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VBB on Competition Law

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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

FOREIGN DIRECT INVESTMENT

National level

BELGIUM

Belgian Interfederal Investment Screening Committee publishes new guidelines on interpretation of Belgian FDI screening mechanism

On 4 April 2024, the Interfederal Investment Screening Committee (the "ISC"), which is responsible for coordinating the application of the Belgian mechanism for the screening of foreign direct investment (the "Mechanism"), published new guidelines for the interpretation of the Mechanism (the "Additional Guidelines").

While guidance regarding the interpretation of the law governing the Mechanism remains scarce, the ISC previously already published two sets of proposed guidelines – and occasionally provides additional insight on an informal and individual basis. Interestingly – and contrary to the previously published guidelines – the Additional Guidelines are not explicitly marked as *proposed* guidelines.

The publication of the Additional Guidelines follows a public consultation by the ISC on the evaluation of the ISC's notification forms in February 2024, on which VBB also provided input at the ISC's invitation.

The Additional Guidelines provide further details on the functioning of the Mechanism and notification requirements. They were incorporated into the existing proposed guidelines, adding 30 further questions and answers (there are now 81 in total) and also clarifying certain previous answers.

The Additional Guidelines clarify that:

- no individual exemptions can be granted, or rulings obtained, prior to a notification (this was already clear from practice);
- certain asset deals are subject to the Mechanism and notification obligation (this was already clear from the law governing the Mechanism). While the Additional Guidelines provide that the acquisition of a mere physical local presence without any legal structure would not in principle fall under the Mechanism, they also add that this assessment remains subject to a case-by-case analysis;
- the standstill-obligation following a notification under the Mechanism only applies to the Belgian aspects of the notified transaction, adding that the non-Belgian aspects may already be implemented prior to the decision under the Mechanism;
- foreign investors can be fined if they fail to provide certain required information for a notification or if disclosed information is inaccurate (this was already clear from the law governing the Mechanism), adding the recommendation to provide for appropriate solutions in this respect in the relevant transaction documentation;
- *ex officio* investigations cannot result in a decision to retroactively dissolve a transaction, but they can result in an order to divest; and
- *ex officio* investigations can be launched in relation to transactions that were not notifiable (this was already clear from the law governing the Mechanism).

The Additional Guidelines further clarify how to calculate certain investment thresholds triggering a notification obligation. Interestingly, the Additional Guidelines no longer indicate that it is not possible to appeal decisions launching *ex officio* investigations and that an appeal would only be possible after the *ex officio* investigation resulted in a final decision. Finally, the Additional Guidelines stress that the ISC always recommends notifying a transaction in case of doubt.

The text of the Additional Guidelines can be found in Dutch here and in French here.

FOREIGN SUBSIDIES REGULATION

European Union level

Commission flexes FSR muscles in multiple investigations of Chinese subsidies allegedly distorting markets

The European Commission ("Commission") has recently embarked on a series of significant investigations under the Foreign Subsidies Regulation ("FSR") – a pivotal, novel EU tool designed to tackle distortions in the internal market stemming from foreign subsidies. These developments highlight the Commission's political willingness to protect European businesses against subsidized competition by Chinese companies.

The Commission's investigations rely on a variety of tools available under the FSR:

- On 16 February 2024, the Commission used the FSR procurement tool to open the first-ever Phase 2 investigation in the context of public procurement in the railway sector in Bulgaria. This investigation was terminated, due to the withdrawal of the Chinese tenderer and the subsequent Bulgarian decision to cancel the bid.

- On 3 April 2024, the Commission opened two additional Phase 2 investigations related to tenders for solar photovoltaic solutions. The Commission's intervention in these cases reportedly led to the withdrawal of Chinese tenderers from the procurement procedures, significantly impacting the market dynamics.

- On 9 April 2024, the Commission continued its intervention in the green energy sector (in addition to the abovementioned investigations concerning solar panels, the Commission has also recently opened an anti-subsidy investigation against EVs from China) by initiating its first-ever *ex officio* case, targeting the supply of wind turbines for wind park projects in different Member States (Spain, Greece, France, Romania and Bulgaria) (see Van Bael & Bellis Client Alert of 22 April 2024).

- On 23 April 2024, the Commission surprised the FSR community when dawn raids of subsidiaries in the Netherlands and Poland of a Chinese supplier of security equipment components marked the opening of the second *ex officio* investigation. The Commission's aggressive tactics raised eyebrows, since it would appear doubtful that the Commission could find meaningful evidence on Chinese distortive foreign subsidies at the EU subsidiaries – as most of the relevant information about those support schemes would presumably reside in China. A request for information followed by an inspection in China (a well-established practice in the trade defence context) may thus have been a more effective way to gather evidence and receive more comprehensive explanations of the different subsidy schemes – without getting directly confrontational with a foreign government.

In addition, the Commission has also activated the **International Procurement Instrument** ("IPI", see Van Bael & Bellis Client Alerts of 30 June 2022, and 30 April 2024), a tool established a few years ago to promote reciprocity of access to procurement markets and ensure EU companies' participation in procurements abroad (including in China). The Commission opened an IPI investigation concerning procurement procedures of medical devices in China where European device makers are allegedly excluded. Depending on the outcome of the investigation – and of discussions with the Chinese government – the Commission is empowered to take proportionate measures seeking to open up Chinese medical device procurement markets. In particular, the Commission could limit access for five years to public procurement procedures in the EU to businesses, goods or services originating in China – by either introducing a score adjustment on tenderers from that country, or excluding them directly.

FOREIGN SUBSIDIES REGULATION

European Union level

These developments – and especially the news about an FSR dawn raid – send a strong signal that the Commission is committed to pro-actively using the investigative (and potentially decision-making) powers under the FSR and other trade-related instruments.

Questions remain, however, about the practical impact of these investigations. For instance, the medical device IPI investigation targets a sector where Chinese manufacturers are not present in Europe – raising doubts about incentives for the Chinese government to open up Chinese procurement markets to EU competitors. In addition, the two in-depth investigations under the FSR procurement tool led to the withdrawal of Chinese bidders. While for some this may mean greater "fairness", it also means higher costs for European taxpayers, reduced access to competitive products, and potentially less investment in Europe. It may well be that the Commission is in this for the long game, hoping that a continued use of the full arsenal of tools may eventually lead to broader negotiations with China about market access and subsidies.

Notwithstanding the above, it is worth emphasising that these developments do not provide total comfort to non-Chinese players active in the EU. Indeed, although the Commission's current focus is evidently on China, only targeting one country may raise discrimination concerns under WTO law. Therefore, it is not inconceivable that – once the "Chinese wave" of investigations has passed – the Commission will launch at least some investigations into distortions caused by subsidies granted by other countries.

ABUSE OF DOMINANT POSITION

European Union level

Federal Court of Justice confirms the FCO's finding that Amazon has paramount significance for competition across markets, thereby applying German national competition law in parallel with the DMA

On 23 April 2024, the German Federal Court of Justice ("FCJ") confirmed the German Federal Cartel Office's ("FCO") finding that Amazon.com, Inc. ("Amazon") has paramount significance for competition across markets – pursuant to Section 19a (1) of the German Act against Restraints of Competition ("ARC"). In its judgment, the FCJ also confirmed that Section 19a (1) ARC – which allows the FCO to regulate conduct of companies found to have paramount significance for competition across markets – can be applied to companies that are also subject to Digital Markets Act ("DMA") obligations.

Under Section 19a ARC, the FCO is empowered to establish the paramount significance of the company for competition across markets, and – in a second step – to prohibit the company from engaging in certain types of conduct deemed particularly harmful to competition (such as self-preferencing). The indicators of such "paramount significance" are: (i) a dominant position on one or more markets; (ii) financial strength or access to other resources; (iii) vertical integration and activities on otherwise interrelated markets; (iv) access to competition-relevant data; and (v) the importance of activities for third-party access to procurement and sales markets as well as related influence on the business activities of third parties. Such finding is limited to five years after it becomes final.

On 5 July 2022, the German FCO concluded that Amazon and its affiliated companies are of paramount significance for competition across markets pursuant to Section 19a (1) ARC for the provision of online marketplace services for business. Amazon and a German group company appealed this decision. During the appeal proceedings, on 6 September 2023, Amazon was designated as a gatekeeper by the European Commission ("Commission") – pursuant to the DMA.

On substance, the FCJ ruled that the FCO rightly found that Amazon is active to a significant extent on multi-sided markets and that the group is of paramount significance for competition across markets. The FCJ confirmed that such a finding does not require any specific competitive threat or restriction of competition. Rather, the existence of strategic and competitive opportunities – the abstract potential threat of which is addressed by the provision – is sufficient. The FCJ found that Amazon has a dominant position on the German market for online marketplace services for commercial traders. In particular, as the operator of numerous national online marketplaces worldwide and in Germany, Amazon was found to hold a key position for retailers' access to their sales markets – and was therefore able to exert considerable influence on the sales activities of third-party retailers. The FCJ concluded that the FCO was correct in determining that Amazon is of paramount significance – not only as a marketplace service provider, but across markets. The FCJ noted that Amazon is active on many different, vertically integrated markets which are interconnected in a diverse and conglomerate manner – curiously referring to a number of services where Amazon does not have a significant market position (such as Home Entertainment, Twitch, Prime Video, Kindle Content, Amazon Music, Amazon Games, Amazon Echo und Amazon Alexa, Amazon Fire, and Fire TV). Finally, the FCJ observed that Amazon has superior financial strength and superior access to competitively relevant data – such as customer and user data, data from the operation of the trading platforms and advertising platforms and related services as well as from the operation of AWS.

ABUSE OF DOMINANT POSITION

European Union level

Observations

The FCJ's ruling sheds light on the potential conflict between the DMA and national competition rules. Indeed, the DMA did not pre-empt the application of Section 19(a) ARC to Amazon, which had been designated by the Commission as a gatekeeper for the services Amazon Marketplace and Amazon Advertising. According to the conflict rule in Article 1(6) of the DMA, the DMA does not affect the application of Articles 101 and 102 TFEU (or their national equivalents) under certain conditions. More specifically, national competition law which prohibits other unilateral conduct can be applied only if it imposes further obligations on designated gatekeepers *that go beyond the DMA* (Article 1(6) (b), DMA). Amazon had been designated as a gatekeeper by the Commission with respect to Amazon Marketplace and Amazon Advertising. As a result, Section 19a ARC can be applied to Amazon only insofar as it relates to other services and/or it imposes further obligations that go beyond the catalogue of obligations as set out in the DMA (particularly in Articles 5 – 7). This would appear to leave little room for the application of the second stage of Section 19a ARC in a manner that would not conflict with the DMA. It remains to be seen how the FCO will now wield this instrument if and when proceeding to the second stage (preventive prohibition of specific conduct).

Clearly, this development raises concerns about a fragmentation of the rules governing the digital internal market (i.e., exactly the opposite result to the objective sought by the DMA) – especially if other EU Member States are inspired by Germany's willingness to shape its own digital rules on top of those applicable to the same players under the DMA. A reference for preliminary ruling might therefore have provided more clarity in regard to the application of conflict rules, particularly since this was the first case in which the FCJ has ruled on the controversial Section 19a ARC.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

THE NETHERLANDS

Dutch Competition Authority does not object to proposed sector-wide sustainability standard

On 11 April 2024, the Dutch Competition Authority ("DCA") announced that –following an informal assessment – it had no objections to the launch of a sustainability standard by e-commerce sector association Thuiswinkel.org.

Thuiswinkel.org, an association of undertakings that is active in the e-commerce sector, sought to create the first sector-wide non-profit standard for undertakings aimed reducing their environmental impact in a way that is recognizable to consumers within six themes, namely: strategy, product offering, packaging, delivery, returns and circularity.

When assessing the compatibility of the sustainability standard at issue with competition law, the DCA noted the following: (i) undertakings may voluntarily choose whether they want to participate in the sustainability standard; (ii) an independent institution assesses whether the conditions of the standard are met; (iii) undertakings retain room to set their own objectives and make their own sustainability choices, within the framework of that standard; (iv) undertakings are free to take further sustainability steps if they wish; (v) the standard offers space for new sustainable innovations, such as new packaging options; and (vi) Thuiswinkel.org provided assurances that no commercially sensitive information would be exchanged between the relevant undertakings.

This development should also be considered within the context of the DCA's broader initiatives on sustainability. Indeed, in addition to verifying compatibility with rules on competition, the DCA also verifies whether undertakings provide consumers with clear, complete, and specific information about sustainability claims, including through the use of sustainability standards. Moreover, the DCA has previously published its Guidance on Sustainability Claims (here) and Policy Rule on Sustainability Agreements (here).

To further encourage sustainability initiatives from industry, the DCA reiterates that undertakings may ask the DCA questions when in doubt about sustainability agreements. However, the DCA is not the only competition enforcer to be proactive on competition and sustainability. For instance, the UK's Competition and Markets Authority ("CMA") has similarly provided recent informal guidance on Fairtrade's initiative to promote sustainable sourcing (here) and WWF's aspired science-based net-zero targets (here) – and such informal assessments must also be read in conjunction with the CMA's Green Agreements Guidance (here) (see VBB on Green Agreements in PLC here).

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

UNITED KINGDOM

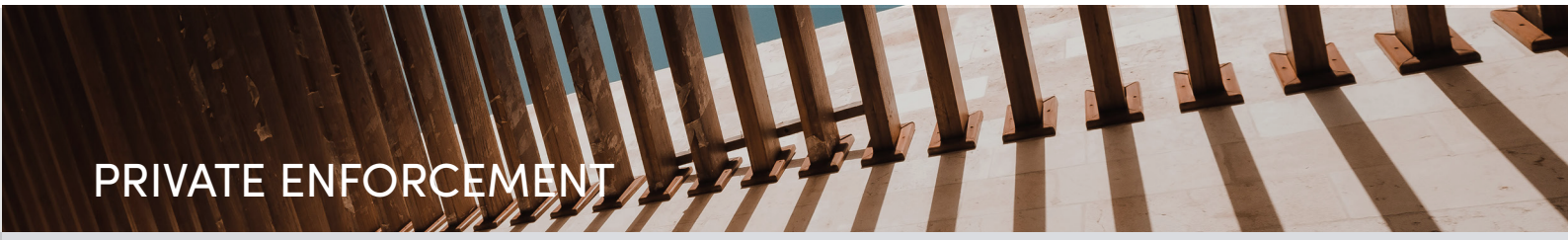
No place like home? High Court fully restores CMA's powers to raid domestic premises

On 22 April 2024, the High Court of England and Wales ruled that the UK's Competition Appeal Tribunal ("CAT") had set an erroneously high legal standard for the UK's Competition and Markets Authority ("CMA") to exercise its powers to search domestic premises under section 28A of the Competition Act 1998 ("CA 1998"). The judgment clarifies that one of the threshold conditions for granting a warrant to search domestic premises can be satisfied by inference from the suspected existence of a secret cartel.

In October 2023, as part of its investigation into a suspected cartel in the chemical admixtures market, the CMA applied to the CAT for four warrants to enter and search both business and domestic premises. Under sections 28 (business premises) and 28A (domestic premises) of CA 1998, the CAT may issue a warrant to enter and search premises if there are reasonable grounds to suspect that there are documents on the premises which – if required by the CMA to be produced by notice – would not be produced (but would instead be concealed, removed, tampered with, or destroyed). The CAT granted the warrants in respect of the business premises but refused the application in respect of the domestic premises. The CAT held that, while the threshold condition in section 28 could be satisfied by inference from the suspected existence of a secret cartel, the (identically-worded) condition in section 28A required something more to suggest a propensity to destroy evidence (see, VBB on Competition Law, Volume 2023, No. 12).

The High Court found that the CAT was wrong as a matter of law to conclude that the inference – arising from the suspected existence of a secret cartel – of a propensity to destroy or conceal documents is never sufficient, of itself, to satisfy the threshold condition in section 28A of CA 1998. The High Court agreed with the CMA that requiring additional evidence showing a propensity to destroy documents in all cases concerning domestic premises "*goes too far*", especially in circumstances where such additional evidence might be difficult for the CMA to obtain. Nevertheless, whether or not the inference would be enough to satisfy the threshold condition will necessarily depend upon the facts and circumstances of each particular case.

The CMA has naturally welcomed the overturning of the CAT's judgment, which – in its view – had "*risked seriously undermining*" the CMA's ability to enforce effectively against cartels. With the increase in remote and flexible working, the CMA considers that "*it is essential*" that it is able to search domestic premises. Against that background, the High Court judgment should thus serve as a timely reminder to companies operating in the UK that the prospect of simultaneous dawn raids at business premises and at key employees' homes is not out of the question.



PRIVATE ENFORCEMENT

European Union level

Court of Justice declares former Czech rules on limitation incompatible with EU law and clarifies relevance of a non-final Commission infringement decision for the purpose of determining the limitation period

On 18 April 2024, the European Court of Justice ("ECJ") handed down its judgment in Case C-605/21 (*Heureka Group* (*Comparateurs de prix en ligne*)) concerning the compatibility of the former Czech rules on limitation with EU law, namely (i) with Article 102 TFEU, Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions ("Damages Directive"); and (ii) the principle of effectiveness.

The case pertains to a follow-on action brought by Heureka – a Czech company active in the price comparison services market – against Google before the Czech courts, on the basis of the 2017 decision of the European Commission ("Commission") in the *Google Search (Shopping)* case.

In summary, the ECJ held that the former Czech law on limitation is incompatible with EU law considering that:

(i) Article 10 of the Damages Directive (which is applicable *ratione temporis*), Article 102 TFEU and the principle of effectiveness preclude national legislation setting out a limitation period which (a) starts to run without the injured party having had knowledge of the fact that the behaviour concerned constituted a competition law infringement and without that infringement having come to an end, and (b) may not be suspended or interrupted during a Commission investigation into the infringement; and

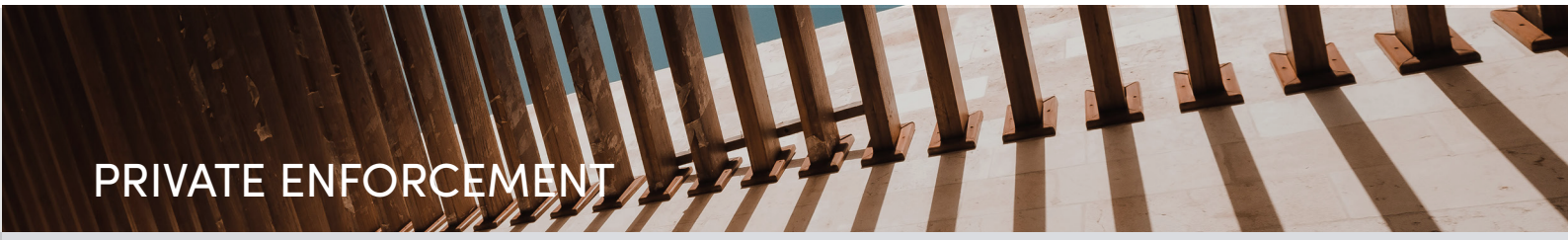
(ii) Article 10 of the Damages Directive precludes national rules which do not provide for a suspension of the limitation period for – at the very least – one year after the relevant infringement decision has become final.

Background

In 2017, the Commission imposed a fine on Google for abusing its dominant position as a search engine by systematically promoting its own comparison-shopping service, while demoting competing comparison-shopping services in the search results (see VBB on Competition Law, Volume 2017, No. 6). As regards the Czech Republic, Google's alleged infringement had started in February 2013 and had continued to produce effects on the date of the adoption of the Commission decision on 27 June 2017.

In 2020, Heureka subsequently brought a follow-on damages action against Google – claiming that the latter's anticompetitive practices in the Czech Republic, for the period from February 2013 to 27 June 2017, had caused reduced traffic on Heureka's sales price comparison portal. Heureka's claim thus related to an alleged infringement which began *prior* to the entry into force of the Damages Directive on 25 December 2014, but ceased *after* the date of expiry of the time limit for the transposition into national law of the Damages Directive on 27 December 2016. In response, Google contended that the claim was – at least in part – time-barred based on the former Czech law on limitation (which remained applicable to Heureka's action).

Under the old regime – in force until the late transposition of the Damages Directive into Czech law on 1 September 2017 – the start of the three-year limitation period was linked solely to the knowledge of the harm (and of the identity of the party liable to pay compensation for that harm). For the limitation period to start to run, the rules did not, however, require that either (i) the injured party knows that the conduct at issue amounts to a competition law infringement; or (ii) the infringement has come to an end.



PRIVATE ENFORCEMENT

European Union level

Moreover, according to the case law of the Czech Supreme Court, the harm caused by continuing competition law infringements is divisible in partial occurrences of harm, each of which triggers a new and separate limitation period. This effectively means that, under the previous framework, even knowledge of partial harm could trigger a new limitation period. A damages claim could thus gradually become time-barred at several separate junctures in time.

Finally, the old rules did not subject the three-year limitation period to a suspension or interruption during a Commission investigation into possible infringements.

In addition, the Commission decision is – importantly – not yet final. Google first challenged the decision before the General Court, which dismissed the relevant action – for the most part – on 10 November 2021 (see VBB on Competition Law, Volume 2021, No. 11). Google then lodged an appeal against the General Court's judgment before the ECJ, which is still pending.

In this context, the referring Czech court asked the ECJ to clarify in a preliminary ruling whether the former national rules on limitation were compatible with EU law, and in particular with (i) Article 10 of the Damages Directive which governs limitation periods, (ii) Article 102 TFEU as well as (iii) the principle of effectiveness.

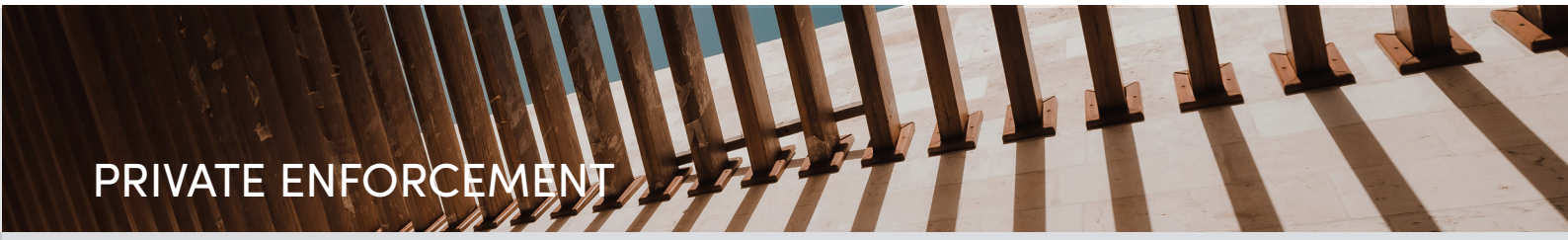
The ECJ's judgment

The ECJ first addressed the temporal applicability of Article 10 of the Damages Directive in the present case. For this purpose, the ECJ, relying on its recent judgment in *Volvo and DAF Trucks* (see VBB on Competition Law, Volume 2022, No. 6), sought to establish whether – at the date of expiry of the time limit for transposition of the Damages Directive – the three-year limitation period provided for in the former Czech rules had elapsed. This, in turn, required the ECJ to ascertain the starting point of the limitation period on the basis of the applicable national legislation – whilst taking account of the principle of full effectiveness of Article 102 TFEU.

In this regard, the ECJ held that the principle of effectiveness may place limits on national legislation even before the deadline for transposition of the Damages Directive had expired. In particular, the ECJ noted that Article 102 TFEU and the principle of effectiveness require that the relevant limitation period only starts running when the competition law infringement has come to an end and when the claimant is aware – or is reasonably expected to be aware – of the information necessary to bring an action for damages (including the fact that the behaviour concerned constitutes an infringement of the competition rules). According to the ECJ, this requirement also means that a limitation period may not commence before a single and continuous infringement has come to an end.

The ECJ further recalled that – in line with its previous caselaw (see, for example, ECJ order in *QJ and IP v Deutsche Bank AG*, VBB on Competition Law, Volume 2023, No. 3) – the knowledge of the claimant is, in principle, expected to exist on the date of publication of the summary of the Commission decision in the EU's Official Journal. The ECJ added that the burden falls upon the defendant to prove that the claimant's knowledge occurred before such publication.

Importantly, the ECJ also made clear that a claimant may rely on the findings of a Commission decision which, as in the present case, has not become final to support its damages action. The ECJ explained that a Commission infringement decision under appeal enjoys a presumption of legality and produces a binding effect for as long as it has not been annulled. The ECJ added that the circumstances in the present case are different from those in *Volvo and DAF Trucks*, *QJ and IP v Deutsche Bank AG* and *Sumal* (see VBB on Competition Law, Volume 2021, No. 10) where the infringement had been recorded in a decision that had become final. The ECJ clarified that circumstances like those in *Sumal* represent only a more obvious situation in which an action for damages may be brought – but that this does not prevent actions for damages to be brought on the basis of a Commission decision that is not yet final.



PRIVATE ENFORCEMENT

European Union level

Finally, the ECJ held that – whilst the principle of effectiveness requires the limitation period to be suspended or interrupted for as long as the Commission investigation is ongoing – that principle does not require the limitation period to continue to be suspended until the resulting Commission decision becomes final. The Court reasoned that suspension or interruption during the investigation is necessary in order to enable the injured party to assess whether an infringement has been committed (and to rely on that finding of infringement to bring an action for damages). However, as the injured party may rely on a Commission decision that has not become final, a continuation of the suspension during appeals before the EU Courts is not necessary.

In light of these considerations, the ECJ concluded that – on the date of expiration of the time limit for transposition of the Damages Directive into national law (i.e., 27 December 2016) – the limitation period provided for in the old Czech rules had likely not started to run. The ECJ explained that this is because – on that date – the alleged infringement at issue likely had not yet in any event come to an end. As a result, the ECJ ruled that Article 10 of the Damages Directive is applicable *ratione temporis* in the present case. The Court concluded that the former Czech rules on limitation were incompatible not only with Article 102 TFEU and the principle of effectiveness, but also with the terms of Article 10 of the Damages Directive. The latter requires that the suspension of the limitation period is to end – at the earliest – one year after the relevant infringement decision has become final.

The *Heureka* judgment confirms the ECJ's recent case law pertaining to the issue of limitation in the context of damages actions and provides useful clarifications, including as to the relevance of a non-final Commission decision in determining the starting point of the limitation period. The judgment can also be seen as an illustration of the emphasis placed by the ECJ on the principle of effectiveness to restrict national procedural autonomy in this field. However, considering the particularly strict nature of the national rules examined in this case, its practical significance for other EU Member State jurisdictions may also be limited.

Brussels
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone:+32 (0)2 647 73 50
Fax:+32 (0)2 640 64 99

Geneva
26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone:+41 (0)22 320 90 20
Fax:+41 (0)22 320 94 20

London
Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com