Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 January 2019[1]

Case C-637/17

Cogeco Communications Inc.
v
Sport TV Portugal, SA,
Controlinveste-SGPS, SA
and
NOS-SGPS, SA

(Request for a preliminary ruling
from the Tribunal Judicial da Comarca de Lisboa (District Court, Lisbon, Portugal))

(Request for a preliminary ruling — Competition — Private enforcement — Directive 2014/104/EU — Actions for damages under national law for infringements of the competition-law provisions of the Member States and of the European Union ('damages for anticompetitive conduct') — Limitation periods for actions seeking damages under national law — Evidential value of the decision of a national competition authority in the action for damages — Temporal applicability of the Directive to facts which occurred prior to its entry into force — Period for transposition of the Directive)

I. Introduction

1. In recent years, *private enforcement* of the rules on competition contained in the European Treaties has become increasingly significant as a second pillar alongside *public enforcement*. Private actions for damages by the victims of anticompetitive business practices are becoming ever more popular and, as a result of the decentralised system for the enforcement of antitrust law, created by means of Regulation (EC) No 1/2003,[2] such actions are now a well-established feature.[3] They are often filed in the wake of decisions given by the competent competition authorities ('follow-on actions'), but sometimes also independently therefrom ('stand-alone actions').

2. Admittedly, many questions still also require detailed clarification, not least in connection with the new directive on damages under antitrust law (Directive 2014/104/EU[4]), which the Court of Justice is dealing with for the first time in the present case.

1 Original language: German.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1); 'Regulation No 1/2003'.

3 See, essentially, on this subject judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461); and of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317). See also the pending case *Otis Gesellschaft and Others* (C-435/18).

4 Directive 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'.

3. The Court of Justice is called upon to assess whether a limitation provision, such as that under Portuguese civil law, which previously provided for a limitation period of three years in respect of private actions for damages due to abuse of a dominant market position, is compatible with the provisions of primary and secondary EU law. The case also concerns the evidential value of decisions of national competition authorities before the civil courts that are called upon to rule on private actions for damages of this nature.

4. The facts forming the basis of the case occurred prior to the publication and entry into force of Directive 2014/104 and the action for damages was filed with the national court after the entry into force of the Directive, but before the expiry of the period for its transposition. Although this transposition period has now expired, and the Portuguese legislature has recently — with some delay — transposed the Directive into national law, the new statutory provisions do not apply retroactively and also do not apply to actions brought prior to their entry into force.

5. Against this background, the question is raised as to which resolution elements can be provided by Directive 2014/104 in respect of the decision in the main proceedings and whether, if applicable, certain requirements result from Article 102 of the Treaty on the Functioning of the European Union ('TFEU') and from the general principles of EU law — specifically the principle of effectiveness. However, in so doing particular care must be taken to ensure that the main proceedings relates to a purely horizontal legal relationship between private parties.

6. The importance of the judgment of the Court in the present preliminary ruling procedure with regard to the practice of the national courts and to the private enforcement of EU antitrust law should not be underestimated.

II. Legal context

A. EU law

7. The context under EU law in this case is determined, firstly, by the general principles of EU law — namely the principle of effectiveness and the right to an effective remedy — and, secondly, by the provisions under secondary law of Regulation No 1/2003 and Directive 2014/104.

Regulation No 1/2003

8. The relationship between Article 102 TFEU and national competition laws is governed by the second sentence of Article 3(1) of Regulation No 1/2003 as follows:

'Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by [Article 102 TFEU], they shall also apply [Article 102 TFEU].'

9. Under the heading 'Powers of the competition authorities of the Member States', Article 5 of Regulation No 1/2003 also contains the following provision:

'The competition authorities of the Member States shall have the power to apply [Articles 101 and 102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

– requiring that an infringement be brought to an end,

– ordering interim measures,

– accepting commitments,

– imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

Directive 2014/104

10. The 'subject matter and scope' of Directive 2014/104 is described as follows in Article 1 thereof:

'1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.'

11. According to Article 2 of Directive 2014/104, the following definitions apply:

'infringement of competition law' means 'an infringement of Article 101 or 102 TFEU, or of national competition law' (Article 2(1) of the Directive); and 'national competition law' means 'provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced' (Article 2(3) of the Directive).

12. In relation to the 'effect of national decisions', Article 9(1) of Directive 2014/104 states:

'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. Article 10 of Directive 2014/104 concerns 'limitation periods' and is worded as follows:

'1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

(a) of the behaviour and the fact that it constitutes an infringement of competition law;

(b) of the fact that the infringement of competition law caused harm to it; and

(c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.'

14. Under the heading 'Transposition', Article 21(1) of Directive 2014/104 states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. …

…'

15. Lastly, with regard to the 'temporal application' of Directive 2014/104, the following is provided in Article 22 of the Directive:

'1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seised prior to 26 December 2014.'

16. According to Article 23 thereof, Directive 2014/104 entered into force on 25 December 2014, that is to say, the twentieth day following that of its publication in the *Official Journal of the European Union*.[5]

B. National law

17. In Portuguese law, relevance attaches, firstly, to Article 498 of the Código Civil (Portuguese Civil Code; 'the CC') and, secondly, to Article 623 of the Código de Processo Civil (Portuguese Civil Procedure Code; 'the CPC').

18. Article 498 of the CC provides as follows:

'1. The right to compensation expires after a period of three years from the date on which the injured party was aware of its right, even if unaware of the identity of the person liable and of the full extent of the damage, regardless of the general limitation in the case of the expiry of the relevant period from the event causing the damage.

2. The limitation period for the right of recovery between liable parties is also three years from the fulfilment of the obligation.

3. In the case where the unlawful act constitutes a criminal offence for which the law establishes a longer limitation period, that limitation period shall apply.

4. The limitation of the claim for damages does not bring about the limitation of any claim to ownership or an action for recovery due to unjust enrichment.'

5 The edition of the Official Journal in which Directive 2014/104 was published is dated 5 December 2014.

19. Article 623 of the CPC is included under the heading 'Third-party effect of the criminal conviction' and is worded as follows:

'A final conviction given in the criminal case constitutes, in relation to third parties, a rebuttable presumption as regards the existence of the facts which satisfy the conditions for the imposition of a penalty and the elements of an offence in any civil actions in which legal relationships depending on the commission of the offence are discussed.'

20. Directive 2014/104 was transposed into Portuguese law only in June 2018 by means of Law No 23/2018.[6] As is clear from Article 25 thereof, this law entered into force 60 days following its publication. Furthermore, according to Article 24 thereof, the substantive provisions of that law — including those relating to the burden of proof — do not apply retroactively and the procedural provisions of that law do not apply in respect of actions filed prior to its entry into force.

III. The facts and the main proceedings

21. Cogeco Communicatons Inc. ('Cogeco') is a Canadian commercial company which brought an action on 27 February 2015 before the Tribunal Judicial da Comarca de Lisboa[7] (Portugal), the referring court, seeking damages against the three Portuguese companies Sport TV Portugal, SA ('Sport TV'), Controlinveste SGPS-SA ('Controlinveste') and NOS-SGPS, SA ('NOS') (jointly 'the defendants'), with Controlinveste and NOS being shareholders in Sport TV in the period germane to the action.

Background of the main proceedings with regard to competition law

22. Cabovisão — Televisão Por Cabo, SA ('Cabovisão'), of which Cogeco was a shareholder at that time,[8] is a provider of subscription television in Portugal. On 30 July 2009 it lodged a complaint with the Autoridade da Concorrência[9] (Portugal) against Sport TV,[10] alleging anticompetitive practices by that undertaking in the area of premium sports channels, in particular a discriminatory pricing policy, which, it argued, substantiated the complaint of abuse of a dominant market position.

23. By decision dated 14 June 2013, the Autoridade da Concorrência found that Sport TV had abused its dominant market position and had thereby infringed Article 102 TFEU and a corresponding provision under Portuguese law.[11][12] For this infringement it ordered Sport TV to pay a fine of EUR 3.73 million plus an ancillary penalty.

24. Upon opposition by Sport TV, the Tribunal da Concorrência, Regulação e Supervisão[13] (Portugal) modified the decision of the Autoridade da Concorrência by judgment of 4 June 2014 to the effect that Sport TV had committed an offence due to abuse of a dominant market position in the form of discriminatory pricing practices only under national law, but had not also committed an infringement

6 Law No 23/2018 of 5 June 2018 (*Diário da República* No 107/2018, p. 2368).

7 District Court, Lisbon (Portugal).

8 It is clear from the files that at that time Cogeco — directly or indirectly — exercised sole control of Cabovisão.

9 The competition authority.

10 The complaint also concerned other undertakings in addition to Sport TV.

11 Article 6 of Portuguese Law No 18/2003.

12 File reference PRC-02/2010.

13 Competition, Regulation and Supervision Court.

of Article 102 TFEU.[14] The Tribunal da Concorrência, Regulação e Supervisão ruled as follows in the operative part of its judgment inter alia: 'Article 102 TFEU does not apply to the defendant's conduct'. It also reduced the fine imposed on Sport TV to EUR 2.7 million and, in addition, annulled the ancillary penalty.

25. An appeal filed by Sport TV against that judgment before the Tribunal da Relação de Lisboa[15] (Portugal) was dismissed on 11 March 2015.

Previous course of the civil-law action for damages before the national courts

26. By its civil law action, Cogeco is now seeking damages for the culpable and unlawful anticompetitive conduct of the three defendants in the period from 3 August 2006 to 30 March 2011. The damages claimed, plus default interest, allegedly result, firstly, from the payment of inflated prices by Cabovisão for the transmission rights to the programmes of Sport TV, secondly, from the loss of return on capital — which is not available because of the inflated prices — and, thirdly, from loss of profit. In the alternative, Cogeco requests that the three defendants be ordered jointly and severally to reimburse the revenue unlawfully attained thereby.

27. The three defendants have raised the objection that the action is time-barred. They are of the opinion that the three-year limitation period as provided by Portuguese law under Article 498(1) of the CC in respect of claims based on non-contractual liability had already expired. They contend that Cogeco had possessed all of the information required for it to be aware of the existence of its right to compensation at the latest at any one of the following four points in time:

– on 30 April 2008, the date on which Cabovisão acquired the transmission rights for the programmes of Sport TV;

– on 30 July 2009, the date on which Cabovisão lodged the complaint with the Autoridade da Concorrência;

– on 30 March 2011, the date on which the alleged infringement of the competition rules ended; or

– on 29 February 2012, the date on which Cabovisão was sold by Cogeco.

28. Against this, Cogeco takes the view that its action is not yet time-barred. In the main proceedings, Cogeco argues that the limitation period did not begin to run until the issuing of the decision of the Autoridade da Concorrência on 14 June 2013, because it was only by means of that decision that the undertaking gained access to all the information it needed to form a view on whether there were practices contrary to competition law and to assert its rights to compensation. Prior to the decision of the Autoridade da Concorrência, Cogeco submits that it only suspected an infringement of competition rules. In any event, Cogeco argues that the limitation period had been suspended during the proceedings before the Autoridade da Concorrência.

29. The referring court now wishes to ascertain whether Article 498 of the CC and Article 623 of the CPC are consistent with the requirements of EU law. It acknowledges that the facts of the dispute in the main proceedings occurred prior to the adoption of Directive 2014/104 and in particular prior to the expiry of the period for transposition thereof. Nonetheless, it raises the question, not least with

14 The Tribunal da Concorrência, Regulação e Supervisão did not consider that it had been proven that the business practices of Sport TV in question were capable of affecting trade between Member States within the meaning of Article 102 TFEU.

15 Court of Appeal, Lisbon.

reference to the *Van Duyn*[16] and *Mangold*[17] judgments, and the obligation of sincere cooperation devolving on the Member States (Article 4(3) of the Treaty on European Union; 'TEU'), whether this directive possibly produces prior effects that the court has to bear in mind in its decision in a dispute between private parties, especially at the present time, when the period for transposition of the Directive has long since expired.

IV. Request for a preliminary ruling and proceedings before the Court of Justice

30. By order of 25 July 2017, received on 15 November 2017, the Tribunal Judicial da Comarca de Lisboa (District Court, Lisbon) referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) May Articles 9(1) and 10(2), (3) and (4) of Directive 2014/104/EU, as well as the remaining provisions of that directive or general principles of EU law applicable, be interpreted as creating rights for a private party (in this case, a commercial limited company subject to Canadian law) which it may enforce in court proceedings against another private party (in this case, a commercial limited company subject to Portuguese law) in the context of an action seeking compensation for alleged damage sustained as a result of an infringement of competition law, in particular, when as at the date on which the action in question was brought (27 February 2015), the deadline for Member States to transpose that directive into national law, as provided for in Article 21(1) of that directive, had not yet even expired?

(2) May Article 10(2), (3) and (4) of the Directive, as well as the remaining provisions of the Directive or general principles of EU law applicable, be interpreted as precluding, as incompatible therewith, a national provision, such as Article 498(1) of the Portuguese Civil Code which, when applied to facts which occurred before the publication of the Directive, before its entry into force and before the date laid down for its transposition, in an action also brought before that last date:

   (a) lays down a three-year limitation period for a right to compensation based on non-contractual civil liability;

   (b) lays down that that three-year period starts to run from the date on which the injured party was aware of its right, even if unaware of the identity of the person liable and the full extent of the damage; and

   (c) does not include any provision requiring or authorising the suspension or interruption of that period simply because a competition authority has taken measures in the context of an investigation or a process relating to an infringement of competition law to which the action for compensation relates?

(3) May Article 9(1) of Directive 2014/104, as well as the remaining provisions of the Directive or general principles of EU law applicable, be interpreted as precluding, as incompatible therewith, a national provision, such as Article 623 of the Portuguese Civil Procedure Code which, when applied to facts which occurred before the Directive entered into force and before the date laid down for its transposition, in an action also brought before that last date:

   (a) provides that a final order in infringement proceedings does not produce effects in any civil actions in which legal relationships depending on the commission of the infringement are discussed? Or (depending on the interpretation)

16 Judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 12).

17 Judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709).

(b) lays down that such a final order in infringement proceedings constitutes, in relation to third parties, only a rebuttable presumption as regards the existence of the facts which satisfy the conditions for the imposition of a penalty and the elements of an offence, in any civil actions in which legal relationships depending on the commission of the infringement are discussed?

(4) May Articles 9(1) and 10(2), (3) and (4) of Directive 2014/104, the third paragraph of Article 288 TFEU, or any other provisions of primary or secondary law, case-law precedents or general principles of the European Union applicable, be interpreted as precluding, as incompatible therewith, the application of provisions of national law, such as Article 498(1) of the Portuguese Civil Code and Article 623 of the Portuguese Civil Procedure Code which, when applied to facts which occurred before the publication of the Directive, before its entry into force and before the date laid down for its transposition, in an action also brought before that last date, do not take into consideration the text and purpose of the Directive and do not seek to achieve the result pursued by it?

(5) In the alternative, and only if the Court of Justice of the European Union answers any of the preceding questions in the affirmative, may Article 22 of Directive 2014/104, as well as the remaining provisions of the Directive or general principles of EU law applicable, be interpreted as precluding, as incompatible therewith, the application to the case by the national court of Article 498(1) of the Portuguese Civil Code or Article 623 of the Portuguese Civil Procedure Code in their current version, but interpreted and applied in such a way as to be compatible with the provisions of Article 10 of the Directive?

(6) If Question 5 is answered in the affirmative, may a private party rely on Article 22 of Directive 2014/104 against another private party before a national court in an action seeking compensation for the alleged damage sustained as a result of an infringement of competition law?'

31. Written observations in the preliminary-ruling proceedings were submitted to the Court by Cogeco, Sport TV, Controlinveste and NOS as parties in the main proceedings and also by the Portuguese Republic, the Italian Republic and the European Commission. With the exception of Controlinveste and Italy, those parties were also represented at the hearing held on 15 November 2018.

V. Admissibility of the request for a preliminary ruling

32. As the referring court itself emphasises, the main proceedings exhibit two particular features:

– firstly, the underlying facts occurred prior to the adoption and entry into force of Directive 2014/104 and the action for damages was also filed by Cogeco at a time after that directive had entered into force, but before the expiry of the period for its transposition;

– secondly, the national competition authority of Portugal was not able to enforce, before the national courts that had previously dealt with this case, its view that, in addition to the national prohibition of abuse of a dominant market position, the pricing strategy of Sport TV also infringed the corresponding prohibition under EU law pursuant to Article 102 TFEU.

33. Under these circumstances, at first sight it may be questioned whether the present request for a preliminary ruling is not partly or entirely inadmissible due to lack of relevance for purposes of resolution of the dispute.

34. However, it should be recalled that, according to settled case-law, a presumption of relevance applies in respect of requests for a preliminary ruling on questions concerning the interpretation of EU law.[18] In addition, the Court of Justice determines a lack of relevance of the questions referred only in extremely exceptional cases, that is to say when this is obvious.[19]

35. In the present case it is certainly not possible to proceed on that assumption. Directive 2014/104 is not obviously inapplicable, nor is it beyond any doubt that Article 102 TFEU cannot be applied here.

36. Firstly, as far as Directive 2014/104 is concerned, it is clear from Article 22(2) thereof that at any rate some of its provisions are entirely applicable to actions which — like the action in question here brought by Cogeco — are brought before national courts between the time of entry into force of the Directive and the expiry of the period for transposition thereof and which relate to facts from the past. Whether it is also possible to claim that Articles 9 and 10 of Directive 2014/104, which are specifically in dispute here, apply to a case such as that described above is not a question concerning the admissibility of the request for a preliminary ruling, but a substantive question that can be answered only after a thorough consideration of those provisions of the Directive.[20]

37. In any event, in the context of Article 22(2) of Directive 2014/104 it cannot be argued that the provisions of that directive would *obviously* not be relevant to the main action.

38. As regards Article 102 TFEU, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court), as the supervisory body for the decisions of the national competition authority, has already expressly held in the present case that that provision under EU law does 'not apply' to the conduct of Sport TV, and the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) has subsequently confirmed this at second instance.

39. However, such a court ruling alone should not mislead one to the premature conclusion that the present case *obviously* does not relate to EU law — whether primary or secondary law — and that questions relating to Article 102 TFEU consequently cannot be relevant from the outset.

40. On the one hand, in view of the case-law of this Court[21] there are considerable doubts as to whether national courts have the power at all to give a binding ruling that Article 102 TFEU does 'not apply' to a specific individual case — for instance here to the conduct of Sport TV.

41. On the other hand, the national legal situation in Portugal, namely Article 623 of the CPC, according to the referring court at the time when the action was brought by Cogeco, is still to be understood as meaning that the finding of an infringement of the competition rules in a decision of the national competition authority was at best a rebuttable presumption for the purposes of civil actions for damages. If this legal situation is taken as a basis, there would be no absolute obstacle under national law for the referring court to hold that Article 102 TFEU does apply, notwithstanding the view taken by another court in the preceding competition proceedings.

18 Judgments of 7 September 1999, *Beck and Bergdorf* (C-355/97, EU:C:1999:391, paragraph 22); of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 45); of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others* (C-426/16, EU:C:2018:335, paragraph 31); and of 25 July 2018, *Confédération paysanne and Others* (C-528/16, EU:C:2018:583, paragraph 73).

19 It is clear from the settled case-law cited in point 18 that the Court may refuse to give a ruling on a request from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it.

20 See in this regard my statements in relation to the first and sixth questions referred (below, points 65 to 71 of this Opinion).

21 Judgment of 3 May 2011, *Tele 2 Polska* (C-375/09, EU:C:2011:270, in particular paragraphs 21 to 30).

42. Against this background, the questions referred in relation to the evidential value of decisions taken by national competition authorities ultimately also make complete sense. In essence, by means of these questions, the referring court nevertheless merely wishes to make sure that EU law — in particular Article 9(1) of Directive 2014/104 — *does not prevent* it from *deviating* from the legal interpretation of a different court previously concerned with a decision of the national competition authority in relation to the non-applicability of Article 102 TFEU and from *applying* this provision of EU primary law. This is a genuine question concerning EU law that the Court is called upon to answer and upon which the fate of Cogeco's action in the main proceedings may crucially depend.

43. All in all, there is therefore no reason to deny, in whole or in part, the relevance of the questions concerning EU law referred to the Court and thus ultimately to deny the admissibility of the request for a preliminary ruling.

VI. Substantive appraisal of the questions referred

44. According to settled case-law, even where national courts are called on to give judgment in proceedings between individuals, EU law requires those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective.[22] The request for a preliminary ruling by the Tribunal Judicial da Comarca de Lisboa (District Court, Lisbon) is clearly characterised by the desire to comply with this obligation under EU law.

45. By means of the six questions referred in total, the referring court essentially wishes to ascertain which requirements result from EU law in respect of civil actions between private parties in which legal questions relating to the limitation of claims for damages due to competition infringements and relating to the evidence of such competition infringements are raised. In so doing, the referring court primarily refers to Directive 2014/104, in particular Articles 9, 10 and 22 thereof. However, the referring court does not limit itself solely to these provisions of secondary law, but rather expressly also takes into account the 'general principles of EU law applicable' and hence ultimately primary EU law. Not least the prohibition of abuse of a dominant market position (Article 102 TFEU), which is of particular relevance to the present case, is enshrined in primary law. In order to provide the referring court with an answer that will be of use to it,[23] all questions relating to the 'general principles of EU law applicable' are to be understood as meaning that they predominantly concentrate on Article 102 TFEU and the principle of effectiveness.

A. Preliminary remarks on the applicability of Article 102 TFEU and of Directive 2014/104

46. In each individual one of the six questions which it has referred, the referring court makes reference, with largely identical wording, to Directive 2014/104, to the 'general principles of EU law applicable' or to both of these. In this context, it appears to be appropriate to discuss all possible questions of doubt with regard to the applicability of Article 102 TFEU and the Directive as a preliminary point.

22 Judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 29), and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 37); to the same effect, judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 111), and of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 89).

23 The need to provide the national courts with useful guidance on the interpretation and application of EU law and, where necessary, to reformulate the questions referred is recognised in settled case-law; see, inter alia, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 34).

1. The applicability of Article 102 TFEU

47. Article 102 TFEU is readily applicable *ratione temporis* to the facts of the main proceedings — as is Article 82 EC, which has the same content in respect of the time prior to the entry into force of the Treaty of Lisbon.

48. However, doubts could arise as regards the applicability *ratione materiae* of Article 102 TFEU in the main action in view of the judgments previously delivered by the two Portuguese courts called upon to rule in this case on the lawfulness of the decision of the national competition authority in relation to the business practices of Sport TV. As already mentioned, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court) in this case departed from the view taken by the Autoridade da Concorrência and expressly held that Article 102 TFEU does 'not apply' to the conduct of Sport TV, and this was no longer called into question in the subsequent appeal proceedings before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon).

49. However, this finding in judgments of other national courts must not be misunderstood as meaning that on that basis the inapplicability of Article 102 TFEU has now been established with binding effect also for the referring court in the action for damages. In the decentralised system for enforcement of EU antitrust law, no national authority can be empowered either to establish, with binding effect for other national authorities or even for the European Commission, the inapplicability of Article 102 TFEU or to state that no abuse within the meaning of that provision exists.

50. In relation to the powers of national competition authorities, the Court has already established this some years ago, in the judgment in *Tele 2 Polska*, on the basis of Article 5 of Regulation No 1/2003.[24] In the absence of indications of an infringement of Article 102 TFEU, Article 5 of Regulation No 1/2003 restricts the powers of national competition authorities to decide that there are no grounds for action on their part. The national competition authorities are thus precluded from making the considerably more extensive finding that there is no breach of Article 102 TFEU.

51. This must also apply if the national courts called upon in connection with an appeal — as in this case — come to the conclusion that certain conditions for the assumption of a breach of Article 102 TFEU are absent, in derogation from the decision of a national competition authority. Even in that case they must not summarily declare that Article 102 TFEU does not apply or find with binding effect for other proceedings that there was no breach of that provision of EU law. The powers of national courts which are once again confirmed by Article 6 of Regulation No 1/2003[25] in respect of the application of Articles 101 and 102 TFEU also cannot lead to any different result. In so far as such courts do not act as competition authorities within the meaning of Article 5 of Regulation No 1/2003, their review may relate to the decision of a national competition authority in accordance with the provisions of Article 5 of Regulation No 1/2003. Regardless of their investigative powers under national law in such a case it must be ruled out in any event that their decision will curtail the powers of another court, for instance in the context of an action for damages, under Article 6 of Regulation No 1/2003.

52. The restriction of the powers of national bodies by means of Article 5 of Regulation No 1/2003 is ultimately intended to ensure that in a system of decentralised enforcement of competition rules a competent national authority does not bind the hands of other authorities which are likewise competent. In particular, it is intended to enable the victims of antitrust offences to bring actions under civil law for compensation for any damages they have suffered not only in the context of 'follow-on actions' (that is to say, by means of actions in the wake of the finding of infringements of

24 Judgment of 3 May 2011, *Tele 2 Polska* (C-375/09, EU:C:2011:270, in particular paragraphs 21 to 30).

25 See in this regard Opinion of Advocate-General Mazák in *Tele 2 Polska* (C-375/09, EU:C:2010:743, point 32).

the competition rules by the authorities) but also in the context of 'stand-alone actions' (that is to say, by means of actions regardless of whether any findings have been made by the authorities).[26] Consideration must also be given to this objective within the context of Article 6 of Regulation No 1/2003.

53. In the main proceedings, it is thus incumbent on the referring court independently to make the necessary findings on the material applicability of Article 102 TFEU — and in particular on whether the business practices of Sport TV are capable of appreciably affecting trade between Member States[27] — without in the process being bound by the prior finding of the inapplicability of Article 102 TFEU by other national courts which have previously dealt with this case.

2. The applicability of Directive 2014/104

54. As regards Directive 2014/104, in addition to its material applicability in particular its temporal applicability to the main proceedings is in doubt.

(a) Material scope of the Directive

55. The material scope of Directive 2014/104 is defined in Article 1 thereof, in conjunction with Article 2.

56. According to its Article 1(1), the Directive deals with infringements of competition law by an undertaking or by an association of undertakings and contains provisions intended to ensure that anyone who has suffered harm caused by such infringements can effectively claim compensation.

57. The concept of 'infringement of competition law' is in turn specified further in Article 2(1) of the Directive as meaning that it must involve infringements of Article 101 or 102 TFEU, or of national competition law. However, according to Article 2(3) of the Directive, 'national competition law' means only those provisions of national law that are applied to the same case and in parallel to EU competition law.

58. Considering Article 1(1) together with Article 2(1) and (3), it therefore follows that the material scope of Directive 2014/104 is restricted to disputes in relation to claims for damages that are — at any rate also — based on infringements of EU antitrust law. Conversely, claims based exclusively on infringements of national competition law are not covered by the material scope of the Directive. This is explained by the objective of the Directive, which, as stated in Article 1 thereof, seeks to ensure equivalent protection in the internal market for everyone.[28] A sufficient relationship to the internal market is, however, present only in cases in which the 'inter-State clause' of Article 101 TFEU or Article 102 TFEU is satisfied, that is to say, in cases in which — at least potentially — an appreciable effect on trade between Member States can be assumed.

59. As already stated,[29] the referring court in the main proceedings is thus not prevented from applying Article 102 TFEU solely because the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court) previously declared in the same case that that provision did 'not apply'. It is instead incumbent on the referring court independently to make the necessary findings on the material applicability of Article 102 TFEU, and thus also those on the material applicability of Directive 2014/104.

26 See in this regard also the first sentence of recital 13 of Directive 2014/104, under which the right to compensation is recognised regardless of whether or not there has been a prior finding of an infringement by a competition authority.

27 See also in this regard, inter alia, judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 40 to 42).

28 In this sense also recitals 9 and 10 of Directive 2014/104.

29 See in this regard above, points 47 to 53 of this Opinion.

(b) Temporal scope of Articles 9 and 10 of the Directive

60. The temporal scope of Directive 2014/104 is limited by Article 22 thereof to the effect that a general prohibition of retroactive effect applies in respect of substantive provisions relating to the transposition thereof (see, in this respect, Article 22(1) of the Directive). All other national transposition provisions — namely procedural provisions — are, admittedly, applicable to facts predating the entry into force of the Directive, but only in the context of actions that were themselves brought after the Directive had entered into force.

61. However, the provisions of Article 9(1) and Article 10 of Directive 2014/104 in question here are not purely procedural provisions.

62. Firstly, the evidential value to be attributed under Article 9(1) of the Directive to the decisions of national competition authorities with regard to the proof of infringements of Articles 101 or 102 TFEU is a question of substantive law.

63. Secondly, in any event, Portuguese law at that time likewise considered that the limitation to which Article 10 of the Directive refers forms part of substantive law according to the undisputed indications of a number of parties involved in the proceedings. So long as the question of limitation of claims for damages was not harmonised, Portugal was thus free to make precisely such a consideration that in its legal system those rules form part of substantive law.[30] The extent to which this consideration is called into question in light of Article 22(2) of Directive 2014/104 on the basis of the transposition of the Directive that has now been effected,[31] can, as rightly emphasised by several participants at the hearing, ultimately be left unanswered, as such national transposition provisions cannot in any event allow claims that are already time-barred to be 'revived' under the old law.

64. It thus follows from Article 22(1) of Directive 2014/104 that neither Article 9 nor Article 10 of that directive can apply to an action such as that pending here in the main proceedings which, despite being brought after the entry into force of the Directive, relates to facts that occurred prior to the adoption and entry into force of the Directive.[32] Moreover, Article 22(2) of Directive 2014/104 does not in any case preclude a provision on the temporal applicability of the transposition provisions, under which the procedural provisions of the law in question do not apply to actions brought prior to its entry into force.[33]

B. Effects of provisions of EU law in relationships between private individuals (first and sixth questions referred)

65. By its first question and the sixth question posed in the alternative, the referring court essentially seeks to establish whether, firstly, Directive 2014/104 and, secondly, the 'general principles of EU law applicable' — that is to say, Article 102 TFEU — can produce a direct effect between private parties (between 'individuals'). It is appropriate to discuss both questions together.

30 To the same effect, involving a criminal context, judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 44 and 45).

31 See above, point 20 and footnote 6.

32 To the same effect, judgment of 3 March 1994, *Vaneetveld* (C-316/93, EU:C:1994:82, paragraphs 16 to 18).

33 See point 20 above.

66. As far as Article 102 TFEU is concerned, it is settled case-law that the prohibition of the abuse of a dominant market position enshrined in this provision as primary law produces direct effects in relations between individuals and creates rights for the individuals concerned which national courts must safeguard. [34]

67. By contrast, the situation is different with the provisions of Directive 2014/104 in a case such as that involved here.

68. Directives can assuredly also produce a direct effect if — as has now happened here — the period for transposition thereof has expired and furthermore the provisions of the directive in question appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise. [35] However, it is settled case-law that a directive cannot of itself impose obligations on an individual, with the result that the directive cannot be relied upon as such against an individual. [36]

69. Moreover, Directive 2014/104 also cannot be assigned an '*effet d'exclusion*' [37] such that national provisions such as Article 498 of the CC and Article 623 of the CPC which are incompatible with the Directive may simply not be applied in a dispute between private persons. The Court of Justice has recently issued a clear rejection of the theory of the '*effet d'exclusion*' and ruled that a national court, hearing a dispute between private persons, cannot be obliged, solely on the basis of EU law, to refrain from applying the provisions of its national law which are contrary to those provisions of that directive. [38]

70. In addition, in the present case, it must also be borne in mind that a directive can hardly be applicable outside of its temporal limitations. As the facts of the main proceedings, as already stated, [39] are not covered by Articles 9 and 10 of the Directive from a temporal perspective, the parties cannot rely on those provisions of the Directive before the national court.

71. In answer to the first question referred, it must therefore be held:

Article 102 TFEU produces direct effects in relations between individuals. By contrast, Articles 9 and 10 of Directive 2014/104 do not apply directly to a dispute between individuals in which the civil action was brought prior to the expiry of the period for transposition of that directive and concerns facts which occurred before it entered into force.

C. Time-barring of claims for damages in respect of infringements of competition rules (second question referred)

72. The second question referred concerns the time-barring of claims for damages under national law. The referring court wishes to know whether, on the one hand, Directive 2014/104 and, on the other hand, the 'general principles of EU law applicable' preclude a limitation rule such as that under Portuguese law pursuant to Article 498(1) of the CC, under which the limitation period for civil

34 Judgments of 30 January 1974, *BRT* v *SABAM* (127/73, EU:C:1974:6, paragraph 16); of 18 March 1997, *Guérin automobiles* v *Commission* (C-282/95 P, EU:C:1997:159, paragraph 39); of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 23); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 39); and of 5 June 2014, *Kone and Others* C-557/12, EU:C:2014:1317, paragraph 20); to that effect also the first sentence of recital 3 of Directive 2014/104.

35 Fundamentally, in this regard, judgment of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25); see also judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 33), and of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 98).

36 Judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 42).

37 Fundamentally on the '*effet d'exclusion*' see Opinion of Advocate-General Léger in *Linster* (C-287/98, EU:C:2000:3, in particular points 57 and 67 to 89).

38 Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, in particular paragraph 49).

39 See in this regard above points 60 to 64 of this Opinion.

actions for damages based on non-contractual liability is three years, a period which begins to run at the time when the injured party merely becomes aware of the existence of harm, and does not provide for any possibility for suspension or interruption during ongoing administrative proceedings before the national competition authority.

73. Since the present case, as already mentioned, falls outside the temporal scope of Directive 2014/104, and in particular of Article 10 thereof, a limitation provision such as that in Article 498(1) of the CC in the main proceedings can be measured only by the yardstick of the general principles of EU law, but not by the standard of the Directive.

74. It must be recalled in relation to the general principles of EU law that the competition authorities of the Member States and their courts and tribunals are required to apply Articles 101 TFEU and 102 TFEU, where the facts come within the scope of EU law, and to ensure that those articles are applied effectively in the general interest.[40] If the referring court should thus conclude that the business practices of Sport TV were capable of appreciably affecting trade between Member States, it would have to apply Article 102 TFEU in the main proceedings and ensure that the right of the injured party to seek compensation for the harm sustained due to abuse of a dominant market position[41] can be effectively enforced.

75. As long as the harmonisation brought about by Directive 2014/104 does not yet apply, it is for the domestic legal system of the Member State in question to prescribe the rules on the enforcement of this right to compensation, provided that the principles of equivalence and effectiveness are observed.[42]

76. As the limitation provision of Article 498 of the CC, according to the consistent indications of the parties involved in the proceedings, applies equally to claims for damages based on EU law and to those under national law, a breach of the principle of equivalence cannot be assumed here.

77. Conversely, a more detailed examination is required into the question of whether that limitation rule is compatible with the principle of effectiveness, which states that national rules must not make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.[43]

78. The fact alone that a national rule such as Article 498(1) of the CC subjects claims for damages based on non-contractual liability to a limitation period of three years can scarcely be regarded as a breach of the principle of effectiveness. Three years is a sufficiently long period of time for potentially injured parties to assert their rights to compensation under EU law by filing an action before a national civil court.

79. It is true that in the meantime Article 10(3) of Directive 2014/104 has introduced a more generous limitation period of at least five years in respect of actions for damages under antitrust law. However, this does not mean that a shorter statutory limitation period that was previously applicable at national level would from the outset make it impossible or excessively difficult to bring claims for damages due to an infringement of the competition rules under EU law.

40 Judgment of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 19).

41 On the right to compensation, see judgments of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 60 and 61); of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 21); and of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 21 to 23), in each case relating to comparable problems in connection with the related provision of Article 101 TFEU (formerly Article 81 EC).

42 Judgments of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 62 and 64); of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraphs 25 to 27); and of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 24); see also recital 11 of Directive 2014/104.

43 Judgments of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 62); of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 27); and of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 25).

80. By means of the harmonised limitation period of at least five years, as is now provided in Article 10(3) of Directive 2014/104, the EU legislature has taken a step towards improving the legal protection afforded to parties harmed by antitrust offences. This provision of the directive is not to be understood merely as a codification of that which already resulted — implicitly — from primary law, namely from Article 102 TFEU and the principle of effectiveness.

81. However, as the Commission rightly emphasises, in the assessment of effectiveness it is not sufficient to consider individual elements of the national rules on limitation in isolation. Instead, this rule must be assessed as a whole. [44]

82. In this context, it must be emphasised that a national rule such as the Portuguese rule in Article 498(1) of the CC does not merely restrict the limitation period to three years. Rather, this rule is firstly notable in that the limitation period begins to run regardless of whether the injured party is aware of the identity of the person liable and of the full extent of the damage. Secondly, this rule does not provide for any suspension or interruption of the limitation period during ongoing proceedings before the national competition authority. [45]

83. The fact that the limitation period begins to run without any knowledge as to the identity of the party responsible and the extent of the damage, as well as the lack of provisions for suspension or interruption of the limitation period during proceedings before the competition authority, are, in my estimation, capable of rendering the assertion of claims for damages under antitrust law excessively difficult.

84. Firstly, knowing who the person responsible is, especially under antitrust law, is indispensable for a successful assertion of non-contractual claims for damages, in particular by bringing an action before the courts. The undertakings responsible for infringements of the competition rules are mostly organised as legal persons which are not infrequently part of groups of undertakings or corporate structures that are difficult for outsiders to penetrate, and may, moreover, be subject to restructuring operations over the course of time.

85. Secondly, a correct legal appreciation of infringements of the competition rules in many cases requires the assessment of complex economic relationships and internal business documents, which often come to light only as a result of the work of the competition authorities. [46]

86. Against this background, it must be held in relation to the second question referred:

Article 102 TFEU, in conjunction with the principle of effectiveness under EU law, precludes a provision such as Article 498(1) of the Portuguese Civil Code, which, in respect of non-contractual claims for damages due to abuse of a dominant market position, establishes a limitation period of three years which begins to run even when the injured party is not yet aware of the identity of the person liable and of the full extent of the damage, and which is neither suspended nor interrupted during proceedings of the national competition authority to investigate and take action in respect of that infringement.

44 To that effect see also the judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 78 to 82), in which the Court assesses the length of the limitation period not least as a function of the time at which the limitation period begins to run and the possibility of interrupting this period. See also my Opinion in Joined Cases *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2004:624, point 109).

45 Unlike the rules under Norwegian law, for example, which were the subject of an evaluation of effectiveness in the judgment of the Court of Justice of the European Free Trade Association States ('EFTA Court') of 17 September 2018, *Nye Kystlink AS* v *Color Group AS and Color Line AS* (E-10/17, paragraph 119).

46 See to that effect also the considerations in the previously cited judgment of the EFTA Court in Case E-10/17, paragraph 118.

D. Evidential value of decisions of national competition authorities (third question referred)

87. The third question referred concerns the proof of competition infringements in respect of which damages are sought. In essence, the referring court wishes to know whether, on the one hand, Directive 2014/104 and, on the other hand, the 'general principles of EU law applicable' preclude a provision such as that under Portuguese law in accordance with Article 623 of the CPC, under which the final finding of an infringement of competition law in proceedings concerning administrative offences by the national competition authority in civil actions for damages either has no effect or merely constitutes a rebuttable presumption.

88. Since the present case, as already mentioned, falls outside the temporal scope of Directive 2014/104, in particular that of Article 9 thereof, a rule on evidence such as that in Article 623 of the CPC in the main proceedings can be measured only by reference to the general principles of EU law, but not by reference to the Directive.

89. It must be recalled in relation to the general principles of EU law, as already noted in the context of the second question referred,[47] that the competition authorities of the Member States and their courts and tribunals are required to apply Articles 101 TFEU and 102 TFEU, where the facts come within the scope of EU law, and to ensure that those articles are applied effectively in the general interest. If the referring court should thus come to the conclusion that the business practices of Sport TV were capable of appreciably affecting trade between Member States, it would have to apply Article 102 TFEU in the main proceedings and ensure that the right of the injured party to seek compensation for the harm sustained due to abuse of a dominant market position can be effectively enforced.

90. So long as the harmonisation brought about by Directive 2014/104 does not yet apply, it is for the domestic legal system of the Member State in question to prescribe the rules on the enforcement of this right to compensation, provided that the principles of equivalence and effectiveness are observed.[48]

91. As the rule in Article 623 of the CPC concerning evidence, according to the consistent indications of the parties involved in the proceedings, applies equally to claims for damages founded on EU law and to those under national law, a breach of the principle of equivalence cannot be assumed here.

92. As regards the principle of effectiveness, it must be noted that, according to the indications of the referring court, Article 623 of the CPC is open to two different interpretations: either in the sense that the finding of an infringement of the competition rules as an administrative offence by the national competition authority has no effect whatsoever in the civil action for damages, or as meaning that it is merely taken to be a rebuttable presumption of the existence of such a competition infringement.

93. Firstly, the enforcement of claims for damages due to breaches of Article 102 TFEU would be rendered excessively difficult if the preliminary work of a competition authority were to be accorded no effect whatsoever in the civil action for damages. In view of the particular complexity of many antitrust offences and the difficulties that injured parties face in practice in proving such offences, the principle of effectiveness dictates that the final finding of an infringement by the national competition authority be given at least an indicative effect in the action for damages.

47 See in this regard above, point 74 of this Opinion.

48 Judgments of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 62 and 64); of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraphs 25 to 27); and of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 24); see also recital 11 of Directive 2014/104.

94. Secondly, it will scarcely be possible to infer from the principle of effectiveness as such that the abuse of a dominant market position always has to be irrefutably established in a civil action for damages before the national courts as soon as the national competition authority has made a final finding that such a competition breach exists.

95. With the introduction of an irrefutable presumption, as now provided for in Article 9(1) of Directive 2014/104, the EU legislature has taken a step towards enhancing the legal protection afforded to parties adversely affected by antitrust offences. This provision of the Directive is not to be understood merely as a codification of that which already resulted — implicitly — from primary law, that is to say, from Article 102 TFEU and the principle of effectiveness.

96. Prior to the start of application of Article 9 of Directive 2014/104, a binding effect in proceedings before national courts was to be accorded under EU law only to decisions of the European Commission. This particular binding effect, which follows from Article 16(1) of Regulation No 1/2003 and from the *Masterfoods* case-law,[49] is founded on the key role of the Commission in shaping competition policy in the European internal market and ultimately also on the priority of EU law and the binding nature of rulings given by EU bodies. It cannot be extended in the same way to the decisions of national competition authorities unless the EU legislature expressly provides for this, as has been done for the future with Article 9 of Directive 2014/104.

97. All in all, the following must therefore be held in relation to the third question referred:

Article 102 TFEU, in conjunction with the principle of effectiveness, precludes the interpretation of a provision such as Article 623 of the Portuguese Civil Procedure Code, under which the final finding by the national competition authority of an abuse of a dominant market position produces no effects whatsoever in the civil action for damages. By contrast, this provision is compatible with Article 102 TFEU and the principle of effectiveness if it is understood to the effect that in the subsequent civil action for damages the rebuttable presumption of abuse of a dominant market position results from such a final finding by the national competition authority.

E. Interpretation in conformity with EU law (fourth and fifth question referred)

98. By its fourth question, and the fifth question posed in the alternative, the referring court is essentially seeking information on the content and limits of its duty to interpret national law, specifically provisions such as Article 498(1) of the CC and Article 623 of the CPC, in conformity with EU law. It is appropriate to discuss these two questions together.

99. According to settled case-law, the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it; this applies to the interpretation in conformity with primary law[50] and to the interpretation in conformity with secondary law, in particular the interpretation in conformity with the Directive.[51]

49 Judgment of 14 December 2000, *Masterfoods* v *HB* (C-344/98, EU:C:2000:689, in particular paragraph 52, in conjunction with paragraphs 46 and 49).

50 Judgment of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 43); see also judgments of 4 February 1988, *Murphy and Others* (157/86, EU:C:1988:62, paragraph 11), and of 11 January 2007, *ITC* (C-208/05, EU:C:2007:16, paragraph 68).

51 Judgments of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 26); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113, 115, 118 and 119); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 98 and 101); and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 39).

100. However, the principle of interpretation in conformity with EU law can have effect only within the scope of the provision of EU law in question in each case. Specifically with regard to Directive 2014/104, this means that there can be no obligation in the present case to make an interpretation in conformity with the Directive since the facts of the main proceedings, as explained above,[52] fall outside the temporal scope of Directive 2014/104 as defined in Article 22 thereof.

101. It is true that, according to settled case-law, there is a prohibition on frustrating the objective of a directive, such that even before the period prescribed for transposition of a directive has expired the Member States must refrain from taking any measures liable seriously to compromise the result prescribed by that directive.[53] It follows therefrom that, from the date upon which a directive has entered into force, the authorities and national courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.[54] In the case of Directive 2014/104, which is of interest here, the objective pursued by the EU legislature is, however, precisely to avoid a retroactive application of the harmonised provisions in relation to the limitation of claims for damages and the evidential value of decisions of national competition authorities, either because they concern substantive provisions to which the prohibition on retroactive effect under Article 22(1) of Directive 2014/104 is subject, or because the national legislature has in any case observed the limits of any possible retroactive effect of other provisions under Article 22(2) of the Directive when transposing the Directive.[55] Consequently, it is also not possible to derive from the prohibition on frustrating the objective of a directive any obligation under EU law for the referring court to achieve a result in conformity with the directive in a case such as the present.

102. However, if the referring court should conclude that the business practices of Sport TV were liable appreciably to affect trade between Member States,[56] it ought to apply the prohibition under EU law on the abuse of a dominant market position entirely independently of Directive 2014/104 in the main proceedings and then interpret and apply national law — in particular Article 498(1) of the CC and Article 623 of the CPC — consistently with Article 102 TFEU and the principle of effectiveness.

103. With regard to the evidential value of a decision of the national competition authority, this specifically means that the national court must not summarily disregard this decision, but rather — as stated above[57] — at least afford it an indicative effect in the context of Article 623 of the CPC.

104. As far as the limitation of claims for damages based on non-contractual liability is concerned, it follows from the principle of interpretation in conformity with EU law that the national court must take into consideration the objective of effective enforcement of claims for damages due to abuse of a dominant market position in interpreting and applying a provision such as Article 498(1) of the CC, namely in relation to the start and duration of the limitation period as well as any reasons for the suspension or interruption of that period.

52 See in this regard above, points 60 to 64 of this Opinion.

53 To that effect, judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45); of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 32); and of 27 October 2016, *Milev* (C-439/16 PPU, EU:C:2016:818, paragraph 31).

54 Judgment of 27 October 2016, *Milev* (C-439/16 PPU, EU:C:2016:818, paragraph 32); see also judgment of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 122 and 123).

55 See again, in that regard, above, points 60 to 64 of this Opinion. In this respect the main proceedings differs from the case that was recently the subject of the judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833, paragraph 39 et seq.).

56 See above in this regard, in particular point 53 of this Opinion.

57 See above, in this regard, point 93 of this Opinion.

105. However, the principle of interpretation of national law in a manner consistent with EU law is limited by general principles of law and also cannot serve as the basis for a *contra legem* interpretation of national law.[58] Specifically, this means in the present case that there is no obligation under EU law for the national court, contrary to the wording of Article 498(1) of the CC and of any other provisions of national law that may be relevant in terms of limitation, to delay the start of the limitation period until the identity of the persons liable and of the full extent of the damage is known, to provide a limitation period of more than three years or to recognise an entirely new reason for the suspension or interruption of the limitation period that is not disclosed in the national law.

106. In summary, it must therefore be held in relation to the fourth and fifth questions referred:

If a civil action for damages relates to facts which fall outside the temporal scope of Directive 2014/104, there is no obligation to interpret the national law in a manner consistent with that directive. This does not affect the obligation to interpret the national law in a manner consistent with Article 102 TFEU, to the extent that that article is applicable, and with the principle of effectiveness, provided that thereby the general principles of EU law are taken into consideration and EU law is not taken as a basis for an interpretation of the national law that is *contra legem*.

VII. Conclusion

107. In light of the foregoing considerations, I propose that the Court answer the request for a preliminary ruling from the Tribunal Judicial da Comarca de Lisboa (District Court, Lisbon, Portugal) as follows:

(1) Article 102 TFEU produces direct effects in relations between individuals. By contrast, Articles 9 and 10 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 do not apply directly to a dispute between individuals in which the civil action was brought prior to the expiry of the period for transposition of that directive and concerns facts which occurred before it entered into force.

(2) Article 102 TFEU, in conjunction with the principle of effectiveness under EU law, precludes a provision such as Article 498(1) of the Código Civil (Portuguese Civil Code), which, in respect of non-contractual claims for damages due to abuse of a dominant market position, establishes a limitation period of three years which begins to run even when the injured party is not yet aware of the identity of the person liable and of the full extent of the damage, and which is neither suspended nor interrupted during proceedings of the national competition authority to investigate and take action in respect of that infringement.

(3) Article 102 TFEU, in conjunction with the principle of effectiveness, precludes the interpretation of a provision such as Article 623 of the Portuguese Civil Code, under which the final finding by the national competition authority of an abuse of a dominant market position produces no effects whatsoever in the civil action for damages. By contrast, this provision is compatible with Article 102 TFEU and the principle of effectiveness if it is understood to the effect that in the subsequent civil action for damages the rebuttable presumption of abuse of a dominant market position results from such a final finding by the national competition authority.

58 Judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 110); of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 32); and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 40).

(4) If a civil action for damages relates to facts which fall outside the temporal scope of Directive 2014/104, there is no obligation to interpret the national law in a manner consistent with that directive. This does not affect the obligation to interpret the national law in a manner consistent with Article 102 TFEU, to the extent that that article is applicable, and with the principle of effectiveness, provided that thereby the general principles of EU law are taken into consideration and EU law is not taken as a basis for an interpretation of national law that is *contra legem*.