

Access to Evidence (Session 2)

Procedural matters in private competition litigation

Training of National Judges in EU Competition Law

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Introduction to Session 2

- 1. Access to the administrative file**
- 2. The impact of disclosure on civil procedure**
- 3. The disclosure request and order**
- 4. Confidentiality**
- 5. Workshop: Exchange of experiences**
- 6. Disclosure Hearing**
- 7. Closing speech: proposals to improve civil procedure**

The use of disclosure in Spanish proceedings

- **Access to the file**

- *Cardboard Packaging Cartel*: CC nº 10 Barcelona, 23 November 2020, ES:JMB:2020:334A
- *Unison v SGAE*: CC nº 3 Barcelona, 1 December 2021, ES:JMB:2021:4168A
- *Decennial Insurance Cartel*: CC nº 2 Madrid, 9 June 2020, ES:JMM:2020:5799

- **Economic disclosure: quantification of overcharge**

- Pre-action disclosure requests in *Trucks (Rockmond)*: e.g. AAP Valencia 4 December 2019, ES:APVA:2019:1445, AAP Valladolid, 19 October 2020, ES:APVA:20201101A, AAP Vizcaya 4 November 2020 ES:APBI:20220:543A

- **Economic disclosure: access to data underlying expert report**

- Of claimant (*Trucks*): CC nº 3 Valencia, 15 September 2020, ES:JMV:2020:5922
- Of defendant (*Trucks*): CC nº 3 Valencia, 10 December 2019: ES:JMV:2019:4122

- **Pass-on**

- Outright rejection for allegedly inconsistent argument
- Proportionality and data requirements
- Specific documents: *Trucks* (resale) and *Decennial Insurance* (pricing)

Concept of Disclosure in the Damages Directive (I)

- **UK origins**

- **The novelty of the Damages Directive**

- EU procedural rule

- Recital (14):

Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

- P Hitchings, M A Malo and L Loras, "Considerations concerning the implementation of the EU competition law damages directive in Spain", Concurrences N° 2-2015

"While many of the concepts in the Directive are very familiar or already well dealt with in Spain, the Directive offers a welcome opportunity to create some greater transparency and effectiveness in Spanish procedures with the particular beacon of the new disclosure provisions"

- **A new paradigm?**

Concept of Disclosure in the Damages Directive (II)

- ***Paccar*** (C-163/21)
 - Aim: to address information asymmetry and ensure equality of arms
 - An EU specific right with specific scope (proportionality and effectiveness)
- ***RegioJet*** (C-312/21)
 - Parallel proceedings (private & public)
 - Parallel access to evidence

Concept of Disclosure in the Damages Directive (III)

- ***Tráficos Manuel Ferrer*** (C-312/21)
 - Para. 44: measures to correct info asymmetry = Art 5/6 and 17
 - Para. 46/56/57: party approach to disclosure is, in particular, relevant to court assessment (e.g. costs, judicial estimation)
 - Para. 52/53: need to prove existence of harm to individual claimant, which in case of indirect purchaser may require access to defendant documents
 - Para. 58: disclosure of underlying data for expert reports to be welcomed and process may be iterative

Implications for Spanish civil procedure (I)

- **Limitations in the transposition**

- CoA Valencia: *“se limita a copiar sus contenidos sin más reflexión, ni adaptación a otros instrumentos útiles existentes en nuestro ordenamiento”*
Judgment of 17 November 2020, ECLI:ES:APV:2020:4230
- Decision to limit scope and retain existing rules

- **Specificities in Spanish implementation**

- Before or during the proceedings:
 - Art. 283 bis e) 1: *“Las medidas de acceso a fuentes de prueba podrán solicitarse antes de la incoación del proceso, en la demanda o durante la pendencia del proceso.”*
 - Pre-action disclosure as the default mechanism: preparation of claim
- Time-limits for submission of evidence:
 - Preamble RDL 9/2017: *“el acceso a fuentes de prueba no exime al litigante de la carga de proponer en tiempo y forma la práctica del medio probatorio pertinente”*
 - Strict rules: documents with statements of claim and defence (art. 265 LEC), as expert reports, subject to exceptions (art. 336-338 LEC), new evidence or evidence party could not access earlier provided it has identified its location (art. 270 LEC), evidence related to complementary allegations (art. 426 LEC). Effect: preclusion (art. 269 and 271 LEC).

Implications for Spanish civil procedure (II)

- **Pre-action disclosure vs disclosure within proceedings**
 - The terms of the Damages Directive indicate a preference for disclosure during proceedings
 - Disadvantages of pre-action disclosure:
 - The problem of claimant disclosure
 - Timing: the experience of pre-action requests in Trucks
 - Equality of arms and informed decision-making
 - UK preference for disclosure after pleadings

Implications for Spanish civil procedure (III)

- **A move to more flexible proceedings?**
 - Para 58, *Tráficos Manuel Ferrer* (the offer of data by the defendant)
 - Transparency is good, as it contributes to the contradictory debate around the existence and quantum of harm.
 - It permit parties to fine tune, modify or complete their lines of argument
 - It permits the court to have access to more elements with which to assess harm
 - It permits party to focus further requests for disclosure
 - The dataroom story in Spain
 - Problem of credence of defendant models based on company data
 - The data room solution proposed and accepted by CC nº 3 Valencia – impact on judicial estimation (judgment of 10 December 2019, ES:JMV:2019:4122)
 - The procedural problems identified by the CoA Valencia (judgment of 17 November 2020, ES:APV:2020:4230):
 - Proportionality, non-confidential information, evidence is party-led, time-limits
 - Data rooms not a mechanism compliant with Spanish procedural rules, nor prescribed by EU soft law. Production of underlying data not required.

Implications for Spanish civil procedure (IV)

- **Post Tráficos?**

Issue	EU law	Spanish law
Evidence party-led	✓ OK	✓ OK
Proportionality	✓ OK	✓ OK
Confidentiality	✓ OK	✓ OK
Time-limits	Must not make disclosure ineffective. Iterative process may be appropriate	Disclosure must take place prior to moment for proposing evidence. It must be possible for experts to amend their reports in light of access to further data
Transparency	It is advisable to make underlying data available	Need to rethink approach (Art. 366.2; Art. 347.2 is not a substitute)
Datarooms	A useful tool for assessing high volumes / confidential data, to be used in right circumstances, but beware limitations	If approached as a source of evidence in the right circumstances, to then be produced in proceedings

The role of the national judge

- **Judicial control of disclosure**
 - Proportionality, confidentiality, adequate justification
- **Exercise of discretion**
 - *“Active judges”* (V Moreno Catena)
 - *“out of their comfort zone”* (F Gascón Inchausti)
- **Party cooperation**
 - Arts. 24 and 118 CE
 - ELI-UNIDROIT Model Rules
- **Development of coherent criteria**
 - Need for transparency
 - Training
 - Unification of criteria tools

Thank you!

The ideas expressed in this presentation form part of the research for my PhD thesis
The impact of EU law on Spanish civil procedure in competition damages litigation
UCM, Dir. Fernando Gascón Inchausti

For further information on the dataroom saga, see:

P Hitchings, *La prueba pericial económica en los procedimientos de reclamaciones de daños*
Almacen de Derecho, 12 May 2021

[an English versión is available at: www.hitchingsco.com/actualidad in the section Documents]

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