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ABSTRACT

This article discusses the limitation periods within which victims of a competition law infringement can bring an action for damages in the European Union. Firstly, it addresses the evolution of the European rules in this regard since 2005. Secondly, it provides an overview of the limitation periods (pre and post Damages Directive) in five EU Member States where victims of competition law infringements have brought a significant number of damages actions, or seem inclined to bring increasingly more damages actions; Belgium, England and Wales, France, Germany and the Netherlands.
Thirdly, it identifies some inconsistencies and shortcomings in both the EU and national laws (post Damages Directive) and suggests some amendments in the EU or national (case) laws.

Le présent article traite des règles de prescription en matière d'actions en indemnisation que les victimes d'infractions au droit de la concurrence sont en droit d'introduire. Premièrement, il examine l'évolution depuis 2005 des règles européennes applicables en la matière. Deuxièmement, il offre une analyse des règles (pré et post adoption de la Directive Dommages-Intérêts) applicables dans cinq Etats membres de l'Union dans lesquels les victimes d'infraction au droit de la concurrence ont introduit un nombre important d'actions, ou semblent enclins à introduire de plus en plus d'actions, à savoir l'Allemagne, l'Angleterre et le Pays de Galle, la Belgique, la France et les Pays-Bas. Troisièmement, cet article identifie quelques incohérences et insuffisances tant en droit de l'Union que dans les droits nationaux (après l'adoption de la Directive Dommages-Intérêts) et propose des modifications des normes et jurisprudences européenne et nationales.

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I. Introduction

1. Limitation periods in EU competition law damages actions. The issues raised by the enforcement of limitation period rules[1] in competition law damages actions brought in the European Union are numerous and yet seem to have been under-examined to a large extent. Firstly, limitation periods in competition law damages actions give rise to recurrent questions. According to both legal doctrine[2] and private competition lawyers,[3] defendants in competition law damages actions frequently raise the defence that the action is time-barred right after arguing that the court before which the action is brought has no jurisdiction to hear the case.

1 Limitation period rules may be defined in simple terms as rules that address the time periods within which a claimant may ask a court to enforce his or her claim.

2 R. Amaro and J.-F. Laborde, *La réparation des préjudices causés par les pratiques anticoncurrentielles : Recueil de décisions commentées*, February 2019, "Chapter 1, Prescription extinctive" (*Concurrences*, 2019), 9; M. Strand, Managing Transposition and Avoiding Fragmentation: The Example of Limitation Periods and Interest, in M. Strand, V. Bastidas Venegas and M. C. Iacovides (eds.) *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart Publishing, 2019), 41; D. Ashton, *Competition Damages Action in the EU: Law and Practice* (2nd edition, Edward Elgar, 2018), 258; P. Scott, M. Simpson and J. Flett, Limitation periods for competition claims – the English patient, *G.C.L.R.* 2011, (18) 18.

3 AIJA Antitrust Conference, Lyon, 4 October 2019, Panel: "The defendant's Corner" (document in possession of the authors); M. Seegers, *EU Antitrust Private Enforcement*, Slides for Sciences Po Paris (IEP) seminar in Global Competition Litigation supervised by M. Barennes, 2017–2018 (document in possession of the authors), and McDermott Will & Emery, Limitation Periods for Antitrust Damages Actions in the European Union, special report, July 2, 2014, 3, available at: https://www.mwe.com/fr/insights/limitation-periods-for-antitrust-damages-actions__.

Secondly, determining the limitation period is decisive to ascertain both the right for competition infringement victims to obtain damages and the amount of those damages. If the claim is fully time-barred, it is no longer possible to enforce it and claimants consequently will not receive any compensation. If the claim is partially time-barred, claimants may only receive partial compensation, i.e., for the part of damage that is not yet time-barred.

Thirdly, determining whether a competition damages action is time-barred often appears to be complex.[4] A first reason for that complexity is that both EU and Member State limitation period rules adopted before and even after the Damages Directive[5] are unclear[6] in several regards. A second reason is that, even after the implementation of the Damages Directive, limitation period rules still vary in many respects from one Member State to the other.[7] Some actions may end up being time-barred in one Member State, while the contrary holds true in another one.[8] Moreover, while the latest case law[9] of the ECJ[10] has been contributing to clarifying how national limitation period rules applicable before the adoption of the Damages Directive are compatible with EU law, the Damages Directive did not provide for harmonised and clear solutions in every respect.[11]

Fourthly, despite the key role of limitation period rules in the success or failure of a competition damages action, it seems that no systematic study of those rules and their inconsistencies (before and after the adoption of the Damages Directive) at both the European and Member State levels has been published yet.[12]

Against this backdrop, this article discusses the limitation periods within which victims of a competition law infringement can bring an action for damages in various EU Member States and whether there is further need for clarification and harmonisation of these rules.[13] In this context, Section II addresses the evolution of the European rules applicable to limitation periods in competition law damages actions since 2005. It finds in essence that, given the specific features of competition law infringements, there has been a clear trend to extend limitation periods within which victims of competition law infringements can bring damages actions. Section III provides an overview of the limitation periods in EU competition law damages actions in five EU Member States where victims of competition law infringements have brought a significant number of damages actions, or seem inclined to bring increasingly more damages actions, namely Belgium, England and Wales,[14] France, Germany and the Netherlands. It examines in essence how limitation period rules apply in each of these Member States before and after the adoption of the Damages Directive. Taking stock of the two previous sections, Section IV identifies some inconsistencies and shortcomings in both the EU and national laws regarding limitation period rules (post Damages Directive). It consequently suggests some amendments in the EU or national (case) laws, bearing in mind that the EC[15] is bound to review the Damages Directive before 27 December 2020.[16]

II. Evolution of European limitation period rules applicable to competition law damages actions

2. Remaining diversity regarding EU limitation periods. Fifteen years have passed since the so-called Ashurst report attracted much attention with the famous phrasing: "*The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.*"[17] Today, there remains no doubt that actions for damages are an integral part of the system for enforcement of the EU competition rules.[18] The total-underdevelopment statement seems to be no longer applicable as far as damages actions brought by corporate victims of competition law infringements

4 For a similar opinion, *see* for instance, P. Akman, Period of limitations in follow-on competition cases: the elephant in the room?, *CCP Working Paper* 13-8, ISSN 1745-9648, available at: http://competitionpolicy.ac.uk/documents/107435/107587/13-8+complete.pdf/559b75e2-e5a9-4e86-8c45-48d7ac937527; R. Amaro and J.-F. Laborde, *op. cit.*, 9.

5 Directive 2014/104/EU of the European Parliament and of 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, OJ L 349, 5.12.2014, pp. 1–19.

6 *Infra* Section III of this article.

7 *Infra* Section III of this article.

8 *Infra* Section IV of this article.

9 ECJ, 28 March 2019, case No. C-637/17, ECLI:EU:C:2019:263, *Cogeco*.

10 Court of Justice of the European Union.

11 *Infra* Section III of this article.

12 With the exception of B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), 506 p., which however deals with issues concerning competition law damages actions in a more general way and is less focused on limitation period rules specifically.

13 The scope of this article is limited to limitation periods applying to tort actions, not those applying to a breach of a contract. This article does also not examine the limitation periods applying to contribution actions that infringers may bring against each other. Only a few references are made to those issues, for information purposes.

14 This article does not examine the impact of a potential Brexit on the limitation period rules in England and Wales.

15 The European Commission.

16 Article 20 Damages Directive.

17 D. Waelbroeck, D. Slater and G. Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative report, 31 August 2004, 1.

18 E.g., ECJ, 14 March 2019, case No. C-724/17, ECLI:EU:C:2019:204, *Skanska*, para. 45.

are concerned[19] and harmonisation has been improved since the implementation of the Damages Directive. Differences across the EU Member States nevertheless remain numerous, for example concerning provisions on limitation periods.[20]

3. ECJ *Manfredi* judgement highlights importance of effectiveness principle. The Ashurst report itself already mentioned in 2004 that limitation periods varied widely across the Member States and could constitute obstacles to the effective private enforcement of competition law damages actions.[21] Approximately two years later, the ECJ confirmed the importance of limitation periods for such actions. In its seminal *Manfredi* judgement in 2006, the ECJ was asked, in essence, whether Article 101 TFEU[22] precludes a national rule that provides that the relevant limitation period begins to run from the day on which the prohibited agreement or practice was adopted.[23] As no EU rules governing the matter existed at the time, the ECJ replied that it was for the domestic legal system to lay down the detailed procedural rules.[24] Those rules, however, must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not render the exercise of rights conferred by EU law "*practically impossible or excessively difficult*" (principle of effectiveness).[25] The ECJ subsequently strongly hinted that national limitation periods, which begin to run from the day on which the agreement or concerted practice is adopted (i.e., started), could breach the effectiveness principle, particularly if it concerns a short limitation period that may not be suspended.[26] This would especially be true in the case of continuous or repeated infringements as it would be possible that the limitation period expires even before the infringement is brought to an end.[27]

4. Suggestions on limitation periods in EU preparatory documents. In its Green Paper issued in 2005, the EC acknowledged the considerable diversity between Member States concerning limitation periods.[28] It observed that (short) limitation periods might constitute an obstacle to the effective private enforcement of competition law damages actions.[29] The EC suggested that those limitation periods would be suspended during proceedings by a competition authority or would commence only after a court of last instance has decided on the issue of infringement.[30] The EC extended this line of thinking in its White Paper issued in 2008, taking the considerations of the EP[31] into account[32] and explicitly referring to the ECJ *Manfredi* judgement.[33] It suggested that the applicable limitation period should not start to run (1) in general, before the injured party can reasonably be expected to have knowledge of the infringement and of the corresponding harm and (2) for continuous or repeated infringements, before the day on which the infringement ceases.[34] Furthermore, the EC suggested that a new limitation period of at least two years should start once an infringement decision became final (thereby supporting follow-on claims that rely on such a decision).[35] Interestingly, the EC initially did not consider it necessary to suggest a minimum duration for stand-alone cases.[36]

At the time of publication of the White Paper, however, the EC published an accompanying Impact Assessment Report.[37] That report put forward, as the preferred

19 By contrast, probably due to the lack of an effective EU class action system and because only a minority of Member States have adopted collective redress mechanisms, competition damages action brought by consumers do still remain totally underdeveloped.

20 B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *op. cit.*, 411–485.

21 D. Waelbroeck, D. Slater and G. Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative report, 31 August 2004, 8, 87–89, 114 and 120.

22 At the time of the judgement, Article 81 EC.

23 ECJ, 13 July 2006, joined cases No. C-295/04–C-298/04, ECLI:EU:C:2006:461, *Manfredi*, para. 73.

24 Principle of national procedural autonomy as introduced by the ECJ in its judgement of 16 December 1976, No. 33-76, ECLI:EU:C:1976:188, *Rewe*.

25 ECJ, 13 July 2006, *op. cit.*, *Manfredi*, para. 62 and 78.

26 Ibid., para. 78.

27 "(…) *in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action*": ECJ, 13 July 2006, *op. cit.*, *Manfredi*, para. 79.

28 EC, Commission staff working paper – Annex to the Green Paper, SEC(2005) 1732, para. 265.

29 EC, Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 11, and EC, Commission staff working paper – Annex to the Green Paper, SEC(2005) 1732, para. 42. Furthermore, it is mentioned that longer limitation periods might increase the power of the claimant in settlement negotiations because he or she will feel reduced pressure to commence proceedings to stop the running of the limitation period (para. 262).

30 EC, Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 11, option 36. The proposal to suspend was based on § 33 Abs. 5 German GWB, the delayed starting point on the "Spanish model": EC, Commission staff working paper – Annex to the Green Paper, SEC(2005) 1732, para. 271–272.

31 The European Parliament.

32 EP resolution of 25 April 2007 on the Green Paper on damages actions for breach of the EC antitrust rules, 2006/2207/(INI), para. 24–25. The EP suggested that (1) follow-on cases would have a limitation period of one year after the final infringement decision, (2) stand-alone cases would have a limitation period of which the duration corresponds to the period in which the EC is entitled to take a decision imposing a fine (i.e., five years—Article 25 Regulation No. 1/2003), and (3) the limitation periods should be suspended/stop running during formal discussions or mediation between the parties and during an investigation by a competition authority.

33 EC, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 8 and EC, Commission staff working paper accompanying the White Paper, SEC(2008) 404, para. 230.

34 EC, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 8. The European Economic and Social Committee agreed with the White Paper's suggestions on limitation periods, mentioning that "*it is important for the purposes of legal certainty to standardise criteria in this regard*" (Opinion of the EESC on the White Paper on damages actions for breach of the EC antitrust rules, 2009/C 228/06, para. 3.5)

35 EC, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 9. Compared to the suggestion in the Green Paper 2005 (option 36), the EC thus preferred the option of a new limitation period starting after the infringement decision to the option of a suspension. According to the EC, a suspension might create difficulties to calculate the remaining limitation period. Furthermore, if the suspension starts at a late stage of the period, the time left might be insufficient to prepare a claim. Although the reasoning of the EC is understandable, the newly suggested option has the downside that a potential claimant, who is aware of ongoing proceedings by a competition authority, takes a risk when postponing its damages action, as he or she cannot be sure that the proceedings will end with the adoption of an infringement decision.

36 EC, Commission staff working paper accompanying the White Paper, SEC(2008) 404, para. 236. Stand-alone actions may be defined as those for which the victim cannot rely on a prior competition authority decision to assert his or her right to compensation. Those actions contrast with follow-on actions, in which the victim can rely on such a decision.

37 EC, Impact Assessment – Commission staff working document accompanying the White Paper, SEC(2008) 405. This report draws, inter alia, on the findings of the external study: CEPS, EUR and LUISS, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, 21 December 2007 (on limitation periods: 533–543).

option, a (minimum) duration of the applicable limitation period in stand-alone cases—namely, five years from the moment that the victim can reasonably be considered to have knowledge of the infringement and the harm it caused.[38] The EP agreed with this suggestion in the Resolution it adopted in 2009.[39] Consequently, the Proposal for the Damages Directive abandoned the idea of a new two-year limitation period after the adoption of a final infringement decision.[40] Instead, it focussed on the fulfilment of knowledge requirements and the cessation of the continuous or repeated infringement, after which a limitation period of at least five years begins to run.[41] That limitation period would be suspended if a competition authority takes action[42] or during the duration of a consensual dispute resolution process.[43]

5. Limitation periods in the Damages Directive. Due to observations of the Council[44] and the EP,[45] the final provisions on limitation periods in the Damages Directive do not completely align with those suggested in the Proposal thereof.[46] In the end, Article 10 Damages Directive includes provisions on the commencement, duration and suspension or interruption:[47]

– Paragraph 2, commencement: the limitation periods cannot begin to run before the cessation of the infringement. Furthermore, it is required that the claimant knows or can reasonably be expected to know of four cumulative aspects: (1) the behaviour, (2) the fact that that behaviour constitutes a competition law infringement, (3) the fact that that infringement has caused him or her harm, and (4) the identity of the infringer;

– Paragraph 3, duration: the relevant limitation periods must be at least five years;

– Paragraph 4, suspension/interruption: if a competition authority takes an investigative action or action for its proceedings in respect of the (alleged) competition law infringement at hand, the limitation period must be either suspended or interrupted. If the Member States opt for suspension, then that suspension may end at the earliest one year after the final infringement decision is adopted[48] or after the proceedings are otherwise terminated.

Furthermore, Article 11 Damages Directive creates a derogation from the joint and several liability rule in favour of the immunity recipient.[49] Pursuant to that provision, the immunity recipient is only jointly and severally liable to other injured parties than its own direct or indirect purchasers and providers if those injured parties cannot obtain full compensation from the other infringing undertakings.[50] In that case, Article 11(4) Damages Directive requires Member States to "*ensure that any limitation period applicable* (…) *is reasonable and sufficient to allow injured parties to bring such actions.*"

Similar to the situation in which a competition authority takes action, Article 18(1) Damages Directive provides for a suspension of the applicable limitation period for the duration of any consensual dispute resolution process.[51] That suspension applies only with regard to those parties that are or were involved or represented in the consensual dispute resolution.[52]

Lastly, Article 4 Damages Directive reiterates the (general) requirement of the ECJ *Manfredi* judgement[53] to comply with the principle(s) of effectiveness (and equivalence).

6. Temporal application of the Damages Directive. As many former national provisions on limitation periods differ from the newly implemented ones (*infra* Section III), the temporal application of the Damages Directive plays a crucial role. According to Article 22(1) Damages Directive, its substantive provisions may not apply retroactively. Its procedural provisions, on the other hand, may not apply to damages actions of which a national court was seized prior to 26 December

38 EC, Impact Assessment – Commission staff working document accompanying the White Paper, SEC(2008) 405, para. 155. For an analysis of the (estimated) preferred duration of the limitation period, *see*: CEPS, EUR and LUISS, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, 21 December 2007, 537–538. The five-year limitation period to which the powers conferred on the EC to impose fines or penalties are subject, seems to have been decisive (Article 25 Regulation No. 1/2003).

39 EP resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules, 2008/2154(INI), para. 19.

40 EC, Proposal for a Directive of the EP 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) 404 final.

41 Article 10(2)–(4) Proposal Damages Directive.

42 Article 10(5) Proposal Damages Directive. Contrary to the White Paper issued in 2008 and despite its arguments *contra*, the EC at this point thus chooses for a suspension (instead of the beginning of a new limitation period).

43 Article 17(1) Proposal Damages Directive.

44 Council of the European Union, Adoption of the general approach on the Commission's proposal for a [Damages Directive], Brussels, 2013/0185, No. 15983/13. For example, the Council suggested a duration of at least three years and introduced the choice for Member States to opt for suspension or interruption of the limitation period if a competition authority takes action.

45 EP, Report on the proposal for a [Damages Directive], No. A7-0089/2014. For example, the EP suggested including an explicit recital on the ability of the Member States to maintain or introduce absolute limitation periods and setting the end of the suspension during actions by a competition authority at minimum two years after a final infringement decision.

46 The final provisions are a result of political trilogues and technical meetings held in 2014, of which the Committee of Permanent Representatives endorsed the results on 26 March 2014 (No. 8136/14).

47 In the end, the only aspect of limitation periods that the Damages Directive does not deal with is the possibility to conventionally deviate from the applicable legislation.

48 According to Article 2(12) Damages Directive, this "*means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means*."

49 According to Article 2(19) Damages Directive, this "*means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme*." Hence, this derogation does not apply to those undertakings that received partial (and not total) immunity.

50 The reason being to ensure the effective public enforcement and the corresponding importance of the leniency programmes (Recital 38 Damages Directive).

51 The reason being to incentivise parties to engage in consensual dispute resolutions (Recitals 48–49 Damages Directive).

52 According to Article 2(21) Damages Directive, this "*means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages.*"According to Recital 48 Damages Directive, this includes, inter alia, out-of-court settlements, arbitration, mediation or conciliation.

53 ECJ, 13 July 2006, *op. cit.*, *Manfredi*.

2014 (Article 22(2) Damages Directive). Unfortunately, no guidance is provided on which provisions are to be considered substantive or procedural (*infra* No. 58). This enigmatic temporal application of the Damages Directive and a number of uncertainties regarding the scope and implementation of its provisions uphold the important clarifying role that supranational courts have to play.

7. EFTA Court clarifies the scope of the equivalence and effectiveness principles. Interestingly, the first decision on limitation periods after the ECJ *Manfredi* judgement is not to be found with the ECJ itself, but with the EFTA Court.[54] In its judgement of 17 September 2018,[55] the EFTA Court ruled on the compliance of the applicable Norwegian rules on limitation periods[56] with the principles of equivalence and effectiveness.[57] The case concerned a follow-on damages action brought by the ferry company Nye Kystlink against another ferry company, Color Line. On 14 December 2011, the EFTA Surveillance Authority ruled that the latter had infringed Articles 53 and 54 EEA Agreement[58] because of (its reliance on) an exclusivity clause in a harbour agreement with the Municipality of Strömstad.[59] No appeal was lodged against that EFTA Surveillance Authority decision, which became final on 14 February 2012. On 14 December 2012, Nye Kystlink filed a complaint against Color Line with a conciliation board, including a claim for damages, thereby interrupting the applicable limitation period. In later court proceedings, the question was raised whether Nye Kystlink had or should have had the "*necessary knowledge of the factual circumstances to be able to file a claim for damages with the prospect of a positive outcome*" more than three years before filing the aforementioned complaint, i.e., 14 December 2009 as the "*cut-off date*."[60] The Oslo District Court ruled that this was the case, thus concluding that the damages claim was time-barred.[61] On appeal, the Borgarting Court of Appeal decided to stay proceedings and to request an advisory opinion of the EFTA Court.

A first question was whether, pursuant to the principle of equivalence, the extended one-year limitation period, applicable to damages resulting from criminal offences, should be applied to damages caused by infringements of the EEA competition rules as well.[62] Section 11 Norwegian Limitation Act provides for a separate one-year limitation period for damages actions that arise from a criminal offence that has been established by a final criminal conviction, even if the general three-year limitation period has expired. Nye Kystlink argued that this provision should correspondingly apply to damages actions arising from EEA competition law infringements that have been established by a final EFTA Surveillance Authority's decision imposing a fine.[63] The EFTA Court concluded that this is the case only if the administrative sanction/infringement may be considered similar to a criminal sanction/offence under national law.[64] In that context, features to be taken into account by the national court are, inter alia, the nature of the breach, its severity and the reasons why the national authorities (may) have chosen between administrative and criminal sanctions for competition law breaches.[65] National courts must thus keep in mind, depending on the national framework, the possibly beneficial spillover effects that criminal provisions (exceptionally) might create regarding damages actions for breaches of (EU)[66] competition law, especially in those cases in which the Damages Directive does not yet apply.

The second and third questions addressed the issue whether under the principles of equivalence and effectiveness, the three-year subjective limitation period under Norwegian law could expire prior to the adoption of the EFTA Surveillance Authority decision.[67] As shown by the facts of this case, the applicable Norwegian law could result in a damages claim being time-barred before the competition authority had reached a (final) infringement decision based on a complaint from the injured party. As a first step of its judicial review, the EFTA Court emphasised the holistic case-by-case analysis required by the effectiveness principle.[68] It considered that a three-year limitation period is not in itself incompatible with that principle.[69] The same holds true for a starting point based on the (reasonably expected) knowledge of the injured party, possibly in combination with a duty of investigation regarding information that can be uncovered without unreasonable

54 Court of Justice of the European Free Trade Association. The European Economic Area (EEA) Agreement transposes the EU law rules concerning the single market (such as the EU competition rules) into the three EFTA states, i.e., Iceland, Liechtenstein and Norway. Concerning the implementation and application of the EEA Agreement in those three states, the EFTA Surveillance Authority has a similar role as the European Commission in the EU and the EFTA Court has a similar role as the ECJ in the EU.

55 In its judgement of 30 May 2018, the EFTA Court also dealt with preliminary questions concerning a damages claim for EEA competition law infringements, yet not related to any provisions on limitation periods (case E-6/17). One of the interesting findings of this case is that EEA law does (did) not (yet) require the decision of a national competition authority to be binding on the national courts in a follow-on damages action.

56 At the time the Act of 18 May 1979 No. 18 relating to the limitation period for claims (more precisely Section 9(1) thereof).

57 EFTA Court, 17 September 2018, case E-10/17.

58 Being the analogous EEA rules of Articles 101–102 TFEU.

59 EFTA Surveillance Authority, 14 December 2011, case 59120 – *Color Line*.

60 EFTA Court, 17 September 2018, case E-10/17, para. 32.

61 Oslo District Court, 30 November 2015.

62 EFTA Court, 17 September 2018, case E-10/17, para. 74, and EFTA Court, 13 June 2013, case E-11/12, para. 123. A straightforward example of this required equivalence is the fact that damages claims based on a breach of EEA (or EU) competition law must not be treated less favourably than such claims based on a breach of national competition law (EFTA Court, 17 September 2018, case E-10/17, para. 76).

63 EFTA Court, 17 September 2018, case E-10/17, para. 43–48.

64 Ibid., para. 80.

65 Ibid.

66 If the reasoning of the EFTA Court could be analogously applied in EU cases, which seems to be the case.

67 Y. Rager and T. Schreiber, The EFTA Courts clarifies the application of limitation periods to antitrust claims resulting from competition law infringements, blog post, 25 January 2019, https://www.carteldamageclaims.com/fr/the-efta-court-clarifies-the-application-of-limitation-periods-to-antitrust-claims-resulting-from-eea-competition-infringement.

68 EFTA Court, 17 September 2018, case E-10/17, para. 111.

69 More generally, the EFTA Court states that this is the case if the applicable limitation period is not overly short, possibly in combination with grounds for interruption or suspension (EFTA Court, 17 September 2018, case E-10/17, para. 119).

difficulty.[70] However, national courts must always take the special characteristics of competition cases into account, such as their magnitude and complexity, and the aim of effective enforcement. Furthermore, individuals must in any case be able to determine the applicable limitation period with a reasonable degree of certainty.[71] This way, the judgement highlights the strengths of the effectiveness principle, as well as its limitations. In this case, it appeared to be a decisive factor that the injured party had filed the initial complaint with the competition authority and had sufficient knowledge to start a damages action by itself.

8. ECJ confirms effectiveness principle as guardian of effective private enforcement. On 28 March 2019 in the *Cogeco* case, the ECJ rendered a preliminary ruling on a situation similar to the aforementioned EFTA case.[72] The case concerned an abuse of dominance by Sport TV Portugal on the Portuguese market for premium sports TV channels, for which the Portuguese competition authority imposed a fine on 14 June 2013.[73] As in the ferry company EFTA case, the complaint with the competition authority, dated 30 July 2009, had been lodged by the later claimant of damages: Cogeco Communications Inc.[74] The damages claim was brought before the Lisbon District Court on 27 February 2015. According to Article 498 Portuguese Civil Code, however, the claim was time-barred. That provision imposes a three-year limitation period starting from the date on which the injured party was aware of its right to compensation. This remains true even if the claimant did at the time not (yet) know the identity of the person liable or the full extent of the harm. Any proceedings before the national competition authority are not taken into account either.

The Lisbon District Court stayed the proceedings and requested a preliminary ruling from the ECJ focussing on two main aspects.[75] Firstly, the question arose whether the Damages Directive was applicable *ratione temporis*.[76] While this question gave the ECJ an opportunity to provide clarification on the unclear temporal application of the Damages Directive (*infra* No. 58), the ECJ was able to conclude that the Damages Directive was not applicable without giving much guidance in this respect.[77] Nevertheless, in its preliminary ruling, the ECJ highlights the measure of discretion of the Member States in that regard.[78] That way, it seems to be leaving the decision, whether provisions on limitation periods are to be considered substantive or procedural, open for the Member States to decide (*infra* No. 55).

Secondly, the question arose whether the applicable Portuguese legislation[79] would render the exercise of the EU right to damages practically impossible or excessively difficult, thereby breaching the effectiveness principle.[80] Similar to the EFTA Court, the ECJ stresses as a first step of its review the holistic approach that the principle requires, thus considering all the elements of the national rules at hand.[81] It also highlights the "*specificities of competition law cases*," the "*complex factual and economic analysis*" that it requires, the impact of these specificities and complex analysis for the "*bringing of legal actions in such cases*," and especially the importance of the full effectiveness of Article 102 TFEU (and analogously of Article 101 TFEU).[82] This reasoning corresponds to a different influential ECJ judgement of March 2019: in its *Skanska* decision, the ECJ acknowledged damages actions as being an integral part of the enforcement system of the EU competition rules, thereby contributing to the deterrence and punishment of anticompetitive

70 EFTA Court, 17 September 2018, case E-10/17, para. 116.

71 Ibid., para. 113.

72 ECJ, 28 March 2019, *op. cit.*,, *Cogeco*.

73 Initially the Portuguese Competition Authority decided that both Article 102 TFEU and the corresponding Article 11 Portuguese Competition Act had been infringed. On appeal, however, it was decided that this was the case only for the national provision due to a lack of proof that the practice at hand (may have) affected trade between the Member States. When claiming damages, Cogeco could nevertheless still try to prove that the abuse of dominance did affect such trade (ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 19).

74 More precisely, the Portuguese company Cabovisão-Televisão por Cabo S.A., of which Cogeco was a shareholder, had filed the complaint.

75 A third set of questions focused on the compatibility of national law that does not consider a final infringement decision binding on the national court, dealing with a (follow-on) damages action, as to the existence of a competition law infringement or even merely a rebuttable presumption of such an infringement. The ECJ declared those questions inadmissible as the Portuguese courts of appeal (when reviewing the decision by the competition authority) had decided that no breach of Article 102 TFEU had taken place (para. 60). AG Kokott, however, had touched upon this issue, considering that the principle of effectiveness would be breached if such a final infringement decision did not at least result in a rebuttable presumption of infringement during a follow-on damages action (Opinion AG Kokott, 17 January 2019, case No. C-637/17, para. 97).

76 The damages action at hand was brought before the Lisbon District Court on 27 February 2015, i.e., before the expiry date for Member States to transpose the Damages Directive (Article 23: 27 December 2016) and before the implementation by Portugal on 5 June 2018 by Law No. 23/2018 (ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 31). Interestingly, the ECJ did not (have to) touch upon this issue in its recent *Otis*-judgement (ECJ, 12 December 2019, case No. C-435/18, ECLI:EU:C:2019:1069, *Otis*; see also Opinion AG Kokott, 29 July 2019, case No. C-435/18, *Otis*, para. 7).

77 The uncertainty concerning the temporal application of the Damages Directive follows from its Article 22, which makes a distinction between substantive and procedural provisions (*supra* No. 6). The characterisation of provisions on limitation periods as being substantive or procedural is a much-discussed debate. The ECJ managed to circumvent taking part in this debate by concluding that the Damages Directive would not apply *ratione temporis* regardless of that qualification (ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 33).

78 For example, ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 28–29.

79 Being Article 498(1) of the Portuguese Civil Code.

80 *See*, e.g., ECJ, 5 June 2014, case No. C-557/12, ECLI:EU:C:2014:1317, *Kone and Others*, para. 25.

81 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 45. In this respect, the ECJ followed the opinion of AG Kokott. Elements to be taken into account are, inter alia, the length and commencement of the limitation periods, and possible suspensions or interruptions (Opinion AG Kokott, 17 January 2019, case No. C-637/17, para. 82–83).

82 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 46–47.

behaviour.[83] This mindset of the ECJ shows that the effectiveness principle might need to be applied more vigorously than it has been in the aforementioned EFTA case. In the end, the ECJ reached a twofold conclusion. On the one hand, the effectiveness principle precludes short limitation periods that start to run before the injured party knows or is able to know the identity of the infringer.[84] On the other hand, the principle also precludes short limitation periods that cannot be subject to a suspension or interruption for the duration of proceedings by a national competition authority or by a review court leading to a final decision.[85] This way, the ECJ confirmed its reasoning of the *Manfredi* judgement (*supra* No. 3).[86] It clearly acknowledges the fundamental role of a final decision finding an infringement, thus being very sceptical if a claim can be time-barred before such a decision is adopted.[87] More generally, short limitation periods appear to be especially susceptible to breach the effectiveness principle.[88]

9. Compatibility of national limitation periods with ECtHR case law. The ECtHR[89] has not yet adopted judgements dealing with limitation period issues in competition law damages actions. It could, however, be argued that some of the ECtHR guiding principles should be taken into account regarding such actions. For instance, in its *Howald Moore* judgement, the ECtHR examined whether a ten-year absolute time bar, which starts running after the harmful event took place, was compatible with Article 6 ECHR (right of access to a court).[90] It should be noted that such review may be compared, *mutatis mutandis*, to that of the ECJ assessing the compatibility of national limitation periods with the principle of effectiveness. In its *Howald Moore* judgement, the ECtHR ruled that a ten-year absolute ban for asbestos victims to bring a damages action for the injuries they suffered was incompatible with Article 6 ECHR, because the limitation period did not take into account the specific circumstances of this case.[91] While the specifics of this case are obviously different from that of a competition law case, there are nonetheless commonalities between these cases. Like asbestos victims, cartel victims will in practice only get an objective chance to learn about the wrongdoing and the extent of injuries they suffered a (long) period after the wrongdoing and damage have occurred. While it remains uncertain how the ECtHR would deal with limitation periods regarding competition law damages, it is certain that the ECtHR will take into account all the relevant circumstances to assess whether a limitation period for a competition damage action is consistent with the ECHR.[92] In this respect, an absolute limitation period may breach Article 6 ECHR if it commences when the harmful event takes place and consequently possibly time barres the claim before the injured party could be aware of the claim.[93] The mere fact that an absolute limitation period has a short duration, however, is in itself insufficient to breach article 6 ECHR.[94]

10. Some conclusive remarks on the evolution of EU rules applicable to limitation periods. As shown above, since the adoption of the ECJ *Manfredi* judgement in 2006[95] until the adoption of the ECJ *Cogeco* judgement in 2019,[96] the European trend, understood as the one englobing the EU, EFTA (and ECtHR to a certain extent) rules and case law, has clearly been to extend limitation periods within which victims can bring damages actions. In our view, three guiding principles seem to have led this trend. Firstly, limitation periods should be sufficiently long to provide victims of competition law infringements with enough time to bring a damages action given the complexity, magnitude and often clandestine nature of such infringements. Secondly, limitation periods should not start to run before the infringement has ceased and the victim could or should have known the necessary information in a way that it could reasonably bring an action for damages. Thirdly, limitation period statutes must provide for some suspension or interruption when a competition authority investigates the case.

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83 ECJ, 14 March 2019, *op. cit.*, *Skanska*, para. 45 (See also ECJ, 12 December 2019, case No. C-435/18, ECLI:EU:C:2019:1069, *Otis*, para. 24). The ECJ followed the opinion of AG Wahl (Opinion AG Wahl, 6 February 2019, case No. C-724/17, *Skanska*, para. 80). That opinion takes an interesting/controversial view regarding the ongoing debate on the function of damages actions for breaches of EU competition law. It explicitly provides: "*In the final analysis, therefore, the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function*" (para. 50). The authors of this article, however, do not agree with this opinion. The main goal and function of damages actions, even within the sphere of private enforcement, remains to be a compensatory one. Of course, the deterrent effect of a more effective private enforcement system is a "*beneficial side effect*." *See*, e.g.: J. S. Kortmann and C. R. A. Swaak, The EC White Paper on antitrust damage actions: why the Member States are (right to be) less enthusiastic, *ECLR* 2009, (340) 341 and F. Pantaleón, Comentario del artículo 1902 Código Civil, in L. Díez-Picazo, C. Paz-Ares, P. Salvador Coderch, R. Bercovitz (eds.), *Comentario del Código Civil*, t. II, Ministerio de Justicia, Madrid, 1993, (1971) 1971.

84 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 49–50.

85 Ibid., para. 51.

86 ECJ, 13 July 2006, *op. cit.*, *Manfredi*, para. 78.

87 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 52.

88 Ibid., para. 48. Nevertheless, the holistic approach remains necessary. Short limitation periods per se do not necessarily breach the effectiveness principle. *See* for instance, AG Kokott's opinion in which she considers that a three-year limitation period is in itself sufficiently long for injured parties to bring a damages claim before a national court (Opinion AG Kokott, 17 January 2019, case No. C-637/17, para. 78). *See also*: P. De Bandt and C. Binet, Arrêt "Cogeco" : le droit primaire au secours du demandeur de dommages et intérêts pour une infraction au droit de la concurrence, *JDE* 2019, No. 6, (249) 251.

89 European Court of Human Rights.

90 European Convention on Human Rights.

91 ECtHR, 11 March 2014, *Howald Moor v. Switzerland*, para. 80.

92 ECtHR, 18 March 2014, *Bogdanovic v. Croatia*, para. 51; ECtHR, 17 September 2013, *Eş im v. Turkey*, para. 20; ECtHR, 7 July 2009, *Stagno v. Belgium*, para. 27.

93 ECtHR, 11 March 2014, *Howald Moor v. Switzerland*, para. 74 (absolute limitation period of ten years); ECtHR, 17 September 2013, *Eş im v. Turkey*, para. 23–26 (absolute limitation period of five years).

94 ECtHR, 18 March 2014, *Bogdanovic v. Croatia*, para. 52 ff.

95 ECJ, 13 July 2006, *op. cit.*, *Manfredi*.

96 ECJ, 28 March 2019, *op. cit.*, *Cogeco*.

III. Overview of national limitation period rules in five EU Member States

1. Belgium

11. Belgium's implementation of the Damages Directive. The Belgian legislator implemented the Damages Directive by the Implementation Act of 6 June 2017.[97] This Act introduced a new Title 3 to Book XVII of the Belgian Code of Economic Law (CEL).[98] Article XVII.72 CEL now offers an explicit basis for damages claims for competition law infringements. The general (tort law) principles nevertheless remain relevant,[99] as long as they are consistent with the new rules (Article XVII.71, § 2 CEL).

12. Temporal application. The Implementation Act 2017 came into force on 22 June 2017, i.e., ten days after its official publication in the Belgian Official Journal.[100] This means that the substantive rules apply to harmful events[101] that occurred on or after 22 June 2017 only.[102] The procedural rules, on the other hand, do not apply to actions for damages of which a court was seized prior to 26 December 2014.[103] Even though no unanimity exists on the characterisation of the provisions on limitation periods as being substantive or procedural, it appears that they are to be considered substantive provisions as regards the Implementation Act 2017.[104] In principle, the question would thus become whether the corresponding relevant facts, to which the new rules refer, occurred before or on/after 22 June 2017.[105] Provisions on limitation periods, however, follow a specific temporal application scheme that has been derived from criminal law and applies to civil law provisions as well.[106] Firstly, if a claim had become time-barred before the new provisions entered into force (i.e., 22 June 2017), it is generally accepted that this claim cannot revive on the basis of the new limitation rules.[107] Secondly, if the limitation period had not started running yet before the new rules entered into force, those new provisions logically apply.[108] Thirdly, a distinction is made between provisions that extend or shorten the duration of ongoing limitation periods.[109] Provisions that result in extending ongoing limitation periods immediately apply, having as a starting point the legal facts to which the new rules link legal consequences.[110] This holds true for a change in duration as well as for an alteration of the starting point or the suspension/interruption grounds.[111] Provisions that result in a shortening immediately apply as well, yet having as a starting point the entering into force of the new rules.[112] Those "shortening provisions," however, cannot result in the limitation period being longer than it would have been according to the old rules.[113]

97 Wet 6 juni 2017 houdende invoeging van een Titel 3 "De rechtsvordering tot schadevergoeding wegens inbreuken op het mededingingsrecht" in Boek XVII van het Wetboek van economisch recht, houdende invoeging van definities eigen aan Boek XVII, Titel 3 in Boek I en houdende diverse wijzigingen van het Wetboek van economisch recht, *BS* 12 June 2017, 63.596.

98 Title 3, Book XVII CEL: "*Actions for damages for breaches of competition law.*" The new rules apply both to infringements of Articles 101–102 TFEU (EU competition law) and/or Article IV.1-IV.2 CEL (Belgian competition law) (*see* Article I.22 CEL).

99 F. Wijckmans et al., Belgium, in I. K. Gotts (ed.), *The Private Competition Enforcement Review – Twelfth Edition* (London, The Law Reviews, 2019), (46) 48.

100 Art. 4, para. 2 Wet 31 mei 1961 betreffende het gebruik der talen in wetgevingszaken, het opmaken, bekendmaken en inwerkingtreden van wetten en verordeningen, *BS* 21 June 1961, 5.171; C. Cauffman, Enkele problemen van overgangsrecht bij de nieuwe regels inzake schadevergoeding voor mededingingsrechtelijke inbreuken, *RW* 2018–2019, No. 8, (282) 282; J. Léonard, Le droit de la concurrence entre-t-il dans l'ère du *private enforcement* ? La loi sur l'action en dommages et intérêts pour les infractions au droit de la concurrence, *TBM* 2018, No. 1, (4) 32.

101 "*Schadeverwekkend feit*" or "*schadeveroorzakend feit*," *see*, e.g., Cass., 15 November 1991, *Arr. Cass.* 1991-92, 241 and Cass., 14 November 2014, *Arr. Cass.* 2014, 2595. However, often many interchangeable notions are being used, thus making the precise trigger point unclear (for a thorough overview *see* T. Vancoppernolle, *Intertemporeel recht* (Mortsel, Intersentia, 2019), 710–715, No. 670).

102 Article 1 Civil Code (former Article 2 Civil Code): general rule of immediate effect. C. Cauffman, *op. cit.*, 289.

103 Article 45 Implementation Act 2017 transposes Article 22(2) Damages Directive into the Belgian legislation. Unfortunately, the Explanatory Memorandum to the Implementation Act 2017 (2413/001, 50) provides no guidance on which provisions are to be considered substantive or procedural, even though the Council of State advised the legislator to do so (2413/001, 87).

104 C. Cauffman, *op. cit.*, 283–284 and T. Tanghe, De verjaring van buitencontractuele rechtsvorderingen tot schadevergoeding wegens kartelinbreuken: een intrigerend drieluik, *TPR* 2018, (1383) 1422. *See also* I. Claeys, Begrip, voorwerp en aard van de bevrijdende verjaring en onderscheid met andere termijnen, *TPR* 2018, (631) 631–638; M. E. Storme, Perspektieven voor de bevrijdende verjaring in het vermogensrecht: met ontwerpbepalingen voor een hervorming, *TPR* 1994, (1977) 1981–1987.

105 C. Cauffman, *op. cit.*, 289. *See also* T. Vancoppernolle, *op. cit.*, 22–24, No. 31 (explaining the "*cesuur*" as the moment after which the relevant facts must take place in order to fall within the temporal application of the new legislation).

106 G. Closset-Marchal, *L'application dans le temps des lois de droit judiciaire civil* (Brussels, Bruylant, 1983), 17–19, No. 18, and P. Popelier, Toepassing van de wet in de tijd: vaststelling en beoordeling van temporele functies, in *APR* (Antwerp, Kluwer, 1999) 88, No. 134.

107 P. Popelier, Toepassing van de wet in de tijd: vaststelling en beoordeling van temporele functies, in *APR* (Antwerp, Kluwer, 1999) 88, No 134–135, referring to Cass., 7 May 1953, *Arr. Cass.* 1953, 607 and Cass., 12 November 1996, *Arr. Cass.* 1996, 1039. On the other hand, if the infringement takes place completely after 22 June 2017, the new rules logically apply.

108 T. Tanghe, *op. cit.*, 1412.

109 G. Closset-Marchal, *L'application dans le temps des lois de droit judiciaire civil* (Brussels, Bruylant, 1983), 17–19, No. 18.

110 P. Popelier, Toepassing van de wet in de tijd: vaststelling en beoordeling van temporele functies, in *APR* (Antwerp, Kluwer, 1999) 89, No 136 and T. Vancoppernolle, *op. cit.*, 102, No. 103.

111 Het overgangsrecht en de inwerkingtreding van wettelijke regels, in het bijzonder met betrekking tot het verzekeringsrecht, *TPR* 2005, (49) 72, No. 38 (referring to Cass., 28 May 1997, *JT* 1997, 480) and 74–79, No. 40–42. *See also* C. Cauffman, *op. cit.*, 290.

112 G. Closset-Marchal, *L'application dans le temps des lois de droit judiciaire civil* (Brussels, Bruylant, 1983), 17–19, No. 18, and P. Popelier, Toepassing van de wet in de tijd: vaststelling en beoordeling van temporele functies, in *APR* (Antwerp, Kluwer, 1999) 90–91, No. 138–139, referring to Cass., 6 March 1958, *Arr. Cass.* 1958, 489 and Cass., 24 January 1997, *Arr. Cass.* 1997, 107.

113 For example: the duration of a limitation period becomes three instead of five years. The starting point of the three-year limitation period is the moment that the new rules become applicable. If, according to the old rules, the limitation period has started three years ago, this would result in a total duration of six years. In that event, the five-year limitation period remains applicable. If, on the other hand, according to the old rules, the limitation period has started one year before, then the claim becomes time-barred after four years since the original starting point (i.e., one plus three years). *See also* S. Lierman and B. Weyts, Het overgangsrecht en de inwerkingtreding van wettelijke regels, in het bijzonder met betrekking tot het verzekeringsrecht, *TPR* 2005, (49) 72–73, No. 39.

The Belgian legislative framework provides for both a relative and an absolute limitation period.

1.1 Relative limitation period

13. Pre-Damages Directive. Damages claims for competition law infringements are typically brought on the basis of general tort law principles and more specifically Articles 1382–1383 Civil Code.[114] According to Article 2262 bis, § 1, para. 2 Civil Code, a five-year limitation period is applicable, starting on the day following the one on which the injured party became aware of both the harm (or the aggravation thereof)[115] and the identity of the person liable for that harm. The Supreme Court ("Cour de cassation") clarified that the injured party should have actual knowledge of the harm and the identity of the infringer so that it is capable of establishing a causal link between the harmful event and the harm.[116] The subjective requirement of actual knowledge, however, is to be assessed on the basis of objective evidence as well, in such a way that, provided the evidence, the claimant could not have been ignorant.[117] Furthermore, a (very) limited duty of investigation applies, i.e., if the ignorance is solely due to the claimant's passiveness to obtain readily accessible information.[118] Nevertheless, the knowledge requirement cannot be translated into a general "could reasonably be expected to know" criterion.[119] Regarding continuous infringements, the majority view is that, if the knowledge requirements are met during the infringement and if the ongoing harm is suffered on a daily basis, the limitation period starts each day for the harm suffered on that day.[120]

14. Constitutional Court: claim cannot be time-barred before the adoption of a final infringement decision. The judgement of the Constitutional Court of 10 March 2016 supplements the general rules.[121] In a case concerning an abuse of dominance,[122] the Constitutional Court decided that the rights of the injured party are disproportionally infringed[123] if the (civil) damages action resulting from a competition law infringement can be time-barred before a judgement that has the authority of res judicata establishes the existence of a competition law infringement.[124] Unfortunately, the scope of this judgement remains unclear. Firstly, the Constitutional Court provides no guidance on the consequences of postponing the possibility to be time-barred until after the final infringement decision is adopted. For instance, this leads to the question whether the initial limitation period is to be suspended or interrupted.[125] Secondly, it is also questionable whether in cases where no infringement decision (by a competition authority) is ever taken, stand-alone claims could never be time-barred, even if the knowledge requirements have long been fulfilled.[126]

15. Suspension and interruption. Regarding the suspension and interruption of the relative limitation period, the general rules apply. For example, a proposal for mediation suspends the limitation period by one month (if the conditions of Article 1730 Judicial Code are met) and the signing of a mediation protocol suspends the limitation period for the duration of the mediation (Article 1731, § 3 Judicial Code).[127] A notice of default or a summons to appear in court or before an arbitrator results in the interruption of the limitation period (Article 2244 Civil Code).[128]

16. Post-Damages Directive. The new Article XVII.90 CEL on limitation periods firstly refers to the general provisions, thus being Article 2262 bis Civil Code. The duration of the limitation period remains unchanged, i.e., five years. The commencement thereof, however, changes in accordance with Article 10 Damages Directive. The limitation period starts on the

114 F. Wijckmans et al., Belgium, in I. K. Gotts (ed.), *The Private Competition Enforcement Review – Twelfth Edition* (London, The Law Reviews, 2019), (46) 47–48.

115 According to the preliminary preparations, an aggravation of the harm occurs when there is an unexpected increase beyond the reasonably foreseeable evolution of the initial damage (*Parl. St.*, Kamer, 1997–1998, No. 1087/7, 9).

116 This does not mean that the injured party must be capable of establishing a certain causal link between the harmful event and the harm: Cass., 26 April 2012, *Pas.* 2012, I, 922, and Cass., 5 September 2014, *Arr. Cass.* 2014, No. 9, 1759 (*see also* E. Verjans, Enkele verduidelijkingen omtrent het vertrekpunt van de vijfjarige verjaringstermijn voor buitencontractuele rechtsvorderingen uit artikel 2262*bis* BW (annotation of Cass., 5 September 2014), *TBBR* 2015, No. 7, (380) 385–387). One of the main reasons that the injured party should be capable of establishing a causal link between the harmful event and the harm is that the preliminary preparations clarify that the limitation period commences from the moment on which the injured party has all the information necessary to initiate a damages claim: Report on behalf of the Committee on Justice issued by J. Barzin, *Parl. St.*, Kamer, 1997–1998, No. 1087/7, 5.

117 E. Verjans, *op. cit.*, 381–382. Furthermore, evidential presumptions can apply (Articles 1349 and 1353 Civil Code), *see*, e.g., T. Tanghe, *op. cit.*, 1400.

118 E.g., Police Court Bruges, 25 April 2013, *RW* 2014–2015, 595; T. Tanghe, *op. cit.*, 1399.

119 T. Tanghe, *op. cit.*, 1395; E. Verjans, *op. cit.*, 382.

120 Of course, if the knowledge requirements have been fulfilled after the cessation of the continuous infringement, then the limitation period can only begin to run from that moment. I. Boone, De verjaring van de vordering tot schadeherstel op grond van buitencontractuele aansprakelijkheid en van de burgerlijke vordering uit een misdrijf, in H. Bocken, I. Boone, B. Claessens et al. (eds.), *De herziening van de bevrijdende verjaring door de wet van 10 juni 1998: de gelijkheid hersteld?*, (Antwerp, Kluwer, 1999), (93) 110; I. Claeys, Opeisbaarheid, kennisname en schadeverwekkend feit als vertrekpunten van de verjaring, in I. Claeys (ed.), *Verjaring in het privaatrecht. Weet de avond wat de morgen brengt?* (Mechelen, Kluwer, 2005), (31) 67; I. Durant, Le point de départ des délais de prescription extinctive et libératoire en matière civile. Rapport belge, in P. Jourdain and P. Wéry (eds.), *La prescription extinctive. Études de droit comparé* (Brussels, Bruylant, 2010), (264) 284; T. Tanghe, *op. cit.*, 1400.

121 Constitutional Court, 10 March 2016, No. 38/2016.

122 For the decision on the merits, *see*: Commercial Court Ghent, 23 March 2017, *TBM* 2017, No. 2, 162.

123 Thus violating Articles 10 and 11 of the Belgian Constitution.

124 Constitutional Court, 10 March 2016, No. 38/2016, B.14. The judgement can be both a decision by the competent competition authority or the competent court (T. Tanghe, *op. cit.*, 1417).

125 A possible interpretation could be that no issues arise if the civil claim is time-barred "*one second after the final infringement decision.*" This, however, appears to be contrary to the reasoning of the Constitutional Court. Could the same be said if the civil claim is time-barred (because of the initial limitation period) one, two… six… twelve… months after the final infringement decision? Interestingly, the court mentions that the preliminary question at hand concerns the difference in treatment regarding the interruption of the limitation periods (B.2), yet never refers to this phrasing again in the other parts of the judgement.

126 T. Tanghe seems to be answering this question in the affirmative: *op. cit.*, 1416-1418.

127 Unless otherwise agreed to by the parties, the suspension of the limitation period ends one month after the notification by one of the parties (or by the mediator to the other party or parties) of its intention to terminate the mediation (Article 1731, § 4 Judicial Code).

128 M. De Ruysscher, Burgerlijke stuiting van de bevrijdende verjaring: een stand van zaken, *RW* 2013–2014, (843) 848.

day following the one on which the infringement has ceased and the claimant knows or could reasonably be expected to know of (1) the conduct and the fact that it constitutes a competition law infringement, (2) the fact that he or she suffered damage due to the infringement, and (3) the identity of the infringer (Article XVII.90, § 1 CEL). Continuous infringements are deemed to have ceased only on the day on which the last (part of the) infringement ended (Article XVII.90, § 1, para. 2 CEL). If this new commencement provision results in an extension of the limitation period, it immediately applies from 22 June 2017 onwards, having the new requirements as a starting point (*supra* No. 12). If, however, the new provision results in a shortening of the limitation period (e.g., because "*could be reasonably expected*" is added), it also applies from 22 June 2017 onwards, yet having that date as a starting point (*supra* No. 12).[129]

The new knowledge requirements appear to be both less and more beneficial for the claimant at the same time. They are less beneficial because actual knowledge is no longer required (*supra* No. 13) and it suffices that the knowledge could be reasonably expected. They are more beneficial because the requirement of knowing that the conduct constitutes a competition law infringement is added.[130]

17. Suspension and interruption. The general rules on suspension and limitation, if not overruled, remain applicable (*supra* No. 15). Furthermore, Article XVII.90, § 2 CEL provides that the limitation periods are interrupted when a competition authority carries out an act of investigation or takes action to bring a proceeding for the competition law infringement to which the damages action relates.[131] The interruption ends (and the limitation period thus starts anew) on the day following the one on which the infringement decision has become final or otherwise terminated (Article XVII.90, § 2 CEL).[132] In the event of multiple infringers, the question arises when the infringement decision becomes final with respect to each individual infringer.[133] Provided that the infringers are jointly and severally liable (Article XVII.86 CEL), it appears that the general rules on joint and several liability imply that the interruption with respect to one infringer does not end before the decision became final for all infringers.[134]

Article XVII.91 CEL provides for a general suspension of the limitation periods during the entire duration of the amicable settlement of disputes,[135] being any process that enables the parties to settle a dispute on a damages claim out of court (e.g., mediation and out-of-court settlements, Article I.22, 18° CEL).[136] Arbitration has been excluded from this provision because it already results in an interruption of the limitation periods (*supra* No. 15).[137] Furthermore, the Implementation Act 2017 extends the scope of the Belgian collective redress mechanism to claims for infringements of EU competition law (Article XVII.37, 33° and XVII.70 CEL).[138] Specific rules exist on the suspension of the limitation periods that are applicable to the individual claim of injured parties that are no (longer) part of the collective proceedings (Article XVII.63 CEL).

The triggering events of the suspension[139] or interruption[140] must take place on or after 22 June 2017 in order for the new rules to apply (*supra* No. 12). If those events started before 22 June 2017, yet continue afterwards (e.g., ongoing investigation by a competition appeal tribunal), the new rules on suspension and interruption apply as well.[141]

1.2 Absolute limitation period

18. Pre-Damages Directive. In addition to the relative limitation period, Belgian law provides for an absolution limitation period: a claim will in any event be time-barred after twenty years from the day following the one on which the facts that caused the harm occurred (Article 2262 bis, § 1, para. 3 Civil Code). In the event of continuous infringements, it is generally understood that the absolute limitation period starts running only after

129 If the claimant could have been reasonably expected to know of one of the knowledge requirements before 22 June 2017, this'reasonable'condition is to be treated as being fulfilled the earliest on 22 June 2017 (T. Tanghe, *op. cit.*, 1419).

130 I. Claeys and M. Van Nieuwenborgh, De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?, *TBH* 2018, No. 2, (119) 136. It remains to be seen how the Belgian courts will deal with this requirement, knowing that (especially in stand-alone cases) the fact that the conduct constitutes a competition law infringement is often one of the disputed issues of the claim.

131 The Dutch version of the Explanatory Memorandum to the Implementation Act 2017 (2413/001, 48) confusingly uses the term "*schorsing/suspension*."This is a mistake as the French version uses the correct term "*interruption/interruption*."The legislator chose to opt for an interruption instead of suspension as this was considered more in line with the "*spirit of the Damages Directive*."

132 Knowing that the public enforcement process can take many years by itself, infringers can thus be faced with damages claim long after the infringing conduct (and thus with a long-lasting uncertainty about the financial impact of the infringement).

133 Article I.22, 11° CEL clarifies that an infringement decision becomes final when there is no (longer) any possibility of appeal under current legal remedies. However, it provides no clarification on the different types of appeal nor on the multiple-infringer situation.

134 Articles 1206 and 2242–2249 Civil Code; I. Claeys and M. Van Nieuwenborgh, De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?, *TBH* 2018, No. 2, (119) 137; T. Tanghe, *op. cit.*, 1425–1426; M. Van Quickenborne and J. Del Corral, *Hoofdelijkheid* in X, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Kluwer, 2013), 140.

135 For those parties (that have been) involved in the amicable settlement process.

136 Unfortunately, little guidance is provided on which actions/documents by the parties can be considered as initiating or ending such a process. The Explanatory Memorandum to the Implementation Act 2017 (2413/001, 49) merely clarifies that, in the case of a dispute on the suspension, it is up for the court to determine the start and end of the amicable settlement process.

137 On the basis of Article 2244 Civil Code (J. Léonard, Le droit de la concurrence entre-t-il dans l'ère du *private enforcement* ? La loi sur l'action en dommages et intérêts pour les infractions au droit de la concurrence, *TBM* 2018, No. 1, (4) 30). *See also* Explanatory Memorandum to the Implementation Act 2017, 2413/001, 49.

138 Such claims are to be brought before the courts of Brussels (Article XVII.35 CEL). Before the addition of the infringements of EU competition law, the collective redress mechanism could be applied only in cases of infringements of the Belgian competition rules, i.e., Book IV CEL (Article XVII.37, 1°, a) CEL).

139 Cass., 4 December 2009, *Arr. Cass.* 2009, afl. 12, 2901.

140 Cass., 12 April 2002, *Arr. Cass.* 2002, afl. 4, 973.

141 T. Tanghe, *op. cit.*, 1421, referring to Cass., 21 February 2014, *Arr. Cass.* 2014, No. 2, 489.

the cessation of the infringement.[142] The general rules on suspension and interruption apply.

19. Post-Damages Directive. The Implementation Act 2017 does not alter the duration nor the commencement of the absolute limitation period. Referring to Recital 36 Damages Directive, the Belgian legislator decided to maintain the application of Article 2262 bis, § 1, para. 3 Civil Code.[143] At first sight, it appears that Article XVII.90, § 1 CEL would alter the trigger point of the absolute limitation period as well, given the plural phrasing "*the general law limitation periods.*"[144] However, the explanatory memorandum clarifies that Article 2262 bis, § 1, para. 3 Civil Code remains fully applicable, thus also including its original starting point.[145]

The new Article XVII.91 CEL, on the suspension of the limitation periods because of amicable settlements, applies to the absolute limitation period (*supra* No. 17).[146] The same would normally hold true for the newly introduced interruption, but given that Article XVII.90, § 2 CEL refers to the limitation periods of its § 1 and knowing that § 1 only entails the relative limitation periods, one could argue that the interruption due to the action of a competition authority does not apply to the absolute limitation period.[147]

2. England and Wales[148*]

20. UK's implementation of the Damages Directive. After the former government department Business Innovation & Skills launched a consultation round on 28 January 2016,[149] the United Kingdom implemented the Damages Directive with the adoption of Regulations 2017,[150] which came into force on 9 March 2017.[151] As the Consumer Rights Act 2015 (CRA 2015) reformed the UK's regime on damages for breaches of competition law significantly and as well-established case law on the matter already existed,[152] the UK chose to implement the Damages Directive through a light-touch approach.[153]

While only the limitation periods in England and Wales are examined hereafter, it should be noted that many similarities exist with respect to the applicable rules in Northern Ireland and Scotland.[154]

21. Institutional design: High Court or CAT. Claimants seeking compensation for damages for breaches of competition law can either initiate a case before the High Court of Justice of England and Wales or before the Competition Appeal Tribunal (CAT). The CAT is a specialist judicial body with a cross-disciplinary expertise in law, economics, business and accountancy that was set up by s. 12 and Sch. 2 Enterprise Act 2002.[155] Initially, only follow-on claims could be brought before the CAT.[156] In order to enhance the role of the CAT as the main venue for the private enforcement of competition law, the CRA 2015 allows stand-alone claims to be brought before it as well.[157] Furthermore, the CAT is the competent court when seeking collective (opt-in or opt-out) redress.[158]

22. Temporal application. Regulations 2017 identify the provisions on limitation periods as being substantive provisions in nature.[159] Consequently, the prohibition

142 T. Tanghe, *op. cit.*, 1403. The paradoxical result is that, in the event of continuous infringements, the relative limitation periods can start running on a daily basis during the ongoing infringement, whilst the absolute limitation period commences after the cessation of the infringement only.

143 Explanatory Memorandum to the Implementation Act 2017, 2413/001, 47–48. The use of a plural phrasing appears to refer to the different limitation periods on contractual and non-contractual claims.

144 I. Claeys and M. Van Nieuwenborgh, De rechtsvordering tot schadevergoeding voor mededingingsinbreuken. Een grote stap vooruit?, *TBH* 2018, No. 2, (119) 136, footnote 185.

145 Explanatory Memorandum to the Implementation Act 2017, 2413/001, 47–48; T. Tanghe, De verjaring van buitencontractuele rechtsvorderingen tot schadevergoeding wegens kartelinbreuken: een intrigerend drieluik, *TPR* 2018, (1383) 1408.

146 Article XVII.91 refers to the "*limitation periods for bringing a damages action*" in general.

147 *Contra* T. Tanghe, *op. cit.*, 1409. In any event, it seems plausible that, even if the interruption would not apply, the Constitutional Court would decide that the rights of the injured party are disproportionally infringed if the claim becomes time-barred due to an absolute limitation period before the adoption of a final infringement decision (cf. Judgement 10 March 2016).

148 * This article does not touch upon the possible changes that may occur because of Brexit.

149 Department for Business Innovation & Skills, Consultation: Implementing the EU Directive on damages for breaches of competition law, January 2016, BIS/16/6. This consultation document was accompanied by an impact assessment report of 6 July 2015 (IA No: BISCCP004). The now Department for Business, Energy & Industrial Strategy closed the consultation round in December 2016 ("Damages for breaches of competition law – government response to consultation"), accompanied by a final impact assessment report of 23 September 2016 (IA No: BISCCP004).

150 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, SI 2017/385.

151 Section 1(2) Regulations 2017. The regulations apply both to claims arising from EU and UK competition law breaches ("single Regime," Explanatory Memorandum to the [Regulations 2017], 2017 No. 385, para. 7.6–7.8).

152 For example, Regulations 2017 do not explicitly implement the provisions of the Damages Directive recognising the validity of the passing-on defence and the rights of indirect purchasers. This already follows from the well-established principles of tort law and from the recognition by the CAT in *Sainsbury's Supermarkets Ltd v. MasterCard Inc* [2016] CAT 11 (Explanatory Memorandum to the [Regulations 2017], 2017 No. 385, para. 7.11).

153 Explanatory Memorandum to the [Regulations 2017], 2017 No. 385. Furthermore, the consultation document (BIS/16/16) mentions: "(…) *during the negotiation of the Damages Directive, the UK successfully ensured that it was based closely on the UK model*" (para. 1.4). Nevertheless, the remark has been made that the main parts of the Damages Directive "*were copied out more or less literally*": B. Rodger, United Kingdom, in B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *op. cit.*, 407.

154 Northern Ireland: the relevant rules of Part 5 Regulations 2017 apply equally to Northern Ireland as to England and Wales, yet the default rules are to be found in the Limitation (Northern Ireland) Order 1989/1339. Scotland uses the term "prescriptive period," having the same function as the limitation period in England and Wales, yet possibly slightly differing from it (e.g., five years instead of six years). The Scottish default rules are to be found in the Prescription and Limitation (Scotland) Act 1973 c. 52.

155 Enterprise Act 2002 c. 40.

156 Former s. 47A CA 1998.

157 Schedule 8(1) CRA 2015. Furthermore, the CAT has been given the power (in proceedings in England and Wales or Northern Ireland) to grant a claim for an injunction (s. 47A(3)(c) CA 1998).

158 S. 47B CA 1998 (as amended by Schedule 8(1) CRA 2015 in order to add the opt-out possibility and also to include a wider range of persons permitted to act as the representative for both types of collective claims).

159 Explanatory Memorandum to the [Regulations 2017], 2017 No. 385, para. 7.31.

on a retroactive application as set forth by Article 22 Damages Directive applies. When interpreting this prohibition, the UK government considered achieving "*a balance between allowing consumers access to the reformed regime while not putting defendant businesses in an unfair position.*"[160] In the end, it was believed to be the fairest approach that the new substantive rules apply only to claims where the infringement takes place and the loss or damage is suffered on or after 9 March 2017.[161] As a result, it might take some time before damages claims for breaches of competition law will be subject to the new limitation period rules.[162] Even if the infringement (and damage) partly occurs after 9 March 2017, the old limitation period regime remains applicable when the infringement takes place over a period of two or more days (e.g., cartel infringements) if the first of those days is situated before 9 March 2017.[163] In other words, even if a cartel, which commenced before 9 March 2017, continues to be enforced in 2019, the old limitation period rules continue to apply. Due to this temporal application, the old limitation period regime remains of practical importance for both claimants and defendants. Concerning proceedings before the CAT, an additional distinction has to be made between pre- and post-CRA cases. The relevant provisions on limitation periods are to be found in para. 8(1) of Sch. 8 CRA 2015, which adds s. 47E to the Competition Act 1998 (CA 1998). According to para. 8(2) of Sch. 8 CRA 2015 that section does not apply in relation to claims arising before 1 October 2015.[164]

2.1 High Court of Justice of England and Wales

23. Pre-Damages Directive. Claims before the High Court are most commonly brought on the basis of the tort of breach of statutory duty.[165] The relevant limitation period rule is therefore the one that applies to tort claims in general, being s. 2 Limitation Act 1980. No absolute limitation period applies. Regarding the relative limitation period, an action must be brought within six years from the date on which the cause of action accrued.[166] The "accrual of the cause of action" means that the breach has occurred, i.e., the infringement of competition law has been committed, and that the claimant has suffered damage.[167] A series of breaches taking place over a longer period is to be divided in time.[168] This objective trigger point could be problematic for victims of "secret infringements" such as cartels. Hence, in that case it is believed that the subjective rule of s. 32(1)(b) Limitation Act should supplement the objective one.[169] That rule provides that, when the defendant has deliberately concealed any fact relevant to the plaintiff's right of action from him, the period of limitation does not begin to run until the claimant has discovered the concealment[170] or could have done so with reasonable diligence.

The key question thus becomes at what time claimants are entitled to rely on s. 32(1)(b) Limitation Act in the event of a cartel infringement. Based on previous case law,[171] both the High Court and the Court of Appeal clarified in the *Arcadia v. Visa* case that this question primarily boils down to the "statement of claim" test.[172] This means that s. 32(1)(b) Limitation Act applies only to concealed facts that are essential for a claimant to prove in order to establish a prima facie case.[173] It does not apply to (new) facts that might make the claimant's case stronger. Knowing that the courts accept a "generous approach" towards claimants when applications are made to strike out competition claims,[174] s. 32(1)(b) Limitation Act must be interpreted narrowly.[175] Concerning cartel damages claims, this means that the

160 BEIS, Damages for breaches of competition law – government response to consultation, 2016, para. 6.

161 Para. 42(1) of Sch. 1 Regulations 2017 and BEIS, Damages for breaches of competition law – government response to consultation, 2016, para. 7.

162 R. Bellinghausen, T. Cassels, K. Schwedt and D. Strik, The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive, *G.C.L.R.* 2017, (103) 106–107; K. Dietzel, S. Wisking and M. Herron, Nothing to see here? The UK's implementation of the EU Damages Directive, *G.C.L.R.* 2017, (169) 170; B. Rodger, United Kingdom, in B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *op. cit.*, 382–383.

163 Para. 42(2) of Sch. 1 Regulations 2017. The concern has been raised that this might be incompatible with the Damages Directive as Article 10(2) Damages Directive thereof provides that the limitation period shall not begin to run before the infringement has ceased (B. J. Rodger, Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?, *E.C.L.R.* 2017, (219) 227). However, to be incompatible with Article 10(2) Damages Directive, the provision must first be applicable, which is precisely the issue that is being dealt with by the temporal application (Article 22 Damages Directive) and more precisely by the interpretation of the prohibition to retroactively apply the new substantive rules. This interpretation seems to be left open for the Member States. One might argue that a strict interpretation of this provision can hardly lead to a violation thereof.

164 Para. 8(2) of Sch. 8 CRA 2015 provides that s. 47E does not apply in relation to claims arising before the commencement of the paragraph at hand (i.e., no retrospective effect). According to s. 3(j) CRA Order 2015, the commencement date is 1 October 2015 (The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015, SI 2015/1630).

165 The duty being breached not to act contrary to Chapters I and II CA 1998 or Articles 101–102 TFEU (P. Scott, M. Simpson and J. Flett, Limitation periods for competition claims – the English patient, *G.C.L.R.* 2011, (18) 19).

166 In the *Arcadia v Visa* case ([2014] EWHC 3561 (Comm) and [2015] EWCA Civ 883), the relevant limitation period rule was s. 9 Limitation Act (*Time limit for actions for sums recoverable by statute*), which entails a similar six-year limitation period as s. 2 Limitation Act.

167 B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *op. cit.*, 385; P. Scott, M. Simpson and J. Flett, Limitation periods for competition claims – the English patient, *G.C.L.R.* 2011, (18) 19.

168 As shown by the *Arcadia v. Visa* case, in which all claims that alleged infringement more than six years before the proceedings were issued were struck out as time-barred. *See also DSG Retail Limited and Another v. MasterCard Inc. and Others* [2019] CAT 5, para. 31.

169 B. J. Rodger, Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?, *E.C.L.R.* 2017, (219) 223.

170 Or fraud or mistake, yet concealment appears to be the most relevant option with respect to competition law infringements.

171 E.g., *Johnson v. Chief Constable of Surrey Times* [1992] 10 WLUK 225; *C v. Mirror Group Newspapers* [1997] 1 W.L.R. 131, [1996] 6 WLUK 257; *AIC Ltd v. ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 1601, [2007] 1 All E.R. (Comm) 667, [2006] 11 WLUK 669.

172 *Arcadia v. Visa* [2014] EWHC 3561 (Comm) and [2015] EWCA Civ 883; B. Rodger, United Kingdom, in B. Rodger, M. Sousa Ferro and F. Marcos (eds.), *op. cit.*, 386.

173 [2014] EWHC 3561 (Comm), para. 24(7): "*What a claimant has to know before time starts running against him under s.32 (1) (b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation.*"

174 Thus not readily striking out the claim because of the insufficiency of the pleading (especially in stand-alone claims): [2014] EWHC 3561 (Comm), para. 32–34.

175 [2015] EWCA Civ 883, para. 34, referring to the wording of Lord Justice Russell in *Johnson v. Chief Constable of Surrey Times* [1992] 10 WLUK 225.

limitation period starts to run from the moment the claimant has knowledge of the essential facts to allege the existence of "*(1) an agreement or concerted practice between undertakings, (2) having as its object or effect the prevention or distortion of competition which is (a) appreciable and (b) not objectively necessary, (3) which affects trade between Member States (Article 101 TFEU), or within the United Kingdom (s.2 of the CA 1998)* (…), *and (4) which has caused some loss and damage to the claimant.*"[176] Contrary to what has been suggested,[177] even the relative limitation period thus commences at some point in time and claimants should be careful when relying on s. 32(1)(b) Limitation Act.[178]

24. Post-Damages Directive. The UK government decided that no changes were necessary regarding the duration of the limitation periods, which does thus remain the same, i.e., six years.[179] The commencement and running of that period, however, have been brought in line with the Damages Directive.[180] Para. 19 of Sch. 8A CA 1998 states that the limitation period does not start to run until the later of the day on which the infringement ceases or the "*claimant's day of knowledge.*" The latter is 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 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.[181] At first sight, this appears to set a much higher threshold for the level of required knowledge when compared to the *Arcadia v. Visa* case.[182] However, para. 19(6) of Sch. 8A CA 1998 clarifies that the requirements to know something mean that the person should have sufficient knowledge of it to bring competition proceedings. Whether this is a reference to the "statement of claim" test remains unclear.[183] It could also be the recognition of the fact that it is not possible to know in advance that the infringement caused loss (as this is precisely one of the disputed issues of the claim). However, para. 2(5) of Sch. 8A CA 1998 seems to be dealing with this already by clarifying that "*where the context requires, references to an infringement of competition law and to loss or damage (however expressed) include an alleged infringement and alleged loss or damage.*"[184] In any case, the new commencement rules are an improvement for victims of competition law infringements that would normally not trigger s. 32(1)(b) Limitation Act (e.g., certain types of abuse of dominance).

Regulations 2017 also implemented the required suspension grounds. Para. 22 of Sch. 8A CA 1998 deals with the suspension during consensual dispute resolution, which is defined by para. 6(a) as "*arbitration, mediation or any other process enabling parties to a dispute to resolve it out of court.*"[185] Some clarification is provided on when the process begins (e.g., an agreement between the claimant and the defendant) and when it ends (e.g., a notification of withdrawal from the consensual dispute resolution). Para. 21 of Sch. 8A CA 1998 concerns the suspension during an investigation by a competition authority.[186] This suspension begins when the competition authority takes the first formal step in the investigation and ends one year after the day on which the decision becomes final (or the investigation is closed otherwise).[187] According to s. 58A(3)–(4) and para. 3(4)–(5) of Sch. 8A CA 1998 a decision becomes final when the time for appealing against it expires without an appeal having been brought or, where an appeal has been brought, when it has been decided or otherwise ended and the time for further appeal has expired without it having been brought. As shown by pre-CRA case law on limitation periods concerning CAT proceedings, uncertainty might arise on the types of appeal that trigger the suspension.

2.2 Competition Appeal Tribunal

25. Pre-CRA. Prior to the CRA 2015, the CAT could hear follow-on claims only (*supra* No. 21). According to r. 31(1)–(2) CAT Rules 2003 (No. 1372), the claim must be made within two years after the later of the date on which the cause of action accrued (*supra* No. 23) or the end of the period specified in former s. 47A(7) or (8) CA 1998.[188] Those sections provide in essence that no claim can be made as long as the decision by the relevant competition authority is not final, i.e., as long as the decision can be

176 [2014] EWHC 3561 (Comm), para. 31.

177 V. Soyez, The commencement of the subjective limitation periods in private competition litigation, *G.C.L.R.* 2013, (7) 11: "*It can therefore be concluded that in many cases of private competition litigation the subjective limitation period will not commence at all.*"

178 A case-by-case analysis, however, remains necessary. The *Arcadia v. Visa* case is a peculiar case because there had been several public enforcement investigations that resulted in decisions (although no actual infringement decisions) on which the claimants could (partly) rely (for an overview *see*: [2014] EWHC 3561 (Comm), para. 49–90). It is therefore not clear when the "statement of claim" test would be met in cases where no or insufficient findings by a competition authority have been made public.

179 BEIS, Damages for breaches of competition law – government response to consultation, para. 30. The limitation order in Northern Ireland remains six years as well (the Limitation (Northern Ireland) Order 1989/1339). The prescriptive period in Scotland remains five years (Prescription and Limitation (Scotland) Act 1973 c. 52).

180 Explanatory Memorandum to the [Regulations 2017], 2017 No. 385, para. 7.16. More generally, the UK opted for a stand-alone limitation regime in the CA 1998. In order to safeguard certain general provisions concerning claimants under a disability or concerning new/counter claims (in pending actions), specific referring provisions have been included (para. 20, 24 and 26 of Sch. 8A CA 1998).

181 Para. 19(3)–(5) of Sch. 8A CA 1998 provides specific clarification on the interpretation of those rules when the claimant has acquired the right to make the claim or has acquired the infringer's liability.

182 B. J. Rodger, Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?, *E.C.L.R.* 2017, (219) 226.

183 K. Dietzel, S. Wisking and M. Herron, Nothing to see here? The UK's implementation of the EU Damages Directive, *G.C.L.R.* 2017, (169) 173.

184 The same reasoning holds true for the knowledge requirement regarding the existence of an infringement in stand-alone cases.

185 Unfortunately, it remains unclear what such "other processes" would be that would trigger the suspension. Because of this, it has been suggested that parties continue to enter into contractual tolling arrangements to ensure clarity (K. Dietzel, S. Wisking and M. Herron, Nothing to see here? The UK's implementation of the EU Damages Directive, *G.C.L.R.* 2017, (169) 174).

186 The UK government did not choose for the limitation period to be interrupted.

187 Unfortunately, no clarification is provided on what constitutes a "first formal step" by a competition authority.

188 Furthermore, r. 31(4) CAT Rules 2003 denies claims to be made before the CAT in specific circumstances. No such claims may be made if, were the claim to be made in proceedings brought before a court, the (entire) proceedings would be time-barred prior to the commencement of (former) s. 47A CA 1998 (i.e., 20 June 2003).

appealed.[189] Hence, the key question becomes when a decision is considered final.[190] Two case series have been crucial in this regard.[191] The first series of cases concern the issue of one infringer not appealing the decision (e.g., a leniency applicant), whilst other infringers do. At first, the CAT ruled that the limitation period would not start to run against the non-appealing infringer as long as some addressees of a decision did (or could) appeal.[192] The Supreme Court, however, overruled this line of thought in the *Deutsche Bahn v. Morgan* case, finding that a decision becomes final within the meaning of s. 47A CA 1998 once the time for the individual appellant to appeal against that decision has expired.[193] The second series of cases concern the issue of an appeal against the level of the fine instead of the actual infringement. Although the CAT first ruled that such an appeal also means that the decision has not become final within the meaning of s. 47A CA 1998,[194] the Court of Appeal overruled this judgement by deciding that only an appeal against the infringement has that effect.[195] The Supreme Court confirmed that this interpretation did not raise any problems concerning the EU principles of effectiveness and legal certainty.[196]

26. Post-CRA and pre-Damages Directive. The CRA 2015 harmonised the limitation periods applicable to claims before the CAT with those before the High Court.[197] Para. 8(1) of Sch. 8 CRA 2015 introduces s. 47E to the CA 1998, which provides that "*the Limitation Act 1980 applies as if the claim were an action in a court of law*." For those claims that arose after 1 October 2015, the six-year limitation period thus applies (*supra* No. 22–23). Furthermore, s. 47E(3)–(5) CA 1998 introduce a suspension of the limitation period of a single claim on the basis of s. 47A CA 1998 when s. 47B-collective proceedings are initiated. The suspension starts on the date on which the collective proceedings are commenced and ends on the date on which any of the events in s. 47E(5)(a)–(j) occurs.[198]

Because of r. 119(2) CAT Rules 2015 (No. 1648) the limitation periods of r. 31(1)–(3) CAT Rules 2003 (*supra* No. 25) remain applicable to claims that arose before 1 October 2015.[199] Even though this rule has been criticised[200] and although various respondents raised concerns about it during the consultation round, the UK government decided that the consideration of r. 119 would be outside the scope of the implementation of the Damages Directive.[201]

27. Post-Damages Directive. The stand-alone limitation period regime as introduced by Regulations 2017 apply equally to the CAT and the High Court (para. 17(1) of Sch. 8A CA 1998). Hence, the same issues arise concerning the beginning of the six-year limitation period (*supra* No. 24). The same rules on suspension are applicable as well, thus making the pre-CRA case law on the finality of an infringement decision relevant again (*supra* No. 25). S. 47E CA 1998 on the suspension during collective proceedings is now (more or less identically) to be found in para. 23 of Sch. 8A CA 1998.

3. France

28. France's implementation of the Damages Directive. Order No. 2017-303 dated March 9, 2017[202] (hereinafter, the "Order"), supplemented by its implementing Decree No 2017-305 adopted on the same day[203] (hereinafter the "Decree") (the Order and the Decree are hereinafter referred to as the "French Implementing Acts"),[204] implemented the Damages Directive into French law. The French Implementing Acts entered into force on 11 March 2017, a bit more than two months after the deadline set by the Damages Directive. A new Title ("Titre VIII") in Book 4 ("Livre 4") was inserted in the Commercial Code. It should also be highlighted that the Ministry of Justice issued a Circular on 23 March 2017[205] providing explanation about the French Implementing Acts in which a chapter ("Fiche 11") is dedicated to the limitation period rules.

189 Exceptionally, the CAT could give its permission for a claim to be made earlier (r. 31(3) CAT Rules 2003).

190 Note that the same question is key concerning the suspension (or interruption) of the limitation period according to Article 10(4) Damages Directive.

191 For a critical in-depth analysis of those cases, *see* P. Akman, Period of limitations in follow-on competition cases: when does a "decision" become final?, *Journal of Antitrust Enforcement* 2014, 2(2), 389–421.

192 *Emerson Electric Co and others v. Morgan Crucible Company plc and others* [2007] CAT 28, para. 64–67.

193 The reason being that a decision by a competition authority (in the case at hand the EC) constitutes in fact a series of individual decisions, *Deutsche Bahn AG and others v. Morgan Advanced Materials Plc* [2014] UKSC 24, para. 21–22.

194 *BCL Old Co Ltd v. BASF* [2008] CAT 24, para. 34.

195 *BCL Old Co Ltd v. BASF SE* [2009] EWCA Civ 434, para. 21.

196 *BCL Old Co Limited and others v. BASF plc and others* [2012] UKSC 45, para. 43.

197 B. J. Rodger, Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?, *E.C.L.R.* 2017, (219) 224.

198 E.g., when the CAT rejects the claim (c) or when the claim is settled (i). If the resumed limitation period would, without resumption, expire before the end of a six-month period beginning with the resumption date, the limitation period is treated as expiring at the end of that six-month period (s. 47E(6) CA 1998).

199 If the claims arose before 1 October 2015, but the proceedings were commenced on or after that date, r. 31(4) CAT Rules 2003 no longer applies. Hence, if the claims could not have been made in proceedings brought before a court because those entire proceedings were time-barred prior to 20 June 2003, they can still be made in proceedings brought on or after 1 October 2015 before the CAT (if the other conditions of r. 31(1)–(3) CAT Rules 2003 are fulfilled), *see DSG Retail Limited and Another v. MasterCard Inc. and Others* [2019] CAT 5, para. 37–45.

200 E.g., T. De La Mare, Private actions in the Competition Appeal Tribunal: the Consumer Rights Act giveth and the 2015 Competition Appeal Tribunal Rules taketh away, *Comp. L.J.* 2015, 14(4), 219–229.

201 BEIS, Damages for breaches of competition law – government response to consultation, para. 137–138.

202 Ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles (*JORF* n° 59 du 10 mars 2017, texte n° 29).

203 Décret n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles (*JORF* n° 59 du 10 mars 2017, texte n° 31).

204 Reference should also be made to the Rapport au Président de la République relatif à l'ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles accompagnant l'ordonnance (*JORF* n° 59 du 10 mars 2017, texte n° 28), to the extent that this report provides clarification on the Order.

205 Circulaire du 23 mars 2017 relative aux actions en dommages-intérêts du fait des pratiques anticoncurrentielles (*Bulletin officiel du ministère de la Justice* (*BOMJ*) du 31 mars 2017). *See also* D. Ashton, *Competition Damages Action in the EU: Law and Practice* (2nd edition, Edward Elgar, 2018), 258.

29. Temporal application. Pursuant to Article 12-I(1) Order[206] the new provisions in the Commercial Code apply to claims in which the infringement took place after the Order entered into force, i.e., 11 March 2017. This solution is consistent with Article 2 Civil Code according to which substantive rules,[207] such as limitation period rules,[208] cannot be applied retroactively.

However, regarding the infringements for which a competition damages claim was not yet time-barred on 11 March 2017, those of the new provisions of the Commercial Code regarding limitation period rules that are favourable to the plaintiff immediately apply to these claims.[209] In these cases, the time already elapsed under the previous rules must be taken into account when determining when the limitation period expires.[210]

The French legislative framework provides for both a relative and an absolute limitation period.

3.1 Relative limitation period

30. Pre-Damages Directive. Article 2219 Civil Code[211] provides that limitation periods lead to the "*extinction of a right*" because of the absence of an action for a predetermined period of time. The rules regarding the limitation periods to bring an action for competition law damages in France evolved considerably in several respects during the fifteen years preceding the adoption of the French Implementing Acts.[212] Regarding the time lapse after which an action for antitrust damages is time-barred, the *lex generalis* for tort actions provided for in Article 2270-1 (1) Civil Code was applicable before the adoption of the law on 17 June 2008.[213] According to that Article, an action could be brought within ten years as of the day of occurrence of the damage or its aggravation.[214]

31. Duration and commencement of limitation period. Since the adoption of the law on 17 June 2008, which was applicable until the Order entered into force on 11 March 2017, the general rules applicable to the limitation periods were provided for in Article 2224 Civil Code. According to that Article, tort actions, including competition law damages actions, were time barred five years after the person that could bring such an action knew or should have known about the facts that entitled him or her to bring an action.[215] As correctly highlighted elsewhere, the same five-year limitation period applies to actions for the annulment of a contract based on a competition law infringement.[216]

According to case law,[217] the limitation period starts to run not only when there was suspicion about the existence of an infringement but also when this infringement had been established in both its factual and legal elements.[218] It can be inferred from the case law that two situations could be distinguished:

– In case of secret anticompetitive practices that were unknown to their victims, which is usually the case for cartels, both the civil[219] and the administrative courts[220] held that the limitation period started to run at the time the decision was adopted by the competition authorities,[221] even if an action for damages had already been brought in some other jurisdictions or if the existence of the illegal behaviour in question had been reported in the media. The Paris Court of Appeal even considered that the five-year limitation period could not start to run after the competition authority had adopted an interim measures decision. It found that such a decision did not grant "real" and "useful" knowledge of the infringement, since at the time of this first decision, it had not yet been established that the practices at stake were illegal.[222]

– In cases where the anticompetitive practices were known to the victim, such as an abuse of dominance for which the victim had lodged a complaint with the competition authority, courts have considered that

206 *See also* Fiche 13 Circular.

207 On the other hand, procedural rules such as those dealing with the communication or disclosure of evidence are applicable to actions brought as of 26 December 2014.

208 While none of the French Implementing Acts provide that limitation period rules are substantive in nature, this is accepted by the case law (*see* for instance on the non-retroactivity of limitation period rules, T. com. Paris, 23 September 2019, *Soc. Carrefour e.a. v. Soc. Johnson & Johnson Santé Beauté France*, No. 2017013944), Fiche 11 Circular and the doctrine (*see* for instance, Actions en réparation des pratiques anticoncurrentielles : État des lieux en France et dans l'Union, transcript of the conference held on 28 March 2019 at the Paris Court of Appeal, *Concurrences*, 11).

209 In French, according to Article 12(2) Order, "*les dispositions de la présente ordonnance qui allongent la durée d'une prescription s'appliquent lorsque le délai de prescription n'était pas expiré à la date de son entrée en vigueur. Il est alors tenu compte du délai déjà écoulé.*" The new provisions that are more favourable to the plaintiff are those that postpone the day when the limitation period starts to run or that suspend the limitation period.

210 *See* in that regard, D. Ashton, *Competition Damages Action in the EU: Law and Practice* (2nd edition, Edward Elgar, 2018), 258. *See also*: M. Sousa Ferro and E. Ameye, What to expect from Cogeco: Temporal scope, time-barring and binding effect of NCA decisions, *Competition Law Insight*, 8 March 2019, available at: https://www.competitionlawinsight.com/practice-and-procedure/what-to-expect-from-cogeco--1.htm.

211 According to Article 2219 Civil Code, "*la prescription extinctive est un mode d'extinction d'un droit résultant de l'inaction de son titulaire pendant un certain laps de temps.*"

212 *See* in that regard, R. Amaro and J.-F. Laborde, *op. cit.*, 9.

213 Loi nº 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.

214 In French, "*à compter de la manifestation du dommage ou de son aggravation*."

215 In French, "*à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer.*"

216 D. Ashton, *Competition Damages Action in the EU: Law and Practice* (2nd edition, Edward Elgar, 2018), 257.

217 E.g., CA Paris, *Arkeos v. EDF*, 6 March 2019, RG 17/21261; CA Paris, *EDF v. Câbliers*, 2 July 2015, RG 13/22609.

218 For a brief discussion on this issue: S. Justier, Prescription de l'action en réparation in Actions en réparation des pratiques anticoncurrentielles : État des lieux en France et dans l'Union, transcript of the conference held on 28 March 2019 at the Paris Court of Appeal, *Concurrences*.

219 CA Paris, *Doux Aliments v. Timab Industries*, 6 February 2019, RG 17/04101; CA Paris, *Arkeos v. EDF*, 6 March 2019, RG 17/21261.

220 CAA Nantes, *Département des Côtes-d'Armor v. Signalisation France*, 10 May 2017, No. I6NT02222 and CAA Douai, *Département de la Seine-Maritime v. Société Signalisation France*, No. I7DA00507-I7DA00509-I7DA00511.

221 *See*, for instance, Trib. com. Paris, 23 September 2019, *Soc. Carrefour e.a. v. Soc. Johnson & Johnson Santé Beauté France*, No. 2017013944 and for the administrative Courts, Cons. Etat, *SNCF Mobilités v. Bouygues Travaux Publics*, 22 November 2019, No 16PA02417.

222 CA Paris, *Arkeos v. EDF*, 6 March 2019, RG 17/21261.

the limitation period would start to run before the adoption of the competition authority's decision. The reason underlying this position is that the victim knew about the infringement since he or she actually brought an action.[223] It cannot,[224] however, be excluded that the latest case law[225] could render this line of reasoning obsolete. Indeed, it could be argued that, even if the victim knew he or she was suffering an abuse of dominance, he or she could not "usefully act," i.e., he or she did not have in his or her possession sufficient concrete evidence to prove the harm suffered as well as the causal link with the illegal behaviour until the competition authority had adopted a final infringement decision.[226]

In any event, it is settled case law[227] that the limitation period cannot start to run before the day when the anticompetitive behaviour ceased.

32. Suspension and interruption. Regarding the acts that may interrupt[228] the limitation period, the French legislator adopted on 17 March 2014 a new Article 462-7 Commercial Code in a law commonly referred to as "Loi Hamon."[229] Article 462-7 Commercial Code (as drafted in "Loi Hamon") reversed the solutions adopted by the French Courts until then. Initially, in their judgements such as *Conseil régional d'Île-de-France et Région Île-de-France*[230] and *JCB Sales*,[231] the Paris first instance and appeal courts respectively held that an ongoing (public enforcement) action pending before the competition authority, or even the adoption of an EC decision, did not interrupt the limitation period to bring a damages action. Article 462-7 Commercial Code (as drafted in "Loi Hamon") provided on the contrary that the opening of a procedure before any competition authority in the EU interrupted the limitation period until the competition authority decision or its appeal before a court had become final.

33. Post-Damages Directive. Article 482-1 Commercial Code confirms the five-year limitation period that was already provided for in Article 2224 Civil Code. Firstly, Article 482-1 Commercial Code mirrors Article 10 Damages Directive as it requires that in competition law damages actions the victim knew or should have known cumulatively (i) that the acts in question were illegal anticompetitive practices, (ii) that they caused harm to that victim, and (iii) the identity of one of the authors of these anticompetitive practices.[232] In that last respect, the Circular insists on the fact that it is not necessary that the victim knew all the infringers as long as he or she knew one of them.[233] Secondly, by way of clarification to the rule that the limitation period starts to run when the three conditions listed above are met,[234] Article 482-1 Commercial Code provides that, on the one hand, in cases of continuous infringements, the limitation period cannot start to run before the infringement has ceased. On the other hand, the five-year limitation period does not start to run vis-à-vis the immunity recipient as long as the victims of the anticompetitive practices have not been in a position to bring an action against its co-infringers.

34. Suspension and interruption. As far as the suspension and interruption grounds are concerned, the Order extends the list of circumstances provided for in Article 462-7 Commercial Code (as drafted in "Loi Hamon") that trigger an interruption or a suspension.

Firstly, Article 462-7 Commercial Code (as it results from the Order) provides that any act from a competition authority that aims at searching, finding, or condemning anticompetitive practices[235] interrupts the limitation period before both the civil and administrative courts. Pursuant to the Circular, these acts of the competition authorities may consist in, inter alia, requests for information letters, decisions to carry out inspections, the opening of a procedure and the statement of objections.[236] This interruption lasts until the decision of the competition authority or the judgement of the first instance court may not be the object of an ordinary appeal ("*voie de recours ordinaire*"). This implies that the limitation periods are interrupted until the Court of Appeal, but not the Civil Supreme Court, hands down its judgement concerning an appeal of a competition authority's decision.[237]

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223 *See*, for instance, CA Fort-de-France, 24 January 2017, RG 15/00486. In this case, this Court of Appeal found that the victim was in position to "usefully act" since she brought an action. This judgement was, however, quashed by the Civil Supreme Court on the ground that this court of appeal had no jurisdiction to adjudicate that case (Cass. com., 10 July 2018, No. 17-16.365).

224 For a similar opinion, Prescription de l'action en réparation in Actions en réparation des pratiques anticoncurrentielles : État des lieux en France et dans l'Union, transcript of the conference held on 28 March 2019 at the Paris Court of Appeal, *Concurrences*, 11.

225 CA Paris, *Doux Aliments v. Timab Industries*, 6 February 2019, RG 17/04101; CA Paris, *Arkeos v. EDF*, 6 March 2019, RG 17/21261.

226 Such an approach would, however, lead to the unacceptable result that in stand-alone actions the limitation period would never start to run as, by definition, no competition authority decision will be adopted. A solution would be, in our view, to consider that, in such stand-alone actions, the limitation period would start to run only when the victim had, or should have had, in its possession at least some concrete evidence to establish an abuse of dominance and was therefore in a position to "usefully act," i.e., to bring an action based on some concrete evidence in his or her possession.

227 E.g., CA Paris, *EDF v. Nexans*, 2 July 2015, RG 13/22609.

228 In cases of suspension, the limitation period continues to run for the remaining period after the ground for suspension has ceased; in cases of interruption, a new (full) limitation period starts to run after the ground for interruption has ceased.

229 Loi nº 2014-344 relative à la consommation (*JORF* nº 65 du 18 mars 2014, 5400).

230 TGI Paris, 15 January 2009, *Conseil régional d'Île-de-France et Région Île-de-France*, No. 8/55030, 08/59948, 08/59949, *RLC*, 2009/19, 97, commented by M. Chagny.

231 CA Paris, *Sté JCB Sales e.a. v. SA Central Parts*, 26 June 2013, RG 12/04441.

232 Rapport au Président de la République relatif à l'ordonnance nº 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles accompagnant l'Ordonnance (*JORF* nº 59 du 10 mars 2017, texte nº 28). This contrasts with Article 2224 Civil Code, which provides that the limitation period starts to run from the moment when the damage occurred or when the victim learnt about the damage if he or she proves that he or she could not have been informed about it when it occurred.

233 Fiche 11 Circular.

234 Ibid.

235 This contrasts with Article 462-7 Commercial Code (as drafted in "Loi Hamon"), which provided that solely the opening of the procedure by any competition authority would interrupt the five-year limitation period.

236 Fiche 11 Circular.

237 It should be noted, on the other hand, that an appeal before the Civil Supreme Court ("Cour de cassation") is considered as an "extraordinary" appeal ("*voie de recours extraordinaire*") and does not, as such, interrupt the limitation period (*see* in that regard, Title XVI, Sub-title III, Chapter 1 of the Procedural Civil Code). Such a solution can also be inferred from the judgement CA Paris, 6 March 2019, *Arkeos v. EDF*, RG 17/2126, available at: http://blog.selinsky-avocats.com/articles/action-indemnitaire-consecutive-a-une-pratique-anticoncurrentielle-condamnee-par-ladlc-127.htm.

Secondly, the limitation period is suspended in cases of consensual dispute resolution according to Article 2238(1) Civil Code.[238] The suspension period starts when the parties decide to initiate the settlement ("mediation" or "conciliation") negotiations or, if no written agreement about the settlement process is entered into, as of the first settlement meeting. According to Article 2238(2) Civil Code, the suspension ends when any or both of the parties, the mediator or the conciliator declare that the settlement negotiations are over, in which case the limitation period resumes for a period of time which must be at least of six months. Thirdly, all the other civil law causes of either suspension that are provided for in Articles 2233 to 2239 Civil Code and in Article 623-27[239] of the Consumer Code, or interruption that are provided for in Articles 2240 to 2246 Civil Code, remain applicable.[240]

Finally, it should be noted that an appeal brought by one co-infringer against the decision adopted by the competition authority interrupts the limitation period vis-à-vis all the other co-infringers.[241]

3.2 Absolute limitation period

35. Pre- and Post-Damages Directive. Pursuant to Article 2232 Civil Code,[242] the deferral in time of the day when the limitation period starts to run should not lead to the result that an action is not time-barred twenty years after the "birth" of the right to claim damages. Courts have not had the opportunity to interpret this provision since its adoption. It is still debated by the legal doctrine[243] whether this article should be interpreted as meaning that a damages action could not in any event be brought twenty years after the victim knew or could have known about the facts allowing him or her to act, or as meaning that the victim could not bring under any circumstances an action after twenty years after his or her right arose, even if he or she did not know or could have known about the facts allowing him or her to bring such an action, as the wording of Article 2232 Civil Code seems to indicate.[244] In any event, it is submitted that this absolute limitation period cannot start to run before the infringement has ceased in cases of continuous infringements and must be interpreted in accordance with the principle of effectiveness.[245]

238 Fiche 12 Circular.

239 This Article addresses collective actions brought by consumer associations.

240 Fiche 11 Circular.

241 CA Paris, *Sté des Établissements horticoles Georges Truffaut sur recours contre la décision n° 05-D-32 dans l'affaire "Royal Canin,"* 4 February 2006; Cons. conc., dec. No. 88-D-25. *See also* in that regard, Article 2245, al. 1, Civil Code and Fiche 11 Circular.

242 According to that Article: "*Le report du point de départ, la suspension ou l'interruption de la prescription ne peut avoir pour effet de porter le délai de la prescription extinctive au-delà de vingt ans à compter du jour de la naissance du droit.*"

243 *See*, for instance in this regard, F. Terré, P. Simler, Y. Lequette, F. Chénedé, *Les Obligations* (12th edition, Dalloz, 2018), 1852; Prescription de l'action en réparation in Actions en réparation des pratiques anticoncurrentielles : État des lieux en France et dans l'Union, transcript of the conference held on 28 March 2019 at the Paris Court of Appeal, *Concurrences*, 11.

244 Such interpretation would be, in our view, contrary to both the ECJ and ECtHR case law as described in Section II of this article.

245 ECJ, 28 March 2019, *op. cit.*, *Cogeco*.

4. Germany

36. Germany's implementation of the Damages Directive. In Germany, the Damages Directive was implemented by the Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 1 June 2017 (hereinafter: GWB). All provisions relating to limitation periods are found in § 33h GWB, which is regarded as a *lex specialis* in relation to the general rules on limitation periods in the German Civil Code (hereinafter: BGB).

37. Temporal application.[246] § 186 GWB regulates the entry into force of § 33h GWB. The general rule is that § 33h GWB applies to claims arising after 26 December 2016. There is a transitional period for claims that arose before 27 December 2016, but that were not yet time-barred on 9 June 2017. Those claims also fall under § 33h GWB, which practically extends applicable limitation periods. However, the starting point, suspension and interruption for those claims are still governed by the old statute of limitations for the period up to and including 8 June 2017.[247] Regarding the temporal application of the new provisions on limitation periods, it is important to know whether the claim arose before 27 December 2016 and whether it is suspended according to the old rules. If that is the case, two situations need to be distinguished. (1) If the suspension has not yet ended on 9 June 2017, § 33h GWB will apply fully and as a result the new five-year limitation period will apply to this claim. (2) If the suspension ended before 9 June 2017, then the suspension is entirely subject to the old limitation rules. Whether this claim is also subject to the five-year limitation period in § 33h GWB depends on whether the claim has not yet expired before 9 June 2017.[248] In both situations, there will be no reassessment of the starting point of the limitation period, as the facts determining the starting point of the limitation period have already been established under the old law. It has been argued that the more favourable conditions of § 33h Abs. 2 and 3 would not apply to claims arising before 27 December 2016,[249] although there is no case law on this topic yet.

246 Given the scope of this article, the authors decided to include the rules on the limitation periods for claims that arose after 1 January 2002 only. Regarding claims that arose before this date, other limitation periods are applicable. *See*: M. Martinek, Katharsis im Kartellrecht? – die Grauzementkartell II-Entscheidung des BGH zu Kartellschadensersatzansprüchen bei Altfällen, eine vertriebskartellrechtliche Nachlese, *ZVertriebs* 2018, 343; C. Bürger and B.A. Köln, Verjährung des § 33 Absatz 3 GWB bei follow-on Schadensersatzklagen de lege lata und de lege ferenda, *NZKart* 2014, 423. According to § 852 Abs. 1 BGB and § 198 BGB as valid until the entry into force of the Act on the Modernisation of Obligations on 1 January 2002 (Schuldrechtsmodernisierung), tort damage claims were subject to a limitation period of three years, starting from the moment that the injured party is aware of the damage and of the person causing it (e.g., OLG Düsseldorf, 8 June 2011, U (Kart) 2/11, *BeckRS* 2012, 4895).

247 Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 17 November 2016, *BT Drs.* 18/10207, 107.

248 This last situation can be relevant, e.g., in the Trucks cartel. A court reasoned that the limitation period was suspended as of 18 January 2011 when the EC carried out inspections. The investigations were concluded with the adoption of the decision of 19 July 2016. The decision became legally effective two months after the decision was announced to the parties concerned, i.e., on 19 September 2016. Taking into account the six-month suspension after the legally binding conclusion, the absolute ten-year limitation period therefore began to run again from 19 March 2017 at the earliest (LG Stuttgart, 25 July 2019, 30 O 44/17, *BeckRS* 2019, 16037).

249 C. Klöppner and M. Schmidt, Die Verjährung kartellrechtlicher Schadensersatzansprüche 2.0, *NZKart* 2018, (449) 449-450.

4.1 Relative limitation period

38. Pre-Damages Directive. The statutes of limitations applicable before the entry into force of the Implementation Act are §§ 195 and 199 BGB. The duration of the relative limitation period is three years (§ 195 BGB). It starts to run at the end of the year in which (1) the claim arose (*infra* No. 42) and (2) the debtor obtained knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he or she had not shown gross negligence (§ 199, Abs. 1). Knowledge is presumed if the injured party can reasonably be expected to have good prospects of bringing its claims, even if this is not without risk.[250] The claimant does not need to be able to quantify his or her claim with certainty.[251] The knowledge required is that there can be no legitimate doubt about the damage and the person liable for compensation.[252] Gross negligence shall be deemed to exist when the claimant has no knowledge because he or she has violated the required due care and has also failed to make very obvious considerations or has failed to observe what should have been obvious to everyone in the given case.[253] There is no generally accepted time at which knowledge (or gross negligence) can be assumed. This has to be considered on a case-by-case basis.[254] In the case of continuous infringements, the legal doctrine states that the limitation period starts to run only when the infringement has ceased.[255]

Sufficient knowledge according to § 199 BGB was accepted in some cases, when the fines imposed on the infringer were apparent from press releases issued by the Bundeskartellamt.[256] Due to the intensity of the reporting, the injured parties could not have been unaware of those fines.[257] In another case, the Bundeskartellamt's press releases were considered insufficient, as the findings and available evidence were described in a strongly summarised and general way. There was only sufficiently detailed information to be found in the later fine decision and the Bundeskartellamt's files.[258] An example of gross negligence was the case where the claimant had not taken the Bundeskartellamt's press release as a basis for further investigation. The claimant should have checked the reports and obtained an overview of the evidence.[259] From the moment the fine is imposed and reported to the press, there would be gross negligence and ignorance if the claimant were to remain inactive at that moment and, for example, did not submit a request for access to the files.[260]

39. Suspension and interruption. The general provisions regarding suspension and interruption apply (§ 203 ff. BGB). § 203 BGB provides for a suspension in the case of negotiations. The limitation period shall recommence at the earliest three months after the end of the suspension.[261] § 204 BGB does the same for arbitration, but in this case, the suspension ends six months after the final and absolute decision in the proceedings. With effect as of 1 July 2005 a specific suspension ground was introduced, which suspends the limitation period when the Bundeskartellamt (or the national competition authority of another Member State) or the EC initiated an infringement procedure (old § 33 Abs. 5 GWB). This

250 BGH, 22 July 2014, KZR 13/13, *NJW* 2014, (3092) 3093; BGH, 10 May 2012, I ZR 145/11, *GRUR* 2012, 1248; Court of Appeal Karlsruhe, 9 November 2016, 6 U 103/12, *BeckRS* 2016, 133703; Court of Appeal Karlsruhe, 9 November 2016, 6 U 204/15, *NJOZ* 2018, 528; C. Klöppner and M. Schmidt, *op. cit.*, 450.

251 BGH, 22 July 2014, KZR 13/13, *NJW* 2014, (3092) 3093; BGH, 10 May 2012, I ZR 145/11, *GRUR* 2012, 1248; C. Klöppner and M. Schmidt, Die Verjährung kartellrechtlicher Schadensersatzansprüche 2.0, *NZKart* 2018, (449) 450.

252 BGH, 23 September 2004, IX ZR 421/00, *NJW-RR* 2005, (69) 70; Court of Appeal Karlsruhe, 9 November 2016, 6 U 204/15, *NJOZ* 2018, (528) 536, No. 65.

253 BGH, 28 February 2012, VI ZR 9/11, *NJW* 2012, 1789, No. 17; BGH, 10 November 2009, VI ZR 247/08, *NJW-RR* 2010, (681) 683, No. 13–15; Court of Appeal Karlsruhe, 9 November 2016, 6 U 204/15, *NJOZ* 2018, (528) 537, No. 69.

254 T. Hertel, M. Nuys and J. Penz, Anscheinsbeweis Adieu – Gezeitenwechsel für den Schadensnachweis bei Follow-on Klagen, *NZKart* 2019, (86) 89.

255 C. Bürger and B. Aran, Verjährung des § 33 Abs. 3 GWB bei follow-on Schadensersatzklagen de lege lata und de lege ferenda, *NZKart* 2014, (423) 424; H. Schweitzer, Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen, *NZKart* 2014, (335), footnote 47. However, in other cases than that of private enforcement of competition law, the BGH sometimes tends to divide the continuous infringements into separate claims, which leads to distinct limitation periods for each claim (BGH, 15 January 2015, I ZR 148/13, *NJW* 2015, 3165). *See* more detailed: H. Grothe, § 199, in *Münchener Kommentar zum BGB* (München, C. H. Beck, 2018), No. 14–16.

256 German Competition Authority.

257 This was ruled by the Court of first instance Düsseldorf, 17 December 2013, 37 O 200/09, *BeckRS* 2013, 22380. This reasoning was followed in appeal. In addition, it appeared that the publication of the competition law infringement had also appeared in several ordinary newspapers. Furthermore, it was argued that the injured party, being a market participant, should monitor the market conduct of the other market participants and in particular of the infringer, since the infringer was one of its important suppliers. Therefore, if the injured party had no knowledge, this was due to gross negligence only (Court of Appeal Düsseldorf, 18 February 2015, VI-U (Kart) 3/14, *NZKart* 2015, (201) 202). In another case the defendant was unable to prove that the injured party already had sufficient knowledge before the Bundeskartellamt's decision to impose a fine (Court of Appeal Karlsruhe, 10 March 2017, 6 U 132/15, *BeckRS* 2017, 149111).

258 Court of Appeal Karlsruhe, 9 November 2016, 6 U 204/15, *NJOZ* 2018, (528) 536, No. 66. The Court of Appeal's decision, that the claimant should be granted an additional investigation period of at least ten months in view of the size of the files of the fining procedure, was striking. The Court of Appeal is thus postponing the moment at which the statute of limitations becomes known in a manner that is not provided for by the law, which is rather unusual. The BGH, 12 June 2018, KZR 56/16, Grauzementkartell II, *NZKart* 2018, 315 nevertheless implicitly confirmed the reasoning of the Court of Appeal.

259 Court of Appeal Karlsruhe, 9 November 2016, 6 U 204/15, *NJOZ* 2018, (528) 537, No. 69.

260 C. Klöppner and M. Schmidt, *op. cit.*, 451.

261 For a more detailed explanation of these provisions: T. Riehm, Alternative Streitbeilegung und Verjährungshemmung, *NJW* 2017, 113; B. Boemke and C. Dorr, Verjährungshemmung durch Verhandlung, *NOJZ* 2017, 1578.

suspension also ended six months after the proceedings (§ 204 Abs. 2 BGB).[262] The temporal application of § 33 Abs. 5 GWB is similar to the one of the new limitation rules in § 33h GWB (*supra* No. 37). § 33 Abs. 5 GWB applies to claims arising before 1 July 2005 if they are not yet time-barred at that time.[263]

40. Post-Damages Directive. The duration of the relative limitation period corresponds to the minimum one provided for in the Damages Directive, i.e., five years (§ 33h Abs. 1 GWB). This deviates from the three-year period under general limitation law (§ 195 BGB). Regarding the starting point, all the requirements of Article 10(2) Damages Directive have been adopted. However, there appears to be two (minor) differences between § 33h GWB and the Damages Directive. The German legislator does not formulate the knowledge requirement as "*reasonably be expected to know*," but as "*should have known without gross negligence*."[264] Another difference is that § 33h GWB explicitly states the arising of the claim as a prerequisite.[265] § 33h GWB differs from the general statute of limitations (§ 199 BGB) as it introduces the condition that the infringement must have ended.[266] Moreover, unlike the general statute, § 33h Abs. 2(a) GWB does not only require knowledge of the factual circumstances, but seems to imply a required knowledge of the legal assessment as well.[267] It is also important to take into account that the starting point of the relative limitation period begins only at the end of the year in which the conditions of § 33h Abs. 2 GWB are met.[268] Lastly, it should be noted that uncertainty remains about the relationship between the so-called "residual damage claim" in § 852 BGB and the limitation periods in the GWB.[269]

On the basis of § 33h Abs. 8, Satz 1 and 2 GWB[270] the five-year limitation period does not start to run against the immunity recipient or the SME[271] until the end of the year in which the victims were unable to obtain full compensation from the other infringers for damages resulting from the infringement. The victims carry the burden of proof that they were "*unable to obtain full compensation*" from the other injured parties. The fact that their claims have become time-barred against the other infringers is not accepted as a reason that they were "*unable to obtain full compensation*" for the application of § 33h Abs. 8 GWB (§ 33e Abs. 2 GWB).[272]

41. Suspension and interruption. The grounds for suspension introduced by the Damages Directive already existed to a similar extent before it was adopted in German law. Regarding the consensual dispute resolution the same provisions as before (§§ 203 and 204 BGB[273]) apply after the Damages Directive as well.[274] It is stated that this (lack) of implementation measure leads to a narrower result than the one that the Damages Directive seeks to achieve, because these rules can be interpreted in such a way that they are not applicable to non-formal settlement negotiations between parties.[275] This does not seem to be the case, considering that the term "*Verhandlungen*" (negotiations) in § 203 BGB has to be interpreted broadly and knowing that it is sufficient that there is an exchange of views between both parties

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262 BGH, 12 June 2018, KZR 56/16, Grauzementkartell II, *NZKart* 2018, (315) 316.

263 In the absence of explicit transitory provisions, the BGH had to clarify the temporal application. The same principle applies: in the event of a change in the limitation rules, the new law applies to claims that arose before the entry into force of the law, but that have not yet become time-barred. The starting point, suspension and interruption of the limitation period before 1 July 2005 (i.e., before the entry into force of the new law) are still determined by the earlier limitation period rules (BGH, 12 June 2018, KZR 56/16, Grauzementkartell II, *NZKart* 2018, (315) 319-320. This solution had already been adopted by the lower courts: Court of Appeal Düsseldorf, 18 February 2015, VI-U (Kart) 3/14, *NZKart* 2015, (201) 205-206; Court of first instance Düsseldorf, 8 September 2016, 37 O 27/11, *NZKart* 2016, (490) 491). § 33 Abs. 5 refers to suspension in the event of a procedure being initiated ("*wenn ein Verfahren eingeleitet wird*"). However, it remains unclear which specific official acts of the competition authorities "initiate proceedings" and thus give rise to a suspension of the limitation period. (*See* for more detailed information: Court of first instance Köln, 17 January 2013, 88 O 1/11, *BeckRS* 2013, 8412; Court of Appeal Stuttgart, 4 April 2019, 2 U 101/18, *NZKart* 2019, 345; Court of first instance Stuttgart, 25 July 2019, 30 O 44/17, *BeckRS* 2019, 16037; T. Hertel, M. Nuys and J. Penz, Anscheinsbeweis Adieu – Gezeitenwechsel für den Schadensnachweis bei Follow-on Klagen, *NZKart* 2019, (86) 89; C. Klöppner and M. Schmidt, *op. cit.*, 452; U. Loewenheim, K. M. Meessen, A. Riesenkampff e.a., *Kartellrecht* (München, C.H. Beck, 2016), § 33, No. 35).

264 Some legal scholars regard this rule as more lenient and protective of claimants: B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 458.

265 This would not have been necessary in itself, as this condition is contained in the knowledge of all the circumstances giving rise to the claim (§ 33h Abs. 2(2), a GWB).

266 The German legislator hereby refers to the continuing or repeated infringements within the meaning of Article 25(2) Regulation (EC) No. 1/2003 of 16 December 2002. The limitation period laid down in Article 25(2) of Regulation 1/2003 does not begin to run, in the case of continuing or repeated infringements, until the day on which the infringement ceases.

267 § 199 BGB requires knowledge of the factual circumstances only. A proper legal assessment of the facts is, in principle, not necessary. Thus, legal errors on the part of the claimant generally have no effect on the commencement of the limitation period. However, if the legal situation is unclear or doubtful, in particular if a legally competent third party cannot reliably assess the limitation period, the starting point of the limitation period may be postponed due to ignorance (BGH, 22 July 2014, ZR 13/13, *NJW* 2014, (3092) 3093; BGH, 25 February 1999, IX ZR 30/98, *NJW* 1999, 2041; Court of Appeal Karlsruhe, 9 November 2016, 6 U 103/12, *BeckRS* 2016, 133703).

268 Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 17 November 2016, *BT Drs.* 18/10207, 66.

269 § 852 BGB can call into question the regular limitation period of damages claims in the area of competition law. The application of this provision could deviate from the limitation principle of the protection of the debtor without a legal basis in competition law or legal political support. *See* further: D. Petzold, § 852 S. 1 BGB im Kartellrecht – Regelverjährung ade?, *NZKart* 2018, 113; O. Gänswein, Gesamtschuldnerausgleich unter Kartellbeteiligten: Bestimmung des Haftungsanteils und Verjährung der Ausgleichsansprüche, *NZKart* 2016, 50. Certain case law has held with regards to the limitation periods before the implementation of the Damages Directive that a residual damages claim of § 852 BGB remains possible even when the regular limitation period of damages claims in the area of competition law has elapsed (OLG Karlsruhe, 10 April 2019, 6 U 126/17, *ZVertriebsR* 2019, 264).

270 § 33h Abs. 7 GWB determines the limitation period for the claim for compensation pursuant to § 33d Abs. 2 GWB in the relationship between jointly and severally liable debtors to each other concerning the obligation to pay compensation.

271 Interestingly, the German legislator appears to go further than the provisions of the Damages Directive, which requires a reasonable and sufficient limitation period, only regarding the exceptional joint and several liability of full immunity recipients, and not regarding the SME's (as Article 11(4), last sentence, Damages Directive refers to "*under this paragraph*").

272 C. Kersting, Germany, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (124) 139–140.

273 For a more detailed explanation of these provisions: T. Riehm, Alternative Streitbeilegung und Verjährungshemmung, *NJW* 2017, 113; B. Boemke and C. Dorr, Verjährungshemmung durch Verhandlung, *NOJZ* 2017, 1578.

274 Legal doctrine considers the application of the existing rules to be sufficient to meet the requirements for the suspension in the case of consensual dispute resolution (Article 18 Damages Directive) (C. Bürger and B. Aran, *op. cit.*, 427).

275 B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 471.

to have a negotiation according to § 203 BGB.[276] § 33h Abs. 6 GWB provides for specific suspension grounds if (1) a competition authority or the EC takes action with regard to an investigation or infringement procedure or (2) if the claimant has brought an action against the infringer to obtain information or produce evidence in accordance with § 33g GWB. This provision (§ 33h Abs. 6 GWB) largely corresponds to the former § 33 Abs. 5 GWB. The old § 33 Abs. 5 GWB already provided for a suspension when the (German) competition authority (of another Member States) or the EC initiated an infringement procedure. One of the differences being that under the old regime the suspension ended six months after the proceedings (§ 204 Abs. 2 BGB).[277] The second ground for suspension in § 33h Abs. 6 GWB is new in relation to the Damages Directive and the old statute of limitations.[278] Both the suspension grounds in § 33h Abs. 6 GWB end one year after the final and legally binding decision or any other settlement of the proceedings.

4.2 Absolute limitation period

42. Pre-Damages Directive. German law provides for two absolute limitation periods (§ 199 Abs. 3 BGB). There is a (1) ten-year absolute limitation period that starts to run from the arising of the claim and a (2) thirty-year absolute limitation period that starts to run from the date on which the act, breach, duty or other event that caused the damage occurred. Contrary to the relative limitation period, both objective limitation periods start to run when their requirements are met and not at the end of the corresponding year (*supra* No. 38).[279] In case of single and continuous infringements (e.g., cartels), it may be argued that the absolute limitation period starts to run at the end of such an infringement. The absolute limitation periods are subject to the general provisions of suspension and interruption as is the case for the relative limitation periods (*supra* No. 39).[280] The arising of the claim in the ten-year limitation period corresponds, in the event of a dispute, to the occurrence of the damage as a result of the infringing act.[281] The damage does not have to be quantifiable or numerable.[282]

43. Post-Damages Directive. § 33h GWB also determines absolute limitation periods based on § 199 BGB. The first is a period of ten years starting from the date on which the claim arose and after the infringement has ended (§ 33h Abs. 3 GWB).[283] The second absolute limitation period is thirty years starting from the date of the violation that caused the damage according to § 33 (§ 33h Abs. 4 GWB). It is unclear whether the occurrence of the event (the damage itself must not yet have occurred) is sufficient as a starting point for the thirty-year limitation period or whether it must also be established that the event constitutes an infringement of § 33 GWB. The thirty-year limitation period does not imply that the infringement has ceased. Both objective limitation periods are subject to the suspension and interruption rules.[284]

5. The Netherlands

44. The Netherlands' implementation of the Damages Directive. The Netherlands implemented the Damages Directive by the Act of 25 January 2017,[285] which introduced Articles 6:193k–6:193t into the Dutch Civil Code (Burgerlijk Wetboek, hereinafter: BW). Regarding the implementation of the Damages Directive, reference was made as much as possible to the general rules on limitation periods according to Article 3:306 ff. BW.[286] The Dutch Implementation Act does not go beyond what was necessary for the implementation of the Damages Directive.[287] For this reason, the Implementation Act currently applies to cross-border competition law infringements only. As a result, the old limitation period rules stay applicable to purely national infringements and related claims. At the time of writing, however, a legislative proposal has been put forward to extend the scope of the Implementation Act to purely national infringements as well.[288]

45. Temporal application. The entry into force of the Dutch Implementation Act is 10 February 2017 (Article IV Dutch Implementation Act).[289] The general

276 BGH, 15 August 2012, XII ZR 86/11, *NJW* 2012, 3633; BGH, 26 October 2006, VII ZR 194-05, *NJW* 2007, 587; H. Grothe, § 203, in *Münchener Kommentar zum BGB*, *op. cit*.,, No. 5-6. This also seems to be implied by B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 471.

277 BGH, 12 June 2018, KZR 56/16, Grauzementkartell II, *NZKart* 2018, (315) 316.

278 This additional ground for suspension has been introduced in order to avoid that the infringer has an incentive to delay the submission of evidence or the disclosure of information (Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 17 November 2016, *BT Drs.* 18/10207, 66).

279 H. Grothe, § 199, in *Münchener Kommentar zum BGB*, *op. cit.*, No. 47 & 49; A. Bach and C. Wolf, Neue Instrumente im Kartellschadensersatzrecht – Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung, *NZKart* 2017, (285) 292.

280 H. Grothe, § 199, in *Münchener Kommentar zum BGB* (München, C. H. Beck, 2018), No. 49; B. Boemke and C. Dorr, Verjährungshemmung durch Verhandlung, *NOJZ* 2017, (1578) 1580.

281 Court of Appeal Karlsruhe, 10 March 2017, 6 U 132/15, *BeckRS* 2017, 149111, No. 94; H. Grothe, § 199, in *Münchener Kommentar zum BGB*, *op. cit*.,, No. 9.

282 BGH, 18 September 2018, II ZR 152/17, *NZG* 2018, (1301) 1302; BGH, 23 March 1987, II ZR 190/86, *NJW* 1987, (1887) 1888; W. Henrich, § 199, in *BeckOK BGB* (München, C. H. Beck, 2019), No. 5.

283 Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 17 November 2016, *BT Drs.* 18/10207, 66.

284 A. Bach and C. Wolf, Neue Instrumente im Kartellschadensersatzrecht – Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung, *NZKart* 2017, (285) 292.

285 Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), *Stb.* 2017, 28 (publication on 9 February 2017).

286 C. Spierings, Verjaring van kartelschadevorderingen, in E. M. Hoogervorst e.a. (eds.), *Kartelschade* (Deventer, Kluwer, 2019), (155) 155.

287 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 2.

288 Wijziging Mededingingswet n.a.v. evaluatie Markt en Overheid, technische wijzigingen concentratietoezicht en nationale toepassing privaatrechtelijke handhaving mededingingsrecht. For the legislative proposal, *see*: https://www.internetconsultatie.nl//wijzigingmarktenoverheid. The proposal will be discussed in the Tweede Kamer der Staten-Generaal at the end of 2019 (https://zoek.officielebekendmakingen.nl/kst-35000-XIII-80.html).

289 Article IV states that the Implementation Act shall enter into force on 26 December 2016. Article IV, however, also states that, if the Official Journal in which this Act appears is issued after this date, then the Act shall enter into force only on the day after the date of issue of the Official Journal in which the Act appears. The publication took place on 9 February 2017.

rules regarding temporal application in private law are, in our view, applicable.[290] Those are found in the "Overgangswet nieuw Burgerlijk Wetboek."[291] Articles 72–73a Overgangswet entails specific provisions for the temporal application of limitation and expiry periods. They deviate from the general principle of immediate effect provided for in Article 68 Overgangswet.[292] Article 73 Overgangswet states that in the event that the limitation period commenced before the entry into force of the new law, the starting point and duration of the old law will remain in force for one year after the entry into force of the new law, after which it will be superseded by the new law. In the event that the new law becomes applicable after that year and as a result implies that the limitation period has already been reached, the new period will be deemed not to have been completed before the end of that year.[293] The temporal rules on interruption (Article 120 Overgangswet) and extension (Article 121 Overgangswet) are not concerned by the one-year transitional period and therefore have immediate effect.[294] The Implementation Act itself provides for one specific provision regarding temporal application (Article III being the implementation of Article 22(2) Damages Directive).[295] Article III, unfortunately, creates uncertainty. Initially it stated that Article 6:193s BW (starting point and duration of limitation periods) did not apply to cases brought before a court prior to 26 December 2014.[296] On 15 June 2018, however, Article III was changed by the Dutch legislator and Article 6:193s BW was replaced by Article 6:193r BW,[297] stating that the initial reference to Article 6:193s BW was a mistake and the correct provision should have been Article 6:193r BW.[298] Article III in relation to the general temporal application rules results in different transitional periods, which application remains uncertain until the courts have clarified the matter.

5.1 Relative limitation period

46. Pre-Damages Directive. Article 3:310, para. 1 BW is applicable for damages prior to the Damages Directive and provides for a five-year limitation period that begins to run when there is knowledge of the damage and of the person liable. This is a matter of actual knowledge. A presumption of the existence of the damage is not sufficient for the commencement of the limitation period. The limitation period begins to run only on the day following the day on which the injured party is actually able to initiate a legal action for compensation of damages.[299] The exact amount of damages does not have to be determined yet.[300] Pursuant to case law, the injured party must have sufficient—not absolute—knowledge that the damage was caused by a shortcoming or a faulty action on the part of the infringer.[301] The injured party does not have to be aware of the legal assessment of the facts and circumstances.[302] Regarding continuous infringements, if the ongoing harm is suffered on a daily basis, but the knowledge requirements are fulfilled during the infringement, then the limitation period starts to run each day for the harm suffered.[303]

Under the old limitation period rule of Article 3:310 BW, the starting point of the limitation period often coincided with the publication of an infringement decision. For example, press releases that merely announced an investigation into activities that violated competition law were considered insufficient, as they did not yet imply any fault. The mentioning in press releases of a multitude of suspicious agreements and factual actions without a connection to a certain geographical market

290 The Implementation Act itself does not provide for specific provisions regarding temporal application, except for Article III that creates uncertainty (*see* later in this paragraph). Therefore, this reasoning is based on the general rules of temporal application. Other scholars are of the opinion that the limitation rules have immediate effect. The new law will apply as of the coming into force of the law with regard to the nature, the time of commencement and the duration of the limitation period for legal actions that are not yet fully time-barred at that point in time. This reasoning is based on Article 68a Overgangswet. *See*: B. J. Drijber, Private handhaving en het weerbarstige leerstuk van verjaring, *M&M* 2019/3, (120) 123. *See also* J. Kortmann and S. Mineur, The Netherlands, in *The EU Antitrust Damages Directive: transposition in the member states* (Oxford University Press, 2018), (270) 288. However, they do not clarify why Article 68a Overgangswet should apply and why this would not be the case for the specific Articles 72–73a Overgangswet. In the absence of a clear justification for this reasoning, the specific Articles 72–73a Overgangswet should be applied. Most likely, it will eventually be up to the courts to determine the temporal application of the Implementation Act.

291 Initially those transitional rules were created for the introduction of the BW, but the legal doctrine and the Dutch legislator have extended the application of the Transitional Act to private law as a whole. Memorie van toelichting, *Tweede Kamer, vergaderjaar 1984-1985*, 18 998, nr. 3, 17; H. L. Van Der Beek, *Overgangsrecht nieuw Burgerlijk Wetboek* (Deventer, Kluwer, 1992), 13–14; T. Vancoppernolle, *op. cit.*, 32–34, No. 42.

292 C. L. de Vries Lentsch-Kostense, *Overgangsrecht* (Deventer, Kluwer, 1992), 46. As a result of the scope of Articles 72 ff. Overgangswet other time limits are covered by the general rules in Articles 68 ff. Overgangswet.

293 For a more in-depth analysis of these rules with examples, *see*: Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3 and 5; B. C. de Die, Termijnen, verjaring en verval in het overgangsrecht, *WPNR* 1991, 347; H. L. Van Der Beek, *Overgangsrecht nieuw Burgerlijk Wetboek* (Deventer, Kluwer, 1992); C. L. de Vries Lentsch-Kostense, *Overgangsrecht* (Deventer, Kluwer, 1992).

294 B. C. de Die, Termijnen, verjaring en verval in het overgangsrecht, *WPNR* 1991, (347) 349.

295 Article IV states that the Implementation Act shall enter into force on 26 December 2016. Article IV, however, also states that if the Official Journal in which this Act appears is issued after this date, then the Act shall only enter into force on the day after the date of issue of the Official Journal in which the Act appears. The publication took place on 9 February 2017, which means that this date is applicable.

296 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 26.

297 Article XVIII Wet van 15 juni 2018, houdende verbeteringen in enkele wetten van het Ministerie van Justitie en Veiligheid (Verzamelwet Justitie en Veiligheid 2018), *Stb.* 2018, 228 (publication on 20 July 2018).

298 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2017-2018*, 34 887, nr. 3, 15.

299 Hoge Raad (hereinafter: HR—the Hoge Raad is the Supreme Court of the Netherlands), 8 July 2016, ECLI:NL:HR:2016:1483, *TenneT v. ABB*, *NJ* 2017, (4141) 4147 annotation S. D. Lindenbergh and J. S. Kortmann; HR, 9 October 2009, ECLI:NL:HR:2009:BJ4850, *NJ* 2012, 193, r.o. 3.6, annotation C. E. du Perron; HR, 31 October 2003, ECLI:NL:PHR:2003:AL8168, *NJ* 2006, 116, r.o. 3.4, annotation C. E. du Perron; Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.18.

300 C. Spierings, *op. cit.*, 160; E.-J. Zippro, *Privaatrechtelijke handhaving van mededingingsrecht* (Deventer, Kluwer, 2009), 472.

301 HR, 8 July 2016, ECLI:NL:HR:2016:1483, *TenneT v. ABB*, *NJ* 2017, (4141) 4147 annotation S. D. Lindenbergh and J. S. Kortmann; HR, 9 October 2009, ECLI:NL:HR:2009:BJ4850, *NJ* 2012, 193, r.o. 3.6, annotation C. E. du Perron; Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.18; C. Spierings, *op. cit.*, 160; E.-J. Zippro, *op. cit.*,472.

302 HR, 9 October 2009, ECLI:NL:HR:2009:BJ4850, *NJ* 2012, 193, r.o. 3.6, annotation C. E. du Perron; Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.18.

303 Court of first instance Rotterdam, 7 March 2007, ECLI:NL:RBROT:2007:BA0926, 3.6; E.-J. Zippro, *op. cit.*, 476; M. Koopmann, *Bevrijdende verjaring* (Deventer, Kluwer, 2010), 19.2.

or to certain companies was also considered insufficient knowledge.[304] In another case, the injured party itself had filed a complaint with the EC. This complaint led to the conclusion that the injured party was aware of the damage and that the damage was "evident" as a result of the acts and omissions of the infringer about which the injured party had complained. It was not required that the unlawful nature of the infringer's actions had already been established by the EC.[305]

47. Extension and interruption. The general provisions of extension (*infra* No. 49) (Article 3:320 ff. BW) and interruption (Article 3:316 ff. BW) should be taken into account when applying the limitation periods. Extension is the equivalent of suspension, since Dutch statutes of limitations do not provide for any form of suspension.[306] The interruption of limitation periods is rather easy, because pursuant to case law a notification is an act of interruption.[307] The claimant must give a written notice in which he unambiguously reserves his right to demand compliance (Article 3:317 BW)[308] and the notification must contain a sufficiently clear warning to the debtor.[309],[310] The limitation period can also be interrupted by the filing of a claim, as well as by any other act of prosecution on the part of the entitled party in the required form (Article 3:316, para. 1 BW). The "*on the part of the entitled party*" refers also to acts that are carried out on behalf of the entitled party, such as seizing assets or collective actions (Article 3:305a BW).[311],[312]

48. Post-Damages Directive. The Implementation Act introduced Article 6:193s BW. The conditions for the starting point of the relative limitation period are a copy of those in Article 10(3) Damages Directive. The duration of this period corresponds to the minimum period imposed by the Damages Directive, i.e., five years. This is the same duration as the general relative limitation period of Article 3:310 BW.[313] The starting point of Article 6:193s BW, however, differs from the one in Article 3:310 BW, as Article 6:193s BW does not allow the limitation period to run until the infringement has ceased.[314] This requirement is, in any event, more favourable to the injured party. On the other hand, Article 6:193s BW is also more disadvantageous than Article 3:310, para. 1 BW, since Article 3:310, para. 1 BW requires actual knowledge of the damage and the person involved (*infra* No. 29).[315] The Damages Directive introduced a more objective approach by stating that the limitation period starts to run when the injured party is aware of these facts or can reasonably be expected to be aware of them.[316] Another difference is that Article 6:193s BW requires knowledge of an infringement of competition law, while Article 3:310 BW does not require knowledge of the legal assessment of the facts and circumstances.[317]

49. Unclear meaning of extension in Article 6:193t BW. Article 6:193t BW implements Articles 10(4) and 18(1) Damages Directive, but differs from the Damages Directive because Dutch law uses the concept of "extension" instead of "suspension." Extension was preferred in order to maintain the coherence of the Dutch

304 HR, 8 July 2016, ECLI:NL:HR:2016:1483, *TenneT v. ABB*, *NJ* 2017, (4141), 4147 annotation S. D. Lindenbergh and J. S. Kortmann (The court thus followed the position of the appellate court against which the cassation proceedings were brought: Court of Appeal Arnhem-Leeuwarden, 2 September 2014, ECLI:NL:GHARL:2014:6766, *NJF* 2014, 461, r.o. 3.19–3.21). In a press release of 29 January 2004, it was mentioned that the EC had launched a raid against a (possible) infringer. In a later press release of 17 March 2004, the infringer acknowledged that anti-competitive behaviour took place in Belgium, Luxembourg and Germany. The Netherlands was not mentioned. In a press release of 11 October 2005, the infringer stated that it had received the EC's statement of objections concerning the investigation into anti-competitive behaviour in Belgium, Germany, Luxembourg and the Netherlands. They merely stated that they cooperated in the investigation and would examine the statement of objections. All of these press releases were rejected by the court as a starting point for the limitation period, since it was insufficiently certain for the claimants that they had suffered damage caused by the possible infringement. The clarity required for the start of the limitation period was only present from 21 February 2007 onwards, when the Commission announced that it had imposed fines on the (named) infringers for participating in a cartel in the Netherlands (Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.19). *See also*: Court of Appeal Arnhem-Leeuwarden, 7 May 2019, ECLI:NL:GHARL:2019:3990, r.o. 26.

305 Court of first instance Rotterdam, 7 March 2007, ECLI:NL:RBROT:2007:BA0926, r.o. 3.10-3.12. Agreeing with this decision: J. L. Smeehuijzen, Verjaring van civiele schadeclaims wegens schending van het mededingingsrecht, *MP* 2015, 122, § 2. The specific circumstances of the case have to be taken into account, because it is not clear that this reasoning applies more broadly, e.g., also to cartel damage claims. The complaint was filed by a party who could not become a member of a certain trade association (Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch gebied ("FEG") (translated: Dutch federation for the wholesale trade in the electrotechnical field)), because of specific turnover criterion for admission to membership. The party then lodged a complaint with the EC that a collective exclusive dealing arrangement existed between FEG members and members of other organisations. The party in this case was aware of the liable persons and of the damage.

306 The suspension was replaced by the extension with the introduction of the new Civil Code in the Netherlands (Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 19). In the case of a suspension, the limitation period does not run during the suspension and the limitation period continues to run after the ground for suspension disappears. In the case of an extension, the limitation period continues to run during the event giving rise to the extension. If the limitation period expires during the existence of an extension ground or within six months after the disappearance of such a ground, the limitation period will continue to run until six months have elapsed after the disappearance of such ground (Article 3:320 BW). E.g., Court of first instance Rotterdam, 11 September 2019, ECLI:NL:RBROT:2019:7241.

307 *See* the case law in C. H. Sieburgh, De verbintenis in het algemeen, tweede gedeelte, in *Asser 6-II* (Deventer, Kluwer, 2017), 424a.

308 J. L. Smeehuijzen, *op. cit.*, 122, § 2.

309 HR, 14 February 1997, ECLI:NL:HR:1997:ZC2274, *NJ* 1997, 244.

310 Letters accompanied with the claimants' names on whose behalf the letters were sent to the infringers were sufficient to interrupt the limitation period (Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.24).

311 E.g., HR, 28 March 2014, *NJ* 2015/306, and HR, 9 October 2015, *NJ* 2016/490.

312 C. H. Sieburgh, *op. cit.*, 425c. With regards to collective actions it is important to note that the holder of all the claims from the victims can proof the cessation of the claim and that the cessation of the claims was notified to the infringers in due time. Otherwise, it will be difficult for the infringers to identify those against whom the limitation period has now been interrupted. It was ruled that it was insufficient for the interruption that the claim filed included a number of large indirect or direct customers of the infringers or by stating in the articles of association that one of its purposes is to acquire claims against the infringers (Court of first instance Rotterdam, 23 October 2019, ECLI:NL:RBROT:2019:8230, r.o. 9.21-9.28).

313 No reason was found to deviate in competition law cases from what is normally the case for claims relating to damages (Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 19).

314 Some legal doctrine disapproves of this requirement in Article 6:193s BW, the criticism being that this condition is deemed problematic from a legal certainty point of view. *See* for more details: J. L. Smeehuijzen, *op. cit.*, 122, §2; C. Spierings, *op. cit.*, 160.

315 HR, 8 July 2016, ECLI:NL:HR:2016:1483, *TenneT v. ABB*, *NJ* 2017, (4141) 4147 annotation S. D. Lindenbergh and J. S. Kortmann; HR, 9 October 2009, ECLI:NL:HR:2009:BJ4850, *NJ* 2012, 193, r.o. 3.6, annotation C. E. du Perron; HR, 31 October 2003, ECLI:NL:PHR:2003:AL8168, *NJ* 2006, 116, r.o. 3.4, annotation C. E. du Perron.

316 C. Spierings, *op. cit.*, 163.

317 HR, 9 October 2009, ECLI:NL:HR:2009:BJ4850, *NJ* 2012, 193, r.o. 3.6, annotation C. E. du Perron; C. H. Sieburgh, *op. cit.*, 415.

statutes of limitations.[318] The Dutch legislator stated that the replacement of suspension with extension does not raise any specific difficulties, because the difference between them is not significant since they achieve the same result.[319] The Dutch legislator seems to imply that the extension is de facto a suspension, which, however, is not how the general extension rule in Article 3:320 BW functions (*supra* No. 47).[320] Paradoxically, this means that the extension introduced to maintain coherence with the general limitation period rules itself undermines such coherence because it is being given a different meaning. On the other hand, the Dutch legislator's interpretation in Article 6:193t BW seems to be more consistent with the Damages Directive than if the extension rules were applied in the original manner according to Article 3:320 BW. This does not mean that the application of the extension rules, as they are usually applied under Article 3:320 BW, is incompatible with the Damages Directive. Such incompatibility does, however, seem to be much more likely. For example, imagine a situation where three of the five years of the limitation period have passed and the competition authority consequently needs one year to reach a decision. If the extension rules in Article 6:193t BW are to be applied in the original manner as under Article 3:320 BW, this would mean that the limitation period would only be extended by one year after the extension ends. In the example, this would mean that after the decision of the competition authority is adopted, the limitation period runs for one year. The extension as a de facto suspension, on the other hand, adds, on top of that one year, the period corresponding to the elapsed time during the suspension. Applied to the example, the limitation period will still be running for three years. The latter seems to be the solution proposed by the Damages Directive. Hence, considerable uncertainty remains about how the extension should be calculated and interpreted.[321]

50. Specific applications of the extension. The extension in Article 6:193t, para. 1 BW applies to consensual dispute resolutions. Parliamentary preparation clarifies that all forms of consensual dispute resolution are included.[322] The duration of the extension is determined by the duration of the consensual dispute resolution procedure.[323] Unlike the extension for acts of a competition authority, the extension is not lengthened by one year. Furthermore, the scope of Article 6:193t, para. 1 BW is uncertain. The concept of "consensual dispute resolution" is undefined.[324] In addition, it is not clear when the extension starts and only in the case of mediation, it is explicitly regulated when the extension ends.[325] Article 6:193t, para. 2 BW deals with the extension of the limitation period in case of act(s) of a competition authority. In that case, the limitation period is extended for a period equal to the period necessary for the adoption of a final infringement decision or for the otherwise termination of the proceedings, plus one year.

51. Interruption rules limit the added value of the new extension rules in Article 6:193t BW. The general provisions of interruption (Articles 3:316 and 3:317 BW) continue to apply. Acts that lead to interruption can correspond with those that lead to an extension in Article 6:193t BW.[326] The legal doctrine considers that the injured party can choose on which provisions it relies. Interruption will be more favourable than extension. Because of this, the added value of Article 6:193t BW is rather limited. Article 6:193t BW, however, does have value in the case of mediation and non-binding advisory procedures, because those procedures are not grounds for interruption.[327]

5.2 Absolute limitation period

52. Pre-Damages Directive. In addition to the relative limitation period, the claim will in any event be time-barred twenty years after the event that caused the damage (Article 3:310, para. 1 BW). The following is regarded as an "event": the conduct (an act or omission) of the person liable, which may lead to the damage, even if it is uncertain whether the damage will indeed be a consequence thereof and even if the damage occurs later in time.[328] Concerning continuous infringements, it is debated whether the infringement is a daily event that causes daily damages (in which case the limitation period starts each day on which there is an event causing damage) or whether the limitation period starts to run on the day

318 It is striking that the Dutch legislator opted for an extension, while for other implementations of directives in the context of consensual dispute resolutions it opted for an interruption (e.g., Article 6, first paragraph of the Act of 15 November 2012 (*Stb*. 2012, 510), which provides for the implementation of Article 8 Directive 2008/52/EC; Article 11 Implementation Act for out-of-court settlement of consumer disputes (Dutch *Bulletin of Acts and Decrees* 2015, 160), which is an implementation of Article 12 Directive 2013/11/EU).

319 The legislator states that in the event of an extension, the limitation period shall continue to run and shall be extended by the period during which the extension ground exists (Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 20).

320 Certain legal doctrine emphasises that a suspension usually leads to longer overall limitation periods than is the case with extension under Dutch law (J. Kortmann and S. Mineur, The Netherlands, in *The EU Antitrust Damages Directive: transposition in the member states* (Oxford University Press, 2018), (270) 278).

321 *See also*: J. Kortmann and S. Mineur, The Netherlands, in *The EU Antitrust Damages Directive: transposition in the member states* (Oxford University Press, 2018), (270) 278-279.

322 Such as arbitration, binding advisory procedures, non-binding advisory procedures and mediation.

323 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 20.

324 For instance, the question whether negotiations outside the framework of mediation or the negotiation of a possible settlement fall under this provision (C. Spierings, *op. cit.*, 165).

325 C. Spierings, *op. cit.*, 166. In order to define the duration of mediation, the Dutch legislator has added in the first paragraph of Article 6:193t of the BW that the extension ends when one of the parties or the mediator has informed the other party in writing that the mediation has ended or when none of the parties has performed any action in the mediation during a period of six months. This is inspired by Article 6(1) of the Act of 15 November 2012 and provides for the implementation of Article 8 Directive 2008/52/EC.

326 For a list of examples, *see*: C. Spierings, *op. cit.*, 166-167.

327 Ibid., 167.

328 M. Koopmann, *op. cit.*, 19.6.

on which the last (part of the) infringement ended.[329] The general rules on extension and interruption apply (*supra* No. 47). With regard to the absolute limitation period, Article 3:321, para. 1 sub f BW provides for an extension when the debtor intentionally conceals the existence of the debt from the claimant.[330] The intention of the infringer to conceal damages caused by a cartel or the abuse of a dominant position will often be easier to prove in competition law cases than in other cases where the existence of the debt or its enforceability is concealed.[331]

53. Post-Damages Directive. The Dutch legislator made use of the possibility to maintain an absolute limitation period. Article 6:193s BW determines a limitation period of twenty years, which starts to run on the day following the day on which the infringement has ceased. This limitation period rule has been introduced for reasons of legal certainty and is inspired by the general limitation rule of Article 3:310, para. 1 BW.[332] The latter also has a duration of twenty years, but differs in terms of the starting point (*supra* No. 52). The absolute limitation period of twenty years would satisfy the requirements of Recital 36 Damages Directive, i.e., that national rules on limitation periods should not constitute an unnecessary obstacle to bringing an action for damages.[333] As is the case with the case law on Article 3:310 BW, an invocation of the twenty-year limitation period of Article 6:193s BW could, in certain circumstances, be in conflict with reasonableness and fairness.[334] Article 6:193t BW regarding the extension and interruption seems to be applicable (*supra* No. 49).

IV. Inconsistencies, shortcomings and proposals regarding limitation period rules in the EU

54. Remaining inconsistencies and shortcomings, as well as some proposals. The goal of this final section is to identify the most salient remaining inconsistencies and shortcomings in both the EU and national laws regarding limitation period rules (post-Damages Directive) and consequently to suggest amendments in the EU or national (case) laws.[335] In doing so, this section relies on the findings of the previous sections.

1. Nature of the provisions on limitation periods

55. Uncertainty regarding the nature of provisions on limitation periods. An examination of the national provisions on limitation periods shows that it is not entirely clear in all Member States whether limitation periods are of a substantive or of a procedural nature. While it seems that in most Member States limitation period rules are considered substantive in nature,[336] the question seems to remain open to a certain extent in some others (e.g., Belgian and Dutch law). Furthermore, while in England and Wales the law itself provides that limitation periods are of a substantive nature, there is no such explicit indication in Belgian,[337] Dutch, French and German law. Regarding the nature of the Dutch limitation period rules, the doctrine remains divided. Some authors consider the Dutch provisions on limitation periods for competition law damages actions to be of a substantive nature.[338] Others take a more cautious approach and merely indicate that the fact that the ECJ refers to limitation period rules as "procedural rules" does not mean that it necessarily refers to rules that are considered procedural according to Dutch law.[339] In any case, it is submitted that the absence of an explicit provision in this regard, in both the EU and national rules, creates unneeded uncertainty.

329 In favour of the first option: E.-J. Zippro, *op. cit.*, 474; M. Koopmann, *op. cit.*, 19.2. In favour of the second option: D. F. H. Stein, Verjaring van schadevergoedingsvorderingen bij voortdurende onrechtmatige daden, *NTBR* 2019, afl. 11, (61) 69-70. Regarding case law, a court had to decide when the objective limitation period in the Turkish civil code for continuous infringements started to run. The court decided that the limitation period started to run from the date of termination of the (alleged) cartels and opted therefore for the second option (Court of first instance Oost-Brabant, 27 June 2018, ECLI:NL:RBOBR:2018:3170). Another court had to rule on the same issue but this time concerning Finnish law and preferred the second option as well (Court of first instance Amsterdam, 10 May 2017, ECLI:NL:RBAMS:2017:3166, *NJF* 2014/314). Those cases did not apply Dutch law, but foreign law because of their competence. It therefore remains debated which option will be chosen under Dutch law.

330 This ground of extension is also applicable to relative limitation periods. However, for relative limitation periods this is rarely used, since the relative limitation periods require certain knowledge (M. Koopmann, *op. cit.*, 34.2). When the infringer conceals the existence of the debt, the relative limitation period will not start to run since the claimant has no knowledge.

331 E.-J. Zippro, *op. cit.*, 474; C. H. Sieburgh, *op. cit.*, 429.

332 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 19.

333 Ibid. See also: J. L. Smeehuijzen, *op. cit.*, 122, § 1.

334 C. Spierings, *op. cit.*, 168-169.

335 As mentioned above, the EC will have to review the Damages Directive before the end of 2020 (Article 20 Damages Directive).

336 For a different opinion, *see* B. Rodger, M. Sousa Ferro and F. Marcos, Transposition Context, Processes, Measures, and Scope, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (411) 435.

337 In Belgium, legal doctrine on the private enforcement of competition law appears to be opting for a substantive nature. Discussion on this question, especially from a more general point of view on the nature of limitation period rules, nevertheless remains possible.

338 B. J. Drijber, Privaatrechtelijke handhaving van het mededingingsrecht: nieuwe rechtspraak en nieuwe wetgeving, *Ondernemingsrecht* 2016/124, (620) 630. The same author confirmed this reasoning in a more implicit way as well: B. J. Drijber, Private handhaving en het weerbarstige leerstuk van verjaring, *M&M* 2019/3, (120) 123.

339 For example: C. H. Sieburgh, *op. cit.*, 361.

56. Nature of limitation rules crucial for applicability *ratione temporis* and *ratione territoriae*. In addition to having effects on the temporal application of the limitation period rules (*infra* No. 58), the question whether provisions on limitation periods are of a substantive or procedural nature is of the utmost importance to determine their applicability *ratione territoriae*. In international cases, the court with jurisdiction to hear a case will have to determine which substantive law(s) to apply to that case. In cases where several markets were affected by the anticompetitive conduct, the court in principle applies various substantive rules, including limitation period rules. However, as an exception for the claims arising from infringements that took place after 1 January 2009, Article 6(3)(b) Rome II[340] provides that, where the market is affected in more than one country and/or the claimant sues more than one defendant, the claimant may request the uniform application of the substantive *lex fori*, provided that the infringement "*directly and substantially affects also the market*" in the forum state. Pursuant to Article 6(3)(b) Rome II, a claimant could therefore benefit from a more favourable limitation period than the one which would have been otherwise applied to him if the court had not applied the substantive *lex fori*. The characterisation of the limitation period as a substantive norm, rather than as a procedural one, may therefore be of great influence on the admissibility of a claim in cases where several EU markets are affected, as is often the case.

57. ECJ *Cogeco* judgement as a missed opportunity. Should the EC, when reviewing the Damages Directive,[341] decide not to take a clear stance on whether limitation periods are of a substantive or a procedural nature, the ECJ could decide usefully on this issue.[342] It would not be the first time that the ECJ would need to decide on the nature of a limitation period rule. In the context of the (old) Customs Code,[343] the ECJ ruled that the limitation period in the old Article 221(3) Customs Code is a substantive rule.[344] Other doctrine, however, infers from ECJ case law that time limitation rules in a wide range of fields are procedural in nature.[345]

For that reason, the ECJ *Cogeco* judgement appears to be a missed opportunity (*supra* No. 8)[346]. In that case, the ECJ concluded that the Damages Directive did not apply, without, unfortunately, taking an explicit stance on the nature of limitation periods.[347] In doing so, the ECJ seems to have preferred to adopt a more cautious approach than the one it chose in its *Manfredi* judgement (*supra* No. 3). That judgement dealt with the "procedural autonomy" of the Member States if no EU rules governing the matter exist, as was the case in the *Manfredi* judgement concerning limitation periods.[348] The wording in that judgement appeared to imply that provisions regarding limitation periods are to be regarded as procedural rules.[349] By contrast, the ECJ *Cogeco* judgement did not only circumvent this discussion, it also replaced the wording "*detailed procedural rules*" with "*detailed rules*."[350] This could be interpreted as meaning that the ECJ finds the discussion about the nature of the limitation period rules as one that should be dealt with by the Member States, at least within the limits set by the Damages Directive. AG Kokott's Opinion in the ECJ *Cogeco* case, on the other hand, did consider that the provisions of Article 10 Damages Directive are (at least) not purely procedural ones.[351] In any event, it is submitted that a clear and harmonised position on this issue at the EU level would bring more legal certainty (for both claimants and defendants).[352]

2. Temporal application

58. Unclear temporal application creates legal uncertainty. The temporal application of the Damages Directive has raised many doubts.[353] Article 22(1) Damages Directive

340 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.7.2007, pp. 40–49).

341 Pursuant to Article 20 Damages Directive.

342 Similarly, *see*: B. Rodger, M. Sousa Ferro and F. Marcos, Transposition Context, Processes, Measures, and Scope, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (411) 433-434; P. Kirst, The temporal scope of the Damages Directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe, *SSRN* October 2019, 6-7.

343 Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code.

344 ECJ, 23 February 2006, case No. C-201/04, ECLI:EU:C:2006:136, *Belgische Staat v. Molenbergnatie*, para. 41.

345 E.g., B. Rodger, M. Sousa Ferro and F. Marcos, Transposition Context, Processes, Measures, and Scope, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (411) 434–435 and 459, especially referring to the ECJ *Taricco* judgements. *See also* references in C. Cauffman, *op. cit.*, 285, footnote 35.

346 See also P. Kirst, The temporal scope of the Damages Directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe, SSRN October 2019, 4.

347 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 33.

348 ECJ, 13 July 2006, *op. cit.*, *Manfredi*, para. 73 and 77.

349 Although, admittedly, it also seems that the ECJ uses the notion "procedural rules" in a rather broad way.

350 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 42. The ECJ had already used the same wording in its *Kone* judgement as well (ECJ, 5 June 2014, case No. C-557/12, ECLI:EU:C:2014:1317, *Kone*, para. 24). As put forward by C. Cauffman, this might be a pure coincidence, but it could also be a very deliberate decision as the *Manfredi* judgement took place before and the *Kone* judgement after the introduction of the distinction between substantive and procedural provisions during the trilogue meetings held in 2014 (C. Cauffman, The CJEU Clarifies the Rules on Antitrust Damages Actions Before and After the Harmonization, *CPI* 2019, (1) 5). Interestingly, the EP initially suggested that the national rules implementing the Damages Directive "*should* (…) *apply only to matters brought before a national court after the date of the entry into force of this Directive*" and "*shall not apply to competition law infringements that are the subject of an action for damages pending before a national court on or before the date of entry into force of this Directive*" (European Parliament, Report on the proposal for a [Damages Directive], No. A7-0089/2014, 16/86 and 31/86).

351 Opinion AG Kokott 17 January 2019, case No. C-637/17, para. 61 and 63.

352 P. De Bandt and C. Binet, Arrêt "Cogeco" : le droit primaire au secours du demandeur de dommages et intérêts pour une infraction au droit de la concurrence, *JDE* 2019, No. 6, (249) 250; P. Kirst, *op. cit.*, 4.

353 For instance: B. Rodger, M. Sousa Ferro and F. Marcos, Transposition Context, Processes, Measures, and Scope, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (411) 433-436. *See also* R. Amaro and J.-F. Laborde, *op. cit.*, 9–10. According to these authors, for instance in France, "*le régime de la prescription est une compilation de règles divergentes dont l'application dépend de la date des faits. Ces règles sont d'un maniement malaisé et peuvent avoir des effets radicalement différents pour les parties en présence.*"

requires Member States to ensure that its substantive provisions do not apply retroactively, whilst Article 22(2) Damages Directive prohibits procedural provisions to apply to damages actions of which a national court was seized prior to 26 December 2014.[354] Unfortunately, the Damages Directive provides no guidance on which provisions are to be considered substantive or procedural (*supra* No. 55). As a result, differences exist between national laws, in contradiction with both the harmonisation objective of the Damages Directive and the need for legal certainty.[355] Furthermore, the scope of the prohibition on the retroactive application of the substantive provisions remains unclear. This prohibition can be interpreted in several ways. For example, the legislator in England and Wales decided that the new substantive provisions apply only to claims where the infringement (in its entirety) takes place and the loss or damage is suffered after the entry into force of Regulations 2017. In France, on the other hand, victims of infringements for whom a competition damages claim was not yet time-barred on 11 March 2017 benefit from the more favourable limitation period provisions adopted in the French Implementing Acts (*supra* No. 29). In most other Member States, the temporal application of the Damages Directive raises questions, thereby leading to legal uncertainty.[356] The scope of the prohibition to apply the procedural provisions to damages actions brought before a national court prior to 26 December 2014 is less obscure, but as the ECJ confirmed in its *Cogeco* judgement, leaves Member States with a certain measure of discretion.[357] National legislators can decide that the newly implemented procedural rules apply to actions for damages brought after 26 December 2014, but before the implementation date, or only to such actions brought after the expiry of the implementation period or perhaps sometime in between.[358]

In any event, old limitation period rules will often remain applicable for many years to come. Therefore, it is important to keep in mind that those rules must comply with the principles of effectiveness and equivalence, as clarified both by the EFTA Court and the ECJ (*supra* No. 7–8 and *infra* No. 63 and 65).

59. Interpretation consistent with the Damages Directive. Given the late implementation of the Damages Directive by most EU Member States,[359] complex questions may arise with regard to the actions brought during the interim period between the implementation deadline, which was set on 27 December 2016, and its effective implementation by the Member State.[360] The old limitation period rules[361] that would be applicable in those cases must not only take into account the principles of effectiveness and equivalence, but should also be interpreted in conformity with the Damages Directive.[362] Such interpretation, however, is limited by the general principles of law, such as legal certainty and non-retroactivity, and cannot result in an interpretation *contra legem*.[363]

3. Commencement

60. Knowledge requirement of an "infringement of competition law" unclear. It often does not remain entirely clear when a limitation period commences in a specific case, especially in stand-alone cases. Unfortunately, Article 10(2) Damages Directive, even though it explicitly addresses this issue, did not clarify the matter. One of the knowledge requirements introduced by Article 10(2) (a) Damages Directive is "*the fact that* [the behaviour] *constitutes an infringement of competition law*." The characterisation of a behaviour as an infringement, however, is a legal question that requires a decision by a competent competition authority or a judge. How could an injured party, e.g., a consumer or a SME, (reasonably) be expected to know that a behaviour is in fact illegal if no such decision exists? It is submitted that such a degree of certainty can be inferred only from a competition authority's or court's decision. Interestingly enough, the Council indeed suggested that "*a claimant can reasonably be expected to have this knowledge as soon as the decision of the competition authority is published*."[364]

354 At first, the EP suggested that the newly adopted rules would not apply to competition law infringements for which damages actions were already pending before a national court or before the date of entry into force of the Damages Directive (Report on the proposal for a [Damages Directive], No. A7-0089/2014, 31/86, Article 20a).

355 For examples, *see*: B. Rodger, M. Sousa Ferro and F. Marcos, Transposition Context, Processes, Measures, and Scope, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (411) 434-435. Interestingly, it appears that Portugal often opted for a different qualification than the majority of the other Member States.

356 As indicated, there is a widespread consensus among scholars that the temporal application of Member State rules is a complex issue. Some scholars identified at least six different temporal successions of rules in seven researched Member States (*see* M. Sousa Ferro and E. Ameye, What to expect from Cogeco: Temporal scope, time-barring and binding effect of NCA decisions, *Competition Law Insight*, 8 March 2019, available at: https://www.competitionlawinsight.com/practice-and-procedure/what-to-expect-from-cogeco--1.htm). See also P. Kirst, *op. cit.*, 30-31.

357 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 28–29.

358 Ibid., para. 28. See also P. Kirst, *op. cit.*, 3.

359 *See* https://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

360 B. Rodger, M. Sousa Ferro and F. Marcos, Promotion and Harmonization of Antitrust Damages Claims by Directive 2014/104/EU?, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (24) 52.

361 Some Member States have introduced specific temporal rules concerning this interim period, e.g. France and Germany (see also P. Kirst, The temporal scope of the Damages Directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe, SSRN October 2019, 9).

362 *See*, e.g., C. Cauffman, *op. cit.*, 291.

363 For example, ECJ, 4 July 2006, case No. C-212/04, ECLI:EU:C:2006:443, *Adeneler*, para. 110.

364 Council of the European Union, Adoption of the general approach on the Commission's proposal for a [Damages Directive], Brussels, 2013/0185, No. 15983/13, Recital 27. The Impact Study 2007 also mentions, "*The fact that the* [EC] *or* [an] *NCA started proceedings is normally not held as evidence that the plaintiff should have become aware of the infringement*" (CEPS, EUR and LUISS, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, 21 December 2007, 538, footnote 826).

However, this would imply (in an unacceptable way) that the relative limitation period never commences in the case of stand-alone actions. Furthermore, the suspension or interruption due to a competition authority's action would in such a scenario matter only after a decision has been adopted (without being final yet).[365]

It would thus be useful to explicit the circumstances where the claimant "*knows or can reasonably be expected to know*" that the behaviour constitutes an infringement. As rightly explained elsewhere, "[b]*ecause the precise determination of the existence of an antitrust infringement is, very often, dependent on access to confidential documents and on complex economic and legal assessments, injured parties may be in a position where they 'suspect', and may even 'believe', that there was an infringement, but cannot reasonably be said to 'know' it. Knowledge, it may be argued, requires a degree of certainty which can only derive from a prior* res judicata *public enforcement decision, or from a clear-cut antitrust infringement which has already been confessed to or where none of its requirements is reasonably subject to dispute*."[366] Therefore, it could be argued that in cases of clandestine infringements, such as cartels, limitation periods should start running only after the infringer(s) publicly confessed its/their participation in an infringement or when the competition authority published its decision, as before then victims could not actually bring an action even if they were suspecting a cartel. The Dutch and German case law on the old limitation period rules of Article 3:310 NBW and § 199 BGB could be useful in this regard, as they often (in a nuanced way) decided that the starting point coincided with the publication of the infringement decision.[367]

61. Stand-alone cases and knowledge requirement of "infringement of competition law". This issue of knowledge of the infringement is particularly problematic in stand-alone cases, where "*this raises the spectre of the limitation period never beginning to run.*"[368] An elegant solution to this issue might be the approach adopted in England and Wales, clarifying that "*where the context requires, references to an infringement of competition law and to loss or damage (however expressed) include an alleged infringement and alleged loss or damage*" (*supra* No. 24). This appears to lower the threshold, thus making the knowledge requirement workable in case of stand-alone claims. On the other hand, this opens the debate of the bearing of "*alleged loss or damage.*" At which point can the claimant (reasonably) be expected to know that the behaviour constitutes an alleged infringement of competition law? Clearly, this is a subjective assessment that needs clarification and application in case law. It is submitted that in stand-alone cases, the limitation period should not start to run before the plaintiff has in its possession at least some evidence (of the infringement) that puts him or her in a position to bring effectively an action for damages.

62. "Reasonably expected to know" requirement. The introduction in the Damages Directive of the "*claimants knows, or can reasonably be expected to know*"-requirement, which had already been applied under, e.g., French law (*supra* No. 31), is generally more beneficial for claimants because it indirectly takes into account the claimant's effective capacity to bring an action. As regards the Dutch legislation, however, this is a "step back" for the claimant because the old general provisions on limitation periods required actual knowledge in order for the period to commence. The introduction of "*reasonably expected to know*" also takes into account the negligence of victims who did not take the necessary measures to acquire knowledge. Consequently, (presumed) knowledge of victims will probably be accepted more easily than it would have been under the old limitation period rules. The German implementation in this regard is rather controversial since it does not use the "*reasonably expected to know*"-requirement, but opted for the use of "*should have known without gross negligence.*" Some legal scholars perceive this requirement as more lenient and protective towards claimants.[369] Furthermore, it should be highlighted that the German legislator opted for a later starting point of the relative limitation period: it starts running only at the end of the year in which the requirements have been fulfilled. In any event, in its *Cogeco* judgement,[370] the ECJ made it clear that "*account must be taken of the specificities of competition law cases and in particular of the fact that the bringing of actions for damages on account of infringements of EU competition law requires, in principle, a complex factual and economic analysis*" and that "*In those circumstances,* (…) *national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that right by the persons concerned, so as not to undermine completely the full effectiveness of Article 102 TFEU.*"

365 In addition, taking into account the fact that the suspension may end at the earliest one year after the infringement decision has become final. This could create a paradoxical situation when the initial decision "immediately" becomes final (e.g., because no parties appeal the decision). If the Member State chooses interruption, then this would de facto have little effect as the limitation period commences only after the decision anyway. If the Member State chooses suspension, however, then that suspension would end at the earliest one year after the infringement decision. This would mean that a suspension would, in this case, result in a longer limitation period than an interruption. On the other hand, it can be argued that the suspension (or the interruption) would not apply at all because the limitation period has not started running yet when the competition authority is taking action.

366 B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 458.

367 It seems to be frequently the case in practice that defendants argue that the limitation period starts to run as of the day a press release is published announcing that dawn raids have been carried out by competition authorities. While such press releases indicate that an investigation is ongoing, they usually do not provide potential victims of an alleged infringement with sufficient information and evidence to bring an action "effectively."

368 B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 458.

369 Ibid.

370 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 46–47.

4. Duration

4.1. Relative limitation period

63. Observations regarding provisions on relative limitation periods. Regarding the duration of relative limitation periods, several observations stand out. Firstly, Article 10 Damages Directive imposes a minimum five-year duration, not a mandatory one. Consequently, even though most Member States opted for the proposed five-year limitation period, England and Wales decided to maintain its six-year limitation period. On the one hand, the preservation of such an extra year can be cheered upon, as an additional year to bring a damages action cannot be considered as excessive given the complexity of those cases.[371] On the other hand, from a harmonisation perspective this, of course, does not contribute to a level playing field across the EU.

Secondly, it must be noted that the Damages Directive does not include any specific limitation period provisions regarding contribution actions between infringers, which thus remain different in various Member States.[372] It is rather unfortunate that the EU legislator omitted to harmonise this aspect, taking into account the importance given by the Damages Directive to the joint and several liability of infringers (Article 11 Damages Directive). This will likely cause additional disputes between co-infringers.

Thirdly, in any event, the (pre-Damages Directive) national provisions on limitation periods need to comply with the requirements as set forth by the ECJ *Cogeco* judgement.[373] Therefore, all limitation periods that are shorter than five years, that do not provide for a suspension during the investigations carried out by a competition authority, or a commencement date taking into account the (actual or potential) knowledge of the infringement and the infringer, are exposed to being considered as incompatible with the effectiveness principle. Questions in this regard could also arise in the case of continuous infringements. If the knowledge requirements are met during the infringement and the harm is suffered on a daily basis, national legislation, e.g., Belgian and Dutch laws (*supra* No. 13 and 46), might provide that the limitation period commences each day for the harm suffered on that day. This could mean that part of the damages action is time-barred even before the infringement itself has ceased. The EC seems to have derived from the ECJ *Manfredi* judgement that such a scenario would be incompatible with the effectiveness principle.[374] It may therefore be expected that further cases will be referred to the ECJ on the compatibility of pre-Damages Directive limitation period rules with that principle.

Lastly, at first sight, it is striking to see that most Member States appear to have "forgotten" about Article 11(4) Damages Directive. As mentioned (*supra* No. 5), the immunity recipient is jointly and severally liable to other injured parties than its own direct or indirect purchasers and providers, only if those parties cannot obtain full compensation from the other co-infringers. Consequently, claimants will often bring their claim against the immunity recipient only after it became clear that they would otherwise not receive full compensation. In that regard, Article 11(4) Damages Directive requires Member States to ensure that the applicable limitation periods are reasonable and sufficient to allow injured parties to bring such actions. Amongst the researched Member States, only France and Germany have explicitly taken this requirement into consideration. In France, according to Article 482-1 Commercial Code the applicable five-year limitation period does not start to run vis-à-vis the immunity recipient as long as the victims have not been in a position to bring an action against the co-infringers of the immunity recipient (*supra* No. 33). In Germany, § 33h Abs. 8 GWB provides that the five-year limitation period does not start to run against the immunity recipient (or the SME) until the end of the year in which the victims were unable to obtain full compensation from the co-infringers (*supra* No. 40). As regards the other Member States, it appears that the general rules on interruption and/or suspension must be taken into account. For example, according to Articles 1206 and 2249 Belgian Civil Code, the interruption of the limitation period affects all joint and severally liable co-infringers that are liable for the same obligation (*supra* No. 17). However, situations might occur in which one could question whether the immunity recipient can be considered jointly and severally liable on the moment that the interruption/suspension ground takes place.[375] If so, in order to be compatible with Article 11(4) Damages Directive, the general rules must be interpreted in such a way that those immunity recipients are/were indeed (possibly retroactively) jointly and severally liable at the time in order to

371 According to a report of the Cartel Working Group of the International Competition Network, 2019, 5, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/CWG_Privateenforcement-2019.pdf: "*To promote actual compensation, jurisdictions should strive for limitation periods that are long enough to accommodate claimants, yet not so long as to frustrate out-of-court settlements between the parties.*"

372 Germany for example has inserted a limitation period for contribution actions (§ 33 Abs. 7 GWB).

373 ECJ, 28 March 2019, *op. cit.*, *Cogeco*.

374 EC, Commission staff working paper accompanying the White Paper, SEC(2008) 404, para. 234.

375 As Article 11(4) Damages Directive stipulates that the immunity recipient is jointly and severally liable to other injured parties than its direct or indirect purchasers or providers, only where full compensation cannot be obtained from the other infringers. It is plausible that the claimant realises that he or she cannot receive full compensation, only after the damages action has been granted. In such a scenario, the interruption/suspension grounds regarding the co-infringers already took place before the immunity recipient "became" jointly and severally liable, which would mean that those grounds would not yet apply to the damages action against the immunity recipient.

make sure that the interruption/suspension grounds apply to damages actions against them as well.

4.2 Absolute limitation period

64. Applicability of the Damages Directive provisions on absolute limitation periods. Pursuant to Recital 36 Damages Directive, Member States are allowed to maintain or introduce absolute limitation periods, provided that their duration comply with the effectiveness principle.[376] The corpus of the Damages Directive, however, does not include any specific provision mirroring Recital 36, thus making it unclear which provisions might be applicable in that regard. It appears that Article 11(4) Damages Directive, which addresses the reasonable and sufficient limitation periods applicable to the jointly and severally liable immunity recipient (*supra* No. 5 and 63), applies to absolute limitation periods as well, as it refers to "*any limitation period*," i.e., both relative and absolute limitation periods. The knowledge requirements of Article 10(2)–(3) Damages Directive, on the other hand, do (logically) not apply. The provisions on the cessation of the infringement, the minimum five-year duration and the suspension (or interruption) in the case of a competition authority's (investigative) action or consensual dispute resolution seem to be in a grey zone. On the one hand, one could argue that the Damages Directive does, in principle, not regulate absolute limitation periods and leaves it open to the Member States to adopt such a limitation period or not (as provided for by Recital 36 Damages Directive). On the other hand, it could also be argued that those provisions, at least textually, make no distinctions regarding the nature of the limitation periods. Unfortunately, Member States that maintained an absolute limitation period, such as Belgium, France and Germany, did not clarify this point. By way of example, in Belgium it appears that the interruption because of an investigative action by a competition authority does not apply to the absolute twenty-year limitation period (*supra* No. 19). In France as well (*supra* No. 35), courts have not had the opportunity yet to decide whether the twenty-year absolute limitation period would start running even if the victim had never learnt about the illegal behaviour.

65. Compatibility of absolute limitation periods with effectiveness principle and ECtHR case law. It can be argued that it would be incompatible with the ECJ *Manfredi*[377] and *Cogeco* judgements[378] and with the spirit of the Damages Directive (especially focussing on the principle of effectiveness) if a claim is time-barred before the competition authority has reached a (final) infringement decision.[379] As a rule, all national provisions on absolute limitation periods need to comply with the effectiveness principle. In Germany for instance, questions have been raised by the legal doctrine concerning absolute limitation periods. As explained above (*supra* No. 42) German law provides for two absolute limitation periods: a shorter one of ten years, which starts to run from the date on which the claim arose and after the infringement has ended, and a longer one of thirty years, which starts to run from the date of the infringement, according to § 33 GWB, that caused the damage. It is the compatibility of the absolute limitation period of ten years that has been questioned.[380] By contrast, in the Netherlands for instance, it is likely that the twenty-year limitation period, in so far as it starts to run from the moment the infringement has ceased, is compatible with the effectiveness principle.[381] In both countries, the provisions on suspension/extension and interruption seem applicable to absolute limitation periods, reducing the chance that they would be incompatible with the effectiveness principle. In general, it should also be noted that national absolute limitation periods pre- and post-Damages Directive must comply with the requirements of the ECtHR case law (*supra* No. 9). Hence they have to be interpreted in a way that there can only be an absolute limitation period if it does not time-bar the claim before the infringement ceased and the injured party knew or should have known about it.

5. Suspension and Interruption

66. National diversity remains despite harmonisation attempt. The Damages Directive harmonised only "the tip of the iceberg" concerning the provisions on suspension and interruption of limitation periods. Even within that harmonisation, a certain measure of discretion is left open for the Member States. As a result (a lot of) diversity remains. For example, as allowed by the Damages Directive, some Member States opted for the limitation period to be suspended if a competition authority takes (investigative) action (e.g., England and Wales, and Germany), whilst others opted for an interruption of the limitation period (e.g., Belgium and France). The choice of the Dutch legislator in this regard, i.e., extension instead of suspension, is rather ambiguous. It interprets the extension in Article 6:193t NBW in such a way that the difference between suspension and extension would be insignificant. This way, the Dutch legislator seems to imply that the extension is de facto a suspension, which differs strongly from the usual interpretation of extension under the general rules in Article 3:320 NBW. In essence, the exact meaning of extension under Dutch law and the way it should be calculated remains unclear (*supra* No. 47).[382]

376 The part on absolute limitation periods in Recital 36 Damages Directive has been included in line with the suggestions of the Council (2013/0185, No. 15983/13, Recital 27) and the EP (No. A7-0089/2014, Recital 26).

377 ECJ, 13 July 2006, *op. cit.*, *Manfredi*.

378 ECJ, 28 March 2019, *op. cit.*, *Cogeco*.

379 As previously mentioned regarding Belgian law, it seems plausible that the Belgian Constitutional Court in such a scenario would decide that the rights of the injured party are disproportionally infringed (similar to its judgement of 10 March 2016).

380 B. Rodger, M. Sousa Ferro and F. Marcos, Transposition: Key Issues and Controversies, in B. *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018), (440) 459.

381 Memorie van toelichting, *Tweede Kamer, vergaderjaar 2015-2016*, 34 490, nr. 3, 19. *See also*: J. L. Smeehuijzen, *op. cit.*, 122, § 1.

382 *See also*: J. Kortmann and S. Mineur, The Netherlands, in *The EU Antitrust Damages Directive: transposition in the Member States* (Oxford University Press, 2018), (270) 278–279.

Another example of diversity in this regard is the choice of the German legislator to add an additional suspension ground. The limitation period is suspended when the claimant brings an action against the infringer to obtain information or produce evidence in accordance with § 33g GWB, which is a ground for suspension that is not provided for in the Damages Directive. Concerning the interruption, it is interesting to note that it may be triggered rather easily under Dutch law (*supra* No. 47). Therefore the added value of the suspension ground introduced by the Damages Directive (and implemented in Article 6:193t NBW) is rather limited. As injured parties have a choice between opting for extension or interruption, they will most likely opt for the latter.

In any event, in its *Cogeco* judgement, the ECJ made it clear that the effectiveness principle precludes short limitation periods that cannot be subject to a suspension or interruption for the duration of proceedings by a national competition authority or by a review court leading to a final decision.[383]

67. Suspension for infringers jointly and severally liable. Unfortunately, the scope and meaning of many concepts dealing with suspension and interruption remain unclear, e.g., when does a consensual dispute resolution process giving rise to suspension begin and end?[384] Especially the provision on the ending of the suspension (at the earliest one year) after the final infringement decision is adopted will probably trigger much discussion in damages actions that involve jointly and severally liable infringers. For example, does the limitation period start to run against a non-appealing infringer (e.g., immunity recipient) if another or other infringers appeal the competition authority's decision? What if the infringer appeals against the level of the fine only and not against the actual infringement decision? The English pre-CRA case law on the CAT might provide useful guidance in this matter (*supra* No. 25). This would mean, firstly, that the limitation period would start to run once an individual applicant's right to appeal has expired and secondly, that only an appeal against the infringement itself has a suspensive effect. On the other hand, one might question whether those solutions are compatible with the principle of effectiveness.

V. Conclusion

68. Call for clarification. This article shows in essence that, despite the adoption over the past fifteen years of limitation period provisions increasingly favourable to competition law victims, there still remains numerous inconsistencies and shortcomings in the EU and Member States limitation period rules. While the ECJ has played a crucial role in defining the scope of such rules, it is submitted that the EC should take advantage of its duty to revisit the Damages Directive before 27 December 2020 to provide clearer and uniform answers to the many questions raised in this article. ■

383 ECJ, 28 March 2019, *op. cit.*, *Cogeco*, para. 51.

384 In that regard, reference can be made to para. 22 of Sch. 8A CA 1998 that deals with such questions according to English and Welsh law (*supra* No. 24). *See also* The Netherlands (*supra* No. 50).

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