above 700 HP

Tractor units with engine power:

From 200 HP to 300 HP

From 301 HP to 360 HP

From 361 HP to 450 HP

From 451 HP to 500 HP

From 501 HP to 600 HP

Above 700 HP

Construction vehicles and special vehicles, with various types of drive:

4x2, 4x4, 6x4, 6x6, 8x4, 8x6, 8x8, 10x4. [Or. 3]

It is not necessary to list variations in the cab (for tractor units) or in coachwork (for rigid vehicles). The names of the models included in this list must be the commercial names used in the price lists and in information for the public and users rather than the internal project names customarily used by the manufacturers, so that the continuity in a model or type of model can be identified.

2) FACTORY PRICES (or GROSS PRICES)

Factory prices (on the understanding that this is another name given to gross prices) or prices at the parent company or intermediary undertaking (if any) for each of the models listed above in 1 invoiced to the importer, dealer or Spanish subsidiary that ultimately transfers the vehicle to the end user or final customer.

3) DELIVERY COST

The 'Total Delivery Cost' of each model included in the preceding list.

This document is commonly used (including with this name in English) and is drawn up by all vehicle manufacturers (whether of heavy duty, private or commercial vehicles), detailing the costs assigned to each stage of the design and production process, including preliminary studies, basic and detail engineering and validation tests.

The minimum information that the document must contain is shown by way of example in the following table:

Function	Truck A	Truck B
Product planning	EUR 6 700	EUR 7 300
Preliminary analysis of the competition	EUR 600	EUR 900
Digital development of the project	EUR 7 000	EUR 5 800
Physical development of the project (prototypes)	EUR 8 000	EUR 7 100
Development personnel	EUR 3 000	EUR 4 200
Physical validation	EUR 12 000	EUR 13 500
Outsourcing	EUR 4 000	EUR 4 100
Cost of equipment	EUR 28 000	EUR 29 200
Production cost (assembly line)	EUR 600	EUR 640
Logistics	EUR 1 500	EUR 1 500
Taxes and customs duties	EUR 3 000	EUR 3 100
Delivery to customer	EUR 400	EUR 400
Total cost	EUR 74 800	EUR 77 740

3 The applicant's request is based on the arguments summarised as follows:

a) By Decision of 19 July 2016, AT.39824-Trucks ('the Decision'), the European Commission ('the Commission'), imposed a penalty for infringement of competition law committed by the leading European manufacturers of medium and [Or. 4] heavy trucks, which occurred between 17 January 1997 and 18 January 2011 and was based on collusion in respect of pricing and gross price increases for trucks throughout the EEA and the timing and passing on of costs for the introduction of new emissions technologies required by Euro 3 to 6 standards. The Decision was addressed to DAF and undertakings in its group.

b) All the requirements are satisfied whereby the proposed actions for damages can reasonably be found to be plausible:

- There was a cartel.
- Harm was caused.
- There is a causal link between the unlawful conduct and the harm.
- The person intending to bring proceedings is the injured party or subrogated to the position of the injured party.

- The harmful conduct can be attributed to the defendant companies in the DAF Group.

c) In order to uphold the right to full compensation, the loss and damage must be quantified, and can be categorised in three broad types:

- That relating to overpricing.
- That due to increased consumption.
- That relating to interest.

d) Since the European market has been affected overall, it has not been possible to use comparative methods based on data from other markets or identical or similar sectors of the market in the same geographical zone (the entire EEA has been affected because virtually all manufacturers were involved) or from different geographical zones of the same market (given the different technical and regulatory requirements, meaning that they would not be sufficiently homogeneous to be comparable), with the effect that the only means of investigating the artificial price increase resulting from the cartel is to compare recommended prices over time, before, during and after the cartel period.

e) It is also necessary to define clearly and precisely the specific meaning of ‘gross price’ and ‘net price’, in order, in addition, to determine the full impact on the final customer — for the purposes of this submission we will assume that the gross price is the factory price (or ex works price in some commercial parlance) to the entity that commences the marketing of the vehicles. The net price is understood as the price ultimately paid by the customer to purchase the vehicle. The production costs must also be known, since the agreements may have facilitated much more significant increases in the gross margin than those generated by the agreement to fix gross prices.

f) The foregoing highlights the need for the defendants to disclose the documents requested in the forms of order sought in the application.

4 A hearing was held on 7 October 2019 at which representations were made by the defendants and the parties applying for access. [**Or. 5**]

5 At that hearing the defendants objected to the application on the basis of arguments which, put very concisely, alleged that some of the applicants lacked standing to bring proceedings, that the Commercial Court lacked territorial jurisdiction, that some of the defendants did not have legal capacity to be sued since they were not found to have committed infringements under the European Commission Decision, on the grounds that there were doubts as to the existence of overpricing or overconsumption, that the application was disproportionate and because it was necessary to adopt confidentiality measures, and, last, asserted that a number of documents have to be drawn up on an *ad hoc* basis.

Proceedings relating to the question referred for a preliminary ruling

- 6 By an order of 11 November 2019, under Article 4*bis* of the LOPJ, the parties were both given 10 days in which to make submissions on the referral of a question to the Court of Justice for a preliminary ruling on interpretation under Article 267 TFEU.
- 7 On 2 December 2019, the applicants lodged a submission objecting to referral of the question. They submit that that the disclosure of evidence referred to in the Directive and in Article 283*bis* of the LEC must be interpreted broadly, with the effect that ‘disclosure of evidence’ cannot consist of the indiscriminate transmission of evidence requiring the injured parties to search for and select data that are necessarily and inevitably processed by the infringer and immediately accessible to it, and that existing information held by the infringer must therefore be provided in an orderly and understandable manner.
- 8 On 3 December 2019, the defendants lodged a submission in which, whilst they did not object to the referral of the question for a preliminary ruling, they summarised the many references according to which in their view the Court of Justice of the European Union may interpret Article 5 of the Directive as meaning that requests for disclosure under that article cannot include evidence that does not already exist and that, as a result, a party cannot be requested to prepare evidence under that article, bearing in mind that, in accordance with the principles of necessity, proportionality and the least possible burden, doing so could involve an excessive burden on defendants that goes beyond what is involved in simply disclosing documents.

GROUNDS IN LAW

Overview of the legal dispute in terms of EU law

- 9 The question referred seeks to elucidate how the ‘Damages Directive’ delimits and defines the scope of the disclosure of evidence system governed in Articles 5 to 8, given that the system, which is implemented in Spanish domestic law by Article 283*bis* of the Law on Civil Procedure, which is a procedural law, is going to be the route used now and in the future not only for the application [Or. 6] to which these proceedings relate but for subsequent proceedings in which private parties seek to apply competition law.

Applicable legislation

- 10 The focal point of the EU legislation to which this matter relates is Article 5(1) 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, which reads as follows:

‘1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.’

- 11 As recital 4 of the Directive points out, the right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.
- 12 Article 283*bis*(a)(1) of the LEC, inserted by Real Decreto-ley 9/2017 (Royal Decree-Law 9/2017) of 26 May 2017 (BOE of 27 May 2017), which applies to this case by virtue of the second paragraph of the Second Transitional Provision, is worded similarly to Article 5(1) of the Directive and provides that ‘upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages arising from infringements of competition law, the courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this section. The court is also able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.’
- 13 Royal Decree-Law 9/2017 does not expressly derogate from Article 328 of the LEC, which states that:
- ‘1. Each party may request that the other parties disclose documents not available to that party relating to the subject matter of the proceedings or the effectiveness of the evidence.
2. The request for disclosure must be accompanied by a copy **[Or. 7]** of the document or, if there is no copy or it is not accessible, must indicate the contents of that document as precisely as possible.’

Similarly, it does not derogate expressly from Article 330 of the LEC, according to which:

‘1. Without prejudice to the provisions of this Law on pre-trial disclosure, third parties who are not parties to the proceedings may only be required to disclose documents held by them where those documents have been requested by one of

the parties and the court believes that knowledge of those documents is important for the purposes of ruling on the matter.’

Issues on which this court requires interpretation

- 14 The provisions governing the disclosure of relevant evidence of both the Directive and the LEC expressly refer to the fact that a court can, on request by a party, order the defendant, applicant or a third party ‘to disclose relevant evidence which lies in their control’.
- 15 For its part, ‘evidence’ is defined in Article 2(13) of the Directive as ‘all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored’.
- 16 Focusing on documentary evidence, which is the type of evidence whose disclosure has been applied for in these proceedings, the request for access to evidence in this case has been made in such a way that it covers documents which may not already exist but require the requested party to carry out work to prepare them (compiling and classifying according to the parameters requested by the applicant) which goes beyond merely searching for and selecting existing documents or merely making all the data available to the applicant, with the necessary safeguards of confidentiality. That work would imply the need to express information, knowledge or data held by the party to whom the request for information has been made in a new document, on a digital or other medium.
- 17 The fact that Article 5(1) and recital 14 of Directive 2014/104 refer to the evidence being in the control of or held by the other party or a third party suggests that the document whose disclosure is sought must exist already, since the holding of a document underscores the idea that the document must already exist instead of a situation in which a document is created *ex novo*. The notion that the document must exist already also seems to emerge from the principle that the evidence must be identified, contained in Article 5(2) and developed in recital 16 when it states that ‘where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested [or] the time during which they were drawn up’.
- 18 Lastly, the fact that the Directive refers to the disclosure of or access to evidence, in this case documentary evidence, but does not refer to the disclosure of or access to information, knowledge or data in the control of the other party or a third party likewise suggests that documents created *ex novo* are excluded. Such information, **[Or. 8]** knowledge or data must in any event be expressed in a means of evidence, customarily documentary evidence, in order to be submitted in proceedings. The option of creating data rooms accessible to the applicant, which are generally virtual, on account of the large amount of information involved, and with the necessary measures to keep data and information confidential, flow from the

guiding principles of Article 5 of the Directive and of Article 283*bis* of the LEC. By means of such data rooms the applicant would have access to all the data (existing documents) of the requested party with no requirement for the requested party to carry out tasks to compile and classify data in order to create a new document.

- 19 Conversely, there are arguments to suggest a broader interpretation according to which disclosure or access may also include documents that have to be created *ex novo* with data, information or knowledge belonging to the other party or a third party.
- 20 In general, a restriction on the system for the disclosure of evidence could undermine the right to full compensation and the principle of effectiveness. Further, the provisions on the costs and expenses of disclosure, contained in the Directive as a component of the principle of proportionality in relation to granting disclosure, may indicate that the requested party does have to carry out work, giving rise to costs, going beyond merely searching for and providing existing documents, and to perform tasks to classify and compile existing data, knowledge or information, thereby performing tasks to create a new document.
- 21 The answer to the question referred will be decisive in this case since the request made to the defendants for access to evidence (the disclosure of documents) may involve the defendants not only having to disclose existing documents to the applicant but also to disclose documents created *ex novo* from data and information available to the defendants.
- 22 Independently of the fact that any application for access to evidence must be determined subject to the principle of proportionality as set out in Article 5 of the Directive and Article 283*bis* of the LEC, the answer to be given to the question referred is also important since it can afford a means of gauging the extent of that proportionality in the event that the Court of Justice favours a broad interpretation of Article 5.
- 23 On the basis of the legal arguments set out, it is appropriate to refer the question contained in the operative part of this decision to the Court of Justice for a preliminary ruling. [Or. 9]

OPERATIVE PART

This court

One.— Stays the proceedings pending disposal of the referral for a preliminary ruling.

Two.— Refers the following question to the Court of Justice of the European Union for a preliminary ruling:

(1) Must Article 5(1) 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 be interpreted as meaning that the disclosure of relevant evidence refers exclusively to existing documents in the control of the defendant or a third party or, in contrast, can Article 5(1) also include the disclosure of documents that must be created *ex novo* by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it?

[...]

[...] [address of the Court of Justice, concluding procedural formulae and signature of the judge]

[...]

[...] [**Or. 10**] [...] [data protection formulae] [**Or. 11**]