Briefing

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SHEPHERD+WEDDERBURN

The UK implements the EU Competition Damages Directive



The UK regulations[1] (**the Regulations**) to implement the EU Damages Directive[2] (**the Directive**) were laid before Parliament on 20 December 2016 and came into force on 9 March 2017. The UK Regulations will apply to claims relating to cartels arising on or after 9 March and some aspects of the Regulations will apply to claims where the cartel existed before that date.

The Directive seeks to facilitate competition law damages claims across the EU. In its consultation documents the UK government stated that it considered that the UK rules were largely in line with the requirements of the Directive and therefore significant changes to the UK legislation were not required. This was the case in particular following the reforms introduced by the Consumer Rights Act 2015.

Nonetheless, the implementation of the Directive amends the Competition Act 1998, the Civil Procedure Rules and the Competition Appeal Tribunal (CAT) Rules in some significant respects. The key changes introduced are as follows:

- **Application of provisions and transitional arrangements.** The Regulations distinguish between substantive and procedural provisions. The new substantive rules 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 all proceedings which begin after the commencement of the implementing legislation even if the harm or infringement took place before the Regulations came into force.
- **Implementing as a single regime.** The Regulations implement the Directive as a single regime which has the same procedures whether the original breach was of EU or domestic competition law. Although this goes somewhat beyond the requirements of the Directive, it removes uncertainty that would be created by two separate procedures for the EU and national law infringements. It is unclear whether this single regime will survive Brexit.

Issues relating to limitation and prescriptive periods:

- **The starting point for the limitation period.** The government has decided to copy out the provisions of the Damages Directive for the knowledge requirements relating to limitation, so that, under the new regime, the limitation period will not start until the anti-competitive behaviour has ceased and a claimant can reasonably be expected to know of that behaviour. The claimant should also know the identity of the infringer and have sufficient knowledge that they have suffered a loss as a result of the breach to bring a claim.
- **Suspension of the limitation period during an investigation of a competition authority, Consensual Dispute Resolution (CDR) or for collective proceedings.** The Regulations ensure that the limitation period is suspended where a competition authority (either in the UK or elsewhere in the EU) is investigating the behaviour to which the complaint relates as required by the Damages Directive. The suspension will begin on the day that the competition authority commences a formal investigation (takes its first formal step) and will end one year after the authority takes an infringement decision or closes the investigation. The limitation periods are also suspended where the parties to the claim agree to enter into a consensual dispute resolution process or where the collective damages regime applies (under Consumer Rights Act 2015).
- **Disclosure, use of evidence and penalties.** The Damages Directive sets out strict new rules on disclosure, which require that courts have the power to order the disclosure of relevant evidence from the defendant, claimant or third parties. The Regulations require amendments to the court rules. A new Practice Direction 31C provides that when a person has claimed disclosure in a competition claim, the court may only permit disclosure or inspection that is

proportionate as set out in the Directive. In relation to leniency statements and settlement submissions, the Regulations ensure that these (and quotations from them) are protected from disclosure and admissibility as evidence. This will not restrict the admissibility of evidence which has been obtained lawfully through routes other than the competition authority's file.

- **Passing on of overcharges and the passing-on defence.** The government considers that the rights of indirect purchasers in competition damages claims have been clarified with the *Sainsbury's v Mastercard* CAT judgment, which it considers has established the passing-on defence. The Regulations amend the Competition Act 1998 to ensure that it is clear that the burden of proving that an overcharge has been passed on rests with the defendant (i.e. the party from whom damages are being sought), in line with the terms of the Damages Directive.
- **Quantification of harm and the presumption of harm.** The Regulations amend legislation to include a rebuttable presumption that cartels cause harm. No further provisions on estimation of harm were considered necessary, because the government considered that this is already a common practice of the UK courts.
- **Joint and several liability.** The government considered that under the UK law it is well accepted that a claimant may be jointly and severally liable, as required by Article 11(1) of the Damages Directive. The Regulations do not legislate to expressly set out the joint and several liability of competition co-infringers. The Regulations implement certain provisions of the Directive, for example where the infringer is an SME it will only be liable to its own direct and indirect purchasers (rather than also to those of its co-infringers) provided its market share in the relevant market was below 5% at any time during the infringement and the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.
- **Effect of decisions of EU national competition authorities.** The Regulations require that final decisions of EU Member State competition authority or review court may be presented as prima facie evidence before the UK courts that an infringement has occurred.

Comment

Overall, the government has adopted 'a light touch' approach to the implementation of the Directive. The legislative revisions introduced by the Regulations present a missed opportunity to clarify a number of questions that were raised by the legal community during the consultation process (see for example **our response**, also quoted by the **BEIS response to the consultation**). In particular, we anticipate that the transitional provisions for substantive provisions are insufficiently clear and will likely lead to costly litigation before the UK courts. It is welcome that the Regulations specifically deals with the pass-on defence and the rights of indirect purchasers. However, the Regulations leave a number of questions open as regards the quantification and the standard of proof that is required to show pass-on.

Most importantly, the substantive rules will only apply to infringements and harm suffered after the rules come into effect. Taking into account the secretive nature of competition law infringements and the fact that the infringement decisions often take a number of years to finalise, the parties will not be able to rely on the substantive rules of the Directive for the foreseeable future, which practitioners have estimated may well be as long as a decade.

Endnotes

1. The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385).
2. Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and the EU

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