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AG's Opinion in Heureka – On The Temporal Application of EU Damages Directive and Why Does it (Not) Matter

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Summary of Facts

On 21 September 2023 the Advocate General Juliane Kokott presented her opinion in the [Case C-605/21, Heureka Group a.s. v. Google LLC](#). The opinion addresses a request for a preliminary ruling from the Prague Municipal Court, which is hearing Heureka's follow-on action against Google based on the Commission's [Decision C\(2017\) 4444 final \(Google Shopping\)](#). This is not the only high-profile follow-on damages action against Google in the Czech Republic, as Seznam.cz (the largest Czech alternative search engine) is also seeking compensation for a breach of competition law following the Commission's [Decision C\(2018\) 4761 final \(Google Android\)](#).

Much of the AG's opinion focuses on the interpretation of the temporal aspects of the law applicable to compensation for harm caused by competition law infringements. Therefore, it is important to establish the dates of the relevant events. According to the Commission's decision in Google Shopping, Google infringed Art. 102 TFEU from February 2013 to June 2017. During that period, there was no specific law in the Czech Republic concerning compensation for harm in the field of competition. However, on 27 December 2016, the deadline for transposing the Competition Law Damages [Directive No. 2014/104](#) ('Damages Directive') expired. The [Czech Act No 262/2017 Coll.](#), which transposed the Damages Directive, entered into force on 1 September 2017, i.e., only after the infringement as declared in the Google Shopping decision had ended.

Before the Act, the Czech Civil Code applied a 3-year the so-called subjective limitation period to claims for compensation for harm caused by competition law infringements. The start of that period depended on the claimant's subjective knowledge of the harm and the identity of the person liable for it. According to the established case law of the Supreme Court, which would have likely applied in this case, each new occurrence of harm (e.g., each new display of results favouring Google's price comparison service) would trigger a new limitation period (and could be claimed separately). In other words, the limitation period started, ran, and ended not at once in case of lasting infringements but consecutively or gradually in respect of the separate partial harms as the time had passed.

Google argued that Heureka's claim was time-barred (at least partially), as the infringement began in February 2013 and Heureka was allegedly aware of its harm and Google's identity from the outset. Heureka lodged its claim with the Prague Municipal Court on 26 June 2020.

Preliminary Questions Asked

To determine whether Heureka's claim was (at least partly) time-barred, the referring court asked the CJEU questions about (i) the temporal applicability of the Damages Directive between February 2013 and June 2017, (ii) the compatibility of the previous national rules on limitation periods with Article 10(2) of the Damages Directive and, if applicable, with Article 102 TFEU and with the principle of effectiveness, according to which the rules governing actions for protecting rights derived from EU competition law must not make it practically impossible or excessively difficult to exercise those rights.

The referring court considered that this principle was undermined by the potentially applicable national rules, mainly because (i) they did not include any cessation requirement (i.e., that the limitation period could not start before the infringement ceased), (ii) they did not require knowledge of the infringement, (iii) they did not suspend the limitation period during the investigation of the infringement and (iv) they could expire before the final decision on the infringement was issued.

Advocate General's Opinion

The AG examined the questions on the applicability of the Damages Directive especially also in light of the CJEU's judgment in *Volvo AB and DAF Trucks NV v. RM* (Case C-267/20) (*Volvo*).

The AG first assessed whether the Commission's infringement decision in *Google Shopping*, which is still subject to pending judicial review before the Court of Justice, has a binding effect for an action for damages, like the one in the proceedings before the referring court. The AG found that it does, and that the referring court can use that decision to establish the existence and the duration of the infringement. The court can also suspend the proceedings until the decision becomes final (i.e., all the appeals are over) if it deems it appropriate for the case.

Then, based on *Volvo*, the AG confirmed that the rules in the Damages Directive concerning limitation periods of Article 10 of the Damages Directive are of a substantive nature (and, hence, cannot be applied retroactively according to Article 22 of the Damages Directive). Furthermore, he concluded that the part of the infringement that happened after the deadline for transposing the Damages Directive generally falls under Article 10 of the Damages Directive. If the Damages Directive was not transposed by then, the national law should be interpreted in line with the Damages Directive, without going against the national provisions (*contra legem*). The AG opined that it should be feasible to interpret the Czech law in accordance with the Directive (and contrary to the Supreme Court's interpretation) but left the verification of that to the national court. In any case, in her view, as regards the period after the deadline for transposing the Damages Directive, the limitation period could not have started to run before the end of the infringement as a whole.

For the period before the deadline for transposing the Damages Directive, the AG stated that the starting point of the limitation period is set by the then effective national law.

However, even when only applying national law that predates the Damages Directive, that national law still needs to be construed and applied in light of Article 102 TFEU and the principle of

effectiveness. The AG argued that the said principle precludes national legislation that allows the limitation period for compensation for harm caused by competition law infringement to start (i) before that conduct ceases entirely (is ended as a whole) and (ii) before the injured party knows or can be reasonably expected to know the information needed to bring its action for damages, including the existence of the competition law infringement in question.

Regarding the first condition, it is worth noting that the AG treated the infringement as a ‘*single and continuous infringement*’ of competition law, similarly to the way that concept is applied in the public enforcement by the European Commission.

Concerning the knowledge of existence of an infringement, the AG said that such knowledge can be reasonably assumed to be acquired, subject to verification by the national court, (i) from the official publication of the summary of the infringement decision (in case of follow-on actions), or (ii) from a precise and consistent body of evidence, which would be reasonably known to a diligent party (mostly in case of stand-alone actions).

Finally, the AG concluded that Article 102 TFEU, read in conjunction with the principle of effectiveness, requires that national rules on limitation allow injured parties to base their actions on decisions of competition authorities related to EU competition rules infringements.

Comments

The AG’s opinion offers a relatively expansive perspective on the temporal application of Article 10 of the Damages Directive in line with CJEU’s judgment in *Volvo*. Some aspects of it still remain unclear in the Czech setting and need further examination by national courts, especially the question of how to interpret the Czech law during the interim period where the Czech state was late with the transposition of the Damages Directive. Given the relative brevity of such a delay, it should not have significant practical impact. Anyway, the relevance of the discussion concerning the temporal application of the rules stemming from the Damages Directive is diminished by the AG’s interpretation of the requirements of Article 102 TFEU and the principle of effectiveness that were applicable long before the Damages Directive.

The AG’s findings on how to interpret Article 102 TFEU and the principle of effectiveness for limitation periods of competition damages claims would allow longer limitation periods (even for the situations prior to the Damages Directive and the Czech Act No 262/2017 Coll.) than the ones that were thought to exist under the Czech civil law prior to the Damages Directive and its implementation. Potential claimants could, hence, submit claims in respect of harm caused by competition law infringements that could have been thought time barred previously. However, the Czech Act No 262/2017 Coll., which transposed the Damages Directive, has been in force for over 6 years now, which quite reduces the practical impact of these findings for damages claims in the Czech Republic as the more pro-claimant provisions concerning limitation periods apply under the said Act anyway. Still, it may be possible that the interpretation advocated by the AG (if adopted by the CJEU) could lead to some recalculation of limitation periods in the Czech Republic in respect of harms caused by historic wrongdoings. In any case, such an interpretation will surely influence the pending Czech cases where the issues of expiry of limitation periods have been also dealt with. It is yet to be seen whether those cases will come up with some further preliminary questions on the application of the EU Damages Directive.

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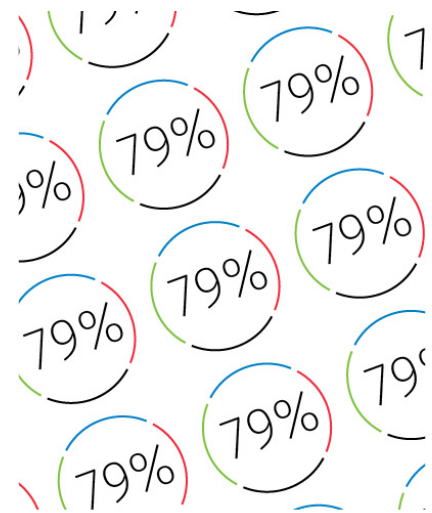
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