



DISCLOSURE IN ANTITRUST DAMAGES ACTIONS IN EUROPE



UNIVERSITÄT WIEN



PANEL 1: CHALLENGES OF DISCLOSURE IN ANTITRUST DAMAGES ACTIONS

3 November 2023

- Vivien TERRIEN -
Judge's Counselor
(EU General Court)

CHALLENGES OF DISCLOSURE IN ANTITRUST DAMAGES ACTIONS

CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

INTRODUCTION



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DAMAGE CLAIMS

Case C-453/99, *Courage and Crehan*, 20 September 2001



“ RECOGNITION OF THE RIGHT TO OBTAIN DAMAGES

*[T]he existence of such a right **strengthens** the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.*

*Actions for damages before the national courts can make a **significant** contribution to the maintenance of effective competition in the Community.*

*There should not therefore be **any absolute bar** to such an action being brought by a party to a contract which would be held to violate the competition rules. ”*



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

THE RIGHT TO FULL COMPENSATION

Evidence is an important element for bringing actions for damages for infringement of Union or national competition law.

However, as competition law litigation is characterised by an

information asymmetry, it is appropriate to ensure that claimants are afforded the **right to obtain the disclosure of evidence relevant to their claim**, without it being necessary for them to specify individual items of evidence.

Damage directive, recital 15 *in limine*



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

THE RIGHT TO FULL COMPENSATION

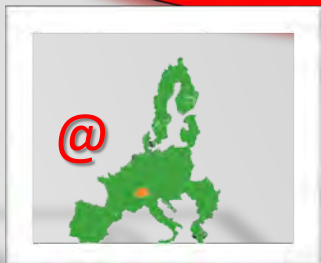
FOLLOW-ON ACTIONS



SOURCES OF INFORMATION

Documents
from
national procedures

Documents
from
EU procedures



CHALLENGES OF DISCLOSURE IN ANTITRUST DAMAGES ACTIONS

CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE @ EU LEVEL



DECISIONS

PUBLICATIONS OF DECISIONS

Documents from EU proceedings



Interim Relief Proceedings

AUTOMATIC PROVISIONAL PROTECTION

- Order in Case T-345/12 R, *Akzo Nobel and Others/Commission*, 16.11.12
- Order in Case T-341/12 R, *Evonik Degussa/Commission*, 16.11.12
- Order in Case T-164/12 R, *Alstom/Commission*, 29.11.12
- Order in Case T-462/12 R, *Pilkington/Commission*, 11.3.13



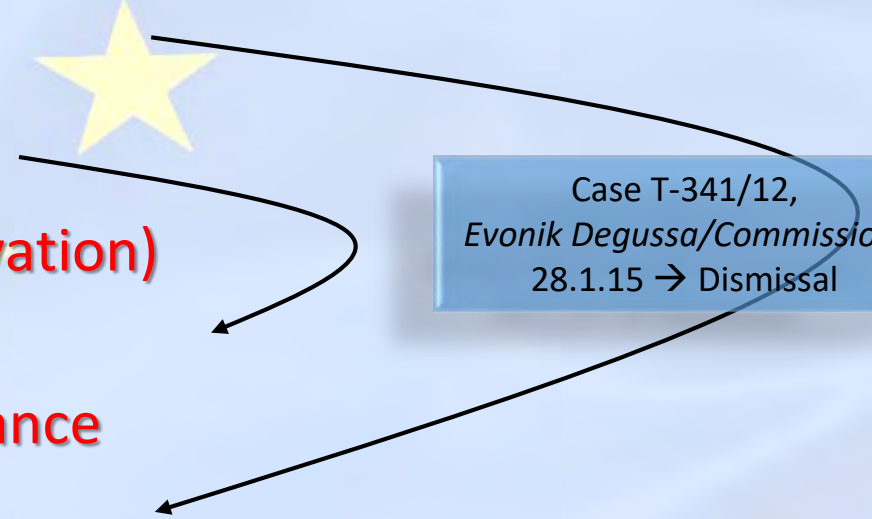
Confirmed (substitution of motivation)

- Order in Case C-278/13 P(R), *Commission/Pilkington Group*, 10.9.13

Even after dismissal at 1st instance

- Order in Case C-162/15 P-R, *Evonik Degussa/Commission*, 2.3.16

Case T-341/12, *Evonik Degussa/Commission*, 28.1.15 → Dismissal



focus

Documents
from
EU proceedings

DECISIONS

PUBLICATION

- *MORE DETAILED COMMISSION DECISIONS* -

Main Proceedings

DISMISSAL

- Case C-517/15 P, *AGC Glass Europe and Others/Commission*, 26.7.17

REMOVAL

- Case T-423/17, *Nexans France and Nexans/Commission*, 13.9.18
- Case T-419/18, *Crédit agricole/Commission*, 7.5.19
- Case T-79/19, *Lantmännen and Lantmännen Agroetanol/Commission*, 19.11.19





DECISIONS

PUBLICATION

- MORE DETAILED COMMISSION DECISIONS -



Documents
from
EU proceedings

Summary

TO **OBTAIN** INFORMATION VIA EU PROHIBITION DECISIONS

VS

TO **PROTECT** CONFIDENTIALITY

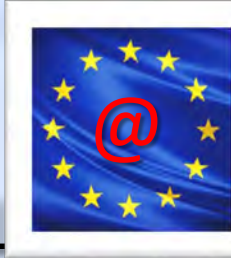


- **Protection** against the risk to infringe the right of confidentiality
 - Interim measure procedures (*Evonik Degusa, Akzo, Pilkington, Alstom*)
 - Main procedures (*Evonik Degussa*)

- **Limits** of the protection granted against the risk to infringe the right of confidentiality
 - Interim measure procedures (*AGC Glass, Nexans, Crédit agricole, Lantmännen*)
 - Main procedures (*Akzo, AGC Glass*)

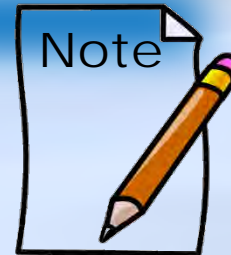


CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Documents
from
EU procedures

PUBLICATION OF DECISIONS



REJECTED GROUNDS FOR NON DISCLOSURE

➤ to avoid damage actions

Case C-517/15 P-R, AGC Glass Europe e.a./Commission, 14 January 2016

➤ to protect data, despite passage of time

Case C-65/18 P(R), Nexans France and Nexans/Commission, 12 June 2018

➤ to protect presumption of innocence

Case C-1/19 P(R), JPMorgan Chase e.a./Commission, 21 March 2019

➤ based on mere claims of confidentiality or of potential harm

Case C-318/19 P(R), Lantmännen et Lantmännen Agroetanol/Commission, 10 September 2019



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Documents
from
EU procedures

LEGAL INSTRUMENTS AVAILABLE

- **SPECIFIC** : Access to **File**
- **GENERAL** : Access to **Documents**

CHALLENGES OF DISCLOSURE IN ANTITRUST DAMAGES ACTIONS

CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE

@

NATIONAL LEVEL



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-360/09, *Pfleiderer*, 14 June 2011



THE STORY

- Manufacturer cartel fined in Germany on the decor paper market
- Pfleiderer = purchaser of decor paper
→ seeks **full** access to NCA's file → partially rejected
- Appeal of NCA's decision to Local Court → preliminary reference

THE QUESTION

Does EU Law **preclude** damages claimants to be given access to documents provided in the framework of a **leniency** program?



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-360/09, *Pfleiderer*, 14 June 2011



THE REASONING (1/2)

STEP #1: COMPETENCE

In the **absence** of binding regulation under EU law on the subject, it is for Member States to establish and apply national rules on the right of access in such situation

STEP #2 : EXERCISE

- Principle of effectiveness -

National rules may not render the implementation of European Union law impossible or excessively difficult

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-360/09, *Pfleiderer*, 14 June 2011

THE REASONING (2/2)

STEP #3: NUANCE

- Public enforcement -

However, leniency programs = useful tools to uncover infringements
= serve the objective of EU competition law's effective application

→ Should not be compromised

→ Possibility of disclosure should not deter infringers to apply

STEP #4: BACKFLIP

- Private enforcement -



Nevertheless, right to claim damages = settled case-law + help public enforcement → deterrence



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-360/09, *Pfleiderer*, 14 June 2011



THE RULING (1/2)

WEIGHING TEST

*It is for the MS courts, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by **weighing the interests protected by EU law***

- can only be done on a case-by-case basis
- all the relevant factors in the case have to be taken into account

“to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency”





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-360/09, *Pfleiderer*, 14 June 2011

THE RULING (2/2)

IN OTHER WORDS



EU law DOES NOT PRECLUDE a person who has been ADVERSELY AFFECTED by an infringement of EU competition law and is seeking to obtain damages FROM BEING GRANTED ACCESS to DOCUMENTS RELATING TO A LENIENCY PROCEDURE involving the perpetrator of that infringement

≠ AG Mazák's opinion

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013



THE STORY

- Cartel fined in Austria on the wholesale distribution of printing chemicals
- Association of undertaking seeks access to file
 - *gather evidence to assess nature and amount of potential harm*
- All the parties refuse to consent to disclosure
 - *Need all parties' consent under Austrian legislation*

THE QUESTION

Does EU law *precludes* such a provision under which *access* to documents is made *solely* subject to the *consent* of all the parties?



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013



THE STRAIGHTFORWARD ANSWER !

EU LAW, in particular THE PRINCIPLE OF EFFECTIVENESS, PRECLUDES a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency program, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, WITHOUT LEAVING ANY POSSIBILITY FOR THE NATIONAL COURTS OF WEIGHING UP THE INTERESTS INVOLVED



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013

BEST PIECES

- Importance of the balancing test -



“Th[e] weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals.”

(para. 31)



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013

BEST PIECES

- Capacity to consider overriding interests -

“those courts, which are empowered only to take due note of the consent or refusal expressed by the parties to the proceedings concerning the disclosure of the evidence in the file, may not intervene in order to protect overriding public interests or the legitimate overriding interests of other parties, including that of allowing disclosure of the documents requested, if just one of those parties objects.”



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013

BEST PIECES

- **No systematic refusal** -



*“although considerations [re risk of undermining leniency program] may justify a refusal to grant access to certain documents contained in the file of national competition proceedings, they do not necessarily mean that that access may be **systematically** refused, since any request for access to the documents in question must be assessed on a **case-by-case basis**, taking into account **all the relevant factors** in the case”*

(para. 43)



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013

BEST PIECES

- Alternative -



*“In the course of that assessment, it is for the national courts to appraise, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of **other possibilities** it may have.”*

(para. 44)



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013



BEST PIECES

- **Precise examination of the risks** - (1/2)

*national courts must take into consideration the **actual** harmful consequences which may result from such access having regard to public interests or the legitimate interests of other parties.*

*(...) the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for damage actions may undermine the effectiveness of a leniency program **CANNOT** justify a refusal to grant access to that evidence.*

(paras 45-46)



DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

LENIENCY APPLICATION

Case C-536/11, *Donau Chemie*, 6 June 2013



BEST PIECES

- **Precise examination of the risks** - (2/2)

*By contrast, the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on **and** applicable to EACH document to which access is refused.*

*It is **ONLY** if there is a risk that a GIVEN document may actually undermine the public interest relating to the effectiveness of the national leniency program that non-disclosure of that document may be justified.*

(paras 47-48)

DIRECTIVE

on antitrust damages
actions

- 10 November 2014 -



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Directive 2014/104/EU

Article 5

Disclosure of evidence

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.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

- (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- (b) 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;
- (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Directive 2014/104/EU on Antitrust Damages Actions

ARTICLE
5(3)

Specific provisions: Disclosure

(PFLEIDERER & DONAU CHEMIE CONSEQUENCES)

“MS shall ensure that national courts limit the disclosure of evidence to that which is proportionate.”

BALANCING TEST → LENIENCY DOCUMENTS | EXAMINATION OF EACH DOCUMENTS
(PFLEIDERER CONSEQUENCES) *(DONAU CHEMIE CONSEQUENCES)*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Directive 2014/104/EU

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.
2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.
3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.
4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:
 - (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;
 - (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
 - (c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.
5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:
 - (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
 - (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
 - (c) settlement submissions that have been withdrawn.
6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:
 - (a) leniency statements; and
 - (b) settlement submissions.



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Directive 2014/104/EU

Article 6

Disclosure of evidence included in the file of a competition authority

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.
8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.
9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.
10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.
11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

BLACK

L  S T

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

- (a) leniency statements; and
- (b) settlement submissions.

GREY

L  ST

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- (c) settlement submissions that have been withdrawn.

WHITE

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

LIST



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL

Documents
from
national proceedings



CASE C-163/21

PACCAR

10 November 2022



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

Case C-163/21, *PACCAR*, 10 November 2022



Type of evidence



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL

Documents
from
national proceedings

Case C-163/21, *PACCAR*, 10 November 2022



ARTICLE **5** OF DAMAGE DIRECTIVE



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**.



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-163/21, *PACCAR*, 10 November 2022

THE STORY



- 19 July 2016 : Commission's decision re trucks cartel
- Action for damages against truck manufacturers before a Spanish court
- Dispute re breadth of the disclosure request
 - → list of models made b/w 1990 and 2018 classified by year & other criteria + gross prices + delivery costs
 - → beyond mere research and selection of documents already in existence; or, mere making it available



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL

Documents
from
national proceedings

Case C-163/21, *PACCAR*, 10 November 2022



THE QUESTION



“RELEVANT EVIDENCE”

PREEEXISTING



EX NOVO

CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE



Documents
from
national proceedings

DISCLOSURE AT NATIONAL LEVEL



Case C-163/21, *PACCAR*, 10 November 2022

THE RULING



*The disclosure of ‘**RELEVANT EVIDENCE**’, within the meaning of EU law, includes documents that a party may be required to create by compiling or classifying information, knowledge or data in its possession*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-163/21, *PACCAR*, 10 November 2022

THE RULING



*In accordance with the principle of proportionality, the national courts must, **HOWEVER**, take into account the **appropriateness of the workload** and the **cost that the creation** of such documents may entail*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL

Documents
from
national proceedings



CASE C-57/21

REGIOJET

12 January 2023



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL



Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023



GREY LIST



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023

THE STORY



- January 2012: CZ proceedings against České dráhy, national railway company
- 2015: Action for damages by RegioJet, rail passenger transport services provider
- November 2016: Commission's proceedings
 - CZ → stay of proceedings
- December 2017: RegioJet's request for a disclosure order

THE QUESTION

Disclosure still possible when national procedure is suspended?



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL

Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023



ARTICLE 6(5)(A) OF DAMAGE DIRECTIVE



National courts may order the disclosure of the following categories of evidence **only after a competition authority**, by adopting a decision or otherwise, **has closed its proceedings**:

- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023

THE RULING



*A national court may order the disclosure of evidence for the purpose of proceedings for damages connected with an alleged infringement of competition law, **EVEN IF** the proceedings have been stayed owing to the Commission's initiation of an investigation concerning the same infringement*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023

THE RULING



*That court must, **HOWEVER**, ensure that the disclosure of evidence is actually **necessary** and **proportionate** for the purpose of the action for damages*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-57/21, *RegioJet*, 12 January 2023

THE RULING



*The court must ensure that the claimant **does not have access to that evidence before it has completed that review**, where the evidence falls within the **WHITE LIST** or, where that evidence falls within the **GREY LIST**, **before** the competent competition authority has **closed its proceedings***





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL

Documents
from
national proceedings



CASE C-312/21

TRÁFICOS MANUEL FERRER

16 February 2023



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT **NATIONAL** LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

**Disclosure
tool**



**Judicial
estimation**



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

ARTICLE 17(1) OF DAMAGE DIRECTIVE



Member States shall ensure that the **national courts are empowered**, in accordance with national procedures, **to estimate the amount of harm** if it is established that a claimant suffered harm but it is **PRACTICALLY IMPOSSIBLE OR EXCESSIVELY DIFFICULT** PRECISELY TO QUANTIFY THE HARM suffered ON THE BASIS OF THE EVIDENCE AVAILABLE.



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

THE STORY



- 19 July 2016 : Commission's decision re trucks cartel
- 11 October 2019 : Action for damages against truck manufacturers before a Spanish court
- Data used by defendant to draw up its expert report were given to the claimant

THE QUESTION

Are we still in situation of asymmetry of information?



CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

THE RULING



*The fact that the defendant **has made available** to the claimant the data on which it relied in order to refute the expert report of the latter **IS NOT, IN ITSELF, RELEVANT** for the purposes of assessing whether it is permissible for the national courts to undertake an estimation of the harm...*





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

THE RULING



... that estimation being based on the premiss, **first**, that the existence of that harm has been established and, **second**, that it is practically impossible or excessively difficult to quantify it with precision...





CJEU CASES ON DISCLOSURE & ITS IMPACT ON PRACTICE

DISCLOSURE AT NATIONAL LEVEL



Documents
from
national proceedings

Case C-312/21, *Tráficos Manuel Ferrer*, 16 February 2023

THE RULING



... which involves taking into consideration **ALL THE PARAMETERS** leading to such a finding and, **IN PARTICULAR**, the **unsuccessful nature of steps** such as the request to disclose evidence laid down in Article 5 of that directive.

