CPI EU News Presents:

The CJEU Clarifies the Rules on Antitrust Damages Actions Before and After the Harmonization

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May 2019

Facts

Cogeco Communications, was a shareholder of Cabovisão — Televisão Por Cabo SA ("Cabovisão") between August 3, 2006 and February 29, 2012. On July 30, 2009, Cabovisão filed an abuse of dominance complaint before the Portugese Competition Authority against *inter alia* Sport TV Portugal.

In the subsequent decision of June 14, 2013, the Portuguese Competition Authority fined Sport TV Portugal for infringement of both Article 102 TFEU and the corresponding national provision. Later, appealing before the Competition, Regulation and Supervision Court, the fine was reduced on the grounds that only the national equivalent of Article 102 TFEU had been infringed. The latter article itself was considered inapplicable because no potential effect on trade between the Member States had been proven. That judgment was upheld on a further challenge by the judgment of the Court of Appeals on March 11, 2015.

On February 27, 2015, Cogeco brought an action before the Lisbon District Court *against inter alia* Sport TV Portugal and its parent companies, with the aim of obtaining compensation for the damages caused by the defendants' infringement of Article 102 TFEU and its national equivalent between August 3, 2006 and March 30, 2011. Before giving its decision in this case, the Lisbon District Court referred six long questions to the Court of Justice relating to the temporal application of the Antitrust Damages Directive[2] (hereinafter: "ADD") and the compatibility of a number of national rules applying to antitrust damages cases in the pre-harmonization era.

The Court of Justice's Decision

a. The questions

The Court of Justice rephrased and reduced the referred questions down to three[3]:

- Must Article 22 of the ADD be interpreted as meaning that that directive is applicable to the dispute in the main proceedings?
- Must Article 102 TFEU and the principles of equivalence and effectiveness be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is set at three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and the full extent of the damage, and, secondly, does not include any possibility of suspending or interrupting that period during the proceedings before the national competition authority?
- Do Article 102 TFEU and the principles of equivalence and effectiveness preclude national legislation, which provides that the definitive finding of an infringement of competition law in proceedings before the national competition authority is not binding on the national court before which an action for damages has been brought as to the existence of an infringement of competition law, or does it merely establish a rebuttable presumption in that regard?

b. Temporal scope of the Antitrust damages directive

With regard to the *ratione temporis* application of the ADD, the Court of Justice noted that Article 22(1) of that Directive required Member States to ensure that national measures transposing the substantive provisions of that directive do not apply retroactively, while Article 22(2) ADD required Member States to ensure that national measures transposing that Directive's procedural provisions do not apply to actions for damages which a national court seized prior to December 26, 2014.

Consequently, Portugal was entitled to provide that the national rules transposing the procedural provisions of the ADD do not apply to actions for damages brought before the date of entry into force of said national provisions. Actions brought after December 26, 2014, but before the entry into force of the Portugese transposition act, are therefore solely subject to the "old" national rules. The same applies to national rules transposing the Directive's substantive provisions, which must not apply retroactively.

Since Cogeco's action was brought before the expiry of the deadline for transposing the ADD and before that Directive's transposition into Portuguese law, the Court of Justice held that the Directive did not apply *ratione temporis* to the dispute in the main proceedings.

c. Requirements for national rules on limitation periods outside the temporal scope of the Directive

The second question addressed by the Court of Justice concerned the compatibility of the Portuguese rules on limitation periods that apply outside the temporal scope of the Directive with Article 102 TFEU and the principles of equivalence and effectiveness. These rules set the limitation period for damages claims at three years, starting from the date on which the injured party was made aware of its right to compensation (even if unaware of the identity of the person liable and the full extent of the damage), and do not include any possibility of suspending or interrupting that period during the proceedings before the national competition authority.

The principle of equivalence did not raise any problems, since the national rules concerned applied equally to actions for damages based on EU law and actions for damages based on national law. In contrast, the compatibility of the national rules in question with the principle of effectiveness required further analysis. Pursuant to the principle of effectiveness, the national rules must not make it impossible or excessively difficult to exercise the rights conferred by EU law, and, in the case of Article 102 TFEU, they must not jeopardize the effective application of this article.

Following Advocate General Kokott, the Court of Justice held that, for the purpose of this assessment, all the elements of the rules on limitation periods must be taken into consideration: the duration of the limitation period, its starting point, and the possibility of suspension or interruption. In addition, the specificities of competition law cases must be considered, in particular the fact that such cases require, in principle, a complex factual and economic analysis. Moreover, in order to be able to bring forward actions for damages, the injured party must know who is liable for the infringement of competition law.

Therefore, short limitation periods that start to run before the injured person is able to ascertain the identity of the infringer may render their exercise of the right to claim compensation practically impossible or excessively difficult. The same applies to a short limitation period that cannot be suspended or interrupted for the duration of proceedings, following which a final decision is made by the national competition authority or by a review court. Indeed, if the limitation period is too short compared to the duration of these proceedings and cannot be suspended or interrupted during their course, the limitation period may expire before said proceedings are even completed. Consequently, damages actions could not be brought up following a final decision finding an infringement of EU competition rules.

These considerations led the Court of Justice to the conclusion that a limitation period of three years which starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and which may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the injured party's right to full compensation for harm caused by an infringement of Article 102 TFEU practically impossible or excessively difficult, and is therefore incompatible with Article 102 TFEU and the principle of effectiveness.

d. Impact of final infringement decisions on damages actions outside the temporal scope of the Directive

The question of whether Article 102 TFEU and the principles of equivalence and effectiveness preclude national legislation, which provides that the definitive finding of a competition law infringement by the national competition authority is not binding on the national court before which an action for damages based on that infringement is brought, or which merely establishes a rebuttable presumption of the existence of an infringement, was declared inadmissible. The Court of Justice referred to its settled case law according to which it may refuse to rule on a question referred for a preliminary ruling where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[4] According to the Court of Justice that was the case for the aforementioned question presented by the Portuguese Court, since it followed from the case file that the original infringement decision finding had been partially annulled on appeal because no risk of appreciable effects on trade between the Member States had been shown. Consequently, the referring Court did not have to decide on a damages action following a final decision that found an infringement of Article 102 TFEU by a national competition authority or a review court, and the referred question bore no relation to the actual facts of the case in the main proceedings or its purpose.

Comments

Since neither the procedural nor the substantive rules of the ADD applied *ratio temporis* to the case brought before the referring court, it was indeed not necessary for the Court of Justice to determine whether the rules on limitation periods, and those on the impact of decisions in national public enforcement cases on damages actions, were to be considered as having a procedural or a substantive nature within the meaning of the Directive. That question might, however, be relevant for other cases that are to be decided by national courts.

In this regard, it is interesting to note that the Advocate General does address the issue in her Opinion and considers both types of rules to not be purely procedural. With regard to the irrebuttable presumption of Article 9(1) ADD, she is more explicit and qualifies it as having a substantive character.[5] This means that the concept of procedural rules in the ADD has a more restrictive meaning than in the Court of Justice's early private enforcement cases.

Indeed, in *Courage* the Court first stated that "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State (…) to lay down the detailed procedural rules governing the actions for safeguarding rights which individuals derive directly from Community law."[6] Subsequently, it held that this statement applied to rules relating the unjust enrichment and preventing a litigant to profit from his own unlawful conduct.[7]

In *Manfredi*, the Court repeated the statement referring to the "detailed procedural rules"[8] and applied it to the rules on the application of the concept of "causal relationship"[9] and … on limitation periods.[10]

In *Kone* the Court subtly amended its recurring phrase and no longer included the word "procedural."[11] This may have been a pure coincidence because the Court referred to a paragraph from *Manfredi* that did not mention 'procedural' either,[12] but came closely after one that did mention it.[13] However, it may also have been a very conscious decision after the Court had become aware of the confusion it could cause. The decision in *Kone* indeed dates to June 5, 2014 while the distinction between "substantive" and "other rules" had been introduced into the proposal for the ADD during the tripartite meetings ("trilogues") between the European Parliament, the Council, and the Commission as reported by an Interinstitutional file dd. March 24, 2014.[14] In any case, in *Cogeco* the Court also limits itself to speaking of the "detailed rules" instead of "detailed procedural rules."[15]

The Court's finding on the compatibility of the pre-harmonization national rules on limitation periods with the principle of effectiveness goes further than its earlier decision on this point in *Manfredi*. There, the Court left it to:

the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.[16]

In *Cogeco*, the Court decided itself that national legislation which, first, provides that the limitation period in regard to actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority, is incompatible with the principle of effectiveness.

With regard to the last question, the Court of Justice was indeed entitled to refuse to answer it, given the facts of the case in the main proceedings. Nevertheless, it is interesting to refer to the Opinion of the Advocate General, who did answer the question. In her opinion, the enforcement of claims for damages for infringements of Article 102 TFEU would be made extremely difficult if civil proceedings for damages did not attribute any effect to the previous work of a competition authority. In view of the particular complexity of competition law infringements and the practical difficulties injured parties face in proving these infringements, the principle of effectiveness would therefore require that the final finding of an infringement by the national competition authority should, in a damages procedure at least, be given indicative effect.

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[2] Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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, p. 1.

[3] In fact, the first question referred by the Portuguese court was not reformulated. However, given the answer to the previous questions, the CJ did not consider it necessary to answer it. The question was in essence whether Articles 9(1) and 10(2) to (4) of the Antitrust Damages Directive, as well as the other provisions of that directive or general principles of EU law could, be interpreted as creating rights for a private party in the context of an antitrust damages action, when as at the date on which the action was brought, the deadline for transposition of that directive into national law, as provided for in its Article 21(1) had not yet expired.

[4] CJ December 20, 2017, *Núñez Torreiro*, Case C-334/16, EU:C:2017:1007, para. 38 and the case-law cited.

[5] Opinion AG Kokott January 17, 2019, Case C 637/17, *Cogeco Communications Inc./Sport TV Portugal SA and others*, ECLI:EU:C:2019:32, paras. 61-63.

[6] CJ September 20, 2001, Case C-453/99, *Courage Ltd. and Bernard Crehan*, 2001 I-06297, ECLI:EU:C:2001:465, para. 29.

[7] CJ September 20, 2001, Case C-453/99, *Courage Ltd. and Bernard Crehan*, 2001 I-06297, ECLI:EU:C:2001:465, paras. 30-31.

[8] CJ July 13, 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, Joined cases C-295/04 to C-298/04, 2006 I-06619, paras. 61 and 77. See also paras. 71-72.

[9] Para. 64. Meant is the content of the concept op causation, not the fact that causation is a requirement for liability. That latter requirement is derived from Art. 101 TFEU itself.

[10] Para. 82. It is interesting to note that in earlier cases, the CJ also considered national rules on limitation periods in other fields as procedural rules, see e.g. claim for reimbursement of national charges incompatible with Community law: ECJ September 15, 1998, *Edilizia Industriale Siderurgica Srl (Edis) / Ministero delle Finanze*, Case C-231/96, ECR 1998, I-04951, ECLI:EU:C:1998:401; ECJ November 17, 1998, *Aprile Srl, in liquidation t/ Amministrazione delle Finanze dello Stato*, Case C-228/96, ECR 1998, I-07141; right to obtain pay arrears or damages for breach of the equal pay principle: ECJ December 1, 1998, *BS Levez /T.H. Jennings (Harlow Pools) Ltd.*, Case C-326/96, ECR 1998 I-07835, ECLI:EU:C:1998:577; claim for compensation of the loss resulting from the provision of a universal service: CJ December 21, 2016, *TDC A/S t/ Teleklagenævnet and Erhvervs- og Vækstministeriet*, Case C-327/15, ECLI:EU:C:2016:974;.

[11] CJ June 5, 2014, *Kone and Others*, Case C-557/12, EU:C:2014:1317, para. 25.

[12] Para. 64.

[13] Para. 62.

[14] https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208088%202014%20INIT.

[15] Paras. 42-45.

[16] Para. 82 and operative part nr. 4.