Kluwer Competition Law Blog

AG Rantos: Temporal scope of the Damages Directive, substantive and procedural provisions and limitation periods

Ignacio García-Perrote Martínez (Universitat Pompeu Fabra) · Saturday, February 19th, 2022

Advocate General Rantos delivered his Opinion in a request of a preliminary ruling by a Spanish court (case C-267/20), the *Audiencia Provincial* of León, the appellate court in a trucks' cartel damages claim. In particular, Advocate General Rantos Opinion deals with the temporal scope of application of the Damages Directive; the "substantive" or "procedural" nature of its provisions on limitation periods, the presumption of harm caused by cartels and judicial estimation of damages; and the compatibility of the pre-Directive regime in Spain and, more specifically, the *dies a quo* in follow-on actions. Given the increasing growth of private litigation against competition law infringers, as the empirical study of Jean François Laborde depicts, this Opinion and the judgment that will be issued in the case are of doubtless importance.

The case at the national level

Let us first recall the facts of the case and the questions referred to the Court of Justice.

In 2006 and 2007, RM ("the claimant") acquired three trucks produced by AB VOLVO and DAF Trucks NV ("the defendants").

On 19 July 2016, the European Commission issued a prohibition decision with a fine against several truck producers, including the defendants, for entering into several collusive agreements on gross prices and their increase for medium and heavy trucks in the EEA between 17 January 1997 and 18 January 2011 that amounted to an infringement of Article 101 TFEU. The Commission published a press release informing about the decision that same day. However, the publication of the summary of the decision in the Official Journal of the European Union did not happen until 6 April 2017, the day of the publication of the non-confidential provisional version of the decision.

The claimant brought a damages claim of 38.1487,71 euros against the defendants on 1 April 2018 in the Commercial Court of León. The claimant grounded its claim on the national provisions that transposed the Damages Directive and, collaterally, on the general civil non-contractual liability regime, which was the applicable one before the Directive. The defendants counter-argued that the applicable law was the general regime and, hence, the claim was time-barred and, furthermore, that there was no proof of a causal link between the infringement and the alleged harm.

On the applicable law, Spain did not have specific provisions for competition law damages claims. Victims could only file general non-contractual liability actions of Article 1902 of the Spanish Civil Code the limitation period of which is of one year from the moment the injured party is aware of the harm according to Article 1968(2) of the Spanish Civil Code. The implementing measures of the Damages Directive, including the specific five-year limitation period, entered into force on 28 May 2017.

The Commercial court of León partially upheld and declared the defendants jointly and severally liable to pay 10.906,31 euros as damages to the claimant. The court grounded its judgment on the provisions of the Spanish Competition Act, as it was after the transposition of the Damages Directive, and to some extent on the regime in force prior to the transposition. The court argued that the claim was not time-barred because the limitation period (be it one- or five-year) had not expired yet. Furthermore, the court applied the presumption of harm and the rules on judicial estimation since the court argued that these were procedural provisions applicable without infringing the rules on retroactivity of Article 22 of the Damages Directive.

The defendants appealed the judgment before the *Audiencia Provincial* of León, arguing that the applicable law was the general regime of non-contractual liability and, in particular, that the claim was time barred because the one-year period had elapsed. They argued that the *dies a quo* was the day the European Commission's press release, instead of the day of the publication of the summary of the decision in the Official Journal.

In this context, the Provincial Court decided to stay the proceedings and refer the case to the Court of Justice of the European Union for a preliminary ruling on 12 June 2020. The court considered relevant to have some clarification on the transitional application provisions of the Directive. Particularly, when it comes to the application of the national provisions implementing the Damages Directive to claims brought when these provisions were already in force to facts that happened before the entry into force of the Directive itself, but that the authority sanctioned between then and the (late) transposition of the said Directive.

The referring court, thus, referred the following questions to the Court of Justice:

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

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

When applying a provision such as that of Article 76 of the Ley de Defensa de la Competencia (Law on the Protection of Competition), must Article 17 of Directive 2014/104, concerning judicial estimation of harm, be interpreted as a procedural provision that will apply to main proceedings in which an action is brought after the entry into force of the national transposing legislation?"

AG Rantos Opinion

Advocate General Rantos delivered his Opinion on 28 October 2021. The Advocate General addresses firstly questions 2 and 3 on whether the provisions on limitation periods, the presumption of harm and judicial estimation are substantive or procedural to assess whether they are applicable *ratione temporis* to the national proceeding. Then, Advocate General Rantos deals with the obligations stemming from the principle of effectiveness of Article 101 TFEU regarding the retroactive application of transposition measures of the Damages Directive, and, if those provisions are not applicable *ratione temporis*, the compatibility of the previous regime with the principle of effectiveness and the prohibition of Article 101 TFEU.

Non-retroactivity of substantive rules and their application to the case at hand

Article 22(1) of the Damages Directive prohibits the retroactive application of substantive provisions, while allows procedural rules to be applied to proceedings starting after the entry into force of the Directive. In particular, according to Advocate General Rantos, the referring court wants to know if the non-retroactive application refers to the date of the infringement, of the prohibition decision with fine or of the damages claim itself.

The Advocate General recalls that legal rules apply since they enter into force to ongoing situations or effects of pre-existing situations arising after that point. Regarding pre-existing finalised situations, substantive provisions only apply to them insofar as its aim clearly seeks that effect. In his view, Article 22 distinguishes between the effects of substantive and procedural provisions and follows the general principles of EU law. The substantive provisions do not apply to situations that existed before their entry into force, i.e. they are not to be applied retroactively.

The *quid* to decide whether the application would be retroactive or not is established when trucks producers' liability arose. The Advocate General identifies two possible points in time: when the infringement took place or when the authority issued the prohibition decision. According to him, the moment when the conduct that infringed competition law happened determines the legal rules applicable to the damages claim. Three reasons support this option. Firstly, legal certainty and non-retroactivity aims at

allowing possible infringers to foresee the consequences of their acts, including the possible liability that may result from their conduct and the applicable legal regime. Secondly, this criterion, which is objective and verifiable, allows a uniform application of the Damages Directive rules. Thirdly, the Spanish transposing regime opted to limit substantive rules to situations arising after the transposition of the Directive.

Hence, while procedural provisions might be applicable *in casu*, substantive provisions are in force but not applicable due to the principle of non-retroactivity.

The next step is the determination of the specific procedural or substantive nature of Articles 10 and 17 of the Damages Directive. This decision lies within the realm of EU law, instead of national law, to ensure legal certainty and the effectiveness of competition law.

Article 10 Damages Directive on limitation periods

Advocate General Rantos, firstly, assesses whether Article 10 of the Damages Directive on limitation periods is substantive or procedural in nature.

He recalls that Advocate General Kokott qualified limitation periods in Cogeco as not purely procedural provisions and that, according to the CJEU's case-law, they are an institution designed to protect both the victim's right to claim for damages and the injurer from a never-ending risk of being sued. Furthermore, rules on limitation are substantive in most Member States, and Spain did not include any specific provision that would allow arguing otherwise.

Advocate General Rantos opines that Article 10 of the Damages Directive is substantive and it should not be applicable in a claim arising from an infringement that happened before the entry into force of the transposing measures even if the action was filed afterwards.

Article 17(1) Damages Directive on judicial estimation of damages

Then, Advocate General Rantos analysis focuses on whether the provision to empower the courts to estimate the damages if it is practically impossible or excessively difficult for the claimant to accurately quantify the amount is substantive or procedural.

The Advocate General considers that this provision seeks to guarantee the effectiveness of competition law insofar as it trusts Member States to ensure that the claimants' duty to quantify the damages does not render claims ineffective. Actually, it seeks to alleviate the information asymmetry between claimants and defendants regarding the specific harm without switching the burden of proof or removing the claimant's obligation to prove and quantify the harm suffered.

Being this provision a tool for courts to adjust the evidentiary requirements to implement their duty to adjudicate, Advocate General Rantos opines that it could be

procedural and, thus, applicable in the case at hand.

Article 17(2) Damages Directive on the presumption of harm

Thirdly, the Advocate General examines the substantive or procedural nature of Article 17(2) of the Damages Directive, which includes a rebuttable presumption that cartel infringements cause harm.

According to the Advocate General, this presumption relates directly to the question of whether the harm, the cause of which is the infringement, exists, rather than just deciding who has the burden of proving the harm. This sort of presumption affects the elements of civil liability itself and renders liable for damages to whoever was part of a cartel unless otherwise proven.

Therefore, Article 17(2) is, according to Advocate General Rantos, a substantive provision that cannot be applied in a case dealing with an infringement that happened before the transposition measure entered into force, such as the case at hand.

The compatibility of the Spanish regime prior to the Damages Directive with the principle of effectiveness

Finally, Advocate General Rantos assesses the compatibility of the substantive provisions of the Spanish pre-Directive regime in light of the principle of effectiveness.

Identifying a provision as substantive renders it inapplicable to certain proceedings, such as the one before the referring court. However, it does not mean that national laws could have other institutions or provisions in force when the infringement took place that could lead to the same outcome, be it, for instance, the possibility of courts to apply the *ex re ipsa* doctrine and conclude that the harm is a consequence of the cartel. Where there is no regime harmonised by EU law, courts must rule according to national law if it respects the principles of effectiveness and equivalence.

The Advocate General, before analysing the Spanish regime, recalls two fundamental ideas. Firstly, effectiveness means in this context that national regimes cannot render the right to compensation excessively difficult or practically impossible. Secondly, public and private enforcement of competition law seek a common objective: deterring new infringements. In the case of private enforcement, this aim is achieved when undertakings take into account the risk of facing claims from those injured by the conduct and paying damages to them.

When it comes to limitation periods, Advocate General Rantos stresses that the case law of the Court, particularly in Cogeco, requires the appraisal of their compliance with the principle of effectiveness to encompass the period itself, the setting of the *dies a quo* and the possibility to suspend or interrupt them. Under Spanish law, the period to bring a general non-contractual liability claim is of one year, which is far shorter, as Advocate General Rantos highlights than the five-year period of the

Damages Directive.

However, the key point is the *dies a quo*: it will determine whether the claim is actually effective or not. Advocate General Rantos recalls that the Court of Justice case law ruled in Cogeco that knowing the identity of the infringer is indispensable for the limitation period to start running. According to the referring court, there are two possible moments where this requirement can be fulfilled: the publication of the press release and the summary of the decision in the Official Journal.

The Advocate General compares and contrasts the two types of documents and concludes that the summary of the decision, published in all official languages of the European Union, addresses the personal, material and temporal scope of the infringement. Accordingly, these elements provide possible victims with information enough to identify if their acquisition of a product or service was affected by the infringement and have a damages claim. Therefore, Advocate General Rantos opines that the claim is not time barred because the one-year period finished on 6 April 2018 and the claimant filed the action on 1 April 2018.

The Advocate General is aware that individuals have a duty to be informed of anything related to their current and future claims. However, this general duty of diligence does not amount to be up to date with all competition authorities' press releases: this would otherwise set the bar too high and could run counter to the victims' right to damages. Advocate General Rantos believes that the criteria to determine when victims know that an infringement caused them a harm, or should be aware of it, must be clear and foreseeable, and this happens only with the publication of the summary in the Official Journal.

When it comes to presuming the harm applying Spanish law, Advocate General Rantos reminds that national courts cannot issue judgments on infringements of competition law that run counter a Commission decision on the same case. In his view, this may ease establishing a causation link between the infringement and the harm without using the presumption of harm of the Directive. Likewise, he states that the prohibition against a retroactive application does not preclude national courts from applying other presumptions already available in their national law that respect the principles of effectiveness and equivalence.

Further thoughts

This case joins the list of judgments of the Court of Justice that will shape private enforcement of competition law in the European Union. In particular, together with Manfredi and Cogeco, it will clarify the criteria to assess the compatibility of national limitation periods for competition law damages claims with EU law. It will also allow the Court to confirm the general rule on the temporal scope of application of directives in general and the Damages Directive particularly.

Advocate General Rantos carefully follows the Court case law and seeks reaching a decision compatible with the Member States own practice to foster legal certainty. Likewise, it confirms that deterrence is a collateral effect of these claims and that

companies considering infringing competition law should take damages into account when deciding whether to execute the conduct or not.

On the one side, labelling Articles 10 and 17(2) of the Damages Directive as substantive provisions does not break with the interpretation followed in national courts. Lower courts in Spain did not apply the new and specific regime for competition law damages claims, but the previous one insofar as they understood that many novelties were already part of the legal order thanks to the *acquis communautaire* or, in the case of Spain, general Spanish tort law. For instance, courts have awarded damages arguing that the only cause of the harm could have been the cartel unless proven otherwise, i.e. they ruled on causation based on the *ex re ipsa* doctrine instead of applying any presumption of harm.

Concerning limitation periods, if the Court follows the Advocate General's Opinion, the relevant date to set the *dies a quo* for follow-on claims will be clarified finally. Regarding competition law damages claims in Spain, this will not lead to a change in setting the *dies a quo* since the current interpretation already sets it with the publication of the summary of the decision or the decision itself, unless the circumstances allow establishing a different *dies a quo* (the latter happened, for instance, in the Centrica case). Once this Court of Justice ruling is issued, it should not prevent injured parties from bringing stand-alone claims, but the *dies a quo* of these actions will have to be set at a different point of time. Both *dies a quo*, however, will doubtless share the fact that the victim needs to know, or should be aware of, the identity of the infringer. Otherwise, the effectiveness of competition law would be put in jeopardy.

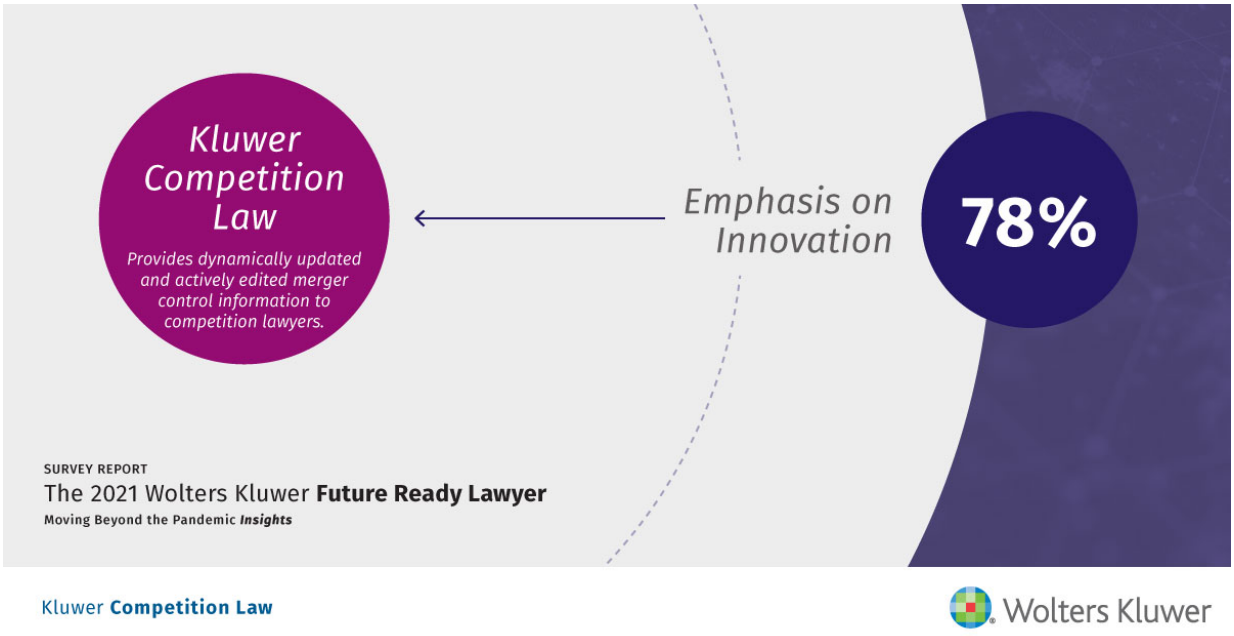
On the other side, it was surprising to read (though it should have not happened) that the judicial estimation of harm of Article 17(1) was a procedural provision. May it be a consequence of the Spanish transposition of the Directive that included it within the provisions without retroactive application, most courts understood it was substantive and refrained from applying it. Instead, if claimants proved the harm but neither their quantification nor the defendants' report convinced the court on the specific amount to award, courts estimated damages following Spanish procedural law on interpretation of (economic) reports and the case law of the Spanish Supreme Court on competition law damages claims, mainly its judgment of 7 November 2013 on damages caused by the sugar cartel. The outcome, however, will be the same: the claimants' burden of proof would not be alleviated and they will have to prove that they suffered a harm caused by the competition law infringement and quantify the damages.

Were the Court of Justice to follow the Advocate General, national courts would doubtless use this new legal ground when opting for estimating the damages award. However, this decision may have a side effect. Article 17(1) on the harm has a sister provision: Article 12(5) on the judicial estimation of the share passed on. Having both the same content, the consideration of procedural of one means that the other becomes it too. Then, if defendants argue, prove and quantify that the claimant passed on in part or in full the harm, courts will have to estimate it as well relying on the provision transposing Article 12(5) if they are not fully convinced with the quantification itself.

Finally, the Advocate General took a brave stand when establishing that the rules applicable to the damages claim are those in force when the harm arose, i.e. when the infringement happened, and based it on legal certainty grounds. This is especially relevant given that the *dies a quo* in follow-on claims, according to the Advocate General, is the day of publication of the summary decision.

In the trucks' cartel case, the injured party knows, or should have known, the relevant information to bring the claim from the moment of the publication. The particular relevance of this point lies with the fact that this case has two decisions. On the one hand, the settlement decision that led to this claim issued and published before the entry into force of the transposing measures of the Directive. On the other hand, the Scania decision of 27 September 2017 that the General Court confirmed on 2 February 2022 (and commented here). While it is clear that the damages claims that follow the settlement decision, such as the one in the case at hand, apply the provisions in force before the Damages Directive, what are the applicable provisions to possible claims against Scania? For Advocate General Rantos, the reply is straightforward: the applicable law to the claim is the one in force when the infringement happened, then it will be, at least in Spain, the pre-Directive regime. If, however, as Spanish scholarship pointed out here and here, the connecting point in time is the moment when victim knows, or should be aware of, the relevant information to bring the claim, the applicable law will be the Damages Directive as implemented into Spanish law.

Advocate General Rantos paved the way and now it is up for the Court of Justice to decide where this leads to and, in particular, how damages claims will look from now on.



This entry was posted on Saturday, February 19th, 2022 at 10:00 am and is filed under Advocate General, Source: UNCTAD“>Damages, European Union, Limitation Period, Private actions, Private enforcement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.