36 Piecemeal Harmonization of European Civil Law

The Case of Limitation Periods in the Antitrust Damages Directive

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36.1 Introduction

In 2014, the Directive on antitrust damages actions (the "Directive") was adopted, offering a common set of rules for antitrust damages claims in the EU.[1] The Directive has a twofold aim, namely to ensure full compensation of antitrust harm, and to prevent that claimants face varying rules across Member States.[2] Diverging rules are argued to lead to an uneven playing field, which may jeopardize the proper functioning of the internal market. Differing rules may also affect the decision of injured parties about where to file their claims, arguably leading to uneven enforcement for undertakings depending on their place of establishment, and ultimately affecting competition on the markets.

The Directive is a prime example of harmonization with a limited scope that results in approximation of parts of national civil and procedural law. The desirability of harmonization of civil procedural law has been heavily debated, with proponents considering it necessary for the functioning of the internal market, while more critical commentators emphasize the risk of fragmentation of civil procedural law of this vertical approach, or even oppose harmonization in this area of law altogether.[3]

This paper considers the Directive in light of this critique, focusing in particular on its rules on limitation periods. The paper addresses the question whether a special limitation period for antitrust damages actions is warranted and which problems might occur. The paper evaluates the design of the rules on limitations in the Directive, laying out the current differences in limitation periods across Member States and assessing the impact of the

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1 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 O.J. 2014 L 349/1.

2 Preamble para. 54 of the Directive; 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, pp. 2-5.

3 See Section 36.2.1 below.

Directive. In doing so, the paper also discusses the reasons why rules may continue to diverge once the Directive has been implemented, relating to different implementation by the Member States, unclear terms in the Directive and rules that are not affected by the Directive.

The remainder of the paper is structured as follows. Section 36.2 provides an overview of the debate regarding the harmonization of civil procedural law. Section 36.3 discusses the rationale for limitation periods as well as the particular issues that arise in the context of limitation periods for antitrust damages claims. Section 36.4 presents a comparative overview of the applicable rules on limitation periods in the Member States, followed by an investigation of the impact of the Directive. This section also discusses the possible ways for Member States to implement the Directive, as well as unclear terms and rules that are not dealt with by the Directive, which may result in remaining differences in the rules. Section 36.5 concludes.

36.2 Harmonization of Civil Procedure

36.2.1 The Debate on the Desirability of Harmonization

The harmonization of civil procedural law is a controversial theme, and has been discussed for a long time as part of the general debate on the desirability of harmonization of private law.[4] Historically, procedure was viewed by many as too closely linked to a nation's identity for it to adapt to a foreign model. As European integration progressed, harmonization of civil procedure remained a debated issue. While some perceive a uniform procedure as a contribution to market integration or to the ideal of a European polity, more skeptical observers have questioned the need for full harmonization.

In 1990 the Commission requested a group of experts chaired by Professor Marcel Storme to study the approximation of procedural laws. Their report, published in 1994, proposed an EU directive to harmonize core parts of the civil procedures of the Member States. Harmonization could proceed on a piecemeal basis, and several issues were identified

4 Whether limitation periods are considered part of procedural law or of substantive law differs per jurisdiction. However, the arguments raised in the debate on the harmonization of procedural law appear relevant in the context of limitation periods, regardless of their qualification.

where common EU rules could be introduced.[5] The report divided opinion[6] and triggered a debate on the desirability of civil procedural harmonization in the European Union.[7]

From a legal perspective, various reasons have been brought forward for why harmonization and even unification of civil procedural law may be required. First, differences in procedural rules of the Member States can disrupt the smooth functioning of the Internal Market and cross-border trade.[8] Differences in procedural law may moreover contribute to a fragmented market and not to the creation of a single internal market.[9] This is undesirable as regards access to justice within the European Union.[10] When EU law creates rights and obligations with direct effect, the realization of these rights and obligations relies on their enforcement in national courts. Existing national procedural rules might limit the realization of such substantive EU norms. Variation in these rules furthermore means that litigants are treated unequally in different national jurisdictions, e.g. on questions of standing, time limits, or burden of proof. Harmonization of procedural rules may thus be needed to ensure a uniform application of EU law.[11] A related argument is that harmonized measures of enforcement could secure a level playing field for undertakings, and thus ensure the functioning of the unified substantive rules.[12] Differences in legal rules between Member States could create inequality in the competitive conditions. Harmonizing civil procedural rules is moreover considered to foster transparency and legal certainty.[13] In comparison to the ad-hoc, case-by-case harmonization that is currently being developed by the Court of Justice of the EU, a legislative measure would be more legitimate.[14] Finally, harmonization of procedural laws has been argued to be a necessary step in the process of

5 M. Storme, *Approximation of Judiciary Law in the European Union*, Kluwer, Dordrecht, 1994, p. 54.

6 P.H. Lindblom, 'Harmony of Legal Spheres. A Swedish View on the Construction of a Unified European Procedural Law', *European Review of Private Law*, Vol. 5, No. 1, 1997, pp. 32-45. See also Ch.M.G. Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited', *European Law Review*, Vol. 22, 1997, p. 303 and F.K. Juenger, 'Some Comments on European Procedural Harmonization', *The American Journal of Comparative Law*, Vol. 45, No. 4, 1997, p. 932.

7 C.H. van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective', *in* X.E. Kramer and C.H. van Rhee (Eds.), *Civil Litigation in a Globalising World*, The Hague, T. M. C. Asser Press, 2012, p. 56.

8 *Cf.* A. Schwartze, 'Enforcement of Private Law: The Missing Link in the Process of European Harmonisation', *European Review of Private Law*, Vol. 1, 2000, pp. 138-141, who analyzes the costs of market integration under varying procedural rules.

9 Van Rhee, *supra* note 7, p. 50.

10 E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered*, Oxford University Press, Oxford, 2008, p. 78.

11 Id., p. 2.

12 K. Kerameus, 'Procedural Implications of Civil Law Unification', *in* A. Hartkamp, M. Hesselink and E. Hondius (Eds.), *Towards a European Civil Code*, The Hague, Kluwer Law International, 2004, p. 121; M. Storme, *Approximation of Judiciary Law in the European Union*, M. Nijhoff, Dordrecht, 1994, pp. 44-45.

13 M. Eliantonio, 'The Future of National Procedural Law in Europe: Harmonisation vs. Judge-Made Standards in the Field of Administrative Justice', *Electronic Journal of Comparative Law*, Vol. 13, No. 3, 2009, pp. 6-7.

14 Id., p. 11.

integration, in parallel with the growing Europeanization of substantive laws. EU law influences procedural laws of the Member States in several ways – for example via the competence of Article 81 of the TFEU and the judgments of the CJEU. Some therefore see a compelling need for an umbrella instrument, providing for a coherent and systematic set of rules of European procedural law.[15]

Visscher has challenged many of these arguments from an economic perspective, arguing that harmonized rules do not necessarily result in more legal certainty, and that there is no empirical evidence that harmonization of law would result in more international transactions.[16] Harmonization could reduce transaction costs resulting from differences in legal systems that make international transactions more costly, such as costs of becoming informed about the foreign rules or of drafting multiple contracts or terms and conditions. Nevertheless, the savings in transaction costs from harmonization may be limited given the costs associated with translation and interpretation of the unified law.[17] Visscher is also unconvinced by the argument that harmonization would create a level playing field, since unequal competitive conditions across Member States would remain if foreign actors have to comply with different, more stringent norms than domestic actors. He moreover doubts that a level playing field is a worthwhile goal to aspire in the first place, since different groups may prefer different rules. Finally, he argues that even if the law is harmonized, other aspects such as infrastructure and wages will continue to differ.[18]

From an economic perspective, legal diversity is in principle desirable because people have may have different preferences regarding the applicable rules. A harmonized, European law is not able to take these differences into account. This idea, that greater choice from different communities will allow people to locate to the particular community that best suits their preferences, was first expressed by Tiebout.[19] Tiebout's theory relies on a number of assumptions regarding e.g. citizens' information about other jurisdictions and their costs of moving, and insofar as these assumptions do not hold in reality, there may be arguments in favor of harmonization. For example, harmonization may be warranted if the costs of a regulation can be (partly) externalized to other jurisdictions.[20] However, such interstate externalities do not play a role in procedural law, given that civil procedure takes

15 B. Hess, 'Procedural Harmonisation in a European Context', *in* X.E. Kramer and C.H. van Rhee (Eds.), Civil Litigation in a Globalising World, The Hague, T. M. C. Asser Press, 2012, pp. 168-171.

16 L.T. Visscher, 'A Law and Economics View on Harmonisation of Procedural Law', *in* X.E. Kramer and C.H. van Rhee (Eds.), Civil Litigation in a Globalising World, The Hague, T.M.C. Asser Press, 2012, p. 76, referring to J. Smits, 'Diversity of Contract Law and the European Internal Market', *in* J. Smits (Ed.), *The need for a European contract law. Empirical and legal perspectives*, Groningen, Europa Law Publishing, 2005, 179.

17 Visscher, *supra* note 16, pp. 83-84.

18 Visscher, *supra* note 16, p. 76.

19 C.M. Tiebout, 'A Pure Theory of Local Expenditures', *Journal of Political Economy*, Vol. 64, No. 5, 1956, pp. 416-424.

20 Visscher, *supra* note 16, p. 80.

place between the parties involved.[21] Another reason may be to avoid a "race to the bottom", in which states continuously relax their standards in order to attract actors to their jurisdiction, while it would be in the interests of all jurisdictions not to lower them beyond a certain point.[22] Again, this problem appears minor in the context of procedural law, where the costs and benefits of attracting claimants are not straightforward.[23] Finally, harmonization may be desirable in order to achieve economies of scale or to reduce the previously mentioned transaction costs. Scale economies exist if a unified legislator can design and implement a policy at lower costs for a given area than each of the lower levels of government combined. Given that each Member State has developed its own procedural rules, this does not appear to be the case for the harmonization of procedural law. Indeed, harmonization may reduce transaction costs involved in having to become familiar with all the different legal systems, although only to the extent that harmonization can really achieve uniformity. This may be doubtful considering the remaining differences in the underlying substantial law, language and interpretation.[24]

While arguments in favor of harmonization of procedural law are therefore few in number, legal diversity offers additional advantages beyond matching varying preferences. A plurality of systems offers the possibility to experiment with different legal solutions, and for jurisdictions to learn from the experiences of other jurisdictions.[25] In the context of procedural law, forum shopping by consumers may even provide an incentive for improvement of the system.[26] Lower levels of government may also have better information regarding the local preferences and problems than a central government.[27]

From a legal perspective, too, there are various arguments against harmonization in the context of procedural law. It has been questioned whether a European procedural law

21 Id., p. 87.

22 G. Wagner, 'The Economics of Harmonization: the Case of Contract Law', Common Market Law Review, Vol. 39, No. 5, 2002, pp. 1003-1004. *Cf.* also A. Ogus, 'Competition Between National Legal Systems: a Contribution of Economic Analysis to Comparative Law, *International and Comparative Law Quarterly*, Vol. 48, No. 2, 1999, p. 415.

23 On the one hand claims burden the public system, while on the other some types of claims can attract business in the form of law firms.

24 Visscher, *supra* note 16, p. 87.

25 See in the context of procedural law e.g. A.A.S. Zuckerman, 'Conference on 'the ALI-UNIDROIT Principles and Rules of Transnational Civil Procedure', hosted by the British Institute of International and Comparative Law, London 24 May 2002, *Civil Justice Quarterly*, Vol. 20, p. 322; N. Andrews, *The Modern Civil Process*, Mohr Siebeck, Tübingen, 2008, p. 281.

26 Lindblom, *supra* note 6, p. 23 and P. Legrand, 'On the Unbearable Localness of Law: Academic Fallacies and Unreasonable Observations', *European Review of Private Law*, Vol. 1, 2002, p. 68.

27 The influence of interests groups on the legislator through lobbying may also differ for different levels of government, although this argument has been used both in favor and against harmonization. See e.g. R. Van den Bergh, 'Subsidiarity Principle in European Community Law: Some Insights from Law and Economics', *Maastricht Journal of European & Comparative Law*, Vol. 1, 1994, pp. 345-348.

would fit into the legal traditions of the Member States.[28] Some consider these legal traditions to represent a core part of Member States' culture, maintaining that harmonization would be contrary to the principle of subsidiarity.[29] Arguably, procedural rules, despite their technical nature, enforce a political choice that should not be harmonized. Instead, the legal plurality should be maintained.[30] National tradition may also form a more technical obstacle to harmonization, because civil procedure is embedded in a national structure for the administration of justice, which is organized differently from state to state.[31] Harmonization could prove particularly challenging because of the close links between procedural law and substantive law of the different Member States.[32] In this light, it is also questionable whether market integration is an appropriate starting point to harmonize procedural law, at the heart of which lie other values besides efficiency.[33] Harmonization has also been dismissed for the risk of resulting in a rigid and inflexible system,[34] and because it would be extremely hard to design a set of rules that all Member States would agree upon, given that their legal systems are based on such different principles.[35]

36.2.2 Different Ways to Harmonize

While a comprehensive approach as suggested by Storme has so far not been taken up, EU law influences national procedural law in various ways. The Treaty of Amsterdam introduced judicial cooperation in civil matters as a specific EU policy area, now included as Article 81 of the Treaty of the Functioning of the European Union. Moreover, the Court of Justice has on numerous occasions intervened in national procedural rules. The Court

28 Lindblom, *supra* note 6, p. 27; P. Biavati, 'Is Flexibility a Way to the Harmonization of Civil Procedural Law in Europe?' *in* F. Carpi and M. Lupoi (Eds.), *Essays on transnational and comparative civil procedure*, Turin, Giappichelli, 2001, p. 91.

29 H. Collins, 'European Private Law and the Cultural Identity of States', *European Review of Private Law*, Vol. 3, 1995, p. 353.

30 Storskrubb, *supra* note 10, p. 21, referring to P. Legrand, 'Against a European Civil Code', *Modern Law Review*, Vol. 1, 1997, p. 61 and S. Prechal, 'Judge-made Harmonisation of National Procedural Rules: A Bridging Perspective', *in* J. Wouters and J. Stuyck (Eds.), *Principles of Proper Conduct for the Supranational, State and Private Actors in the European Union: Towards ad Ius Commune. Essays in Honour of Walter van Gerven*, Antwerp, Intersentia, 2001, pp. 55-58.

31 B. Allemeersch & E. Vandensande, 'Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective', *in* X.E. Kramer and C.H. van Rhee (Eds.), *Civil Litigation in a Globalising World*, The Hague, T. M. C. Asser Press, 2012, p. 327.

32 Visscher, *supra* note 16, p. 84.

33 Storskrubb *supra* note 10, p. 23; J. Niemi-Kiesiläinen, 'International Cooperation and Approximation of Laws in the Field of Civil Procedure', *in* V. Heiskanen and K. Kulovesi (Eds.), *Function and Future of European Law*, Helsinki, Helsinki University Press, 1999, p. 251.

34 J. Schwarze, 'The Convergence of the Administrative Laws of the EU Member States', *in* F. Snyder (Ed.), *The Europeanisation of Law: the Legal Effects of European Integration*, Oxford, Hart Publishing, 2000, p. 177.

35 Eliantonio, *supra* note 13, p. 9 and the references therein.

has set minimum standards and reference points by using the tools of equivalence and effectiveness, and in order to ensure a minimum degree of uniformity.[36] This has spurred a debate regarding the question whether Member States still have procedural autonomy at all.[37] Parallel to these developments, the EU legislator adopted several substantive instruments that, in practice, extend into other fields such as procedural law as well.[38] Given these developments in European law, the relevant question may be not so much whether we should harmonize or not, but what would be the best approach to do so.[39] In searching for a model for procedural harmonization, it needs to be considered what the end result should be, as well as what type of harmonization would be possible and manageable.

A comprehensive approach, in which all procedural law is fully harmonized, would preserve the coherence and the transparency of the legal system.[40] However, it may not be sensible to harmonize procedural law in areas where substantive law is not harmonized, since the conditions to effectuate a claim in these areas will still differ across Member States.[41] It is moreover doubtful that such an approach would be politically attainable, which is likely to be one of the reasons for the European Commission to have taken a different approach. For all the reasons discussed, many commentators consider unification of procedural law to be undesirable, but welcome less far-reaching European projects in this area.[42]

An alternative approach, taken up in Article 81 TFEU, is to limit harmonization to transnational disputes.[43] Article 81 TFEU provides for harmonization of laws in civil matters with a cross-border element, and has resulted in a number of European legislations.[44] The limitation to cross-border cases means that purely national cases continue to be governed by the civil procedural rules of the Member States. The problem is that this creates double standards of protection, which may give national courts a hard time in maintaining the integrity of the system. According to Wagner, the limitation to cross-border cases in Article 81 TFEU is not based on any logic and takes out much of the

36 Id., p. 1.
37 Storskrubb, *supra* note 10, pp. 14-20.
38 Hess, *supra* note 15, p. 165; Storskrubb, *supra* note 10, p. 26.
39 Allemeersch and Vandensande, *supra* note 31, p. 326.
40 Hess, *supra* note 15, p. 165; Storskrubb, *supra* note 10, p. 284.
41 Visscher, *supra* note 16, p. 85.
42 Storskrubb *supra* note 10, p. 24 and the references therein.
43 This approach was already suggested by Juenger, *supra* note 6, p. 936.
44 E.g. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings; 2. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European Enforcement Order for uncontested claims.

practical relevance of the legislation.[45] It may also be impossible to sever the parts of the claim that are based upon EU law from those that are rooted in national law.[46] Van Rhee even maintains that differences between the procedural laws of the Member States always have cross-border implications, for example on the decisions of businesses about where to produce and sell their products.[47]

The limitations of full harmonization and Article 81 TFEU can explain, at least in part, the exploration of harmonization initiatives for specific areas in the field of civil procedure, also called vertical harmonization. In case of vertical harmonization, the EU introduces procedural rules without relying on Article 81 TFEU as a legal basis.[48] Examples of such policies for a specific area that have a procedural law element include consumer policy[49] and the Enforcement Directive.[50] The Enforcement Directive was adopted on the basis of Article 114 TFEU on the functioning of the internal market. Similarly, the Antitrust Damages Directive was adopted on the basis of Article 114 TFEU, together with Article 103 TFEU on the enforcement of competition law.

The problem with a vertical harmonization approach is that various special rules are created that may undermine the internal coherence of national procedural law. Moreover, the harmonized rules might not cover all aspects of a civil (procedural) law topic, resulting in remaining differences that defeat the purpose of harmonization. The special rules on limitation periods for antitrust damages claims laid down in the Antitrust Damages Directive are an example of where this problem of fragmentation of procedural law may occur, raising the question of the rationale for and the impact of the Directive on limitation periods in the Member States.

36.3 Limitation Periods

36.3.1 The Efforts to Encourage Antitrust Damages Claims

In the European Union, antitrust enforcement has so far primarily relied on public enforcement by competition authorities. The number of private damages actions has increased considerably in primarily the United Kingdom, Germany and the Netherlands during the last years, but private damages actions still play a limited role in the EU as

45 G. Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives', *in* X.E. Kramer and C.H. van Rhee (Eds.), *Civil Litigation in a Globalising World*, The Hague, T. M. C. Asser Press, 2012, p. 98.
46 Eliantonio, *supra* note 13, p. 8.
47 Van Rhee, *supra* note 7, p. 54.
48 Wagner, *supra* note 45, p. 101.
49 W. Kennett, *The enforcement of judgments in Europe*, Oxford University Press, Oxford, 2000, p. 40.
50 Directive 2004/48/EC on the enforcement of intellectual property rights.

compared to the United States.[51] The European Commission introduced the Antitrust Damages Directive aiming to encourage claimants to file antitrust damages actions.[52]

The efforts towards the adoption of this Directive started with the Ashurst study, which was conducted on request of the Commission with the aim of identifying the legal and practical obstacles faced by parties to antitrust damages actions. The report concluded that private enforcement in the EU showed "total underdevelopment", and Member States' rules were of an "astonishing diversity". The Ashurst report identified legal rules and their diversity across Member States as obstacles for potential antitrust claimants.[53] The Ashurst report also found that rules on limitation periods differed markedly across Member States, leading to uncertainty among litigants and possibly to the denial of compensation for antitrust harm.

Several cases illustrate the importance of limitation periods in the context of antitrust damages claims, where it may take years for claimants to learn about the harmful conduct. In 2007, the Rotterdam District Court found a claim brought by an electro-technical fittings distributor against the association of producers of fittings to be time-barred.[54] In 2014, the British Supreme Court dismissed an antitrust damages claim by Deutsche Bahn against carbon manufacturer Morgan Crucible, because the action was brought out of time.[55] Later that year, a London court struck out around thirty years of potential damages from a lawsuit brought by a group of British retailers against Visa because the limitation period had run out.[56]

With the aim of protecting the interests of claimants and defendants, the Directive lays down specific rules for limitation periods in antitrust damages actions.[57] The Directive

51 For an overview of recent cases in the United Kingdom, Germany and the Netherlands see e.g. M. Kuijpers, S. Tuinenga, S. Wisking, K. Dietzel, S. Campbell, and A. Fritzsche, 'Actions for damages in the Netherlands, the United Kingdom, and Germany', *Journal of European Competition Law & Practice*, Vol. 6, No. 2, 2015, p. 1. As they note, most cases are still in a preliminary phase as they have only been launched recently. As a comparison, until 2004 only 60 damages actions were reported in the EU, compared to almost 700 cases in the U.S. in only two years. See also B. Scharaw, 'Commission Proposal For a Directive on Antitrust Damages and Recommendation on Principles For Collective Redress – the Road Towards "Private Antitrust Enforcement" in the European Union?', *European Competition Law Review*, Vol. 35, No. 7, 2014, p. 356 and D.H. Ginsburg, 'Comparing Antitrust Enforcement in the United States and Europe', *Journal of Competition Law and Economics*, Vol. 1, No. 3, 2005, p. 435.

52 Preamble para. 54 of the Directive; Proposed Directive, at pp. 2-5.

53 Study on the conditions of claims for damages in case of infringement of EU competition rules, 31 August 2004 ("Ashurst report"), available at http://ec.europa.eu/competition/antitrust/actionsdamages/study.html (Last visited 16 July 2016), p. 1.

54 Rotterdam District Court 7 March 2007, LJN BA0926.

55 *Deutsche Bahn AG and others v. Morgan Crucible Company plc* [2014] UKSC 24.

56 *Arcadia Group Brands et al. v. Visa et al.*, 2013-985.

57 For a discussion of the contents of the Directive, see e.g. S. Wisking et al., 'European Commission Finally Publishes Measures to Facilitate Competition Law Private Actions in the European Union', *European Competition Law Review*, Vol. 35, 2014, pp. 185-193; and 'Editorial comments, "One bird in the hand…" The Directive on damages actions for breach of the competition rules', *Common Market Law Review*, Vol. 51, 2014, pp. 1333-1342.

stipulates that the limitation period starts when the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know of i) the behavior and the fact that it constitutes an infringement of competition law; ii) the fact that the infringement of competition law caused harm to him; and iii) the identity of the infringer.[58] The minimum duration of the limitation period is five years.[59] Member States must moreover ensure that limitation periods are suspended during proceedings at the national competition authority or the Commission, and until at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.[60] The limitation period must moreover be suspended for the duration of a consensual dispute resolution process.[61] Member States retain the right to maintain or introduce general, absolute limitation periods, provided that their duration does not render it impossible or excessively difficult for claimants to obtain compensation.[62]

36.3.2 The Rationale for a European Limitation Period for Antitrust Damages Claims

The rationale of introducing a uniform limitation period for antitrust damages claims includes various considerations. The first concerns the general question of the optimal length of a limitation period for civil claims, and the second concerns the question whether antitrust damages claims possess special characteristics that warrant specific rules for the limitation period.

36.3.2.1 The Length of the Limitation Period

The rationale of limiting the period during which an injured party can file his claim is to provide the defendant with legal certainty. The limitation period allows a defendant to "close the books", which has an efficiency benefit. It allows a defendant to use the resources reserved for possible claims in a more productive way.[63] Another argument in favor of limitation periods is that evidence deteriorates over time. As claims are filed longer after the occurrence of the damage, trials become more costly and legal error becomes more likely.[64]

58 Art. 10(2) of the Directive.
59 Art. 10(3) of the Directive.
60 Art. 10(4) of the Directive.
61 Art. 18(1-2) of the Directive.
62 Preamble, Para. 36 of the Directive.
63 M.M. Martin, 'Statute of repose for product liability claims', *Fordham Law Review*, Vol. 50, No. 5, 1981, pp. 745-780.
64 R. Cooter & T. Ulen, *Law and Economics*, Harper-Collins, New York, 1988, p. 155. See also W.M. Landes & R.A. Posner, *The Economic Structure of Tort Law*, Harvard University Press, Cambridge, p. 567.

A too short limitation period, however, may lead to a denial of compensation for victims.[65] The time barring of claims moreover limits injurers' exposure to liability, thereby reducing their incentives to comply with the law ex ante. Defining the optimal duration of the limitation period therefore involves a balancing exercise. The optimal duration is found at the point where marginal costs of limiting claims, i.e. the reduction in deterrence, equals the marginal benefits of doing so, i.e. error costs and the social costs of litigation.[66]

The length of the limitation period may also have a bearing on litigation dynamics. A shorter limitation period may induce claimants to invest more resources in obtaining evidence in order to avoid the time bar. Claimants may also have lower bargaining power if the settlement negotiation takes place closer to the time limit. Additionally, defendants may adopt strategic behavior to induce claimants to postpone bringing claims.[67]

36.3.2.2 A Special Limitation Period for Antitrust Damages Claims

Arguments can be brought forward for why additional considerations are at play in the context of antitrust damages actions that warrant special rules on limitation periods. First, claimants may take considerable time to find out about antitrust harm, since firms that exert anticompetitive behavior usually expend considerably resources in keeping this conduct a secret. Moreover, claimants may only learn about the harm they suffered after a competition authority has launched an investigation, or even when the firms have been sanctioned for their anticompetitive conduct. Such investigations and proceedings can take several years, meaning that for follow-on civil damages claims the limitation period may need to be linked to the length of public proceedings.[68] Finally, in the case of cartels antitrust damages claims affect the incentives for cartel participants to reveal the cartel under the leniency program. Protecting the interests of leniency applicants, in order to maintain effective public antitrust enforcement, while allowing for compensation of antitrust harm, may have implications for the desirable limitation period.

Nevertheless, the general argument that harmonization for specific areas might undermine the internal coherence of Member States' legal systems also applies to antitrust damages claims. Member States have set a limitation period according to domestic legal traditions and in conjunction with standards of care and procedural conditions for bringing a claim. The special limitation period for antitrust damages actions does not take these additional rules into account.

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65 A. Renda et al., 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' ("Renda report"), 21 December 2007, at p. 533.

66 T. Miceli, 'Deterrence, Litigation Costs, and the Statute of limitations for Tort Suits', *International Review of Law and Economics*, Vol. 20, No. 3, 2000, pp. 383-394.

67 Renda report, see *supra* note 65, p. 535.

68 Follow-on claims are launched after a public investigation and sanction of the anticompetitive behavior, as opposed to stand-alone cases concerning conduct that was not sanctioned by competition authorities. Claimants in stand-alone cases bear a much larger burden in proving the anticompetitive conduct.

The design of the rules on limitation periods in the Directive also spurred critical responses.[69] The additional grace period of one year has been criticized for putting a penalty on appealing the decision of the Commission or the competition authority. As a result of the grace period, appealing extends the period during which a defendant is exposed to claims.[70] The additional grace period may create incentives to appeal the public decision, even for the firm whose fine was waived under the leniency program. Since claimants usually wait to file their claim until the decision has become final, defendants can postpone claims by appealing in order to avoid being the primary target for litigation.[71] This raises the questions of whether any appeal, e.g. challenging the calculation of the fine, but not the finding of an infringement, should trigger the suspension, and of whether appeals by all parties to the infringement must have run out before a decision is considered final regarding each infringer.[72] The additional grace period has also been criticized because it is a concept generally unknown to other areas of law, which could be at odds with legal certainty.[73] Others have noted that the "open-ended" liability caused by the additional grace period runs counter to the legal certainty that limitation periods ought to provide to defendants.[74] Since detection, public investigations and appeals may take several years, the additional grace period can extend the five-year limitation period considerably.[75] Nevertheless, one may wonder whether this uncertainty argument should outweigh the benefit of ensuring compensation to claimants who may be discouraged from suing if they cannot await the final decision of the competition authority, especially when it concerns small enterprises and consumers. A decision by the competition authority serves as proof of fault in court, reducing the difficulties for claimants in follow-on cases to meet the evidentiary burden. A more convincing argument against the additional grace period than

69 J.S. Kortmann & R. Wesseling, 'Two Concerns Regarding the European Draft Directive on Antitrust Damage Actions', *Antitrust Chronicle*, Vol. 8, 2013, p. 5; D. Geradin & L.-A. Grelier, 'Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?', *Concurrences Journal*, Vol. 4, 2014, p. 14; Ch.F. Weidt, 'The Directive on Actions for Antitrust Damages After Passing the European Parliament', *European Competition Law Review*, Vol. 35, No. 9, 2014, pp. 440-441; J.S. Kortmann, 'The Draft Directive on Antitrust Damages Actions and its Likely Effects on National Law', *in* A.S. Hartkamp *et al.* (Eds.), *The Influence of EU Law On National Private Law*, Deventer, Kluwer, 2014, p. 699.

70 J.S. Kortmann & Ch.R.A. Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States Are (Right to Be) Less Than Enthusiastic', *European Competition Law Review*, Vol. 30, No. 7, 2009, p. 348.

71 P. Akman, 'Period of limitations in follow-on competition cases: when does a "decision" become final?', *Journal of Antitrust Enforcement*, Vol. 2, No. 2, 2014, at p. 390-392; A. Howard, 'The Draft Directive On Competition Law Damages – What Does It Mean For Infringers And Victims?', *European Competition Law Review*, Vol. 35, No. 2, 2014, pp. 51-55.

72 See Section 36.4.3.2.

73 Kortmann & Swaak, *supra* note 70, p. 348.

74 Kortmann, *supra* note 69, p. 699; Confederation of Swedish Enterprise, response to the Commission White Paper, 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (Last visited 30 June 2016).

75 Kortmann & Swaak, *supra* note 70, p. 349.

the effects on legal certainty may therefore be that an alternative is available to deal with the problem of lack of proof. Rules on access to documents can provide claimants with the necessary evidence as well. The disadvantage remains that claimants face the risk that the decision is overturned on appeal, and their investments in litigation are lost. However, this could be considered a risk that should remain with the claimant.

The possibilities of gathering evidence through the public proceedings have also raised criticism as to why the Directive does not distinguish stand-alone cases and follow-on cases with respect to the limitation period. In the context of follow-on actions, the optimal or necessary limitation period is arguably much shorter than for stand-alone cases, where claimants need time to gather evidence to substantiate their claim.[76] A shorter, fixed limitation period has been argued to be in the interest of claimants as well, since it would foster settlements. When defendants settle with one claimant, this may "open the floodgates" to other claims. The minimum limitation period leaves uncertainty on the number of claims still to come, which may discourage defendants from settling early on.[77] Nevertheless, if indeed new claimants learn about their right to compensation by a settlement offered to other claimants, this is desirable from a perspective of full compensation of harm. Although it would be problematic if claimants acted strategically, waiting to file their claim until others have obtained a settlement in order to "free ride" on their litigation investments, this does not appear to happen in reality. Claimants have much to gain from suing earlier rather than later, such as a lower risk that defendants are unable to pay. Even if long limitation periods discourage quick settlements, it is still questionable whether we would observe early settlements if the limitation periods were short. Defendants appear to have other interests in prolonging the proceedings. One of these interests stems from the Directive itself, namely the rules on contribution, which leave a settling defendant exposed to liability.[78]

Summarizing, the scholarly critique on the rules in the Directive broadly capture two concerns. The first concern is that the long duration of the limitation period will undermine legal certainty and discourage defendants from settling with claimants early on. The second concern is that the Directive leaves variation in limitation periods across EU Member States, while at the same time undermining the internal coherence of Member States' civil law systems.

76 Renda report, see *supra* note 65, p. 535-537; Geradin & Grelier, *supra* note 69, p. 14.

77 See Kortmann & Wesseling, *supra* note 69, p. 5; Geradin & Grelier, *supra* note 69, p. 14; Weidt, *supra* note 69, pp. 440-441 and Kortmann, *supra* note 69, p. 699.

78 Kortmann & Wesseling, *supra* note 69, pp. 8-9.

36.4 Comparing Member States' Limitation Periods

The extent to which the last concern will turn out to be a problem depends on the current differences in rules on limitation periods across the Member States, as well as the impact of the Directive on these rules. This impact, in turn, depends on the way the Member States choose to implement the Directive as well as on the clarity of the terms in the Directive. In 2004, the Ashurst report found the rules on limitation periods to differ markedly across Member States, leading to uncertainty among litigants.[79] This section provides a new comparative overview, conducted on the basis of Member States' laws, policy documents and country reports.[80] The section also evaluates the remaining differences once the rules in the Directive will have been implemented.

36.4.1 Current Member States' Rules

Member States' rules on limitation periods differ on the following points: i) the starting moment of the limitation period, ii) the duration of the limitation period and iii) whether the limitation period is suspended for the duration of public proceedings.

The majority of Member States has an objective limitation period in place, in most cases coupled with a subjective period (see Table 36.1 below). An objective limitation period starts to run the moment the facts occurred or the harm was materialized, whereas a subjective limitation period only starts to run with the claimant's knowledge of the infringements (and the liable party). All but six Member States have a subjective limitation period in place, but rules vary on the definition of the required "knowledge" of the claimant. In most cases, the subjective limitation period also starts when the claimant could, or should have, had the required knowledge. Additionally, some Member States couple the knowledge requirement with the condition that the infringement has ceased (e.g. Germany). A small majority (11 Member States) provides for suspension during public proceedings, although many of these provisions have been introduced recently and will not yet apply to claims currently being filed (for example in Croatia, France, Malta and Slovakia).

79 Ashurst report, *supra* note 53, pp. 111-112.

80 A list of the specific legislations for each Member State is available with the author. Additionally, the following reports were used: Global Competition Review Reports, available at http://globalcompetitionreview.com (Last visited 30 June 2016); International Comparative Legal Guides, available at www.iclg.co.uk (Last visited 30 June 2016); Private Antitrust Litigation: Jurisdictional Comparisons, B. Adkins and S. Beighton (Eds.), Sweet & Maxwell 2013; Private Antitrust Litigation 2013 *Getting the deal through*, available at www.chsh.com (Last visited 30 June 2016); The Private Competition Enforcement Review, I. Knable Gotts (Ed.), Law Business Research Ltd 2015.

Table 36.1 Limitation periods in EU Member States

Only subjective	Only objective	Subjective & Objective	Suspension or extra period after public decision
Malta (2 years), France and Italy (5), United Kingdom (6), Latvia and Luxembourg (10)	Lithuania (3 years), Hungary (5), Cyprus and Ireland (6), Finland and Sweden (10)	Croatia and Slovenia (3&5 years), Denmark, Estonia and Germany (3&10), Poland (3&10), Portugal (3&20), Austria (3&30), Czech Republic and Slovakia (4&10), Belgium, Greece and Netherlands (5&20)	Croatia, Germany, Malta and Slovenia (until decision), Austria (6 months), Finland, Hungary and Spain (1 year), Romania and United Kingdom (2), Bulgaria (5)

Indeed, various Member States changed their limitation periods during the last years, meaning that for many antitrust claims filed now the old regime still applies. Some Member States included a grace period similar to the one in the Directive, which starts when the public infringement decision has become final. The length of this period differs considerably, ranging from six months in Austria to five years in Bulgaria. In Bulgaria and Romania, this type of limitation period is the only one in place for antitrust damages claims. In the United Kingdom, the grace period only applies to proceedings before the Competition Appeal Tribunal ("CAT"). A few Member States increased the length of the limitation period (Cyprus and Sweden), or decreased it (Denmark) in the last decade. Some others opted for a different combination of objective and subjective periods (Finland, Hungary and Malta). Overall, the landscape of limitation periods applicable in EU Member States changed significantly in the last decade.

36.4.2 The Impact of the Directive

In order to illustrate what these limitation periods mean for claimants, and what the impact of the Directive will be, Figure 36.1 presents a hypothetical example in which the claimant obtains the knowledge required for subjective limitation periods to commence when *five years* have passed since the damage occurred;[81] actual knowledge overlaps with the moment the claimant should have had this knowledge; the term "knowledge" is interpreted in the

81 Bearing in mind that anticompetitive conduct usually lasts for several years, five years could be seen as a minimum for the period of time likely to pass between the occurrence and the detection of the harm.

same way everywhere;[82] and the final decision of the competition authority or Commission (including appeals) is rendered *five years* after the claimant obtained this knowledge.[83]

As Figure 36.1 illustrates, limitation periods may overlap (e.g. in France and the United Kingdom), and wherever the objective limitation period has run out, the subjective period is cut off (e.g. in Croatia and Slovenia).[84] Only three Member States currently have subjective limitation periods in place that exceed the five-year period (Latvia, Luxembourg and the United Kingdom), meaning that most of the subjective limitation periods have to be amended to comply with the Directive. At the same time, many of the absolute limitation periods may have limited practical impact. The absolute limitation periods exceeding 10 years are all coupled with a subjective period that may very well cut off the objective periods. This is in any case true in this example, but may be different if claimants a much longer time to become aware of the infringement. However, shorter objective time limits will be prohibited by the Directive for rendering it excessively difficult to file claims (see further Section 36.4.3.2 below).[85] Overall, the rules allowing for suspension during public proceedings are likely to leave the most post-Directive variation, unless Member States will adapt their rules to the one-year grace period in the Directive.

In the example illustrated in Figure 36.1, a claimant will find his claim time-barred in only three out of 28 Member States at the moment he obtains knowledge of the infringement. In two of these Member States, Croatia and Slovenia, this is the case only if the competition authority or Commission did not start an investigation within five years after the occurrence of the damage. Once the decision has become final, the claimant will find his claim time-barred in 17 out of 28 Member States. Of the remaining 11 countries, in three countries the possibility for the claimant to still file his claim depends on whether the subjective period had not yet run out before the public investigation started (Malta, Croatia, and Slovenia).

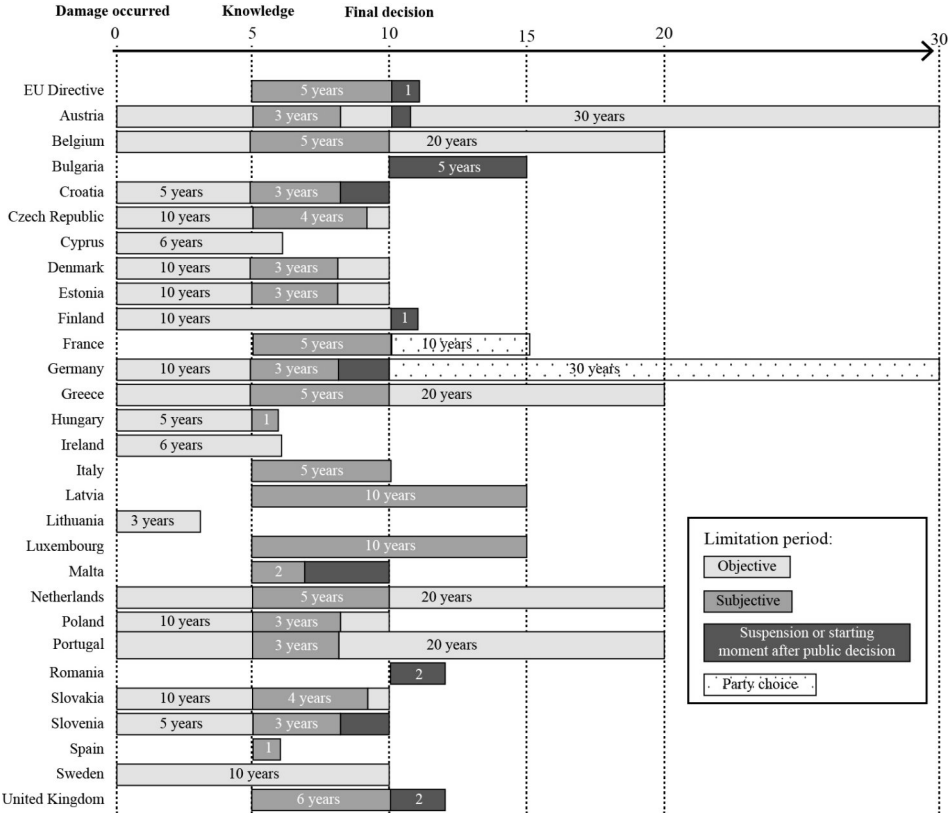
82 National courts have interpreted "knowledge" differently (see Section 36.4.3.2). This hypothetical example aims to show the variation in rules even in the absence of such different interpretations.

83 The list of cartel cases published on the Commission website shows that five years is a modest estimation. Including the appeals, cases generally take much longer, at least at the Commission (http://ec.europa.eu/competition/cartels/cases/cases.html, last visited 30 June 2016).

84 The hypothetical example does not include the possibilities that the infringement has ceased or the proceedings started after the claimant obtains the necessary knowledge, which may alter the situation in some Member States.

85 Preamble, Para. 36 of the Directive.

Figure 36.1 An example of the current limitation period landscape



In short, the current limitation rules may form a real obstacle to compensation for injured parties in many Member States. Particularly the short objective periods are problematic, since these do not take into account the time it took the claimant to learn about the damage. Regarding the subjective time limits, lengthy proceedings are the key obstacle to compensation. The additional grace period provided for in the Directive mitigates this problem of claims being time-barred while public proceedings are still ongoing. Regarding the desirability of the length of the limitation period in the Directive, it can thus be said that the Directive helps to ensure that claimants have a real opportunity to file their claim, although the instrument of an additional grace period brings along the problems discussed in Section 36.3.2.2 above.

36.4.3 Remaining Sources of Variation

Some variety in rules on limitation periods is still likely to remain once the Directive is implemented, due to reasons of different implementation, unclear terms in the Directive that leave room for interpretation, and national rules that affect limitation periods but that are not regulated by the Directive.

36.4.3.1 Implementation by the Member States

The Directive only prescribes a minimum standard, allowing Member States to specify longer limitation periods. How Member States will choose to implement the Directive is therefore relevant for the effects that the Directive will have on length and the uniformity of the applicable rules. Member States had until the end of 2016 to implement the Directive. They had the following options in adapting their legislation to comply with the Directive:

1. Copy the rules in the Directive;
2. Specify longer limitation periods than minimum standards specified in the Directive.
   a. The longer limitation periods apply to all civil claims in that Member State;
   b. The longer limitation periods apply only to antitrust damages claims.

Option 1 is preferable from a perspective of uniformity of rules in the EU, while option 2a better serves the internal coherence of a member state's legal system. Option 2b is inferior to options 1 and 2a in both of these respects. It appears unlikely that Member States would choose the drastic option of adapting the limitation period for all civil claims. The general limitation period is based on a broad range of considerations, going beyond the aims of the Directive. Option 1 appears to be the simplest way for Member States to implement the Directive, and would ensure uniformity across the EU. This may be different for Member States that already have a limitation period in place that goes beyond the minimum standard in the Directive. For reasons of legal certainty these Member States may choose to maintain their longer limitation period, rather than changing it again.

Only three Member States currently have subjective periods in place exceeding five years: Latvia, Luxembourg and the United Kingdom. The United Kingdom has announced that it will implement the rules on limitation periods in the Directive in the new Consumer Rights Bill currently in the final stages of the parliamentary process. This bill envisages a harmonization of limitation periods between the High Court and the CAT to six years.[86] If the Consumer Rights Bill is adopted, the United Kingdom partly follows option 2a, ensuring internal coherence regarding antitrust damages claims but differing from the limitation period in most other Member States. Luxembourg has announced to follow the

86 Proposed Consumer Rights Bill, Schedule 8, available at www.publications.parliament.uk/pa/bills/lbill/2014-2015/0064/15064.pdf (Last visited: 1 July 2016).

approach of the Directive to further the principles of equivalence and effectiveness, thus adopting option 1.[87]

The Dutch proposal follows option 1 as well, with the proposed implementation act following the provisions of the Directive in terms of the subjective limitation period and the additional grace period, and maintaining an objective limitation period of twenty years.[88] Similarly, the Finnish proposal adopts option 1 by copying the rules of the Directive, but maintaining the ten-year objective limitation period that was introduced in 2011.[89] Germany, too, maintains the ten-year long stop while prolonging the subjective limitation period to five years in order to comply with the Directive.[90] It is questionable to what extent the objective limitation periods are compatible with the Directive (see Section 36.4.3.2 below).

The potential for different implementation of the required additional grace period is particularly high, as several Member States have recently introduced additional grace periods. Where this additional grace period is shorter than the one-year minimum enshrined in the Directive, such as in Austria, the rules will have to be amended. However, Member States with a longer period in place may choose to maintain this period to ensure legal certainty. The longer periods differ considerably from the period in the Directive, ranging from two years (Romania and the United Kingdom), to five years in Bulgaria. Romania and Bulgaria have not yet published their proposals to implement the Directive, but depending on their implementation variation might remain with respect to the additional grace period, undermining the uniformity of rules across Member States.

36.4.3.2 Unclear Terms

A second remaining source of uncertainty concerns some unclear terminology in the Directive. Such unclear terminology may lead to diverging interpretations by national courts, which would undermine the goal of providing a uniform Union approach.

The most prominent example of an unclear term is the "knowledge" required for the limitation period to commence. The ambiguity of this term is illustrated by the varying

87 Projet de loi relatif à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence, available at http://chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/153/536/155325.pdf (Last visited: 26 July 2016).

88 Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, Artikel 193s, 193t, available at https://www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht (Last visited: 27 July 2016).

89 Finnish Government proposal for a new Act on Antitrust Damages Actions, available at https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/HE_83+2016.pdf (Last visited: 27 June 2016).

90 Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (9. GWB-ÄndG), 1 July 2016, available at https://www.bmwi.de/BMWi/Redaktion/PDF/G/neunte-gwb-novelle,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (Last visited: 22 July 2016).

interpretations that national courts have given it in the past, even within Member States. In the Netherlands, the Dutch Rotterdam District Court ruled that a claimant was aware of the damage and the liable party when he sent a letter to the Commission complaining about anticompetitive conduct that later resulted in an infringement decision. As a result, the claim was time-barred.[91] In a more recent ruling, the East-Netherlands District Court rejected the argument that a press release regarding an investigation was sufficient to start the limitation period.[92] The Court of Appeal upheld this decision, clarifying that the claimant should have sufficient certainty regarding the liability of the party. The press release did not imply a conviction, and the limitation period only started to run when the Commission rendered its decision.[93] In Finland, the District Court in the *Asphalt* case found that only the final, non-appealable ruling of the Supreme Administrative Court provided the plaintiffs with sufficient knowledge to raise actions, regardless of the wide media coverage of the case.[94] The District Court in the *Timber* case took a markedly different approach, ruling that the limitation period started to run when the competition authority announced the investigation. The Helsinki Court of Appeal overturned this ruling, following the ruling in the *Asphalt* case. The court noted that the press release on the investigation did not provide any certain information that an infringement had actually occurred. The fine proposal by the competition authority was still too unclear to establish sufficient awareness to file a claim.[95] A high threshold for the required knowledge also applies in Germany, where the limitation period only starts if the claimant would have obtained knowledge of the harm and the liable party if he had not shown gross negligence.[96] In Italy the relevant moment is usually the day of publication of the competition authority decision.[97] In 2011, the Milan Court even held that where the claimant is a company, the limitation period should already start on the day of the publication of the commitments or the day of the statement of objections.[98]

All these interpretations fit with the knowledge requirement enshrined in the Directive. Without further guidance, national courts are likely to reach different conclusions regarding the starting moment of the limitation period. This can have detrimental consequences, causing uncertainty for litigants across the EU and potentially time-barring claims. Whereas the uncertainty left by the implementation of Member States is the result of a deliberate choice for minimum harmonization, this source of variation could have been

91 Rotterdam District Court 7 March 2007, ECLI:NL:RBROT:2007:BA0926.
92 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403, paras. 4.22-4.24.
93 Court of Appeal Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6766, paras. 3.20-21.
94 District Court of Helsinki, judgment 13/64929, on November 28, 2013.
95 *The Finnish Competition Authority v. UPM-Kymmene Oyj, Stora Enso Oyj and Metsäliitto Osuuskunta*, Case MAO:614/2009, Market Court, 3 December 2009.
96 Section 199(1) of the German Civil Code.
97 Court of Cassation, judgment No. 26188 of 6 December 2011.
98 Tribunal of Milan, 20 May 2011.

easily prevented. Rather than using the subjective term "when the claimant knows, or can reasonably be expected to know", the Directive could have specified a specific moment during the investigation as the starting point for follow-on cases.

While this moment might in some cases not coincide with the moment when the claimant actually obtained knowledge of the infringement, which might be deemed unfair, such an objective starting moment would considerably reduce uncertainty and the scope for diverging interpretations by courts. Only for stand-alone cases courts would have to determine the starting moment. In follow-on cases, the vast majority of cases, the litigation costs now spent repeatedly on this issue would be saved. Moreover, other than the objective periods starting at the occurrence of the damage, such a rule would still account for the long period of time that it might take for anticompetitive conduct to be detected or revealed.

A second source of uncertainty is the term "final decision". The one-year grace period starts to run when the infringement decision has become final. However, the Directive fails to specify whether this is determined for each defendant individually, or regarding the decision as a whole. Nor does it specify whether an appeal regarding only the amount of the fine, and not the infringement, postpones the moment the decision becomes final. The effect of appeals on the limitation periods for follow-on claims is of great interest for both claimants and defendants. The issues were litigated in the United Kingdom, where the relevant courts held that an appeal against the fine only did not prevent the decision from becoming final,[99] and appeals by one defendant did not suspend limitation periods with respect to non-appealing defendants in the same case.[100] The Directive risks replicating the problems that were experienced in the United Kingdom, rather than providing a clear rule.[101] It will now be up to national courts and the Court of Justice to ensure uniformity using the preliminary reference procedure.[102]

Finally, uncertainty remains regarding the possibility of Member States to maintain or introduce absolute limitation periods. The Directive allows Member States to maintain or introduce longer absolute limitation periods, as long as they do not render private antitrust claims impossible or "excessively difficult". However, it remains unclear what this means exactly for the absolute limitation periods that Member States have in place. Bearing in mind the hypothetical example in figure 36.1, the correct view seems to be that

99 *Emerson Electric Co and others v. Morgan Crucible* (Emerson I) [2007] CAT 30; *Emerson Electric Co and others v. Morgan Crucible* (Emerson II) [2007] CAT 28; *Emerson Electric Co and others v. Morgan Crucible* (Emerson III) [2007] CAT 8; *BCL Old Co Ltd v. BASF* (BCL I) [2008] CAT 24; and *BCL Old Co Ltd v. BASF* (BCL II) [2009] CAT 29.

100 *Deutsche Bahn AG and others v. Morgan Crucible Company plc* [2014] UKSC 24. See Akman, *supra* note 71, p. 14-16 for a comment on these rulings.

101 Wisking, *supra* note 57, p. 188. See also S. Peyer, 'Competition Law Enforcement in England and Wales', *in* K. Hüschelrath and H. Schweitzer (Eds.), *Public and Private Enforcement of Competition Law in Europe*, Berlin, Springer-Verlag, 2014, pp. 247-270.

102 Art. 267 TFEU.

absolute periods of ten years or less are prohibited, which would mean that the Finnish proposal would be incompatible with the Directive.[103] The legality of periods of fifteen or twenty years, however, is more difficult to determine.

36.4.3.3 Rules That Are Not Affected by the Directive

A final source for remaining variation concerns aspects of limitation periods that the Directive does not regulate. Most notably, this concerns the actions needed to suspend the limitation period.[104] In the Netherlands, for example, the limitation period can be suspended by simple written notification.[105] This means that claimants can easily stop the limitation period from running, even before they have gathered any evidence to substantiate their claim. Some Member States maintain stricter conditions, such as a judicial act, to interrupt the limitation period.[106] The time that claimants effectively have to file their claim will continue to differ across Member States.

36.5 Conclusion

It appears that the Directive will considerably reduce the variation in limitation periods of the Member States, both regarding their duration and with respect to the starting moment. The Directive addresses the problem of claims being time-barred before claimants became aware of the harm by stipulating a limitation period that only commences once the public decision has become final. This should contribute to a more effective private enforcement of competition law in the EU. It remains to be seen, however, what the impact of this one-year grace period will be on litigation dynamics, in particular incentives to settle early on, since appeals by defendants will prolong the limitation period. Moreover, the Directive does not create a complete level playing field with regard to limitation periods, for three main reasons.

First, variation in limitation periods may remain if Member States implement the Directive in different ways. The policy advice to Member States is to adopt the minimum standards in order to ensure uniformity throughout the EU. Nevertheless, some Member States whose rules already go beyond these minimum standards may choose to maintain them. A second source of uncertainty stems from unclear terms in the Directive that leave room for interpretation. It is regrettable that the Directive includes such unclear terms,

103 However, others appear to consider such a duration compatible with the Directive, e.g. F. Bien *et al.*, 'La transposition de la directive 2014/104/UE relative aux actions en dommages et intérêts pour violation du droit des pratiques anticoncurrentielles', *Concurrences*, Vol. 2, 2015, p. 15.

104 Geradin and Grelier, *supra* note 69, p. 14.

105 Section 3:317(1) of the Dutch Civil Code.

106 E.g. France, Germany and Belgium. See Bird&Bird, 'Statute of limitation – EMEA comparative table', available at www.twobirds.com (Last visited 14 July 2016).

since clearer definitions would have ensured more uniformity at negligible extra costs. It remains to be seen whether the preliminary reference procedure at the Court of Justice will be effective in avoiding diverging interpretations. Thirdly, the Directive does not provide rules on some aspects of limitation periods, most notably the requirements to interrupt the limitation period. The remaining differences in national rules may lead to uncertainty for litigants or to forum shopping.

In light of the debate on harmonization of civil procedural law, these remaining differences are regrettable, since they may undermine the goals of reducing transaction costs and enhancing the functioning of the internal market. Harmonization comes at the cost of a loss of opportunities for learning and experimentation, and in the context of procedural law also with the risk of undermining the internal coherence of national procedural systems. In order to get the best out of the Directive, therefore, it is to be hoped that national governments, together with national courts and the Court of Justice, will strive to minimize divergences in implementation and interpretation of the Directive.