Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 28 October 2021 [1]

Case C-267/20

AB Volvo,
DAF TRUCKS NV
v
RM

(Request for a preliminary ruling
from the Audiencia Provincial – León (Provincial Court, León, Spain))

(Reference for a preliminary ruling – Article 101 TFEU – 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 – National rule determining as the reference point for retroactivity the date of the penalty and not the date on which the action was brought – Limitation period for non-contractual liability – Quantification of the damage suffered – Principles of equivalence and effectiveness)

I. Introduction

1. This case is one of the series of references for a preliminary ruling made to the Court by national courts regarding the interpretation of Directive 2014/104/EU, [2] which concerns actions for damages for infringements of competition law provisions.

2. The present request for a preliminary ruling relates to the interpretation of Article 101 TFEU and of Articles 10, 17 and 22 of Directive 2014/104.

3. The request was made in the context of proceedings between AB Volvo and DAF Trucks NV ('the defendants') and RM ('the applicant) concerning an action for damages brought by the latter seeking compensation for the harm resulting from an infringement of Article 101 TFEU, as established by the European Commission, allegedly committed by a number of undertakings, including the defendants.

[1] Original language: French.

[2] 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).

4. This case will see the Court clarify the scope *ratione temporis* of Directive 2014/104, a task first undertaken in the judgments in *Cogeco Communications*[3] and *Skanska Industrial Solutions and Others*.[4] In so doing, the answers which the Court will provide the referring court in the present case may impact on proceedings currently pending before national courts across the European Union that raise the issue of the application *ratione temporis* of the provisions of that directive, in particular in the context of actions for damages concerning facts that occurred before the Directive entered into force.

II. Legal context

A. European Union law

1. Regulation (EC) No 1/2003

5. Article 25(2) of Regulation (EC) No 1/2003[5] provides:

'Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.'

6. Under Article 30 of that regulation, which is entitled 'Publication of decisions':

'1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

2. Directive 2014/104

7. Article 10 of Directive 2014/104, which is entitled 'Limitation periods', states:

'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;

[3] Judgment of 28 March 2019 (C-637/17, EU:C:2019:263; 'the judgment in *Cogeco*').

[4] See judgment of 14 March 2019 (C-724/17, EU:C:2019:204).

[5] Council Regulation of 16 December 2002 on the implementation of the rules of competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

(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.'

8. Article 17 of that directive, which is entitled 'Quantification of harm', provides:

'1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. 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.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.'

9. Article 21 of the Directive, entitled 'Transposition' provides, in paragraph 1 thereof:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.'

10. Article 22 of the same directive, which is entitled 'Temporal application', states:

'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 seized prior to 26 December 2014.'

B. Spanish law

11. Under Article 74(1) of Ley 15/2007 de Defensa de la Competencia (Law 15/2007 on the protection of competition) of 3 July 2007 [6] ('Law 15/2007'):

'The limitation period for an action for damages for harm resulting from an infringement of competition law shall be five years.'

12. Article 76(2) of Law 15/2007 provides:

'Where it is established that an applicant has suffered harm but it is practically impossible or excessively difficult to quantify precisely the harm suffered on the basis of the evidence available, the courts shall be empowered to estimate the amount of the compensation for the harm.'

13. The first transitional provision of Real Decreto-ley 9/2017 (Royal Decree-Law 9/2017), which is entitled 'Transitional scheme for actions for damages resulting from infringements of the competition law of the Member States and of the European Union', states:

'1. The provisions of Article 3 of this Royal Decree-Law shall not apply retroactively.

2. The provisions of Article 4 of this Royal Decree-Law shall apply only to proceedings brought its entry into force.'

14. Article 1902 of the Código Civil (Civil Code) provides:

'Any person who, by an action or an omission, causes damage to another person, wilfully or by negligence, shall be required to provide compensation for the damage caused.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

15. During 2006 and 2007, the applicant purchased three trucks manufactured by the defendants.

16. On 19 July 2016, the Commission adopted Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 – Trucks) ('the Commission Decision') [7] and published a press release in that regard ('the press release').

17. By that decision, the Commission found that a number of international truck manufacturers, including the defendants, infringed Article 101 TFEU and Article 53 of the agreement on the European Economic Area ('the EEA Agreement') by colluding, first, on price setting and the increase in the gross prices of trucks weighing between 6 and 16 tonnes ('medium trucks') and trucks weighing more than 16 tonnes ('heavy trucks') within the EEA and, second, on the timing and the passing on of the costs for the introduction of emission technologies required by the EURO 3 to 6 standards. As far as concerns the defendants, the infringement lasted from 17 January 1997 to 18 January 2011.

[6] BOE No 159 of 4 July 2007, p. 28848.

[7] The penalty imposed by the Commission is not, moreover, final in respect of one of the undertakings, which is challenging it in an action pending before the General Court, *Scania and Others* v *Commission* (T-799/17), brought on 11 December 2017.

18. On 1 April 2018, the applicant brought an action against the defendants before the Juzgado de lo Mercantil de León (Commercial Court, León, Spain). By that action, he sought compensation for the harm allegedly suffered by him as a result of the anti-competitive practices in which those two companies had engaged. The action is based, primarily, on the relevant provisions of Law 15/2007, as amended following the transposition of Directive 2014/104, and, in the alternative, on Article 1902 of the Civil Code, which lays down the general rules governing non-contractual civil liability. The action is, in relation to the defendants, an action for damages brought following a final decision of the Commission finding an infringement of Article 101 TFEU (a 'follow-on' action for damages).

19. By judgment of 15 October 2019, the court of first instance, the Juzgado de lo Mercantil de León (Commercial Court, León) upheld the claim for damages in part and ordered the defendants to pay compensation to the applicant equating to 15% of the purchase price of the trucks, plus interest; it did not, however, order those companies to pay the costs. More specifically, that court rejected the plea in law raised by the defendants that the action was time-barred on the ground, inter alia, that the five-year limitation period provided for in Article 74(1) of Law 15/2007, which transposes Article 10(3) of Directive 2014/104, applies. In addition, that court applied the presumption of harm caused by cartel infringements provided for in Article 17(2) of that directive, which is transposed in Article 76(3) of Law 15/2007, and used the courts' power to assess the harm caused afforded in Article 17(1) of that directive, which is transposed in Article 76(2) of Law 15/2007, since those two provisions are procedural in that they govern the burden of proof.

20. The defendants lodged an appeal against the judgment before the Audiencia Provincial de León (Provincial Court, Léon, Spain), claiming that the action is subject to the general scheme governing non-contractual liability laid down in Article 1902 of the Spanish Civil Code, under which actions brought pursuant to that article are subject to a one-year limitation period as provided for in Article 1968(2) of that code. In the defendants' view, that period began to run from the publication, on 19 July 2016, of the press release and is therefore time-barred because the claim for damages was made on 1 April 2018. The defendants are also of the view that there is no proof of the causal relationship between the behaviour described in the Commission Decision and the increase in the price of the trucks purchased by the applicant, and that, since Article 1902 of that Civil Code applies to the action, if the applicant fails to provide proof of the harm suffered the claim must be rejected.

21. In those circumstances, the Audiencia Provincial León (Provincial Court, Léon) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 101 TFEU and the principle of effectiveness be interpreted as precluding an interpretation of national legislation according to which neither the 5-year limitation period established in Article 10 of Directive [2014/104] nor Article 17 thereof, concerning judicial estimation of harm, is retroactively applicable, and which establishes retroactive effect by reference to the date of the penalty rather than the date on which the action is brought?

(2) Must Article 22(2) of Directive 2014/104 and the term "retroactively" be interpreted as meaning that Article 10 of the directive is applicable to a claim such as that brought in the main proceedings, which, although lodged after the directive and the transposing legislation entered into force, refers to prior facts or penalties?

(3) When applying a provision such as that of Article 76 of [Law 15/2007], must Article 17 of Directive 2014/104, concerning judicial estimation of harm, be interpreted as a procedural provision that will apply to main proceedings in which an action is brought after the entry into force of the national transposing legislation?'

22. In the course of the preliminary ruling procedure before the Court, written observations were submitted by the applicant, the defendants, the Spanish and Estonian Governments, and the Commission. All those parties, with the exception of the Estonian Government, also replied in writing within the prescribed time limit to questions put by the Court pursuant to Article 61(1) of the Rules of Procedure of the Court of Justice.

IV. Analysis

A. Preliminary observations

23. This case ('the "Trucks" case') raises complex and sensitive questions of law concerning the temporal application of certain provisions of Directive 2014/104 to an action for damages which, although brought after that directive and the national implementing measures entered into force, concerns an infringement that ended prior to the entry into force of both that directive and those national measures.

24. It should be recalled that the infringement of Article 101 TFEU, which is at the origin of the action for damages, was committed between 1997 and 2011. It was the subject of a Commission decision adopted on 19 July 2016. The non-confidential version and the summary of that decision were published on 6 April 2017.

25. As regards Directive 2014/104, I note that it entered into force on 26 December 2014 and that the deadline for its transposition expired on 31 December 2016. That directive was, in turn, transposed into Spanish law on 26 May 2017.

26. The action for damages was brought after the entry into force of the national measures transposing Directive 2014/104, that is to say, on 1 April 2018.

27. It should also be observed that the Kingdom of Spain ensured the transposition of Directive 2014/104 by adopting Royal Decree-Law 9/2017. Articles 3 and 4 of that royal decree-law maintained the distinction between substantive and procedural provisions. Article 3 of that royal decree-law implements the substantive provisions of Directive 2014/104 (including those relating to limitation period and the quantification of the harm, set out respectively in Articles 10 and 17(1) of that directive), by amending Law 15/2007 (new Articles 74 and 76 of that law). Article 4 of Royal Decree-Law 9/2017 implements the procedural provisions of Directive 2014/104 by amending the Ley de Enjuiciamiento Civil (Code of Civil Procedure).

28. Thus, the contested points in the present case concern the legal rules applicable, first, to the limitation period of the action brought by the applicant (and more specifically the duration and the start date of the limitation period) and, second, the assessment and the quantification of the harm suffered.

29. I propose to answer, in the first place, the second and third questions, as they concern the Member States' obligations under Directive 2014/104 which, in the present context, may be regarded as *lex specialis*, then, in the second place, to the first question which relates to the obligations of the Member States under principles of primary law, the clarification of which becomes relevant only if the obligation in question cannot be inferred from the more specific provisions of that directive.

B. The second and third questions referred for a preliminary ruling

30. By the second and third questions referred, the referring court asks, respectively, about the temporal application of Articles 10 and 17 of Directive 2014/104, within the meaning of Article 22 of that directive, to the action for damages brought by the applicant against the defendants and about the – substantive and procedural – nature of the rules under that directive.

31. Since those two questions are closely linked, it is my view that they must be examined together. Only after a joint analysis of those two questions can a useful answer to each of them be provided.

1. Interpretation of the retroactive effect provided for in Article 22(1) of Directive 2014/104 and the temporal application of the 'substantive' provisions of that directive

32. Under Article 22(1) of Directive 2014/104, Member States are to ensure that national measures adopted pursuant to Article 21 of that directive in order to comply with the substantive provisions of the Directive do not apply retroactively.

33. The referring court has doubts as to the interpretation of the adverb 'retroactively' used in that provision. More specifically, the referring court asks whether the retroactive effect refers (i) to the date of the infringement of competition law by the cartel, (ii) the date of the penalty imposed by the Commission or, as the case may be, (iii) the date on which the action for damages is brought.

34. I would point out that, in accordance with settled case-law, a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects and to new legal situations (principle of the non-retroactivity of legal acts).[8] It is otherwise only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.[9]

35. It likewise follows from settled case-law that, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them.[10]

[8] See judgments of 14 April 1970, *Brock* (68/69, EU:C:1970:24, paragraph 7), and of 10 July 1986, *Licata* v *ECS* (270/84, EU:C:1986:304, paragraph 31).

[9] Judgments of 16 December 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:779, paragraph 32); of 26 March 2015, *Commission* v *Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 32); and of 15 January 2019, *E.B.* (C-258/17, EU:C:2019:17, paragraph 50).

[10] See judgments of 24 March 2011, *ISD Polska and Others* v *Commission* (C-369/09 P, EU:C:2011:175, paragraph 98 and the case-law cited), and of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraph 44 and the case-law cited).

36. In addition, Directive 2014/104 contains specific rules on the conditions governing its temporal application. Thus, the scope *ratione temporis* of that directive is limited by Article 22 thereof, which draws a distinction between 'substantive provisions', which do not apply retroactively, [11] and 'measures other than those referred to in paragraph 1 [of that Article 22]' ('the procedural provisions'), which apply in the context of actions which were brought after that directive entered into force (namely, on 26 December 2014). [12]

37. In so doing, the wording of Article 22(1) of Directive 2014/104 reflects the general principle established by the Court that, unlike procedural rules, which are generally intended to apply to all pending proceedings from their entry into force, substantive rules are usually interpreted as not applying, in principle, to 'situations existing' before their entry into force. [13]

38. It is therefore now necessary to examine when the legal situation existed in the 'Trucks' case and, more specifically, whether that situation occurred before or after the entry into force of that directive and the deadline for its transposition.

39. I note, in that connection, that, in the judgments in *Cogeco* and *Skanska Industrial Solutions and Others*, [14] the Court found that Directive 2014/104 was not applicable *ratione temporis* to 'facts' which occurred before that directive was adopted and entered into force, without however clarifying whether that reference concerned merely the infringement or also took into account the decision adopted by the competition authorities and the action for damages. I would, nevertheless, observe that, unlike the cases cited above, in which the actions for damages were brought before Directive 2014/104 entered into force, in the present case the action for damages was initiated after the entry into force of that directive and on the basis of Law 15/2007 which transposes that directive. [15]

40. The defendants contend that, for the purpose of determining the substantive rules applicable to the alleged harm caused by the infringement of competition law, the time at which the situation existed is the time at which that harm was caused, that is to say when, over the period of the infringement established, the applicant purchased the trucks in question.

41. For his part, the applicant submits that his legal situation existed when the action for damages was brought. Thus, Directive 2014/104 is applicable in its entirety and the question of retroactivity does not arise.

42. In turn, the referring court also asks about the possibility of taking account of a third point in time in order to establish when the legal situation existed, namely the date of the penalty imposed for the infringement of competition law.

[11] See Article 22(1) of Directive 2014/104.

[12] See Article 22(2) of Directive 2014/104.

[13] See judgments of 24 March 2011, *ISD Polska and Others* v *Commission* (C-369/09 P, EU:C:2011:175, paragraph 98 and the case-law cited), and of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraph 44 and the case-law cited).

[14] See judgment of 14 March 2019 (C-724/17, EU:C:2019:204).

[15] Furthermore, as mentioned in point 24 of this Opinion, the Commission's decision in the 'Trucks' case was adopted after the Directive entered into force but before the deadline for transposition of Directive 2014/104, whereas the summary of the Commission decision was published in the *Official Journal of the European Union* and the non-confidential version of the Commission's decisions was published on the website of the Commission's Directorate-General for Competition after the deadline for transposition of that directive but before its transposition into Spanish law by Law 15/2007.

43. I note from the outset that that the wording of Article 22 of Directive 2014/104 raises doubts as to the scope *ratione temporis* of certain provisions of that directive. More specifically, that article does not identify which of the provisions of that directive are of a 'substantive' or 'procedural' nature. Furthermore, the scope of the prohibition on the retroactive application of substantive provisions is not sufficiently clear. This has led to divergent approaches between Member States in the transposition of that directive, a factor which risks undermining both the objective of ensuring uniform application of EU competition law[16] and the imperative of legal certainty.[17]

44. I further take the view that, if the applicant's interpretation were accepted, this would amount to the retroactive application of substantive provisions in respect of which the EU legislature did not provide for retroactive effect. This would give rise to a situation that would undermine the objectives of foreseeability and uniformity pursued by Article 22(1) of Directive 2014/104. In addition, such an interpretation would risk 'reviving' actions that may already be time-barred prior to the entry into force of the national implementing provision.[18]

45. As for the date of the penalty imposed by the Commission, I acknowledge that, since the present case falls within the scope of the private enforcement of competition law and, more specifically, concerns an action for damages further to an infringement of competition law established by a competition authority (a 'follow-on' action for damages), the question could arise whether the applicable criterion in order to establish when the legal situation existed should not rather be linked to the adoption of the Commission decision establishing the infringement. In the context of 'follow-on' actions for damages, the legal situation of the injured party is not only linked but also inherently dependent on the finding of the infringement by a competition authority, which is a fundamental preliminary step for it to be able to exercise its right to obtain compensation.

46. In that regard, I would observe that taking as the sole point of reference the date of the harm suffered or of the infringement committed in order to establish when the legal situation existed is indeed a relevant approach in the context of the public enforcement of Article 101 TFEU, as is shown by Article 25 of Regulation 1/2003, or in the context of actions for damages brought before national courts regardless of whether a competition authority has found there to be an infringement (stand-alone actions), but could potentially fall outside the conceptual and contextual framework of 'follow-on' actions for damages, which presuppose the existence of a decision adopted by a competition authority and use that decision as the basis of their action.

47. However, even though the foregoing argument appears rational, it cannot be accepted.

48. In the first place, it should be observed that the general principle of non-retroactivity is a corollary of the principle of legal certainty. The requirement of the principle of legal certainty seeks, in particular, to ensure that persons subject to EU law are not affected by legislation that is not 'clear and predictable'.[19] Thus, like the sanctions imposed under EU competition law in the public enforcement of Article 101 TFEU, the purpose of the non-retroactivity of new substantive rules to actions for damages is to ensure that the infringer is able to foresee the consequences of

16 See recital 34 of Directive 2014/104.

17 I note in that regard that the question of the temporal application of the new limitation period provided for under article 10 of Directive 2014/104 perfectly illustrates the issue in light of the different approaches followed by the Member States when transposing the directive.

18 See Opinion of Advocate General Kokott in *Cogeco Communications* (C-637/17, EU:C:2019:32, point 63).

19 Judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (Joined Cases 212/80 to 217/80, EU:C:1981:270, paragraph 10).

committing the unlawful act and, in particular, the possible extent of his liability under the substantive rules in force at the time of the infringement. It follows that Article 22(1) of Directive 2014/104 reflects the case-law of the Court which guarantees, for the individuals concerned, the foreseeability of the substantive rules which determine liability for damages arising from infringements of competition law, thus prohibiting the retroactive application of its substantive provisions. [20]

49. Accordingly, in the case of actions for damages for infringement of competition law, the relevant factual situation for the purpose of determining the application *ratione temporis* of the national measures adopted to comply with the substantive provisions of Directive 2014/104 that establish when non-contractual liability arises is the occurrence of the facts that give rise to the conditions for liability which, in this case, ended before the national implementing legislation entered into force. More specifically, in the case of 'follow-on' actions for damages, whilst it is true that undertakings that participated in a cartel such as that in the present case could foresee that their own conduct constituted an infringement of competition law punishable by a competition authority and could potentially lead to the injured parties being able to claim compensation for the harm suffered, the fact remains that such actions must be governed by the substantive provisions in force when the infringement was committed. That position is, moreover, confirmed both by Directive 2014/104 [21] and by the case-law of the Court, according to which, in the absence of provisions in EU law, actions for damages are governed by the national rules and procedures of the Member States. [22] I would, however, point out that that fact does not call into question the right of the injured parties to obtain compensation for the harm suffered. As I will explain in points 93 and 94 this Opinion, that right is guaranteed by primary EU law and, in particular, the principle of effectiveness under Article 101 TFEU.

50. In the second place, using the date of the infringement, which is a clear, objective and verifiable criterion, would also mean ensuring the consistent application of the substantive provisions of Directive 2014/104, and is one of the fundamental objectives of that directive. [23]

51. In the third place, it should also be noted that, in transposing Directive 2014/104, a significant number of Member States have more or less explicitly accepted that the substantive provisions of that directive do not apply to situations such as those at issue in the main proceedings, in which the harm suffered by the infringement occurred before the deadline for transposition of that directive or the entry into force of the national measure transposing that directive. It would appear that the Spanish legislature has opted for such a model by providing that, while the procedural provisions apply only to proceedings instituted after the entry into force of the Royal Decree-Law transposing Directive 2014/104 (that is, from 27 May 2017), the substantive provisions do not apply 'retroactively', namely to events that occurred before the date of transposition of Directive 2014/104. That approach was not, moreover, called into question by the Commission in its report on the implementation of that directive. [24]

52. In the light of the foregoing, I am of the view that whilst the 'procedural' provisions of Directive 2014/104 do apply to the case in the main proceedings, the provisions classified as 'substantive' do not have retroactive effect and are not applicable.

[20] See judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraphs 50 and 51 and the case-law cited).

[21] See recital 11 of Directive 2014/104.

[22] See judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 31).

[23] See recital 34 of Directive 2014/104.

[24] See 'Report on the implementation of the Damages Directive', 14 December 2020.

2. Determination of the substantive and procedural provisions set out in Article 22 of Directive 2014/104

53. I note that the second and third questions concern the obligations of Member States under Article 22 of Directive 2014/104 concerning the temporal application of the provisions of that directive relating to the limitation period (Article 10), the power of national courts to estimate the amount of damage (Article 17(1)) and the rebuttable presumption of harm caused by cartel infringements (Article 17(2)).

54. The referring court therefore asks whether the above provisions are substantive provisions within the meaning of Article 22 of the Directive and whether they apply to an action for damages such as that at issue in the main proceedings.

(a) The latitude enjoyed by the Member States in determining the substantive and procedural provisions of Directive 2014/104

55. First and foremost, it is necessary to determine whether the Member States have the freedom to classify the rules adopted to ensure the transposition of Directive 2014/104 as substantive or procedural rules.

56. The Spanish and Estonian Governments consider that that question should be answered in the affirmative. Thus, those governments argue that, since the question of the limitation period for actions for damages was not exhaustively harmonised as a matter of EU law, the respective national legal system remained free to classify the rules governing that limitation period as substantive rules or procedural rules.

57. The Estonian Government also states that the Member States have procedural autonomy which affords them latitude in implementing Directive 2014/104 which the Court is bound to respect provided that the Member State in turn complies with the principles of equivalence and effectiveness. In that government's view, the classification of a rule as substantive or procedural after that directive has entered into force constitutes unacceptable interference in the procedural autonomy of the Member States.

58. By contrast, the Commission and one of the defendants are of the view that the question of which of the provisions of Directive 2014/104 are substantive and which are not must be assessed in the light of EU law and not having regard to the requirements of the applicable national law.

59. I disagree with the latter view.

60. In the first place, it should be observed that, even though Article 22 of Directive 2014/104 does not define those provisions which are substantive and those which are procedural, that article does expressly refer to the 'substantive provisions of this Directive', which appears to indicate that the nature of its provisions is a specific question of EU law.

61. In the second place, I would point out that the primary objectives of Directive 2014/104 include the intention to ensure that EU competition law is applied consistently, to increase the effectiveness of actions for damages in that area and to ensure the effective and consistent application of Articles 101 and 102 TFEU.[25] However, affording Member States such discretion

[25] See recital 34 of Directive 2014/104.

would risk entailing an inconsistent and non-uniform application of the provisions of that directive in the different legal orders, which would run counter to the abovementioned objectives. By contrast, taking the view that EU law should determine which of the provisions of that directive are substantive and which are not would allow legal certainty to be increased and prevent and deter persons injured by an infringement of the rules of competition law from bringing an action for damages before a particular court chosen on the ground that that choice will mean the application of substantive and procedural rules that are more favourable to their interests than those which might be applied by another national court. In other words, this approach would prevent 'forum shopping'.

62. In the third place, I note that, even if it were accepted that the EU legislature had left to the Member States the choice of determining which provisions were substantive or procedural, the fact remains that that choice must be made in accordance with the general principles of EU law as well as the principle of effectiveness in competition law in order to guarantee an effective system of penalties for infringements of competition law that are enforced privately.

63. Accordingly, it is my view that the second and third questions should be examined on the assumption that the determination of the nature of the provisions of Directive 2014/104 is a matter governed by EU law.

(b) The rules governing limitation periods under Article 10 of Directive 2014/104

64. It should be noted that, as with Article 17 of Directive 2014/104, the Spanish legislature transposed Article 10 of that directive into Spanish law as a substantive provision without retroactive effect.

65. I would point out that Advocate General Kokott set out her position on the classification of Article 10 of Directive 2014/104 in her Opinion in *Cogeco*, finding it not to be a purely procedural provision. [26]

66. Furthermore, the Court has also stated that, in contrast to procedural time limits, the limitation period is a matter of substantive law since it has the function of ensuring protection both of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and the person liable for the damage, by preventing the aggrieved person from being able to delay indefinitely the exercise of his right to damages. [27]

67. I would also observe that the question of the limitation period is a matter of substantive law in the majority of national laws and that, therefore, Article 10 of Directive 2014/104 has been transposed as a substantive provision in most Member States. [28]

68. In that regard, it should be noted that, unlike other Member States, [29] the Spanish legislature does not seem to have provided for special transitional rules as regards the scope *ratione temporis* of the new rules governing limitation.

[26] See Opinion of Advocate General Kokott in *Cogeco Communications* (C-637/17, EU:C:2019:32, point 61).

[27] Judgment of 8 November 2012, *Evropaïki Dynamiki* v *Commission* (C-469/11 P, EU:C:2012:705, paragraphs 52 and 53).

[28] Thomas, B. and Aubin, F., in Amaro, R. (ed.), *Private Enforcement of Competition Law in Europe*, 1st edition, Brussels, Bruylant, 2021, 'Chapter 7 – Limitation period', p. 165.

[29] See for example the approach followed by France in Article 12(2) of Ordinance No 2017-303 of 9 March 2017 on actions for damages as a result of anti-competitive practices (JORF No 59 of 10 March 2017).

69. In the light of the foregoing, I propose that the second question referred for a preliminary ruling be answered to the effect that Article 22(2) of Directive 2014/104 is to be interpreted as meaning that Article 10 of that directive does not apply to an action for damages, which, although brought after that directive and the national implementing measures entered into force, concerns facts occurring and penalties imposed before those provisions entered into force.

(c) Power of courts to estimate and quantify harm as provided for in Article 17(1) of Directive 2014/104

70. With respect to Article 17(1) of Directive 2014/104, as is apparent from the wording of that provision, it relates primarily to the standard of proof required for the purpose of quantifying the harm suffered by the injured party and the assessment by the respective national court of the evidence on which the claimant may rely in order to prove the extent of the harm suffered.

71. The first sentence of Article 17(1) of Directive 2014/104 requires Member States to ensure that neither the burden nor the level of proof required for the quantification of the harm renders the exercise of the right to damages practically impossible or excessively difficult.

72. I note at the outset that this provision is an expression of the principle of effectiveness of competition law as established by the case-law of the Court. [30]

73. The same is true, in my view, as regards the second sentence of Article 17(1) of Directive 2014/104, which does not establish a new substantive obligation on the parties to the proceedings.

74. Thus, by relaxing the level of proof required for the purposes of determining the amount of harm suffered, that provision is intended to remedy the asymmetry of information existing to the detriment of the applicant and the fact that the quantification of the harm suffered, in particular in cartel cases, requires an assessment of the way in which the market concerned would have developed in the absence of the infringement, a task which is virtually impossible for an injured party to perform.

75. I further note that, unlike Article 17(2) of Directive 2014/104, Article 17(1) of that directive does not remove the burden of proof or the main obligation on the applicant to quantify and prove the amount of harm suffered. That provision merely provides national courts with a method of quantifying the amount of harm by granting them a discretion which allows them to adjust the level of proof required for the purpose of establishing the amount of harm and thus to accept a lower level of proof than that normally required when the applicants have difficulties in accurately quantifying the harm caused.

76. In doing so, I consider that this tool only reinforces what is otherwise the natural role of a court in an action for damages, namely the determination of the amount of harm suffered.

77. In the light of the foregoing, I take the view that Article 17(1) of Directive 2014/104 may be regarded as a 'procedural' provision within the meaning of Article 22 of that directive and that, as such, it applies to an action for damages such as that at issue in the main proceedings which, although brought after the entry into force of that directive and of the national implementing provisions, relates to an infringement which ended before the entry into force of both that directive and those national provisions.

[30] See the judgment in *Cogeco* and judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069).

(d) The presumption of harm resulting from an infringement of competition law provided for in Article 17(2) of Directive 2014/104

78. As for whether or not Article 17(2) of Directive 2014/104 is a substantive provision within the meaning of Article 22 of that directive, it should be recalled that, according to the wording of that provision, it is to be presumed that cartel infringements cause harm. The infringer is, however, to have the right to rebut that presumption.

79. I note from the outset that that provision does not just allocate the burden of proof vis-à-vis the existence of the harm (which is a procedural matter) but also establishes a rebuttable presumption as regards the existence of harm resulting from the cartel concerned, which has a direct bearing on the non-contractual liability of infringers of rules of competition law.

80. In that connection, I would point out that it is clear from the Court's case-law that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU.[31] The existence of harm and the causal relationship between that harm and the infringement of competition law committed are unquestionably constituent factors of non-contractual civil liability.

81. In that context, I take the view that the presumption established in Article 17(2) of Directive 2014/104 does not have a purely evidentiary purpose. In fact, by allocating the burden of proof to the infringer and thus exempting the injured party from the obligation of proving the existence of the harm suffered on account of the cartel or a causal relationship between that harm and that cartel, that presumption is directly linked to the assignment of non-contractual civil liability to the infringer concerned and, as a result, directly affects the latter's legal situation. It therefore appears to me that Article 17(2) of Directive 2014/104, and in particular the first sentence thereof, is a rule that is closely linked to the accrual, assignment and scope of the non-contractual liability of undertakings which infringed Article 101 TFEU by participating in a cartel. In addition, it may be inferred from case-law that such rules can be classified as 'substantive rules'.[32]

82. In that regard, it must also be noted that the Court has not found other provisions of Directive 2014/104, which are also closely linked to establishing the liability of infringers, to have retroactive effect. For example, in the judgment in *Skanska Industrial Solutions and Others*, the Court found that Article 11(1) of that directive, which concerns establishing the joint and several liability of the undertakings which infringed competition law through joint conduct, does not apply *ratione temporis* to the facts at issue, which concerned an action for damages brought after the cartel which had triggered it.[33]

83. In addition, as the Commission has observed, in the field of private international law, there is evidence to support the view that provisions which introduce presumptions such as that laid down in Article 17(2) of Directive 2014/104 can be classified as substantive provisions.[34]

[31] See judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 22 and the case-law cited).

[32] See judgment of 1 July 2004, *Tsapalos and Diamantakis* (C-361/02 and C-362/02, EU:C:2004:401, paragraph 20).

[33] See judgment of 14 March 2019 (C-724/17, EU:C:2019:204, paragraph 34).

[34] See Article 15(c) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II') (OJ 2007 L 199, p. 40) and Article 12(1)(c) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

84. In the light of the foregoing, I am of the opinion that, unlike Article 17(1) of Directive 2014/104, Article 17(2) of that directive may be characterised as a 'substantive' provision within the meaning of Article 22(1) of that directive and that, in consequence, the national legislation adopted in order to comply with that provision must not apply to acts incurring liability committed before the entry into force of those national implementing rules.

85. That being so, as explained in paragraphs 139 to 141 of the present opinion, that interpretation in no way prevents national courts from applying presumptions relating to the burden of proof concerning the presence of harm which existed prior to the respective national implementing rules, whose compliance with the requirements of EU law must be assessed having regard, in particular, to the general principles of equivalence and effectiveness.

86. In those circumstances, I propose to answer the third question that Article 22(1) of Directive 2014/104 is to be interpreted as not precluding the application of national implementing measures adopted in order to comply with Article 17(1) of that directive, which empowers national courts to estimate the amount of the harm, to harm suffered on account of an infringement of competition law which ended prior to the entry into force of the national implementing legislation in the context of an action for damages brought after the entry into force of the national implementing measure. Article 22(1) of the Directive is to be interpreted as precluding the application of national legislation adopted to implement Article 17(2) of the same directive, which lays down a rebuttable presumption of harm caused by cartels, to infringements committed before the entry into force of the national implementing legislation in the context of an action for damages brought after the entry into force of the national implementing measure.

C. The first question referred for a preliminary ruling

87. In view of the answers that I propose to give to the second and third questions, it is, in my view, necessary to answer the first question referred for a preliminary ruling.

88. There are two parts to that first question.

89. First, by its first question, the referring court asks about the obligations on Member States under primary law, that is to say, the effect of Article 101 TFEU and of the principle of effectiveness in determining whether Article 10(3), the second sentence of Article 17(1) and Article 17(2) of Directive 2014/104 apply to a situation such as that at issue in the main proceedings. Thus, the question arises whether Article 101 TFEU and the principle of effectiveness require that the first transitional provision of Royal Decree-Law 9/2017 is interpreted as meaning that the amendments made to the Law on the protection of competition concerning limitation periods, the rebuttable presumption of harm in the context of a cartel and the quantification of harm apply to actions brought after Royal Decree-Law 9/2017 entered into force, as in the case of the action that is the subject of the dispute in the main proceedings, including those cases where the claim relates to facts occurring and penalties imposed before the entry into force of that royal decree-law.

90. Second, the referring court also asks the Court to rule on the compatibility of the provisions of Spanish law – and more specifically the provision concerning non-contractual liability, which forms the alternative legal basis of the action for damages in the case at issue in the main proceedings – with Article 101 TFEU and the principle of effectiveness in the event that Articles 10 and 17 of Directive 2014/104 are not applicable *ratione temporis*.

91. With regard to the first part of the first question referred, as identified above, I note that the principle of effectiveness cannot require the retroactive application of the substantive provisions of Directive 2014/104. This would run counter to general principles of law, such as the principle of legal certainty. I therefore take the view that the fact that the Spanish legislature decided that the provisions transposing Articles 10 and 17(2) of that directive are substantive provisions which do not apply retroactively – a classification that is, moreover, compatible with EU law, as I have explained in my analysis of the second and third questions referred for a preliminary ruling – is consistent with the principle of effectiveness. However, the same reasoning does not apply to Article 17(1) of that directive, which is a procedural provision and can apply to the action for damages that is the subject of the present case.

92. As for the second part of that question, I would observe from the outset that prohibiting the non-retroactivity of national legislation transposing the substantive provisions of Directive 2014/104 pursuant to Article 22(1) of that directive, as regards facts establishing liability that occurred before the entry into force of the national implementing legislation, does not preclude the application by Member States of their national legislation in accordance with their pre-existing obligations under primary law, in accordance with the principle of effectiveness. [35]

93. It is thus established that, in the absence of related EU rules applicable *ratione temporis*, it is for the domestic legal order of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of Articles 101 and 102 TFEU, in order to safeguard the rights which individuals derive directly from those rules, provided that such national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). [36]

94. In that regard, it should be recalled that Article 101 TFEU produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard. Thus, the full effectiveness of Article 101 TFEU requires that any person who has suffered harm must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. [37]

95. The Court has clarified the content and the scope of that case-law as regards specific aspects of actions for damages. Thus, it has held that the principle of effectiveness precludes national legislation which makes the exercise of the right to compensation in full 'practically impossible or excessively difficult'. [38]

96. It should likewise be noted that public enforcement of competition law and private enforcement of competition law must be regarded as tools serving a common objective, namely observance of competition law. I note in this regard that it has been acknowledged in the case-law of the Court that the right to claim compensation for the harm caused by an infringement of competition law strengthens the working of EU competition rules and has the effect of discouraging agreements or practices, frequently covert, which are liable to restrict or

[35] See recital 11 of Directive 2014/104.

[36] See judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 29); of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 24); and in *Cogeco* (paragraph 42).

[37] See, to that effect, judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 95).

[38] See judgments in *Cogeco* (paragraphs 38 to 55), and of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 25 and the case-law cited).

distort competition. Viewed from that perspective, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union.[39] Thus, whilst in the public enforcement of competition law the deterrent effect takes the form of the penalties imposed by competition authorities, in the private enforcement of competition law that deterrent effect is ensured by the risk of undertakings which participated in a cartel of facing a significant number of actions for damages brought by potentially injured parties in various jurisdictions (in particular where the infringement of competition law has a cross-border dimension and covers several Member States, as is the case here).

1. Examination of the rules on limitation laid down in the Spanish Civil Code in the light of the principle of effectiveness

97. The Court has specified the factors to be taken into account in determining whether specific rules on limitation are consistent with the principle of effectiveness. In particular, the Court has held that consideration had to be given to all aspects of the limitation and more specifically: (i) the duration of the limitation period;[40] (ii) whether the period starts to run before the person injured knows of the harm suffered;[41] and (iii) whether the period may be suspended or interrupted.[42]

98. The compatibility of the rules on non-contractual liability laid down in the Spanish Civil Code must therefore be examined in the light of those criteria.

(a) The duration of the limitation period

99. The Court has held that the duration of the limitation period cannot be 'short to the extent that, combined with the other rules on limitation, it renders the exercise of the right to claim compensation practically impossible or excessively difficult'.[43]

100. I note that the one-year period provided for in the rules on non-contractual liability in the Spanish Civil Code is significantly shorter than the five-year period provided for in Article 10(1) of Directive 2014/104.

101. However, I would observe that, in the light of the criteria established by the case-law in the judgment in *Cogeco*, all elements of the rules on limitation in question must be taken into consideration.[44] Thus, in the assessment of effectiveness it is not sufficient to consider individual elements of the national rules on limitation in isolation.[45]

102. Before considering the starting point of and the event that triggers the limitation period, I would point out that the question of the suspension or interruption of the limitation period (despite its significance in establishing whether the one-year period is compatible with the criteria established by the case-law of the Court in the judgment in *Cogeco*) has not been raised

[39] See judgment of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 29).

[40] See judgment in *Cogeco* (paragraph 48).

[41] See judgment in *Cogeco* (paragraph 49).

[42] See judgment in *Cogeco* (paragraph 51).

[43] See judgment in *Cogeco* (paragraph 48).

[44] See judgment in *Cogeco* (paragraph 45).

[45] See Opinion of Advocate General Kokott in *Cogeco Communications* (C-637/17, EU:C:2019:32, point 81).

in this case. As far as concerns the elements to be taken into account in order to guarantee compliance with the principle of effectiveness in that respect, I refer to the Court's analysis in the judgment in *Cogeco*.[46]

(b) The dies a quo *for the calculation of the limitation period*

103. If the Court were to find that Article 10 of Directive 2014/104 does not apply in an action for damages such as that at issue in the main proceedings, the national court would, in principle, be required to apply the one-year limitation period provided for in the general rules on non-contractual liability laid down in Article 1902 of the Civil Code and to determine the *dies a quo* for the calculation of the limitation period.

104. In that connection, the defendants are of the view that the limitation period provided for in Article 1902 of the Spanish Civil Code started to run on the day on which the press release was published, that is to say, on 19 July 2016. Since the applicant's action was brought on 1 April 2018, that action is thus time-barred.

105. For their part, the applicant, the Spanish Government and the Commission argue that the date of publication of the summary of the Commission decision in the *Official Journal of the European Union*, that is to say, 6 April 2017, should be used as the *dies a quo*, which means that, in the present case, the action for damages is not time-barred.

106. I would point at the outset that the Court has held that the principle of effectiveness requires that national legislation laying down the date from which the limitation period starts to run must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that law by the persons concerned.[47] The Court has also ruled on the event and the date marking the start of the limitation period, clarifying that it was indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law.[48]

107. Those criteria may also be found in Article 10(2) of Directive 2014/104 which provides that the starting point for the calculation of the limitation period is subject to the satisfaction of two cumulative conditions: first, the infringement of competition law has ceased and, second, the claimant is aware of certain information that is essential in order to bring an action for damages.

108. In the present case, the referring court asks which document – the publication of the press release or the publication of the summary of the decision in the *Official Journal of the European Union* and of the non-confidential version of that decision on the website of the Commission's Directorate-General for Competition – can be classified as the relevant event from which time it is reasonable to consider that the applicant knew the information essential to bringing an action for damages.[49]

[46] See judgment in *Cogeco* (paragraphs 44 to 55).

[47] See judgment in *Cogeco* (paragraph 47).

[48] See judgment in *Cogeco* (paragraphs 48, 49 and 50).

[49] I therefore consider that the following analysis is equally relevant for establishing the *dies a quo* in a case in which Article 10 of that directive is applicable.

109. In order to answer that question, it is necessary to analyse the subject matter, nature and in particular the content of the press release by comparing it to the summary of the decision published in the *Official Journal of the European Union* in the 'Trucks' case. Consideration must also be given to whether any duty of due diligence exists which the injured parties should be required to demonstrate in the context of the private enforcement of Article 101 TFEU.

(1) The publication of press releases and Commission decisions

110. Pursuant to Article 30 of Regulation No 1/2003, the Commission is required to publish the decisions that it takes pursuant to Articles 7, 9, 10 and 24 of that regulation.

111. The Commission complies with that obligation by publishing in the *Official Journal of the European Union* a summary of the decisions adopted pursuant to Article 101 and/or 102 TFEU in all official languages 'shortly after' their adoption. [50]

112. It is also the practice of the Commission Directorate-General for Competition to publish 'as soon as possible' on its website non-confidential versions of the decisions adopted pursuant to Article 101 or 102 TFEU, although, unlike the summaries, the decisions are published in the language of the case only. By virtue of the obligation to protect the parties' business secrets and confidential information, those public versions are generally published some time after those decisions are adopted. [51]

113. I would point out that, in the present case, the Commission decision was adopted on 19 July 2016. On the same day, it announced the adoption of that decision in a press release available on its website. [52] Subsequently, on 6 April 2017, the Commission published a summary of that decision in the *Official Journal of the European Union*. On that same date, the Commission published a provisional, non-confidential version of the decision on the website of the Directorate-General for Competition.

(2) The existence of a duty to obtain information incumbent on the party injured by an infringement of competition law

114. In the light of the foregoing, the question arises whether there is an obligation on potentially injured parties to comply with a certain duty of due diligence in handling their affairs in order to obtain the information required to enable them to bring an action for damages and, if so, to what extent that duty of due diligence requires those parties to monitor the publications of the Commission's press releases regarding decisions adopted pursuant to Article 101 TFEU.

115. The defendants appear to contend that, since the claimants were undertakings or experienced professionals, such a duty of due diligence should be required. According to those parties, certain factors – such as the media coverage of the decision's adoption on the date of publication of the press release or the fact that law firms, investment funds and other experts involved in similar claims for damages appear to have announced the possibility of bringing proceedings against the truck manufacturers – indicate that the truck purchasers could not claim to be unaware of the decision adopted by the Commission.

[50] See paragraph 148 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6).

[51] See paragraph 149 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.

[52] See https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582.

116. Thus, according to the defendants, the applicant should be regarded as having known of the infringement from the publication of the press release and was able to bring an action for damages or, at the very least, interrupt the limitation period by sending a letter from that date, which would appear to have been the case with other truck purchasers who are currently taking action against the truck manufacturers before the Spanish courts.

117. I do not dispute the fact that, on the date of publication of the press release, a number of persons operating in the market concerned by the cartel knew that the Commission had adopted such a decision. It is likewise clear that, given the duration of the investigation and the press releases issued by the Commission during the investigation (which were likely reproduced by the press in several Member States) [53] as well as the implications for the purchasers of the goods, it is reasonable to expect that a section of the market was aware of the Commission's ongoing investigation and, a fortiori, of the decision adopted by the Commission.

118. However, there is not, in my view, a general duty of due diligence on the part of the parties injured by competition infringements that requires them to monitor such press releases.

119. It is true that it cannot be ruled out that, in some jurisdictions, actions for damages may have been brought following the publication of the press release, or even before. [54] However, that practice (which, moreover, is not universal, in particular in view of the different approaches taken by Member States as regards the point at which the limitation period starts to run) [55] does not create, in my opinion, 'a duty of due diligence' requiring all parties injured by infringements of competition law to bring actions for damages on the basis of those press releases.

120. Thus, in the light of the foregoing, it cannot be assumed that, following the mere publication of a Commission press release on its website, the injured party concerned knows all the information required to exercise his right to bring an action for damages. Like the Commission, I am of the view that requiring a potentially aggrieved party to demonstrate an excessively high degree of due diligence, that is to say which goes beyond what that party could reasonably have known, would undermine its right to claim compensation for the harm caused by an anti-competitive practice. Thus, the principle of the full effectiveness of Articles 101 and 102 TFEU and the principle of legal certainty inherent in establishing the limitation period require that that duty of due diligence is not too restrictive for the person claiming damages. [56]

121. Lastly, I note that the judicial practice of certain Member States appears to establish a distinction between 'professional' consumers or large undertakings and 'ordinary' consumers as regards that alleged 'duty of due diligence'. Thus, the former are meant to be treated as having a higher duty of due diligence than the latter, requiring the former to monitor the publication of the Commission's press release.

[53] In that connection, it should be observed that, in 2011, the Commission confirmed that it had conducted unannounced inspections as part of its investigation into the truck manufacturing sector (see memo of 18 January 2011, 'Antitrust: Commission confirms unannounced inspections in the truck sector', available in English only on the website https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_29). Subsequently, in 2014, the Commission also confirmed via a press release that it sent a statement of objections to truck manufacturers suspected of having participated in a cartel (see press release of 20 November 2014, 'Antitrust: Commission sends statement of objections to suspected participants in trucks cartel', available in English, French and German on the website https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2002). However, those two documents do not identify the undertakings which are the subject of the investigation or the geographic markets, the goods concerned or the duration of the infringement under investigation during that period.

[54] Thomas, B. and Aubin, F., in Amaro, R. (ed.), *Private Enforcement of Competition Law in Europe*, 1st edition, Brussels, Bruylant, 2021, 'Chapter 7 – Limitation period', pp. 170 to 172.

[55] Van Bael & Bellis, *Competition Law of the European Union*, 6th edition, Kluwer Law International, 2021, 'Chapter 11: Private Enforcement', p. 1322.

[56] See judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 26).

122. Although, ultimately, it is for the national court to examine on a case-by-case basis whether the duty of diligence owed by the aggrieved party required it to monitor the progress of a competition case with a view to exercising its rights, it is my view that establishing such a distinction between aggrieved parties would increase the – already existing – uncertainty in the private enforcement of Article 101 TFEU. Thus, since the sphere in which the potentially aggrieved parties operate is not homogeneous, the degree of due diligence required in each case would necessarily turn on a multitude of criteria which relate to the particular circumstances of the potentially aggrieved party, such as, for example, the size of the purchaser concerned, the quantity or volume of the goods purchased, the market structure, the terms of that purchase as well as other criteria which demonstrate the practical difficulty of establishing such a distinction. I am therefore of the view that, at least in relation to the press releases issues and decisions adopted by the Commission in relation to infringements connected with competition law, clear and foreseeable criteria vis-à-vis 'knowledge' must be laid down, such as a link (by way of presumption, for example) to the publication of the summary of a Commission decision in the *Official Journal of the European Union*.

123. In the light of the foregoing, I take the view that, in the context of 'follow-on' actions for damages, a connection to an objective factor such as the publication of a Commission decision establishing the infringement in the *Official Journal of the European Union* – which is the final stage of the public enforcement of Article 101 TFEU – makes it possible to establish clearly, precisely and transparently when the limitation period starts to run, both for the undertakings which participated in a cartel and for the injured parties. Thus, the right of an injured party to bring an action for damages further to anti-competitive behaviour arises when the Commission decision finding that that behaviour exists is adopted, and more specifically when it is published in the *Official Journal of the European Union*.

124. I note, furthermore, that, given the content of the summary of the decision, I find it difficult to understand why that summary could not be published on the same day that the Commission adopted its decision and the press release was published. Unlike the non-confidential version of the decision, in respect of which a temporary delay between the date of adoption of the decision and the publication of its non-confidential version is justified by the need to protect the parties' business secrets and confidential information, no such need seems to arise as regards the publication of the summary of the decision in the *Official Journal of the European Union*.[57]

(3) The content of the press release and of the decision adopted by the Commission in the 'Trucks' case

125. It should be noted from the outset that, as compared with the summary of the decisions published in the *Official Journal of the European Union*, press releases generally contain less detailed information about the anti-competitive conduct and the reasons why it constitutes an infringement.

[57] I note in this regard that the temporary delay between the publication of the summary of a decision in the *Official Journal of the European Union* several months after its adoption and the publication of the press release on the day on which that decision is adopted is liable to give rise to a degree of legal uncertainty which jeopardises the effective and consistent application of competition law within the European Union in light of the different approaches taken by the Member States with respect to the *dies a quo*.

126. Furthermore, press releases are not addressed directly to the parties for whom the information published may present a particular interest and are not therefore intended to produce legal effects in respect of third parties. A legal notice to that effect appears on the Commission's website. [58]

127. Here, unlike the summary of the decision in the 'Trucks' case which was published in all the official languages of the European Union, the press release was published in only six official languages. [59] Furthermore, I note that it was not published in Spanish, the language of the country of origin of the applicant in the main proceedings. I also note that the press release refers to the possibility of persons or undertakings injured by anti-competitive practices such as those described of seizing the courts of the Member States and claiming damages. [60]

128. Consideration must now be given to the key points of a press release which enable an injured party to bring an action for damages.

129. First, the press release does not identify the specific addressees of the decision (the parent company and any subsidiaries to whom the decision is of concern are not all stated), and does not provide the names of the legal entities to which the decision is addressed [61] but merely the trading names of the undertakings involved. Conversely, the summary of the decision names the infringers.

130. Second, the press release does not provide a sufficiently detailed description of the infringement and, in particular, the specific types of trucks concerned by the infringement. It states merely that the infringement concerns 'medium' trucks (weighing between 6 and 16 tonnes) and heavy trucks (weighing over 16 tonnes), whereas the summary of the decision specifies that both rigid trucks and tractor trucks are included in the medium and heavy trucks, and that the decision does not concern aftersales or other services or warranties relating to the trucks, or the sale of used trucks or any other goods or services.

131. Third, the press release does not state the exact duration of the infringement or the duration of that infringement attributed to each legal entity to which the decision is addressed. Thus, the press release simply notes that the infringement 'lasted 14 years, from 1997 to 2011', whereas the summary of the decision states the exact duration (from 17 January 1997 to 18 January 2011), and specifies the duration attributed to each of the undertakings concerned relative to their participation in the cartel found to exist.

132. Those elements are, in my view, crucial information in order for an injured party to be able to identify whether the infringement occurred in a geographic market that is of concern to it and over a period during which it did in fact purchase the type and model of the trucks that were the subject of the cartel.

58 See to that effect: https://ec.europa.eu/info/legal-notice_en.

59 The press release was published in Dutch, English, French, German, Italian and Swedish.

60 A link to Directive 2014/104 and to the website of the Commission's Directorate-General for Competition containing further information about actions for damages in cases involving cartels or the abuse of a dominant position as well as a practical guide on how to quantify the harm caused by infringements of competition rules are available to the public.

61 However, it should be observed that, after downloading the press release in the section relating to the 'Trucks' case on the website of the Commission Directorate-General for Competition several days after its publication (on 25 July 2016), the names of the undertakings which were the addressees of the Commission decision did appear at the top of the page devoted to the case (see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code= 1_39824). It cannot therefore be ruled out that people who consulted the press release could have learned of the identity of the addresses of the decision.

133. In the light of the foregoing and in view of the subject and nature of press releases and, in particular, their content, it is clear, in my opinion, that the injured party was able to obtain the information that would enable it to bring an action for damages solely with effect from the date of publication of the summary of the decision in the *Official Journal of the European Union*.

134. I note, in that regard, that, according to the observations of the Spanish Government and subject to verification by the referring court, it would appear that the Spanish courts interpret the limitation period in the context of actions for damages brought on the basis of Article 1902 of the Civil Code in such a way that the limitation period of one year does not begin to run until the publication of the summary of the Commission's decisions in the *Official Journal of the European Union*.

135. It is therefore my view that, in a case such as that in the main proceedings, the action is not time-barred.

2. The presumption of harm in the light of the principle of effectiveness in competition law

136. As regards the proof of the existence of harm by the applicant, such proof will have to be furnished in accordance with the ordinary rules of law since, as per my analysis of the third question referred for a preliminary ruling, Article 17(2) of Directive 2014/104 does not apply.

137. In the first place, I note that Article 16(1) of Regulation 1/2003, which codifies the case-law of the Court and in particular the judgment in *Masterfoods and HB*,[62] provides that, when national courts rule on agreements, decisions or practices under Article 101 or 102 TFEU which are already the subject of a Commission decision, those courts cannot take decisions running counter to the decision adopted by the Commission.

138. In my view, this would make it easier to establish the causal relationship between the infringement (which has already been established by the Commission decision) and the harm suffered without resorting to a retroactive application of Article 17(2) of Directive 2014/104.

139. In the second place, as mentioned in point 85 of the present opinion, nothing precludes national courts from applying presumptions relating to the burden of proof concerning the presence of harm that existed prior to the respective national implementing rules, whose conformity with the requirements of EU law must be assessed taking into account in particular the general principles of equivalence and effectiveness.[63]

140. In this connection, I note that, according to recital 11 of Directive 2014/104, in the absence of EU law (and therefore in cases falling outside the scope of that directive), national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 TFEU, including those concerning aspects not dealt with in that directive, such as the notion of a causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence.

62 See judgment of 14 December 2000 (C-344/98, EU:C:2000:689).

63 See recital 11 of Directive 2014/104.

141. This means that national rules 'should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the [FEU Treaty]', such that the national court is afforded discretion and interpretative leeway in its estimate of the harm suffered. [64]

142. In the light of the foregoing, I propose that the first question is answered to the effect that Article 101 TFEU is to be interpreted as not precluding an interpretation of a national rule that excludes the retroactive application of the five-year period for bringing an action and of the rebuttable presumption of harm caused by cartel infringements, as provided for respectively in Article 10(3) and Article 17(2) of Directive 2014/104. However, Article 101 TFEU and the principle of effectiveness require the national legislation governing actions for damages to provide that the limitation period starts to run only from the date of publication of the summary of the Commission decision in the *Official Journal of the European Union*.

V. Conclusion

143. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Audiencia Provincial – León (Provincial Court, Léon, Spain) for a preliminary ruling as follows:

(1) Article 101 TFEU is to be interpreted as not precluding an interpretation of a national rule that excludes the retroactive application of the five-year period for bringing an action and of the rebuttable presumption of harm caused by cartel infringements, as provided for respectively in Article 10(3) and Article 17(2) of Directive 2014/104 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. However, Article 101 TFEU and the principle of effectiveness require the national legislation governing actions for damages to provide that the limitation period starts to run only from the date of publication of the summary of the European Commission decision in the *Official Journal of the European Union*.

(2) Article 22(2) of Directive 2014/104 is to be interpreted as meaning that Article 10 of that directive does not apply to an action for damages which, although brought after that directive and the national implementing measures entered into force, concerns facts occurring and penalties imposed before those provisions entered into force.

(3) Article 22(1) of Directive 2014/104 is to be interpreted as not precluding the application of national implementing measures adopted in order to comply with Article 17(1) of that directive, which empowers national courts to estimate the amount of the harm, to harm suffered on account of an infringement of competition law which ended prior to the entry into force of the national implementing legislation in the context of an action for damages brought after the entry into force of the national implementing measure. Article 22(1) of that directive is to be interpreted as precluding the application the application of national legislation adopted to implement Article 17(2) of that directive, which lays down a rebuttable presumption of harm caused by cartels to infringements committed before the entry into force of the national implementing legislation in the context of an action for damages brought after the entry into force of the national implementing measure.

[64] See recital 11 of Directive 2014/104.