

Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries

by

Ana Vlahek and Klemen Podobnik*

*A limitation prevents stale claims, encourages plaintiffs to not wait
to bring a claim, and, by limiting old liabilities, provides finality
and certainty to business transactions.*

Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, 2007

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* Ana Vlahek – Doctor of Laws (University of Ljubljana), Associate Professor of civil and commercial law & Assistant Professor of European law at the University of Ljubljana, Faculty of Law, Senior Research Fellow at the Institute for Comparative Law at the Faculty of Law in Ljubljana, e-mail: ana.vlahek@pf.uni-lj.si; Klemen Podobnik – Doctor of Laws (University of Ljubljana), Master of Laws (Columbia, NY, USA); Associate Professor of civil and commercial law at the University of Ljubljana, Faculty of Law, Senior Research Fellow at the Institute for Comparative Law at the Faculty of Law in Ljubljana, e-mail: klemen.podobnik@pf.uni-lj.si. Article received: 04.08.2017; accepted: 01.09.2017.

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Abstract

The article analyses the provisions on limitation of antitrust damages actions set out in Directive 2014/104/EU 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. It presents (draft) implementing legislation of CEE countries from the perspective of their general rules on limitation, and the problems the Member States have faced in the process of transposing the Directive into their national legal systems. Within that, focus is placed upon the analysis of the types of limitation periods, their length and their suspension or interruption. In addition, the authors present the effects of the new limitation regime on the balance between the interests of the claimants and of the defendants, as well as on the relation between public and private antitrust enforcement.

Résumé

L'article analyse les dispositions relatives à la limitation des actions en dommages prévues par la directive 2014/104/UE relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne. Il présente (un projet) la législation de mise en œuvre des pays d'Europe centrale et orientale du point de vue de leurs règles générales en matière de limitation, et les problèmes rencontrés par les États membres dans le processus de transposition de la Directive dans leurs systèmes juridiques nationaux. Dans ce cadre, l'accent est mis sur l'analyse des types de délais de prescription, de leur durée et de leur suspension ou interruption. En outre, les auteurs présentent les effets du nouveau régime de limitation sur l'équilibre entre les intérêts des demandeurs et des défendeurs, ainsi que sur la relation entre l'application publique et privée du droit de la concurrence.

Key words: limitation of antitrust damages claims; limitation; limitation periods; suspension of limitation; interruption of limitation; competition law; antitrust; liability for damages; Directive 2014/104/EU; CEE countries; private enforcement of antitrust.

JEL: K21; K15

I. Introduction

The main aim of statutes of limitations is the prevention of infinite controversies (Cigoj, 1984, p. 1141). It is described as a concept that sanctions the inactivity of the creditor, and thereby protects legal certainty and legal peace (Brus, 2011, p. 343). Some authors name it ‘a dead period’, that is, a period without any legally relevant activities of the parties or relevant outer circumstances (Blagojević and Krulj, 1983, p. 1152–1153). Best CJ eloquently put it in *A’Court v. Cross* in 1825¹ that the statute of limitation is a statute of peace, as vexing, long dormant claims can hold in them more cruelty than justice. Areeda and Hovenkamp argue that in antitrust, the statute of limitations is aimed at preventing stale claims, encouraging the litigation activity of creditors and ensuring the finality of commercial transactions (Areeda and Hovenkamp, 2007, p. 282). Adding to that, Pearl points out that the statute of limitations is ‘an implicit approximation of when the enforcement of an action may start doing more harm than good – chilling competition rather than fostering it – whether because the injuring act is too removed to correct a market failure or because a longer limitations period would introduce too much uncertainty about past liabilities’ (Pearl, 2017).

One cannot overlook that private enforcement of antitrust has special characteristics (mainly due to the constant intertwining of public and private spheres), which to a certain extent warrant a special regime of damages claims and, arguably, statutes of limitations. Should there be a deviation from general rules on statutes of limitation in the antitrust field? How intense should it be? Those questions were already dealt with by the American legislature when forming and passing the Clayton Act, and have been intensively analysed by the EU and its Member States in the last decade.

The regulation of limitation of antitrust claims has been one of the focal issues of 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 (hereinafter, the Directive).² In *Manfredi*,³ the only CJEU judgment addressing the issue of limitation of antitrust damages claims, the Court has given only limited guidance as to the proper content of the limitation regime in the field of EU competition rules. Focusing on the questions put forward by the referring national court, the CJEU stated that ‘[i]n the absence of Community rules governing the matter,

¹ (1825) 3 Bing 329.

² OJ L 349, 05.12.2014, p. 1–19.

³ Judgment of 13.06.2006, *Manfredi*, case C–295/04, ECLI:EU:C:2006:461.

it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed', and that '[i]n that regard, it is for 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'. The Commission and the European legislator were thus given a fair amount of leeway in drafting the new regime of limitation.

It is this regime that is addressed in this paper. Article 10 of the new Directive and relevant *travaux préparatoires* are examined in detail.⁴ Focus is placed upon the analysis of the types of limitation periods, their length and their suspension or interruption. Within that, (draft) implementing legislations of the respective CEE countries (i.e. Slovenia, Croatia, Bulgaria, Romania, Hungary, Poland, Latvia, Lithuania, Estonia, Slovakia, the Czech Republic)⁵ are analysed and compared to the provisions of the Directive as well as to their national general rules on limitation. The problems Member States have encountered in the process of transposing the Directive into their national legal systems are also presented. Furthermore, the paper discusses the effects of the new limitation regime on the balance between the interests of the claimants and of the defendants, as well as on the relation between public and private enforcement of antitrust.

⁴ Article 18(1) of the Directive regulating the suspension of limitation during ADR is not being addressed here. Suffice to say that this rule, too, additionally postpones the running out of the limitation period and that here, too, the Member States faced challenges in correctly understanding the provisions of the Directive (Vlahek and Podobnik, 2017, p. 290–291; Piszcz, 2017, p. 306–307).

⁵ Member States' legislative proposals and enacted implementing acts that are being analyzed in this paper, are available at http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (01.09.2017). Data shows that, until 14.06.2017, seven of the analyzed CEE Member States (Estonia, Hungary, Lithuania, Poland, Romania, Slovakia and Slovenia) have already transposed the Directive. Croatia followed in July whereas three CEE Member States (Latvia, Czech Republic and Bulgaria) have not yet enacted the implementing legislation although the implementation deadline expired on 27.12.2016.

II. Analysis of the limitation regime and its implementation in CEE Countries

1. One or two-tier system of limitation periods

1.1. Definition of the two systems

Article 10 of the Directive regulates a limitation period that is – at least in two-tier systems of limitation periods – denoted as ‘subjective’ or ‘short’, sometimes also ‘relative’ limitation period. Such periods generally begin to run when the claimant knows, or can reasonably be expected to know of the infringement, the harm and the identity of the infringer. Such limitation periods are shorter than the ‘long-stop’ (called also ‘objective’ or ‘maximal’ or ‘absolute’) limitation periods, which usually begin to run already from the moment when the loss has occurred (or, sometimes, already from the moment the infringement took place). Legal systems combining the two types of limitation periods are called two-tier limitation systems, whereas systems with only one limitation period (usually that with a subjective criterion⁶) are called one-tier limitation systems. In two-tier limitation systems, claims are time-barred when one of the two limitation periods runs out.

Article 10(2) of the Directive sets out antitrust-specific criteria for what triggers the start of the ‘short’ limitation period: knowledge of or discoverability of (i) the behaviour and the fact that the behaviour constitutes an infringement of competition law, (ii) the fact that the infringement of competition law caused harm to the claimant, and (iii) the identity of the infringer, whereby the limitation period does not begin to run before the infringement of competition law has ceased. A combination of specific subjective (knowledge or discoverability criterion) and objective criteria (cessation of the infringement) is thus set out as the starting point of the ‘short’ limitation period. According to Article 10(3) of the Directive, this limitation period has to be at least five years long.

Although the definition of the ‘short’ period contains an objective element (that is, cessation of the infringement), Article 10 of the Directive does not provide for a long-stop limitation period that would run from the moment

⁶ That is the case in all of the analyzed CEE countries that set out a one-tier system with the exception of Hungary where, as is explained below, the general rules on limitation of damages claims that applied also to antitrust damages actions, provide only for an objective period (Miskolczi Bodnár, 2017, p. 139; see also Pusztahelyi, 2013). In the US, too, only the objective period is set out for bringing antitrust damages claims as the subjective period was perceived as practically eliminating limitation (Stewart, 2012, p. 71, 74).

the damage occurred (or from the moment the infringement took place as set out in some national rules). Paragraph 36 of the Preamble of the Directive, however, allows for the possibility of introducing or maintaining ‘absolute limitation periods’ that are of general application, provided that the duration of such absolute limitation periods does not render the exercise of the right to full compensation practically impossible or excessively difficult. The draft Directive did not mention this ‘absolute limitation period’. It seems that it was inserted into the final text of the Directive (though only into the Preamble) on the basis of the opinions of the Council and the European Parliament. The Committee for Economic and Monetary affairs and the Internal Market and Consumer Protection Committee proposed that the Commission’s text is supplemented with a paragraph stating that irrespective of the rules on length, beginning and suspension of the shorter limitation period, damages actions should be filed within ten years after the act causing the damage has taken place.⁷ In its Impact Assessment, the Commission in fact provided for an option of setting out a twenty-year limitation period that would start to run from the moment the damage had occurred. The Commission also explained in its Impact Assessment that in order to guarantee legal certainty, some of the businesses proposed the creation of an objective limitation period running from the moment the damages occurred.⁸

It should be noted that the term ‘absolute limitation period’ usually denotes one of the two types of limitation periods known in some jurisdictions within the ambit of criminal law and minor offences law (and not within civil law). In contrast to the ‘relative limitation period’ in which persecution of the act is to be initiated, the ‘absolute limitation period’ denotes a period in which criminal or minor offences proceedings have to become final, i.e. a judgment has to be rendered and become final. Both periods start running from the moment the offence has been committed. ‘Objective limitation period’ and ‘subjective limitation period’ are, on the other hand, describing a period in which damages actions have to be filed with the court, whereby one runs from the moment the relevant facts are or could have been discovered, the other from the moment the damage has occurred or from the moment the infringement took place.

⁷ Commission staff working document, Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, p. 87.

⁸ *Ibidem*, p. 76, 79.

1.2. Implementation in CEE countries

Member States with a one-tier limitation system in their general civil law (setting out a subjective limitation period) have obviously opted for a one-tier system also within their antitrust damages actions regimes. Among the analyzed CEE countries, Bulgaria (Petrov, 2017, p. 36), Romania (Mircea, 2017, p. 239), Estonia (Pärn-Lee, 2017, p. 112–113), Lithuania (Mikelenas and Zaščurinskaitė, 2017, p. 191) and Latvia (Jerneva and Druvieta, 2017, p. 161) have done so. With the exception of Latvia, they have all set a five year limitation period in line with Article 10(2) of the Directive, which is in the majority of these States longer than their respective general limitation periods for damages claims; only in Bulgaria, has the general limitation period been five years already prior to implementing the Directive (Petrov, 2017, p. 36). Mirroring its general rules on limitation, Latvia decided for a ten-year limitation period starting to run as defined in Article 10(2) of the Directive (Jerneva and Druvieta, 2017, p. 161).

The majority of the Member States with a two-tier limitation system in their general rules on limitation of damages actions have added an objective limitation period also for the cases of antitrust damages claims. Among the analyzed CEE countries, Slovenia, Croatia and Poland implemented a two-tier system. Slovenia opted for a combination of limitation periods of five and ten years (three and five years being the general subjective and objective limitation periods for bringing damages actions (Vlahek and Podobnik, 2017, p. 277–278)). Croatia chose a combination of five and fifteen years (three and five years being the general subjective and objective limitation periods for bringing damages actions), while Poland of five and ten years (three and ten years being the general limitation periods for bringing damages actions). In Croatia and Slovenia, for example, the general long-stop period runs from the moment the damage is sustained. In Slovenia, the antitrust-specific ten-year limitation period starts to run when the damage is sustained and it cannot run before the infringement has ceased; the antitrust-specific fifteen-year long-stop period in Croatia is set to run from the moment the infringement has ceased (Butorac Malnar, 2017, p. 64). In Poland, the general objective ten-year limitation period starts to run the moment the act causing harm takes place, whereas the new antitrust-specific period starts to run when the antitrust infringement ceases to exist. The differences in the starting points might in some cases lead to different outcomes in terms of when the claim was time-barred.

Interestingly, Slovakia and the Czech Republic decided for a one-tier system of limitation of antitrust damages claims with a five-year limitation period despite the fact that a two-tier system has traditionally been part of their

private law regimes. Czech civil law provides for a subjective three-year and objective ten- or fifteen-year limitation periods, whereby the objective period runs from the date the infringement took place (Petr, 2017, p. 89–90). Slovak civil law sets out a subjective four-year and objective ten-year period, the later running from the end of the injurious harmful behaviour (Blažo, 2015, p. 270). It ensues from one of the commentaries of the Czech implementation provisions that the reason behind such decision in the Czech Republic was to align the national provisions to those of the Directive (Petr, 2017, p. 89–90). However, commentators of the novel Slovak regime emphasize that the new system is ambiguous, and that it is not completely clear whether the ten-year long-stop period applies also in antitrust damages cases or not (Blažo, 2017, p. 252).

A somewhat unique system of limitation of damages claims seems to be set out in Hungarian law. Namely, according to Article 6:22 of the Hungarian civil code, the general limitation period for damages claims is five years, starting the moment when the damage occurs (thus, only an objective limitation period is set out). Article 6:24 of the code then states that if the creditor is unable to enforce a claim for an excusable reason, prescription shall be suspended and the creditor is entitled to submit a claim within one year after the excusable reason is no longer in place, even if less than one year is left until the end of the initial five-year period. It ensues from some commentaries that the term ‘excusable reason’ encompasses also lack of creditors’ awareness of the damages (Miskolczi Bodnár, 2017, p. 139; see also Pusztahely, 2013). If this is in fact so, the Hungarian system could be categorized as a unique two-tier system. If it is not, then it is to be categorized as a unique one-tier system where the sole limitation period is an objective one (and not subjective as is usually the case of one-tier systems). After the implementation of the Directive, the system of limitation of antitrust damages claims is diametrically opposite, as only a subjective five-year limitation period as defined in Article 10(2) of the Directive is now being laid down.

In virtually all jurisdictions, the definition of the limitation periods and/or their length has been altered to some extent in comparison to their general rules on limitation. It is also to be stressed that the moments from which the periods begin to run, as well as application of the rules on suspension/interruption to long-stop periods differ from Member State to Member State. A comparative analysis of the limitation periods should therefore not only consist of the length of the periods but should also cover other elements of the limitation system.

2. Beginning of the running of the Article 10(2) limitation period

2.1. Introductory remarks

As has already been explained in the previous chapter, Article 10(2) of the Directive deals with the beginning of the running of the ‘shorter’ limitation period. It provides that the period shall not begin to run, first, before the infringement of competition law has ceased, and second, before the claimant knows, or can reasonably be expected to know of the following: (i) the infringer’s behaviour and the fact that it constitutes an infringement of competition law, (ii) the fact that the infringement of competition law caused harm to the claimant, and (iii) the identity of the infringer. It can therefore be said that within this limitation period, the Directive sets out a combination of an objective and a subjective trigger for the beginning of the running of such limitation period.

2.2. Objective trigger starting the running of the Article 10(2) limitation period

As an objective trigger causing the start of the running of the limitation period regulated in Article 10, the Directive provides for a negative definition: the limitation period should not run until the infringement of competition law has ceased. This was surely inspired by the interpretation given by the CJEU in *Manfredi*⁹ where it stated that ‘[a] national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended’, and added that ‘[in] such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, 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. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings’. The Commission’s draft Directive stated in Article 14(2) that Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement ceases. The final wording of the Directive has omitted the reference to continuous or repeated infringements. Article 10(2) now states

⁹ See paras. 73–82 of the judgment.

that the period shall not begin to run before the infringement of competition law has ceased.

However, both the judgment and the opinion of AG Geelhoed¹⁰ in *Manfredi*, and the Directive, omit to specify the terms ‘infringement’, ‘continuous or repeated infringement’ and ‘cessation of infringement’. Does the infringement take place when, for example, a cartel agreement was entered into or only when the agreement was implemented on the market (for example, the cartel prices were actually set) or does it refer to an individual transaction applying the cartel price in a one-time or an ongoing relationship with an individual customer? Should thus the cessation of the infringement be viewed in relation to each individual claimant, or should it be viewed in relation to the infringement as a whole regardless of when the legal relationship between the perpetrator and individual claimant and the transactions causing damage within such relationship have ceased? What is the meaning of ‘continuous infringement’? What is the dividing line between a continuous antitrust violation and a series of separate individual antitrust violations?¹¹ What is clear from *Manfredi* is that setting the starting point of the limitation period to the moment of concluding the agreement is generally not appropriate in cases where the effects of the agreement might occur long afterwards (for example, in cases where after the agreement is concluded, a series of transactions causing damages are made on its basis with the claimant in a longer period of time). It is, however, uncertain how this objective trigger of Article 10(2) will be interpreted in practice.

2.3. Subjective trigger starting the running of the Article 10(2) limitation period

As the subjective cause triggering the start of the running of the limitation period regulated in Article 10(2), the Directive sets forth the creditor’s (claimant’s) awareness of the said three circumstances. Alternatively, the criterion of reasonable expectation of awareness is provided for (so-called ‘discoverability criterion’, present in Member States’ general rules on limitation or in their case-law). The running of the limitation period can thus start the moment when the claimant could be reasonably expected to know of the competition law infringement, its perpetrator and the harm caused by it.

The standard of reasonable expectation of awareness has caused practical and theoretical concerns regarding the moment when the conditions for such legal fiction are actually fulfilled. Is it (a) the moment when a purported

¹⁰ Moreover, the AG’s opinion does not even touch upon the issues assessed by the Court, The Opinion of Advocate General Geelhoed delivered on 26.01.2006, ECLI:EU:C:2006:67.

¹¹ For further details on these concepts in US antitrust, see Practising Law Institute, 2017, p. 54–55; Broder, 2012, p. 72–73; Foer and Stutz, 2012, p. 255–256.

infringement was reported on by the media; (b) the moment when the competition authority has started its formal or informal inquiry into a business practice; (c) the moment of the publication of a statement of objections; (d) the moment of the publication of a decision by the relevant authority;¹² (e) the moment of the finality of such a decision?¹³

The fact that, according to Article 10(4) of the Directive, the limitation period is suspended for the complete duration of the public enforcement procedure (or perhaps even longer if the authorities take actions already before the start of the formal proceedings) might steer us to the conclusion that the limitation period probably starts to run at the latest at the outset of the public enforcement procedure, and definitely before it ends with a final decision. Setting a suspension/interruption for the duration of the proceedings would otherwise be pointless. The important question here is, however, whether the subjective limitation period set out in Article 10(2) of the Directive will ever start to run before the moment set for a suspension or interruption of the period due to public enforcement proceedings. If not, that would mean that this limitation period starts to run only after one year from the finality of the public enforcement decision. Member States have not clarified their positions on this issue in their respective implementation legislations, leaving it to be assessed by national courts.

2.4. Implementation of Article 10(2) in CEE countries

Member States (CEE countries included) have followed Article 10(2) of the Directive in terms of the moment when the period starts to run and have copy-pasted it, or at least intended to copy-paste it as verbatim as possible into their national legislation. Some have retained the negative definition of the elements found in the Directive, for example Slovakia and Romania¹⁴; others transformed it into a positive definition, for instance Slovenia, Croatia (Butorac Malnar, 2017, p. 64) and Poland (Piszczyński and Wolski, 2017, p. 218). In

¹² Such was the position of the Council in para. 27 of its General Approach to the Proposal of the Directive dated 02.12.2013, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015983%202013%20INIT> (22.04.2017): 'A claimant can reasonably be expected to have this knowledge as soon as the decision of the competition authority is published'. See also Ashton and Henry, 2013, p. 115–116.

¹³ Finnish and Norwegian courts have already tackled this dilemma. See the Norwegian case *Bastø Fosen* in which the EFTA Surveillance Authority submitted its *amicus curiae* on the relevant question of limitation, and the Finnish raw woods case, presented in Franklin, Fredriksen and Barlund, 2016, p. 17–18, and Havu, 2016, p. 404. See also the Commission staff working document, Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive..., p. 57.

¹⁴ A critique of such style has been given by Blažo, 2017, p. 252.

Slovenia, one of the earlier drafts of the implementing legislation overlooked that point (a) of Article 10(2) requires not only the knowledge of the infringer's behaviour but also the fact that it constitutes an infringement of competition law (Vlahek and Podobnik, 2017, p. 277; Vlahek and Lutman, 2017, p. 115). In order to comply fully with the Directive, the final version of the draft has added the missing element. It is plausible, however, that in reality these two elements coincide. In Poland, a reference to the general rules of the civil code was made with regard to the starting point of the five-year limitation period, whereby the general rules (although they were amended at the time of the implementation of the Directive) mention only the knowledge or discoverability of the damage and the person obliged to repair it. In addition, the person obliged to repair the damage (for example, the parent company) does not necessarily coincide with the person committing the infringement (parent company's subsidiary). The same inconsistency can be detected in the Estonian (Pärn-Lee, 2017, p. 113) and Czech draft implementing provisions (Petr, 2017, p. 90). Hungarian implementing provisions require knowledge or discoverability of the amount of the damage sustained (not merely the fact that the infringement caused harm to the claimant) and the person obliged to repair it (Miskolczi Bodnár, 2017, p. 140). Hungarian commentators also stress that the term 'knowledge of the infringer's identity' is not clearly defined, as in cartel cases, the infringers are usually manifold. Is it to be interpreted so as to demand knowledge of any or all of the many cartelists (*Ibid.*)?¹⁵

3. Length of the limitation periods

3.1. Short subjective period

Article 10(3) of the Directive sets forth the length of the limitation period at a minimum of five years. The length of the period is hardly in step with latest comparative trends urging for relatively short limitation periods, set between two and six years, whereby commentators stress that subjective limitation periods, if implemented, should be set closer to the minimum of the said spectre and that creditors should in those cases be required to act expeditiously.¹⁶

The Directive thus sets forth what is a minimum length for a limitation period, therefore leaving the decision of potentially longer periods to the

¹⁵ We believe this to be a relatively moot issue – knowledge of the infringer will usually arise from the knowledge of the existence of a cartel itself and therefore (all of) its members.

¹⁶ Draft Common Frame of Reference (DCFR) and UNIDROIT Principles accordingly set out a general 3-year limitation period. Von Bar and Clive, 2009, p. 1144–1147, 1149.

Member States' legislators. A comparative analysis shows that most Member States (including the majority of CEE countries) opted for the minimum prescribed time span (five years), which is surely due to the fact that their respective juridical traditions are not familiar with longer limitation periods. The majority of the Member States, including CEE countries, have set forth a general subjective period that is shorter than five years. In Slovenia, Croatia, Estonia, the Czech Republic, Lithuania and Poland, the general subjective limitation period is three years, in Slovakia four years and in Bulgaria five years. Compared to the EU as a whole, a longer, six-year limitation period has been set out only in Ireland and the United Kingdom (save Scotland with a five-year period). Latvia is an interesting standout with a 10-year limitation period, implemented in order to align it to Latvian general limitation period (Jerneva and Druviete, 2017, p. 161). It is surprising that a five-year minimum has been set out in the Directive, as it fully corresponds neither to the traditions of the majority of the Member States, nor to proposals for a unified private law in the European legal environment. One would expect for the Commission and the legislator to provide a detailed analysis of the various limitation regimes and put forward arguments for selecting a five-year limitation period, coupled with various instances of a potentially long suspension or interruption.¹⁷

It is also worth mentioning that Article 10 of the adopted Directive sets out a unified approach applying to all types of antitrust damages actions, in contrast to the Commission's White Paper and later the draft Directive which set different limitation periods for stand-alone actions and for follow-on actions. In the case of the latter, mirroring the regime in force at that time before the Competition Appeal Tribunal in the UK, the limitation period was set to two years after the infringement decision becomes final (Ashton and Henry, 2013, p. 115; Vlahek and Lutman, 2017, p. 104–105). The same regime was in force in Romania prior to implementing the Directive (Mircea, 2017, p. 239; Vlahek, 2017, p. 58).

3.2. Long-stop period

As has already been demonstrated, the length of the long-stop period, the moment it starts running, and the level of deviation from general rules on limitation vary from Member State to Member State. Among CEE countries,

¹⁷ Upon amending the US Clayton Act in 1955, for example, a uniform objective 4-year limitation period for bringing antitrust damages cases was decided on upon a survey conducted by the Senate Committee of Justice. The survey showed that limitation periods set in the laws of the federal states range from 1 to 20 years, that the majority of states set forth a 4-year limitation period, that the average limitation period was 4,85 years, and that limitation periods were at that time being shortened (Stewart, 2012, p. 71, 74).

Slovenia, Croatia and Poland implemented a two-tier system. Slovenia (where the general long-stop period is five years from the moment the damage is sustained) opted for a ten-year long-stop period, which starts to run when the damage is sustained and the infringement has ceased, and is suspended during public enforcement proceedings (Vlahek and Podobnik, 2017, p. 277–278). Croatia (where a general objective limitation period for bringing damages actions is also five years from the moment the damage is sustained) decided for a fifteen-year long-stop period starting to run from the moment the infringement has ceased (Butorac Malnar, 2017, p. 64). It is, however, not clear from the Croatian implementing provisions if this period, too, is interrupted as is the case of the shorter, five-year limitation period. In Poland, the general long-stop period of ten years applies also in antitrust damages cases, but it starts to run when the antitrust infringement ceases to exist.

4. Suspension/interruption of the limitation period due to public enforcement proceedings

4.1. Provisions of the Directive

In Article 10(4), the Directive requires Member States to ensure that the limitation period is suspended or interrupted (national legislators can thus freely choose between the two options) if a competition authority takes action for the purpose of the investigation or its proceedings with respect to the infringement of competition law, to which the action for damages relates. Such suspension is to end at the earliest one year after the infringement decision has become final, or after the proceedings are otherwise terminated.

In addition, paragraph 36 of the Directive's Preamble underscores that national rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. According to the drafters of the Directive, this is particularly important in view of the follow-on actions that build upon a finding of an infringement by a competition authority or a review court. In this respect, Member States should set forth a regime, enabling actions for damages after proceedings by a competition authority, with a view to enforcing national and EU competition law.

4.2. Concept of suspension/interruption

The statute of limitations is generally aimed at protecting debtors and certainty of their legal position, while the interruption and suspension of the limitation period are in the interest of creditors. The distinction between

suspension and interruption lies not only in their legal consequences (the limitation period is merely stayed during the suspension, while it runs anew in case of interruption), but also in the underlying reasons. Traditionally, an interruption of limitation period is caused by activities of the parties (for example, filing an action, admitting the debt), while a suspension is caused due to special (personal or social) relations between the creditor and the debtor, or by certain exogenous circumstances representing insurmountable barriers¹⁸ regarding access to courts (for further details see Vlahek, 2017, p. 43–44). Suspension of the running of a limitation period is usually also justified when the parties attempt to solve their dispute out-of-court.

The Draft Common Frame of Reference (DCFR), representing an optimal modern European civil law regulation, lists a suspension, renewal (equal to interruption in continental legal jurisdictions) and postponement of the expiry of the period of prescription. Suspension and postponement both form part of a more general, common concept of an extension of the limitation period. In addition, certain situations where continental legal systems provide for an interruption, the DCFR regime proposes a suspension of the limitation period.¹⁹ The trend of shifting from an interruption to a suspension is also tangible in some national limitation regimes (see Von Bar and Clive, 2009, p. 1167–1169).

The question is whether proceedings before the competition authorities fall within these traditional meanings. Is pending public enforcement an impediment requiring the suspension of the limitation period? Is an initiation of public enforcement proceedings comparable to filing an action triggering an interruption of the limitation period? Does the regime set out in the Directive imply that national courts are not sufficiently equipped to apply antitrust rules

¹⁸ Impediments beyond control, such as war, floods, earthquakes, epidemic diseases, other natural disasters.

¹⁹ Art. III–7:301 of the DCFR sets forth the suspension of limitation period for cases of a creditor's ignorance, while Art. III–7:302 DCFR provides that the running of the limitation period is suspended from the time when judicial proceedings to assert the right have begun, and the suspension itself lasts until a decision has been made which has the effect of *res judicata*, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended. Art. III–7:303 DCFR regulates the suspension in cases of impediments beyond creditor's control (where there is no reasonable expectation of potential avoidance or overcoming of such impediments) – the suspension in such cases is triggered only if the impediment arises, or subsists, within the last six months of the limitation period. The postponement of the expiry of the limitation period is provided for in cases of negotiations (Art. III–7:304 DCFR) and incapacity (Art. III–7:305 DCFR). The renewal of the limitation period by acknowledgement or by attempted execution is regulated in Arts. III–7:401 and III–7:402 DCFR.

by themselves, although due to the reform brought about by Regulation 1/2003²⁰ they undoubtedly have jurisdiction to apply all the provisions of Articles 101 and 102 (for details of the reform see Vlahek, 2004)? Is antitrust enforcement somewhat special in comparison to other fields of law due to the complexity of the legal issues assessed within the element of illegality or/and due to the binding effect of competition authorities' decisions finding an infringement? It is clear that public antitrust enforcement proceedings do not fit well into the general definitions of the reasons for a suspension and an interruption. In the US, where the suspension of limitation of antitrust damages claims has been set out in the Clayton Act since 1914, both the case-law and theory stress that the purpose of Article 5(i) tolling rules is 'to reap the benefits of the Government suit', 'take advantage of Government antitrust proceedings', 'get a free ride on a public enforcement action' (Stewart, 2012, p. 76–77). The purpose of tolling systems in the US and in the EU is merely to aid claimants, who are better off with a public decision in their hands before turning to the court. This, however, does not mean that without competition authorities' decision, the parties would be deprived of a remedy. They may file a claim with the court irrespective of whether an infringement decision has been issued by the relevant authority or not. It would thus be an exaggeration to interpret the lack of public antitrust enforcement as an impediment 'beyond control', preventing the claimant from pursuing his or her claim. The rules on suspension and interruption of limitation periods in antitrust represent, therefore, a novel set of rules in the Member States' regimes of limitation.

4.3. Drafting of the provisions of the Directive

In its Green Paper from 2005,²¹ the European Commission dealt with the issues of suspension and interruption quite modestly, underscoring the arguably important role the two concepts (and also longer limitation periods in general) play in ensuring efficiency of antitrust damages claims, especially in cases of follow-on suits. During its public consultations, the main thrust of the questions was focused on the issue of a suspension of limitation periods in cases of public enforcement procedures, more precisely on the trigger points for the beginning of a suspension. Two options were presented: one set the trigger at the outset of the proceedings before national competition authorities or the Commission, alternatively, the limitation period would not even start running before the

²⁰ Council Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25.

²¹ European Commission, Green Paper, Damages actions for breach of the EC antitrust rules, COM(2005) 672 final.

finality of the decision issued by the relevant authority.²² In its reaction to the Green Paper, the European Parliament adopted a positive stance to the concept of a suspension of the limitation period.²³ The White Paper of 2008, published by the Commission seems to prove, however, that the Commission has shifted towards favouring the concept of an interruption, since it presented the latter with a two-year prolongation as its preferred option for follow-on actions.²⁴ This decision was based on the recognition that claimants find it sometimes difficult to calculate precisely the remaining period for filing a claim, given that the opening and closing of public enforcement proceedings by competition authorities is not always publicly known. The Commission also stressed that if a suspension was to commence at a very late stage of the limitation period, there may not be enough time left to prepare a claim.²⁵ This led the Commission to lengthen the period of suspension for an additional year counting from the finality of public enforcement procedures. In 2007, this view was shared by the European Parliament in its Resolution on the Green Paper of 2005.²⁶ It is to be pointed out, however, that the Green Paper itself contains no mentioning of a suspension period lasting beyond the finality of public enforcement decisions. It is also worth mentioning that certain European Parliament Committees favoured shorter as well as longer extensions of suspension of the limitation periods than those suggested by the Commission. The Committee for Economic and Monetary Affairs thus proposed a six-month period,²⁷ while the Internal Market and Consumer Protection Committee, the Legal Affairs Committee and the European Economic and Social Committee pushed for a two-year period following the finality of public enforcement procedure.²⁸ The Commission and/or the European legislator provide no detailed explanation of the reasons for deciding on the said rule. It might be that the eventually chosen rule (setting out an extension of the suspension period for a year after the finality of public enforcement procedures) was inspired by the concept of tolling found in the US Clayton Act of 1914, as amended in 1955.²⁹ The US Congress Judiciary

²² Question M, Green Paper.

²³ Para. 25 of the European Parliament Resolution of 25.04.2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)).

²⁴ Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive..., p. 77, 79.

²⁵ White Paper, p. 9.

²⁶ Para. 24 of the Resolution.

²⁷ Proposal dated 03.10.2013.

²⁸ Proposals dated 09.01.2014, 27.01.2014 and 16.10.2013.

²⁹ Sec. 5(i) of the Clayton Act stipulates that the running of the statute of limitations is suspended whenever any proceeding (civil, criminal or administrative FTC proceeding) is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws. The suspension is in effect for the duration of such proceedings and for one year thereafter.

Committee had this to say about the proposed one-year postponement: ‘The plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government’s case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint (...). [The one additional year provision] would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings’. It has to be noted, however, that the Committee recognized the potential pitfalls of such a prolongation. It especially stressed the fact that a long duration of public antitrust proceedings, taken in conjunction with a lengthy statute of limitations, may tend to prolong stale claims, unduly impair efficient business operations, and overburden court calendars. We strongly agree with this position and believe that the new European regime of limitation of antitrust damages claims and its counterparts in EU Member States are susceptible to these risks by setting out very long limitation periods, postponing the beginning of the running of these periods, setting out a suspension or even interruption of limitation, and adding an additional year to it etc.

4.4. Implementation of Article 10(4) in CEE countries

Some of the Member States had already provided for a suspension/interruption during public enforcement proceedings in their legislation in

The limitation period thus expires either (a) at the end of the one-year additional period after the finality of any public proceedings or (b) at the end of a four-year period after the cause of action accrued (Sec. 4B of the Clayton Act), depending on whichever period expires the latest. The US regime of suspension (or tolling, as it is called in the US) of the limitation period in the field of antitrust, however, does not affect the running of the period itself (which thus remains set at four years), but precludes the expiration of such period of four years in cases where the public enforcement lasts longer and thus postpones the moment of expiration for a period of one year after the finality of public proceedings. What in the US system is called suspension or tolling, might better be understood in the European setting as postponement known, for example, in the DCFR. In its original wording from 1914, the Clayton Act provided for a suspension of the limitation period; there was, however, no room for a year long postponement that found its place into the Act only after the 1955 amendments. When drafting the tolling provisions of the Clayton Act, due care was taken to avoid (i) unclear and uncertain provisions, (ii) enabling enforcement of stale claims and stalling by the claimants as well as (iii) overburdening of businesses. The provisions were in fact drafted in belief that the length of civil law damages procedures would thus be effectively decreased. It is now claimed that one of the effects of the antitrust tolling system has been a rise in private enforcement of antitrust, first by follow-on actions and eventually also by stand-alone actions. For further details on the US tolling system see Stewart, 2012, p. 73–81; Practising Law Institute, 2017, p. 23, 55–56, 71–72; Waters and Morse, 1996, p. 46; Foer and Stutz, 2012, p. 252–253; Rodger, 2013, p. 107.

force prior to the Directive. Among CEE countries, Slovenia, for example, set out the suspension rule already in 2008, when the new Competition Act was enacted. It did not, however, prolong the suspension for one year after the finality of the infringement proceedings (for further details see Vlahek in: Grilc, 2009, p. 513–516; Vlahek, 2017, p. 62). Hungarian law, on the other hand, set out the one-year suspension prolongation already before the implementation of the Directive (Miskolczi Bodnár, 2017, p. 139). In Bulgaria, too, the interruption of the limitation period with a new period running after the finality of the administrative decision has been part of national law before the Directive was implemented (Petrov, 2017, p. 36).

A vast majority of the Member States decided to use the concept of a suspension of the running of limitation periods, in spite of the Commission's preference for the concept of an interruption. Among the CEE countries, Slovenia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Hungary and Romania have chosen the suspension option. In those states where suspension had already been set forth prior to the implementation of the Directive (Slovenia and Hungary), the suspension system was retained. The implementation provisions of those CEE countries that opted for a suspension are quite similar, providing for the limitation period to be suspended for the time of the public enforcement procedures and one year after its finality. None of them has chosen to set the suspension period for post-public enforcement procedure at more than one year, despite the fact that the Directive clearly provides for such an option. Given the fact that the limitation period can already be greatly extended in such legal framework, the decision of the Member States not to prolong it for more than one year is reasonable.

The concept of interruption of the limitation period was chosen by Croatia, Slovakia and Bulgaria. The relevant starting point in Croatia is the finality of the administrative decision or the moment of a different termination of such procedures. Slovakia and Bulgaria³⁰ have surprisingly set the starting point of the new limitation period at one year after the finality of the competition authority's decision. We believe this decision to be based on an erroneous interpretation of the fourth paragraph of Article 10(4) of the Directive – it seems that the Member States in question deemed that this provision encompasses also cases of interruption, rather than only suspension. It is less plausible to think that they have intentionally decided to protect creditors even more intensely than the Directive. Although not running contrary to the Directive, it is questionable whether such intense protection of the creditors does not go beyond what is acceptable in terms of legal certainty and the fair balance of the interests of the debtors and of the creditors. Some authors have

³⁰ Outside the CEE circle also Spain and Sweden.

fittingly, in our view, also criticised such a regime, cautioning that it unduly burdens the position of the infringers, and is in addition fairly unnecessary as the interruption concept already entails a ‘fresh’ start of the new limitation periods (see also Blažo, 2017, p. 253).

In view of the consequences the interruption system has on limitation, and thus on the creditor-debtor relationship, the percentage of Member States, including CEE states, opting for the interruption system is surprisingly high (32% overall, 27% among CEE countries) (for details of particular national regimes see Vlahek, 2017, p. 57–61). It should be underscored that the limitation period in the ambit of this concept starts to run anew only after the finality of the public enforcement procedure, which, in theory, could even mean decades after the harm was caused. In line with the explanation of the Commission in its White Paper in 2008, the Slovak legal authors stress that the interruption system is less problematic, as the period will restart after the final infringement decision. By contrast, the suspension system can be troublesome as its term shall be calculated with reference to the authorities’ ‘action for the purpose of the investigation or its proceedings’. It is claimed that this can be difficult to establish in Slovakia, because such information is not published by their competition authorities. In addition, such an action by the authorities may even take place before any proceedings start (Blažo, 2015, p. 270–271). Croatian and Bulgarian drafters offer no explanations for their decision. It might be that they deemed it more in line with the main goal of the Directive, that is, an effective enforcement of competition law.³¹

According to the Preamble, Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation. This prerequisite would probably be met either by a shorter long-stop period to which a suspension or interruption would apply, or by a longer long-stop period that could not be suspended or interrupted. Such conclusion can be drawn also from the Commission’s Green Paper of 2005 (Question M). When assessing the draft Directive, which did not mention the long-stop period, the Internal Market and Consumer Protection Committee, for example, proposed for the Commission’s text to be supplemented with a paragraph stating that irrespective of the rules on length, beginning and suspension of the shorter limitation period, damages actions should be filed within ten years after the act causing the damage has taken place. Article III.–7:307 of the DCFR also implicates that the long-stop period cannot be suspended. National rules on this issue are rather vague. In Slovenia, for example, this is not explicitly set

³¹ This explanation was, for example, given by the Belgian legislative proposal.

out in the law, and the theory and case-law barely address this issue. The position taken there, however, is that the rules on suspension apply also to long-stop periods (Vlahek and Lutman, 2017, p. 117). This, coupled with fear that otherwise the long-stop period might run out too soon, was the reason for including into the Slovenian implementing provisions an explicit rule that a suspension applies to both types of periods.

The implementing provisions (or commentaries thereof) of certain Member States with a two-tier limitation period system that have opted for the interruption concept (for example, Croatia and Denmark) reveal, on the other hand, that the interruption itself does not apply to the 'longer' limitation period. Regardless of the fact that the shorter five-year period restarts after the finality of an administrative decision (or other ways of terminating the proceedings) the right to claim damages will be, in the above jurisdictions, in any case barred after the expiry of the longer period, which will not be interrupted by the public enforcement procedure. In Croatia, this longer period amounts to fifteen years after the cessation of an infringement. The differentiation between the shorter and the longer period, and the effect of an interruption and a suspension on them is important, because of the consequences both designs ultimately have for the absolute length of the debtors' exposure to claims. The outcome may well be that the limitation will occur at a later stage in a suspension system than in the interruption system. As underscored, in Croatia, for example, the interruption of the limitation period pertains only for the shorter, five-year period (while the longer limitation period runs intact) – the interruption itself results in the shorter period starting anew after the finality of the public enforcement decision. This might lead us to speculate that the infringer's position in Croatia (and, indeed, in all Member States opting for an interruption instead of a suspension) is inferior to that in Slovenia and other Member States that have opted for the suspension concept. Such a conclusion is an oversimplification, as, for example, in Slovenia, the suspension affects also the longer 'objective' limitation period, which may result in the infringer's longer 'exposure' to potential claims than in Croatia. Therefore, taking into account the length of the public enforcement procedure, the time of its beginning and the starting point of the shorter limitation period, the infringer might very well be worse off in Slovenia than in Croatia. It is, however, also true that his/her position might be perceived as superior because the shorter, five-year long period could expire quicker in Slovenia than in Croatia.

The event triggering the suspension or interruption of the running of limitation periods has not been uniformly regulated in the Member States. This can be attributed to an extremely vague wording of Article 10(4) of the Directive ('if a competition authority takes action for the purpose of the

investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates'). While the regimes of the Member States seem, at first glance, to be verbatim copies of the Directive's wording, a closer analysis shows that the implementation provisions are nuanced and vary in certain important aspects. In addition, the commentators and the proposing Member States themselves seem to have a contrasting understanding and interpretations of the Directive's provision in question. An exact definition of the critical triggering event is of utmost importance in those Member States that opted for the suspension concept, as the length of the remaining limitation period depends on the decision regarding its starting point. If we slide the starting point to the left on a timeline, the suspension window will increase. One could identify, as the most problematic trigger events measures that are related to public enforcement investigation and procedure but are not properly formalised and thus not obvious or even noticeable to the parties. Do all kinds of activities of the competition authorities suffice in this context, also those taking place prior to issuing a decision starting the proceedings, for example, sending the undertakings and/or their managers or shareholders an informal request to submit information required for a market study? For example, Croatia set the 'beginning of the procedure in which the infringement will be established' as the triggering event, whereby some Croatian authors interpret it as the strictly formal beginning of the procedure, and thus not encompassing any prior investigative measures that would not be known to the parties (Butorac Malnar, 2017, p. 64). The Czech implementation proposal, on the other hand, provides that the limitation periods do not run during the formal infringement procedure as well as during the informal investigation. Furthermore, the Czech implementing proposal provides for a suspension during the disclosure of evidence procedure. Some Member States' implementing acts distinguish between the investigation and the infringement procedure, but define both as activities that trigger the suspension of the limitation period. The Latvian proposal rather imprecisely references to the complete duration of an investigation of an infringement. In Slovenia, the drafters of the implementation act have somewhat awkwardly copied the wording of the Directive, and decided on a definition that is as inexact as the original one. According to the Slovene implementation legislation, the triggering moment is 'the moment in which the authority takes measures for the purpose of an investigation or procedure relating to an infringement of competition law'. Such provision was faced with criticism in Slovenia as being ambiguous and not guaranteeing legal certainty and predictability. Drafters explained that activities taken by the competition authority prior to the opening of its proceedings, such as surveying a market, are also covered (see Vlahek, 2017, p. 67–68). It is therefore clear that in a large part of the CEE

countries, the task of clarifying the relevant trigger point for the suspension or interruption of limitation periods is, at the moment, left in the hands of national courts. The Commission has not been very helpful in this regard as it sometimes defines the relevant moment as the beginning of infringement proceedings,³² while other times it refers to the moment when the authority starts investigating the infringement.³³ One can thus not overstate the need for future interpretation of this part of the Directive by the CJEU. If, in fact, non-detectable activities of the authorities are also covered in the definition, it is important that any abuses of the provision to the detriment of the defendants are prevented (Vlahek, 2017, p. 68).

Similarly important is the moment when the suspension stops and the starting point of the running of the new limitation period after its interruption. In Article 10(4), the Directive sets forth that the suspension 'shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated'. As has already been emphasized, those Member States that opted for the suspension concept have all set this period to one year. None of the countries thus felt the need to extend this period beyond one year, although the Directive allows for that. We find it important to reiterate, however, that a one-year post-public proceedings period was also enacted by some of the Member States that otherwise opted for the interruption concept, which to us remains a peculiar solution, as the interruption results in the limitation period starting anew.

The event defined as the starting point of the running of the additional one-year suspension period by the Directive is the finality of the public enforcement decision, or the termination of such procedure. The 'suspension Member States' have all set this moment by following the provision of the Directive. Although the Directive provides in the same paragraph for the concept of an interruption as an option for Member States, it says nothing about the starting point for the running of a new limitation period. The 'interruption Member States' have similarly set as the starting point for the running of a new limitation period the day when the public enforcement decision becomes final, or the termination of such procedure, or the first next day.

It should hereby be stressed that the rules on a suspension and interruption of limitation periods apply not only with respect to proceedings ending with a final decisions finding an infringement, but also in all other public

³² European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.06.2013, p. 16, http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (22.04.2017).

³³ http://europa.eu/rapid/press-release_MEMO-14-310_en.htm (22.04.2017).

enforcement proceedings irrespective of their outcome. This means that the limitation period was suspended or interrupted also if the authority terminated the proceedings without finding the infringement, which seems logical keeping in mind that the purpose of a suspension/interruption is to enable claimants to wait for the competition authorities to assess the alleged infringements without fear that their claims are time-barred. Despite a termination of given proceedings by the authority (in this case, the authority does not necessarily determine that the infringement did not take place (such is the case in Slovenia)), the claimants might still file damages actions against the defendant and try proving the infringement to the court in a stand-alone action.

Another relevant question is where the public enforcement procedure that triggers a suspension or interruption should have taken place. Member States, including CEE states, have uniformly defined as relevant not only their domestic competition authorities, but also the European Commission, and other Member States' competition authorities.³⁴

The final issue that needs to be addressed is how the rules on suspension operate in cases of multiple infringers. Do they extend uniformly to them all, or are they applied individually according to the circumstances of each individual infringer? Let us imagine that a competition authority finds an infringement in the form of a cartel of two undertakings, but only one of them makes use of legal remedies and appeals against the authority's decision. In this case, the decision issued against the infringer that has not appealed becomes final, and so the suspension of the limitation period for claims against the non-appealing undertaking ends. At the same time, limitation is still suspended in relation to the infringer that has appealed the decision. Potential claimants thus have to be cautious if they wish to file actions against all of the infringers. On the other hand, undertakings that did not appeal against their administrative decisions, have to take into account that they might be targeted first by claimants, and that they might be held jointly and severally liable for the harm caused by the infringement (an extensive analysis of this issue is available in Akman, 2013). However, if they are immunity recipients, a special regime applies according to Article 11(4) of the Directive requiring Member States to ensure that any limitation period applicable to cases covered by Article 11(4) is reasonable and sufficient to allow injured parties to bring actions against immunity recipients. This is particularly relevant in cases where an immunity recipient is jointly and severally liable also to other injured parties (not only to its own direct or indirect purchasers or providers), that is, in cases where full compensation cannot be obtained by such injured parties from other infringers. Slovenia, for example, implemented this provision by stating that the limitation period

³⁴ Authorities of Norway, Liechtenstein and Iceland forming the EEA have not been mentioned.

does not run between the immunity recipient and the claimant who is not the immunity recipient's customer, between the moment the claimant filed a damages claim against other infringers and the moment he/she could not have obtained full compensation from these other infringers. Immunity recipients might thus be unsure for a long time about their status as defendants. It should be added that we find the whole regime of joint and several liability as set out in Article 11 of the Directive to be extremely vague and can see why at least some of the Member States – Slovenia for example – encountered difficulties in implementing its provisions (see Vlahek, 2016b, p. 576–580).

III. Conclusions

We do believe that the Directive's regime of limitation is too activist and 'political' in its inclination towards the position and interest of the claimant, whom it clearly favours, while the status of the infringer-debtor is largely overlooked, as is the issue of legal certainty. We point yet again at the important differentiation between the protection of 'claimants who would otherwise be left without effective legal remedies' and the protection of 'free-riding claimants and their stale claims'. It is unfortunately not clear whether the Directive understands and provides for a clear dividing line between these two.

Although shortening and unification of limitation periods is encouraged in comparative law, the implementation of the Directive has resulted in a further differentiation of the limitation regimes in EU Member States, as well as further prolongation of the limitation periods in the field of antitrust damages claims. In most of the EU Member States, including CEE countries, the length of the subjective limitation period had to be extended beyond the majority of general limitation periods. In addition, limitation periods are being suspended or interrupted during public enforcement and ADR proceedings. Thus, limitation will occur only at a very distant point in the future, given the fact that (at least in CEE countries) public enforcement procedures can often take years.³⁵ Hopefully, this will improve as a result of the Proposal for a Directive to empower the

³⁵ Data on the length of judicial review procedures in competition law cases in EU Member States shows that in some CEE countries (Poland, Slovenia, Hungary, Slovakia, the Czech Republic) such procedures take from 800 to 1600 days on average. The collected data pertains only to first instance courts and thus does not reveal the length of a 'complete' judicial review process including the potential involvement of appellate courts. It could be therefore inferred that the judicial part of the public enforcement procedure alone could take five or more years. The 2016 EU Justice Scoreboard, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf (01.09.2017). For an analysis of the length of Slovenian antitrust damages cases see Vlahek, 2016a.

competition authorities drafted to strengthen national competition authorities.³⁶ Furthermore, some Member States have abandoned their general long-stop limitation periods, or are applying the rules on suspensions/interruptions also to long-stop periods, making it almost impossible for the periods to run out. One of the consequences of the implementation activities is the existence of new sets of rules on limitation that diverge substantially from the general rules already in place in the civil laws of the Member States. The Directive also failed to bring about harmonization in the special field of antitrust, as its proposed regime lacks precision and leaves many issues unsolved, thus leading to legal uncertainty due to dissimilar implementing provisions in Member States. The wording of Article 10 as well as other rules on limitation set out in the Directive, the dilemmas the drafters of national implementing legislation were faced with, and a detailed analysis of the national provisions show that some of the Directive's rules on limitation periods are vague and unclear. Furthermore, some provisions of the Directive offer broad discretion to Member States, while others are very detailed and prevent national legislators from aligning the new rules to their national civil law traditions. Clear reasoning in support of some of the Directive's provisions on limitation is also lacking. Some of the issues that would be worth addressing in detail, such as the application of the regime of limitation to other civil claims outside damages claims, are not covered (see Vlahek and Podobnik, 2017, p. 270–271, 276). Detailed rules on the application of the Directive's limitation regime to relationships existing prior to the enactment of the novel implementing legislation could also be provided. Member States, including CEE countries, have expectedly taken different paths in implementing the relevant provisions. The result of the implementation process is that, despite prudent attempts of the Member States to transpose the Directive as accurately as possible and to insert the new rules into the existing national limitation frameworks as logically as possible, the harmonization of the limitation regime in the field of antitrust has been rather unsuccessful. Moreover, novel sets of limitation regimes have been implemented in Member States that deviate to some extent from their traditional national rules and make the whole limitation system hard to comprehend.

We can also establish that CEE countries do not deviate greatly from the rest of the EU Member States – the differences in their implementing provisions are (similarly) a result of their varied general limitation regimes and – to an extent – different perception and interpretation of the Directive's aim and wording. Given the challenge they encountered with the ambiguous provisions of the Directive, they have in fact done a remarkable job. It is now

³⁶ Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2017/0063 (COD).

for the courts to apply the new system, detect its pitfalls and offer solutions, and for the competition authorities to detect antitrust infringements, assess them as thoroughly and quickly as possible to ultimately adopt well-reasoned infringement decisions.

On a more general note, we detect that the Commission and the Parliament are sending an important signal through the Damages Directive and the Proposal for a Directive to empower the competition authorities. Public enforcement is to be strengthened, as it paves the way for future successful private enforcement claims; it seems at the same time that stand-alone private enforcement no longer represents an important goal for the Commission. It is obvious that the new private enforcement regime shifts its scope to national competition authorities and limits the role of Member States' courts to mainly follow-on suits. The statute of limitation in the Directive stands as a fine example of this. How else can one understand the adoption of a regime, which could result in extremely long suspensions or even interruptions of limitation periods in damages claims procedures (for further details, see Vlahek, 2017). To put it very bluntly, it seems as if the limitation regime at hand has been tailored primarily to grant enough time to public enforcement authorities to finish their procedures, so as to provide potential claimants with a legal basis for their follow-on damages claims.

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