



SHEPHERD+ WEDDERBURN

**Department for Business Innovation & Skills**

**Reply to Consultation: Implementing the EU Directive  
on damages for breaches of competition law**

**Question 1**

**Do you agree that implementing the Directive as a single regime would be the right approach?**

- ☒ Yes  
☐ No  
☐ Not sure

Comments:

Having two sets of rules for claiming damages following the UK and EU competition law infringements would result in unnecessary confusion and additional legal costs for businesses. Having two sets of rules may also lead to procedurally different outcomes, for what may be conceptually similar breaches of law.

In terms of implementing a single regime, it will be imperative to ensure that no conflict or confusion is created by the proposed 'copy and paste' approach in terms of which the provisions of the Directive are simply replicated in full in implementing legislation. Serious consideration must be given to the implications of this approach on current procedures. It is extremely disappointing in this context that no further consultation is proposed on the terms of the legislative/procedural changes that are to be implemented.

**Question 2**

**Do you agree that the current limitation period of 6 years in England, Wales and Northern Ireland and 5 years in Scotland should remain? If not, what period (it must be at least 5 years) should there be?**

- ☐ Yes  
☐ No  
☒ Not sure

Comments:

We would support a consultation on this point for Scotland, in particular to assess the costs and benefits of changing the rules to have a uniform regime in the whole of the UK. The concern is that more beneficial limitation period in England, Wales and Northern Ireland would attract more competition claims.

**Question 3**

**Do you agree that there is a need for a new trigger point for limitation periods in order to implement the Directive fully?**

- ☒ Yes  
☐ No  
☐ Not sure



Comments:

Changes are required to codify trigger point for limitation periods in order to implement the Directive fully in the UK. We agree with the proposal in the consultation to implement the provisions of the Directive by copying them into the domestic law as they are, with the exception of the wording of Article 10(4) of the Directive, as explained hereafter.

We support the same implementation in England & Wales, as in Scotland.

*Suspension of the limitation period pending investigation by the competition authority*

Article 10(4) of the Directive requires “Member States [to] ensure that a limitation period is suspended or, depending on national law, 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. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.”

We would propose to include a suspension period ending two years after the infringement decision becomes final. This would be in line with the old regime under the Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372) (the “**CAT Rules 2003**”). We believe that one year is not sufficient for the claimants to determine whether they can bring a case for competition law damages, to arrange or determine funding for the action and to file the case. One year would be particularly time constraining for bringing class actions.

*Limitation periods in Scotland*

Codification of the trigger point in Scotland is required to implement the Directive. Currently there is a degree of uncertainty in relation to the trigger point as established in case-law. The UK Supreme Court’s judgment in *David T Morrison & Co Ltd v ICL Plastics Ltd & Others* [2014] UKSC 19, means that where the five-year prescription period applies, a pursuer (claimant) must pursue its claim within five years of the date when it became aware that it suffered a loss, or when it could with reasonable diligence have become so aware, and this applies whether or not the pursuer knows that loss to be the result of a breach of contract or negligence by the party against whom it claims. In their judgment, the Court recognised that the decision changed the law as previously understood.

Given the recent developments in relation to the level of knowledge required to start the prescriptive period, codification of the trigger point is required to ensure that a consistent interpretation is taken in England & Wales and Scotland and to give potential claimants/pursuers certainty about the period in which they can make a claim for an alleged breach of competition law. We would support the same implementation for the trigger point for limitation periods in Scotland, as for England and Wales.

As a matter of procedure of implementing the changes, we would support a separate consultation in Scotland in relation to these revisions in accordance with the Devolved Administration regime. In view of the above judgment, in Scotland, a wider question may be asked on the application of these changes to non-competition claims. This would be a good opportunity to codify/clarify the position pursuant to *Morrison v ICL*.

On 22 February 2016, the Scottish Law Commission published a Discussion Paper on Prescription setting out proposed legislative reform in this area. It does not deal with the EU Damages Directive.

**Question 4**

**Do you agree that the new limitation requirements should only apply from commencement of the implementation instrument?**

- ☒ Yes  
☐ No  
☐ Not sure



Comments:

We agree that new limitation requirements should apply from the commencement of the implementation instrument in accordance with Article 22(1) of the Directive

We would like to draw your attention to transitional provisions included in the CRA 2015. On the face of it, after 1 October 2015, the CRA 2015 disapplies the limitation period found in the CAT Rules 2003 rule 31 and replaces it with the general rules of limitation found in the laws of Scotland, England and Wales and Northern Ireland respectively (albeit in an amended form for collective actions).

However, these new limitation rules only apply prospectively and, as such, a transitional regime was required. This transitional regime is contained in rule 119 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648) (the “**CAT Rules 2015**”). In effect, pursuant to rule 119(3)(b), this regime requires the continued application of the old limitation rule found in the CAT Rules 2003 to any action arising before 1 October 2015.

In practice, this means that the limitation rule found in the CAT Rules 2003 will continue to apply for a foreseeable future. In particular, the nature of cartels is that they operate in secret for a number of years before being uncovered and giving affected parties a chance to bring an action in court. A great many cartel actions for many years to come will have ‘arisen’ well before 1 October 2015 and, as such, the old limitation rule from the CAT Rules 2003 will apply. As many commentators and practitioners have noted, this could have serious consequences of the viability of standalone claims (for example, see a blog post by Tom De La Mare from Blackstone Chambers, 1 October 2015, “[The CRA 2015 giveth; and the 2015 CAT Rules taketh away](#)”).

At best, most of these claims will need to be brought within the restrictive limitation period under the CAT Rules 2003. At worst, the transitional regime may be construed as requiring the existence of an infringement decision before a claim can be made and as such bars standalone claims based on circumstances arising before 1 October 2015 being brought in the CAT altogether.

Of course, the continuing application of the limitation rule from the CAT Rules 2003 will also have an effect on follow-on claims. In particular, follow-on claimants will be required to get permission to bring their claim before an infringement decision becomes definitive and, due to the potential problems with bringing standalone claims described above, there may be issues in bringing hybrid claims where different limitation periods may potentially apply to standalone and follow-on aspects of the same claim.

All of this means that, in many cases, the transitional regime found in the CAT Rules 2015 will likely not lead to the application of a limitation period of five/six years from the date the claimant knows or is expected to know about the infringement, for quite some time. Article 10(3) of the Directive requires Member States to ensure limitation periods for bringing competition damages claims are at least five years. As such, at the very least, a question arises that the CAT Rules 2015 as they currently stand will not adequately implement this provision of the Directive by the 21 October 2016 deadline.

We note the government’s reliance on Article 22(1) of the Directive, which states that substantive provisions of the Directive should not be applied retrospectively. We agree with this statement. However, the issue highlighted with the transitional period provisions may mean that in certain cases, because of the continued application of rule 31(2) of the CAT Rules 2003, standalone claims brought even after the implementation date of the Directive, will be faced with the limitation period of two years; unless transitional rules prescribed in Rule 119 of the CRA are revised to reflect the implementation required by the Directive.

**Question 5**

**Do you agree that the benefits of implementing the Directive on the October 2016 Common Commencement Date outweigh the costs of early implementation?**

- ☐ Yes  
☐ No  
☒ Not sure



Comments:

We would raise a concern that early implementation of this complex legislation may lead to rushed decisions and risk confusion. Rather than early implementation, we would support consultation on the draft legislation.

**Question 6**

**Do you agree that the provisions in paragraphs 7.1 to 7.36 implement effectively the relevant Articles of the Directive? If you do not agree, please explain where you feel UK legislation does not implement the requirements of the Directive.**

- ☐ Yes  
☒ No  
☐ Not sure

Comments:

Paragraph 7.23

We agree with the copy-out approach suggested to implement the Directive, with the exception specified in this submission, namely extending the period referred in Article 10(4) to two years.

Paragraphs 7.24-7.26

*Penalties*

Article 8 of the Directive deals with penalties in relation to document disclosure obligations. We believe that further implementation of this Article will be required in England and Wales, as well as in Scotland. We would support implementing this provision as set out in the Directive.

*Disclosure rules in Scotland*

Contrary to the statement in paragraph 7.26 of the Consultation, disclosure in Scotland is a more restrictive concept than in England and Wales. Document disclosure rules in Scotland are set out in Chapter 35 of the Court of Session Rules. These will need to be revised to implement the Directive.

The Court of Session Rules in Scotland adopt a more restrictive approach to disclosure of documents than the Civil Procedure Rules in England and Wales. In Scotland it is for a party to specify the categories of document that he should be allowed to recover. There is no equivalent process to standard disclosure requiring a party to disclose documents which adversely affect his case. These documents would only need to be disclosed in Scotland if they fell within the scope of a category of document that had been requested by the other party to the dispute.

Whilst the Consultation states that disclosure is a well-established concept in the UK, the approach taken differs significantly in Scotland. We would support a separate consultation in Scotland in relation to these revisions in accordance with the Devolved Administration regime. The consultation would need to consider whether the changes required could be implemented in a manner that is consistent with the approach taken in Chapter 35 of the Court of Session Rules.

*Wider application of Article 9(2) of Directive*

Under Article 9(2) of the Directive, decisions of competition authorities from other Member States constitute *prima facie* evidence before the courts in the UK. It may be useful to consider whether there are merits of clarifying the evidential weight of these foreign decisions before the courts in the UK. In particular, if there are merits in implementing this provision more widely, to give more weight to foreign decisions in the UK courts (as was originally included in the draft Directive).



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**Do you have any other comments that might aid the consultation process as a whole?**

*Implementation of the changes may result in three different regimes*

Currently, the changes introduced by the CRA 2015 apply to actions arising after 1 October 2015 (Rule 119 of the Competition Appeal Tribunal Rules 2015). The changes introduced by the legislation implementing the Directive cannot be applied retroactively (Article 21 of the Directive). Thus, following the legislative changes as required to implement the Directive, there will be three different legal regimes for limitation periods: (i) first, applying to actions arising before 1 October 2015; (ii) second, applying actions arising after 1 October 2015, but before the date of the implementation of the Directive; and (iii) third, rules applying to actions arising after the implementation of the Directive. In deciding which is the applicable regime, it is therefore necessary to be able to identify the point at which an action arises. At present, there is some confusion as to this, and so clarification on this point is required.

In order to avoid expensive litigation on the question of applicable rules, clear guidance should also be provided on the application of these three different legal regimes, in particular noting any transitional periods and relevant complexities. In particular, we draw your attention to recent proceedings where claimants filed two proceedings following the changes introduced by the CRA 2015 in relation to the same claim due to the uncertainty as to which rules apply (case number CAT 1244/5/7/15, *Peugeot Citroën Automobiles UK LTD and Others v Pilkington Group Limited and Others*; and case HC-2014-001072 before the High Court in England & Wales).

*Third party funding*

Adhering to the overall objectives of facilitating private damages claims for competition infringements, this may be a good opportunity to review the legal position on third party funding options available in the UK. Third party funding is increasingly used for private damages actions and legal certainty as to the enforceability of such agreements and their effect on costs orders is of paramount importance. As the law stands, there is a degree of discretion granted to the judges and this creates a degree of uncertainty for the parties and the funders.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

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At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes

☐ No

**Shepherd and Wedderburn LLP**  
**March 2016**