McDermott Will & Emery

Limitation Periods for Antitrust Damages Actions in The European Union

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SPECIAL REPORT

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Limitation Periods for Antitrust Damages Actions in The European Union

Introduction

The last decade or so has seen a marked increase in antitrust damages actions brought before the national courts of the EU Member States. As things currently stand, such actions are governed by the various national laws of the 28 Member States. This patchwork of differing national rules further complicates the already complex underpinning of antitrust damages actions. In order to facilitate the initiation of such actions, the European institutions have recently agreed upon a new directive that provides for a minimum degree of harmonisation of certain rules governing actions for damages under national laws (the Damages Directive). Its promulgation is now just a formality.[1]

One of the key, yet often overlooked, legal considerations in antitrust damages actions is the issue of limitation periods. For a defendant, a careful assessment of this issue is core to any cartel defence strategy and must be considered at the time of administrative proceedings, as it can have huge implications on the decision of whether or not an appeal should be considered (see the *Morgan Crucible* proceedings before the English courts, discussed below).

For a claimant, it is equally crucial in order to ensure that a claim is not time-barred and, as a result, left with no legal remedy. An action brought out of time will fail, no matter how robust the claim is perceived to be. A complication arises in this context, however, given the often cross-border nature of antitrust infringements, which means a claim may be brought in a number of Member States, each of which have different rules in place with respect to the length and calculation of limitation periods.

Calculating a given limitation period will often be a relatively straightforward exercise but complexities do sometimes arise. This is illustrated by the *Morgan Crucible* cases in the United Kingdom, which only recently resolved key questions relating to the calculation of limitation periods for the purposes of bringing an action before the English courts.

Against this backdrop, this special report looks at the limitation periods in those EU Member States that are arguably at the forefront of developments in antitrust damages actions: France, Germany, Italy, the Netherlands and the United Kingdom. In particular, this report analyses the complexities relating to limitation periods, as illustrated by the UK courts' attempts to grapple with the matter in a complex line of cases, ending up before the UK Supreme Court. This special report also highlights potential problem areas with respect to the limitation periods that are not addressed by the Damages Directive and may adversely affect the interplay between the public and private enforcement system in the European Union.

Complexities of the Limitation Period

At first glance, the rules on limitation periods often appear to be straightforward. That said, however, their prescriptions can sometimes be open to different interpretation, leading to multiple sets and rounds of litigation.[2] An illustration of this is provided by the *Morgan Crucible* cases that led to the UK Supreme Court having to decide on the correct interpretation of the limitation period for bringing a follow-on antitrust damages action before the UK Competition Appeal Tribunal (CAT).

By way of background, a follow-on claim can be brought before the CAT up to two years from either the date on which the substantive infringement decision becomes final and is no longer open to appeal, or the date on which the action accrued (Section 47A(7) and (8) of the Competition Act 1998),[3] whichever is the later. For example, an infringement decision by the Commission that is not

[1] See European Parliament legislative resolution of 17 April 2014 on the proposal for a directive of the European Parliament and of the Council 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 (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)).

[2] See also *Emerson Electric Co. v Morgan Crucible plc* [2007] CAT 28.

[3] The UK Government's Consumer Rights Bill introduced in the House of Commons on 23 January 2014 proposes that the limitation periods for the CAT are harmonised with those of the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session as appropriate. This means that a six year limitation period will apply to all cases in the CAT brought in England and Wales and Northern Ireland. In Scotland, the limitation period will remain as five years. These changes will bring the limitation period applicable in the CAT into line with the Damages Directive.

appealed within the required time limit will become final. Where an appeal is filed, the limitation period will not start to run until the appeal has been determined and no further appeals are possible. This is the basic premise that recently gave rise to litigation before the UK courts in the *Morgan Crucible* cases. Specifically, the UK courts had to deal with the vexed question of how the term "decision" in Section 47A(8) was to be construed. The courts had to assess whether it referred to a decision concerning a particular defendant to a Section 47A claim or to a decision concerning all the addressees of a decision.

The *Morgan Crucible* cases arose out of the Commission's Electrical and Mechanical Carbon and Graphite Products decision of 3 December 2003.[4] Morgan Crucible, a leniency applicant that received immunity from fines, did not appeal the Commission's decision, while the other defendants lodged actions for annulment before the EU General Court. After the General Court had dismissed the appeals and the time for appeal to the European Court of Justice (ECJ) had expired, Deutsche Bahn brought an action for damages in the United Kingdom against all members of the cartel, including Morgan Crucible. Morgan Crucible argued that the two year limitation period for bringing a follow-on claim against it had expired, so Deutsche Bahn's action against it was time-barred.

At first instance, the CAT held that the limitation period must be determined in relation to each defendant individually.[5] As a result, the CAT held that an action brought against Morgan Crucible in December 2010 on the basis of the Commission's decision of 3 December 2003 was time-barred. Specifically, it held that, in circumstances where Morgan Crucible had not appealed the decision, the limitation period in respect of damages claims brought against it began to run from the deadline for filing an action before the European courts, *i.e.,* on 14 February 2004, and expired two years later, *i.e.,* on 14 February 2006.

On appeal, the Court of Appeal (CA) overturned the CAT's finding, ruling that the clock started ticking when the time for an appeal by all members of the cartel expired.[6] With respect to the definition of the term "decision", the CA held

> *The appeal by the undertakings against infringement is an appeal against the basic decision that the relevant prohibition has been infringed. The result of a successful appeal might be that no infringement situation existed at all. It is not correct to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party. It is an appeal directed to the decision that an infringement situation exists because a relevant prohibition has been infringed. The appeal is not simply against the decision against a particular party or a particular addressee. The addressing of the decision on infringement to a particular undertaking is a secondary matter involving the allocation of responsibility consequential on a logically prior decision that the prohibition has been infringed and that an infringement situation exists.*

The CA reasoned in its judgment that any follow-on claims should be postponed until the final decision on infringement becomes known so all questions of causation, quantum and contribution are resolved at the same time. It further held that, if follow-on actions were allowed against a leniency applicant, the leniency applicant may be liable for the infringement by all the cartel members, even if those undertakings were successful in their appeals to the ECJ. In *Morgan Crucible*, as some of the undertakings appealed the infringement decision to the General Court, the time in fact began to run as of the deadline for appealing to the ECJ (18 December 2008) and expired two years later (18 December 2010). As Deutsche Bahn's damages claim was filed on 15 December 2010, according to the CA the claim had been brought in time.

The CA's judgment was, however, set aside by the UK Supreme Court.[7] The Supreme Court held that the damages claim brought against Morgan Crucible on 15 December 2010 was, in fact, out of time. Specifically

> *A Commission decision establishing infringement of Article [101 of the Treaty on the Functioning of the European Union (TFEU)] constitutes in law a series*

[4] Case C.38.359, Electrical and Mechanical Carbon and Graphite Products.

[5] [2011] CAT 16. See para. 41: "In short, it is our clear conclusion that "decision" must mean that specific part of the *dispositif* that makes a decision as regards a particular addressee".

[6] [2012] EWCA Civ 1055.

[7] [2014] UKSC 24.

of individual decisions addressed to its individual addressees. The only relevant decision establishing infringement in relation to an addressee who does not appeal is the original Commission decision. Any appeal against the finding of infringement by any other addressee is irrelevant to a non-appealing addressee. Under Section 47(5), the relevant decision establishing that Article [101 TFEU] had been infringed is thus in the present case the Commission decision dated 3 December 2003 and, once the time for the appellant to appeal against that decision had expired on 13 February 2004, the respondents had, under Section 47A(8,) two years within which to bring a follow-on claim.

In sum, the UK Supreme Court reasoned that the decision against Morgan Crucible became final at the time when the period it could be appealed expired.

In terms of the practical implication for non-appealing cartelists, the stakes could not be greater. Parties that decide not to appeal have to accept and internalise a (huge) fine imposed by the Commission. In addition, they are saddled with joint and several liability for all damages caused by the cartel, even in those cases where the appellants manage to disprove the legal existence of the cartel on appeal. In this respect, a non-appealing cartelist would also be unable to claim a contribution from the co-cartelists.

In terms of the interplay between public and private enforcement, it is clear that this situation may have a chilling effect on the incentives for cartelists to come forward for leniency. The Damages Directive does offer some protection to leniency recipients in this respect, but it is not completely watertight.[8] It remains to be seen whether or not the UK Supreme Court ruling will dis-incentivise leniency applicants going forward, given that the United Kingdom is often a jurisdiction of first resort for many damages claimants.

The Damages Directive

The Damages Directive, *inter alia,* seeks to harmonise certain basic rules relating to limitation periods for bringing an antitrust damages action. Taking a mainly claimant-friendly stance, the Damages Directive prescribes that Member States must ensure that the limitation period for bringing an action for damages is at least five years. It lays down rules determining when the limitation period begins to run and the circumstances under which the period is interrupted or suspended. Under Article 10(2) of the Damages Directive, the limitation period must not begin to run before the infringement in question has ceased and the claimant knows of, or can be reasonably expected to know

- Of the behaviour in question and the fact that it constitutes an infringement of competition law
- That the infringement of competition law caused the claimant harm
- The identity of the infringing undertaking.

The limitation period must be suspended during an investigation by a competition authority into conduct to which a claim relates until at least one year after the competition authority's decision becomes final and an appeal is no longer possible. The Damages Directive does not, however, address explicitly the issue of whether the limitation period is suspended individually for each defendant or collectively until no appeal is possible/under way. It can be assumed, therefore, that this particular matter is to be regulated by each Member State under its own national rules. The issue that arose before the UK Supreme Court in the *Morgan Crucible* cases may, therefore, still arise in other jurisdictions following the transposition of the Damages Directive into national law.

For the foreseeable future, limitation periods will be determined by national rules. The transposition of the Damages Directive into national law must occur within two years of the date of its entry into force and diverging national rules will apply until that date. Various national rules will also apply to actions based on antitrust infringements that occurred prior to the transposition of the Damages Directive, as the Directive does not contain any rules on retroactive application.

[8] See Article 11(3) of the Damages Directive which reads as follows: "[…] Member States shall ensure that an immunity recipient is liable (a) to its direct and indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law." See also Article 11(4) "[…] The amount of contribution of an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers."

Overview of The Rules in The Main EU Jurisdictions

FRANCE

In France, the limitation period is five years.[9] It can be amended by the parties to between at least one year and a maximum of 10 years. The transposition of the Damages Directive will not require a change in the length of the limitation period.

Under the French Civil Code, the limitation period starts to run from the "manifestation of the damage".[10] The date of the manifestation of the damage is the date on which the holder of a right to bring a claim becomes aware (or should have become aware) of the facts, enabling him or her to exercise their right. If the right holder was not aware of the anti-competitive activity, a decision by the Commission or the French Competition Authority to levy a fine would set the starting date. Again, the transposition of the Damages Directive will not require changes to this part of the French rules on limitation periods.

The opening of a proceeding before a competition authority (the French Competition Authority, the national competition authority of another Member State or the European Commission) suspends the limitation period until a definitive decision has been taken by these authorities or, in the event of an appeal, by the relevant court.[11] Unlike the Damages Directive, however, the suspension ends with the competition authority's decision rather than at least one year after the decision.[12] If a decision of the French Competition Authority is appealed, it is not considered as definitive until a court ruling is rendered, even towards the parties who have not appealed the decision

Courts may, at the request of parties or on their own motion, decide that several proceedings will be joined if there is a link between the proceedings and where, in the interests of justice, the cases be heard and decided at the same time.[13]

GERMANY

The length of the limitation period for a claim for antitrust damages in Germany is three years.[14] In principle, a limitation period can be extended or shortened contractually but it cannot be shortened for claims resulting from intentional conduct. The maximum length that can be effectively agreed upon is 30 years from the statutory start of the limitation period. When either the Commission or a competition authority of any Member State has initiated proceedings because of a violation of Articles 101 or 102 TFEU or a violation of German Antitrust law, the limitation periods for damages claims based on the respective violation are suspended for the duration of the proceedings.[15] This limitation period will need to be extended to transpose the Damages Directive.

The limitation period for a damages claim starts at the end of the first year in which the claim existed and the claimant was aware or, owing to gross negligence, unaware of the fundamental facts constituting the claim, including the identity of the debtor.[16] Regardless of whether or not the claimant was aware, or negligently unaware, of the claim and/or its constituting facts, a damages claim expires at whichever is the earlier of either 10 years after the claim came into existence or 30 years after the conduct giving rise to the damage.[17]

In principle, limitation periods for claims against multiple debtors who are jointly and severally liable start and expire separately for each debtor (the principle of "individual effectiveness"). The same holds true for the suspension of limitation periods. This principle can be abrogated contractually, *i.e.,* the length and suspension of limitation periods can be stipulated with each debtor individually. It is thus possible, within the statutory boundaries outlined above, to *a-priori* harmonise the time limits for claims against multiple debtors who are jointly and severally liable.

[9] Article 2224 of the French Civil Code and Article 423-18 of the French Consumer Code concerning group actions

[10] Article 2224 of the French Civil Code

[11] Article L. 462-7 of the French Commercial Code

[12] For group actions only, as introduced by the French Consumer Act promulgated on 18 March 2014, the limitation period starts from a decision taken by the European Commission, national competition authorities or national courts, once the appeals relating to the facts have been exhausted (see Articles L. 423-17 and L. 423-18 of the French Consumer Code). This means that, if an ongoing appeal is limited to the fine or the procedure (and does not relate to the facts of the case), the five year limitation period starts to run anyway. It should be noted that the French Consumer Act came into force only very recently so it is possible that questions will arise in relation to the practical application of the limitation period for group actions and that courts will be asked to clarify certain issues.

[13] Article 367 of the French Code of civil procedure

[14] Section 195 of the German Civil Code

[15] Section 33(5)(i) of the German Act against Restraints of Competition

[16] Section 199(1) of the German Civil Code

[17] Section 199(3) of the German Civil Code

Apart from contractual abrogation, there are few exceptions to the principle of individual effectiveness. The most relevant one applies to non-incorporated partnerships, whose partners are, in general, jointly and severally liable for claims against the partnership under German law. If a non-incorporated partnership is sued, the filing of the lawsuit will suspend the limitation periods for the corresponding claims against the jointly and severally liable partners. This only works one way: the filing of a lawsuit against a partner of a non-incorporated partnership will not suspend the limitation periods for corresponding claims against either the partnership or other partners.

Courts may *ex officio* join different proceedings regardless of the parties involved, if the proceedings are factually connected, the proceedings are of the same type (this will routinely be given for multiple proceedings for antitrust damages) and joining the proceedings is practicable. Courts may, at their discretion, separate proceedings that have been joined.[18]

ITALY

Damages actions for antitrust infringements are qualified by the Italian courts as tort actions.[19] Under Italian law, the limitation period for tort liability-based claims is five years from the day the harmful event occurred[20] In principle, therefore, no changes will be required to transpose the Damages Directive. Under the Italian Civil Code, agreements aimed at modifying the limitation period are null and void.[21]

Under Italian law, the limitation period for tortious damages actions starts running from the date the harmful event occurred.[22] According to the case law, the limitation period in antitrust damages actions starts running from the day the claimant, by using ordinary diligence, became "reasonably and adequately aware of the damages allegedly suffered, and their unlawfulness".[23] In general, this is the day of the publication of the competition authority's fining decision, unless the claimant successfully demonstrates that, for objectively justified reasons, he or she became aware of the unlawful conduct and the relevant damages at a later time.[24]

Conversely, in principle, the defendant may be able to prove that the claimant had knowledge of the damages suffered as a result of the alleged unlawful conduct prior to the publication of the fining decision, *e.g.,* if the action is not based (solely) on information/data contained in the competition authority's decision. If so, the limitation period should start from that prior date.[25]

In addition, in a recent case, the Milan court held that, if the claimant is a company, the limitation period should start prior to the publication of the fining decision, *e.g.,* on the day of the publication of the commitments or the day of the statement of objection, given that companies should be considered in a better position (compared to individuals) to become aware of the damages suffered as a result of the alleged unlawful conduct.[26]

In principle, the limitation period for antitrust damages actions starts running individually for each potential claimant. As mentioned above, however, in follow-on cases, it *de facto* starts running on the same day for all claimants, *i.e.,* on the day of publication of the decision. According to the case law, whether or not the competition authority's decision has been appealed is not relevant for the purposes of determining the day when the limitation period should start to count.[27]

This case law will have to change under the Damages Directive, which stipulates that Member States must ensure that, if a competition authority takes action for ascertaining an infringement of competition law to which the action for damages relates, the limitation period is suspended or interrupted and the suspension ends either one year after the infringement decision has become final or the proceedings are otherwise terminated, whichever is the earliest. It remains an open question whether or not the Italian courts would, in this case (like the UK courts), rule

[18] Section 147 of the German Civil Procedural Act

[19] For example, Court of Cassation, judgment No 26188 of 6 December 2011; Court of Appeal of Palermo, judgment of 12 June 2012

[20] Article 2947 of the Italian Civil Code

[21] Article 2936 of the Italian Civil Code

[22] Article 2947 of the Italian Civil Code

[23] Court of Cassation, judgment No 2305 of 2 February 2007; Court of Appeal of Naples, judgment of 12 March 2012; Court of Appeal of Palermo, judgment of 12 June 2012

[24] Court of Cassation, judgment No 26188 of 6 December 2011

[25] Court of Cassation, judgment No 26685 of 28 November 2013

[26] *BT Italia v Vodafone* Tribunal of Milan order of 20 May 2011

[27] Court of Cassation, judgment No 2305 of 2 February 2007

that an appeal only hinders the limitation period with respect to the individual defendant.

The parties may request the judge before which several identical or connected actions are pending, to join the proceedings.[28] The judge may also *ex officio* join several identical or connected actions pending before him.

THE NETHERLANDS

In accordance with the Code of Civil Procedure, claims for damages in the Netherlands are time-barred five years after the claimant has become aware of the damage, but, in any event, no later than 20 years after the event causing the damage occurred. The first part of the test is subjective, as the five year period starts running from the point at which the claimant ought to have known about the damages. It is therefore possible in the Netherlands for the limitation period to start and run out before the competition authority adopts an infringement decision. This was confirmed by the Rotterdam District Court,[29] where the claim for damages was dismissed because it was held to be time-barred. The claimant, a complainant in the antitrust proceedings, brought an action for damages only after the EU Commission adopted a decision, which was five years after the claimant's original complaint.

THE UNITED KINGDOM

As set out above in the discussion of the *Morgan Crucible* cases, the limitation period in the United Kingdom to bring follow-on claims in competition cases is two years. The transposition of the Damages Directive will therefore require a change in the length of the limitation period. Where an appeal is filed, the limitation period will not start to run until the appeal has been determined and no further appeals are possible. The Supreme Court has confirmed that the limitation period starts running—individually for each defendant—on the date when the defendant no longer has a right to appeal the decision. The defendant may ask the court to stay the proceedings, but this remains at the discretion of the courts.

Conclusion

Although antitrust damages actions are on the rise, it is clear that important procedural issues remain to be ironed out in the European Union before they fully take off. The crucial matter of limitation periods is one of these procedural issues, as is well illustrated by the *Morgan Crucible* cases before the UK courts.

This overview of the rules in those EU jurisdictions that are at the forefront of developments in the field of antitrust damages actions confirms that, more likely than not, limitation periods run individually for each company rather than collectively. This issue remains open under the Damages Directive and will therefore not be answered uniformly across the 28 EU Member States for some time to come.

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