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## Implementation of the EU Damages Directive into Member State law

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# Limitation periods

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## ABSTRACT

*Limitation periods could imperil the enforcement of competition damage claims and in the footsteps of the Manfredi case of the ECJ artt. 10, 11 and 18 of the Damages Directive therefore give complex rules on this issue. France, Germany, Italy, the Netherlands and the United Kingdom have adapted their relevant legislations. The five years minimum limitation period is extended in Germany (five years plus rest of the year) and England (six years) and in some Member States there is discussion or case law on when in practice the period really starts to run, especially with a view to the question of publication of decisions of competition authorities. Absolute limitation periods, which are mentioned in Recital 36, is provided for in a number of Member States. Member State choices for suspension or interruption diverge. Sometimes, there are specific rules for limitation periods for claims for contribution against co-infringers. One may wonder whether some of these divergencies may lead to law and forum shopping.*

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Les délais de prescription pourraient compromettre la mise en œuvre des demandes d'indemnisation du fait des pratiques anticoncurrentielles. Par conséquent, les articles 10, 11 et 18 de la directive sur les actions en dommages et intérêts donnent, dans la lignée de l'arrêt Manfredi de la CJUE, des règles complexes sur cette question. La France, l'Allemagne, l'Italie, les Pays-Bas et le Royaume-Uni ont adapté leur législation pertinente. Le délai de prescription de cinq ans au minimum est allongé en Allemagne (cinq ans plus la fin de l'année) et en Angleterre (six ans). Dans d'autres États membres, il y a un débat ou de la jurisprudence sur le point de savoir quand en pratique le délai de prescription commence réellement à courir, en particulier au regard de la question de la publication des décisions des autorités de concurrence. Les délais de prescription absolus mentionnés au considérant 36 sont prévus dans plusieurs États membres. Les choix des États membres divergent entre la suspension et l'interruption. Il y a parfois des règles spécifiques pour les délais de prescription concernant les demandes en contribution à l'encontre des coauteurs de l'infraction. On peut se demander si certaines de ces divergences peuvent mener à un forum shopping ou à un law shopping.

## I. Introduction

1. Limitation periods—or prescription—are a classic issue of private law, but may sometimes have been regarded as a quite dull subject,<sup>1</sup> as a kind of Cinderella of the law. On closer inspection, it appears that such a view would be mistaken and would produce a false impression. In the law of limitation periods, diametrically opposed interests of the parties involved must be taken account of and weighted. On the one hand, there is, in the words of the great pandectist Bernhard Windscheid taken up to the *Motive* (the *travaux préparatoires* or legislative materials) to the German Civil Code (Bürgerliches Gesetzbuch, BGB), the “obfuscating power of time” (*verdunkelnde Macht der Zeit*).<sup>2</sup> If a long period of time has passed, it gets more and more difficult to establish and prove the facts. Legal peace (*Rechtsfriede*) must, someday, be

established.<sup>3</sup> On the other hand, a creditor should have a realistic chance to enforce his claim. In case his claim would be time-barred by the statute of limitations even before he became aware of his claim and had a realistic chance to pursue it, his claim would be deprived of substance and value and practically be taken away from him.<sup>4</sup> In this field full of tension, legal rules on limitation periods mostly have to strike some compromise. In matters of competition law, also the public interest may be involved.<sup>5</sup> And in practice, limitation has sometimes been invoked as a defence successfully in competition damages actions.<sup>6</sup> Interestingly enough, a number of European legislators have, in relatively recent years, thoroughly reformed their laws on limitation periods, e.g., France in

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1 In the same sense, R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, 2002, 65.

2 B. Windscheid, *Lehrbuch des Pandektenrechts*, Band I, 9th edition by v. Kipp, 1906, § 105; *Motive* I 291.

3 H. Prütting, G. Wegen and G. Weinreich (eds.) (*-Deppenkemper*), *BGB*, 12th edition 2017, § 194 no. 3; H. Brox and W.-D. Walker, *Allgemeiner Teil des BGB*, 39th edition 2015, no. 668.

4 *Begr. des RegE*, BT-Drs. 14/6040 S. 95, 96; vgl. dazu BGH, Urteil vom 20-04-1993 – X ZR 67/92.

5 See A. Piekenbrock, *Befristung, Verjährung, Verschweigung und Verwirkung*, 2006, p. 317ff.

6 A specific problem is the intertemporal application of the rule on suspension after a competition authority has taken action, see A. Rinne and K. Kolb, *Die Verjährung kartellschadensersatzrechtlicher “Altansprüche” – Ein Überblick*, *Neue Zeitschrift für Kartellrecht*, 2017, 217-223.

2008<sup>7</sup> and already in 2002 Germany.<sup>8</sup> These reforms have also been in harmony with some academic proposals for uniform European or international rules on limitation periods.<sup>9</sup> But above all, in the present context, there is the *Manfredi*-ruling of the ECJ. There, the ECJ found that national limitation periods for actions for damages because of infringements of the European competition rules have to observe the principles of equivalence and of effectiveness and may not render it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.<sup>10</sup> It thus seems logical that the Directive 2014/104<sup>11</sup> expressly addresses the issue of limitation periods. This is done in Article 10 Directive, which has got four paragraphs, and also in Article 11(4) (joint and several liability of immunity recipient) and Article 18 (consensual dispute resolution). Recital 36 gives explanations to Article 10 and Recital 49 to Article 18. This already shows considerable complexity of the issue. To give at least an introductory overview, one might try to draw up a non-exhaustive, and yet too long list of issues which merit discussion when one does analyse the different implementing rules of the Member States. At the outset, it should be recalled that Article 10(1) Directive mandates the Member States to “lay down rules applicable to limitation periods for bringing actions for damages” ((1) sentence 1) and these shall “determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended” ((1) sentence 2).

## 1. Five years or more under the subjective system?

2. For the limitation period to begin to run, Article 10(2) Directive requires that the infringement have ceased and that the claimant have or ought to have knowledge. This is a subjective system, but Article 10(3) only prescribes a limitation period of “at least five years.” This is a minimum rule and Member States may adopt—and sometimes indeed adopt—longer limitation periods, e.g., in Germany (five years plus rest of year)<sup>12</sup> or England (six years).<sup>13</sup> Will this cause law and forum shopping?<sup>14</sup>

7 Loi n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile. See, e.g., P. Ancel, *Carakter, System und Fristen der Verjährung in Frankreich nach der Reform*, in: O. Remien (ed.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Würzburger Tagung vom 8. und 9.5.2009, 2011, 29-44; for reports on many aspects of this reform and on reform proposals in other European countries, see the conference volume edited by O. Remien, just cited in this note.

8 Gesetz zur Modernisierung des Schuldrechts, Vom 26. November 2001 (BGBl. I Seite 3138).

9 Above all Principles of European Contract Law and UNIDROIT Principles of International Commercial Contracts.

10 ECJ, judgment of 13. 7. 2006 – C-295/04 (*Manfredi*), No. 82, ECLI:EU:C:2006:461.

11 Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

12 See § 33h GWB.

13 See s. 18.

14 See W. Wurmnest, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, *Neue Zeitschrift für Kartellrecht*, 2017, 2.

## 2. Absolute period?

3. Recital 36, sentence 5, allows Member States “to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.” This is a faculty left to the Member States; the Directive does not prescribe having such an absolute period. Germany, e.g., has such a rule, or even two of them. Does this mean that German law will be disadvantageous for the claimant?

## 3. Effects of lapse of limitation period

4. The Directive gives rules on limitation periods, but does not say anything on their effects. Concepts, however, may differ. The effects of the lapse of the limitation period therefore also may be an issue, although arguably a more dogmatic than practical one.

## 4. Effects of action of competition authority

5. In practice, follow-on actions are important and they are preceded by action having been taken by a competition authority. Article 10(4), sentence 1, Directive prescribes that if a competition authority takes action, the limitation period is suspended or interrupted. The choice between suspension and interruption is expressly left to national law. The two concepts are not defined, but their existence is presupposed—suspension only stopping for some time the limitation period from running, whereas interruption takes away the part of the limitation period which already has lapsed and later leads to a new start of a fresh five years (or longer) limitation period to run. What are the choices which have been made by the national implementing legislators in this respect? At any rate, Article 10(4), sentence 2, adds that the “suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated.”

## 5. Limitation period for recovery of contribution by co-infringer (joint and several liability)

6. Article 11 Directive regulates joint and several liability and Article 11(5) Directive foresees that an infringer may recover a contribution from any other infringer. But what about the limitation period applicable to this claim for contribution of one infringer against his co-infringers? The solution is not necessarily evident, at least the German implementing legislator considered a specific rule to be necessary.<sup>15</sup>

15 § 33 h VII GWB n.F.; see further infra the German report.

## 6. Immunity recipients

7. As far as joint and several liability is concerned, immunity recipients under Article 11(4) Directive enjoy some privilege—they are jointly and severally liable only to their direct or indirect purchasers or providers (lit. a) or “*where full compensation*” cannot be obtained (lit. b); subparagraph 2 of Article 11(4) says that any limitation period applicable shall be “reasonable and efficient, to allow injured parties to bring such actions.” How is this implemented?

## 7. Consensual dispute resolution

8. A consensual dispute resolution process according to Article 18(1) Directive suspends the limitation period. Here, interruption is not given as an alternative option to the Member States. One may ask whether a specific implementing rule is necessary or whether the general rules in periods of limitation can be applied and suffice.

## 8. Collective proceedings

9. Directive 2014/104<sup>16</sup> does not contain specific rules on collective proceedings. Nevertheless, when legislating on competition damages, Member States may wish to legislate on the effect of collective proceedings on the limitation period.

10. The above list gives a number of issues on periods of limitation which possibly could even be extended. To analyse them in the light of the diverging implementing legislations of important Member States promises to be the most interesting and rewarding.

O. R.

# II. France

11. Limitation periods must not be overlooked because they can be an obstacle to an increase in actions for compensation. Follow-on actions should not be impeded by a too large notion of the limitation period. That is the reason why Recital 36 invites Member States to ensure that limitations do not render practically impossible or excessively difficult the exercise of the right to full compensation. Limitations periods are referred to in two Articles of the EU Directive: mainly Article 10 and on a secondary basis Article 18. The provisions of these Articles needed some changes in French law, which have been implemented without difficulties. They did not really trigger much debates.

<sup>16</sup> Above note 11.

## 1. General provisions about limitation periods

12. Article 10 of the EU Directive deals with three specific aspects of limitation periods: the duration; the beginning of these periods; and the circumstances under which they are interrupted or suspended.

### 1.1 The duration of the limitation period

13. Article 10 invites Member States to ensure that the limitation period for bringing actions for damages is at least five years. According to the existing Article 2224 of the Civil Code, action suits shall lapse after a period of five years. The French government could have extended this period, but it clung to the period of five years fixed by Article 2224 of the Civil Code. It was not considered necessary to go beyond five years. Changes to facilitate claims for damages were finally concentrated on the beginning of the limitation period.

### 1.2 The beginning of the limitation period

14. According to Article 2224 of the Civil Code, action suits shall lapse from the day on which the holder of the right became aware or should have been aware of the facts necessary to enable him or her to fully exercise the right. This approach is realistic.

15. Article 10 of the EU Directive outlines the scope further in order to be even more pragmatic. The limitation period should not begin if the claimant does not know or cannot reasonably be expected to know cumulative elements. Two main elements are mentioned: cessation of the anticompetitive practice; knowledge of some accurate information. Those pieces of information are: (a) the behaviour and the fact that constitute an infringement, (b) the facts that the infringement has caused harm to be suffered by the holder of the right, (c) the identity of the infringer. Article L. 482-1 of the Commercial Code faithfully reproduces the list of criteria laid down by Article 10 of the EU Directive. It even added a requirement: the victim must know acts and facts “*imputed to a natural or legal person.*”

16. This would mean in practice that national competition authorities and the Commission publish their decision or a press release containing all these details. The French Competition Authority has aligned its press releases with those of the EU Commission. Its practice is even better in that the French Authority publishes press releases and the decisions they referred to on the same day, whereas the EU Commission publishes its decision long after its press releases. By contrast, the Bundeskartellamt did not

publish most of its decisions<sup>17</sup>. Bruno Lasserre, former president of the French Competition Authority, often regretted this lack of information regarding respect of the rule of law. We hope it will be quite different in the future thanks to the transposition of this Directive.

17. Moreover, Article L. 482-1 implements a subparagraph of Article 11(4) on joint and several liability: “*Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.*” It is explained in the final report to the President of the Republic relative to the ordinance of 9 March 2017 transposing the EU Directive<sup>18</sup>. According to the French government, Article L. 482-1 must be applied in relation with Article L. 481-11 implementing Article 11 of the EU Directive on joint and several liability. The five-year period does not begin to run if the injured party, who did not obtain compensation from jointly and severally liable debtors, brings an action against an immunity recipient. The French government chose to deal with all aspects of the beginning of limitation periods in the same Article L. 482-1.

### 1.3 Interruption or suspension of the limitation period

18. Article 10(4) of the EU Directive requires that “*Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.*” It added that “*the suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.*”

19. Article L. 462-7 is modified in the 4th subparagraph: any action taken by the Competition Authority, the EU Commission or another national competition authority to investigate, to find or to sanction an infringement interrupts the period of prescription. The French government further provides: effects of interruption shall go on until a decision is no longer subject to an ordinary review. The effect of an interruption offers more protection than a suspension. According to Article 2231 of the Code of Civil Procedure, “*interruption erases the delay that has elapsed and causes a new period of the same duration as the former period to run.*” In contrast, suspension of the prescription only stops without erasing the delay that has already run, according to Article 2230. The French government chose interruption, which is the most convenient solution for the injured parties.

We can conclude that Article 10, paragraph 4, of the EU Directive has been faithfully implemented into French law.

## 2. Particular provisions about the suspensive effects of a consensual dispute resolution

20. According to Recital 49, the objective is obviously not to discourage injured parties and infringers from choosing consensual dispute resolution. Recital 49 explains that limitation periods for bringing actions for damages could prevent them from having sufficient time to come to an agreement on the compensation to be paid. That is why suspension seems to be necessary.

21. Article 18, paragraph 1, deals with these suspensive effects: “*Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process.*” It adds: “*The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.*”

22. The French government considered this provision was already implemented thanks to Article 2238 of the Civil Code, which provides: “*Prescription is suspended from the day when, after a dispute arises, the parties agree to proceed to mediation or conciliation, or, if there is no written agreement, from the day of the first meeting of the mediation or conciliation.*” The beginning of the suspension is clearly mentioned. The end of the suspension is as clear. Article 2238 of Code civil further specifies: “*The prescriptive period begins to run again, for a duration that cannot be inferior to six months, from the date on which either one of the parties or both, or the mediator or the conciliator, declares that the mediation or conciliation has ended.*” Suspension for the whole duration of a consensual process is ensured.

We can conclude that existing law in France was already complying with the requirements of the EU Directive.

C. P.

17 T. Weck and P. Rummel, Allemagne : Le Gouvernement allemand adopte le Projet de loi relative à la modernisation de la Loi contre les restrictions à la concurrence (Projet de neuvième amendement de la Loi contre les restrictions à la concurrence), 28 September 2016, *Concurrences* No. 1-2017, Article No. 83364, pp. 222-223.

18 Report to the President of the Republic relative to ordinance No. 2017-303 of 9 March 2017 on actions for damages for anticompetitive practices.

# III. Germany

23. The German GWB (Gesetz gegen Wettbewerbsbeschränkungen—Act against restraints of competition) in the new version enacted with the 9th reform act to it (9. GWB-Novelle) of June 1st, 2017 now has one quite long special provision on “*Verjährung*,” i.e., limitation of actions or prescription. It is § 33h GWB.<sup>19</sup> This provision has no less than eight paragraphs. Article 10 Directive has got four paragraphs and even if one adds Articles 11(4) and 18(1) Directive the German law has the tendency of being quite elaborate. A closer look may show the details.

## 1. Five years?

24. The five years rule of Article 10(3) Directive is followed in § 33h I. The German legislator sticks to the five-year minimum rule and has not opted for a higher number of years. As the ordinary prescription period in the BGB is three years only,<sup>20</sup> this is probably not surprising. However, the number of years alone is not decisive!

## 2. Subjective system and end of the year: Five years plus rest of year!

25. Really great importance must be attached to the question when the limitation period begins to run. Generally speaking, there are objective limitation periods and subjective limitation periods: Objective periods start with some kind of real event; subjective periods start only when the creditor has or ought to have knowledge of the event and/or of his claim.<sup>21</sup> Article 10(2) Directive is quite clear in requiring that for the limitation period to begin to run the infringement must have ceased and the creditor must know or be expected to know of behaviour, infringement (lit. a first and second alternative), harm (lit. b) and identity (lit. c). This is a subjective system. And it is in conformity with current general German law of limitation periods.<sup>22</sup> § 33h II does not closely follow the wording of Article 10(2) Directive, but rather reverses the order of the different elements; however, this does not seem to be a deviation in substance.

26. Though, in one respect there is an important German speciality in § 33h II: The limitation period according to § 33h only starts to run “*mit dem Schluss des Jahres*” (with the end of the year) in which all the requirements have been met. Thus, if today on May 5th, 2017 all requirements are met, the limitation period nevertheless only starts to run with the end of the current year, i.e. December 31, 2017! This is the classic German system of end-of-the-year-, Sylvester or ultimo-prescription! It is nowadays the ordinary prescription system in Germany.<sup>23</sup> In a general comparative perspective, this is interesting, but often not followed in other countries.<sup>24</sup> The effect is that the limitation period is not really five years, but a bit longer: five years plus rest of the current year! Only in case all prerequisites are met on December 31st, the period will be just clear five years. If everything gets known to your client on January 1st, it is five years plus 364 days! This is in conformity with Article 10(3) Directive: “*at least five years*.” Interestingly enough, the reasons for the draft bill do not refer to the general German system of end-of-the-year prescription, but say that in practice it will be hardly possible to exactly determine in time when the preconditions for the start of the running of the limitation period under § 33h II, respectively Article 11(2) Directive, have been met.<sup>25</sup> Whether before or after the beginning of New Year’s Day in the eyes of the German legislator is easier to determine and less often relevant. When, e.g., a claim is started on some July 1st it does not matter whether it has been late in June or early in July of five years ago that the claimant got knowledge, it suffices that it has not been earlier than before the start of that year five years ago. In practice, German law thus should be more creditor-friendly than many other European Member State laws: not five years sharp, but five years plus rest of year! Welcome to German law to those who are just a bit late? But please, not too much. And: England and Wales have six years (but not Scotland...)<sup>26</sup>

## 3. Objective period of limitation: Ten years

27. Subjective systems of periods of limitation mostly have a relatively short subjective period of limitation going together with a long objective period,<sup>27</sup> although the “long-stop” is for specific cases sometimes deliberately left out.<sup>28</sup> Article 10 Directive does not contain such a

19 Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 1. Juni 2017 (BGBl. I S. 1416); before see the draft bill in: BT-Drs. 18/10207 (Gesetzentwurf der Bundesregierung Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen), modified by BT-Drs. 18/11446 (8.3.2017) and see Bundesrat Drucksache 207/17 (10.3.2017).

20 Cf. § 195 BGB.

21 D. Looschelders, *Verjährungsbeginn und -frist im subjektiv-objektiven System sowie die Wirkung von Treu und Glauben*, in: O. Remien (ed.) *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Würzburger Tagung vom 8. und 9.5.2001, 181–198, 181. See also R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, 2002, 96ff.

22 A. Fritzsche, C. Klöppner and M. Schmidt, *Die Praxis der privaten Kartellrechtsdurchsetzung in Deutschland*, *Neue Zeitschrift für Kartellrecht*, 2016, 501, 501–502.

23 D. Looschelders, *Ibid.* 189ff.; BeckOK BGB/Henrich/Spindler, 42. Ed. 1.2.2017, BGB § 199 no. 3. See also O. Remien, *Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung*, in: O. Remien (ed.), *Verjährungsrecht in Europa zwischen Bewährung und Reform*, Würzburger Tagung vom 8. und 9.5.2009, 2011, 337–402, 393.

24 O. Remien, *Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung*, in: O. Remien (ed.), *Verjährungsrecht in Europa* (above note 23) 377, 393.

25 BT-Drs. 18/10207 S. 66 zu Abs. 2.

26 See s. 18.

27 R. Zimmermann (above note 21) 99ff.; O. Remien (above note 23) 385f.

28 See O. Remien, *ibid.* 391f. on personal injury cases in France and the Netherlands as well as in a British draft and, discussing the problem of cases of sexual abuse.

rule, but Recital 36, sentence 5, permits application of “absolute limitation,” provided it does not make it impossible or excessively difficult to exercise the right to full compensation.<sup>29</sup> The German long-stop period starts to run when the claim has accrued (§ 33h III No. 1) and the infringement has ceased (§ 33h III No. 2). In case the infringement continues and the ten-year-limit of § 33h III applies, German law may be quite unfavourable to somebody who acquires knowledge only very late, say after nine years: only one year is left for taking action. Other EU Member States laws seem to be more favourable: Plaintiff, beware of German law?

28. Where the victim learns of the infringement only after more than ten years, one might wonder whether the complete cut-off by § 33h III is really compatible with Recital 36 and the ruling in *Manfredi*.<sup>30</sup> If these latter are taken literally, probably not... But this is doubtful. If such a case should arise in practice, a preliminary reference to the ECJ may be appropriate.

## 4. Further objective long-stop: Thirty years

29. A further objective long-stop is provided for in § 33h IV: Thirty years after the infringement. This runs independent of harm and ceasing of the infringement. Probably, it will be rather exceptional that this rule will be invoked and it may be more by precaution that the German legislator provided for this contingency. The thirty-year period conforms to the general rule in § 199 III 1 No. 2 BGB.

## 5. Prescription taking effect

30. Not much novelty is contained in § 33h V: Prescription takes effect when the five, ten or thirty-year period of limitation of paragraphs 1, 3 or 4 of § 33h have lapsed. This may be rather evident, save exceptions in paragraph 8. What is meant by prescription here is presupposed and is regulated in the general provisions of the BGB: no extinction of the obligation, but a right to refuse to perform if the defence of limitation is invoked.

## 6. Effect of taking action of competition authority

31. Article 10(4), sentence 1, Directive provides that if a competition authority takes action the period of limitation shall be suspended or interrupted. In a quite similar vein, as of July 1, 2005, in Germany the then newly introduced § 33 V GWB had provided for suspension and it continues to give rise to disputes about

<sup>29</sup> Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Recital 36.

<sup>30</sup> ECJ, judgment of 13. 7. 2006 – C-295/04 (*Manfredi*).

its intertemporal applicability.<sup>31</sup> § 33 V GWB of 2005 provided for suspension when the competition authority “initiates a procedure” and thus was somewhat narrower than Article 10(4), sentence 1, Directive; whereas the bill for the 9th GWB-Novelle stuck to the old wording, in the course of the legislative procedure now the broader formulation of the Directive has been followed.<sup>32</sup> But as already in 2005 also now, § 33h VI chooses suspension, not interruption. The British rule (s. 21) seems to be similar. Sentence 2 of § 33h VI takes up Article 10(4) 4. By choosing interruption, i.e., a new start of a five-year period, French law is even more generous to the plaintiff. But is this really necessary if the competition authority has already decided?

## 7. Joint and several liability, and recovery of contribution from co-infringer

32. Article 11 Directive provides for joint and several liability and Article 11(5) speaks of the recovery of a contribution from co-infringer(s). But what about the period of limitation applicable to the paying infringer’s claim for contribution against the co-infringer? In case the infringer pays at the end of the five-year period, will his claim for contribution against the other infringers be time-barred after a couple of days already? § 33 h VII GWB expressly provides that the period of limitation for the claim for contribution only starts to run at the time of payment of damages to the victim. Here, German law protects the joint cartel tortfeasor’s claim for contribution. This is remarkable, because it is a deviation from general German civil law on limitation periods and joint and several liability.<sup>33</sup>

33. The Bundesgerichtshof (the Federal Court of Justice) has, a number of years ago, held that the claim for contribution accrues already when the joint and several liability arises, thus, in principle, with the infringements or their effects. This leads to harmonisation of the limitation period for the original claim for damages for the victim, which by way of *cessio legis* or subrogation has passed to the infringer who has paid damages (§ 426 II BGB), and the independent claim for contribution which is a consequence of the joint and several liability

<sup>31</sup> Cf. *inter alia* OLG Jena 22.2.2017 – 2 U 583/15, BeckRS 2017, 103209; OLG Düsseldorf 29.1.2014 – VU-U (Kart) 7/13 BeckRS 2014, 17537; 14.2.2015 – VI-U (Kart) 3/14, NJW 2015, 2129; LG Berlin 16.2.2014 – 16 O 384/13 Kart, BeckRS 205, 08972; *contra*: OLG Karlsruhe 9.11.2016 – 6 U 204/15 Kart; LG Mannheim 24.1.2017 – 2 O 195/15, *Neue Zeitschrift für Kartellrecht* 2017/137; *see also* F. Bien and J. D. Harke, *Neues Recht für alte Fälle? Der intertemporale Anwendungsbereich der Verjährungshemmung gemäß § 33 Abs. 5 GWB 2005*, *Zeitschrift für Wettbewerbsrecht*, 2013, 312, 344. For a recent survey *see* A. Rinne and K. Kolb, *Die Verjährung kartellschadensersatzrechtlicher “Altansprüche” – Ein Überblick*, *Neue Zeitschrift für Kartellrecht*, 2017, 217; J. Scherzinger, *Hat der Gesetzgeber aus den Fehlern bei der 7. GWB-Novelle gelernt? – Zu den Übergangsvorschriften im Regierungsentwurf für eine 9. GWB-Novelle*, *Neue Zeitschrift für Kartellrecht*, 2016, 513, especially 515f.

<sup>32</sup> *See* BT-Drs. 18/11446 p. 7 (sub bb)) and the explanation p. 29, which also refers to the differences in the procedures in the particular legal systems of the EU. The explanation calls this a “clarification” (“*wird klargestellt*”).

<sup>33</sup> BGH 18. 6. 2009 – VII ZR 167/08, BGHZ 181, 310; slightly critical P. Bydliński, *Münchener Kommentar zum BGB*, 7th edition 2016, § 426 Rn. 25.

(§ 426 I BGB). But it is disadvantageous for the jointly and severally liable person who has paid, here the paying co-infringer. § 33h VII GWB departs from this general rule or, at least, the view of the BGH.<sup>34</sup> This shall protect the jointly and severally liable co-infringer who has paid damages.<sup>35</sup>

## 8. Immunity recipients and SMEs

34. Immunity recipients and SMEs under the Directive enjoy certain privileges, provided the injured party could obtain complete redress from the other tortfeasors. That this proves to be the case may become clear only after years. Article 11(4), subparagraph 2, therefore calls for reasonable limitation periods for the claim against the immunity recipient. In Germany, § 33h VIII GWB provides that for the claim against the immunity recipient or SME the period of limitation starts to run only as from the end of the year in which the injured party could not obtain complete redress from the immunity recipient respectively the SME. This then brings another five years plus. One may wonder whether this is really necessary or whether a suspension as in the case of action of a competition authority would have been sufficient.

## 9. Consensual dispute resolution

35. Article 12 Directive specifically mentions suspension during consensual dispute resolution. The GWB-Novelle does not take this up. Indeed, the BGB in § 204 No. 4 BGB already has a general norm on suspension if the case is submitted to a dispute resolution body and § 203 BGB even provides for suspension during negotiations between debtor and creditor.<sup>36</sup> Therefore, a specific cartel damages rule such as s. 22 of the British statutory instrument in Germany for this issue is not needed.

## 10. Collective proceedings

36. As German law is rather reluctant towards collective proceedings for damages and also the GWB does not bring specific rules in this respect, the question of the effect of collective proceedings on damages claims does not really arise. Something like s. 23 British statutory instrument therefore will be looked for in vain in the reformed GWB.

37. To sum up, one might say on the German implementing legislation:

- Five years plus rest of the year seem to be quite friendly to the claimant;
- But the ten and thirty years objective absolute periods put clear limits in order to restore legal peace (*Rechtsfriede*);
- Suspension is preferred over interruption;
- The claim for recovery of contribution is specifically protected by German law. According to the mandate of the Directive, the same applies in case of immunity recipients and SMEs.

O. R.

## IV. Italy

38. Article 10 of the Directive aims to prevent that the statute of limitations could possibly unduly hamper the bringing of actions for damages.<sup>37</sup> It can be said that, all in all, Article 8 of the Legislative Decree No. 3/2017 faithfully transposes the Directive. The task has not been a hard one for the lawmaker, since Article 10 of the Directive does not imply major changes in the national system, except for the suspension of the limitation periods pending the administrative proceedings. In order to shed some light on the effects of the implementation, I will in the first instance shortly describe the current situation. In the absence of statutory provision specifically dealing with the issue, according to dominant case law, the period of limitation for bringing damages actions for breach of competition law is governed by Article 2947 of the Civil Code (c.c.), relating to tort liability, and it amounts therefore to five years. With regard to the question of when the period of limitation starts to run, the Italian Corte di cassazione has ruled that, since harm caused by competition law infringement is not immediately apparent (so-called “hidden damages”), Article 2947 c.c. has to be construed in the light of the general principle of law, according to which the period starts to run only “*from the day on which the right can be enforced*” (Article 2935 c.c.). As a consequence, the limitation period only starts to run when the victim has or ought to have had knowledge of all the essential elements of the tort; courts shall determine the starting point of the limitation period case by case, taking into consideration all the circumstances of the case.<sup>38</sup> This principle of law applies both to follow-on and to stand-alone actions. In follow-on actions, courts tend to find that the starting point for limitation is the publication of CA’s infringement decision, regardless of its finality.<sup>39</sup> Yet, this is not an uncompromising rule. The publication of the decision simply gives rise to a rebuttable presumption of awareness, on the part of the potential claimant, of the essential elements of the tort. The claimant can bring evidence of delayed knowledge, not attributable to his

34 BGH, 18. 6. 2009 – VII ZR 167/08 BGB, previous footnote; *contra* F. Peters, *Neue Zeitschrift für Baurecht und Vergaberecht*, 2007, 337 (341).

35 See the explanation in BT-Drs. 18/10207 p. 67.

36 Cf. H. Prütting, G. Wegen and G. Weinreich (*-Deppenkemper*), BGB, 12th edition 2017, § 204 no. 11.

37 ECJ, Case C-295/04, *Manfredi*.

38 Leading case: Cassazione civ., 2.2.2007, No. 2305.

39 Cassazione civ., 6.12.2011, No. 26188.



or her negligence; the defendant, who has the burden of proof with regard to limitation, can bring evidence of prior knowledge. As a matter of fact, in the series of cases relating to the so-called “Car Insurance cartel,”<sup>40</sup> where consumers acted as claimants, courts have up to now invariably applied the presumption that the injured party becomes aware of tort and damages not before the publication of the CA’s infringement decision.<sup>41</sup> Instead, in cases concerning abuse of dominant position, when the plaintiff claiming damages is an undertaking active in the same market, where the defendant is active, or in close connected markets, district courts usually take into account the claimant’s special experience and knowledge of the market. As a result, in such cases, the limitation period can start earlier than the publication of the ICA’s infringement decision: depending on the circumstances of the case, from ICA’s formal decision to commence proceedings or even earlier.<sup>42</sup> Unfortunately, case law gives no guidance at all for stand-alone actions.

**39.** Article 10.3 of the Directive requires Member States to ensure/guarantee that the time limit for bringing actions for damages is at least five years. Although there is nothing in the Directive to prevent Member States from keeping or introducing more generous national provisions, Article 8.1 of the Decree provides that the limitation period for bringing actions for damages is precisely five years. The provision is, to that extent, basically consistent with current case law. It is noteworthy, though, that Article 8.1 bears an impact on the dispute, which is still alive not only among scholars, as to whether the infringement of competition laws gives rise to damages in tort or in contract.<sup>43</sup> According to the Report, Article 8.1 clarifies once and for all the tortious nature of antitrust damages, thus confirming the prevailing opinion.<sup>44</sup> From a different perspective, though, the dispute on characterisation now appears to be immaterial, at least with regard to limitation periods. In this light, Article 8.1 seemingly implies that every attempt to argue the applicability of the more generous standard deriving from Article 2946 c.c. (general limitation period of ten years) is now destined to fail.<sup>45</sup>

With regard to the starting point of limitation, Article 8.2 copies out Article 10.1 of the Directive.<sup>46</sup> The case-by-

case assessment of the starting point of limitation period based on subjective standards is nothing new, since national case law already requires that the victim of the tort has knowledge of all the elements necessary to file the claim (behaviour, illegality thereof, harm, causal link, identity of the infringer).<sup>47</sup> Being so, it is likely that previous case law will be confirmed. The rule, in follow-on litigation, will continue to be the same as now: the publication of the infringement decision gives rise to a rebuttable presumption of knowledge of the essential elements of the tort.

**40.** Italian law provides for both interruption and suspension of limitation periods (Articles 2943, 2941 c.c.). Moreover, when the claimant starts judicial proceedings in order to enforce a civil right, the limitation period is both interrupted and “suspended” in the broad sense (Article 2945 c.c.), meaning that the time does not run until the judgment becomes final. Nothing similar used to apply to administrative proceedings before the Competition Authority. This discrimination was not perceived as problematic, due to the fact that, according to the prevailing case law, the starting point of the limitation period was the publication of the ICA’s infringement decision and, even when the limitation period had already started to run before, Article 2943 c.c. allowed the creditor to interrupt it by filing a written request for payment. Fully complying with the Directive, Article 8.2 provides for a new case of suspension: even when the period of limitation had already begun to run before, it is suspended pending the administrative proceedings before the CA and until twelve months after the administrative decision has become final or the proceedings are otherwise terminated, i.e., without finding an infringement.<sup>48</sup> This is a radical change in the national system. When the CA takes action, it is therefore less important to establish when exactly the victim had or ought to have had knowledge of the tort: in any event, the victim has a time limit of at least twelve months after the CA’s decision has become final. Furthermore, while it was previously undisputed that the limitation period continues to run pending an ongoing appeal against the CA’s decision, things are now different. Pursuant to Article 8.2, the period of limitation is suspended not only pending the CA’s investigation, but also pending judicial review proceedings.<sup>49</sup> Since ICA’s decisions are almost always challenged and judicial proceedings before administrative courts are not always fast, the system is likely to lead to extremely long limitation periods.<sup>50</sup>

**41.** The new regime is consistent with the increased value of ICA’s decisions and it appears to align with the overall objective of the Directive, i.e., the enhancement of

40 Follow-on damages actions based on ICA’s decision No. 8546/2000, finding that a number of insurance companies conspired, by means of exchanging confidential information, to inflate insurance prices in the compulsory motor-vehicle liability insurance market.

41 Cassazione civ., 28.11.2013, No. 26685.

42 Tribunale Roma, 23.11.2016, *Fastweb-Wind*; Tribunale Milano, 26.5.2016, *CISMAT-SEA*.

43 Cassazione civile, 3.3.2013, No. 8110, casting doubts on the dominant characterisation as liability in tort.

44 See also: Caiazzo, *Italian Antitrust Review*, 2/2016, 114; Mingione, *Corriere Giuridico*, 3/2017, 384.

45 At a closer look, the question arises of whether Article 8 still allows the claimant to act “at the same time or alternatively under a contract,” when there is a contractual relationship between the parties (see: Caiazzo, 114).

46 Accordingly, limitation period begins only after the conduct has ceased. This is basically consistent with previous case law (Mingione, 385), though it has been noticed that it could indirectly interfere with settled case law relating to the calculation of the period of limitation in case of continuing or repeated infringements (see: Tavassi, 2016, 71; Scoccini, *Giurisprudenza italiana*, 12/2015, 2603).

47 The usual standard of “knowledge by using ordinary diligence” can be deemed to be equivalent to the “reasonable presumption of knowledge” in Article 10 of the Directive. Cf. Granieri, *AIDA*, 1/2015, 90, commenting on the Directive.

48 On the question of whether suspension starts only with the formal commencement of investigation, published in the ICA’s Bulletin, or even with the prior “informal investigation,” see: Granieri, 94.

49 Granieri, 96; Scoccini, 2604.

50 Caiazzo, 115; cf. Mingione, 386.

private enforcement. Nevertheless, scholars commenting on the Directive have criticised the suspension of limitation, on account of its inconsistency with the—up to now undisputed—basic autonomy of civil proceedings and administrative proceedings.<sup>51</sup> It has to be borne in mind, though, that Article 8.2 does not imply that the existence of a prior CA's decision finding an infringement is now a condition precedent to bringing an action for damages. Article 8.2 simply attaches importance to factual difficulties that the claimants usually face in gathering information necessary to substantiate the claim. Theoretically, nothing prevents the victim from bringing a civil action before the CA issues a decision. As a matter of fact, though, everything now encourages the victim to wait. Taken together, the new provisions on the binding effect and on the statute of limitations have the practical effect of preventing parallel proceedings before civil courts and before the CAs. The Decree clearly aims to give precedence to administrative proceedings. This can also be inferred from Article 4.8 of the Decree. Indeed, the latter goes beyond the Directive and allows the staying of civil proceedings pending investigations, with reference to the same infringement, before the CA.<sup>52</sup>

**42.** The Directive contains two other provisions concerning the statute of limitations: Article 11.4, dealing with joint and several liability of co-infringers; Article 18.1, relating to ADR proceedings. Article 11.4 of the Directive aims to harmonise the right to claim full compensation with the special position granted to immunity recipients and SMEs. Accordingly, Article 9.4 of the Decree sets out that, when the injured party seeks compensation from the immunity recipient on a joint and several basis, since full compensation cannot be obtained from the other undertakings, the period of limitation for bringing such actions starts to run only “*when it is established*” (*risulta accertato*) that the condition precedent for bringing such actions has come to existence. The national provision applies the rationale behind Article 2935 c.c., but it is not clear how and when precisely the impossibility of recovering compensation from other co-infringers can be deemed to be “established.”<sup>53</sup>

**43.** With regard to ADR proceedings, Article 18.1 of the Directive mandates that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. Article 15.1 of the Decree simply makes reference to pre-existing national provisions governing the effect on the limitation period of the commencement of some ADR proceedings. All of these provisions set out a rule according to which the commencement of ADR proceedings both interrupts the period and “suspends” it for the entire duration of the

proceedings.<sup>54</sup> Article 15.1 does not mention the ordinary out-of-court negotiations. If none of the aforementioned provisions could apply by analogy, general rules will apply: under Article 2943 c.c., the service of a written request for payment interrupts the limitation period that starts afresh. This would not presumably be fully in line with the Directive, though the practical outcome is perhaps even more favourable to the injured party.

M. N.

## V. Netherlands

**44.** Article 6:193s Civil Code introduces two limitation periods for claims for the compensation of damages as a result of an infringement of competition law: one shorter period of five years (also called a “relative” or subjective period)<sup>55</sup> and a longer period of twenty years (also called an “absolute or objective period”).<sup>56</sup> The short period of five years starts to run on the day subsequent to the day on which the infringement ceased and the harmed party knows or reasonably should know of the infringement, the damage suffered as a result and the identity of the person that is liable for the damage. This part of Article 6:193s Civil Code implements Article 10, paragraph 2, Directive. The drafting of it may give rise to a misunderstanding. Article 10, paragraph 2, Directive requires knowledge of the “*behaviour*” and the “*fact that it constitutes an infringement of competition law*.” The Directive, therefore, seems to make a distinction between the factual behaviour (the acts of the infringer) and its legal qualification as an infringement of competition law. It requires that the harmed party have knowledge of both for the statute of limitations to start to run. That is alien to the Dutch rules on statutes of limitation. Knowledge or awareness of the legal qualification of the facts that gave rise to the damage is not required for a subjective statute of limitations to run.<sup>57</sup> Against this backdrop, one might read “infringement” in Article 6:193s Civil Code as to mean that the harmed party should have knowledge only of the facts that constitute the infringement (or are sufficient to constitute an infringement of competition law). However, Article 6:193s Civil Code purports to implement the Directive loyally.<sup>58</sup> “*Infringement*,” therefore, captures both the “*behaviour*” and “*the fact that it constitutes an infringement of competition law*.” In practice, this will, of course, usually go hand in hand,

51 Tavassi, 71. See Cass. civ. No. 2305/2007, reaffirming the autonomy of judicial proceedings from the pre-existence of a CA's decision.

52 The question of whether civil courts had or not the power to stay, pending the national CA's investigation or the appeal against the decision, has been up to now highly controversial, outside the limited scope of Article 140 *bis* D. lgs. No. 205/2005 (which allows courts to stay the proceedings at the stage of the decision on the admissibility of the consumers’ class action”) and of Article 16 EU Regulation 1/2003 (see Negri, 2012, 427).

53 Caiazzo, 116.

54 Articles 2943.4 and 2945.4 c.c., concerning arbitration; Article 5.6 D. lgs. No. 28/2010, concerning mediation; Article 2 and Article 8 d.l. No. 132/2014, concerning negotiation proceedings, when the lawyers have entered into a so-called “negotiation convention”; Article 141-*quinquies* D. lgs. No. 206/2005, concerning ADR proceedings for consumers. It is arguable that Article 2945 c.c. and the “suspension” of limitations do not apply to the “*arbitrato irrituale*” (so-called “contractual arbitration,” Article 808 *ter* Code of Civil Procedure).

55 Explanatory Memorandum, p. 19.

56 Explanatory Memorandum, p. 19.

57 Cf. Dutch Supreme Court, 26 November 2004, NJ 2006/115 (*Bosman / Mr. G.*) and Dutch Supreme Court, 5 January 2007, NJ 2007/320 (*De Bijenkorf / X*).

58 Cf. Explanatory Memorandum, p. 19.

especially in follow-on litigation. However, this is not necessarily the case. One can think, for example, of a complaint filed by the harmed party with the competition authorities. In that case, the harmed party may be aware of the behaviour, but may not know yet whether it constitutes an infringement of competition law. The District Court in Rotterdam found that, prior to the introduction of Article 6:193s Civil Code, the filing of a complaint and knowledge of damage was sufficient to start the subjective statute of limitations of Article 3:310, paragraph 1, Civil Code (pursuant to which the statute of limitations of five years starts on the day subsequent to the day on which the harmed party gets subjective knowledge of the damage and the person liable for it).<sup>59</sup> A problem with the approach of the Directive may be that it introduces a differentiation for the starting point of the statute of limitations, based on the legal knowledge of the harmed party. Given a certain behaviour on the market, a multinational with a large competition law department may have the knowledge that the behaviour constitutes an infringement of competition law sooner than an SME without a legal department. This is even more true where Article 6:193s Civil Code (and Article 10, paragraph 2, Directive) introduces a certain objectivation of knowledge (“*should have known*”).

**45.** In addition to the subjective term of five years, Article 6:193s Civil Code also provides for an objective term of twenty years. This term starts to run on the day following the day the infringement ceases. The Directive allows the introduction of absolute limitation periods, “*provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.*”<sup>60</sup> The Dutch twenty-year term seems compliant with that provision, in particular because it only starts to run once the infringement has ceased.

**46.** Dutch law makes a distinction between interruption and extension of limitation periods. A bit counter-intuitively, interruption has the effect that a new statute of limitations starts to run. Interruption requires an act of one of the parties, such as the sending of a demand letter. Extensions work *de lege*. Dutch law does not have the concept of suspension of limitation periods.<sup>61</sup> Extension has, however, the same effect as suspension, because the extension extends or lengthens the limitation period with the duration of the period during which there were grounds for extension (or suspension). So, the clock is not stopped during the period in which that ground arises, but is allowed to run for a longer period. The net effect is the same. In order to be consistent with our laws, the legislator has opted to use extension in all instances where the Directive applies suspension.<sup>62</sup>

**47.** Article 6:193t, paragraph 1, Civil Code provides for

<sup>59</sup> District Court Rotterdam, 7 March 2007, ECLI:NL:RBROT:2007:BA0926.

<sup>60</sup> Recital 36 Directive.

<sup>61</sup> Cf. Art.10, para. 4, and 18, para. 1, Directive.

<sup>62</sup> Explanatory Memorandum, p. 20.

an extension during extrajudicial dispute resolution.<sup>63</sup> This provision applies to all forms of ADR, not only mediation, including arbitration.<sup>64</sup> It seems, however, doubtful that arbitration is captured by this provision (and by Article 18, paragraph 1, Directive for that matter). The Directive requires a suspension in case of consensual dispute resolution.<sup>65</sup> The reason for this suspension is to afford the parties a “*genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts.*”<sup>66</sup> This does not suggest that arbitration is meant to be included here. This is reinforced by the link that is made between “*consensual settlements*” and “*consensual dispute resolution.*”<sup>67</sup> Also, at least under Dutch law, there is no need for an extension in case of arbitration. Article 3:316 Civil Code already interrupts the statute of limitations in case of arbitration.

**48.** What possibly militates against this line of reasoning is that Article 18, paragraph 2, Directive provides that the court may suspend the proceedings for up to two years to make way for consensual dispute resolution, “[w]ithout prejudice to provisions in national law in matters of arbitration.”

**49.** However, an arbitration agreement, if invoked before the court, generally leads to a lack of jurisdiction of the courts, at least if done before any other defences were raised.<sup>68</sup> In that case, a suspension of the proceedings makes no sense. So, at least under Dutch law, a suspension of the proceedings to make way for arbitration would only occur if the parties agree to arbitration pending litigation before the courts. That is slightly at odds with the notion that limitation periods must be suspended (or extended) for the duration of the consensual dispute resolution process to offer them a genuine opportunity to engage in it before they bring the matter to court.<sup>69</sup> When considering the possibility of an extension of the proceedings, the courts must take into account the advantages of an expeditious procedure.<sup>70</sup> It can hardly be maintained that opting for arbitration pending litigation will usually result in an expeditious procedure. Therefore, on balance, I do not think that arbitration should lead to an extension of the statute of limitations (other than the interruption under Article 3:316 Civil Code, which makes the extension superfluous in any case).

**50.** Article 6:139t, paragraph 1, Civil Code also determines the end of a mediation. A mediation is ended if one of the parties or the mediator advises the other party that the mediation ends (if the mediator does it, presumably both parties should be advised).

<sup>63</sup> It implements Art. 18, para. 1, Directive.

<sup>64</sup> Explanatory Memorandum, p. 20.

<sup>65</sup> Art. 18, para. 1, Directive.

<sup>66</sup> Recital 49 Directive

<sup>67</sup> Recital 51 Directive.

<sup>68</sup> Art. 1022 and 1074 Code of Civil Procedure; Art. II, para. 3, New York Convention 1958.

<sup>69</sup> Recital 49 Directive.

<sup>70</sup> Recital 50 Directive.

51. Article 6:193t, paragraph 2, Civil Code provides that an act of a competition authority in the context of an investigation is grounds for extension. The extension starts to run the day after the completion of the statute of limitations. The duration of the extension is the time that was needed to make a final infringement decision or the determination of the end of the investigation otherwise plus one year.<sup>71</sup>

52. The starting point of the limitation period for contribution claims is not covered by the Directive. Under Dutch law the starting point is the payment by one of the jointly and severally liable infringers of more than his share (as determined on the basis of Article 6:10, paragraph 1, and 6:102, paragraph 1, Civil Code).<sup>72</sup> In this respect, it is, however, worth noting that contribution claims are governed by the law of the original damages claim. The statute of the latter will, therefore, also govern the issue of the statute of limitations of the contribution claims.

F. K.

## VI. United Kingdom

53. Limitation periods have in the past created some problems in the private enforcement of damages claims in the United Kingdom. In the past, stand-alone and follow-on actions could be initiated in the High Court, while only follow-on actions could be brought before the Competition Appeal Tribunal (CAT). In the High Court for England & Wales, the standard six-year limitation period of the Limitation Act 1980 applied to both stand-alone and follow-on actions,<sup>73</sup> while in the CAT, where only follow-on actions could be brought, the claim had to be made within a period of two years “beginning with the relevant date,” the relevant date being—*cum grano salis*—when the infringement decision became final.<sup>74</sup>

54. This had the effect in *Deutsche Bahn AG v. Morgan Advanced Materials plc* that the claimants’ action against one of the addressees of a Commission infringement decision was struck out. The Commission decision, issued on 3 December 2003, had been addressed to seven defendants, including Morgan Crucible. All addressees except for Morgan Crucible (the immunity recipient) appealed to the General Court, and the General Court dismissed their appeals on 8 October 2008. Deutsche Bahn brought a follow-on action in the

71 Cf. Art.10, para. 4, Directive.

72 Cf. Dutch Supreme Court, 6 April 2012, *NJ 2016/196, ASR / Achmea*

73 Limitation Act 1980, c. 58, whose s. 9(1) provides: “An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.” Even if the nature of the damages claim were to be seen in tort and not as a breach of a statutory duty (as *Garden Cottage Foods v. Milk Marketing Board* [1984] AC 141 held), and even if a contract claim were brought, a six-year limitation period would apply (ss. 2, 5 Limitation Act 1980). At any rate, as will be discussed below, now paragraph 18(1) of the new Schedule 8A to the Competition Act 1998 clarifies that the limitation period is six years.

74 Then: CAT Rules 2003, Rule 31.

CAT by claim form dated 15 December 2010 against six of the addressees (including Morgan Crucible, later renamed Morgan Advanced Materials). Morgan Crucible applied for the claim against it to be struck out. The CAT struck out the claim as being brought out of time, because the infringement decision *against Morgan Crucible* had become final once the time for appeal against the Commission decision had lapsed without an appeal being brought. Deutsche Bahn appealed, and the Court of Appeal allowed the appeal, arguing that the Commission’s infringement decision had not become final until the time for the further appeal against the General Court’s decision had lapsed; the Court of Appeal considered the Commission decision against all the various addressees as one unit, and this decision (addressed to various addressees) had not become final. The UK Supreme Court allowed the appeal against the Court of Appeal’s judgment.<sup>75</sup> The “decision” in the meaning of s. 47A of the Competition Act 1998 was the decision *addressed to Morgan*, and since Morgan had not appealed the Commission decision, the decision against Morgan had become final on 13 February 2004, so that the two-year period under Rule 31 ended in February 2006.

55. Even before the implementation of the Damages Directive, the limitation periods in the High Court and the CAT were harmonised in the new s. 47E of the Competition Act 1998, inserted through paragraph 8(1) of Schedule 8 to the Consumer Rights Act 2015, which provides in s. 47E(2) that in England & Wales the Limitation Act 1980 will apply to the claim brought in follow-on actions in the CAT as well; in Scotland, s. 6 of the Prescription and Limitation (Scotland) Act 1973 applies; and in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies.

56. In implementing the Damages Directive, the new Schedule 8A of the Competition Act 1998, inserted by the 2017 Regulations,<sup>76</sup> provides in paragraph 17 that a competition claim may not be brought in England & Wales or Northern Ireland after the end of the six-year limitation period provided for in paragraph 18(1), and that in Scotland, proceedings may not be brought after the end of the prescription period (and the obligation in respect of the loss or damage is extinguished), this prescription period being five years under paragraph 18(2).

57. Paragraph 19 of the new Schedule 8A to the Competition Act 1998 provides for the beginning of the limitation or prescription period, which is the later date of the day on which the infringement ceases or the “claimant’s day of knowledge,” defined in paragraph 19(2) as “the day on which the claimant first knows or could reasonably be expected to know (a) of the infringer’s behaviour, (b) that the behaviour constitutes

75 *Deutsche Bahn AG v. Morgan Advanced Materials plc* [2014] UKSC 24, [2014] Bus. L.R. 377.

76 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, Statutory Instrument 2017 No. 385, [http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi\\_20170385\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi_20170385_en.pdf).

*an infringement of competition law, (c) that the claimant has suffered loss or damage arising from that infringement, and (d) the identity of the infringer.*” According to paragraph 19(6), references to “*a person knowing something*” are to a “*person having sufficient knowledge of it to bring competition proceedings.*” Given that the beginning of the limitation period is delayed until the claimant’s day of knowledge, there is now likely little need for the provision in s. 32(1)(b) of the Limitation Act 1980, under which the beginning of the limitation period was delayed until concealment ended.

**58.** Paragraphs 21, 22 and 23 provide, respectively, that the periods of investigations by a competition authority, of a consensual dispute resolution process, and of collective proceedings are not to be counted when calculating the expiry of the limitation or prescription period. Paragraphs 20 and 24 provide for legal disabilities.

**59.** The limitation period for claims for contribution in England & Wales is provided for in s. 10 of the Limitation Act 1980, and is set at two years, beginning from the date of the judgment, arbitral award, or the earlier of (1) the earliest date for which payment is agreed, or (2) on which payment is made.

F. W.-v. P. ■