**Case C-605/21**

**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:**

30 September 2021

**Referring court:**

Městský soud v Praze (Czech Republic)

**Date of the decision to refer:**

29 September 2021

**Applicant:**

Heureka Group a.s.

**Defendant:**

Google LLC

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**Background to the main proceedings**

The application lodged by Heureka Group a.s. ('the applicant') with the Městský soud v Praze (Prague City Court, Czech Republic) ('the referring court'), in which the corporation seeks from the corporation Google LLC ('the defendant') compensation for damage in the form of loss of profits, reportedly caused by the abuse of a dominant position by the defendant, in that it placed and displayed, in the best possible position among the results of general searches, its own price comparison engine, to the detriment of the applicant's price comparison engine ('the contested conduct').

**Factual and legal context of the request for a preliminary ruling**

The national court, pursuant to Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), hereby requests from the Court of Justice an

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interpretation of Directive 2014/104, [1] of Article 102 TFEU, and of the principle of effectiveness.

**The questions referred**

1) Must Article 21(1) of Directive 2014/104 and general principles of EU law be interpreted such that Directive 2014/104, in particular Article 10 thereof, will apply, directly or indirectly, to the present dispute seeking compensation in respect of all harm caused by a breach of Article 102 TFEU, which commenced before the date on which Directive 2014/104 entered into force and ended after the expiry of the transposition period for its implementation, in a situation when the action seeking compensation in respect of harm was also lodged after the expiry of the transposition period, or such that Article 10 of Directive 2014/104 will apply only to the part of the conduct (and the ensuing part of harm) occurring after the date on which Directive 2014/104 entered into force or, as the case may be, after the expiry of the deadline for its transposition?

2) Do the meaning and purpose of Directive 2014/104 and/or Article 102 TFEU and the principle of effectiveness require Article 22(2) of Directive 2014/104 to be interpreted such that the ‘national measures adopted pursuant to Article 21, other than those referred to in [Article 22,] paragraph 1’ are those provisions of national legislation through which Article 10 of Directive 2014/104 was implemented, in other words, do Article 10 of Directive 2014/104 and the rules on limitation fall within the first or the second paragraph of Article 22 of Directive 2014/104?

3) Is national legislation and its interpretation in line with Article 10(2) of Directive 2014/104 and/or with Article 102 TFEU and with the principle of effectiveness if it links ‘knowledge of the fact that harm was caused’ – relevant to the commencement of the subjective limitation period – to the awareness of the injured party ‘of individual partial [occurrences of] harm’, which occur over time in the course of continuous or continuing anticompetitive conduct (as case-law is based on the assumption that the claim in question for compensation in respect of harm is, in its entirety, divisible) and in relation to which separate subjective limitation periods start to run regardless of the knowledge of the injured party of the full extent of the harm caused by the entire infringement of Article 102 TFEU, that is, national legislation and its interpretation that allow the limitation period for a claim for compensation in respect of harm caused by anti-competitive conduct to begin to run before the point at which ceased that conduct consisting of more favourable placement and display of one’s own price comparison engine [OR. 2] in breach of Article 102 TFEU?

[1] 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 (OJ 2014 L 349, p. 1, ‘the Directive’).

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4) Do Article 10(2), (3), and (4) of Directive 2014/104 and/or Article 102 TFEU and the principle of effectiveness preclude national legislation that provides that a subjective limitation period, in the case of actions seeking compensation in respect of harm, is three years and starts to run on the day when the injured party learned or could have learned of partial harm and of the person obliged to compensate for it, but does not take into account *(i)* the point at which the infringement ceased; *(ii)* the knowledge of the injured party that the conduct constitutes an infringement of the competition rules and that, at the same time *(iii)* does not suspend or interrupt the three-year limitation period during the proceedings before the Commission concerning the ongoing infringement of Article 102 TFEU; and *(iv)* does not contain the rule that the suspension of the limitation period will end no earlier than one year after the decision concerning the infringement has become final?

**Provisions of EU law invoked**

Article 102 TFEU and Articles 10, 21, and 22 of the Directive.

**Applicable provisions of national law and their temporal scope**

In the period of the contested conduct (from February 2013 to 27 June 2017), three legal regulations applied. Of those, the referring court deems relevant the Občanský zákoník (Civil Code) [2] which is applicable to the majority of the period (from 1 January 2014 to 27 June 2017). Pursuant to Paragraphs 620 and 629 of the Civil Code, the subjective limitation period runs for 3 years, and its commencement is linked to 'knowledge of harm and of the person liable to pay damages'.

Until 31 December 2013, zákon č. 513/1991 Sb., obchodní zákoník (Law 513/1991, the Commercial Code) was in force, which also gave the injured party the right to compensation in respect of harm due to anticompetitive conduct, with the difference that it provided for a four-year limitation period, which, however, the referring court does not deem relevant.

Since 1 September 2017, zákon č. 262/2017 Sb., o náhradě škody v oblasti hospodářské soutěže (Law 262/2017, on compensation for harm in the sphere of competition) ('the LCDC'), implementing the Directive, has been in force. [3]

[2] Zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code; in effect from 1 January 2014) ('the Civil Code').

[3] The requirements of Article 10 of the Directive have been reflected in the provisions of Paragraph 9 LCDC.



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**Brief description of the facts of the case**

1 The applicant challenged the contested conduct on 26 June 2020 by means of an action for damages in the form of loss of profits of CZK 394,857,000 plus associated amounts and interest, lodged with the referring court, as the court of first instance.

2 The action was lodged in pursuance of the Commission decision of 27 June 2017, AT.39740, in Google Search (Shopping) ('the Commission Decision'),[4] which stated that, by its contested conduct, the defendant had infringed Article 102 TFEU, inter alia, in the Czech Republic between February 2013 and 27 June 2017.

3 The issuance of the Commission Decision was preceded by the following facts:

- On 30 November 2010, the Commission opened an investigation regarding the defendant's potential infringement of Article 102 TFEU;
- On 27 May 2014, a press release was issued by the Sdružení pro internetový rozvoj v České republice (Association for Internet Development in the Czech Republic, SPIR), of which the applicant is a member, containing the association's disagreement with the obligations proposed by the defendant in the proceedings before the Commission;
- On 15 April 2015, the Commission issued a statement of objections in the matter; and
- On 14 July 2016, the Commission initiated proceedings for infringement of Article 102 TFEU (with, in addition to the defendant, the defendant's parent company, Alphabet Inc).

4 The defendant argues that the applicant's claims are time-barred as, given the facts stated in the previous paragraph, the applicant could have learned that it was incurring harm and who was causing it[5] far earlier than the point at which the Commission's decision was issued, stating that the subjective limitation periods in respect of (partial) harm commenced gradually, starting in February 2013, i.e., from the beginning of the alleged harm, and no later than from 27 May 2014, i.e., from the publication of the SPIR press release.

5 Hence, the applicant could have asserted its claim earlier and expanded it gradually by adding (partial) harm as it accrued in time, if it believed that the

[4] On the basis of national and EU legal regulation, the referring court is bound by that decision in terms of the determination of the person responsible for anti-competitive behaviour and of whether the behaviour has indeed occurred.

[5] It is not in any doubt that the Google internet search engine is operated by Google LLC.



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defendant's anti-competitive conduct continues and the harm accompanying it is increasing.

6 The defendant therefore considers the claim to be time-barred, at least for the period from February 2013 to 25 June 2016

**Brief statement of grounds for the question referred**

7 **Question 1** – Whether and to what extent the Directive should apply to this case. The answer to the question is not clear, as the contested conduct started before the Directive entered into force (i.e., before 25 December 2014), but only ceased after the expiry of the deadline for implementation of the Directive, i.e., after 27 December 2016, and the Directive was only implemented on 1 September 2017, when the LCDC took effect.

8 Therefore, it is not clear whether Article 10 of the Directive will apply to (i) all damage in the period between February 2013 and 27 June 2017 or only to (ii) a part of the damage in the period between 26 December 2014 and 27 June 2017…, or after the expiry date of the deadline for implementation of the Directive, from 28 December 2016 to 27 June 2017. In this regard, it may also be decisive whether the Article constitutes a substantive or a procedural provision (see paragraphs 10 and 11 below).

9 If the case (even partially) fell outside of the temporal scope of the Directive, the national legislation [6] would have to be assessed only from the perspective of Article 102 TFEU and the principle of effectiveness.

10 **Question 2** – whether Article 10 of the Directive is the provision referred to in paragraph 1 or paragraph 2 of Article 22 of the Directive. Paragraph 1 of that Article applies to substantive provisions and provides for the prohibition of their retroactive application, whereas paragraph 2 applies to 'other', i.e., procedural, provisions of the Directive.

11 National legislation enacted to implement Article 10 of the Directive would then, according to its nature, fall within one of those regimes. If Article 10 fell under the regime of Article 22(2) of the Directive, the provisions of the LCDC, [7] which lays down a limitation period of five years and which applies to limitation periods that had commenced pursuant to hitherto applicable legal regulations and that had not ended by the said date, would apply with effect from 1 September 2017, the action for damages in the present case being filed after 25 December 2014.

[6] The substantive provisions of the LCDC which implemented the Directive do not apply to the case at hand due to the non-retroactivity principle.

[7] Paragraph 36 LCDC lays down the requirement provided for in Article 22(2) of the Directive and stipulates that the law will apply to the relevant proceedings for damages which are initiated after 25 December 2014.

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Conversely, if the provisions concerning limitation in Article 10 of the Directive were seen as substantive rules, that legislation would not apply.

12 Traditionally, Czech doctrine and case-law have viewed rules on limitation as 'substantive'. A successful time-bar objection means that the injured party cannot successfully assert its right to damages in court even though that right continues to exist as a 'natural obligation'. If a time-bar objection is not raised in court, the court will not take the limitation into consideration of its own motion and grants the time-barred right to the applicant. The referring court thus understands that the institute of limitation also has procedural characteristics. Furthermore, the Directive refers to the limitation of the 'right to bring an action' for damages, which might also indicate that that institute is of a more procedural nature.

13 For the sake of completeness, the referring court notes that a similar issue is already the subject of a preliminary ruling before the Court of Justice in Case C-267/20 (*Volvo and DAF Trucks*).

14 **Question 3** – Whether, in terms of the start of the limitation period, the national concept of 'knowledge of harm / of the fact that harm was caused' corresponds to the meaning of the corresponding concepts in EU law.

15 The Nejvyšší soud ČR (the Supreme Court, Czech Republic) [8] considers knowledge of even partial harm caused by a continuous or continuing infringement to be of relevance to the commencement of the subjective limitation period. It is not necessary for the injured party to know of the entire duration of such an infringement and about the full scope of the harm caused by such an infringement. The decision-making practice of courts is based on the assumption that harm in those cases is divisible and that every 'new occurrence of harm' by which the original harm has grown due to the continuation of the same harmful event may be claimed in court separately by a new action or by an extension of an existing claim for damages. A separate subjective limitation period of three years starts to run for each such partial harm.

16 According to that interpretation, in the case at hand, every time the defendant advantageously placed and displayed its own sales price comparison engine on its general search website, the applicant may have incurred a certain loss of profit (partial harm) in connection with which one of many subjective limitation periods for assertion in court of the right to compensation in respect of that partial harm started to run. Thus, the applicant would learn again and again of a 'new scope of harm'. Furthermore, that would result in the fact that partial occurrences of harm which date back to the beginning of the infringement could become time-barred before such an infringement has ceased.

[8] Judgment of the Nejvyšší soud (Supreme Court, Czech Republic) of 23 September 2015, file No. 25 Cdo 2193/2014, CZ:NS:2015:25.CDO.2193.2014.1.



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17 In its judgment in C-637/17,[9] the Court of Justice emphasised the injured party's knowledge of the 'full extent of the damage' and the possibility for the injured party to claim 'full compensation for the damage' caused by the anti-competitive conduct. It is not, however, entirely evident from that judgment whether knowledge of the 'extent of the damage' emphasised by the Court of Justice corresponds to knowledge of 'the full extent of the damage' resulting from the entire enduring abuse of a dominant position, or whether knowledge of 'partial damage' caused at a certain point in time within the framework of such an ongoing offence will suffice.

18 The answer to that question probably depends on whether EU law requires not only qualitative knowledge (i.e., knowledge of a certain type and nature of damage), but also quantitative knowledge (i.e., knowledge of the entire extent of damage accumulating over time). If so, the limitation period could not start before the injured party learns of the full extent of the damage in its entirety.

19 In the view of the referring court, the interpretation according to which the right to compensation for damage may be 'fragmented' into dozens of, if not hundreds or more, partial claims, does not correspond to the nature of the abuse of a dominant position in the case at hand. A partial assault consisting of the contested conduct cannot in and of itself constitute an infringement of Article 102 TFEU, which is solely constituted by the conduct as a whole, whose extent, duration, intensity, and method of execution resulted (could have resulted) in a 'substantial' disruption of competition, or an anti-competitive effect that is one of the prerequisites for the set of facts to qualify as abuse of a dominant position.[10] According to the referring court, any (for example, entirely marginal) effects are not sufficient for this purpose.

20 Hence, the referring court believes that, due to the nature of the matter, the injured party could not learn of the full extent and type of damage in this case in connection with individual 'partial attacks' and the subjective limitation period (and in this case also the objective limitation period which cannot commence before the subjective period) for the exercise of the right to damages could not start to run before the cessation of the infringement, which occurred at the time of issuance of the Commission Decision.

21 In light of those considerations, the referring court has doubts as to the compatibility of the interpretation adopted by national courts with Article 10(2) of the Directive, Article 102 TFEU, and the principle of effectiveness.

[9] Judgment of the Court of Justice of 28 March 2019 in C-637/17, Cogeco Communications, EU:C:2019:263, paragraphs 53 and 54.

[10] See, e.g., judgment of 13 February 1979 in 85/76 *Hoffmann-La Roche* v. *Commission*, EU:C:1979:36, paragraph 123, judgment in C-23/14 *Post Danmark A/S* v *Konkurrencerådet*, EU:C:2015:651, paragraphs, 40, 46, 47, 72, and 73 or judgment of the Court of Justice (Grand Chamber) of 6 September 2017 in C-413/14 P *Intel*, EU:C:2017:632, paragraphs 139-143.

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22 **Question 4** – Whether the Directive, and, if it does not apply then, Article 102 TFEU and the principle of effectiveness, preclude other aspects of the legislation on limitation contained in the Civil Code.

23 The referring court first points to the above-mentioned judgment of the Court of Justice C-637/17 and to the judgment of the Court of Justice of 13 July 2006 in C-295/04 to 298/04 *Manfredi*, EU:C:2006:461, which were, however, rendered in a situation when the Directive was not applicable and the relevant facts of the cases, national legislation, and related case-law differed from those of the present case.

24 In the case at hand, the Civil Code links the commencement of the three-year subjective limitation period to the fact that the injured party knew or could have known who caused the harm and of the harm (awareness of the precise amount of harm is not required, nor is 100% knowledge of the identity of the offender). [11] It is also possible to infer from the abovementioned national case-law a requirement as to the injured party's knowledge of the conduct or of an individual partial assault in the context of a continuous infringement of Article 102 TFEU which resulted in a part of the harm.

25 Unlike Article 10 of the Directive and Paragraph 9 LCDC implementing that article, however, the Civil Code does not contain the following features:

- the requirement that the injured party must know that the conduct constitutes anti-competitive conduct; [12]
- linking the start of the subjective limitation period to the cessation of the anti-competitive conduct; [13]
- the interruption or suspension of the limitation period for the duration of an investigation into anti-competitive conduct by the competent body;
- the end of the suspension of the limitation period no earlier than one year after the decision on the infringement becomes final.

[11] See also judgment of the Nejvyšší soud (Supreme Court) of 28 May 2020, file No. 25 Cdo 1510/2019, CZ:NS:2020:25.CDO.1510.2019.1

[12] Here, the referring court notes that anti-competitive bodies often conclude that a practice in question is unlawful only after a thorough analysis of all relevant facts.

[13] According to the referring court, however, it is not clear whether the cessation of infringement as defined in Article 10(2) of the Directive means the time of the last partial assault of 'continuous/ continuing and repeated infringments' (see judgment of the Court of Justice of 24 March 2011 in T-385/06 *Aalberts Industries and Others* v *Commission*, EU:T:2011:114, paragraph 10; of 16 September 2013 in T-378/10 *Masco and Others* v *Commission*, EU:T:2013:469, paragraphs 119 and 120 (concerning infringement of Article 101 TFEU). The final text of the Directive did not reflect the explicit requirement of the cessation of 'continuous or repeated infringement' which was contained in an earlier draft of the Directive.

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26 Thus, the course of the subjective limitation period in the case at hand was in no way influenced by the fact that, from 30 November 2010 to 27 June 2017, the defendant was subject to a Commission investigation into a potential (still ongoing) infringement of Article 102 TFEU, which led to the Commission Decision.

27 The absence of the above-mentioned requirements of the Directive in national law cannot, in the view of the referring court, be overcome by interpretation in conformity with EU law. Hence, if the referring court interpreted the regulation contained in the Civil Code in accordance with applicable national case-law, the right to damages in the case at hand for the period from February 2013 to 25 June 2017 (i.e., with the exception of two days of infringement) would most likely be time-barred.

28 If the court were to find the objection that the action is time-barred to be well-founded, it would dismiss the action in almost its entire scope. Otherwise, the court would undertake a time-consuming and costly collection of evidence pertaining to the occurrence and the amount of the alleged damage.

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