Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

12 January 2023 *

(Reference for a preliminary ruling – Competition – Abuse of a dominant position – Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – Directive 2014/104/EU – Articles 5 and 6 – Disclosure of evidence – Evidence in a competition authority's file – Proceedings relating to an infringement of competition rules pending before the European Commission – National proceedings relating to an action for damages with regard to the same infringement – Conditions for the disclosure of evidence)

In Case C-57/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší soud (Supreme Court, Czech Republic), made by decision of 16 December 2020, received at the Court on 1 February 2021, in the proceedings

RegioJet a.s.

v

České dráhy a.s.,

intervening party:

Česká republika, Ministerstvo dopravy,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 February 2022,

after considering the observations submitted on behalf of:

– RegioJet a.s., by O. Doležal, advokát,

* Language of the case: Czech.

– České dráhy a.s., by J. Kindl, S. Mikeš and K. Muzikář, advokáti,

– the Greek Government, by K. Boskovits, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. Sclafani, avvocato dello Stato,

– the European Commission, by B. Ernst, P. Němečková and C. Zois, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(1) and (4), of Article 6(5)(a) and of Article 6(7) and (9) 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 (OJ 2014 L 349, p. 1).

2 The request has been made in proceedings between RegioJet a.s. and České dráhy a.s. concerning RegioJet's request for the disclosure of evidence in an action for compensation for the damage allegedly suffered by that company as a result of anticompetitive conduct by České dráhy.

Legal context

European Union law

Regulation (EC) No 1/2003

3 Recitals 7 and 21 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) state that:

'(7) National courts have an essential part to play in applying the [EU] competition rules. When deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles [101] and [102 TFEU] in full.

…

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the [European] Commission. This is relevant for all courts of the Member States that apply Articles [101] and [102 TFEU], whether applying these rules in lawsuits between private parties, acting as

public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of [EU] competition law. …'

4 Article 2 of that regulation, entitled 'Burden of proof', provides:

'In any national or [EU] proceedings for the application of Articles [101 and 102 TFEU], the burden of proving an infringement of Article [101](1) or of Article [102 TFEU] shall rest on the party or the authority alleging the infringement. …'

5 Article 5 of that regulation is worded as follows:

'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.'

6 Chapter III of that regulation concerns the decisions that the Commission is to adopt pursuant to Articles 101 and 102 TFEU. Those decisions may consist in the finding and termination of an infringement (Article 7), the adoption of interim measures (Article 8), decisions making commitments binding (Article 9) and, lastly, a finding that Articles 101 and 102 TFEU are not applicable (Article 10).

7 Article 11 of Regulation No 1/2003, entitled 'Cooperation between the Commission and the competition authorities of the Member States', provides in paragraphs 1 and 6:

'1. The Commission and the competition authorities of the Member States shall apply the [EU] competition rules in close cooperation.

…

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102 TFEU]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.'

8 Article 16 of that regulation, entitled 'Uniform application of [EU] competition law', provides:

'1. When national courts rule on agreements, decisions or practices under Article [101] or Article [102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article [267 TFEU].

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article [101] or Article [102 TFEU] which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.'

Regulation (EC) No 773/2004

9 Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008 L 171, p. 3) provides:

'The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation … No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.'

Directive 2014/104

10 Recitals 6, 15, 21, 23 and 25 to 28 of Directive 2014/104 state:

'(6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. …

…

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a

national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation … No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

…

(21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority. …

…

(23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing "fishing expeditions", i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

…

(25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law and sent to the parties to those proceedings (such as a "Statement of Objections") or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation … No 1/2003, with the exception of decisions on interim measures.

(26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. … To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. …

(27) The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.

(28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority ("pre-existing information").'

11 According to Article 2(17) of Directive 2014/104, 'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority.

12 Article 5 of that directive, entitled 'Disclosure of evidence', provides:

'1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

…

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

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

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

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

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

…

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

13 Article 6 of that directive, entitled 'Disclosure of evidence included in the file of a competition authority', states:

'1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

…

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

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

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

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

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

(a) leniency statements; and

(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

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

…

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.'

14 Article 22 of Directive 2014/104, 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 [seised] prior to 26 December 2014.'

Czech law

Law No 143/2001

15 Zákon č. 143/2001 Sb. o ochraně hospodářské soutěže (Law No 143/2001 on the protection of competition), in the version applicable to the main proceedings ('Law No 143/2001'), states, in Paragraph 1(1) thereof, that it 'shall organise the protection of competition on the market for products and services … against any practice which prevents, restricts, distorts or threatens competition'.

16 Paragraph 21ca(2) of Law No 143/2001 provides, in essence, that the documents and information which are prepared and filed for the purpose of administrative proceedings pending before the national competition authority may be disclosed to the public authorities only after the closure of the investigation or after the final decision of the national competition authority on the closure of the administrative proceedings.

Law No 262/2017

17 Zákon č. 262/2017 Sb. o náhradě škody v oblasti hospodářské soutěže (Law No 262/2017 on damages in the area of competition; 'Law No 262/2017') is intended to transpose Directive 2014/104 into Czech law.

18 Paragraph 2(2)(c) of that law states that confidential information protected by an obligation of confidentiality includes, inter alia, 'supporting documents and information which have been provided specifically for the purpose of the administrative proceedings or the exercise of surveillance by the [national] competition authority'.

19 It is apparent, in essence, from Paragraph 10(1) of that law that prior to the initiation of proceedings in relation to an action for damages for harm caused by a restriction of competition, the President of the Chamber – at the request of the party bringing that action, who is to demonstrate the plausibility of his or her right to compensation for the damage caused by the restriction of competition to a degree of certainty that corresponds to the facts available, where that is deemed to be necessary and proportionate to the exercise by the claimant of the right to compensation for damage – is to order the disclosure of certain documents by persons having those documents in their possession and which make it possible to investigate the situation.

20 Paragraph 15(4) of that law provides that 'the obligation to disclose confidential information, referred to in Paragraph 2(2)(c), may be imposed at the earliest only after the competition authority's decision on the closure of the administrative proceedings has become final'.

21 Paragraph 16(1)(c) of Law No 262/2017 provides, in essence, that, in the event of a request for access to documents containing confidential information and included in the file of the national competition authority, the President of the Chamber is to examine whether their disclosure would compromise the effective application of the competition rules. It is apparent from Paragraph 16(3) that documents containing confidential information may be disclosed only after the closure of the investigation or after the final decision of the national competition authority on the closure of the administrative proceedings.

22 Under Paragraph 18(1) of that law, the President of the Chamber may, under the conditions laid down in Paragraphs 10 and 16 of that law, order the disclosure of evidence even after the opening of the main proceedings.

23 Paragraph 27(1) of that law provides that in proceedings concerning an action for damages the court is bound by the decision of another court, of the Úřad pro ochranu hospodářské soutěže (Office for the protection of competition, Czech Republic; 'the ÚOHS'), and of the Commission on the existence of a restriction of competition and the identity of the person responsible.

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 On 25 January 2012, the ÚOHS initiated administrative proceedings of its own motion concerning a possible abuse of a dominant position by the national railway carrier České dráhy, which is owned by the Czech State.

25 In 2015, RegioJet, an undertaking which offers, inter alia, rail passenger transport services on the Prague-Ostrava (Czech Republic) route, brought an action for damages against České dráhy before the Městský soud v Praze (Prague City Court, Czech Republic), seeking compensation for the harm caused by the conduct of that company that was allegedly contrary to the rules on competition.

26 On 10 November 2016, the Commission decided to initiate formal investigation proceedings under Article 2(1) of Regulation No 773/2004 in order to assess alleged predatory pricing by České dráhy in connection with the provision of rail passenger transport services in the Czech Republic, in particular on the Prague-Ostrava route (Case AT.40156 – Czech Rail).

27 On 14 November 2016, the ÚOHS stayed its administrative proceedings without, however, closing them formally, on the ground that the Commission had itself initiated proceedings which, in substantive terms, concerned the same conduct that was the subject matter of the administrative proceedings.

28 On 11 October 2017, RegioJet, in connection with its action for damages, submitted a request under the provisions of Law No 262/2017 for the disclosure of documents. RegioJet, inter alia, requested the disclosure of documents which it assumed to be in the possession of České dráhy, in particular itemised reports, reports concerning public railway transport, and the accounts of that company's commercial segment.

29 Relying on Paragraph 21ca(2) of Law No 143/2001, the ÚOHS stated that the requested documents that were available to it in the context of the administrative proceedings could not be disclosed until those administrative proceedings had been definitively closed. It stated in addition that the other documents that had been requested fell within the category of documents that constituted a comprehensive set of documents and refused to disclose them on the ground that that might diminish the effectiveness of the policy of prosecuting infringements of competition law.

30 On 26 February 2018, in response to a request of 12 January 2018 by the Městský soud v Praze (Prague City Court), the Commission stated that when the court came to decide on the disclosure of evidence it should, for the sake of protecting the legitimate interests of all the parties to the proceedings and those of third parties, apply, inter alia, the principle of proportionality and take measures to safeguard such information. It also stated that pursuant to Article 16(1) of Regulation No 1/2003 national courts, when ruling on issues falling within the scope of Articles 101 and 102 TFEU, could not take decisions running counter to those adopted by the Commission. National courts also had to avoid giving decisions which would conflict with that contemplated by that institution in proceedings it has initiated. To that effect, the national court was asked to assess whether it was necessary to stay its proceedings.

31 On 14 March 2018, the national court in question ordered České dráhy to disclose a set of documents by placing them in the file. Those documents contained, first, information specifically prepared by that company for the purpose of proceedings before the ÚOHS and, second,

information which was required to be created and kept outside the context of those proceedings, such as train line records, quarterly reports on public railway transport and the list of routes operated by České dráhy. However, that court dismissed RegioJet's requests for the disclosure of the accounts of České dráhy's commercial segment, including the correspondence codes by route and train type, and also the disclosure of the minutes of České dráhy's management board meetings for September and October 2011.

32 By order of 19 December 2018, that court decided, pursuant to Paragraph 27(1) of Law No 262/2017, to stay the substantive proceedings on the action for damages until the closure of the proceedings referred to in paragraph 26 above.

33 For their part, RegioJet and České dráhy both appealed against the order of 14 March 2018 to the Vrchní soud v Praze (High Court, Prague, Czech Republic). By order of 29 November 2019, that court upheld the order of 14 March 2018. With a view to ensuring the protection of the evidence disclosed, it adopted measures to place the evidence under sequestration and disclose it only to the parties, their representatives and experts; in each case, that would always be on the basis of a reasoned, written request and with the prior agreement of the judge hearing the case according to the distribution of work.

34 České dráhy lodged an appeal on a point of law against the order of 29 November 2019 before the referring court, the Nejvyšší soud (Supreme Court, Czech Republic).

35 In those circumstances the Nejvyšší soud (Supreme Court) decided to stay the proceedings and to put the following questions to the Court of Justice for a preliminary ruling:

'(1) Is an approach whereby a court decides to impose the obligation to disclose evidence, even though proceedings are at the same time being conducted by the Commission for the purposes of the adoption of a decision pursuant to Chapter III of [Regulation No 1/2003], due to which proceedings concerning an action for damages caused by a breach of competition legislation have been suspended on that ground by a court, consistent with the interpretation of Article 5(1) of [Directive 2014/104]?

(2) Does the interpretation of Article 6(5)(a) and Article 6(9) of [Directive 2014/104] preclude national legislation that restricts the disclosure of all information submitted in the course of proceedings at the request of a competition authority, even if the information concerned is such that a party is obliged to create and keep (or creates and keeps) it on the basis of other legislation, regardless of the proceedings concerning a breach of the competition legislation?

(3) Can the closure of proceedings "otherwise", within the meaning of Article 6(5) of [Directive 2014/104], consist of the fact that a national competition authority suspended its proceedings as soon as the … Commission commenced proceedings for the purposes of adopting a decision pursuant to Chapter III of [Regulation No 1/2003]?

(4) Having regard to the purpose and goals of [Directive 2014/104], is an approach by a national court whereby it analogously applies national legislation implementing Article 6(7) of [that directive] to [categories] of information such as information pursuant to Article 6(5) of [that directive], that is to say, it decides to order the disclosure of evidence with the proviso that the question whether the evidence contains information that was prepared by a natural or legal

person specifically for the proceedings of a competition authority (within the meaning of Article 6(5) of [that directive]) is to be examined only after the evidence is disclosed to the court, compliant with Article 5(1) of [that directive] in conjunction with Article 6(5) thereof?

(5) If the reply to the previous question is in the affirmative, must Article 5(4) of [Directive 2014/104] be interpreted such that effective measures for the protection of confidential information adopted by a court may, before a final evaluation by the court as to whether the evidence disclosed, or any part thereof, falls into the category of evidence under Article 6(5)(a) of [that directive], exclude access to the disclosed evidence by the applicant or other parties to the proceedings and their representatives?'

Consideration of the questions referred

The applicability ratione temporis *of Articles 5 and 6 of Directive 2014/104*

36 It should be recalled at the outset, as regards the application *ratione temporis* of Directive 2014/104, that that directive contains a special provision which explicitly states the conditions for the temporal application of its substantive and non-substantive provisions (judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 27 and the case-law cited).

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

38 Second, under Article 22(2) of Directive 2014/104, Member States are to ensure that any national measures other than those referred to in Article 22(1) of that directive do not apply to actions for damages of which a national court was seised prior to 26 December 2014.

39 Therefore, in order to determine the temporal applicability of the provisions of Directive 2014/104, it is necessary to establish, in the first place, whether or not the provision concerned constitutes a substantive provision, it being specified that that question must be assessed, in the absence of a reference to national law in Article 22 of Directive 2014/104, in the light of EU law and not in the light of the applicable national law (judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 30 and the case-law cited).

40 In that regard, first, it should be noted that Articles 5 and 6 of that directive are intended to give national courts the power to order the defendant or a third party, under certain conditions, to disclose relevant evidence which lies in their control and, as a result, those provisions determine the course of proceedings relating to an action for damages.

41 In so far as they require the Member States to confer particular powers on those courts when examining disputes relating to actions for damages which seek compensation for damage suffered as a result of infringements of competition law, those provisions seek to remedy the information asymmetry which characterises, in principle, those disputes to the detriment of the injured party, as stated in recital 15 of Directive 2014/104, and which makes it more difficult for that person to obtain the information necessary for bringing an action for damages (see, to that effect, judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 32 and the case-law cited).

42 Second, since the specific purpose of Articles 5 and 6 of Directive 2014/104 is to make it possible for the claimant in such disputes to counteract the deficit in the information that it has, they do indeed have the effect of making available to that party, upon an application to the national court to that end, advantages which it did not previously possess. The fact remains that the subject matter of those articles relates only to the procedural measures applicable before the national courts, conferring on them particular powers in order to establish the facts relied on by the parties to disputes concerning actions for damages in respect of such infringements and does not therefore directly affect the legal situation of those parties, in that those provisions do not relate to the constituent elements of non-contractual civil liability.

43 In particular, it does not appear that Articles 5 and 6 of Directive 2014/104 impose new substantive obligations on any of the parties to the dispute concerned, which would allow those provisions to be considered substantive within the meaning of Article 22(1) of that directive (see, by analogy, judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 34 and the case-law cited).

44 It must therefore be concluded that Articles 5 and 6 of Directive 2014/104 are not among the substantive provisions of that directive, within the meaning of Article 22(1) thereof, and that they therefore number among the other provisions covered by Article 22(2) of that directive, being, in the present case, procedural provisions, as the Advocate General stated, in essence, in points 29 and 34 of his Opinion.

45 In the second place, it is apparent from Article 22(2) of Directive 2014/104 that the Member States enjoyed a measure of discretion in deciding, when transposing that directive, whether the national rules intended to transpose the directive's procedural provisions would apply to actions for damages brought after 26 December 2014 but before the date of transposition of that directive or to those brought, at the latest, before the expiry of the period prescribed for its transposition, namely before 27 December 2016 (judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 28).

46 In the present case, it is apparent from Law No 262/2017 that the Czech legislature decided that the national provisions intended to transpose the procedural provisions of Directive 2014/104 apply, directly and unconditionally, also to actions brought before that date of transposition but after 26 December 2014. The action for damages for which the request for the disclosure of documents was submitted was brought on 25 November 2015.

47 It follows from the foregoing considerations that Articles 5 and 6 are applicable *ratione temporis* in the main proceedings and that it is therefore necessary to answer the questions referred for a preliminary ruling relating to those provisions.

Substance

Preliminary observations

48 It must be observed that the full effectiveness of the rules on competition laid down in Articles 101 and 102 TFEU and, in particular, the practical effect of the prohibitions set out in those provisions include the possibility for any individual to claim damages for loss caused to him or her by a contract or by conduct liable to restrict or distort competition, within the meaning of Article 101(1) TFEU, or by conduct that constitutes abuse of a dominant position, within the

meaning of Article 102 TFEU (see, to that effect, judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 26, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 33).

49 As stated in recital 7 of Regulation No 1/2003, national courts have an essential part to play in applying the competition rules. When deciding disputes between private individuals, they protect the subjective rights under EU law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States.

50 While those courts, when ruling on actions for damages in a situation where there is no final decision by a competition authority relating to the same circumstances (known as '*stand-alone*' actions), must in principle decide indirectly on the existence of an infringement of the competition rules, namely on there being agreements, decisions or practices for the purpose of Article 101(1) and Article 102 TFEU, civil actions cannot replace the national and EU proceedings for the enforcement of Articles 101 and 102 TFEU, which are conducted in the public sphere and which provide in particular, as stated in Article 2 of Regulation No 1/2003, that the burden of proving an infringement of Article 101(1) or of Article 102 TFEU is to rest on the party or the authority alleging the infringement.

51 Consequently, an interpretation of the provisions of Directive 2014/104 on the disclosure of evidence cannot have the effect of circumventing the principles governing the burden of proving anticompetitive conduct where it appears that the subject matter of the action in question is not strictly compensatory.

52 In adopting Directive 2014/104, the EU legislature in fact proceeded specifically from the consideration, referred to in recital 6 of that directive, that the two tools which are intended to ensure effective application of the competition rules – constituted respectively by the enforcement of the EU competition rules by the public authorities (*public enforcement*) and actions for damages for infringement of those rules in the private sphere (*private enforcement*) – are required to interact in a coherent manner, including in relation to the arrangements for access to documents held by competition authorities.

53 As regards private actions for damages for infringement of the competition rules, the provisions applicable to the disclosure of documents set out in Chapter II (Articles 5 to 8) of Directive 2014/104 reflect a balance between, on the one hand, the effectiveness of actions pursued by the competition authorities and, on the other, the effectiveness of actions for compensation brought by persons who consider that they have suffered injury as a result of anticompetitive practices.

54 Consequently, while Directive 2014/104, given the asymmetry of information which often characterises litigation on actions for damages to compensate the injury suffered as a result of infringements of competition law, seeks to improve access to evidence for the victims of anticompetitive conduct, which they undoubtedly need in order to show that their claims for compensation are well founded, it also clearly defines that access.

55 In the first place, Article 5 of Directive 2014/104 sets out a number of general rules on the disclosure of evidence in proceedings relating to actions for damages for infringements of competition law.

56 In the second place, Article 6 of that directive lays down rules that are specific to the disclosure of evidence contained in the file of a competition authority, which in particular demonstrate a level of protection that differs according to the information requested and the need to preserve the effectiveness of proceedings conducted in the public sphere. That provision distinguishes between several categories of evidence.

57 As regards, first of all, evidence relating to leniency statements and settlement submissions ('evidence on the blacklist'), Article 6(6) of Directive 2014/104 provides that Member States are to ensure that national courts cannot at any time order a party or a third party to disclose that evidence.

58 Next, as regards information that was prepared by a natural or legal person specifically for administrative proceedings initiated by a competition authority, information that that latter authority has drawn up and sent to the parties in the course of those proceedings, and settlement submissions that have been withdrawn, Article 6(5) of Directive 2014/104 provides that national courts may order the disclosure of those categories of evidence ('evidence on the grey list') only after a competition authority, by adopting a decision or otherwise, has closed its proceedings.

59 Lastly, in accordance with Article 6(9) of Directive 2014/104, the disclosure of evidence in the file of a competition authority that does not fall into any of the categories referred to previously ('the evidence on the white list') may be ordered in actions for damages at any time, without prejudice to that article.

60 In the third place, it is important to observe that, as is apparent from Article 5(3) and Article 6(4), Directive 2014/104 thus establishes a specific set of rules that is applicable to requests for the disclosure of evidence, meaning that those requests are not automatically granted but are assessed in terms of the principle of proportionality, taking into account the circumstances and legitimate interests involved. The national court dealing with the matter is therefore called upon to carry out a rigorous review of proportionality, while taking account, as appropriate, of the views which the competition authority concerned may submit to that court, in accordance with Article 6(11) of Directive 2014/104.

61 It is in the light of those preliminary remarks that it is necessary to answer the questions raised by the referring court.

The first question

62 By its first question, the referring court asks, in essence, whether Article 5(1) of Directive 2014/104 must be interpreted as precluding a national court from ordering the disclosure of evidence for the purpose of national proceedings brought before that court which concern an action for damages relating to an infringement of competition law, even though proceedings in respect of the same infringement are pending before the Commission with a view to the adoption of a decision pursuant to Chapter III of Regulation No 1/2003, which have led to the national court staying the proceedings initiated before it.

63 At the outset, it should be observed that under Article 11(6) of Regulation No 1/2003 the initiation of proceedings by the Commission is to relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102 TFEU in respect of the same infringements.

64 By contrast, in accordance with Article 16(1) of that regulation, a national court considering an action for damages is not automatically relieved of its jurisdiction to apply Articles 101 and 102 TFEU and to rule on the infringements being examined by the Commission as a result of the initiation of proceedings by that institution. That provision provides that national courts must in fact merely refrain from taking decisions running counter to a decision adopted by the Commission and, in addition, avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated; to that effect, they are to assess whether it is necessary to stay the proceedings.

65 Furthermore, it is clear from a reading of the provisions of Directive 2014/104 as a whole that that directive likewise does not require the national courts of the Member States to stay proceedings brought before them concerning actions for damages for infringements of the competition rules owing to the fact that the Commission has initiated proceedings in respect of the same infringements.

66 While it is true, as observed in paragraph 52 above, that the enforcement of EU competition rules by the public authorities (*public enforcement*) and actions for damages for infringement of those rules in the private sphere (*private enforcement*) must interact in a coherent manner, including in relation to the arrangements for access to documents held by competition authorities, it nevertheless remains the case that those proceedings are complementary and that they may in principle be carried out simultaneously.

67 In that regard, the provisions of Article 6(5) and (9) of Directive 2014/104 demonstrate that proceedings relating to an action for damages may be pursued despite the fact that proceedings are ongoing before a competition authority. Indeed, while the national courts may order the disclosure of evidence on the grey list only after such an authority has closed its proceedings (Article 6(5) of that directive), the disclosure of evidence on the white list may be ordered 'in actions for damages at any time' (Article 6(9) of that directive).

68 On that background, the question thus arises whether Directive 2014/104 precludes a national court from ordering the disclosure of evidence under national provisions intended to transpose Articles 5 and 6 of that directive despite the fact that national proceedings brought in an action for damages have been stayed on the ground that proceedings have been initiated before the Commission.

69 In that regard, it must be found that that directive does not automatically prevent a national court from ordering the disclosure of evidence in an ongoing action for damages for an alleged infringement of competition rules, although proceedings concerning the same infringement are being conducted at the same time by the Commission and the national court has stayed the proceedings on the action for damages while awaiting the end of the Commission's proceedings.

70 When a national court decides to order the disclosure of evidence for the purpose of proceedings relating to an action for damages which have been suspended as a result of the initiation of proceedings by the Commission, that court is not in principle taking a decision which may conflict with the decision contemplated by the Commission in those proceedings, within the meaning of Article 16(1) of Regulation No 1/2003.

71 That being said, while the national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, they must do so while remaining compliant with the requirements arising from Directive 2014/104.

72 Accordingly, the national courts seised, which are required to limit the disclosure of evidence to that which is strictly relevant, proportionate and necessary, must ensure that a decision on the disclosure of evidence does not unduly interfere with an ongoing investigation by a competition authority over an infringement of competition law. Those courts are therefore called upon to carry out a thorough examination of the request submitted to them as regards the relevance of the evidence requested, the link between that evidence and the claim for damages submitted, whether that evidence is sufficiently precise and as regards its proportionality.

73 As stated in recital 23 of that directive, the requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', namely non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings.

74 In that regard, Article 6(4)(b) of Directive 2014/104 states that when national courts examine the proportionality of an order to disclose information, they are also to consider whether 'the party requesting disclosure is doing so in relation to an action for damages before a national court'.

75 It may be inferred from this that when assessing the proportionality of an order for the disclosure of evidence, an assessment which must be carried out carefully, particularly when it concerns evidence in the file of a competition authority, a national court must also take into account the fact that the proceedings relating to the action for damages have been stayed.

76 Although an order to disclose evidence for the purpose of proceedings relating to an action for damages does not, a priori, fall within the scope of the 'decisions' referred to in Article 16(1) of Regulation No 1/2003, both the principle of sincere cooperation, laid down in Article 4(3) TEU, and also the objective of the effective and uniform application of EU competition law require that a national court take account of the proceedings pending before the Commission when adopting any decision or measure in the course of proceedings in an action for damages, especially where that decision or measure is related to a finding of an identical or similar infringement of competition law.

77 Consequently, when a court orders the disclosure of evidence by the parties or by third parties in an action for damages which has been stayed owing to the fact that the Commission has initiated investigation proceedings, that court must ensure that that disclosure, which must follow a request that is sufficiently circumscribed and substantiated, is necessary and proportionate for the purpose of pursuing that action.

78 Having regard to the foregoing considerations, the answer to the first question is that Article 5(1) of Directive 2014/104 must be interpreted as not precluding a national court from ordering the disclosure of evidence for the purpose of national proceedings brought before that court which concern an action for damages relating to an infringement of competition law, even though proceedings in respect of that infringement are pending before the Commission with a view to the adoption of a decision pursuant to Chapter III of Regulation No 1/2003, which have led to the national court staying the proceedings pending before it. It is, however, for the national court to ensure that the disclosure of the evidence requested at that stage of the proceedings, which must fulfil the conditions laid down in Articles 5 and 6 of Directive 2014/104, does not go beyond what is necessary in the light of the claim for damages brought before it.

The third question

79 By its third question, which it is appropriate to examine before the second question, the referring court asks, in essence, whether Article 6(5) of Directive 2014/104 must be interpreted as meaning that a stay by a national competition authority of administrative proceedings that it has initiated, on the ground that the Commission has opened proceedings under Chapter III of Regulation No 1/2003, may be equated to a closing of those administrative proceedings by that authority 'by adopting a decision or otherwise', within the meaning of that provision.

80 In that regard, it should be borne in mind that under Article 6(5) of that directive, national courts may order the disclosure of evidence on the grey list 'only after a competition authority, by adopting a decision or otherwise, has closed its proceedings'.

81 A literal interpretation of that provision, the context in which it appears and the objectives which it pursues indicate that a stay of proceedings relating to an action for damages, such as that at issue in the main proceedings, cannot be equated to a closing of the proceedings.

82 First of all, in its literal sense, a 'stay' refers to an interim ruling by the court. The proceedings have therefore not been closed since they resume once the reason for the stay is not present.

83 That is confirmed by recital 25 of Directive 2014/104, which provides examples of decisions that close proceedings, by reference, inter alia, to decisions that may be adopted by the Commission in accordance with Chapter III of Regulation No 1/2003. That recital thus states that proceedings may be closed as a result of the adoption, for instance, of a decision under Article 5 of Regulation No 1/2003, 'with the exception of decisions on interim measures'.

84 Furthermore, when Directive 2014/104 refers to the closing of proceedings by adopting a decision or 'otherwise', what is meant is measures which, as regards their substance and purpose, are adopted when a national competition authority decides, in the light of the information gathered in the course of the proceedings, that it is possible or even necessary to make a determination and close them.

85 Consequently, the fact that a national competition authority stays its administrative proceedings, even if such a stay was prompted by the initiation of proceedings by the Commission, cannot be equated to the closing 'otherwise' of those administrative proceedings by that authority.

86 Next, the staying of administrative proceedings by a national competition authority pursuant to Article 11(6) of Regulation No 1/2003 must be considered within the context of the rules governing the parallel powers, first of the Commission and, second, of the national competition authorities.

87 As the Court has held, the opening of a proceeding by the Commission does not permanently and definitively remove the national competition authorities' power to apply national legislation on competition matters, since the power of the national competition authorities is restored once the proceeding initiated by the Commission is concluded (judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraphs 79 and 80).

88 Moreover, by virtue of Article 16(2) of Regulation No 1/2003, the competition authorities of the Member States retain their power to act, both in the framework of EU law and national competition law, even if the Commission has itself already taken a decision, on condition that

they do not take decisions which would contradict the decision adopted by the Commission (see, to that effect, judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraphs 84 to 86).

89 A stay of administrative proceedings until the Commission has closed the investigation in the case concerned does not therefore amount to a closing of those proceedings in the sense that a final act concerning the infringement in question has been adopted, but must be regarded as an interim measure. Accordingly, if the Commission decides to close its proceedings without giving a decision on the infringement, the national competition authority concerned may, in principle, decide to reopen its proceedings.

90 Lastly, as regards the objectives pursued by Article 6(5) of Directive 2014/104, it should be observed that, as is apparent from recital 25 of that directive, the protection applicable to the evidence on the grey list is intended to ensure that a disclosure of documents does not unduly interfere with an ongoing investigation by a national competition authority concerning an infringement of EU or national competition law. Allowing the disclosure of evidence on the grey list after a stay of proceedings ordered by a national competition authority, but during an ongoing investigation by the Commission, could undermine, and undermine seriously, the effectiveness of that Commission investigation and, therefore, the objectives of that directive.

91 Having regard to all the foregoing considerations, the answer to the third question is that Article 6(5) of Directive 2014/104 must be interpreted as meaning that the staying by a national competition authority of administrative proceedings that it has initiated, on the ground that the Commission has opened proceedings under Chapter III of Regulation No 1/2003, cannot be equated to a closing of those administrative proceedings by that authority 'by adopting a decision or otherwise', within the meaning of that provision.

The second question

92 As a preliminary point, it should be borne in mind that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may not only have to reformulate the question referred to it, but also to consider provisions of EU law which the national court has not referred to in its questions (judgment of 13 October 2022, *Herios*, C-593/21, EU:C:2022:784, paragraph 19 and the case-law cited).

93 In that regard, although the second question referred for a preliminary ruling, as set out by the referring court, explicitly refers only to the interpretation of Article 6(5) and (9) of Directive 2014/104, that court seeks to ascertain, as is apparent from the terms in which its request for a preliminary ruling is couched, whether that directive precludes the adoption of national legislation that broadens the range of information that is excluded from disclosure in the course of proceedings before a competition authority. Since the discretion enjoyed by the Member States with regard to the transposition of Articles 5 and 6 of that directive is circumscribed by Article 5(8) thereof, it is necessary to reformulate the second question referred for a preliminary ruling and extend its scope to that latter provision.

94 Consequently, it must be held that by its second question the referring court asks, in essence, whether Article 5(8) and Article 6(5)(a) and (9) of Directive 2014/104 must be interpreted as precluding national legislation which temporarily restricts, under Article 6(5) of that directive, not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority, but also that of all information 'submitted' for that purpose.

95 In that regard, it is necessary, first, to rule on the admissibility of the second question, which is challenged by České dráhy, which argues that that question is premature and hypothetical since, to date, the Czech national courts have not yet ruled on whether the documents whose disclosure by České dráhy as evidence is sought had been specifically prepared for the proceedings initiated by the ÚOHS or for those conducted by the Commission.

96 In that regard, it is sufficient to recall that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by 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 give a useful answer to the questions submitted to it (judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraphs 27 and 28).

97 Here, that is not the case. The answer to the second question referred by the national court seeks to facilitate its identification of evidence which does not fall within the grey list but comes within the scope of the white list and which, as appropriate, may be the object of a request for the disclosure of documents under the national provisions transposing Directive 2014/104, despite the fact that the competition authority has not closed its proceedings.

98 It follows that the second question is admissible.

99 Second, as to substance, the referring court asks the Court to rule on the extent of the information which enjoys the temporary protection provided for in Article 6(5) of Directive 2014/104 as regards evidence on the grey list.

100 The referring court observes, in that context, that it is apparent from the wording of Paragraph 16(3) of Law No 262/2017, read in conjunction with Paragraph 2(2)(c) thereof, that the limit in time that is applicable to the disclosure of evidence during the period in which proceedings are being conducted by a competition authority applies to all the information submitted to the competition authority for the purpose of those proceedings, and not only to information 'prepared specifically' for those proceedings.

101 In that regard, it is unambiguously clear from the wording of Article 6(5) of Directive 2014/104, read in the light of recital 25 thereof, that the temporary protection granted under that provision does not concern all information expressly submitted, either voluntarily or at the request of the competition authority, for the purpose of proceedings initiated by that authority, but only information specifically prepared for such proceedings.

102 That finding is confirmed by a systemic interpretation of the provision at issue.

103 In that regard, reference should be made, in the first place, to Article 6(9) of Directive 2014/104, concerning evidence on the white list, by which the disclosure of evidence in the file of a competition authority that is not on the grey or black list may be ordered in actions for damages

at any time. Recital 28 of that directive clarifies the scope of that provision in that it uses the terms 'evidence that exists independently of the proceedings of a competition authority ("pre-existing information")' to illustrate evidence whose disclosure is not automatically prohibited by that directive by virtue of its being included on the grey or black list.

104 In the second place, it should also be observed that Article 2(17) of that directive defines the concept of 'pre-existing information' as 'evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority'.

105 It follows from that definition that evidence in such a file is also capable of being included on the white list. In particular, information that a party to the proceedings is obliged to create and keep (or creates and keeps) on the basis of other legislation, regardless of the proceedings concerning a breach of competition law, constitutes pre-existing information whose disclosure may, in principle, be ordered at any time by the national courts since it concerns evidence which falls within the white list.

106 In the third place, reflecting the idea that it is appropriate, first, to limit the protection afforded to the evidence on the grey and black lists to cases in which that protection would be actually necessary and, accordingly, appropriate from the perspective of the objectives pursued by Directive 2014/104, and, second, to allow reasonably broad access to evidence, Article 6(8) of that directive provides that if only some parts of the evidence requested are on the black list, the remaining parts must, depending on the category under which they fall, be released in accordance with the relevant paragraphs of Article 6 of that directive.

107 In the fourth place, it is apparent from Article 5(8) of Directive 2014/104, which permits Member States to adopt rules which would lead to wider disclosure of evidence, without prejudice to Article 5(4) and (7) and to Article 6 of that directive, that the Member States are not authorised, when transposing Directive 2014/104, to qualify the conditions under which evidence is classified as being on the grey, black or white lists.

108 In particular, allowing Member States to extend the scope of the information falling within the grey list would lead to a more limited disclosure of evidence, contrary to the logic of Article 5(8) of that directive. The harmonisation objective of that directive would thus be undermined if the Member States were able to introduce more restrictive rules in relation to the disclosure of evidence than those laid down in Articles 5 and 6 of that directive.

109 Consequently, national legislation that temporarily limits the disclosure, at the request of a competition authority or voluntarily, of all information submitted in the course of proceedings, including pre-existing information, is not compliant with Article 6(5)(a) and (9) of Directive 2014/104.

110 That conclusion does not imply that a court dealing with an application for the disclosure of evidence in proceedings relating to an action for damages for infringement of the competition rules is necessarily required to order the disclosure of all the documents which have not been specifically prepared for proceedings pending before the competition authority.

111 It is in every case for the national court, even more so when proceedings have been stayed pending the closure of the administrative proceedings initiated by a competition authority, to ensure that the disclosure of the evidence requested at that stage of the proceedings, which must fulfil the conditions laid down in Articles 5 and 6 of Directive 2014/104, does not go beyond what is necessary in the light of the claim for damages brought before it.

112 It follows from all the foregoing considerations that the answer to the second question is that Article 5(8) and Article 6(5)(a) and (9) of Directive 2014/104 must be interpreted as precluding national legislation which temporarily restricts, under Article 6(5) of that directive, not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority, but also that of all information 'submitted' for that purpose.

The fourth question

113 By its fourth question, the referring court asks, in essence, whether Article 5(1) of Directive 2014/104, read in conjunction with Article 6(5)(a) thereof, must be interpreted as meaning that those provisions do not preclude a national court from ruling on a request for the disclosure of evidence and ordering that evidence to be placed under sequestration, while postponing the examination of whether that evidence falls within the grey list in so far as it contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority' within the meaning of that latter provision, to a time when that court has access to that evidence.

114 Despite the reference to Article 6(7) of Directive 2014/104, the referring court ultimately seeks to ascertain whether a court may order the disclosure of evidence, which is governed by Article 5(1) of that directive, in order to assess whether that evidence contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority', within the meaning of Article 6(5)(a) of that directive.

115 In that regard, it must be borne in mind that in Article 6(7) of Directive 2014/104 the legislature provided, as regards evidence on the black list, for a mechanism of prior review so that a national court may access such evidence for the sole purpose of ensuring that its contents do indeed correspond to a 'leniency statement' or a 'settlement submission' as defined in Article 2(16) and (18) of that directive and that it therefore does actually concern evidence on the black list.

116 However, no such review mechanism is provided for with regard to the evidence on the grey list falling within the scope of Article 6(5) of Directive 2014/104. That is because, unlike the evidence on the black list, the protection afforded to evidence on the grey list is merely temporary.

117 In the present case, the question arises whether Directive 2014/104 precludes a national court from being able, on the basis of a possibility provided under the applicable national procedural law, which it is for the referring court to ascertain, to take measures in order to assess whether evidence whose disclosure is sought in support of an action for damages for an infringement of the competition rules, even though the proceedings conducted by the competition authority are still pending, does indeed fall within the grey list.

118 In the case in the main proceedings, it appears that the appeal court has ordered the disclosure of evidence while planning to carry out, on its own initiative, an examination of whether that evidence included evidence on the grey list, after disclosure of the evidence to the court but before its disclosure to the claimant following a reasoned request submitted by that latter party.

119 In this connection, it should be noted, as is also apparent from recital 21 of Directive 2014/104, that the purpose of the rules laid down in Article 6(5) of that directive, as regards evidence on the grey list, is to prevent a decision on the disclosure of evidence from unduly interfering with an ongoing investigation by a competition authority concerning an infringement of EU or national competition law.

120 It follows that the EU legislature carried out the exhaustive harmonisation provided for in that provision mainly in the interests of the public enforcement of competition law.

121 The pursuit of such an objective means that access to the evidence on the grey list is not granted to claimants or to other third parties before the competition authority has closed its proceedings.

122 On the other hand, that objective does not preclude a national court, in applying a national procedural instrument, from ordering the disclosure of evidence, including evidence which could fall within the grey list, with the sole intention of placing the documents concerned under sequestration, and disclosing them to the claimant on request only after the court has ascertained whether those documents did indeed contain evidence falling within that list.

123 Given the need to remedy the asymmetry of information and to ensure the effectiveness of the private enforcement of competition law, a need which underlies the adoption of Directive 2014/104, that directive in principle allows a national court to make use, under the applicable national procedural law, of such a national instrument in order, inter alia, to prevent excessive recourse to the exemption provided for in Article 6(5) of that directive.

124 That procedural instrument is capable of contributing to the effectiveness of claims for damages in the private sphere while maintaining the protection which must be afforded to evidence on the grey list until the competition authority has in some manner closed its proceedings.

125 That being said, the use of such an instrument must comply with the requirements arising from the principle of proportionality, as set out in Article 5(3) and Article 6(4) of Directive 2014/104.

126 In particular, account must be taken of the extent and cost of the disclosure of evidence, the relevance of the evidence whose disclosure has been sought for substantiating the merits of the claim for damages or, in addition, of whether the request for the disclosure of evidence in the competition authority's file has been set out in specific terms as regards the nature, purpose or contents of the documents concerned.

127 As noted in recital 23 of Directive 2014/104, it is necessary to avoid granting non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Particular attention should thus be paid to requests, which should therefore not be deemed to be proportionate, for the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case.

128 In the light of all the foregoing considerations, the answer to the fourth question is that Article 5(1) of Directive 2014/104, read in conjunction with Article 6(5)(a) thereof, must be interpreted as meaning that those provisions do not preclude a national court, pursuant to a procedural instrument of national law, from ruling on the disclosure of evidence and ordering that evidence to be placed under sequestration, while postponing the examination of whether that evidence contains 'information that was prepared by a natural or legal person specifically for

the proceedings of a competition authority', within the meaning of the latter provision, to a time when that court has access to that evidence. The use of such an instrument must, however, comply with the requirements arising from the principle of proportionality, as set out in Article 5(3) and Article 6(4) of Directive 2014/104.

The fifth question

129 By its fifth question, the referring court asks, in essence, whether Article 6(5)(a) of Directive 2014/104 must be interpreted as meaning that where a national court postpones the examination of whether the evidence whose disclosure has been requested contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority', that court may, under Article 5(4) of that directive, refuse access to that evidence to the claimant or to other parties to the proceedings and their representatives.

130 In that regard, it is sufficient to observe that pursuant to Article 6(5)(a) of Directive 2014/104 national courts have not only the right but also the duty to ensure that another party to the proceedings does not have access, in the course of proceedings initiated by a competition authority, to information prepared by a natural or legal person specifically for those proceedings.

131 Consequently, if a national court, pursuant to a procedural instrument of national law, orders the disclosure of evidence which may fall within the grey list in order to ascertain whether that is the case, that court must ensure, regardless of whether or not the documents in question contain confidential information, that another party to the proceedings does not have access to that evidence before it completes that review, where that evidence falls within the white list or, where that evidence falls within the grey list, before the competent competition authority has closed its proceedings.

132 The answer to the fifth question is therefore that Article 6(5)(a) of Directive 2014/104 must be interpreted as meaning that where a national court, pursuant to a procedural instrument of national law, postpones the examination of whether the evidence whose disclosure has been requested contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority', that court must ensure that the claimant or other parties to the proceedings and their representatives do not have access to that evidence before it has completed that review, where the evidence falls within the white list or, where that evidence falls within the grey list, before the competent competition authority has closed its proceedings.

Costs

133 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union**

must be interpreted as not precluding a national court from ordering the disclosure of evidence for the purpose of national proceedings brought before that court which concern an action for damages relating to an infringement of competition law, even though proceedings in respect of that infringement are pending before the European Commission with a view to the adoption of a decision pursuant to Chapter III of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU], which have led to the national court staying the proceedings pending before it. It is, however, for the national court to ensure that the disclosure of the evidence requested at that stage of the proceedings, which must fulfil the conditions laid down in Articles 5 and 6 of Directive 2014/104, does not go beyond what is necessary in the light of the claim for damages brought before it.

2. **Article 6(5) of Directive 2014/104**

must be interpreted as meaning that the staying by a national competition authority of administrative proceedings that it has initiated, on the ground that the European Commission has opened proceedings under Chapter III of Regulation No 1/2003, cannot be equated to a closing of those administrative proceedings by that authority 'by adopting a decision or otherwise', within the meaning of that provision.

3. **Article 5(8) and Article 6(5)(a) and (9) of Directive 2014/104**

must be interpreted as precluding national legislation which temporarily restricts, under Article 6(5) of that directive, not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority, but also that of all information 'submitted' for that purpose.

4. **Article 5(1) of Directive 2014/104, read in conjunction with Article 6(5)(a) thereof**

must be interpreted as meaning that those provisions do not preclude a national court, pursuant to a procedural instrument of national law, from ruling on the disclosure of evidence and ordering that evidence to be placed under sequestration, while postponing the examination of whether that evidence contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority', within the meaning of the latter provision, to a time when that court has access to that evidence. The use of such an instrument must, however, comply with the requirements arising from the principle of proportionality, as set out in Article 5(3) and Article 6(4) of Directive 2014/104.

5. **Article 6(5)(a) of Directive 2014/104**

must be interpreted as meaning that where a national court, pursuant to a procedural instrument of national law, postpones the examination of whether the evidence whose disclosure has been requested contains 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority', that court must ensure that the claimant or other parties to the proceedings and their representatives do not have access to that evidence before it has completed that review, where the evidence falls within the white list or, where that evidence falls within the grey list, before the competent competition authority has closed its proceedings.

[Signatures]