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Limitation Periods for Continuous Infringements and Post-Brexit Divergence in Damages Actions: AG Kokott's Opinion in Heureka v. Google (C?605/21) and Umbrella Interchange Fee Claimants v. Umbrella Interchange Fee Defendants ([2023] CAT 49)

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On 21 September 2023, Advocate General (**AG**) Kokott delivered an opinion on the application of limitation rules for antitrust damages actions (**Opinion**) in the context of a preliminary ruling reference. She invited the Court of Justice to rule, among other things, that the limitation periods may not start to run until the relevant anticompetitive conduct ceases, including for periods pre-dating the implementation of Directive 2014/104/EU (**Damages Directive**).

Should the Court of Justice adopt the Opinion, this would lead to a divergence for a significant pipeline of cases between EU Member States and the UK, whose Competition Appeal Tribunal (**CAT**) already ruled on 26 July 2023 that it would not follow such interpretation, particularly for claims that do not involve a secret cartel (*Umbrella Interchange Fee Claimants v. Umbrella Interchange Fee Defendants*, [2023] CAT 49 (***CAT Volvo***)).

Background

The reference arose out of a damages action before the Prague City Court by Heureka, a price comparison service, against Google, which followed on from the *Google Shopping* (Case AT.39740) decision (**Decision**) by the European Commission (**Commission**). The Decision found that Google abused its position of dominance in violation of Article 102 TFEU by favouring its own comparison shopping service and that, in the Czech Republic, the infringement began from February 2013 and was continuing as of 27 June 2017, the date of the Decision. The General Court largely upheld the Decision on 10 November 2021 (T?612/17) and a further appeal to the Court of Justice remains pending (Case C-48/22 P).

Heureka issued its claim on 26 June 2020 and seeks compensation for harm allegedly suffered as a result of the infringement for the period between February 2013 and 27 June 2017. The claim period straddles the deadline for the transposition of the Damages Directive that harmonized the rules governing actions for damages in EU Member States (including the UK at the time), i.e., 27 December 2016.

Prior to the Czech Republic's (late) implementation of the Damages Directive on 1 September 2017, the applicable national legislation provided for a limitation period of three years. Google argued that part of the claim was time-barred on the basis that the limitation period had begun to run from February 2013, the beginning of the infringement in the Czech Republic as found by the Decision.

On 30 September 2021, the Czech court referred a number of questions to the Court of Justice regarding the applicable limitation periods, including the interplay between the Damages Directive, Article 102 TFEU, the principle of effectiveness, and the prior Czech legislation governing limitation periods.

The Damages Directive and *Volvo*

Article 10(2) of the Damages Directive provides that limitation periods shall not begin to run (i) before the infringement has ceased (**Cessation Requirement**) and (ii) the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer (**Knowledge Requirement**).

Article 22 of the Damages Directive distinguishes between provisions that are "*substantive*", which cannot apply retroactively from the adoption of the national implementing measures (which must be in place by 27 December 2016), and provisions that are "*procedural*", which can apply to actions for damages issued on or after 26 December 2014. The Damages Directive does not specify whether a provision is substantive or procedural.

After the Czech court made its request for a preliminary ruling, the Court of Justice ruled in June 2022 on a separate reference by the Commercial Court of León, Spain in *Volvo AB and DAF Trucks NV v. RM* (Case C-267/20) (***Volvo***), which concerned a damages action arising out of the Commission's *Trucks* (AT.39824) settlement decision. In *Volvo*, the Court of Justice held, among other things, that Article 10 of the Damages Directive (a) is a substantive provision and (b) applies to damages actions brought after the Damages Directive's implementation, provided that they were not already time-barred before the transposition deadline under the old rules (para. 106).

The Opinion

As noted above, the Decision remains subject to appeal and therefore is not yet final. As a preliminary matter, AG Kokott opined that a Commission decision that is not yet final is nevertheless binding on a Member State court, including due to the principle of sincere cooperation under Article 4(3) TEU (para 58). This contrasts with the decision of a national competition authority, which only produces binding effects or provides probative value when it becomes final under Article 9 of the Damages Directive. Further, Article 16(1) of Regulation 1/2003 gives the national court discretion over whether to stay the proceedings pending the appeal (para 63), in respect of which the claimant's right to an effective remedy and the defendant's right to legal certainty "*may argue in favour of the need to resolve the dispute within a reasonable time*" (para 68).

The infringement period after the transposition deadline (i.e., 27 December 2016), following *Volvo*, falls within the temporal scope of Article 10(2) of the Damages Directive (para 78):

- **Cessation Requirement.** AG Kokott considered that the Article 102 TFEU infringement, committed by a single undertaking, consisted in "*continuous conduct pursuing a single objective and economic goal*" and it therefore only ended when this continuous conduct "*ceased in its entirety*". Thus, the limitation period cannot begin to run until 27 June 2017 (the Decision date) at the earliest (paras 91-92).
- **Knowledge Requirement.** Citing *Volvo*, AG Kokott considered that the date of the publication of the summary of the Decision is when it can reasonably be considered that the injured party knew of the elements necessary for it to bring its action. She left open the possibility, however, that Heureka might be aware of those elements earlier as Google argued (paras 84-85) given the public commitments Google offered in 2013, on which Heureka commented as member of a trade association.

Significantly, AG Kokott opined that the principle of effectiveness requires that the Cessation and Knowledge Requirements also apply to the infringement period on or before the Damages Directive's transposition deadline (paras 124 and 131). In respect of the Cessation Requirement, she reasoned that (i) it would be "*artificial*" to "*divide up*" the limitation period for an Article 102 TFEU infringement that satisfies the criteria of a "*single and continuous infringement*" and (ii) given that the infringement in the digital sector could affect players at different levels and alter the market structure, it would be very difficult to establish before the infringement has ceased (paras 112 and 114).

The practical effect is that, should the Court of Justice adopt the Opinion, the part of the claim that would have otherwise been time-barred under the old Czech limitation rules would no longer be given that the infringement only ceased on 27 June 2017 at the earliest and the claim was issued in June 2020.

CAT Volvo and Divergence

The Opinion diverges from the CAT's judgment in *CAT Volvo*, which concerns the interpretation of *Volvo* in the context of damages actions alleging harm suffered as a result of the setting of multilateral interchange fees by Mastercard and Visa. Like the present case, *CAT Volvo* did not involve a secret cartel. The CAT held that *Volvo* is not authority that national limitation rules must include the Cessation Requirement (para 33) prior to the Damages Directive's implementation because the Court of Justice's discussion of the Cessation Requirement was *obiter* only (paras 27-28).

In addition, even if *Volvo* did impose a Cessation Requirement, although the CAT may "*have regard*" to it post-Brexit under section 6(2) of the European Union (Withdrawal) Act 2018, it would decline to follow it. The CAT considered that English law already provided for a Knowledge Requirement and this is sufficient to satisfy the principle of effectiveness, particularly for claims that do not involve a secret cartel (paras 72-73).

Thus, should the Court of Justice adopt the Opinion, this will crystallize the divergence of limitation rules between the UK and EU Member States for infringements preceding or straddling the Damages Directive's implementation deadline. The effect of such divergence is particularly

significant for cases not involving a secret cartel (e.g., notably, abuse of dominance cases in the digital sector) where the Cessation Requirement is more likely to be decisive in determining whether part or all of a claim is time-barred. It can be expected that this factor will likely inform claimants' choice of forum in appropriate cases.

For completeness, the position is different for infringements that post-date the entry into force of the UK regulations implementing the Damages Directive (i.e., 9 March 2017), for which it has not been disputed that the Cessation Requirement applies.

**This post was written before the author joined the Competition and Markets Authority (CMA). The views expressed in this blog post are the author's personal views and do not represent the CMA's views.*

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