

Implementation of the Damages Directive across the EU

February 2017

The Damages Directive¹, which seeks to promote and harmonise the private enforcement of EU competition law before national courts across the European Union - and which was first published in December 2014 after more than ten years of debate - was due to be transposed into national law by each Member State by 27 December 2016.

While most Member States did not meet this deadline², it is nevertheless already apparent that there are divergences in the approach of certain jurisdictions to its implementation.

This Briefing Note considers what we know so far about the approach to implementation of the Damages Directive across certain key EU jurisdictions and the extent to which the differences between the private damages regime in the UK and the equivalent regimes in other Member States will be narrowed as a result. It also highlights the key implications for clients either bringing, or defending, competition damages actions in the EU.

Introduction to the Damages Directive

It is well established that any person has a right to be compensated for loss suffered as a result of an infringement of EU antitrust rules. However, it has clearly been easier for victims of anti-competitive behaviour to claim compensation in some Member States than in others as a result of the differences in the private enforcement regimes across the different Member States. The European Commission was particularly concerned that the lack of developed rules in some Member States could effectively prevent victims from exercising their rights to claim compensation in those jurisdictions.

Against this backdrop, the Damages Directive seeks to ensure that anyone who has suffered harm

caused by an infringement of EU competition law (or equivalent national laws in Member States) can effectively exercise their right to claim full compensation for that harm.

Key provisions include empowering national courts to order disclosure, making final infringement decisions of national competition authorities binding on their own national courts (and *prima facie* evidence of infringement in other Member States' courts), recognising the passing-on defence, introducing a rebuttable presumption that cartels cause harm, codifying the joint and several liability of co-infringers and setting a common approach to limitation periods.

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive").

² It is understood that only Denmark, Finland, Hungary, Luxembourg, Sweden and Latvia (partly) transposed the Damages Directive within the required deadline. Italy voted to approve the implementation of the Damages Directive on 18 January 2017. It is possible to track the progress of each Member State's implementation via the European Commission website at: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

Following implementation of the Damages Directive, claimants will therefore have a host of new tools available to them in claims brought before national courts for breaches of EU competition law.

Implementation of the Damages Directive in the UK

The result of the June 2016 EU Referendum raised the question of whether the UK would implement the Damages Directive. However, on 20 December 2016 the Government published a response to its earlier consultation on implementation, confirming its intention to transpose the Damages Directive into UK law through UK Regulations. The Regulations will not, however, come into force until after they have received formal Parliamentary approval, which is expected in early 2017.

While the initial consultation had proposed adopting a ‘copy out’ approach in respect of certain provisions of the Damages Directive, involving the explicit transposition of those provisions into UK law, respondents to the consultation had raised concerns that this would risk undermining important UK case law and create confusion given that there is already a good understanding of the UK private damages regime.

As a result, the Government now proposes to adopt a ‘lighter touch’ approach such that, where provisions that meet the requirements of the Damages Directive already exist in UK law (including through existing case law), these will be left in place, and changes will only be made to implement the outstanding provisions.

Key elements to note as regards the proposed UK implementation include:

- **Single regime** - The Damages Directive is intended to apply only to cases where there is a breach of EU competition law and not when only domestic law applies. However, to avoid establishing a two-tier system and to prevent uncertainty for businesses, the Government proposes to implement the Damages Directive as a single regime. This means the same procedures will apply whether the original breach was of EU or domestic competition law.
- **Transitional arrangements** - The Regulations make a distinction between “substantive” and “procedural” provisions. All of the major provisions are substantive provisions, save for (i) disclosure and (ii) the binding nature of decisions of other Member States’ competition authorities, both of which are considered to be procedural provisions. The substantive provisions will apply only to claims where both the infringement and harm occurred after the coming into force of the implementing legislation. Procedural provisions will apply to proceedings which begin after the commencement of the implementing legislation, even if the harm or infringement took place before that date.

The UK is one of a small number of European Union (EU) Member States to have an existing regime dedicated to damages claims following breaches of competition law. The purpose of the Directive is to bring other Member States up to the same level as the UK, enabling consumers across the EU to bring damages claims following breaches of EU competition law.

UK Government Department for Business, Energy & Industrial Policy - 20 December 2016

- **Limitation** - The Government will not make changes to the length of the limitation periods currently in force, which it considers already exceed the five-year requirements of the Damages Directive. The Government has indicated that it will, however, create a self-contained competition limitation regime to clarify when the limitation period is to start and be suspended.
- **Disclosure** - Although disclosure is well-established in the UK, there are some divergences with the requirements of the Damages Directive. The Damages Directive requires that national courts limit their disclosure only to evidence which is proportionate. While there is overlap between this and the existing concept of proportionality in the UK Civil Procedure Rules, the issue of confidentiality is not currently a factor that is expressly to be taken into account in determining proportionality under the UK rules. Further, there are currently no specific provisions which deal with disclosure from the file of a competition authority, nor is there an absolute restriction on the disclosure of leniency documents, both of which are required by the Damages Directive. The Government proposes to amend the applicable rules to ensure that these requirements are effectively reflected in the UK regime.
- **Infringement decisions** - Final decisions of UK competition authorities are already binding on UK courts for the purposes of a follow-on damages claim. However UK law does not yet explicitly require that similar decisions by other Member States are *prima facie* evidence of the infringement and the Government will legislate to codify this requirement.
- **Passing-on** - As there is now some clear case law establishing the passing-on defence,³ the Government considers that, in accordance with its lighter touch approach, there is no need to

legislate for these provisions. The Government has, however, decided to legislate to clarify that the burden of proving pass-on rests with the defendant.

- **Rebuttable presumption of harm** - This concept does not currently exist under UK law and the Government has indicated that it will amend legislation to give clear effect to this provision. However, the Government has made it clear that the courts are expected to continue to apply existing principles to calculate the harm caused.
- **Joint and several liability** - The Government considers that it is well accepted that a competition co-infringer may be jointly and severally liable. In line with the lighter touch approach, the UK will not legislate to spell this out, though it will legislate to exempt SMEs and immunity recipients as required by the Damages Directive.

Overall therefore, the UK's proposals for implementation do not involve any fundamental changes to the UK regime and may be characterised more as fine-tuning.

Implementation of the Damages Directive in other key EU jurisdictions

The implementation of the Damages Directive is, however, likely to result in more significant changes to the competition litigation regimes of other Member States - and particularly those that previously had limited architecture for private damages claims.⁴ It remains to be seen how successful the courts in such jurisdictions will be in making the new regimes effective in practice, and the extent to which those jurisdictions will become increasingly attractive for potential claimants.

³ See *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11.

⁴ According to a survey of EU national competition authorities undertaken by PaRR in late 2016, 10 of the 19 authorities that responded expected the new rules to have a direct impact on the number of claims in their Member States, though such impact may not become apparent for a number of years.

Some Member States have, in addition, taken the opportunity to go beyond the requirements of the Damages Directive. By way of example, Spain has chosen to recognise the decisions of other Member States' competition authorities as binding (rather than just *prima facie*) evidence of an infringement.

Aside from the UK, two of the other key jurisdictions in which private damages actions have typically been brought to date are the Netherlands

and Germany. Claimants will therefore likely be keen to understand how these two jurisdictions intend to implement the Damages Directive, and the extent to which there will continue to be divergences between the private damages regimes in the UK, the Netherlands and Germany. We have set out below some of the key effects that the Damages Directive and surrounding legislative changes are likely to have in the Netherlands and Germany.

Germany

On 28 September 2016, the German Government submitted a draft bill implementing the Damages Directive to the Bundestag, where it is currently being debated. It is expected to be adopted in February 2017 and to enter into force in February/March 2017.

Disclosure - Currently under German law neither the claimant nor the defendant have a general right to request disclosure. The Damages Directive therefore represents a fundamental change in approach. Although the Damages Directive only requires Member States to enable the courts to order disclosure in their discretion, the draft bill goes further and establishes a substantive right for claimants and defendants such that courts would only be able to refuse disclosure if the request is disproportionate or in breach of the other requirements of the Damages Directive (e.g. protection of leniency statements). As the concept of disclosure is new to the German legal system and the scope of the draft provisions is somewhat unclear, it remains to be seen how the right to disclosure will be asserted in practice and what approach will be taken by courts.

Passing-on - While German courts already recognised the passing-on defence, with the full burden of proof lying with the defendant, the draft bill codifies this case law into statute.

Adverse costs risk - Currently under German law, a losing claimant has to reimburse intervening parties (e.g. co-infringers that are not defendants) for their legal costs at the same rate as defendants, which can amount to a significant sum. The draft bill limits the reimbursement of legal fees of all interveners to the amount of legal fees that a single defendant could demand. This will likely significantly reduce the cost risks for claimants.

Infringement decisions - Final decisions of the German competition authority and the European Commission as well as the competition authorities of other Member States are all already binding on German courts for the purposes of follow-on claims, which goes beyond the requirements of the Damages Directive.

Joint and several liability - The principle of joint and several liability of co-infringers is already well-established in German law. More significant is the provision in the draft bill that the three year statute of limitations for contribution claims will begin to run only from the time that the defendant demanding contribution has paid damages to the claimant. This addresses the risk currently that contribution claims become time-barred before damages are even paid to the claimant.

Collective action - Germany continues not to have any formal collective action regime for competition damages actions. However, there are initiatives to establish a collective action regime through model actions for declaratory judgments, which will *de facto* allow certain associations to bring claims on behalf of numerous claimants. It remains to be seen how far-reaching any collective redress mechanism will be. No draft bill has yet been published.

The Netherlands

On 24 January 2017, the Dutch parliament adopted a law implementing the Damages Directive. The Dutch implementing law largely follows the provisions of the Damages Directive and, like the UK, the implementation has not led to any fundamental changes to the Dutch competition damages regime, which was already well-established.

Limitation - Similarly to the UK, no changes needed to be made to the length of the five-year limitation periods currently in force. However, in line with the Damages Directive, the implementing law does specify that when a competition authority starts an investigation, the limitation period will be suspended for the duration of the investigation.

Settlements - To aid settlement and provide closure to settling infringers, the implementing law provides that when an infringer and a claimant settle, the remaining claim against the other co-infringers is to be reduced by the settling infringer's share in the liability. By extension, the non-settling co-infringers can no longer claim contribution from the settling infringer when confronted with the remaining claim.

Single regime - Contrary to the UK, the provisions of the implementing law only apply to cases where there is a breach of EU competition law. The Dutch Government has indicated it will deal with purely national infringements in a separate legislative proposal.

Collective action - While the Dutch "WCAM" collective settlement procedure (which allows the court to declare the settlement binding on all members of a class on an opt-out basis) is well-known, the Netherlands also has a separate collective action regime. Currently, this collective action regime only allows representative organizations to seek declaratory or injunctive relief.

On 16 November 2016, the Dutch Government presented a draft bill proposing to extend the collective action regime to allow claims for monetary damages. Similar to the WCAM, the proposal provides that a representative would be able to bring a collective claim on behalf of a defined class who will automatically be included in the claim, unless they opt-out.

The proposal specifies that a collective action can only proceed if the case has a 'sufficiently close connection' with the Netherlands, which exists if (i) the defendant is based in the Netherlands, (ii) the harmful events took place in the Netherlands, or (iii) the majority of the injured parties are domiciled in the Netherlands. It remains to be seen whether the Dutch courts would adopt as wide an approach to finding jurisdiction here as they have with WCAMs.

The draft bill has been subject to academic and political criticism and it is not yet certain whether it will be passed in its current form. Earlier this year, indications were made that the bill (as amended) will take effect from 1 January 2018. It remains to be seen whether this deadline is feasible, especially given the Dutch general election in March 2017.

The UK's ongoing role as centre for competition damages actions

Notwithstanding the Damages Directive's objective of harmonising the competition damages regimes across the EU, the UK continues to present a number of advantages that may be expected to support its ongoing role as a centre for competition litigation.

- **Disclosure** - The UK has a sophisticated disclosure regime, with a well-understood framework that will arguably continue to offer more extensive disclosure than will be available under the disclosure regimes in other jurisdictions post-implementation of the Damages Directive.
- **The Competition Appeal Tribunal (the "CAT")** - The UK's specialist competition tribunal is widely acknowledged to be extremely effective, combining cross-disciplinary expertise in law, economics, business and accountancy with well-honed procedural rules.
- **Litigation funding** - The UK has a sophisticated litigation funding market, involving a combination of (i) activist claimant law firms working on conditional fee or damages based agreements, (ii) a deep pool of litigation funders, who actively book-build potential claims, and (iii) readily available after-the-event insurance to cover adverse costs risks. The result is that potential claimants can in many cases be offered risk-free litigation.
- **Opt-out collective proceedings / collective settlement** - In October 2015, the UK introduced a new collective proceedings regime before the CAT. This regime provides for the possibility of either opt-in or opt-out proceedings. Opt-out proceedings enable a claim to be brought in respect of all class members domiciled in the UK who do not opt-out. Opt-in proceedings allow class members to opt-in. Further, the UK has also introduced a collective settlement regime allowing the court to approve the settlement of claims whether or not collective proceedings have been launched. If approved by the CAT, the collective settlement is binding on all persons falling within the class, other than those who opt-out. The collective proceedings and settlement regimes increase the incentives for claimant firms and litigation funders to build claims proactively in the UK.

Conclusion

Though the Damages Directive seeks to harmonise the private damages regimes across the different Member States, it seems likely that the UK will continue to be an attractive jurisdiction for claimants to bring claims. However, additional uncertainty has of course been created by Brexit and the possibility that this brings of further changes to the UK's private damages regime.

With thanks to Hengeler Mueller (Dr. Thorsten Mäger and Dr. Sarah Milde) and De Brauw Blackstone Westbroek N.V. (Daan Beenders and Wouter Hofstee) for their assistance.



Jonathan Clark
T +44 (0)20 7090 4039
E jonathan.clark@slaughterandmay.com



Camilla Sanger
T +44 (0)20 7090 4295
E camilla.sanger@slaughterandmay.com



James Dobias
T +44 (0)20 7090 4365
E james.dobias@slaughterandmay.com