Competition Practice

# Transitional law on the limitation period for cartel damages claims (Judgment of the CJEU of 22 June 2022, case C-267/20)

A strange decision of the Court of Justice of the European Union that is prone to be misunderstood, but which can also be read as a correct application of the transitional law regarding limitation periods.

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## 1. The judgment

Despite the fact that there is almost a common understanding of the scope of the doctrine of this judgment, which ultimately concludes that actions for damages in connection with the trucks cartel are time-barred *in Spain* after five years, I will allow myself, if only for dialectical purposes, to question whether this is the only possible inference from a judgment that is confusing in its arguments and obscure in its concept.

It is common knowledge that the limitation period that applied in Spain before the transposition (better put, the entry into horizontal effect) of Directive 2014/104 was one year (Art. 1968 of the Civil Code), whereas in the Directive (Art. 10(3)) and in Royal Decree-law 9/2017 (Art. 74(1) of the Competition Act) is five, and that Article 22(1) of the Directive requires Member States to ensure that national measures adopted in order to *comply with the substantive provisions of the Directive are not applied retroactively* (= first additional provision, pt. 1, RDL 9/2017). According to the judgment I am commenting on (paras. 46 and 47), which will not be questioned in this paper, the statute of limitations is a substantive and not a procedural matter, for the purposes of Article 22 of Directive 2014/104.

The maxim of the judgment, which is intended to summarise the arguments developed by the court, is contained in paragraph 79, which I transcribe:

> In the light of the foregoing, Article 10 of Directive 2014/104 must be interpreted as constituting a substantive provision for the purposes of Article 22(1) of that directive, and as meaning that *an action for damages* for an infringement of competition law which, although relating to an infringement of competition law which ceased before the entry into force of the directive, *was brought after the entry into force of the provisions* transposing it into national law *falls within the temporal scope* of that directive, *in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive.*

This maxim is not connected with an earlier statement in paragraph 32 of the judgment, according to which, as a matter of principle, the *new rule* only applies "to the future effects of a situation which arose under the old rule, as well as to new legal situations". The exception to the rule, which would apply "if the *new rule* is accompanied by specific provisions which specifically lay down its conditions of temporal application", will not apply in our case either, not being the case of Article 10 of the Directive, as is clear from Article 22(1).

As I said, it seems to be a common understanding of this obscure passage that, be that as it may, at the time the claimant filed the liability claim, he had a five-year limitation period that had started to run (as will be seen later) from a time well after the commission of the infringement and the entry into force of Directive 2014/104 (*cfr. Expansión Jurídico,* Tuesday 28 June 2022).

However, nowhere in the judgment is there even a suggestion that from the "relevant point in time" the limitation period should be five years, nor that the directive should be applied horizontally directly at this point, prior to the enactment of the transposing domestic law (as, on the other hand, the judgment maintains with regard to Article 17(1)(88), because it is a rule that is binding on the States).

## 2. Obscurity as to the *terminus a quo* of the limitation period

I disagree with that understanding. The sentences I have highlighted with italics in the transcription are obscure because they can be understood as referring to very different realities.

It cannot meaningfully be said that "an action for damages [...] falls within the temporal scope of that directive", which is either gibberish or simply false, because no "action for damages" "falls within the temporal scope" of any rule, unless the rule was adopted subject to a final time limit ("*e.g. until the state of alarm caused by COVID is lifted*"), especially if the rule has no horizontal direct effect and if what is at issue is precisely what its temporal "scope" is. The only hint of the "temporal scope" that can be found in the rule is that this "scope" cannot include retroactive application (Art. 22(1)). This makes as little sense as if we were to say that an action for damages falls within the scope of application of Article 74 of the Competition Act.

As regards the final sentence of the paragraph, I also fail to understand the value of the thing it emphasises. It is emphasised that, although the infringement predates the

directive, the action is nevertheless subsequent to the date of its entry into force "in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive". Does this mean that the limitation period of the old rules applies, which, *not having elapsed* (see below), leaves the matter definitively settled? Or does it mean that the *new rule* applies because the limitation period of the old rules had not elapsed? Or does it mean that the state of affairs changes when the transposition date expires (unsuccessfully), it being sufficient that the one-year period of the old rules had not already elapsed when this contingency takes place? And what happens in this case: does the new five-year period of the directive, which, moreover, lacks direct horizontal effect, come into force, or does the temporary rule of the directive apply on a transitional basis as a "bridge" pending the subsequent transposition by Royal Decree-law 9/2017? And how can the new time-limit have effect from the date of expiry of the time limit for transposition, if it turns out that, according to the judgment itself, the *dies a quo* of the limitation period of the *actio nata* in 2007 (the time of purchase with overpricing) does not start to run until a later time (6 April 2017) than the date of expiry of the time limit for transposition? Which statute of limitations does Article 74 of the Competition Act apply to, that of the Civil Code or that of the directive which was applied with provisional direct effect (the 'legislative bridge')?

## 3. Options open to interpretation

Four possible interpretations can be proposed on the basis of the confusing and obscure judgement. One, that the limitation period is governed by the Spanish Civil Code and that, by application of its Articles 1968 and 1969, the one-year period would not have elapsed. Two, that the limitation period ceased to be governed by Spanish law at the time when the time limit for transposition expired (unsuccessfully) (on 27 December 2016), especially because on that date the limitation period had not yet begun to run, which will do so under the new rule. Three, the limitation period ceased to be governed by Spanish law at the time when the time limit for transposition expired (unsuccessfully) (on 27 December 2016) and the limitation period began to run (on 6 April 2017), and Directive 2014/104 is the *new rule* that applies from that date. Four, although the limitation period began to run under the old rule (on 6 April 2017), it is sufficient for the *new rule* to have entered into force during the course of this limitation period (on 27 May 2017) for it to be understood to have been extended to the longer period established by the new rule, with the periods that ran under the old rule being understood, however, to have been elapsed for the purposes of the new rule.

I transcribe below the relevant paragraphs of the judgment. The italics emphasise textual statements that either do not make sense or may have several meanings:

> § 33. As a general rule, only legal situations existing after the expiry of the time limit for the transposition of a directive which may be brought within the scope *ratione temporis* of that directive (order of 16 May 2019, *Luminor Bank*, C8/18, not published, EU:C:2019:429, paragraph 32 and the case-law cited).
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> § 34. That *applies a fortiori to legal situations which arose under the old rule and which continue to*

*produce effects after* the entry into force of the national measures taken to transpose a directive after the expiry of the time limit for its transposition.

§ 48. It is common ground that Directive 2014/104 was transposed into Spanish law five months after the expiry of the time limit for transposition provided for in Article 21 thereof, as Royal Decree-Law No 9/2017 transposing that directive entered into force on 27 May 2017, *it is necessary, in order to determine the temporal applicability of Article 10 of that directive, to ascertain whether the situation at issue in the main proceedings arose before the expiry of the time limit for the transposition of the directive or whether it continued to produce effects after the expiry of that time limit*.

§ 49. It is necessary to ascertain whether, on the date of expiry of the time limit for the transposition of Directive 2014/104, namely 27 December 2016, *the limitation period applicable to the situation at issue in the main proceedings had elapsed*, which means determining the time when that limitation period began to run.

§ 50. With regard to the time when that limitation period began to run, it must be recalled that, according to the case-law of the Court, where none of the EU rules governing the matter are applicable *ratione temporis*, it is for the legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of Articles 101 and 102 TFEU, including those on limitation periods, provided that the principles of equivalence and effectiveness are observed.

§ 73. In so far as *the limitation period began to run after the date of expiry of the time limit* for the transposition of Directive 2014/104, that is to say, after 27 December 2016, and *continued to run even after the date of entry into force of Royal Decree-Law* No 9/2017, adopted to transpose that directive, that is to say, after 27 May 2017, *that period necessarily elapsed after those two dates*.

§ 74. It therefore appears *that the situation at issue in the main proceedings continued to produce effects after the date of expiry of the time limit for the transposition* of Directive 2014/104, and even after the date of entry into force of Royal Decree-Law No 9/2017 transposing that directive.

§ 77. In a dispute between individuals such as that at issue in

the main proceedings, the national court is required, where appropriate, to interpret national law, as soon as the time limit for the transposition of an untransposed directive expires, so as to render the situation at issue immediately compatible with the provisions of that directive, without however interpreting national law *contra legem* (see, to that effect, judgment of 17 October 2018, *Klohn*, C167/17, EU:C:2018:833, paragraphs 45 and 65).

§ 78. In any event, given that *fewer than 12 months elapsed* between the date of publication of the summary of Decision C(2016) 4673 final in the *Official Journal of the European Union* and the bringing of RM's action for damages, that action does not appear, subject to verification by the referring court, to have been *time-barred at the time when it was brought*.

**4. Relevant points in time**

During 2006 and 2007, RM acquired from Volvo and DAF *Trucks* three trucks manufactured by them. On 19 July 2016, the Commission adopted Decision C(2016) 4673 final relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 - Trucks) and issued a press release in this regard. On 6 April 2017, in accordance with Article 30 of Regulation No 1/2003, the abovementioned institution published the summary of that decision in the *Official Journal of the European Union*.

Let us illustrate the decisive dates:

— *Date of purchase of the trucks*: we chose 31 December 2007 as the most favourable date for the claimant.

— *Date of termination of the infringement within the meaning of Article 25(2) of EU Regulation 1/2003:* 18 January 2011.

— *Filing date of the RM lawsuit against Volvo and DAF:* 1 April 2018.

— *Date of entry into force of Directive 2014/104*: 26 December 2014.

— *Date of expiry of the time limit for transposition of Directive 2014/104*: 27 December 2016.

— *Date the limitation period begins to run for actions for damages in connection with the Truck cartel*: 6 April 2017 (publication of the Commission's decision in the *OJEU*, paragraphs 70, 71, 72 of the judgment).

— *Date of entry into force of the Spanish transposition (RDL 9/2017)*: 27 May 2017.

If the limitation period had started to run from 2008, RM's action would have been time-barred at the time the action was brought, and the publication of the 2014 directive would not have opened a new limitation period. If the limitation period had started with the publication of the press release of the Commission's decision (on 19 July 2016), RM's action would have been time-barred at the time of bringing the action, unless it is understood that the expiry of the time

limit for transposition of the directive (on 27 December 2016) entailed the entry into force of the new limitation period of the directive as a direct horizontal effect of the European rule, which is possible, at least, as long as the annual limitation period of Article 1968 of the Civil Code had not elapsed on that date (27 December 2016). If the limitation period had begun, as the judgment holds, on 6 April 2017, the action would have been alive, *even with the one-year limitation period*, at the time the action was brought (1 April 2018). Consequently, assuming (and accepted here) that the *dies a quo* of the limitation period took place on 6 April 2017, the limitation period would not have occurred, even if it were understood that the limitation period was subject to the limitation period of Article 1968 of the Civil Code, as required by Article 22 of the Directive. *Why propose a more rigorous interpretation, if the preliminary ruling question had been answered in the most favourable terms possible for the "effectiveness" of the claimant's right?* Moreover, the proposed interpretation, technically the correct one, "does not undermine the principle of effectiveness of Article 101" of the Treaty on the Functioning of the European Union, which is what the judgment seems to take care of (para. 53).

**5. The directive cannot be the "new rule"**

The damage caused by the cartel (definitively consolidated at the date of the purchase) is in no way a 'legal situation which continued to produce effects after the date of expiry of the time limit for the transposition', to use the phrase used several times in the judgment to justify the supervening effectiveness of the new rule. Only by observing this obvious fact, having to fix the entry into force of the *new rule* at the deadline for the obligatory transposition could have been avoided. Because the cartel damage is not a *continuing damage*, although for sanctioning purposes it could be proposed that the infringement in which the cartel consists is a *continuing infringement*. It is quite a different matter that the limitation period for that damage did not begin to run until an even later date because only on that date were the "subjective" conditions for the limitation period of Article 1968 of the Civil Code met. But this does not mean that the damage is a situation that is delayed and occurs over a continuous period of time.

But why do we propose that at a given moment (27 December 2016 or 6 April 2017) the directive becomes the *new rule* within the meaning of Article 1939 of the Civil Code? The directive is never directly applicable - not even after the date of expiry of the time limit for transposition (paragraph 76 of the judgment) - nor does it enter into force because the commencement of the limitation period under Article 1968 of the Civil Code coincides with an act of the Commission (publication in the *OJEU*). The *new rule* imposing a five-year limitation period is Royal Decree-law 9/2017, which comes into force on 27 May 2017, *when the limitation period has already begun to run (6 April 2017), and precisely in accordance with the old rule*. Note that both Article 22 of the directive ("national measures") and the first transitional provision of Royal Decree-law 9/2017 ("this royal decree-law") are consistent in that they consider that the *new rule* can only be the (Spanish) transposition, not the directive itself.

**6. Transitional law of the "limitation period that has begun to run".**

According to the Spanish transitional arrangements, "actions and rights not brought or exercised [before the *new rule* came into force] shall subsist to the extent and under the terms recognised by the previous legis-

lation, but subject as to their [...] duration to the provisions [of the new rule]" (4th trans. prov. of the Civil Code). If "duration" is also predicated of actions and if these are subject to a limitation period, it would result that *if the action for damages were subject to a limitation period under the old rule when the new rule comes into force* (we leave in the air whether this rule is the directive or Royal Decree-law 9/2017), it *would be understood that the limitation period would last for all the time remaining after subtracting from five years the limitation period already elapsed under the old rule*.

But the fourth transitional provision of the Civil Code relinquishes its application in favour of a specific rule for the transitional law of the limitation period. The rule of Article 1939 of the Civil Code is summarised in the following terms: the limitation period *that has begun to run* before the entry into force [of the new rule] shall be governed by the old rule, even if it otherwise runs under the new rule.

I have reason to believe that the Civil Code does not consider a limitation period to have begun to run only when the subjective conditions of knowledge referred to in Articles 1968 and 1969 are met, but that the "beginning" of the limitation period coincides for transitory purposes with the moment when *the relevant action arises*. For reasons that are too long to explain, and bearing in mind that our Civil Code has never known the institution of the "stay" of a limitation period, one thing must be the *terminus a quo* of the action and another thing, the time of this limitation period *that is not counted* for the affected party who does not know (as long as he does not know) the precise circumstances. The *elapsed limitation period is not counted* for each affected party except when the conditions developed by the case law in application of Articles 1968 and 1969 of the Civil Code are met; but the limitation period runs, however, for whoever it may run, and *runs in general* for all other relevant purposes. "In general", for example, for the purpose of determining the transitional arrangements in Article 1939 of the Civil Code.

It is an absurdity to argue, going back to the case at hand, that the limitation period for the truck cartel damages action does not run until 6 April 2017. The action arises on the day of purchase (of the purchase of each buyer), but, depending on the conditions, it *may not run against certain people*. Consider that the haulier brother of a Volvo *insider*, who was fully involved in the cartel negotiations, buys two Volvo commercial vehicles in 2009 after his brother has convinced him of the goodness of his brand and has explained to him *in detail* that he should not bother to look for an alternative because the price of the *trucks* is cartelised. It is a fact that that this haulier cannot claim that the limitation period for his action does not begin to run until 6 April 2017. The limitation period for an action for damages starts to run when the damage is caused, even if, in accordance with what has been said, this period is not calculated against parties in respect of whom there is no evidence of the subjective knowledge required by Article 1968 of the Civil Code.

*However, I will dispense with the above consideration*, without trying to take advantage of a conceptual mechanism that some will call fictitious, and I will return to a common position according to which the limitation period begins to run when the conditions of Articles 1968 and 1969 of the Civil Code (or 10 of the Directive) are met. Even with that, Article 1939 of the Civil Code does not produce homogeneous results for each person, because for some the period will have

started to run earlier than for others. *But even so, let us dispense with this precaution* and assume that the limitation period began to run on 6 April 2017. This being the case, the limitation period has started to run under the rule *with the direct horizontal effect that was in force on 6 April 2017.* Notably, *this rule is the Civil Code.* It cannot be the directive, which can never become the horizontal rule of reference. It cannot be the Civil Code "reinterpreted in accordance with the directive" because the leap from one to five years cannot be achieved by means of a legal interpretation.

Of course it will be said that Article 1939 of the Civil Code is a rule of national law and that the directive must be interpreted with autonomous resources. *But in reality there is nothing to interpret in accordance with the directive* because all the institutions and techniques involved remain in the civil law of each state. "*Commencement of the limitation period*" is neither an institution nor a technique that belongs to the catalogue of EU competition law. Nor is Article 1939 of the Civil Code an idiosyncratic Spanish rule. It comes from Article 2281 (now repealed) of the *Code Napoleon*, which has been passed on to all the French filiation codes.

It is true that the codified solution set out above is not the only one possible. It is legitimate for a legislator to employ a method of *divisibility of the running time*, so that (in terms of the current Article 2222 of the French *Code*) "la loi qui allonge la durée d'une prescription est sans effect sur une prescription acquise", but the *new rule* applies "lorsque le délai de prescription n'etait pas expiré a la date de son entrée en vigeur". This is also the solution proposed by paragraph 169 of the German Civil Code Introduction Act to resolve the conflict of application between the German Civil Code (*Bürgerliches Gesetzbuch* - BGB) of 1900 and the previous territorial laws of the German states: the provisions of the *new rule* "finden auf die enstandenen noch nicht verjährten Ansprüche Anwendung"; which is not entirely the solution later chosen by Paragraph 229, § 6, paragraph 4 of the same law to discipline the temporal transition from the old and the amended (in 2001) limitation period arrangements of the German Civil Code. It is quite possible that the European court wanted to apply this rule, but it is strange that it does not even suggest it. Moreover - and we repeat - even if this were the case, this continuity of limitation periods should occur *only on 27 May 2017*, not before, because before this date there is only the directive, which cannot be a horizontal rule directly applicable to the limitation period. And also because of this, which I will not tire of repeating, namely that the result would have been the same if the limitation period had remained constant until the final deadline for bringing the action.

Article 1939 of the Civil Code contains a second subparagraph. A rule of medium retroactivity is established for the case where the *new rule* introduces a shorter limitation period than the old one: the right lapses when that period elapses, even if the action was not time-barred under the rule applicable when the period began to run. There is no retroactivity when the *new rule* introduces a longer limitation period. The rule comes again from the original Article 2281 of the *Code Napoleon* and followed by the French-inspired codes. The same rule has been legally imposed in § 229, § 6, paragraph 4 of the German Civil Code Introduction Act for the purposes of the temporal succession of the codified limitation period arrangements in 2001, and also, more recently, by the single transitional provision, letters *b* and *c*, of the Approval of the First

Book of the Catalan Civil Code (Catalonia) Act 29/2002. *Such transitional succession between the new rule and the old rule is a matter for national legislation*, as there is no more Union baggage in this respect. There is no rule in the *acquis* that imposes a specific solution to the conflict of temporary succession of different limitation periods. And why should the system of continuous divisibility be chosen to solve a problem of succession of rules that affects Spanish law?.

Please note that, when the temporary succession of Article 1968 of the Civil Code by Article 74(1) of the Competition Act takes place, the transition from one to five years' limitation periods will be governed by Article 1939 of the Civil Code, i.e. *there will be no five-year limitation periods for actions for damages for which the limitation period began to run before 27 May 2017.*

## 7. Conclusion

For the sake of common sense, fairness, established law and the requirements of the principle of effectiveness of European Union law, it must be proposed as an authentic interpretation of the judgment of the Court of Justice of the European Union of 22 June 2022 that *the annual limitation period of Article 1968 of the Civil Code had not lapsed, nor was the action time-barred, when RM brought its claim against the manufacturers.* The five-year limitation period of Article 74 of the Competition Act (and there is no other legal source of this period) will never apply to claims arising from the truck cartel.