**Implementing the EU Damages Directive in the UK**

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**Competition analysis: What approach will the UK take to the implementation of the EU Damages Directive? Richard Pike, partner in Constantine Cannon’s antitrust litigation and counselling practice group, sets out how the government proposes to implement the required changes and the impacts they will have on the competition landscape across the EU.**

**Original news**

BIS: UK government consults on implementing into UK law the EU Damages Directive for breaches of competition law, LNB News 28/01/2016 103

*Views on how the UK government propose to implement the EU Damages Directive 2014/104/EU are sought by the Department for Business, Innovation & Skills (BIS). The Damages Directive is designed to make it easier for businesses and individuals to claim for compensation when they have been victims of a breach of European competition law. The changes are relatively minor, as, during negotiations, the UK successfully ensured the Damages Directive was based closely on the UK model. The policy options on which the government are seeking views include whether to implement a separate regime for breaches of European competition law (including where European competition law is applied in parallel with UK competition law) to sit alongside the regime for cases under UK competition law (dual regime), or whether to apply the changes required by the Damages Directive to cases brought as a result of breaches of either European or UK law (or both) (single regime). Responses are also requested on how to handle the Damages Directive’s provisions on limitation periods for bringing claims for damages. The closing date for this consultation is 9 March 2016.*

**What areas of the UK private damages regime need to be revised in order to meet the requirements of the Damages Directive?**

There will be changes to limitation periods, disclosure requirements, joint and several liability, the application of passing-on and the availability of contribution claims against settling defendants. Many of the provisions of the Damages Directive reflect existing law or practice in the UK, so the majority of the changes are limited to specific, sometimes esoteric, points rather than being more wide-ranging. The impact of the Damages Directive in the UK will be less than in many other Member States.

**How is the government proposing to implement the required changes?**

We do not yet have any draft text for the implementing legislation but the government says it is planning to adopt a ‘copy-out’ approach to implementation where it simply inserts provisions into UK law in the same terms as in the Damages Directive. The government is proposing to apply the new rules from October 2016, slightly ahead of the EU deadline of 27 December 2016.

**How will the proposed changes impact the limitation period for bringing private damages actions?**

Limitation will not start running until the relevant competition infringement has finished and the claimant has the requisite knowledge of the infringement (including, for the first time, that it constituted an infringement of competition law). More significantly, the running of time will be suspended while any competition authority investigations or appeals are ongoing. The net effect of this will be to hugely extend existing limitation periods, seemingly allowing claims for up to six years after the final disposal of any infringement appeal. To put this in context, if the new rules had applied at the relevant time it would still be legally possible to bring damages claims relating to the paraffin waxes cartel in 2022, even though the infringement started in 1992 and was the subject of an infringement decision in 2008.

The government has indicated that the new limitation rules will not apply until after October 2016. It is not yet clear exactly what this means but my best guess is that the government will say that the new limitation rules will only apply in respect of causes of action accruing after October 2016. If so, the new rules will not have any practical impact for a long time.

**How will the proposed legislative amendment regarding the passing-on defence work?**

Recognition of the existence of a passing-on defence (if it can be called that) is not itself particularly controversial in the UK as it was already widely accepted among practitioners that the defence would be recognised by UK courts. The more controversial aspect is the use of presumptions required by the Damages Directive—a presumption that there was passing-on in the case of indirect purchaser claimants and a presumption that there was not passing-on in the case of direct purchaser claimants. These conflicting presumptions could potentially result in double-payment where a defendant is sued by both direct and indirect purchasers. In practice, however, I suspect that the UK courts will find the presumption to be overcome relatively easily and will award much the same amounts as they would otherwise have done anyway. If anything, the presumptions may be helpful for defendants in giving them an excuse to seek consolidation of direct and indirect purchaser claims, potentially adding to the costs for claimants and delaying the resolution of cases.

**Could any further changes be made to the private damages regime at the same time as the implementation of the Damages Directive (eg in relation to the transitional rules in the 2015 Competition Appeal Tribunal (CAT) Rules)?**

It would be great if the government could be persuaded to correct the mess that was made with the transitional rule in the 2015 CAT Rules. I am not optimistic that will happen, however.

**Is there likely to be any impact to the attractiveness of the UK private damages regime?**

I do not think the UK implementation will make much difference to the attractiveness of the UK private damages regime. There are, from the perspective of claimants, a few retrograde steps such as new restrictions on disclosure that will overturn helpful rulings in various English cases (eg access to leniency material in National Grid), but these will apply equally in other Member States and are not all that significant anyway. At the same time, the extension of the limitation periods may cause a change in defendant behaviour that makes claims quicker and cheaper than at present in the UK. Up to now, the typical defence strategy has been to delay the resolution of claims in the hope that there will be no settlement or judgment until after limitation periods have expired—thus avoiding the risk of copy-cat claims. This probably will not be possible with the extended limitation periods so defendants may opt, instead, to just dispose of claims as quickly and cheaply as possible. Since cost is one of the biggest reasons for not using the UK courts, this may actually make the UK courts somewhat more attractive.

The more interesting question, though, is whether implementation of the Damages Directive in other Member States will make them more attractive fora than previously and thus cause the UK courts to lose business to them. That is definitely possible, but it really depends on how the provisions are implemented in practice, particularly those relating to disclosure. If courts in other Member States became a lot more willing to grant disclosure then the UK courts could lose some of their attraction, but I suspect that will not happen to any great extent.

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*Interviewed by Jane Crinnion.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*