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Limitation Periods in Antitrust Actions for Damages: How the CJEU Tamed the Tyrant of Time – Heureka Group, C-605/21

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According to the German philosopher Johann Gottfried Herder, the two greatest tyrants on Earth are chance and time. The word 'tyrant' is derived from Ancient Greek 'tyrannos' to describe an 'absolute ruler unrestrained by law or constitution'. Certainly, actions for damages in competition law may depend on numerous factors substantially determined by chance (e.g. questions like whether a particular claimant has been affected by a specific antitrust conduct, whether the infringement is detected at all, or if claimants are able to enforce their rights in cases of collective or scattered harm, cf. the pending case on assignment models ASG, **C-253/23**). Yet the factor of time is one of the main if not the major element when assessing the ability of harmed parties to claim damages. While time can be as severe as a 'tyrant' due to its inflexibility in running (and, by this, affecting both claimants and defendants), it is not entirely 'unrestrained' by law: in fact, law has put its own limits on time, that is, limitation periods.

The judgment of the European Court of Justice (CJEU) in *Heureka Group (Online price comparison services)* (**C-605/21**) provides important guidance on limitation periods applicable to private actions for damages in antitrust cases, in particular in a case where the competition authority's decision serving as the basis for the action (a follow-on action, see para. 62 of the judgment). The intricacy of the case stems from the fact that the Commission's decision is not yet final and the applicability of the Damages Directive is not evident. The action for damages at issue refers to a continuous infringement which covers a period that is governed by the national limitation periods in Czech law pre-dating the Damages Directive, as well as a period that covers the time after the transposition deadline of that directive, which was belatedly transposed into Czech law.

Under these circumstances, the Grand Chamber of the CJEU clarifies the requirements for limitation periods applicable to antitrust actions for damages to comply with EU law in cases where a follow-on action is based on a Commission's decision that is not yet final (a novel element as compared to the **Volvo** case law):

- The limitation period cannot begin to run before the infringement has come to an end and the injured party knows, or could reasonably be expected to know, *inter alia*, of the fact that the behaviour concerned constitutes such an infringement (para. 59);
- The publication of the summary decision of the Commission decision in the *Official Journal of the European Union* coincides, in principle, with the moment in which knowledge of the relevant information by the claimant may reasonably be expected (paras. 66-67);

- EU law requires in principle that limitation period is suspended or interrupted during the investigation by the European Commission into such an infringement in order to enable the injured party to know the scope and the duration of the infringement following the Commission's investigation (para. 79).

The judgment of the Grand Chamber marks an important milestone in private enforcement of competition law to the benefit of claimants. The findings on the prerequisites for actions for damages governed by the national regimes prior to the adoption of the Damages Directive also hold significant practical ramifications for other Member States besides the Czech Republic, in particular when it comes to the national absolute limitation periods and the lack of suspension or interruption during an investigation of the Commission.

The case at hand

Heureka, a Czech company operating an online price comparison portal, brought an action for damages against Google before the Prague City Court. It relied on the decision of the European Commission (Commission) in Google Search (Shopping) which is not final yet. By that decision, the Commission found that Google had abused its dominant position under Article 102 TFEU in 13 national markets for general search services within the European Economic Area including the Czech Republic by decreasing traffic from its general search result pages to competing comparison shopping services and increasing traffic to its own comparison shopping service. According to the Commission, this was capable of having, or likely had, anticompetitive effects on the 13 corresponding national markets for specialised comparison shopping search services and on the national markets for general search services. The General Court annulled that decision in respect of an infringement in 13 national markets for general search services but upheld the rest of the decision (**T?612/17**). An appeal against this judgment has been lodged by Google (pending case C-48/22 P, for the current status see here).

In the damages proceedings in the Czech Republic, Heureka alleges that Google's search engine systematically favored its own price comparison services over Heureka's which resulted in reduced traffic to the latter. Heureka brought its action on 26 June 2020, seeking compensation for the harm allegedly suffered during the period between February 2013 to 27 June 2017 (the duration of the infringement according to the Commission's decision).

The defendant Google argued that Heureka's claim was (at least partially) time-barred under Czech law. As the Damages Directive was belatedly transposed in the Czech Republic, i.e. after the transposition deadline on 27 December 2016, the transposing **Czech Act No 262/2017 Coll.** only entered into force on 1 September 2017. Under the old national regime (Paragraph 620(1) of the Czech Civil Code), a 3-year limitation period applies to claims for compensation which begins to run with each occurrence of harm, regardless of the claimant's knowledge of the fact that the behaviour constitutes an infringement or that the infringement has come to an end. According to the case law of the Czech Supreme Court, each new occurrence of harm would trigger a separate limitation period. Thus, the limitation period expired gradually in respective of the separate partial harms. Besides, prior to Czech law transposing the Damages Directive, there were no provisions for suspending or interrupting the limitation period during the Commission's investigation until one year after the date when the Commission's decision finding that infringement becomes final (as Article 10(4) of the Damages Directive provides).

Against this background, the Prague City Court raises several questions regarding the application of the Damages Directive on limitation periods and the compatibility of the old Czech limitation periods regime with EU law. The first two questions concern the nature of the provision on limitation periods in Article 10 of the Damages Directive and its temporal applicability, which have already been subject to the case law of the CJEU (see **Volvo**). Therefore, the national court withdrew those two questions and maintained only the ones regarding the compatibility of its old limitation period regime with EU law, in particular Article 102 TFEU and the principle of effectiveness.

Application *ratione temporis* of the Damages Directive: necessity to determine when the situation at issue 'arose'

For a start, the CJEU sets the scene for the evaluation of the compatibility of national limitation periods, such as those in the case at hand, with EU law by determining the temporal scope of Article 10 of the Damages Directive. Reaffirming the *Volvo* case law, the Grand Chamber recalls that this provision is of substantive nature within the meaning of Article 22(1) of the Damages Directive, so Member States shall ensure that it does not apply retroactively (para. 47). To determine the temporal application of Article 10, it is thus required to ascertain whether the situation at issue arose before the expiry of the transposition date for the directive or whether it continued to produce effects after that time limit (para. 49 with referral to para. 48 of the judgment in **Volvo**). This in turn requires the exact determination of the expiry of the limitation period under national law, i.e. whether the limitation period applicable to the situation at issue (in other words to the claim) had already elapsed by the transposition date, i.e. 27 December 2016, for the Damages Directive (para. 50). In essence, this means that national courts have to apply the relevant national law to see if the claims were already time-barred by 27 December 2016. Even in the absence of EU rules governing the limitation periods prior to the adoption of the Damages Directive, the general EU law principles of equivalence and effectiveness apply (paras. 51-52). Already in the **Cogeco Communications** judgment, which concerned a situation pre-dating the Damages Directive, the CJEU established that a national limitation period, which begins to run before the completion of the proceedings by a national competition authority or by a review court, is precluded by the principle of effectiveness, if the limitation period is too short in relation to the duration of these proceedings and cannot be suspended or interrupted. As a result, the specificities of EU competition law and the full effectiveness of Article 102 TFEU must be taken into account, regardless of whether the Damages Directive is applicable at hand or not (para. 54).

The cumulative *Volvo* criteria for starting the limitation period: end of the infringement and knowledge

What follows is a conclusion that is neither surprising nor new – already in *Volvo* the CJEU established that the principle of effectiveness precludes national limitation periods applicable to actions for damages for infringements of the provisions of competition law which begin to run before the infringement came to an end (*objective element*) and the injured party did not know, or could not reasonably have been expected to know, the information necessary for bringing its action for damages (*subjective element*) (para. 55 with further references to the *Volvo* judgment). Those two criteria are required *together* to set off the dies a quo for the limitation period for claims for

damages resulting from infringements of EU competition law. The reason for that is also simple – given the information asymmetry between claimants and defendants and the complexity of the factual and economic analysis for bringing competition law damages cases before courts, claimants need sufficient time to prepare and quantify their claims (paras. 56, 57, 59 and 60; see to that effect also **Tráficos Manuel Ferrer** with a note by Lena Hornkohl). Another more practical consideration against splitting the limitation period into "piecemeal" periods that expire successively is the deterrent effect on the infringer who has an incentive to bring the conduct to an end when the ending of the infringement is required for the start of the limitation period (para. 63 with reference to the Opinion of AG Kokott, para. 118).

In essence, by requiring that the limitation period does not begin to run before the cessation of the infringement (para. 59), the CJEU applies the same rule set out in Article 25(2) of Regulation 1/2003 for continuing or repeated infringements pursued by the Commission to all types of infringements in private enforcement proceedings. This is justified, given the different powers of private parties on the one hand and the Commission on the other (cf. para. 57). It would otherwise not make sense why the Commission should benefit from more favorable conditions to pursue infringements of competition law, while private claimants have a weaker position in terms of powers, litigation costs and procedural constraints (cf. on the procedural prerequisites for the quantification of damages **Tráficos Manuel Ferrer**). After all, as the CJEU already stated in para. 37 in the judgment in **Sumal**, private enforcement is "an integral part of the system for enforcement of [the competition] rules" alongside public enforcement (para. 61). Besides, the infringement decision of a national competition authority (NCA) or the Commission may serve as the basis for follow-on damages litigation (para. 62), given that it can inform the claimant of the relevant parameters for the identification and determination of the harm suffered. The required knowledge for the limitation period to begin to run encompasses (i) the existence of an infringement of competition law, (ii) the existence of harm, (iii) the causal link between that harm and that infringement, and (iv) the identity of the infringer form part of that information (para. 59).

The new element in the case at hand which is different from the situation in Volvo is that the Commission's decision relied upon has not yet become final (para. 72). But does this truly make a difference?

Establishing the subjective element when the Commission's decision is not yet final

The short answer is no, there is no difference for the determination of the moment of knowledge of the necessary information to bring an action if the Commission's decision is not yet final.

First, the Court reiterates the existing case law in **Volvo** and **Deutsche Bank (Cartel – Euro interest rate derivatives)** that, in principle, the date of publication of the summary of the Commission decision in the *Official Journal of the European Union* (OJ) in the different official EU languages can be considered as the starting point for the knowledge (paras. 67-69). While the CJEU does not officially call it a legal "presumption" (it uses instead the expression "the view may be taken", para. 78), as this would go further than the Damages Directive which provides only for the substantive presumption that cartels result in harm (Article 17(2) of the Damages Directive) and may unnecessarily intrude into national procedural law (cf., for example, German law which differentiates between legal presumptions and other forms of probative value, such as the 'factual presumption' in cartel damages cases), the objective moment of the publication of the summary

decision can ensure legal certainty (para. 69) and can only exceptionally be rebutted by the defendants if they claim an earlier starting point of the limitation period (paras. 70-71). Unlikely, although not explicitly excluded is also the reverse scenario – that the claimant obtains knowledge of the relevant elements only at a later point, after the publication of the summary decision of the Commission. However, it would not suffice to simply point to not having read the OJ when the summary decision was published, as the CJEU seems to establish a due diligence obligation for claimants to take notice of the OJ (irrespective of their size, thus even consumers). The publication of the summary decision makes it generally possible to establish the existence of an infringement and it may provide knowledge on the extent of the harm suffered (see para. 78).

Second, there is a presumption of legality regarding the Commission's decisions (see Article 16(1) of Regulation 1/2003 and **Masterfoods and HB**), which – unlike NCA decisions (Article 9 of the Damages Directive) – does not need to be final to have probative value. The Court corrects a too narrow understanding of para. 42 of **Sumal** which states that "in order to hold any entity within an economic unit liable, it is necessary to prove that at least one entity belonging to that economic unit has committed an infringement of Article 101(1) TFEU […] and that that fact is recorded in a decision of the Commission which has become definitive". As long as a decision of the Commission has not been annulled, injured parties can rely on it to substantiate their claims for damages (para. 77).

The suspension or interruption of the limitation period during the investigation of the Commission

The CJEU notes that in principle, it is necessary to enable the claimant to await the outcome of the investigation of the Commission to know the scope and the duration of the infringement for a follow-on action (para. 79). This is in line with the preceding case law on the principle of effectiveness and national limitation periods (**Cogeco Communications**). As the Commission's investigation can take quite a long time (in the Google Shopping case almost seven years until the adoption of the decision), it would be practically impossible or excessively difficult for a claimant to rely on the findings of the Commission's decision to bring of an action for damages if the limitation period were to expire during that investigation. That said, the principle of effectiveness does not require that the national courts stay proceedings until the Commission's decision becomes final. They have a right, but not an obligation to do so, provided that they do not depart from the Commission's decision (para. 80). In other words, while the possibility, in principle, to suspend or interrupt the limitation period during the Commission's investigation results from EU primary law (the principle of effectiveness), it is not necessary for the national law to provide for a suspension that lasts one year after the date on which the infringement decision has been final. Only when Article 10(4) of the Damages Directive is applicable *ratione temporis*, it requires for those Member States that have chosen a suspension of the limitation period that the suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated (para. 91). This is a provision that follows only from the directive and as such does not have direct horizontal effect on individuals (para. 92). Also, the provision of the Damages Directive refers to decisions of both NCAs and the Commission, whereas the CJEU's judgment addresses solely the investigation and the following decision of the Commission.

The **Opinion** of AG Kokott (see also the note by Ji?í Kindl and Martin Holásek) is largely followed by the CJEU, but it takes a slightly more nuanced approach in respect of the necessity of

a suspension or interruption rule during the investigation of the Commission – the Opinion considers that the automatic suspension or interruption of the limitation period during the course of the competition authority's proceedings can be one tool to enable the injured party to base its action on the decision of a competition authority, but there may also be other means for that in national law with a similar effect (para. 137). Such other tools could be the staying of the national proceedings, the introduction of a declaratory action in respect of the obligation to compensate the damages of the claimant) which enable the claimant to await the outcome of the investigation of the Commission. The charm of the CJEU's judgment requiring the suspension or interruption during the Commission's investigation in any event is that it provides a clear-cut solution, even though it may require more work on the side of the Member States. Such a suspension or interruption rule for the period during the investigation of the Commission is not common in the national laws prior to the adoption of the Damages Directive (see e.g. a similar provision in German law in the old Section 33(5) GWB adopted in 2005).

The consequences for the case at hand

Following these considerations, the Court considers that the former Czech legislation on limitation periods applicable until the late transposition of Directive 2014/14 is incompatible with EU law as it makes the exercise of the right to compensation practically impossible or excessively difficult (para. 94). On the one hand, it does not respect the two conditions necessary for the dies a quo (namely the end of the infringement and the knowledge of the information necessary for bringing the action for damages and, in particular, the fact that the behaviour concerned constitutes such an infringement). On the other hand, it also does not provide for the necessary suspension or interruption during the Commission's investigation.

In the case at hand, the CJEU acknowledges the summary of the Commission's decision was published in the OJ on 12 January 2018, so this is the relevant moment as of which it could reasonably be expected that Heureka knew the necessary information to bring its action for damages (unless the defendant Google demonstrated an earlier point in time before the national court). Given the nature of the infringement in the Google Shopping decision established as continuous behavior, the conduct did not end before 27 June 2017, so the limitation period could not begin to run in any event before that date (para. 86). As a result, the claim brought by Heureka before the national court on 26 June 2020 could not (not even partially) be considered time-barred, as the situation at issue in the main proceedings had not arisen before the expiry of the period for transposition of the Damages Directive and Article 10 of that directive is applicable *ratione temporis* in the present case.

Conclusions and outlook

The judgment holds important implications for all national limitation period regimes applicable to antitrust claims for damages. As the guidance on the necessary elements for the *dies a quo* and the suspension or interruption of the limitation period during the investigation of the Commission follow directly from EU primary law (the principle of effectiveness and Article 102 TFEU), these requirements apply to all national provisions applicable to actions for damages prior to the temporal application of the Damages Directive. In essence, the judgment does not preclude

Member States from having absolute limitation periods (see also recital 36 of the Damages Directive). However, it requires that the knowledge criterion and the end of the infringement are respected, as well as, in principle, that the suspension or interruption during investigations of the Commission are provided for in order to enable the injured party to assess, inter alia, the scope and the duration of the infringement.

In the consequence, national absolute limitation periods cannot be applied to actions for damages resulting from infringements of EU competition law without complying with the requirements under EU law – Member States shall ensure this compliance either by interpreting national law in line with the requirements under EU law, or, where this would amount to an interpretation *contra legem*, by means of the primacy of application of EU law over conflicting national law.

In practice, in cases where Member States have both a knowledge-based and an absolute limitation period regime for antitrust claims for damages, one solution may be to ensure that the absolute limitation period never expires before the knowledge-based one. This way, it would not be required that the national absolute limitation periods rules are set aside. The question of having a *contra legem* interpretation would potentially arise in Member States that only have an absolute limitation period regime. However, one possible solution that could avoid setting aside the national limitation period overall could be to apply a suspension or interruption until the publication of the summary decision of the Commission – this way, the same outcome could be achieved that the claimant can obtain sufficient knowledge of the infringement's scope and duration and is able to lodge a follow-on action based on the Commission's decision (cf. the **Opinion** of AG Kokott, para. 120).

As for the suspension or interruption rule during the investigation of the Commission, it may generally be less relevant in practice, given that the knowledge is typically acquired with the publication of the summary decision of the Commission, i.e. after the end of the Commission's investigation. As long as the limitation period in the old national regimes does not start to run during the proceedings of the Commission, Member States may be spared from ensuring a new suspension or interruption in their national law in pre-Directive cases.

For Member States that have belatedly transposed the Damages Directive, the national courts are required, where appropriate, to interpret national law, as soon as the time limit for transposing a directive expires, so as to render the situation at issue immediately compatible with the provisions of that directive, without however interpreting national law *contra legem* (para. 93).

Overall, the findings of the CJEU can be summarised as follows:

- *The dies a quo*: Two cumulative criteria are required for the limitation period to start to run, in particular the *objective* element of the cessation of the infringement and the *subjective* element of knowledge of: (i) the existence of an infringement of competition law, (ii) the existence of harm, (iii) the causal link between that harm and that infringement, and (iv) the identity of the infringer form part of that information (paras. 59, 64).
- *Factual presumption of the moment of knowledge:* Irrespective of whether the Commission's decision has become final, from the date of publication of the summary of that decision in the OJ and provided that the infringement concerned has come to an end, it may be reasonably considered that the injured party has all the information necessary to enable it to bring an action for damages within a reasonable period, including the information necessary to determine the extent of any harm suffered as a result of the infringement concerned (para. 78).
- *Suspension or interruption of the limitation period in light of the relationship between public and*

private enforcement: The judgment reiterates the important role of private enforcement as an integral part of the enforcement of Articles 101 and 102 TFEU alongside public enforcement (para. 61). As a result, EU law requires the possibility to suspend or interrupt the limitation period during the investigation of the Commission in order to enable injured parties to rely on the Commission's decision to support their action for damages. Due to the presumption of legality of the acts of the EU institutions, national courts can but are not generally required to stay their proceedings until the Commission's decision has become final.

Finally, the CJEU's judgment may also have implications for limitation periods for private claims for damages resulting from violations under the Digital Markets Act (DMA). The DMA only contains rules on limitation periods for the imposition and enforcement of penalties in public enforcement (Articles 32 and 33 DMA, similar to the rules in Regulation 1/2003), but infringements under the DMA may also give rise to private enforcement (cf. Articles 39, 42 DMA), subject to the national procedural autonomy. Against this background, the guidance of the current judgment under the general principles of EU law may thus also be relevant for future claims for damages under the DMA.

** All opinions expressed reflect only the author's views.*

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