

**Case C-57/21**

**Summary of the order for reference pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

1 February 2021

**Referring court:**

Nejvyšší soud (Czech Republic)

**Date lodged:**

16 December 2020

**Applicant:**

RegioJet a.s.

**Defendant:**

České dráhy, a.s.

**Third party:**

České republiky – Ministerstva dopravy

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**Background to the main proceedings**

Application for the disclosure of certain documents under the control of the Defendant and of the Ministry of Transport in proceedings concerning compensation for damages which the Applicant allegedly sustained due to the Defendant's abuse of its dominant position.

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

Interpretation of Directive 2014/104/EU

Article 267 TFEU

## The questions referred

1. Is an approach whereby a court decides to impose the obligation to disclose evidence, even though proceedings are at the same time being conducted by the Commission for the purposes of the adoption of a decision pursuant to Chapter III of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“the Regulation”), due to which proceedings concerning an action for damages caused by a breach of competition legislation have been suspended on that ground by a court, consistent with the interpretation of 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 (“the Directive”)?
2. Does the interpretation of Article 6(5)(a) and Article 6(9) of the Directive preclude national legislation that restricts the disclosure of all information submitted in the course of proceedings at the request of a competition authority, even if the information concerned is such that a party is obliged to create and keep (or creates and keeps) it on the basis of other legislation, regardless of the proceedings concerning a breach of the competition legislation?
3. Can the closure of proceedings “otherwise”, within the meaning of Article 6(5) of the Directive, consist of the fact that a national competition authority suspended its proceedings as soon as the European Commission commenced proceedings for the purposes of adopting a decision pursuant to Chapter III of the Regulation?
4. Having regard to the purpose and goals of the Directive, is an approach by a national court whereby it analogously applies national legislation implementing Article 6(7) of the Directive to a category of information such as information pursuant to Article 6(5) of the Directive, that is to say, it decides to order the disclosure of evidence with the proviso that the question whether the evidence contains information that was prepared by a natural or legal person specifically for the proceedings of a competition authority (within the meaning of Article 6(5) of the Directive) is to be examined only after the evidence is disclosed to the court, compliant with Article 5(1) of the Directive in conjunction with Article 6(5) thereof?
5. If the reply to the previous question is in the affirmative, must Article 5(4) of the Directive be interpreted such that effective measures for the protection of confidential information adopted by a court may, before a final evaluation by the court as to whether the evidence disclosed, or any part thereof, falls into the category of evidence under Article 6(5)(a) of the Directive, exclude access to the disclosed evidence by the applicant or other parties to the proceedings and their representatives?

### **Applicable European legislation**

Directive of the European Parliament and of the Council 2014/104/EU, Article 2 point 17, Article 5(1) and (4) and Article 6(5), 7 and 9; recitals 25, 27, and 28

Council Regulation (EC) No 1/2003

### **Applicable national legislation**

Zákon č. 262/2017 Sb., o náhradě škody v oblasti hospodářské soutěže (Law No 262/2017 on compensation for damage in the sphere of competition), Paragraph 2(2) and Paragraph 10 to Paragraph 18

Zákon č. 143/2001 Sb., o ochraně hospodářské soutěže (Law No 143/2001, on the protection of competition), Paragraph 11(1), Paragraph 21ca(2)

### **Facts of the case and original proceedings**

- 1 In the present case, the Applicant is exercising its right to damages from the Defendant which were allegedly incurred by an abuse of its dominant position. The preliminary issues arose in proceedings concerning an appeal on a point of law, whereby the Defendant is challenging the decisions of lower-level courts concerning the Applicant's application of 11 October 2017 seeking the disclosure of documents pursuant to Paragraph 10 and ff and Paragraph 18 of Law No 262/2017.
- 2 In its application, the Applicant seeks the disclosure for the purpose of proceedings conducted before the Městský soud v Praze (Prague Municipal Court) ("court of first instance") of I. documents with respect to which it maintains that they are under the Defendant's control, including itemised reports and reports of public railway transport and accounting of the Defendant's commercial segment and II. documents that are under the control of the Ministerstvo dopravy České republiky (the Ministry of Transport of the Czech Republic).
- 3 In its decision of 14 March 2018, the court of first instance mandated that the Defendant disclose, by means of placing in the file, a set of documents featuring not only the information explicitly drawn up by the Defendant for the purpose of proceedings before the Úřad pro ochranu hospodářské soutěže ("Office for the Protection of Competition") ("ÚOHS" or the "Office"), but also information mandatorily created and kept outside of the proceedings, such as itemised reports of train services, quarterly reports of public railway transport, and a list of services operated by the Defendant at its commercial risk.
- 4 Furthermore, the court of first instance denied the Applicant's application for the disclosure of the accounts of the Defendant's commercial segment and an application for the disclosure of minutes of meetings of the Defendant's

management board between September and October 2011 and imposed on the Czech Republic – the Ministry of Transport, the obligation to present additional statistical information and data.

- 5 With respect to the application for the disclosure of evidence, the ÚOHS stated that, on 25 January 2012, it commenced, ex officio, administrative proceedings with the Defendant concerning a potential breach of Paragraph 11(1) of Law No 143/2001. As concerns the disclosure of the proposed documents itself, the ÚOHS stated that, pursuant to Paragraph 21ca(2) of Law No 143/2001, background documents and information drawn up and presented for the purpose of pending administrative proceedings concerning competition protection or the performance of supervision by the Office pursuant to Paragraph 20(1) of Law No 143/2001, as well as background documents and information drawn up by the Office to that end, may only be disclosed to public authorities after the completion of the investigation or once the Office's decision concluding the administrative proceedings takes effect. Furthermore, other documents proposed by the Applicant fall into the category of documents that constitute a comprehensive set of documents whose disclosure may result in a reduction of the effects of the policy prosecuting breaches of competition law.
- 6 Furthermore, it is evident from ÚOHS' statement that the proceedings conducted by the Office were suspended on 14 November 2016 because, on 10 November 2016, the European Commission initiated proceedings pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 in Case No AT.40156 – Czech Rail, which, in terms of the facts of the case, corresponds to the Defendant's actions assessed by the Office in the administrative proceedings. Hence, the Office is not taking any steps in the administrative proceedings to lead to the rendering of a decision on the merits of the case and does not have current and complete information as to the steps taken by the Commission in the course of its proceedings and is not aware which documents the Commission amassed in the course of its investigation.
- 7 In its letter of 26 February 2018, the European Commission – Directorate General for Competition emphasised that the court should, in its decision-making, apply primarily the principle of proportionality to the disclosure of evidence, in the interest of the protection of the legitimate interests of all parties to the proceedings and of third parties, and take measures to protect such information. The Commission recommended suspending the main proceedings concerning damages.
- 8 In its decision of 19 December 2018, the court of first instance ruled that the main proceedings concerning damages were to be suspended until the conclusion of the antimonopoly proceedings conducted by the Commission in case AT.40156 – Czech Rail.
- 9 The Vrchní soud v Praze (Prague High Court), as the court of appeal, confirmed the decision of the court of first instance by its decision of 29 November 2019,

and to ensure protection for the disclosed evidence, it took measures such that the evidence would be placed in custody with the court and only be made available to the parties, their representatives, and experts on the basis of a written request with a justification and subject to the judge's prior consent. The Defendant challenged the decision of the court of appeal by an appeal on a point of law.

### **Summary of the grounds for the order for reference**

- 10 In proceedings concerning the appeal on the point of law, the court hearing that appeal found that, in order to decide on the matter, it has to answer the following questions: (i) whether a court may render decisions while the proceedings are stayed, namely, in this case, a decision to disclose evidence; (ii) whether a court can impose on the Defendant the obligation to disclose confidential information pursuant to Paragraph 2(2) (c) of Law No 262/2017 before the conclusion of administrative proceedings with the proviso that the court of first instance will not assess whether the information indeed falls under Paragraph 2(2) (c) of Law No 262/2017 and withhold it from the Applicant if relevant until after the disclosure of the documents by the Defendant; (iii) whether Paragraph 2(2)(c) contravenes the Directive in terms of the scope of the category of information specified therein; and (iv) whether national courts proceeded correctly when they ordered the disclosure of certain evidence, taking measures for its protection. In evaluating these questions, national legislation implementing the requirements of the Directive must be applied and, in this context, the following preliminary questions concerning its interpretation must be answered.

#### ***The first question***

- 11 In Article 5(1), the Directive imposes on Member States the obligation to ensure that, in proceedings relating to an action for damages, courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control.
- 12 At the same time, however, pursuant to Article 9(1) of the Directive, Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.
- 13 Pursuant to Article 11(6) of the Regulation, the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.
- 14 In this connection, Paragraph 27(1) of Law No 262/2017 stipulates that in proceedings concerning damages, the court shall be bound by a decision of

another court, the ÚOHS, and the Commission that competition has been restricted and identifying the party that has committed such a restriction.

- 15 Hence, the proceedings in the case at hand were suspended pending the conclusion of the antimonopoly proceedings conducted by the Commission in Case AT.40156 – Czech Rail.
- 16 Thus, in principle, the wording of Article 5(1) of the Directive allows for two interpretations of the mutual relationship of the judicial proceedings concerning damages (on the one hand) and the decision concerning the obligation to disclose evidence (on the other).
- 17 According to the first possible interpretation, the decision concerning the obligation to disclose evidence could be considered a part of the very procedure of taking evidence in the main proceedings concerning damages, and hence, if these judicial proceedings are suspended, it would not be possible to decide about the obligation to disclose evidence.
- 18 In the case of the other potential interpretation, the decision imposing the obligation to disclose evidence may be deemed to constitute a special form of *sui generis* independent proceedings (or an independent measure) that are not directly linked to the taking of evidence in the main proceedings concerning damages, and hence, it would be possible to decide about the imposition of the obligation to disclose evidence even if the main proceedings concerning damages are suspended.
- 19 The substance of the question is whether the course of proceedings before the Commission under Chapter III of the Regulation and the related suspension of the judicial proceedings concerning damages prevents the rendering of a decision imposing an obligation under Article 5(1) of the Directive.

***The second question***

- 20 In Article 6(5)(a), the Directive presumes a special regime of disclosure of evidence which contains “information that was prepared by a natural or legal person specifically for the proceedings of a competition authority”.
- 21 The said rule is transposed by Paragraph 16(3) (Paragraph 15(4)) in conjunction with Paragraph 2(2)(c) of Law No 262/2017, according to which confidential information protected by a confidentiality obligation shall include background materials and information submitted explicitly for the purpose of administrative proceedings or supervision by an authority for the protection of competition.
- 22 The linguistic expression of the transposed rule indicates that the temporal restriction of disclosure of the evidence for the duration of proceedings before a competition authority applies, according to Law No 262/2017, to the information that has been submitted to the competition authority.

- 23 The linguistic expression [in Czech] of the same rule in the Directive, however, indicates that this protection is granted only to information explicitly prepared [*ktelé vypracovala ... výslovně*] for the purpose of the proceedings, i.e., not to all information submitted to that end.
- 24 According to established case-law, a formulation used in one language version of an EU legal provision cannot form the sole foundation for the interpretation of the provision and it cannot be given priority above other language versions. Provisions of EU law must be interpreted and applied uniformly on the basis of texts prepared in all European Union languages (judgment of 6 June 2018, Tarragó da Silveira, C-250/17, EU:C:2018:398, paragraph 20).
- 25 Hence, it can be stated that a similar meaning follows from the English text of Article 6(5)(a) of the Directive, which in the relevant context refers to “Information ... prepared ... specifically for the proceedings ...”, or the German text which states “Informationen, die ... für das ... Verfahren erstellt wurden”, or the Slovak “informácie, ktoré fyzická alebo právnická osoba vypracovala osobitne na účely konania ...”.
- 26 The substance of the second question is whether Article 6(5)(a) and Article 6(9) of the Directive must be interpreted to the effect that they prevent the enactment of a legal regulation that extends the range of information excluded from disclosure for the duration of proceedings before a competition authority.
- 27 According to established case-law of the Court of Justice, in interpreting provisions of EU law, not only their text must be taken into account, but also the context and goals pursued by the legal regulation of which it forms a part. The history of the creation of a provision of EU law may also provide relevant information for its interpretation (comp., e.g., judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union, C-583/11).
- 28 The question of the scope of the information to be disclosed is based on the balancing of conflicting interests in the situation at hand, i.e., the interests that would be served by the disclosure and those that would be jeopardised by it (judgments of 14 November 2013, LPN and Finland v Commission, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42, and of 27 February 2014, Commission v EnBW, C-365/12 P, EU:C:2014:112, paragraph 63). On the one hand, there is the interest in enhancing private-law enforcement and in access to relevant background documents, while on the other is the interest in effective public-law enforcement of competition law.
- 29 The interpretation in favour of a restrictive view of the range of information whose disclosure should be excluded during proceedings before a competition authority is supported by the primary goals of the Directive, which include simplification of access to the exercise of the right to damages incurred as a result of anti-competitive conduct.

- 30 Such a conclusion is supported by Article 2, point 17, of the Directive, which classifies as pre-existing information evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority.
- 31 To this corresponds Article 6(9) of the Directive, according to which the disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in that article may be ordered in actions for damages at any time, without prejudice to that article.
- 32 In this context, however, the referring court takes the view that evidence that serves to document “pre-existing information”, as defined by Article 2, point 17, of the Directive, cannot fall under the special regime for evidence containing “information prepared by a natural or legal person specifically for the proceedings of a competition authority”, within the meaning of Article 6(5)(a) of the Directive, even if it is contained in the file kept by the competition authority. Such pre-existing information may be disclosed at any time, i.e., including while proceedings are being conducted before a competition authority, provided regard is had to proportionality of their disclosure, within the meaning of Article 5(3) of the Directive (Paragraph 10(1) of Law No 262/2017), including information contained in the file of the competition authority.
- 33 This conclusion is supported by recital 25 of the Directive, according to which information that was prepared by a party to the proceedings should be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of the Regulation.
- 34 Similarly, pursuant to recital 27 of the Directive, the rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions identified in the Directive ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. Furthermore, pursuant to recital 28 of the Directive, national courts should be able, at any point of proceedings, to order disclosure of pre-existing evidence.
- 35 It can be inferred on that basis that the range of information referred to in Article 6(5) of the Directive [Paragraph 2(2)(c) of Law No 262/2017] must be interpreted as an exemption from the disclosure of information rule and, as such, it must be interpreted restrictively (judgments of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 30, and of 3 July 2014, Council v in’t Veld, C-350/12 P, EU:C:2014:2039, paragraph 48).

### *Third question*

- 36 Pursuant to Paragraph 15(4) and Paragraph 16(3) of Law No 262/2017, documents containing confidential information, as defined by Paragraph 2(2)(c) of this Law,



can be disclosed only after the conclusion of the investigation or after a decision of an authority for the protection of competition concluding administrative proceedings takes legal effect.

- 37 It transposes Article 6(5) of the Directive, according to which national courts may order disclosure of information that was prepared by a natural or legal person specifically for the proceedings of a competition authority only after the competition authority has closed its proceedings, by adopting a decision or otherwise.
- 38 Pursuant to recital 25 of the Directive, a competition authority may close its proceedings by adopting a decision under Article 5 or under Chapter III of the Regulation, with the exception of decisions on interim measures.
- 39 The substance of the question referred depends on an evaluation of whether proceedings closed 'otherwise', within the meaning of Article 6(5) of the Directive can be understood to include the fact that a national competition authority has suspended the proceedings since it has been, within the meaning of Article 11(6) of the Regulation, relieved of its competence to apply Articles 101 and 102 of the Treaty because the Commission has initiated proceedings for the purposes of adopting a decision under Chapter III of the Regulation. And if so, whether information pursuant to Article 6(5) of the Directive prepared for proceedings before the national competition authority also enjoys protection during the course of proceedings before the Commission.

#### ***Fourth question***

- 40 In Article 6(7), the Directive provides for the introduction of a special regime of assessment of whether the evidence whose disclosure is being sought contains a leniency statement and settlement submissions (Article 6(6) of the Directive).
- 41 According to that rule introduced by the Directive, the Applicant may seek court access to certain categories of excluded evidence for the purpose of evaluating whether the information contained therein falls into the category of excluded evidence in question.
- 42 The said rule is transposed into Paragraph 15(1) to (3) of Law No 262/2017.
- 43 In the case of the category of evidence specified in Article 6(5)(a) of the Directive, the Directive does not introduce a special court procedure for verifying whether the evidence whose disclosure is proposed contains information prepared by a natural or legal person specifically for the proceedings of a competition authority.
- 44 If the person obliged to disclose evidence refers to the exemption under Article 6(5)(a) of the Directive (or under Paragraph 2(2)(c) of Law No 262/2017, as the case may be), refusing to disclose the information for the duration of proceedings before a competition authority, no means is available to the court

whereby it may evaluate whether the evidence sought contains information prepared by a natural or legal person specifically for the proceedings of a competition authority.

- 45 Hence, the substance of the question is whether a court may ask the obliged party to submit evidence in order to assess whether it contains information prepared by a natural or legal person specifically for the proceedings of a competition authority as defined by Article 6(5)(a) of the Directive.

***Fifth question***

- 46 Pursuant to Article 5(4) of the Directive, Member States shall ensure that, when ordering the disclosure of confidential information, national courts have at their disposal effective measures to protect such information.
- 47 It is unquestionable that the information disclosed by the Defendant (or a third party) may, depending on specific circumstances, be of such confidential nature that it is in the Defendant's interest to have access to the information excluded or restricted not only vis-à-vis third parties, but also vis-à-vis the Applicant and other parties to the proceedings and their representatives. Moreover, recital 23 of the Directive also draws attention to the related practice of "fishing expeditions".
- 48 At the same time, however, one of the fundamental procedural rights of parties to proceedings under national regulation of civil procedure is the right to view the court file and make excerpts and copies from it. This is a manifestation of the general concept of the right to a fair trial (compare also Article 47 Charter of Fundamental Rights of the European Union), which is fundamentally considered to include the right of a party to civil proceedings to have access to information about proceedings that are being conducted against him.
- 49 Hence, the substance of the issue lies in interpreting the conflict of the contradictory interests referred to above, namely the interest of the Applicant in securing the evidence required for enforcing in judicial proceedings his right to damages caused by a breach of competition legislation, including the related right of the applicant to consult the court file and have access to information about the pending proceedings, against the interest of the Defendant (or a third party) to maintaining the confidentiality of disclosed information, including (at least for a certain period of time) against the Applicant himself.