

The Implementation and Impact of the EU Antitrust Damages Directive in the UK

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Parts of this article are based on the Cleary Gottlieb Alert Memorandum of January 10, 2017, entitled „The UK implements the EU Antitrust Damages Directive“.

The Damages Directive, which was adopted by the European Parliament and the Council in November 2014, was designed to encourage greater, and more dispersed, private enforcement of EU competition law before national courts across the European Union (the „EU“). The Directive was a reaction to the perceived underdevelopment of private enforcement in the EU, where actions for damages have tended to be concentrated in the United Kingdom („UK“), Germany, and the Netherlands. The UK Regulation implementing the Directive came into force on 8 March 2017 (the „Implementation Date“).

This article discusses the UK’s implementation of the Directive and considers the most important changes to the law, including the rules on disclosure. It concludes by examining the potential impact on England’s attractiveness as a forum for antitrust damages actions in the EU.

Umsetzung und Auswirkungen der EU-Schadensersatzrichtlinie im Vereinigten Königreich

Die im November 2014 vom Europäischen Parlament und Europäischen Rat verabschiedete Kartellschadensersatzrichtlinie zielt darauf ab, die private Kartellverfolgung vor den nationalen Gerichten der EU-Staaten zu stärken. Die Richtlinie war eine Reaktion auf die schlechte Entwicklung der privaten Kartellverfolgung: Kartellschadensersatzklagen wurden bis zur Richtlinie zumeist im Vereinigten Königreich (UK), in Deutschland und in den Niederlanden anhängig gemacht. Die UK-Gesetze zur Umsetzung der Kartellschadensersatzrichtlinie sind am 08.03.2017 in Kraft getreten.

Dieser Artikel diskutiert diese Umsetzungsgesetze und analysiert die wichtigsten Änderungen des geltenden Rechts, auch solche der Offenlegungspflichten. Er schließt mit einer Analyse der potenziellen Auswirkungen auf Englands Attraktivität als Forum für Kartellschadensersatzklagen in der EU.

I. Legislative scope of the Directive

The Directive ¹ aims to make it easier for victims of anti-competitive behaviour to seek compensation from infringing parties before national courts in all Member States. ² In particular, the Directive seeks to harmonise rules governing limitation periods, the passing on of overcharges, the principle of joint and several liability, disclosure, and the quantification of harm.

The Directive applies only to cases involving a breach of EU competition law, including where both EU and national competition law are infringed. Member States are not required to implement the Directive's provisions in relation to claims that relate solely to infringements of national competition law.

The UK Government considered, however, that having different rules depending on whether a damages action is based on EU or UK competition law would lead to uncertainty for businesses and consumers, not least because most damages actions are based on both EU and UK competition law. Therefore, although not required by the Directive, the UK Government has decided to apply the provisions of the Directive to all competition damages actions.

The Directive prohibits the retroactive effect of „substantive“, but not that of „procedural“, provisions, without, however, specifying which of the Directive's provisions are „substantive“and which are „procedural“. ³ To address this uncertainty, the Regulations expressly distinguish between „substantive“and „procedural“provisions. „Substantive“provisions of the Regulations apply only to the extent that a claim relates to loss suffered on or after the Implementation Date as a result of an infringement that took place on or after the Implementation Date. „Procedural“provisions of the Regulations apply to all claims brought on or after the Implementation Date, whenever the relevant loss was suffered and whenever the infringement took place.

II. Changes in the law

Prior to the implementation ⁴ of the Directive ⁵, the UK already had well-established rules governing antitrust damages actions. Overall, the Directive has brought about relatively few changes to UK law compared with most other EU jurisdictions.

As a result, the UK Government considered that a „lighter touch“ approach to implementation would be more appropriate than copying out the Directive’s provisions in their entirety in the Regulations. Under this approach, existing provisions that already met (or exceed) the Directive’s requirements were left in place, and changes were made only where necessary.

This section considers the most important changes. The Regulations provide that (1)–(5) are „substantive“ whilst (6)–(7) are „procedural“.

1. Limitation periods

The limitation periods in the UK remain unchanged (*i. e.*, six years for England, Wales, and Northern Ireland and five years for Scotland). The Regulations, however, bring about changes to the starting point of the limitation periods and set out circumstances under which limitation periods are suspended.

The Regulations provide for the suspension of the limitation periods during an investigation by a competition authority. „Competition authorities“ are defined as comprising the Competition and Markets Authority, the UK sectoral regulators with concurrent competition powers,⁶ the European Commission, as well as the competition authorities of other EU Member States. The suspension begins when the competition authority commences a formal investigation and does not end until one year after the investigation ends.⁷

The Regulations also provide for the suspension of the limitation periods during any consensual dispute resolution („CDR“) process between the claimant and the defendant. The suspension begins from the day on which the claimant and the defendant bilaterally agree to engage in the CDR process and either party can unilaterally end the suspension by withdrawing from the CDR process. There are no limitations on the length of the suspension on account of the CDR process.

As a result of the automatic suspension of the limitation periods in circumstances laid down by the Regulations, defendants engaging in anti-competitive behaviour will potentially be susceptible to damages actions for a much longer period than previously.

2. Presumption that cartel causes loss

The Regulations provide that a cartel is presumed to have caused loss or damage. The finding of a cartel infringement in a decision, which will be binding upon the courts as a matter of EU law, will therefore entitle a purchaser from an infringer to bring a claim for loss or damage and the burden of rebutting such presumption of

loss will be on the infringer. This marks a departure from the ordinary principle under English law that a claimant must prove the loss it suffered, although a claimant will continue to bear the burden of establishing the amount (or „quantum”) of its loss.

3. Passing on of overcharges

Where an infringement led to price increases that were, in whole or in part, passed along the distribution chain by a direct purchaser, the issue of passing on arises. Indirect purchasers (*i.e.*, those further down the distribution chain) have to prove that the loss suffered by the direct purchaser was passed on to them in order to establish that they suffered harm and are entitled to claim compensation from the infringer. Passing on, at the same time, provides a defence for infringers against claimants who have passed on the whole or part of the overcharge to their customers.

The Regulations provide another departure from the ordinary principle under English law that a claimant must prove the loss it suffered. An indirect purchaser claimant is deemed to have established (subject to rebuttal by the defendant infringer) that the overcharge has been passed on to it by showing that:

- The defendant committed an infringement;
- The infringement resulted in an overcharge for the direct purchaser from the defendant; and
- The claimant has purchased goods or services subject to the infringement.

The Regulations also expressly place on the defendant the burden of proving that an overcharge has been passed on by the claimant.

As a result of the Regulations, direct and indirect purchaser claimants in damages actions will be able to rely on presumptions that they suffered loss as a result of an infringement. Defendants, on the other hand, will have to rebut such presumptions using evidence that is typically in the claimants' or third parties' control or possession.

4. Exemplary damages

Exemplary damages were previously available under English law (in certain circumstances) and had been awarded in antitrust damages actions in the past in the UK.⁸ Pursuant to the Directive, the Regulations will in future prohibit the award of exemplary damages in antitrust damages actions.

5. Joint and several liability

The principle that parties to anti-competitive behaviour are jointly and severally liable for the damage caused, which the Directive confirms, is already well-established in the UK. Joint and several liability means that a claimant can seek full compensation from any of the infringers and that it is up to the defendant to claim compensation from the other infringers in respect of the proportion of the harm for which they are responsible.

The Regulations provide for derogations from this general principle in respect of defendants that are small and medium-sized enterprises („SMEs”), immunity recipients,⁹ and/or defendants that have settled with the claimant.

In respect of an SME, the Regulations provide that the defendant is liable only for loss caused to its own direct and indirect purchasers, provided that:

- Its share of the relevant market during the infringement period was less than 5%;
- Its economic viability would be irretrievably jeopardized but for this provision;
- It did not lead the infringement or coerce others to participate in the infringement; and
- It has not previously been found to have infringed competition law.

In respect of an immunity recipient, the Regulations provide that the defendant is liable only for loss caused to its own direct and indirect purchasers and suppliers, except where a claimant is unable to obtain full compensation from other infringers (e. g., due to their insolvency).

In respect of an infringer that settles with the claimant, the Regulations provide that the settling claimant will cease to have a right of action against the settling infringer regardless of the terms of the settlement.¹⁰ The Regulations further provide that non-settling infringers are precluded from bringing a claim against the settling infringer by way of contribution. Previously, a defendant considering settlement faced the risk of being brought back into the proceedings by non-settling infringers via contribution proceedings. The Regulations will therefore go some way to ensuring the finality of a settlement.

6. Decisions of other Member States’ competition authorities

Existing laws provided that the decisions of the CMA, the concurrent regulators, and the European Commission were binding on the UK courts.¹¹

The Regulations provide further that decisions of the competition authorities and national courts of other Member States, whenever they were handed down, may be presented as *prima facie* evidence that an infringement has occurred. The presentation of such evidence shifts the burden of proof to the defendant to show that it has not committed an infringement.

7. Disclosure

The disclosure regime in England and Wales requires parties to damages actions to disclose all documents on which they rely, all documents that adversely affect their own case, and all documents that adversely affect or support another party's case.¹² By way of derogation to this general principle, prior to the Regulations, only limited categories of documents could be withheld from disclosure, including documents that were protected by legal professional privilege and, in some circumstances, cartel leniency statements^{13, 14}.

The Regulations set out broader categories of documents, particularly those on a competition authority's case file gathered during an investigation, for which the UK courts may not order disclosure.

The Regulations prohibit the UK courts from ordering the disclosure of cartel leniency statements and settlement submissions that have not been withdrawn.

The Regulations also prohibit the UK courts from ordering the disclosure of the following documents before a competition authority ends its investigation:

- Information sent by the competition authority to an undertaking that is the subject of the investigation, e. g., Statement of Objections, or Requests for Information („RFIs”);
- Information prepared by an undertaking for the purpose of the investigation, e. g., responses to the competition authority's RFIs; and
- Settlement submissions that have subsequently been withdrawn.

However, such documents will be admissible as evidence if they are obtained lawfully through routes other than from the competition authority's file (e. g., if they are voluntarily provided by the defendant that originally submitted the leniency statements and RFI responses).

Pre-existing information or contemporaneous evidence (*i. e.*, information that exists irrespective of a competition authority's investigations) remains disclosable and

admissible as evidence at any time, irrespective of whether it is submitted as part of an undertaking's leniency application.

III. Impact on England's appeal as a forum for damages actions

England has traditionally been one of the favoured jurisdictions for antitrust damages actions within the EU. This has reflected a variety of factors, including England's „loser pays“ costs rules, extensive disclosure regime, the availability of flexible funding arrangements, experienced bar, and the availability of the specialist Competition Appeal Tribunal.

Another factor has been the English courts' permissive approach towards exercising jurisdiction over foreign defendants, which has enabled claimants to consolidate their claims against all infringers within a single jurisdiction.¹⁵ The introduction of the opt-out collective actions regime in October 2015 has the potential of further enhancing England's appeal as a forum for private enforcement.

Other than certain changes to the disclosure regime, the Directive seems unlikely to undermine the factors that have helped cement England's place as a preferred jurisdiction for private enforcement. To the extent that the Directive reduces England's relative appeal, this will likely result from the improvement of conditions for bringing antitrust damages actions in other Member States. It remains to be seen whether, and to what extent, the Directive will bring about an increase in claims in such Member States.¹⁶

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Fußnoten

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

² The right of any natural or legal person to claim compensation for loss suffered as a result of an infringement of EU antitrust rules is well established: see e. g., ECJ, Judgment of 20.09.2001, C-453/99, ECLI:EU:C:2001:465, WuW 2001, 1121 – Courage v Crehan; ECJ, Judgment of 13.07.2006, C-295/04, C-298/04, ECLI:EU:C:2006:461, WuW 2006, 1069 – Manfredi.

- 3 Article 22 of the Directive.
- 4 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the „Regulations“).
- 5 Although the UK voted to leave the EU in June 2016, the UK remains a full member of the EU until exit negotiations are concluded.
- 6 Civil Aviation Authority (CAA), Financial Conduct Authority (FCA), Payment Systems Regulator, Monitor, Northern Ireland Authority for Utility Regulation (NIAUR), Office of Communications (Ofcom), Water Services and Regulation Authority (Ofwat), Gas and Electricity Markets Authority (Ofgem), and Office of Rail and Road (ORR).
- 7 For completeness, the courts already had the power under existing laws to order a stay of the proceedings, including pending an investigation by the competition authorities.
- 8 2 Travel Group Plc (in Liquidation) v Cardiff City Transport Services Limited [2012] CAT 19.
- 9 Immunity recipients are undertakings that participated in an infringement but were granted immunity from financial penalties in return for blowing the whistle on the cartel under a cartel leniency programme run by an EU competition authority.
- 10 The Regulations provide for an exception in cases where the other non-settling infringers are unable to pay damages (e.g., due to their insolvency), but parties may expressly exclude as part of a settlement the settling infringers' liability for other infringers' shares of the damage where the latter are unable to pay damages.
- 11 Competition Act 1998, section 58A.
- 12 Civil Procedure Rules, Rules 31.6 and 31.7 and the Competition Appeal Tribunal Rules 2005, Rules 60–65. The rules governing disclosure in Scotland and Northern Ireland are broadly comparable.
- 13 Cartel leniency statements are information an undertaking voluntarily provides to a competition authority concerning a cartel and the undertaking's role in relation to the cartel specifically for the purposes of the competition authority's leniency programme.
- 14 In ECJ, Judgment of 14.06.2011, C-360/09, ECLI:EU:C:2011:389, WuW 2011, 769 – Pfeleiderer AG v Bundeskartellamt, the Court of Justice of the EU held that there was no absolute prohibition on the disclosure of leniency materials. Rather, national courts were required to weigh the risks of such disclosure undermining the effectiveness of the EU leniency programme against the right of compensation on a case-by-case basis. The English High Court applied Pfeleiderer in National Grid v ABB [2012] EWHC 869 (Ch) and ordered disclosure of parts of the leniency statements in question.

- 15 In a number of cases, claimants succeeded in securing English jurisdiction by suing UK-domiciled subsidiaries of addressees of the relevant European Commission's decision, even though none of these addressees was based in the UK, e. g., Cooper Tire & Rubber Co Europe Ltd and others v Bayer Public Co Ltd and others [2010] EWCA Civ 864 and KME Yorkshire Ltd and Others v Toshiba Carrier UK Ltd and Others [2012] EWCA Civ 1190.
- 16 The impact of the UK leaving the EU is beyond the scope of this article. A full assessment will depend on the outcome of the exit negotiations, which remains largely uncertain at present.