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Competition damages betwixt and between past and future: *Cogeco*

Case C-637/17, *Cogeco Communications Inc.* v. *Sport TV Portugal SA and others*, Judgment of the Court (Second Chamber) of 28 March 2019, EU:C:2019:263

1. Introduction

These are glory days for anyone interested in private enforcement of EU competition law. Until *Courage*,[1] liability in damages for a breach of EU competition law was generally a matter to be decided on the basis of applicable national law. The idea of adopting harmonizing EU legislation on damages actions has been contemplated since the 1960s,[2] but it was only pursuant to *Courage*, where the European Court of Justice famously held that it must be "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition",[3] that the Commission began seriously to address the issue.[4] The end result of these

1. Case C-453/99, *Courage* v. *Crehan*, EU:C:2001:465.

2. See e.g. the so-called Deringer report (*Rapport fait au nom de la commission du marché intérieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européenne par le Conseil de la Communauté économique européenne sur un premier règlement d'application des articles 85 et 86 du traité de la C.E.E.*, document 104/1960-1961), quoted in Milutinovic, *The* "*Right to Damages*" *under EU Competition Law: From Courage v. Crehan to the White Paper and Beyond* (Wolters Kluwer, 2010), pp. 27–28; the subsequent Commission report "La réparation des conséquences dommageables d'une violation des articles 85 et 86 du traité instituant la CEE", 1 Série Concurrence (1966), at 5; and Temple Lang, "Community antitrust law: Compliance and enforcement", 18 CML Rev. (1981), 335–362, at 337–343. Further, in Case C-128/92, *H J Banks* v. *British Coal*, EU:C:1993:86, A.G. Van Gerven famously opined that the ECJ should introduce liability in damages for a breach of Arts. 65 and 66(7) ECSC (parallel to Arts. (now) 101 and 102 TFEU).

3. Case C-453/99, *Courage*, para 26. Subsequent case law on the right to compensation in damages includes Joined Cases C-295-298/04, *Vincenzo Manfredi* v. *Lloyd Adriatico*, EU:C:2006:461; Case C-199/11, *Europese Gemeenschap* v. *Otis*, EU:C:2012:684; and Case C-557/12, *Kone* v. *ÖBB-Infrastruktur*, EU:C:2014:1317.

4. Important documents from the legislative process include Waelbroeck, Slater and Even-Shoshan, "Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report" (2004), <ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> (last visited 2 Aug. 2019); COM(2005)672 final, Green Paper on Damages actions for breach of the EC antitrust rules; and COM(2008)165 final, White Paper on Damages actions for breach of the EC antitrust rules. The Green and White Papers were as usual accompanied by Staff Working Documents with further information, and many valuable comments were submitted. All these documents are available

discussions is Directive 2014/104,[5] which has now been transposed into the national laws of all Member States, and a number of soft law instruments.[6] Pursuant to the definitions in its Article 2(1) and (3), Directive 2014/104 applies whenever Article 101 and/or 102 TFEU apply, including in situations where the Articles apply in parallel with national competition law. For clarity, the Directive does not however exhaust all issues pertaining to competition litigation, but sets out to harmonize only a number of central aspects related to damages actions.[7] The rules in the Directive and the process of transposing them into the legal systems of the Member States have both been commented on quite extensively,[8] but we are still waiting eagerly for the tide of preliminary references on those rules to reach the European Court of Justice.

Suspended between the periods *ex ante* and *ex post* Directive 2014/104, we find *Cogeco.* The facts of the case occurred before the Directive was adopted, but the adjudication of the subsequent action for damages did not reach the competent court in Portugal until after adoption.[9] The Court of Justice was seized with a classic issue relating to damages actions for a breach of EU

on the Commission Antitrust website at <ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> (last visited 2 Aug. 2019).

5. Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 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.

6. Communication from the Commission on quantifying harm in actions for damages based on breaches of Art. 101 or 102 of the TFEU, O.J. 2014, C 167/19; SWD(2013)205, Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union; Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, O.J. 2013, L 201/60; Communication from the Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, O.J. 2019, C 267/4.

7. Alternative remedies, e.g. restitutionary actions, are consequently not covered. On the interrelationship between Directive 2014/104 and restitutionary actions, see Strand, "Beyond the Competition Damages Directive: What room for competition law restitution?" in Bergström, Iacovides and Strand (Eds.), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart, 2016).

8. E.g. Bergström, Iacovides and Strand, op. cit. *supra* note 7; Rodgers, Sousa Ferro and Marcos (Eds.), *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP, 2018); Strand, Bastidas Venegas and Iacovides (Eds.), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart, 2019).

9. It may be pointed out that the other recent case on private enforcement of EU competition law, Case C-724/17, *Skanska*, EU:C:2019:204, is firmly situated in the pre-Directive era and no questions on the impact of the private enforcement package were asked by the referring Finnish court in that case. The Commission nonetheless made a reference to the Directive, prompting the ECJ to point out (para 34) that Directive 2014/104 did not apply *ratione temporis*. For a comment to *Skanska* see Havu, "Competition infringements damages actions: Ruling in *Skanska* provides clarifications on legal persons liable", 45 EL Rev. (2020 forthcoming).

competition law, namely on the protective nature of Article 102 TFEU. The Court was also seized with issues relevant for the future: on limitation periods, and on the effect of national decisions and judgments in subsequent proceedings concerning the same alleged infringement of competition law. The Court concluded in *Cogeco* that Directive 2014/104 was not applicable to the case. Nevertheless, it is suggested here that the judgment offers added value to the future of private enforcement of EU competition law which will also be relevant under the new private enforcement regime.

2. Factual and legal background

The claimant in the national proceedings, Cogeco Communications Inc. (hereafter: Cogeco), is a Canadian commercial company and part of a corporate group which is in the business of television, telecommunications and internet services. From 3 August 2006 to 29 February 2012, Cogeco owned shares in Cabovisão – Televisão Por Cabo, SA (hereafter: Cabovisão), a subscription television provider in Portugal. The defendants in the national proceedings were Sport TV Portugal, a commercial sports television network, and two shareholders in that company. Cabovisão and Sport TV Portugal concluded a contract on 30 April 2008, licensing Cabovisão to transmit a sports television channel provided by Sport TV Portugal. On July 30 2009, Cabovisão filed a complaint against Sport TV Portugal and other providers of premium sports television channels with the national competition authority (hereafter: NCA) of Portugal (Autoridade da Concorrência) alleging that the providers had inflated their prices, violating competition law. The NCA took no action against the other sports television networks targeted by Cabovisãos' complaint, but did decide on 14 June 2013 that Sport TV Portugal had abused its dominant position on the relevant market within the meaning of both national competition law and Article 102 TFEU. Sport TV Portugal was fined EUR 3,730,000 for the infringement of competition law.

Sport TV Portugal appealed the NCA's decision to the competent national court, the Tribunal da Concorrência, Regulação e Supervisão. In a judgment of 14 June 2013, that court changed the NCA decision, by holding that Article 102 TFEU was not applicable to the circumstances of the case, but held nevertheless that Sport TV Portugal had abused its dominant position within the meaning of national competition law. The fine was reduced to EUR 2.7 million. Sport TV Portugal appealed again, now to the court of appeal, the Tribunal da Relação de Lisboa, but to no avail: the appealed judgment was upheld by the court of appeal in March 2015.

On 27 February 2015, just before the conclusion of the public enforcement proceedings against Sport TV Portugal, Cogeco brought an action for damages against Sport TV Portugal and its shareholding companies (hereinafter the defendants), before the Tribunal Judicial da Comarca de Lisboa. Cogeco sought compensation for harm incurred between 3 August 2006 and 30 March 2011 resulting from inflated prices for transmission rights, from the loss of return on capital which was not available because of the inflated prices, and from loss of profit, plus interest. In the alternative, Cogeco claimed damages based on the revenue unlawfully attained by the defendants through the infringement of competition law.

In the private enforcement proceedings, the defendants submitted to the national court that the action for damages was time-barred under the applicable limitation period for non-contractual liability. The national rule at issue, Article 498(1) of the Portuguese Código Civil, provides that:

> "[t]he right to compensation expires after a period of three years from the date on which the injured party was aware of his right [to compensation (author's remark)], even if unaware of the identity of the person liable and the full extent of the damage, regardless of the general limitation in the case of the expiry of the relevant period from the event causing the damage".

The defendants argued that the limitation period had begun to run on one of four alternative dates, ranging from the conclusion of a contract between Cabovisão and Sport TV Portugal on 30 April 2008, to the date when Cogeco sold its shares in Cabovisão, which was on 29 February 2012. Cogeco, however, argued that the limitation period had not begun to lapse until the NCA adopted its decision finding an infringement of competition law, on 14 June 2013, as Cogeco could not before that day be aware that it had a right to compensation, but only suspect that there might have been an infringement of competition law. Cogeco also argued that the limitation period had been suspended while its complaint was being processed by the NCA, similarly to the provision in Article 10(4) of Directive 2014/104.

The action brought by Cogeco also raised questions with regard to the legal effect of findings in the public enforcement proceedings. As mentioned above, the NCA had found that Sport TV Portugal had abused its dominant position on the relevant market within the meaning of Article 102 TFEU. Nonetheless the Tribunal da Concorrência, Regulação e Supervisão subsequently held that Article 102 TFEU was not applicable to the circumstances of the case. The Tribunal Judicial da Comarca de Lisboa, for its part, was uncertain to what

extent it should follow the NCA's decision on this point. Under Article 623 of the Portuguese Código de Processo Civil, findings in national public enforcement proceedings could at best constitute a rebuttable presumption for the purposes of civil actions for damages. This seemingly allowed the Tribunal Judicial da Comarca de Lisboa discretion to hold that Article 102 TFEU did apply, notwithstanding the views adopted in the public enforcement proceedings. By contrast, Article 9(1) of Directive 2014/104 stipulates that "an infringement of competition law found by a final decision of an NCA or by a review court is deemed to be irrefutably established for the purposes of an action for damages".

The Tribunal Judicial da Comarca de Lisboa decided to stay proceedings in order to refer six questions (most of which with various sub-questions) to the ECJ for a preliminary ruling under Article 267 TFEU. The referring court pointed out in its reference that the circumstances of the case had occurred before the adoption of Directive 2014/104, and that the parties in the private enforcement proceedings before it were all private entities. The referring court was nevertheless concerned that the Directive might have some effects on the legal relationship between the parties, in light of relevant case law[10] and the principle of sincere cooperation laid down in Article 4(3) TEU. The referring court was also uncertain about the possible effect of other EU law general principles or rules in the main proceedings. In the six questions referred, which will not be reiterated here, the national court thus raised questions on the compatibility of Article 498(1) of the Portuguese Código Civil and of Article 623 of the Portuguese Código de Processo Civil with applicable rules and principles of EU law, including Directive 2014/104.

3. Opinion of the Advocate General

Advocate General Kokott began by addressing issues relating to the fact that the circumstances of the case occurred before Directive 2014/104 was published and entered into force, and that the national courts involved in the public enforcement proceedings had both found that Article 102 TFEU did not apply to the case. This had given rise to admissibility objections and more general questions as to what EU rules and principles could apply in the main proceedings (the first and sixth questions referred). The Advocate General did not opine that the reference was inadmissible, either in whole or in part, as it was not obvious that the EU law provisions at issue were inapplicable, and further because the questions referred were genuine and substantive questions

10. In this connection, the Tribunal Judicial da Comarca de Lisboa cited Case C-41/74, *van Duyn*, EU:C:1974:133; and Case C-144/04, *Mangold*, EU:C:2005:709.

that should not be answered through a declaration of inadmissibility but after consideration of the EU law provisions at issue.[11] Concerning the applicability of Article 102 TFEU in the main proceedings, the Advocate General noted that the national court had not asked the ECJ to rule on that issue and consequently left it for the national court to make that assessment. Instead, she focused on whether the referring court could be bound by the findings of the other national courts that had held that Article 102 TFEU did not apply to the circumstances constituting an infringement of competition law. In this regard, the Advocate General considered Articles 5 and 6 of Regulation 1/2003[12] and the ECJ's judgment in *Tele2 Polska*,[13] concluding that in a decentralized system of enforcement, the findings of national bodies could not be allowed to "bind the hands" of other competent authorities, and that this was particularly so in the case of stand-alone actions for damages. Therefore, she opined that findings of national courts according to which Article 102 TFEU is not applicable to certain circumstances, should not have binding effect in an action for damages.[14] With regard to the legal effect of Article 102 TFEU, the Advocate General recalled that under settled case law, Article 102 TFEU produces direct effects in relations between individuals and creates rights for the individuals concerned which national courts must safeguard.[15] Going on to the applicability of Directive 2014/104, the Advocate General opined that Articles 9(1) and 10 of Directive 2014/104 could not apply in the main proceedings for reasons related to the interpretation of Article 22 of the Directive and for lack of applicability *ratione temporis*.[16] She further recalled settled case law under which a directive cannot be relied upon as such against an individual,[17] and more recent case law according to which a national court cannot be obliged solely on the basis of EU law to refrain from applying national law which is contrary to the provisions of a directive.[18] In sum, the Advocate General opined that Article 102 TFEU produces direct effects in relations between individuals, while Articles 9 and 10 of Directive 2014/104 could not apply in the main proceedings.[19]

11. Opinion of A.G. Kokott, EU:C:2019:32, paras. 32–43.

12. Council Regulation (EC) 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1.

13. Case C-375/09, *Tele 2 Polska*, EU:C:2011:270.

14. Opinion, paras. 48–52.

15. Case law cited included Case C-127/73, *BRT* v. *SABAM*, EU:C:1974:6; and Case C-453/99, *Courage*. Interestingly the A.G. also cited Directive 2014/104, Recital 3.

16. Opinion, paras. 54–64.

17. Case law cited included Case C-152/84, *Marshall*, EU:C:1986:84; and Case C-91/92, *Faccini Dori*, EU:C:1994:292.

18. Case C-122/17, *Smith* v. *Meade*, EU:C:2018:631.

19. Opinion, paras. 65–71.

The second question referred concerned the national limitation period in Article 498(1) of the Portuguese Código Civil (hereafter: Art. 498(1) CC) and whether it was compatible with EU law. In the event that Article 102 TFEU would be considered applicable, the Advocate General scrutinized Article 498(1) CC in light of the EU law principles of equivalence and effectiveness.[20] The Advocate General found that the principle of equivalence was not infringed, and that a limitation period of three years such as the one in Article 498(1) CC was, as such, compatible with the principle of effectiveness. However, the Advocate General explained that identification of the party liable in damages can be difficult, but is indispensable in order to successfully obtain compensation for harm caused by an infringement of competition law. Secondly, the Advocate General argued that "a correct legal appreciation of infringements of the competition rules in many cases requires the assessment of complex economic relationships and internal business documents, which often come to light only as a result of the work of the competition authorities". For these reasons, the Advocate General opined that both the starting point of the limitation period and the lack of suspension of the limitation period during public enforcement proceedings, respectively, were incompatible with the principle of effectiveness.[21]

Advocate General Kokott then turned to the third question, which concerned whether Article 623 of the Código de Processo Civil (hereafter: Art. 623 CPC), under which a finding of the NCA was at best a rebuttable presumption for the purposes of civil actions for damages, was compatible with EU law. The Advocate General examined Article 623 CPC in light of the EU law principles of equivalence and effectiveness in the event that Article 102 TFEU would be considered applicable. The Advocate General concluded that the principle of equivalence was not infringed. With regard to the principle of effectiveness, the Advocate General recognized that the complexity of infringements of competition law and difficulty of proving them made it necessary under the principle of effectiveness that the final finding of an infringement by the NCA be given at least an indicative effect in the action for damages. On balance, the Advocate General opined that it was not compatible with the principle of effectiveness if findings of national competition authorities had no effects whatsoever in a subsequent civil action for damages, but that Article 623 CPC was compatible with the principle of effectiveness if that national provision was understood to the effect that a final

20. For a concise recent contribution on these principles in the context of private enforcement of EU competition law, see Havu and Tarkkila, "EU competition litigation and Member State procedural autonomy – Current Issues", 11 *Global Competition Litigation Review* (2018), 65–71.

21. Opinion, paras. 72–86.

finding by the NCA would result in a rebuttable presumption in the action for damages.[22]

The fourth and fifth questions referred concerned the duty of the referring court to interpret Article 498(1) CC and Article 623 CPC in conformity with EU law. The Advocate General took the view that if Article 102 TFEU were considered applicable in the main proceedings, the national rules at issue must be interpreted in conformity with Article 102 TFEU and the EU law principle of effectiveness. As a consequence, Advocate General Kokott opined, a decision of the NCA must at least be afforded an indicative effect under Article 623 CPC, and the objective of effective private enforcement of competition law must be considered under Article 498(1) CC. However, the Advocate General warned, the duty of consistent interpretation is limited by general principles of law and, further, cannot serve as the basis for a *contra legem* interpretation of national law.[23]

4. Judgment of the Court

The ECJ used its discretion to restructure the questions asked, and to rephrase them somewhat. As a result, the Court first addressed the fifth and sixth questions referred, which were interpreted as concerning, in essence, "whether Article 22 of Directive 2014/104 must be interpreted as meaning that that directive is applicable to the dispute in the main proceedings".[24]

With regard to the applicability of the Directive, the Court (like the Advocate General) recognized the distinction between substantive provisions covered by Article 22(1) of the Directive and procedural provisions covered by Article 22(2). Concerning the latter, the Court stressed that the Member States enjoyed a measure of discretion to decide on the temporal scope, within the timeframe between 26 December 2014 and 27 December 2017, of national provisions intended to transpose the procedural provisions in the Directive. Consequently, the Court would not scrutinize national transposition measures in this respect, but would accept that actions for damages brought before 27 December 2017 might be governed solely by national procedural law.[25] The same applied *a fortiori*, the

22. Opinion, paras. 87–97.

23. Opinion, paras. 98–106. Case law cited in connection with the last point included Case C-212/04, *Adeneler*, EU:C:2005:654; and Case C-122/17, *Smith* v. *Meade*.

24. Judgment, para 24.

25. In the French language version, such actions "*restent régis uniquement par les règles procédurales nationals*". This was arguably a rare instance of misleading (or outright erroneous) reasoning on behalf of the ECJ, plausibly caused by the ambiguity as to whether or not Art. 102 TFEU applied in the main proceedings. If Art. 102 TFEU were applicable, the

Court held, to substantive provisions of Directive 2014/104. As Cogeco had brought its action for damages before the expiry of the transposition period and before the Portuguese transposition of the Directive, and as the Portuguese legislature had decided that the procedural provisions of the transposing act were not retroactively applicable, the Court concluded that Article 22 of Directive 2014/104 must be interpreted as meaning that the Directive was not applicable *ratione temporis* in the main proceedings.[26]

Next, the ECJ turned to the second question and to the first part of the fourth question referred, and the issue of whether the limitation rule in Article 498(1) CC was compatible with EU law. The Court recast the referred questions, explaining that it has discretion to reformulate referred questions and to offer all the points of interpretation necessary in order to provide useful answers to the referring court, Uncertainty pertained, according to the Court, to "whether Article 102 TFEU and the principles of equivalence and effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is set at three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and the full extent of the damage, and, secondly, does not include any possibility of suspending or interrupting that period during the proceedings before the national competition authority".[27]

In addressing this set of questions the ECJ began with a very important declaration that perhaps would have warranted this case being adjudicated in Grand Chamber, even though the legal point as such was entirely expected. The Court first recalled that Article 102 TFEU produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard. The Court then held, for the first time, that the "full effectiveness of Article 102 TFEU and, in particular, the practical effect of the prohibition laid down in that article would be put at risk if it were not open to any individual to claim damages for loss caused to him by abusive conduct of a dominant undertaking liable to restrict or distort competition", and that "any person can claim compensation for the harm

main proceedings would obviously not be governed "solely" (*uniquement*) by national procedural rules, as those national rules would be subject to EU law principles of judicial protection, i.e. the principles of equivalence and effectiveness. Perhaps a *proviso* on the non-applicability of Art. 102 TFEU was included in an earlier draft of this section of the judgment, but it is not to be found in the published version.

26. Judgment, paras. 24–34 and operative part para 1.

27. Judgment, para 37.

suffered where there is a causal relationship between that harm and an abuse of a dominant position prohibited by Article 102 TFEU".[28]

The ECJ then acknowledged that as long as there were no rules of EU law governing the exercise of this right to compensation that were applicable *ratione temporis* (as Directive 2014/104 did not apply), it was for the domestic system of each Member State to lay down such rules, including rules on limitation periods, provided that the principles of equivalence and effectiveness were observed. Specifically in the context of competition law, the Court added, those national rules must not jeopardize the effective application of Article 102 TFEU. In this regard the Court held that actions for damages for a breach of competition law usually require complex factual and economic analysis, and that national rules on limitation must be adapted to these specificities of competition law "so as not to undermine completely the full effectiveness of Article 102 TFEU".[29] Concerning the limitation period at issue in the main proceedings, the Court held that it was indispensable for the injured party to know who is liable for the infringement of competition law in order to be able to bring an action for damages. The Court further noted that if a limitation period started to run before the completion of public enforcement proceedings and was too short in relation to the duration of those proceedings, and could not be suspended or interrupted during their course, such a limitation period might expire even before the public enforcement proceedings were completed. As a consequence, the Court continued, potential claimants could be barred from bringing damages actions based on a final decision finding an infringement of EU competition rules in public enforcement proceedings. In sum, the Court concluded that:

> "Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority".[30]

28. Judgment, paras. 38–40. On the right to compensation, the ECJ cited, "by analogy", Case C-557/12, *Kone*, paras. 21–22 and the case law there cited (notably Case C-453/99, *Courage* and Joined Cases C-295-298/04, *Manfredi*). It is tempting to quote John Cleese in "Monty Python and the Holy Grail": "You're not fooling anyone, you know!" This was the first time that it was confirmed by the ECJ that compensation is payable for harm caused by a breach of Art. 102 TFEU. See further *infra*.

29. Judgment paras. 41–47 (quote is from para 47).

30. Judgment, paras. 48–55 and operative part para 2. Like A.G. Kokott, the ECJ quickly noted, in para 54, that the principle of equivalence was not infringed by Art. 498(1) CC.

The ECJ then addressed the third question and the second part of the fourth question, which concerned Article 623 CPC and whether "the definitive finding of an infringement of competition law" in public enforcement proceedings should or should not have any binding or other effect in subsequent damages litigation. With regard to these questions, the Court observed that the definitive findings at issue were not that Sport TV Portugal had abused its dominant position on the relevant market within the meaning of Article 102 TFEU, but on the contrary that Sport TV Portugal had *not* abused its dominant position on the relevant market within the meaning of Article 102 TFEU. Consequently, the Court held, there had not been any definitive finding of an infringement of competition law in the national public enforcement proceedings, and therefore the questions referred in connection to Article 623 CPC did not bear any relation to the actual facts of the main action or its purpose. For these reasons the Court declared those questions inadmissible.[31]

Finally the Court briefly held that in view of the answers given to the second to sixth questions there was no need to answer the first question.

5. Comment

5.1. *Cogeco and the past: Settling the issue of compensation*

Cogeco settles an issue that was debated in the 1960s and 1970s, but then gradually faded into relative oblivion. Indeed, it had faded so much that the Advocate General does not touch upon it at all in her Opinion, and so much that the Court of Justice settles it in passing. The legal issue is whether Article 102 TFEU is designed to protect the interests of individuals (so that a breach of that rule may constitute a tort triggering liability in damages for the tortfeasor to anyone who has suffered harm caused by the tortious act), or whether by contrast it is intended to protect general interests (so that an infringement could not as such give rise to liability in damages to individuals harmed). This distinction is known in many jurisdictions.[32] In German law (and in systems inspired by German law) this so-called *Schutznormtheorie* is well accepted and is included in the main rule on damages liability; Article 823(2) BGB.[33] In common law, the tort of breach of statutory duty requires that the legislature intended that a breach of the statute at issue should give rise to

31. Judgment, paras. 56–60.

32. For a historically useful (albeit now somewhat dated) overview see Picañol, "Remedies in national law for breach of Articles 85 and 86 of the EEC Treaty: A review", 10 LIEI (1983), 1–37, at 4–6, followed by a review of national case law at the time.

33. Note, however, that competition damages in Germany are no longer governed by the general rules of the BGB but by the GWB.

damages liability for the tortfeasor. In fact, the text of Articles 101 and 102 TFEU says nothing on liability in damages. The question, therefore, was whether or not they should be construed as implying that a breach would give rise to liability in damages? Since the adoption and national transposition of Directive 2014/104 on actions for damages, the matter has been settled and harmonized. In that regard, *Cogeco* can be seen as a remnant of the pre-Directive or even pre-*Courage* regime. In that perspective the issue of the protective purpose of Article 102 TFEU, now settled by the Court, will matter legally only if you insist it was a good thing to have this finally resolved in relation to primary law and for the purposes of Article 102 TFEU (as opposed to Article 101 TFEU which is covered by previous case law). Against this background, *Cogeco* brings a final end to any lingering doubts and gives reason to briefly recall the older discussions on the purposes of Articles (now) 101 and 102 TFEU.

The benefits of private enforcement to deter infringements were recognized as early as in the 1960 Deringer report,[34] probably in light of the choices made in America where private enforcement was (and still is) the main route to enforcement of State and federal antitrust policies.[35] In accordance with recommendations in the report, the availability of private enforcement actions in the Member States was mapped by the Commission, with predominantly positive results.[36] In discussions on private enforcement in the 1960s, it was noted however that in some Member States (notably Germany and the Netherlands) an action for damages by reason of a breach of competition law might be rejected because the rules at issue were perceived to serve the general, macro-economic interest, rather than the interests of individuals.[37]

34. Deringer report quoted in Milutinovic, op. cit. *supra* note 2.

35. On the (federal) US system from a European perspective, see e.g. Buxbaum, "Private enforcement of competition law in the United States – Of optimal deterrence and social costs" in Basedow (Ed.), *Private Enforcement of EC Competition Law* (Kluwer Law International, 2007); or Jones, "Private enforcement of EU competition law: A comparison with, and lessons from the US" in Bergström, Iacovides and Strand, op. cit. *supra* note 7.

36. Report cited *supra* note 2. There is a stark contrast between the conclusions in this report and those in Waelbroeck, Slater and Even-Shoshan, op. cit. *supra* note 4. Interestingly, a comparative study by Möllers and Heinemann in 2007 resulted, as did the 1966 Commission report, in a more positive view of the possibilities of private enforcement in the Member States, including damages for a breach of Art. 102 TFEU; Möllers and Heinemann, *The Enforcement of Competition Law in Europe* (CUP, 2007), pp. 530–531.

37. For an overview of the national case law at issue see Van den Heuvel, "Civil-law consequences of violation of the antitrust provisions of the Rome Treaty", 12 AJCL (1963), 172–193, at 184–189. The 1966 Commission report, cited *supra* note 2, included a detailed analysis of relevant national law at the time. It was noted in the report that the distinction between rules designed to protect general interests and rules designed to protect the interests of

Tides turned in favour of private enforcement of EEC competition law, however, when the Court of Justice delivered *BRT* v. *SABAM* in 1974. The famous holding that "[a]s the prohibitions of Articles [101](1) and [102] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard"[38] left no room for the argument that those rules were not intended to protect individuals, and little if any room for the view that harm suffered by those individuals should not be compensated in the form of damages.[39] Remaining concerns under German law were overcome in 1979, when the German Bundesgerichtshof held (on the basis of *BRT* v. *SABAM*) that Articles 85 and 86 EEC (now 101 and 102 TFEU) were to be considered to be laws for the protection of private interests within the meaning of Article 823(2) BGB.[40] At this point, Temple Lang suggested that private enforcement should be encouraged by the adoption of a "directive harmonizing national law remedies for breaches of Community antitrust law".[41] It took the EU some time to get to it, though. In the meantime, as mentioned, the ECJ settled in *Courage* that compensation in damages must be available for a breach of Article 101 TFEU. Unsurprisingly, but notably, the Court has now also finally settled in *Cogeco* that compensation in damages must be available for a breach of Article 102 TFEU.

individuals might give rise to variance in the outcome of damages actions, but on a close reading it seemed this variance would not only occur between jurisdictions, but also within e.g. the German jurisdiction as the issue turned on several factors. Those interested in understanding the scholarly debate in the 1960s until the 1980s can find overviews in Staines, "The right to sue in Ireland for violation of the EEC rules on competition", 4 LIEI (1977), 53–70; and Picañol, op. cit. *supra* note 32.

38. Case C-127/73, *BRT* v. *SABAM*, EU:C:1974:6, para 16.

39. Lingering doubts were voiced by Barounos, Hall, and James, *EEC anti-trust law: Principles and practice* (Butterworths, 1975), pp. 135–136. The argumentation at issue aims at damages for a breach of Art. 85 EEC but should apply also to damages for a breach of Art. 86, which is touched upon very briefly at p. 148.

40. BGH, 23 Oct. 1979, KZR 21/78, *BMW-Importe*, para 17. See also *supra* note 33.

41. Temple Lang, op. cit. *supra* note 2, 341. See also Temple Lang, "Compliance with the Common Market's antitrust law", 14 *International Lawyer* (1980), 485–507, at 490–494. The idea of harmonization had already been contemplated in the early 1960s, but in the form of a regulation; see the Deringer report quote in Milutinovic, op. cit. *supra* note 2. The consensus from the 1980s was that the core rules, i.e. Arts. 101 and 102 TFEU and their national equivalents, did protect individual interests and that a breach of those rules could thus be tortious; see e.g. Komninos, *EC Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 191 with references. Swedish readers can see an extensive (pre-*Courage*) discussion with the same conclusion in Andersson, *Dispositionsprincipen och EG:s konkurrensregler: En studie i snittet av svensk civilprocess och EG-rätten* (Iustus, 1999), pp. 146–158.

5.2. *Cogeco and the future: Added value under Directive 2014/104*

5.2.1. *Limitation periods*

Limitation periods for competition damages claims are harmonized under Article 10 of Directive 2014/104, including several specific issues concerned in *Cogeco*. Thus, limitation periods shall be at least five years and shall not begin to run until "the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer". Furthermore the limitation period shall be suspended or interrupted "if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates" and that suspension "shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated". The issue of limitation periods is also touched on in Recital 36 of the Directive, where it is stressed that the Directive intends claimants to be able to initiate an action for damages after public enforcement proceedings by the NCA have ended. However, it is also stated in Recital 36 that "Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation" (i.e. subject to the principle of effectiveness). Against this background, it must be asked if *Cogeco* can offer any added value to the issue of limitation periods in actions brought under the new system of private enforcement, or will the scope of its substantive influence be limited to similar pending actions caught between the past and future of EU competition litigation?

The Court held in *Cogeco* that Article 102 TFEU and the principle of effectiveness precluded national legislation under which the limitation period in respect of actions for damages was three years and, firstly, started to run even if the injured party was still unaware of the identity of the person liable, and, secondly, did not include any possibility of suspending or interrupting that period during proceedings before the NCA.[42] These points all seem to be

42. Judgment, para 53 and operative part para 2. The ECJ did not in this context use the comprehensive analysis and balancing test formulated for the purposes of the principle of effectiveness in Case C-312/93, *Peterbroeck*, EU:C:1995:437, para 14, and Joined Cases C-430 & 431/93, *van Schijndel*, EU:C:1995:441, para 19. There is no room here to discuss further why and when the ECJ will use a more complex or a more rudimentary effectiveness assessment, but

covered by Directive 2014/104, with even more stringent conditions than those following from *Cogeco.* What could be the added value of *Cogeco* to the future of competition litigation? Perhaps only that the requirements that follow from Article 102 TFEU and the principle of effectiveness, as regards the aspects of limitation periods at issue in the judgment, do not seem to exceed those laid down in Directive 2014/104. Nonetheless, the ECJ's reasoning also serves to illustrate that the Court can continue, by interpretation of Articles 101 and 102 TFEU and the EU law principles on judicial protection, to fill in the gaps and details of the current private enforcement regime.

More importantly, however, the ECJ's findings with regard to Article 498(1) CC seem liable to cause disturbances in the national system as regards harm suffered in the past. Insofar as this author is able to understand the Código Civil Português, there is no absolute limitation period for non-contractual liability; the three-year period in Article 498(1) CC is the only limitation period. As the Court has now excluded Article 498(1) CC for the purposes of competition damages actions under EU law, it seems that the issue of limitation of competition damages claims under Portuguese law has been left in limbo. It remains to be seen how the Portuguese courts will cope with this. With respect to the main proceedings in *Cogeco*, it is not an unlikely scenario that the Tribunal Judicial da Comarca de Lisboa will get around this problem by ruling that Article 102 TFEU is not applicable to the action and that therefore Article 498(1) CC will apply as normal, thus adhering to the view chosen by the Tribunal da Concorrência, Regulação e Supervisão and the Tribunal da Relação de Lisboa. Alternatively, if the referring court does instead find that Article 102 TFEU is applicable, it should be able to settle for observing that under the interpretation handed down by the ECJ the action at issue is not time-barred, and there is no need to go into abstract considerations of the legal situation. Nevertheless, Portuguese courts may face an influx of competition damages actions from parties whose claims for damages had been regarded as time-barred under Article 498(1) CC, but now see an opportunity to use the *lacuna* caused by the Court. Indeed, it might be argued by such parties that damages are now payable under Portuguese law for all harm caused by an infringement of EU competition law since Portugal's entry into the Community in 1986.

Although this author is no expert in Portuguese law, it is submitted that such an interpretation of *Cogeco* is probably not the only option available to Portuguese courts if pressed on this issue. The ECJ did not in any way indicate that limitation periods of three years would as such be unacceptable under

it should be noted that there is variance. See further e.g. Dougan, "The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union Law before the national courts" in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 419–421.

Article 102 TFEU and the principle of effectiveness.[43] The incompatibility of Article 498(1) CC with Article 102 TFEU and the principle of effectiveness only pertained to the point in time at which the limitation period began to run, and the lack of possibilities to suspend or interrupt it. Otherwise, Article 498(1) CC does not *prima facie* seem to be at odds with what one could expect the ECJ to derive from primary EU law, even if inspired by Article 9 of Directive 2014/104.[44] In order to adapt to the ECJ's ruling, it should therefore suffice either to reinterpret the regulatory content of Article 498(1) CC so as to comply with the specific instructions in *Cogeco*, or, if possible for a Portuguese court, to complement Article 498(1) CC with a judge-made rule setting a longer, absolute limitation period running from the occurrence of harm.

Such complementing absolute limitation periods are used in Denmark (ten years from the occurrence of harm) and Norway (twenty years). Under those rules, the limitation period that begins to run when the claimant has (or should have) become aware of having suffered harm due to an infringement of competition law is complemented by an absolute limitation period running from the occurrence of harm, in order precisely to provide a final point in time where potential claims by reason of a harmful event are cut off in the interest of legal certainty.[45] There can, of course, be no certainty as to how the ECJ would rule on such absolute limitation periods if given the chance in future preliminary rulings. On the one hand, it could be argued that any limitation period that starts to run before the potential claimant is aware of the relevant facts would be irreconcilable with the Court's clear stance in *Cogeco* that knowledge of those facts is "indispensable . . . for the injured party",[46] and that the Court has stressed the importance of the damages claimant being aware of relevant facts also in the context of public procurement cases.[47] On the other hand, the Court seemed to stress several times in *Cogeco* that the Portuguese limitation period was relatively short, whereas an absolute limitation period will be much

43. A.G. Kokott explicitly opined that three years should be fully acceptable; Opinion, para 78.

44. On the contrary, Directive 2014/104 Art. 9 and Art. 498(1) CC seem to suffer from the same ambiguities concerning e.g. what constitutes knowledge on the part of the claimant. See Pais, "A first look at the Portuguese Act 23/2018 transposing the Private Enforcement Directive" in Strand, Bastidas Venegas and Iacovides, op. cit. *supra* note 8, pp. 72–73.

45. See further Strand, "Managing transposition and avoiding fragmentation: The example of limitation periods and interest" in Strand, Bastidas Venegas and Iacovides, op. cit. *supra* note 8, 46–50.

46. Judgment, para 50.

47. E.g. Case C-406/08, *Uniplex (UK)* v. *NHS*, EU:C:2020:45, paras. 31–32; and Case C-166/14, *MedEval*, EU:C:2015:779, paras. 36–44.

longer.[48] Moreover, as mentioned, the use of absolute limitation periods is explicitly accepted in Recital 36 of Directive 2014/104. There might, therefore, be some room for reasonable absolute limitation periods.

Finally, it may be asked whether the scope of these findings on limitation periods is limited to EU competition law or whether they are transferrable also to other EU law contexts. On the one hand, the basis for the argumentation would suggest a negative answer. The Court reached its conclusions on the basis not only of the general EU law principle of effectiveness, but repeatedly stressed the full effectiveness of Article 102 TFEU, also in the operative part of its ruling. The latter element might suggest a limited scope. On the other hand, the substantive reasoning of the Court seems transferable to any circumstances where harm is suffered, but where the harmed party is unaware of its right to compensation and/or of the identity of the tortfeasor. Such reasoning could, for instance, be equally persuasive under Directive 2004/48/EC on the enforcement of intellectual property rights.[49]

5.2.2. *The binding effect of national decisions: Using inadmissibility to give an answer?*

The ECJ concluded that there was no need to address the issue of the binding effect of national decisions finding an infringement of Article 102 TFEU as there had been no final decision finding an infringement of Article 102 TFEU. One might accuse the Court of slipping away on a technicality of its own making; the final decision of the national courts was that the relevant circumstances fell outside the scope of Article 102, but the referring court might still have been curious whether *that* final decision should have any effect in subsequent litigation. Indeed the wording of the referring court's question (in particular the third question) is not such as to indicate that the distinction between finding an infringement of Article 102 TFEU, on the one hand, and finding that Article 102 TFEU was not applicable, on the other hand, was perceived as significant by the national court. Rather, it was the ECJ that rephrased the questions referred and then declared the rephrased question inadmissible. Curiously, the Court (and the Advocate General) also added that it concerned findings "in infringement proceedings before the national competition authority" while the relevant questions referred were on "a final order in

48. Cf. Joined Cases C-295-298/04, *Manfredi*, paras. 77–82, where the duration of the limitation period, and the practical consequences of having a short limitation period, were similarly stressed but where it was left for the national court to make the final assessment.

49. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. 2004, L 195/16 [corrected version], Art. 13.

infringement proceedings", indicating final decisions either by the NCA or by a national court on appeal.

The referring court may very well be displeased with the lack of an answer. It nevertheless seems the Court provided us with some indications that may be relevant in future competition litigation under Directive 2014/104. According to Article 9(1) of the Directive, "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law". Article 9(2) further stipulates that final decisions taken in another Member State shall serve as at least *prima facie* evidence that an infringement of competition law has occurred. These duties are similar, but not identical, to the duties of national courts to observe Commission decisions under Article 16 of Regulation 1/2003, according to which national courts must abstain from taking decisions that run counter to decisions adopted by the Commission, and must avoid taking decisions that run counter to decisions contemplated by the Commission, if proceedings concern the same factual circumstances as before the Commission.[50]

Probably, it is not by accident that the rephrased question assessed by the ECJ in *Cogeco* comes very close to the wording used in the Directive. Indeed, what the Court seems to have done is to explain what is meant (and what is not meant) by "an infringement of competition law found by a final decision of a national competition authority or by a review court". It is clear from *Cogeco* that declarations by an NCA or review court, finding that a situation falls outside the scope of EU competition law, would not be covered by Article 9 of Directive 2014/104 and consequently not be binding in subsequent damages actions. Arguably, it also follows from the wording of Article 9 that negative declarations in public enforcement proceedings, according to which Article 102 TFEU is applicable but has not been infringed, are not binding in subsequent private enforcement proceedings. If so, the only final decisions of an NCA or by a review court that are covered by Article 9 of Directive 2014/104 are decisions that include a positive declaration that there has been an infringement.[51] As a consequence, courts adjudicating actions for competition damages will need to observe the duties under Article 9 only when it has been positively established, in national public enforcement

50. See Case C-547/16, *Gasorba*, EU:C:2017:891, para 29, and Ashton, *Competition Damages Actions in the EU: Law and Practice*, 2nd ed. (Edward Elgar, 2018), 5.02–5.08.

51. The suggestion that this would follow from the wording of Directive 2014/104 Art. 9 is not new, but has been submitted already e.g. by Andersson, "The binding effects of decisions and judgments under EU competition law" in Strand, Bastidas Venegas and Iacovides, op. cit. *supra* note 8, p. 103.

proceedings, that the defendant has infringed competition law. By contrast, the national court will not need to follow findings in national public enforcement proceedings according to which a situation falls outside the scope of EU competition law, and furthermore the national court will not need to follow findings according to which EU competition law is applicable but has not been infringed. In sum, the system would seem to be designed to promote damages actions. From such a perspective it would be interesting to see whether the Court would accept *national* rules under which national courts hearing an action for damages would indeed be bound by a final negative decision (that is, the final finding that an agreement, decision or practice is compatible with competition law) in public enforcement proceedings.[52] The outcome of a future preliminary ruling on that issue would be truly indicative of the intentions of the Court of Justice.

Finally, it must of course be admitted that the significance for *Cogeco* under Article 9 of Directive 2014/104, as submitted above, does not follow explicitly from the judgment. The Court did not rule on Article 9 (since the Directive was not applicable), but it seems the reasoning of the Court leaves little or no room for any other interpretation than the one suggested here. The judgment entails implicit inspiration from Directive 2014/104, not only with regard to the binding effect of national decisions but also with regard to limitation periods. These could be construed as spillover effects of the Directive, if you will, through which the future of EU competition litigation is allowed to influence its past.[53] More conspicuously, however, *Cogeco* highlights the aforementioned fact that in case law to come, the Court can be expected to continue to fill in the gaps and details of the new private enforcement regime with further interpretations of Articles 101 and 102 TFEU and the EU principles on judicial protection.[54]

6. Conclusion

Cogeco is important, in the sense that it was the first case on private enforcement of EU competition law since the advent of the new private enforcement regime, and since it connects the past and future of private enforcement. Admittedly, it is doubtful whether certain aspects of the case

52. Cf. on this issue the judgment of the EFTA Court in Case E-6/17, *Fjarskipti*, paras. 43–48.

53. Systematically, however, it must be stressed that in *Cogeco* there is no "incidental", "triangular", or other ancillary effect of Directive 2014/104 on the rights and obligations of the parties. The substantive findings of the ECJ were derived from Art. 102 TFEU and the principle of effectiveness.

54. The same point is proven by the abovementioned Case C-724/17, *Skanska*.

will offer useful guidance under the new regime, but in other aspects *Cogeco* should become an important precedent.

The ECJ settled an issue that was debated a long time ago in the European Economic Community: whether Article 102 TFEU protects the interests of individuals so that a breach of that Article can lead to liability to compensate harm caused by the breach. That question has not really been considered a hot topic since the early 1980s, but if there were any lingering doubts, they have finally been put to rest. Indeed, "any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an abuse of a dominant position prohibited by Article 102 TFEU".[55]

Further, the Court gave the referring court an answer that risks causing quite a stir in Portugal. By holding that the Portuguese limitation period for non-contractual liability was incompatible with Article 102 TFEU and the principle of effectiveness, the floodgates appear to have been opened and it remains to be seen how to stem a plausible flow of Portuguese competition damages actions from claimants who, pursuant to *Cogeco*, consider their claims revived from having previously been time-barred. For the purposes of the main proceedings, it also remains to be seen whether the referring court will take the view that Article 102 TFEU is applicable, or whether it will follow the example of the other national courts where it was decided that the alleged abuse had no cross-border impact. If the latter view is adopted, neither Article 102 TFEU nor Directive 2014/104 is applicable in the main proceedings (and the referring court may regret ever having asked). More generally, it also remains to be seen whether the reasoning of the Court on national limitation periods will be transferred to similar situations in other EU law contexts than competition law.

Arguably, the ECJ offered information on Article 9 of Directive 2014/104 by declaring a question on the binding effect of national decisions inadmissible. Taking liberties with the wording of the question, the Court twisted it considerably, with little concern for the usefulness of its answer in the main proceedings. Nonetheless, it seems we can conclude that a national court will not need to follow findings in public enforcement proceedings according to which an agreement, decision or practice falls outside the scope of application of EU competition law, and quite plausibly a national court will not need to follow findings that the defendant has *not* infringed competition law, but only declarations that there *has been* an infringement. That conclusion should be valid, also under Article 9 of Directive 2014/104.

Finally, it deserves to be repeated that although Directive 2014/104 harmonizes a number of central aspects related to damages actions for a breach of EU competition law, it does not in any way exhaust the issues of

55. Judgment, para 40. Expect to see that paragraph cited in case law to come.

competition litigation. As illustrated by *Cogeco*, the ECJ remains able not only to flesh out the new regime with case law on the various provisions of the Directive, but also to fill the gaps with further case law on Articles 101 and 102 TFEU and EU principles on judicial protection. Furthermore, private enforcement in the form of actions for injunctions, restitution, and so on, is still waiting for a bit of attention. With the steady increase of private enforcement in Europe,[56] cases are also likely to appear on such actions.

Magnus Strand *

56. Statistics relating to cartel damages claims are available in Laborde, "Cartel damages actions in Europe: How courts have assessed cartel overcharges", Concurrences N° 1-2019, at 3. These annual reports, if generalized, indicate that private enforcement is on the rise in Europe.

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