

# The UK Implements the EU Damages Directive

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On 9 March 2017, the “Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017” (the “**UK Damages Implementation Act**”) came into force in the United Kingdom (“**UK**”). The UK Damages Implementation Act formally implemented into UK law the much heralded European Directive 2014/104/EU on antitrust damages actions issued on 26 November 2014 (the “**Damages Directive**”).

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## History of the UK Damages Implementation Act

The intention of the Damages Directive is to remove the main obstacles throughout Member States of the European Union (“**EU**”) to effective compensation for individuals and businesses that have suffered harm as a result of anticompetitive conduct, and wish to commence private enforcement proceedings against the infringing parties. To ensure that the benefits and extra protections that derive from the Damages Directive are accessible to litigants, Member States were required to implement it in their national legal systems by 27 December 2016.

The official period of consultation for the UK Damages Implementation Act ran between 28 January and 9 March, 2016.

Following this consultation, the UK government concluded that a minimalist, ‘light-touch’ approach would be adopted for the Damages Directive implementation, because the UK already had in place a fairly developed body of legislation and established case law in relation to the measures required by the Directive.

Following Parliamentary approval and Royal Assent, the legislation came into force on 9 March 2017.

## Scope of the UK Damages Implementation Act

### Legal Scope

Member States are only required to apply the Damages Directive to private enforcement proceedings involving a breach of EU competition law.[1] The Damages Directive did not automatically apply to circumstances where cases are pleaded on the basis of a breach of only the relevant national law, which for the UK is the Competition Act 1998 (the “**UK Competition Act**”), rather than EU law.

Notwithstanding this, the UK Damages Implementation Act applies to all competition damages actions brought in the UK, including proceedings that rely solely on breaches of the UK Competition Act. This reflects the UK government's desire for certainty and consistency among the rules applying to private enforcement proceedings in competition damages claims. It also reflects the reality that the vast majority of private damages actions issued in the UK are international in nature, and therefore rely on breaches of EU competition law rather than purely domestic law.

While there is no practical difference between the substantive provisions concerning what constitutes anticompetitive conduct under the Treaty on the Functioning of the European Union ("**TFEU**") and the UK Competition Act, the decision to extend the scope of the legislation in this way is potentially significant, given the relative uncertainty surrounding the impact of the UK's future departure from the EU. Since the UK implementation of the Damages Directive applies to breaches of EU law as well as the UK Competition Act, the UK Government has helpfully ensured that the rights and protections that derive from the Directive will remain unaffected by Brexit.

## Temporal Scope

Although the legal scope of the Damages Directive is widened by the UK Damages Implementation Act, significant temporal restrictions have been included in the legislation. Part 10 is particularly noteworthy, since it differentiates the point in time at which the 'substantive' and 'procedural' provisions of this Act will come into effect.

The rules relating to 'passing on' (Part 2), 'small and medium-sized enterprises' (Part 3), 'cartels' (Part 4), 'limitation and prescriptive periods' (Part 5), 'exemplary damages' (Part 8) and 'contribution and consensual settlements' (Part 9) (the "**Substantive Provisions**") will only apply to claims relating to loss suffered as a result of an infringement that commenced on, or after, 9 March 2017 (the date that the UK Damages Implementation Act came into force).

As such, given the usual considerable lag time (typically several years and sometimes even decades) between the commencement of cartel activity and its conclusion, let alone the commencement and subsequent conclusion of the investigation into that activity by a competition authority, the Substantive Provisions are unlikely to be applied until many years' time. On a practical level, it is likely that most if not all such private damages actions would be instituted several years later still, once a formal infringement decision is handed down by the relevant authority, enabling a follow-on claim rather than a stand-alone claim to be brought (only the latter would be available to claimants issuing a claim before such date).

Conversely, the rules relating to 'disclosure' (Part 6), 'use of evidence' (Part 7), and a small number of procedural paragraphs within the Substantive Provisions (the "**Procedural Provisions**"), will apply to all private enforcement proceedings brought on or after 9 March 2017, regardless of when the infringing conduct occurred, and/or losses giving rise to proceedings were suffered.

## The Key Substantive Provisions

### Passing On

An undertaking's anti-competitive conduct may result in an illegal increase in the price of the product or service in question. This increase is commonly referred to as an overcharge. Customers of the infringer who have purchased the overcharged product or service directly from the infringer are known as direct purchasers. Purchasers further down the supply chain of the overcharged product or service in question, i.e. from a customer of the direct purchaser down to the end consumer, are known as indirect purchasers.

Direct and indirect purchasers may commence private enforcement proceedings against undertakings that have infringed competition laws to recover the illegal overcharges and other losses they have suffered as a result of purchasing the cartelised products.

However, claimants will only be successful if they can show that they suffered loss as a result of the anti-competitive conduct. Defendants may argue that the claimants did not suffer any loss, as any overcharge

on the claimants' purchases from the defendants has either: been passed on down to the claimants' own customers ("**downstream pass-on**"); or the purchasers of the overcharged product or service that are higher up the supply chain than the claimants, have absorbed the losses suffered from the overcharge ("**upstream pass-on**"), and therefore the overcharge was never passed-on to the claimants.

While only arguments relating to downstream pass-on are relevant to direct purchasers, defendants may argue either, or both, downstream pass-on and upstream pass-on has occurred in private enforcement proceedings brought by indirect purchasers.

While the UK courts have already ruled on the applicability of arguments concerning passing-on in a private enforcement context,[2] the UK Damages Implementation Act goes further by clarifying where the evidential burden of proof lies in respect of upstream pass-on for indirect purchasers, and downstream pass-on for indirect and direct purchasers.

As regards upstream pass-on for indirect purchasers, the UK Damages Implementation Act[3] provides that the indirect purchaser must demonstrate that:

1. The defendant infringed competition law,
2. As a result of the infringement, there was an overcharge when a person acquired a product or service directly from the defendant; and
3. The claimant subsequently acquired –
  - The product or service [that is the subject of the infringement], or
  - A product or service derived from or containing the product or service [that is the subject of the infringement].

The burden of proof then shifts to the defendant to show that indirect purchaser claimants did not have any overcharge passed-on to them. In practice, expert economic evidence is invariably relied on by both parties to establish whether there was in fact upstream pass-on (irrespective of where the burden of proof lies), but the implementation of this presumption can nevertheless only be a positive thing for prospective indirect purchaser claimants. Indirect purchasers will therefore subsequently be able to rely upon the presumption that the overcharges have been passed on to them,[4] with the potentially more challenging onus of disproving the passing-on of overcharges falling to the defendant and its experts.

In respect of downstream pass-on for direct and indirect purchasers, the initial burden of proof lies with the defendant to prove that any losses suffered by the claimants were passed-on downstream to their customers.[5]

These new rules could provide an opportunity for claimants to apply additional pressure on defendants during settlement discussions, as defendants may wish to avoid the costs and risks associated with attempting to meet the evidential burden in respect of upstream and downstream pass-on.

## Limitation

The UK Damages Implementation Act provides that the limitation period for competition damages claims in the UK is 6 years,[6] and therefore presents no change from the current period of limitation for competition damages claims pursued under English law.[7] Pursuant to section 19(1) of the UK Damages Implementation Act, the general rules for triggering limitation is the later of:

1. The day on which the infringement of competition law that is the subject of the claim ceases; and
2. The claimant's day of knowledge.

Importantly however, the UK Damages Implementation Act does contain further provisions that suspend limitation in certain circumstances. These rules may have a substantial impact on the length of time a claimant will have to bring proceedings once limitation has been triggered, depending on the circumstances of the case.

Section 21 (1) provides that limitation is suspended as soon as the competition authority makes its first formal step in investigating the relevant anticompetitive behaviour. The limitation period then resumes running one year after there is a 'final' decision by the competition authority. Infringement decisions by the

competition authorities are subject to appeals to the General Court of the EU and subsequently, the European Court of Justice by any addressees of that decision[8]. As such, this can lead to the determination of the final decision that is adopted by the competition authority being significantly delayed. The date at which limitation expires for filing private enforcement proceedings against the addressees to that infringement decision will also be delayed accordingly. However, it should be noted that where a defendant who is an addressee of that decision has decided not to appeal an infringement decision, the decision against that defendant will be final notwithstanding any appeals lodged in relation the infringement decision by other addressees[9]

## **The Key Procedural Provisions**

### **Disclosure and Use of Evidence**

The new rules on disclosure and use of evidence within the Procedural Provisions present a minor deviation from the current English procedural rules restricting certain categories of document from disclosure. The current disclosure regime requires parties to disclose all documents on which they rely, all documents which adversely affect their own case, and all documents which adversely affect or support the other party's case.[10] By excluding certain documents from the disclosure process, and restricting the UK court's powers to order the disclosure in respect of those documents, claimants may be hindered in obtaining materials necessary to fully understand and establish the full extent of the infringing behaviour.

The specific documents that the UK courts will no longer be permitted to order disclosure are:

1. Settlement submissions that are not subsequently withdrawn, and cartel leniency statements (regardless of whether they are withdrawn or not).[11]
2. A competition authority's investigation materials before the investigation is closed.[12] This would include information sent by the competition authority to an undertaking in relation to its investigation i.e. the Statement of Objections and that undertaking's subsequent response.

Although the UK courts cannot order this information be disclosed, it will be admissible as evidence in private action damages proceedings where claimants can persuade defendants to voluntarily disclose this information.[13] In practice, this may occur where a settling defendant agrees to provide such documentation to the claimants to assist the claimants' claims against any other, non-settling defendants as part of the settlement agreement reached between the parties.

Although these restrictions are unhelpful to claimants, they only relate to materials that were created for the purpose of the competition authority's investigation. These rules do not prevent the UK courts from ordering the disclosure of pre-existing materials, including any documents that relate to that defendant's liability in respect of its involvement in the infringing behaviour that is the subject of the private enforcement proceedings.

### **Conclusion**

There are many promising features within the UK Damages Implementation Act from a claimant's perspective. The UK government's expansive approach in relation to the legal scope of the UK Damages Implementation Act is an encouraging step and provides greater legal certainty for claimants that wish to pursue private enforcement proceedings in the UK courts.

However, this is significantly overshadowed by the temporal restrictions pertaining to the Substantive Provisions. The benefits that derive from those Substantive Provisions will only have effect in relation to damages claims concerning infringing behaviour that commenced after 9 March 2017 and, as a result, private damages actions issued for many years to come will not benefit from the Substantive Provisions. While the Procedural Provisions took effect on 9 March 2017, they are more likely to benefit defendants to private damages actions, as opposed to claimants. The unfortunate result is that, for the foreseeable future, the implementation of the Damages Directive, which was intended to remove obstacles to effective compensation for those who have suffered harm as a result of anticompetitive conduct, may in fact have a net negative impact on claimants' claims as opposed to assisting them.

This is however unlikely to materially affect the long-standing attractiveness of the UK Courts as a venue of choice for European-wide private damages claims. While some of the strategic advantages of the relevant procedural rules in the UK, in particular on disclosure, will now be lessened compared to other EU Member States (which have also implemented the Damages Directive); the extensive familiarity of judges in the UK with managing extensive disclosure exercises in legal proceedings will likely continue to give them the cutting edge over their counterparts in mainland Europe, many of whom will be grappling with disclosure for the first time.

## Footnotes

[1] Article 101 or 102, Treaty on the Functioning of the European Union.

[2] See *Sainsbury's Supermarkets Limited v Mastercard Incorporated and others* [2016] CAT 11.

[3] UK Damages Implementation Act, Section 9(2)(a)-(c).

[4] UK Damages Implementation Act, Section 9(2).

[5] UK Damages Implementation Act, Section 11.

[6] UK Damages Implementation Act, section 18(1).

[7] Limitation Act 1980, section 2. For claims brought in the Competition Appeal Tribunal, the rules on limitation is 2 years from the date of a final infringement decision from the competition authority.

[8] Where the relevant competition Authority is the Competition Markets Authority, infringement decisions will be appeal to the UK Competition Appeal Tribunal.

[9] *Deutsche Bahn AG and others v Morgan Advanced Materials Plc* [2014] UKSC 24.

[10] Civil Procedure Rules, Rules 31.6 and 31.17 and the Competition Appeal Tribunal Rules 2005, Rules 60-65. The rules governing disclosure in Scotland and Northern Ireland are broadly comparable.

[11] UK Damages Implementation Act, section 28.

[12] UK Damages Implementation Act, section 29.

[13] UK Damages Implementation Act, section 32 and 33

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