IMPACT IN HOW EVIDENCE IS PRACTISED IN PROCEEDINGS AND ON THE BURDEN AND STANDARD OF PROOF

Mariya Serafimova, Legal Assistant at the Chambers of AG Kokott, CJEU

Valencia, 24 March 2023

Agenda

1) General principles
2) The Damages Directive 2014/104
3) Recent case law of the CJEU
4) Case C-312/21, Tráficos Manuel Ferrer
   - Bearing of costs
   - Interplay between the estimation of harm and disclosure rules
5) Key takeaways
6) Opinion by AG Kokott
7) Open questions & theses for discussion

General Principles (1)

- Relationship between public and private enforcement
  - Public enforcement: general interest -> enforced by the competition authorities
  - Private enforcement: right of individuals to full compensation
- Procedural autonomy
- Distinction between principles based on primary law (Art. 101, 102 TFEU) and secondary law (the Damages Directive, 'DD')

General Principles (2)

- The goals of private enforcement of competition law:
  - Ensuring full compliance with the EU competition rules (PACCAR, para. 55, Tráficos, para. 41, recital 6 DD)
  - Remedy for the direct damage to the victim (PACCAR, para. 56, Tráficos, para. 42)
  - Restoration of effective competition on the markets (PACCAR, para. 56, Tráficos, para. 42)

General Principles (3)

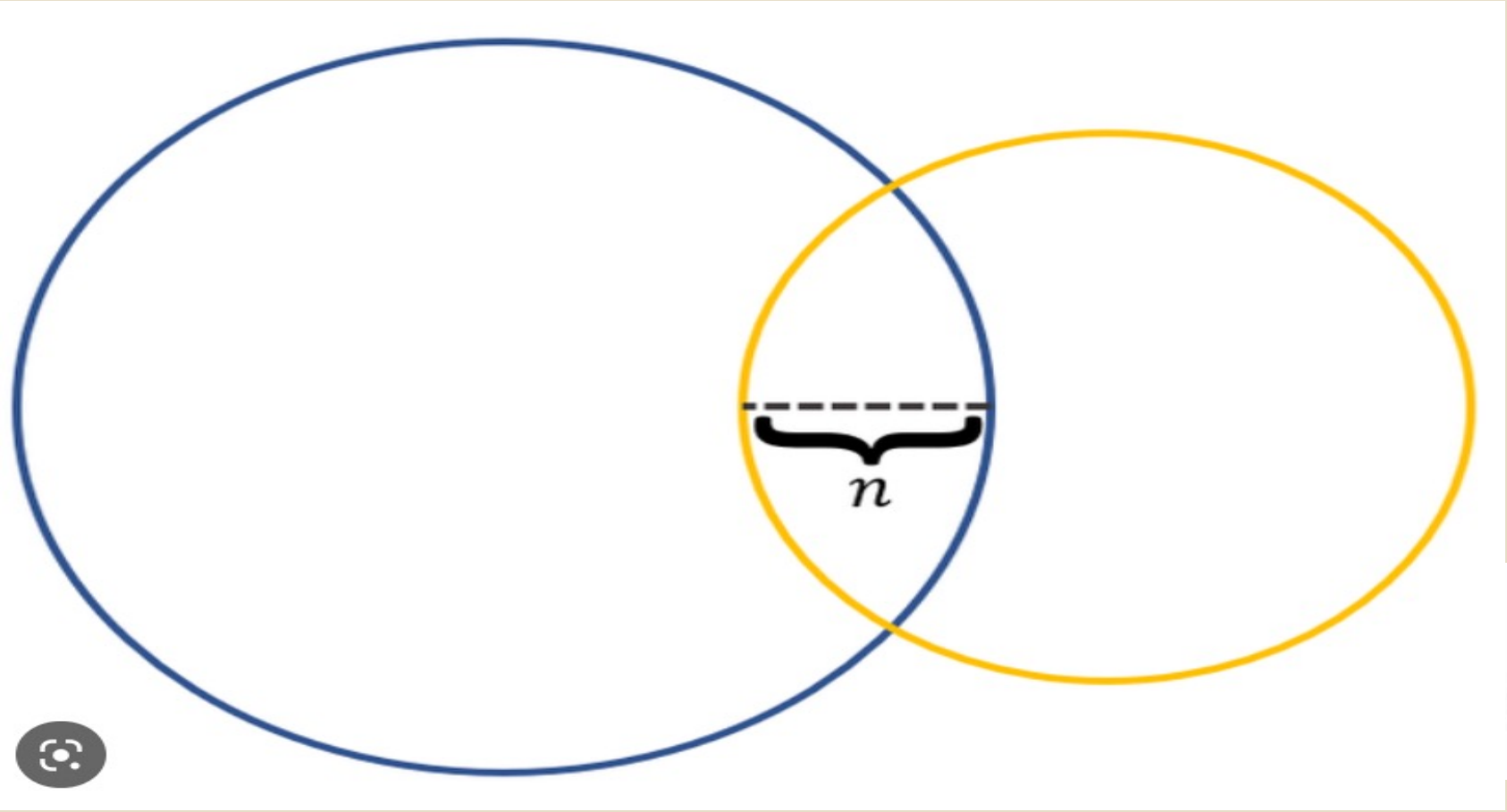
- **Complementarity** of private enforcement:

  41 In that context, as is apparent from recital 6 of Directive 2014/104, as regards actions for damages brought pursuant to national measures intended to transpose that directive, the EU legislature relied on the finding that combating anticompetitive conduct on an initiative taken by the public sphere, that is to say, the Commission and the national competition authorities, **was not sufficient** to ensure full compliance with Articles 101 and 102 TFEU and that it was important to facilitate the possibility, for the private sphere, of **helping to achieve that objective** (see, to that effect, judgment of 10 November 2022, *PACCAR and Others*, C-163/21, EU:C:2022:863, paragraph 55).

  (Tráficos, para. 41)

General Principles (4)

- **Complementarity** of private enforcement:



General Principles (5)

- Procedural autonomy & the principles of **equivalence** and **effectiveness**

  [...] the rules relating to actions for safeguarding rights which individuals derive from EU law **must not be less favourable** than those governing similar domestic actions (principle of equivalence) and

  must **not make it in practice impossible or excessively difficult** to exercise rights conferred by EU law (principle of effectiveness) (see *Cogeco*, C-637/17, para. 43-44; Tráficos, para. 39, recital 11 of the DD).

The Damages Directive (1)

- Primary law (incl. the principles of equivalence and effectiveness) vs. DD

-> **Is the DD applicable?**

[…] 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

(*Volvo DAF Trucks*, para. 38-39).

The Damages Directive (2)

- The applicability *ratione temporis*:

maximum confusion?

Article 22

Temporal application

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.

The Damages Directive (3)

- The applicability *ratione temporis*, Art. 22 DD:

Provision of the DD	Substantive	Procedural
Art. 5 and 6 – disclosure of evidence (RegioJet, para. 43, 44; PACCAR, para. 34)		√
Art. 10 – statute of limitations (Volvo DAF Trucks, para. 46-47)	√	
Art. 17(1) – the burden and standard of proof (ibid., para. 80-85)		√
Art. 17(2) –presumption of harm (ibid., para. 95-97)	√	

The Damages Directive (4)

- On the **burden of proof** („who“): recital 39, Art. 13, 14(1), 15(1) and 17 DD – see next slide

- On the **standard of proof** („what“): Art. 17 DD

Article 17

Quantification of harm

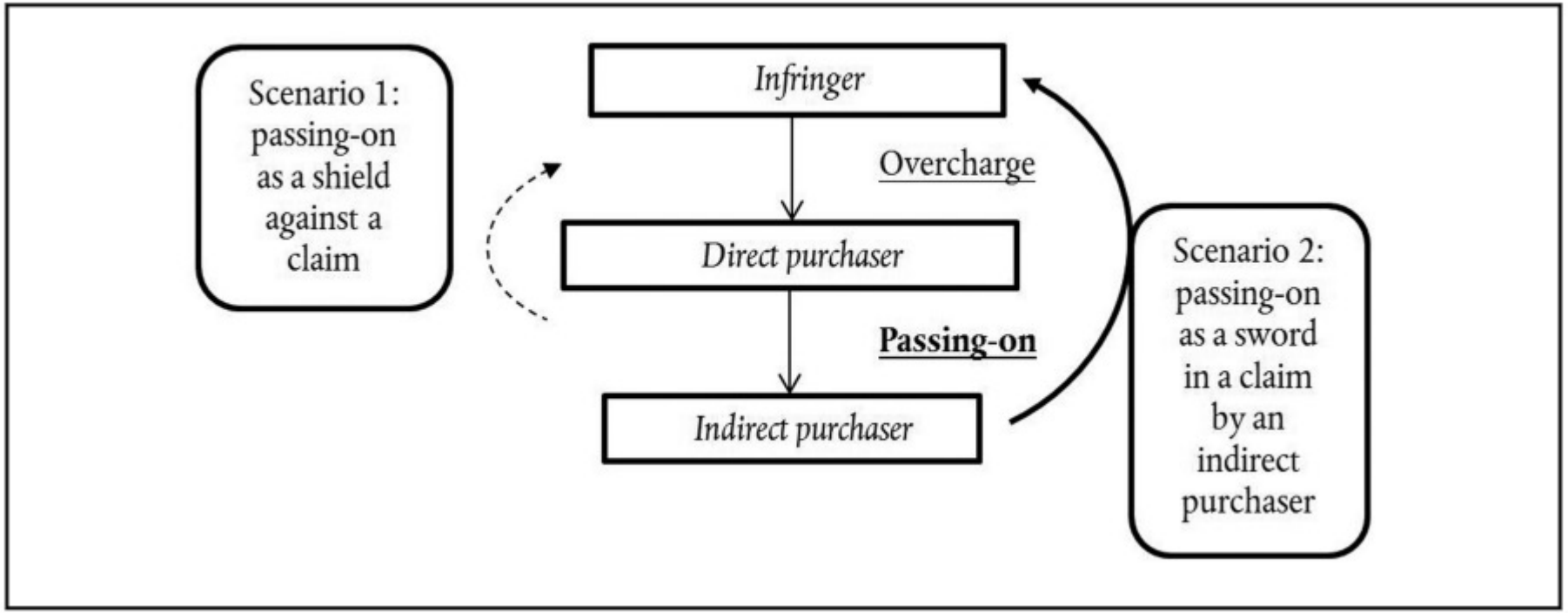
1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national 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.

The Damages Directive (5)

- On the burden of proof („who“) in passing-on cases:

The two typical scenarios of passing-on



Recent Case Law of the CJEU

- **PACCAR a.o.**, 10 November 2022, C-163/21
- **RegioJet**, 12 January 2023, C-57/21
- **Tráficos Manuel Ferrer**, 16 February 2023, C-312/21

Stay tuned: FL und KM Baugesellschaft and S, C-2/23; Heureka, C-605/21; Volvo, C-632/22

C-312/21, Tráficos Manuel Ferrer (1)

Tráficos Manuel Ferrer

& D. Ignacio ----------> Daimler AG

C-312/21, Tráficos Manuel Ferrer (2)

3 questions of the Commercial Court No 3, Valencia

- Cost bearing rule under Art. 394(2) of the CCP
- Estimation of harm (after access to data)
- Estimation of harm (for one infringer who did not sell the good)

C-312/21, Tráficos Manuel Ferrer (3)

37 […] , the right to full compensation for the harm suffered as a result of anticompetitive conduct and, in particular, of an infringement of Article 101 TFEU **does not concern the rules on the allocation of costs** in the context of judicial proceedings relating to the implementation of that right, since those rules do not aim to compensate for the harm, but determine, at the level of each Member State, in accordance with its own law, the manner in which the costs incurred in the exercise of such proceedings are to be allocated.

C-312/21, Tráficos Manuel Ferrer (4)

43 It is to attain **that objective** that the EU legislature – having noted, in recitals 14, 15, 46 and 47 of Directive 2014/104, the **asymmetry of information existing between the claimant and the defendant** in the type of actions covered by that directive, since, according to recital 14 of that directive, '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' – required the Member States to lay down measures **enabling the claimant to remedy** that asymmetry.

C-312/21, Tráficos Manuel Ferrer (5)

44 To that end, Directive 2014/104, in the first place, obliges those States to confer on that party the power to ask national courts to require the defendant or a third party, under certain conditions, to **disclose relevant evidence** in their possession, pursuant to Article 5 of that directive. […]

C-312/21, Tráficos Manuel Ferrer (6)

44 […] In the second place, that directive requires the Member States to empower those courts**, under certain conditions,** where it is practically impossible or excessively difficult to quantify the harm, **to estimate** it, in accordance with Article 17(1) of that directive, where appropriate, if they so wish, with the assistance of the national competition authority, as is apparent from Article 17(3) […]. In the third place, that directive requires Member States to **introduce presumptions**, in particular that relating to the existence of harm arising from a cartel, as provided for in Article 17(2) […].

C-312/21, Tráficos Manuel Ferrer (7)

46 Consequently, it must be held that that case-law cannot be transposed to a type of dispute characterised by the intervention of the EU legislature giving the **claimant**, who is **initially at a disadvantage**, means intended to **correct in its favour the balance of power** between that claimant and the defendant. […]

C-312/21, Tráficos Manuel Ferrer (8)

46 […] The **evolution of that balance of power** and, specifically, the question **whether or not the claimant relied on the tools made available to it** – in particular as regards the possibility of requesting that court to order the defendant or a third party to disclose relevant evidence which lies in their control, in accordance with the first subparagraph of Article 5(1) of Directive 2014/104 – **depends on the conduct of each of those parties**, assessed by the national court seised of that dispute at its absolute discretion.

C-312/21, Tráficos Manuel Ferrer (9)

55 In this respect, in the first place, it must be observed that the objective recalled in paragraph 41 above presupposed the implementation of tools capable of remedying the information asymmetry between the parties to the dispute since, by definition, **the infringer knows** what it has done and or has been accused of doing, if anything, and knows what evidence may have been used [...], whereas the victim of the damage caused by that behaviour does not have such evidence [...].

C-312/21, Tráficos Manuel Ferrer (10)

56 In the second place, in order to remedy the finding of that **asymmetry of information**, the EU legislature therefore adopted a set of measures listed in paragraph 44 of the present judgment, which, it is important to emphasise, interact, **since the need to undertake a judicial estimation of the harm may depend, in particular, on the result obtained by the claimant** following a request for the disclosure of evidence pursuant to the first subparagraph of Article 5(1) of Directive 2014/104.

C-312/21, Tráficos Manuel Ferrer (11)

57 In the third place, because of the key role of that provision within that directive, **it is for the national court, before proceeding to estimate the harm, to determine whether the claimant has made use of it**. If the practical impossibility of assessing the harm is the result of inaction on the part of the claimant, it is not for the national court to take the place of the latter or to remedy its shortcomings.

C-312/21, Tráficos Manuel Ferrer (12)

58 In the present case, the situation is different, given that the defendant, **on its own initiative**, after having been authorised to do so by the referring court, made available to the claimant the data on which it relied in order to refute the latter's expert report. In that regard, it should be noted, [...] that it **benefits both the parties**, which may refine, amend or supplement their arguments. [...]Second, **making those data available**, [...] **may**, on the contrary, **guide the claimant** and provide it with information concerning documents or data which it considers essential to obtain.

Key Takeaways (1)

New (restrictive) posture re damages claims:

- The right to full compensation does not concern the rules on the **allocation of costs** (para. 37)
- Asymmetry of information exists (para. 43) but **evolution of the balance of power** -> the claimant has to make use of the **disclosure** tools (para. 46)

Key Takeaways (2)

- **Party conduct regarding disclosure** is relevant to the assessment of costs, estimation of harm (para. 46, 56-57)

- **Estimation of harm limited** only after taking into consideration all parameters, esp. unsuccessful request to disclose evidence (para. 65)

Opinion by AG Kokott (1)

Three main differences:

- **Structural imbalance** (para. 54)
- The allocation of costs to the claimant is the **exception**, not the rule (para. 68) -> the judgment suggests the opposite in para. 47
- **Promising and reasonably feasible** measures for estimating harm (para. 109)

Opinion by AG Kokott (2)

54. As the applicants argue in the present case and as is apparent from recitals 14, 15, 45 and 46 of Directive 2014/104, the law governing antitrust damages is also characterised by a **structural imbalance** between the claimant – the injured party – and the defendant – the injuring party. That imbalance is due, in particular, to an information asymmetry to the detriment of the claimant and difficulties in providing evidence and quantifying harm, which Directive 2014/104 seeks to address through its rules on disclosure of evidence and quantification of harm (Articles 5, 6 and 17).

Opinion by AG Kokott (3)

68. From this it can be deduced, *mutatis mutandis*, with regard to proceedings for antitrust damages that, where the claimant is unsuccessful in part, it is reasonable for him or her to bear his or her own costs, or at least part of them, as well as part of the common costs, **provided that** the origin of those costs is to be attributed to his or her **own sphere of responsibility**. This could be the case, for example, where the partially unsuccessful outcome is due to the fact that the claimant made excessive claims or due to the manner in which he or she conducted the litigation.

Opinion by AG Kokott (4)

109. Consequently, the fact that the claimant brought an action against only one of the cartel participants from whom he or she acquired the goods at issue implicated in the cartel does not mean that the possibility to estimate the harm on the ground that it is practically impossible or excessively difficult to quantify that harm is precluded, provided that, at the defendant's request, **all promising and reasonably feasible possibilities** of gathering evidence in its favour have also been exhausted.

Open Questions & Theses (1)

- How shall we deal with rules on cost bearing when the allocation of costs **is not attributable** to the claimant? Which **attribution criteria** are relevant?
- Does the CJEU create an **obligation** to request evidence or an „**Obliegenheit**“ for claimants?
- Dissuasive effect by shifting the burden on claimants?

Open Questions & Theses (2)

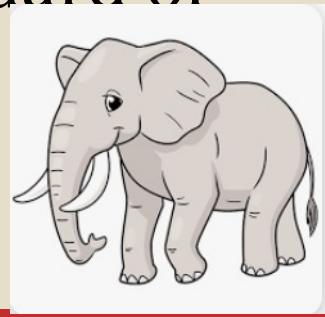
- Does Article 17(1) DD establish a minimum standard for the power of national courts to estimate harm or does it rather **restrain the power of national courts** by limiting it only to the conditions set out in the judgments?

- What are the implications for all **national laws** concerning rules on the estimation of harm?

Open Questions & Theses (3)

- The elephant in the room: how to address an obvious **disproportion** between the claimed harm in some cases and the costs incurred by taking all the necessary disclosure steps as a precondition for the estimation of harm?

- Do we need a (separate) **proportionality criterion** within the assessment of the standard of proof and estimation of harm?



Thank you for your kind attention!

mariya.serafimova@curia.europa.eu