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The International Comparative Legal Guide to:

# Competition Litigation 2016

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# The Likely Impact of the EU Damages Directive

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## 1 Introduction

1.1 On 26 November 2014 the EU Directive on antitrust damages actions (the “**Directive**”) was finally adopted.<sup>1</sup> This was the culmination of extensive discussions and negotiations involving the European Commission, European Council and European Parliament following the publication of the original proposed text in June 2013. Following publication in the Official Journal on 5 December 2014, the Directive entered into force on 26 December 2014, and Member States are required to implement its provisions into national law by 27 December 2016.

1.2 The Directive seeks to ensure “*a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market [...] and to reduce the differences between the Member States as to the national rules governing actions for damages for [competition law infringements]*”.<sup>2</sup> This is a laudable but very ambitious aim, given the mixture of common and civil law systems in the 28 EU Member States and the differing levels of private enforcement to date.

1.3 This chapter considers the key changes which will be introduced by the Directive and the likely impact on antitrust damages actions across EU Member States once implemented into national laws, highlighting the key issues for both practitioners and businesses. These changes are considered against the background of recent developments at both EU and national level, in particular in the UK, Germany, France and the Netherlands.

1.4 It should be noted at the outset that the Directive does not deal with every aspect of antitrust damages actions. In particular, it does not deal with:

- (a) the question of jurisdiction;
- (b) the possibility of claimants joining together to bring a collective antitrust damages action;
- (c) crucial practical issues such as costs and funding; or
- (d) the availability of interim injunctions in standalone private actions (i.e. where there has been no prior infringement decision) where the alleged infringing behaviour has not yet ceased.<sup>3</sup>

1.5 The question of jurisdiction will continue to be determined by the Brussels Regulation (recently recast with effect from 10 January 2015), as applied by national courts.<sup>4</sup> The other key issues listed above will fall to be determined by national courts in accordance with national procedural rules,<sup>5</sup> and are not addressed further in this chapter.<sup>6</sup>

## 2 Disclosure

### Introduction of an EU-wide litigation disclosure mechanism

2.1 The scope of national laws on disclosure has been a key factor in the popularity of certain jurisdictions, with claimants seeking to bring damages actions for infringements of competition law, in particular the UK.<sup>7</sup> This is because antitrust litigation is often characterised by information asymmetry, and the extent to which a claimant can require disclosure of relevant documents from a defendant will be crucial to successfully establishing liability (in a standalone action), causation and quantum (in both follow-on and standalone actions). In a small number of cases, contemporaneous documents in the possession of the defendant(s) may record direct commentary on key elements of a cartel’s “effects” (for example, its duration and scope, and possibly even the extent of any resulting overcharge); even where such direct commentary does not exist (which is more common), data and other records in the possession of the defendant(s) are likely to be critical to any attempt to deduce the scale and scope of the alleged illegal price inflation resulting from the cartel.

2.2 The Directive seeks to impose minimum disclosure requirements which will apply in national courts of all EU Member States, effectively introducing an EU-wide litigation disclosure mechanism. Article 5(1) provides that national courts must have the power to order both defendants and third parties to disclose relevant evidence that lies in their control, provided that the claimant has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. National courts must be able to order disclosure of either specified pieces of evidence or – significantly – relevant “categories” of evidence (in recognition of the fact that it will not always be possible for a claimant to know in advance precisely which relevant documents the defendant has in his control), provided that these are circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts set out in the reasoned justification. In order to ensure equality of arms, courts must also have similar powers to require claimants to disclose relevant evidence in their control to defendants.

2.3 In ordering such disclosure, national courts must respect legal privilege. Moreover, disclosure under Article 5 must also be proportionate. In deciding whether this is the case, national courts must consider the legitimate interests of all parties concerned, including third parties.<sup>8</sup> In particular, Article 5(3) requires that they must consider:

- (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- (b) the scope and cost of disclosure, especially for any third parties concerned, also to prevent non-specific search of information which is unlikely to be of relevance for the parties in the procedure; and
- (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information.

2.4 With regard to the issue of confidentiality, the Directive recognises that whilst relevant evidence containing confidential information should in principle be available in antitrust damages actions, safeguards are needed to ensure that such information is appropriately protected. The recitals to the Directive state that national courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during proceedings. These may include the possibility of redacting sensitive passages in documents, conducting hearings *in camera*, restricting the circle of persons entitled to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.<sup>9</sup>

#### Disclosure of information contained in the file of a competition authority

2.5 Where relevant evidence is not within the control of a defendant but included in the file of a competition authority, as a general rule the competition authority may be required by national courts to disclose it under Article 6 of the Directive, provided that it cannot be reasonably obtained from another party or a third party.<sup>10</sup>

2.6 However, the Directive provides that certain “black-list” documents should benefit from absolute protection from disclosure, namely leniency corporate statements and settlement submissions. This was a particularly controversial aspect of the Directive, which was the subject of considerable debate following the decisions of the European Court of Justice (“ECJ”) in *Pfleiderer*<sup>11</sup> and *Donau Chemie*.<sup>12</sup> In effect, the Directive replaces the “balancing exercise” recommended by the ECJ in those cases<sup>13</sup> with an absolute prohibition on disclosure for these particular types of documents.<sup>14</sup>

2.7 Article 6 also provides for more limited protection for a further set of “grey-list” documents:

- (a) other information prepared specifically for proceedings of a competition authority;
- (b) information that the competition authority has drawn up and sent to parties in the course of proceedings; and
- (c) settlement submissions that have been withdrawn.

Such documents can only be ordered to be disclosed after the competition authority has closed its proceedings by adopting a decision or otherwise.

2.8 When assessing the proportionality of disclosure of documents contained in a national competition authority’s file, national courts are also required by Article 6(4) to have regard to a number of additional factors:

- (a) whether the request has been formulated specifically with regard to the nature, object or content of documents submitted to a competition authority or held in the file of such competition authority, rather than by a non-specific application concerning documents submitted to a competition authority;
- (b) whether disclosure is requested in relation to an action for damages before a national court; and
- (c) the need to safeguard the effectiveness of public enforcement of competition law.

#### Disclosure of evidence obtained via access to the file process

2.9 In some cases, claimants may try to seek disclosure of evidence from a defendant or third party which has been obtained by that defendant/third party via the access to file process. The European Commission is understandably concerned that claimants should not be able to circumvent the protections set out in Article 6 of the Directive relating to “black-list” and “grey-list” documents in this way, and Articles 7(1) and 7(2) therefore provide that if such documents are obtained via the access to file process then they are deemed to be inadmissible in actions for damages or otherwise protected under applicable national rules.

2.10 In respect of other types of documents obtained solely through the access to file process, Article 7(3) of the Directive provides that such evidence may only be used by the person who was originally granted access to the documents via the access to file process (or a person who has succeeded to that person’s rights). Recital 32 explains that this is intended to prevent evidence obtained from a competition authority from becoming “an object of trade”. However, recital 32 goes on to state that this “*limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive*”. At the time of writing it is unclear exactly how this limitation is intended to work in practice and how it will be interpreted by national courts.

#### Likely impact on antitrust damages actions

2.11 These provisions – in particular those relating to disclosure by defendants – will be a significant change for many EU Member States, as the vast majority do not currently have extensive disclosure regimes. For example, under the current French procedure, as a general rule there is no pre-trial disclosure and no general obligation of disclosure placed upon the defendant save in respect of those documents on which it relies.<sup>15</sup> In the Netherlands, claimants are required to identify specific documents when requesting disclosure from defendants, which makes it difficult to obtain extensive disclosure in competition claims (where the existence of specific documents may not be known to the claimants), and a very limited disclosure regime is also currently in place in Germany. For these jurisdictions and a number of others which also currently have limited disclosure regimes the Directive will therefore require significant changes to national procedural rules, as well as a cultural change in favour of increased disclosure.

2.12 Moreover, even for those jurisdictions which already have extensive pre-trial disclosure, such as the UK, the disclosure provisions of the Directive are likely to have at least some impact, potentially including changes to existing procedural rules. For example, the existing UK Civil Procedure Rules require that applications for third party disclosure must be supported by evidence: it is unclear whether the requirement in the Directive that applications for third party disclosure must be made on the basis of “*reasonably available facts*” imports a new lower threshold.<sup>16</sup> It is also possible that the new regime may have a slightly restrictive effect in the UK insofar as the English courts had previously demonstrated a willingness to disclose documents related to leniency applications in certain circumstances.<sup>17</sup>

2.13 However, it appears unlikely that the Directive will result in complete harmonisation of disclosure rules in all EU Member States. The Directive only sets out minimum requirements, and it will therefore remain open to individual Member States to adopt wider disclosure rules. It therefore seems likely that the scope



of national disclosure rules will continue to be a key factor for claimants when deciding where to bring a claim (assuming there is a choice of jurisdiction available), and countries such as the UK are likely to remain attractive to claimants due to wide disclosure rules. It is also notable in this regard that the question of *timing* of disclosure is not addressed by the Directive. In practice, disclosure is particularly critical early on in proceedings, so as to enable the claimant(s) to draft their pleadings on the basis of the available evidence, and to assess the risks involved in proceeding with the litigation. It remains to be seen what approach Member States will take to this question when implementing the requirements of the Directive, but it is a consideration which is likely to continue to be of particular importance for claimants when deciding where to seek to assert jurisdiction to bring a damages claim.<sup>18</sup>

2.14 With regard to the protection of confidential information, it remains to be seen how willing national courts will be to explore the various options recommended by the Directive and order disclosure subject to appropriate protections. In those jurisdictions where national courts have little previous experience of such processes, there may be a natural initial reluctance to order disclosure of sensitive materials. However, it is anticipated that this will be less of an issue for the English courts, which have already shown themselves to be willing to engage in the necessary balancing act between protection of sensitive information and ensuring claimants have access to key evidence required to substantiate their claims. This is well illustrated by the approach recently adopted by Mr Justice Smith in the ongoing *Air Cargo* litigation: in October 2014 he ordered the main defendant, British Airways, to disclose to a confidentiality ring an unredacted version of the European Commission's infringement decision relating to the air cargo cartel (subject to redactions for leniency and legally privileged material).<sup>19</sup> Additional protection was ensured by also prohibiting the claimants from using the disclosed decision to bring any further proceedings. This controversial step was taken following unsuccessful attempts by the claimants to obtain a suitably redacted version of the decision from either the European Commission or British Airways via the usual disclosure process.<sup>20</sup> The disclosure order was challenged by a number of airlines involved in the litigation (in particular, non-addressees of the infringement decision who had been joined as co-defendants, and were concerned that the decision might include references to them). Very shortly before the appeal hearing commenced in the Court of Appeal, on 8 May 2015 the European Commission published a provisional non-confidential version of the decision. However, the judgment of the Court of Appeal on the question of whether the claimants are entitled to information relating to non-addressees of the infringement decision (the so-called "*Pergan* material") is still awaited at the time of writing.<sup>21</sup>

2.15 Whilst the absolute protection granted to leniency corporate statements and settlements submissions in Article 6 appears to spell the end for the *Pfeiderer* balancing exercise in respect of such documents, national courts will still need to weigh up competing interests when assessing the proportionality of disclosure of other types of documents, such as those on the "grey list". In particular, the need to safeguard the effectiveness of public enforcement of competition law is expressly required to be taken into account as part of the proportionality assessment when disclosure is sought of any other documents on a competition authority's file. The *Pfeiderer* balancing exercise is therefore likely to live on in the context of disclosure of "grey list" documents.

2.16 In practice, national courts are also likely to be frequently asked to determine whether particular documents/information fall within the definition of protected "leniency statements" or "settlement submissions" for the purposes of Article 6(6). Recital 24 provides that the protection extends to literal quotations of a

leniency statement or a settlement submission in other documents. However, it appears from recital 28 and the definitions included in Article 1 that protection will not extend to, for example, pre-existing evidence referred to in an application for leniency, or other documents relating to the application other than the actual corporate statement itself. It appears inevitable that claimants and defendants will often disagree on where exactly the line should be drawn.

2.17 In this context it is also worth noting the recent decision by the General Court in relation to the publication by the European Commission of a more detailed non-confidential version of its infringement decision in respect of the bleaching chemicals cartel, four years after the publication of the original non-confidential version, in the interests of transparency.<sup>22</sup> The court rejected objections raised by Evonik Degussa and Akzo Nobel, and held that information provided by the companies in the context of their leniency applications could be included in the revised non-confidential version of the decision. In reaching this conclusion the court drew a distinction between disclosure to third parties of leniency documents and statements in the European Commission's file, and the publication of information in the European Commission's infringement decision of information relating to leniency applications.<sup>23</sup> This decision is currently under appeal,<sup>24</sup> but it raises the possibility that extracts from leniency applications could make their way into the hands of claimants even if national courts shy away from ordering disclosure of leniency-related materials under the new regime provided by the Directive. Moreover, the express identification in a non-confidential version of an infringement decision of documents underlying a leniency application or other related information (even if specific extracts are redacted) could also facilitate further applications for specific disclosure before national courts.

2.18 A further interesting issue to be aware of is the uncertainty as to the potential retroactive effect of the new disclosure regime once implemented into national laws. Article 22(1) of the Directive provides that national measures adopted to comply with the *substantive* provisions of the Directive do not apply retroactively, but the new disclosure regime is arguably made up of *procedural* provisions. In this regard, Article 22(2) of the Directive provides that any measures other than those referred to in paragraph 1 (i.e. non-substantive measures) shall not apply to action for damages "*of which a national court was seized prior to 26 December 2014*". This would appear to indicate that new disclosure rules which are introduced in Member States to comply with the Directive may apply retroactively to claims brought prior to the entry into force of those new national provisions, provided the proceedings were commenced after 26 December 2014.<sup>25</sup>

### 3 Effect of National Decisions

3.1 Infringement findings by the European Commission are already binding on national courts in competition damages actions pursuant to Article 16(1) Regulation 1/2003. The original draft Directive proposed by the European Commission provided that infringement findings by a national competition authority ("*NCA*") of an EU Member State should also be binding on national courts in all EU Member States. In other words, an infringement finding by, for example, the French national competition authority, would have been legally binding proof of liability in a damages action brought before, for example, the UK courts. Unsurprisingly, this proved to be a very controversial issue during debates on the draft Directive. Many EU Member States were reluctant to accept that infringement findings by the NCAs of EU Member States should be legally binding on national courts outside that jurisdiction. This was a particular concern in relation to less experienced NCAs.

3.2 In the final text of the Directive a compromise has been reached. Article 9 provides that infringement findings by an NCA in one Member State will be legally binding on national courts in damages actions brought in its own jurisdiction. However, where the NCA decision is being relied upon before the court of another EU Member State, it will only constitute “*at least prima facie evidence*” that an infringement has occurred, rather than legally binding proof of liability. The NCA decision will be assessed “*along with any other material brought by the parties*”.<sup>26</sup>

#### Likely impact on antitrust damages actions

3.3 By ensuring that infringement findings by NCAs will constitute legally binding proof of liability in damages actions before national courts in the same EU Member State, Article 9(1) of the Directive will help to establish a follow-on action regime in all EU Member States. Whilst this will not change the current position in some jurisdictions, such as the UK,<sup>27</sup> it will be a significant change for others, where infringement findings by national competition authorities are not currently binding on national courts (for example, the Netherlands). It seems likely that this will result in proceedings being commenced more often in the jurisdiction in which they are first investigated, as well as leading to an overall increase in the number of follow-on antitrust damages actions being brought in the EU.

3.4 However, it is questionable how much weight will be given in practice by national courts to decisions by NCAs of other EU Member States. The compromise position reached in Article 9 leaves national courts with a considerable degree of discretion, and it seems unlikely that a national court will accept an infringement decision of an NCA of another Member State as binding proof of liability without looking in detail at the facts and reaching its own conclusions on the issue of whether there has been an infringement.

3.5 This is certainly likely to be the approach adopted by the UK courts, based on the approach taken to similar issues in other contexts. For example, in the case of *Ferrexpo v Gilson Investments*<sup>28</sup> (a shareholder dispute) the High Court held that, whilst decisions of other courts could be relied upon by the claimants as admissible evidence, the High Court could not assess what weight should be properly attached to a decision of another court without going into the facts for itself. It also noted that the difficulties in assessing the weight to be attached to the other decision were magnified if, as in the *Ferrexpo* case, the party relying upon the judgment of another court puts it forward without any information about how the argument before the other court proceeded.<sup>29</sup>

3.6 The impact of Article 9 of the Directive on antitrust damages actions is therefore likely to be relatively limited compared to the impact it might have had if it had remained in its original form. However, it will help to establish a follow-on action regime in EU Member States where private enforcement is not that well-established at present. This is likely to be of benefit to claimants in those jurisdictions, particularly when combined with the new disclosure rules discussed in section 2 above.

## 4 Limitation Periods

4.1 Limitation periods within which an antitrust damages action must be brought will remain a matter for national law, but Article 10 of the Directive introduces minimum requirements which must be reflected in national laws of all EU Member States.

4.2 A minimum limitation period of five years will apply, which will not start to run until:

- (a) the infringement has ceased; and

- (b) the victim knows or can reasonably be expected to have knowledge of:

- (i) the behaviour constituting the infringement;
- (ii) the qualification of such behaviour as an infringement;
- (iii) the fact that the infringer caused harm to him; and
- (iv) the identity of the infringer who caused such harm.

4.3 In addition, the limitation period must be suspended during any investigation by the European Commission or an NCA, and must restart no earlier than one year after any infringement decision has become final or proceedings are otherwise terminated. Pursuant to Article 18(1), the limitation period must also be suspended during any consensual dispute resolution negotiations.

#### Likely impact on antitrust damages actions

4.4 Limitation periods are currently one of the most divergent features of EU private enforcement, with different rules being applied in different Member States as to both the time within which a claim may be brought and the point in time from which the relevant time period begins to run. For example, in the UK, the applicable limitation period is currently six years from the date on which the cause of action occurred, for claims in the High Court (subject to an extension on the basis of deliberate concealment), or two years from the date on which the relevant regulatory investigation is finally determined in the case of a follow-on action before the CAT. In Germany, the time limit to institute proceedings is three years from the end of the year in which the right to claim damages arises and in which the claimant has knowledge of both the circumstances underlying the claim and the identity of the defendant (or does not know of them through gross negligence).<sup>30</sup> This limitation period is stayed where the German competition authority has instituted proceedings for an infringement of competition law.<sup>31</sup> Any such stay ends six months after the conclusion of the investigation, or, where the infringement decision is the subject of an appeal, six months after the appeal court’s final ruling. (German Civil Code, sections 195 and 199 (1)). In the Netherlands, the limitation period for bringing a competition law claim may start to run before any decision by the competition authority becomes final, but may be easily interrupted, and can ultimately last up to 20 years after the cause of action first arises, and a similar maximum limitation period also applies in France. The differences in limitation periods can be a key consideration when choosing where to file a claim when a choice of jurisdiction is available, and the application of limitation rules is also often the subject of interlocutory challenges by defendants, which can cause significant delays in practice.

4.5 The Directive will simplify the position by harmonising the point in time at which time starts to run in all Member States, and requiring limitation periods to be no less than five years from that point. However, there will still be scope for differences between Member States as the five-year period is only a minimum requirement. For example, once the Consumer Rights Act 2015 comes into force in the UK on 1 October 2015, limitation periods before the UK courts and the Competition Appeal Tribunal (“CAT”) in respect of antitrust damages claims will both be set at six years from the date on which the cause of action occurred (subject to postponement where the infringement has been concealed from the claimant), i.e. longer than the minimum length required by the Directive (although it should be noted that the UK provisions may need to be further amended within just over a year of their entry into force, to reflect the requirements of the Directive in relation to the point in time at which the limitation periods starts to run, and suspension pending the outcome of any investigation by a competition authority and any consensual dispute resolution negotiations).<sup>32</sup>

4.6 The partial simplification of the position will also come at a cost for defendants: the requirements of the Directive are likely to lead to longer limitation periods than is currently the case in most, if not all, EU Member States, and an increased risk for businesses that antitrust damages could be brought many years after the infringement has ceased.<sup>33</sup> For example, suppose a cartel was detected by the European Commission and an investigation commenced in 2015. Any limitation period would be suspended pending the outcome of the investigation, and would remain suspended until any appeals to the EU courts had been dealt with and the infringement decision became final. It is easy to imagine that this could take until at least 2023, following which the limitation period would not restart until a year later, in 2024, and run for five years to 2029 (or possibly even later, if the limitation period is further suspended during consensual dispute resolution negotiations which ultimately fail).

4.7 This is likely to be of serious concern for businesses, which face increased uncertainty as to their potential exposure to antitrust damages actions in the future. In addition, if damages are awarded in respect of an infringement which occurred many years earlier, the interest payable on the damages awarded could be very significant. For example, in the damages action before the UK High Court in relation to the gas insulated switchgear cartel (which settled in June 2014), more than half of the amount sought in damages by electricity transmission network National Grid was composed of interest, and the infringement decision in that case only dated back seven years, to 2007. From a practical perspective it is also likely to prove difficult for courts to engage in fact-finding inquiries many years after the cartel activity in question has ceased, when access to both documentary and witness evidence may be more limited.

4.8 It is also notable that the Directive does not define what is meant by an infringement decision becoming “final” in this context. As illustrated by the UK experience, this can be a very important and controversial issue, as it can have a significant impact on whether a claim is deemed admissible or brought out of time. In the UK, antitrust damages claims brought before the CAT must currently be brought within two years of the later of: the cause of action arising; the expiry of any right to appeal against the infringement decision; or an infringement decision becoming “final”.<sup>34</sup> The UK courts have had to determine what is meant by “final” in this context in a number of cases, often resulting in appeals which have significantly delayed the substantive hearing of the case.

4.9 For example, the UK courts have had to consider whether an appeal against the penalty imposed, rather than an appeal against the infringement finding itself, suspends the limitation period,<sup>35</sup> and whether appeals brought by other addressees of the infringement decision should suspend the limitation period against a leniency recipient who has not appealed against the decision.<sup>36</sup> It is likely that national courts will have to reconsider these same issues in the context of the Directive, which does not address these key issues directly.<sup>37</sup> Questions may also arise as to whether an appeal against how the scope of a cartel has been defined in an infringement decision should suspend a limitation period for bringing a damages claim, even if the existence of an infringement is not disputed (as seen in the challenge to the European Commission’s decision in respect of the high-voltage cable cartel, this may be a tactic considered by an immunity recipient wishing to delay possible damages claims).<sup>38</sup> References to the ECJ for preliminary rulings may need to be made to obtain clarity on these points to ensure a consistent approach across all EU Member States.

4.10 It has been suggested that the limitation provisions of the Directive may have at least some retroactive application, potentially rendering a previously non-time barred claim time-barred, or reviving a claim that was previously time-barred (i.e. removing an accrued limitation defence). Rules relating to limitation periods are generally

accepted to be “substantive” provisions rather than “procedural” provisions, and, as noted above, Article 22(1) provides that national measures adopted to comply with substantive provisions of the Directive shall not apply retrospectively. However, the EU courts have previously held that new law can apply to “future effects” or “future consequences” of situations which arose under the previous law.<sup>39</sup> On this basis, the admissibility of a claim lodged after the implementation of the Directive into national law, which relates to an infringement which took place prior to that date and which, under the previous law, would have been time-barred, could potentially be determined by reference to the new limitation period and permitted to proceed. It remains to be seen what approach will be taken by national courts on this issue, which may also necessitate a reference to the ECJ for a preliminary ruling to ensure a consistent approach.<sup>40</sup>

## 5 Joint and Several Liability

5.1 Article 11 of the Directive provides that, as a general rule, a person who has suffered harm as a result of a competition law infringement should be able to claim compensation for the entire harm suffered from any of the co-infringers. It therefore introduces the concept of joint and several liability in antitrust damages actions across all EU Member States.

5.2 There will be a degree of protection for immunity recipients, who will only be liable to compensate their own direct and indirect purchasers, unless the other co-infringers are unable to compensate the remaining claimants (Article 11(4)). However, in practice, this is likely to offer only limited reassurance to those considering whether to apply for leniency, as there is still a risk that they could potentially be held liable for the entire harm caused by the infringement, and it is not clear on the face of the Directive how or when it will be determined whether co-infringers are unable to compensate victims. This could mean that immunity recipients have to wait a number of years to determine the extent of their liability. It is also notable that this protection only applies to “immunity recipients”, defined as those who have received “immunity” from fines under a leniency programme.<sup>41</sup> This would not appear to include those who have received merely a *reduction* in fines through a leniency programme, even though the underlying policy reasons for offering protection to immunity recipients would appear to also apply to those who receive a lesser reduction in fines.

5.3 The Directive also provides an exception to the usual rules on joint and several liability for SMEs, which was not included in the original draft proposed by the European Commission. Article 11(2) states that an SME<sup>42</sup> will only be liable to its own direct and indirect purchasers and not to any other purchasers of the affected products, provided that: its relevant market share was less than 5 per cent at any time during the infringement; the application of the normal rules would irretrievably jeopardise its economic viability and cause its assets to lose all their value; and the SME in question is not a co-ercer or a recidivist. In practice, determining whether these conditions are met in a particular case is likely to be a complex (and costly) question, particularly given the lack of further guidance in the recitals.

5.4 Articles 11(5) and 11(6) expressly deal with the possibility of a contribution claim being brought against co-infringers in circumstances where a defendant has paid more compensation than its appropriate share as a result of the rules on joint and several liability. The amount payable by a co-infringer must be determined in light of its “relative responsibility” for the harm caused. Immunity recipients are once again granted a degree of protection in this regard: Article 11(5) provides that the amount of contribution payable by an immunity recipient shall not exceed the amount of the



harm it caused to its own direct or indirect purchasers or providers. This is however subject to Article 11(6), which provides that in circumstances where the infringement has caused harm to parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution payable by an immunity recipient shall be determined in light of its “relative responsibility” for that additional harm.

### Likely impact on antitrust damages actions

5.5 The basic principle of joint and several liability already exists under the national laws of some Member States, including all four of the jurisdictions focussed on in this chapter (i.e. the UK, Germany, France and the Netherlands). However, the introduction of this principle across all Member States will be a significant change for some other jurisdictions, and should make it easier to bring a claim for the entire harm caused against the defendant with the deepest pockets across the EU, potentially reducing the need for a claimant to “forum shop”. Moreover, even for those jurisdictions which already recognise the basic principle of joint and several liability, national laws will need to be amended to reflect the protections introduced by the Directive for immunity recipients and the exception for SMEs.

5.6 For defendants, the possibility of seeking contributions from co-infringers will provide some comfort, but any such claims will of course involve further proceedings and the associated time and expense. Furthermore, the key question of how to determine the “relative responsibility” of each infringer is not addressed in any detail by the Directive: recital 37 simply provides that this is a matter for national courts, having regard to “relevant criteria” such as turnover, market share, or the role of the infringer in the cartel. In practice, such an assessment is likely to be a complex matter, particularly for courts in those jurisdictions which have not previously had to consider such issues in this context. The experience of the UK courts in applying the UK Civil Liability (Contribution) Act 1978 may be instructive in this regard: section 2 of that Act provides that the amount of contribution recoverable from a co-infringer shall be “such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question”. However, it remains to be seen how other jurisdictions will approach the assessment – and indeed, whether the lack of a “just and equitable” requirement under the Damages Directive will result in any change in approach in the UK.

5.7 The interplay between the provisions on joint and several liability and those setting out minimum limitation periods also raises some interesting questions. Article 11(4) of the Directive states that EU Member States must ensure that for cases where there is an immunity recipient who may benefit from protection from joint and several liability, the limitation period shall be “reasonable and sufficient to allow injured parties to bring such actions”, i.e. to seek compensation from the co-infringers or the immunity recipient in the event that co-infringers prove unable to compensate the victims. No cross-reference is made to this provision in Article 10, but it appears that the limitation period in such circumstances could be significantly longer than would normally be the case.<sup>43</sup>

## 6 Remedies

### General principles

6.1 At the outset, Article 1 of the Directive makes clear that it is intended to facilitate the exercise of the right to “full

compensation” in respect of harm caused by competition law infringements. Article 3 makes two very clear statements regarding the general principles that are to apply in this regard:

- (a) Article 3(2) provides that full compensation “shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed”. As such, it will include compensation for actual loss and loss of profit, together with payment of interest. This principle will be extremely important in many jurisdictions where, in a long-running cartel, the claim for interest alone may equate to over half of the damages sought (as seen in the UK in the *National Grid* case referred to in paragraph 4.7 above); and
- (b) Article 3(3) provides a clear limitation on the amount which may be claimed, expressly excluding “overcompensation”. Examples of overcompensation are stated to include “punitive, multiple or other types of damages”.

6.2 The exclusion of overcompensation is a clear policy statement intended to distinguish the EU approach from systems that employ “punitive” or multiple damages, such as are available under the US Clayton Antitrust Act. However, it is arguable that the exclusion goes too far in seeking to meet this policy objective. The courts in England and Wales have already expressly limited the application of exemplary damages to cases where there has been no previous regulatory fine (thus preventing double punishment) (see the England and Wales chapter). In addition, it would appear to rule out the application of awards for restitutionary damages or other measures seeking to return unjust enrichment. Such awards are not strictly speaking loss-based measures, but are employed as equitable remedies to ensure that unlawful profits are disgorged and repaid, often in circumstances where it may be difficult for the claimant to establish quantum and/or causation of loss on the ordinary measure. It will be interesting to see whether the somewhat simplistic approach adopted in the Directive will be implemented so as to exclude such a remedy.

### Passing-on “defence”

6.3 It was to be hoped that the somewhat stale debate as to whether or not the passing on “defence” (so-called) applied to EU antitrust actions would be laid to rest by the Directive. In some senses it has been, although the detail of Articles 12-16 of the Directive begins to acknowledge how complex the issue will be for national courts to address in practice.

6.4 First, EU Member States are required to ensure that the principle of full compensation expressly permits those who have suffered harm at any level of the supply chain to claim compensation (i.e. including indirect purchasers) and that the compensation claimed does not exceed the actual loss suffered at any particular level of the supply chain (i.e. the passing-on defence is to be available). This approach is obviously consistent with the emphasis on compensatory damages, but then begs the question of how this division of actual loss between different levels of the supply chain is to be proven and assessed.

6.5 To answer this question, the European Commission looks to the usual solution employed to answer evidential conundrums: the solution must lie with the burden of proof. However, complexity is introduced in the form of varying presumptions in respect of the burden of proof to be applied to direct and indirect claims:

- (a) in a direct claim, it is for the defendant to bear the burden of showing that the direct claimant passed on its losses (in the form of higher prices) to its own customers, and therefore that the claimant suffered no actual loss itself. To assist

the defendant in proving a matter which it arguably knows nothing about, a defendant seeking to raise this defence may reasonably require disclosure from the claimant and third parties; and

- (b) in an indirect claim, however, the burden lies upon the indirect claimant to show that the loss was passed on to it (by the direct purchaser), although again disclosure may reasonably be required of the defendant carteliser and other third parties (i.e. presumably the direct purchaser). Yet, even here, the European Commission has loaded the dice in favour of the claimant. This is because the indirect purchaser shall henceforth be deemed to have proven that the overcharge was passed on in circumstances where: the defendant has committed an infringement of competition law; the infringement resulted in an overcharge for the direct purchaser; and the indirect purchaser purchased the affected goods or services from the direct purchaser (subject to the defendant being able to credibly demonstrate to the satisfaction of the court that the overcharge was not in fact passed on).

6.6 Perhaps recognising the potential for complexity it has created, the European Commission then indicates that national courts shall be able to take account of various matters including competing actions arising at different levels of the supply chain in connection with the same infringement, judgments resulting from such actions and other information in the public domain. National courts might be excused from thinking that such insights offer moderate assistance. It is obvious that such issues will need to be taken into account; the difficulty will be how to assess and quantify the competing claims between them.

6.7 Article 16 of the Directive proposes that clarity on this issue will be provided in the form of guidelines for national courts on how to estimate the share of the overcharge that was passed on to the indirect purchaser. These guidelines have not yet been published, but are awaited with interest. It will, perhaps, be more helpful if they are modest in terms of what they seek to achieve, and have regard to the fact that national courts (which in some jurisdictions are used to calculating and apportioning damages between private parties in complex multi-jurisdictional disputes) may have more experience and insight to offer on this topic than the European Commission, whose functions do not extend to such matters.

### Quantification of harm

6.8 On the issue of quantification more generally, the European Commission has demonstrated restraint. As such, Article 17 of the Directive limits itself to setting out a number of very basic principles, clearly aimed at those jurisdictions where existing laws of national procedure make it difficult in practice to begin any form of antitrust claim. Thus EU Member States are to ensure that the standard of proof in the national jurisdiction does not render it excessively difficult to exercise the right to damages and that judges are to be given the opportunity to estimate losses (i.e. a claim is not to fail simply because the harm cannot be quantified on an exact basis).

6.9 Cartel infringements are to be presumed to cause harm (thus ensuring a ground of action does not fail in some jurisdictions simply because the losses cannot be measured at the outset). However, much to the relief of most practitioners, the proposal to import a rebuttable presumption of a certain level of overcharge has been abandoned. Indeed, it had to be, given the clear priority placed upon the principle of compensation for actual loss as proven by the claimant, and the obvious inconsistency with that principle of any measure which awarded a sum on the basis of a presumption.

6.10 Finally, it is interesting that national competition authorities of EU Member States are to be given the power to assist the national court, if so requested, on the issue of quantification of loss. This raises important and interesting possibilities. It may be, for example, that in the course of the administrative procedure the regulator receives a wide variety of confidential information on the effects of conduct upon prices and volume of sales in the affected market. This information may have been received from third parties and never fully disclosed to the cartel defendants or, most likely, the claimants. The possibility of creating important asymmetries of information in this regard is obvious, as is the scope for unfairness should a court seek to take account of material not disclosed to the parties before it. Whilst the European Commission may be prepared to take decisions on the basis of information it alone has been given opportunities to review, such practices are generally rejected by courts on the basis that damages are to be awarded on the basis of evidence that all parties have had the opportunity to comment upon and contest. It therefore remains to be seen how useful this measure will be in practice.

## 7 Effect of Consensual Settlement

7.1 The European Commission has introduced three key measures in the Directive which are aimed at increasing the incentives for parties to reach consensual resolution of antitrust damages actions.

7.2 First, as noted above, Member States are required to ensure that the limitation period for bringing an action for damages is suspended for the duration of the consensual settlement period. Interestingly, this suspension will only work in favour of those parties involved or represented in the settlement negotiations. Presumably, it is envisaged that Member States will require parties to bring such settlement negotiations to the attention of the national court or otherwise reach agreement to suspend the limitation period, in order for the automatic suspension to apply. Otherwise, it is easy to foresee circumstances where a dispute may arise as to whether a “consensual dispute resolution process” for the purposes of the obligatory suspension of the limitation periods has arisen and/or continues to exert a suspensory effect.

7.3 Secondly, national competition authorities are given discretion to consider whether a settlement reached prior to a fining decision should be a mitigating factor in setting the level of any such fine. It remains to be seen how many national competition authorities will make use of this option, which would require the development of reasonably predictable methodologies for recognising and quantifying the mitigating impact of such settlements upon fines. Exactly how this proposed incentive would work in practice is unclear: for example, what level of discount would be offered? Would co-defendants who all contribute the same amount to a settlement pot (relative to their share of sales) all be *entitled* to receive the same discount on fines? From the defendant’s perspective, it seems questionable whether the possibility of a discount on fines will in practice provide a significant incentive to settle prior to an infringement decision, bearing in mind that the amount “saved” through the fine discount may well be dwarfed by the amount payable under the terms of the settlement. However, in circumstances where there is a clear infringement and a significant fine is anticipated, there could be an incentive for a defendant who essentially accepts liability to seek out would-be claimants and ensure some kind of settlement agreement has been reached before the fine has been calculated and imposed. In the UK, the Competition and Markets Authority (“CMA”) recently consulted on draft guidance relating to the approval of voluntary redress schemes

(under new powers given to it by the Consumer Rights Act 2015), in which it indicated that in the majority of cases where it approves a redress scheme the companies involved will benefit from up to a 10 per cent reduction in fines imposed in respect of the infringement.<sup>44</sup> At the time of writing, finalised guidance was still awaited.

7.4 Thirdly, and most importantly in terms of incentives for defendants, a number of measures seek to reinforce the ability of parties to achieve finality of settlement. One of the greatest difficulties in reaching a settlement can be the uncertainty faced by defendants seeking to settle on a definitive basis “their share” of the damages. In such circumstances defendants are often understandably concerned that the claimant may return for further damages having failed to recover other shares from other defendants and/or that the settling defendant may be subject to contribution claims from other co-defendants, who seek to argue that the original settlor did not pay its fair share. The European Commission recognises the need to achieve a high degree of finality if settlements are to be encouraged, and has introduced some helpful measures in Articles 19(1) and 19(2) of the Directive which, effectively, prevent the settling injured party from coming back to the settling defendant for any further sums, and also prevent any non-settling co-infringers from seeking to recover contribution for the remaining claim from the settling co-infringer.<sup>45</sup> Article 19(4) also expressly requires national courts to “take due account” of any damages paid pursuant to a settlement agreement when determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law.

7.5 It is interesting to note in this regard that recital 51 of the Directive further provides that the claim of the injured party should be reduced under Article 19(1) by the settling infringer’s share of the harm “regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party”. In other words, it appears that it will be possible for a defendant to “crystallise” the amount of damages payable by it in respect of an infringement and avoid a future contribution claim,<sup>46</sup> even if the amount paid is lower than the defendant’s actual “fair share” of the harm. This may provide a significant incentive for a defendant in a claim brought against a number of cartel participants to settle at an early stage in proceedings.

7.6 The Directive does not deal further with procedural issues relating to settlement of antitrust damages actions. The detail of settlement regimes is left for Member States to determine and, as a result, the availability of clear settlement procedures – in particular in relation to collective settlement – is likely to remain a key point of difference between jurisdictions, and an important consideration for both claimants and defendants. Whilst the detail of the various different regimes is beyond the scope of this chapter, it is interesting to note in this regard that two of the jurisdictions which are currently amongst the most popular for bringing antitrust damages actions – the Netherlands and the UK – have introduced opt-out collective settlement regimes aimed at allowing businesses to quickly and easily settle competition claims on a voluntary basis, although neither of these mechanisms have yet been used in competition cases at the time of writing.<sup>47</sup>

## 8 Conclusions

8.1 The impact of the Directive will clearly vary across Member States. In some jurisdictions, such as the UK, the impact is likely to be relatively limited in light of existing national laws which – at least in some key respects – already go beyond the requirements of the Directive. Although some changes to national laws are likely to be required to reflect the detail of the Directive, the majority of these are unlikely to be significant in practice (perhaps with the

notable exception of changes to limitation periods). However, it is important not to underestimate the impact the Directive is likely to have on jurisdictions where private enforcement of competition law is not as well developed, in particular in respect of issues such as disclosure and joint and several liability. It is difficult to predict precisely what the impact of these changes will be in the longer term, but it appears likely that the total number of antitrust damages actions being brought across the EU will increase, and forum-shopping may be at least somewhat diminished.

8.2 As to whether the Directive will affect the traditional popularity of the UK, Germany and the Netherlands as claimant-friendly jurisdictions (in cases where a choice of jurisdiction is available), this seems unlikely, at least in the short- to medium-term. The Directive will not result in complete harmonisation of private enforcement regimes across the EU, and Member States will continue to be able to adopt (or retain) measures which go beyond the minimum requirements set out in the Directive and make them more attractive to claimants. The traditionally popular jurisdictions will also have the advantage of experienced judges and legal advisors, which should not be underestimated (particularly in light of the likely challenges to the correct interpretation of some key provisions of the Directive, as highlighted above). However, it remains to be seen how the landscape will develop in the longer term.

## Endnotes

1. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L349/1, 05.12.2014).
2. Recital 9 of the Directive.
3. In practice, the remedy of an interim injunction to prevent an alleged abuse of dominance pending a full hearing of the claim may be as important, or even more important to a claimant than any damages which may eventually be awarded.
4. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (OJ L351/1 20.12.2012). For an interesting recent judgment on the use of an “anchor” defendant to assert jurisdiction in a competition claim see the ECJ’s preliminary ruling of 21 May 2015 in Case C-352/13 – *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel and others* (EU:C:2015:335).
5. The European Commission originally considered addressing the question of whether claimants should be permitted to bring collective antitrust damages actions as part of the Directive, but concluded that it was too controversial. Instead, in June 2013, the European Commission published a separate “Recommendation on Collective Redress”, alongside the draft Directive, setting out a series of common, non-binding principles for collective redress mechanisms in EU Member States (2013/396/EU).
6. In relation to developments in respect of collective actions for competition law infringements in the UK, see chapter [3]. Collective actions for follow-on antitrust damages actions have also recently been introduced in France (on an “opt-in” basis), pursuant to the French Consumer Act – also known as the *Loi Hamon* – published on 18 March 2014.
7. Reforms to the UK disclosure regime which came into effect on 16 April 2013 seek to render the disclosure process more focused and efficient, but the revised rules still assist claimants in requiring both parties to produce and serve



- a report describing documents that exist that are (or which may be) relevant to the matters in issue in the case (see Form N263 and CPR PD 31B). If the extent of disclosure cannot be agreed, the court will order disclosure, having regard to the reports filed by the parties.
8. In this regard, Article 5(4) expressly states that the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.
  9. Recital 14 of the Directive.
  10. Recital 26 of the Directive. This approach is intended to alleviate the burden on competition authorities, at least in the first instance, but in practice it has the potential to lead to considerable delays.
  11. Case C-360/09 *Pfleiderer AG v Bundeskartellamt* (EU:C:2011:389).
  12. Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* (EU:C:2013:366).
  13. On the one hand, documents such as corporate leniency statements and settlement submissions are likely to include information which would be highly relevant and helpful to claimants; yet on the other hand, ordering disclosure of such documents is likely to discourage those involved in anti-competitive conduct from applying for leniency or settlement, thereby undermining key tools of public enforcement of competition law. The ECJ had recommended that national courts should conduct a “balancing exercise” in each case, weighing up the competing interests at stake.
  14. At first sight it appears difficult to reconcile the approach adopted in the Directive with the statement of the ECJ in *Donau Chemie* that “*in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals*” (paragraph 31 of the judgment). However, the ECJ stated that its judgment was made “*in the absence of binding European competition law rules*” (paragraph 9 of the judgment); Article 6 of the Directive therefore supersedes the approach previously advocated by the ECJ.
  15. This is, obviously, somewhat of a generalisation. In particular, during the proceedings, a French court may currently, at the request of the parties or of its own volition, order disclosure, but in practice such requests generally need to be targeted at specific categories of documents whose relevance has been established.
  16. This point was highlighted by Sir Peter Roth (who has considered disclosure requests in the context of antitrust damages actions on a number of occasions in his capacity as a High Court judge) in the paper he presented at the XI Antitrust Conference in Treviso on 15 May 2014: “Too much or too little? The EU initiatives to promote private redress”.
  17. *National Grid Electricity Transmission plc v ABB Ltd & Ors* [2011] EWHC 1717 (Ch) and [2012] EWHC 869 (Ch).
  18. The timing of disclosure may also be affected by any ongoing civil investigation by the European Commission, in cases where a private damages action is brought before the investigation is brought to a close. Whilst the *Masterfoods* doctrine prevents a national court from taking a decision which is inconsistent with a decision taken by the European Commission (leading to a so-called “*Masterfoods stay*”, pending the outcome of the ongoing European Commission investigation), the English courts have shown themselves willing to permit damages proceedings to continue up until the point at which the defence is pleaded, and in some cases order at least some form of initial disclosure prior to imposing a stay, at least where the European Commission investigation is still at an early stage (see for example the *Google* decision ([2013] EWHC 2295 (Ch)), which can be contrasted with the approach taken in *Servier* ([2012] EWHC 2761 (Ch)), where the European Commission investigation was much more advanced), or where an appeal before the EU courts is pending (see for example *National Grid* ([2009] EWHC 1326).
  19. It is interesting to note in this regard that Mr. Justice Smith did not give much weight to arguments raised by the co-defendants joined by British Airways under Part 20 CPR, who were not addressees of the infringement decision, that disclosure of potentially incriminating information relating to them should not be disclosed in circumstances where they had not had an opportunity to defend themselves during the administrative process, or appeal against the decision before the courts, in line with the earlier General Court decision in Case T-474/04 *Pergan v Commission* (EU:T:2007:306) (see further chapter [2]).
  20. The European Commission had informed the national court that it would not be able to resolve confidentiality conflicts until 2020, and British Airways had produced a version which was so heavily redacted as to be deemed “completely useless”.
  21. In Case T-474/04 *Pergan v European Commission* (EU:T:2007:306) the General Court held that information included in an infringement decision should be regarded as confidential, and covered by the obligation of professional secrecy, if it implies that a company was involved in a cartel but the company has not had the opportunity to challenge that accusation in court due to not being named as an addressee of the decision. See further chapter [2] which discusses this issue in more detail.
  22. Case T-341/12 *Evonik Degussa GmbH v European Commission* (EU:T:2015:51) and Case T-345/12 *Akzo Nobel NV and others v European Commission* (EU:T:2015:50). The actual publication of the extended version of the non-confidential decision was suspended pending the appeal, following the grant of a request for interim measures in November 2012.
  23. The General Court held that, in deciding on publication, it is up to the European Commission to balance the public interest in knowing as fully as possible the reasons for any European Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised, and the interest of the European Commission in safeguarding the effectiveness of its leniency programme.
  24. As Case C-162/15.
  25. Article 22(2) could possibly be read as leaving open the possibility that Member States could choose to expressly provide in their national implementing legislation that non-substantive provisions, such as procedural requirements relating to disclosure, do not apply to actions for damages of which a national court was seized prior to the entry into force of the national implementing legislation. However, the position is not clear, and on its face the Directive appears to contemplate an element of retrospective effect for such provisions. This issue was the subject of an interesting debate at a seminar held at Brick Court Chambers in London on 26 March 2015, following a presentation by Daniel Jowell QC which highlighted these concerns.
  26. Article 9(2) of the Directive.
  27. Decisions of the UK competition authority are already binding on the UK courts and the UK Competition Appeal Tribunal.
  28. *Ferrexpo v Gilson Investments* [2012] EWHC 721.
  29. Paragraph 51 of the judgment, citing *Calyon v Michailaidis* [2009] UKPC 34, paragraph 27.
  30. German Civil Code, sections 195 and 199 (1).



31. German Law Against Restraints On Competition, section 33 (5).
32. It is unclear why this issue was not addressed by the UK Government during the passage of the Consumer Rights Act 2015, given that the requirements of the Directive were clear months before the UK legislation received Royal Assent.
33. See in this regard the discussion in the recent *Visa* litigation before the English High Court, where the claimants pointed to the (then draft) Directive in support of their argument against striking out of their claim in respect of the period 1977 to 2007 (i.e. the period which was more than six years before proceedings had been issued). The court expressly noted the Directive requirement that the limitation period should not start to run in a competition claim until the infringement has ceased (which would have meant that the claims in respect of the earlier period were not time-barred in the circumstances of this case). However, unsurprisingly the court declined to apply the Directive before its entry into force and implementation into UK law. (*Arcadia Group Brands Ltd and others v Visa Inc and others* [2014] EWHC 3561 (Comm)).
34. As noted above, the Consumer Rights Act 2015 will amend the limitation periods applicable to damages actions brought before the CAT with effect from 1 October 2015. Limitation periods will be brought into line with the six-year limitation period applicable to claims before the English High Court (which starts to run from the date the cause of action arises). However, it remains the case that the experience of the CAT to date in relation to the question of when an infringement decision becomes “final” is of relevance to the question of how the Directive requirements will be interpreted.
35. *BCL Old Co Limited, DFL Old Co Limited, PFF Old Co Limited and Deans Food Limited v BASF SE (formerly BASF AG), BASF PLC and Frank Wright Limited* [2009] EWCA Civ 434. The UK Court of Appeal concluded that an appeal against the penalty imposed, rather than against the infringement itself, does not suspend the limitation period.
36. *Deutsche Bahn AG and others v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24. The UK Supreme Court held that appeals brought by other addressees of the infringement decision do not suspend the limitation period as against a non-appellant, with the controversial result that, under the existing UK limitation rules, an antitrust damages action may be brought against a leniency recipient even if all the other alleged cartellists successfully appeal against the infringement decision.
37. The European Commission intervened in the *Deutsche Bahn* proceedings (see footnote 36 above) in favour of the outcome reached by the Supreme Court, so it seems clear that its intention would be that national courts should take the same approach on this particular issue once the Directive is implemented. However, it would have been more helpful for this to be clarified in the Directive itself.
38. Case T-445/14 *ABB v Commission* (appeal filed on 16 June 2014, judgment still pending at the time of writing).
39. Case C-122/96 *Saldanha and MTS* (EU:C:1997:458), see paragraphs 12-14.
40. The potential retroactive application of the Directive was the subject of an interesting debate at a seminar held at Brick Court Chambers in London on 26 March 2015, following a presentation by Daniel Jowell QC which highlighted concerns relating to the application of the new limitation period.
41. Article 2(19) of the Directive.
42. Defined as set out in Commission Recommendation C(2003)1422, i.e. fewer than 250 employees and less than EUR 50m annual turnover.
43. Article 11(3) only requires that the limitation period should be “at least” five years, leaving open the possibility of different limitation periods applying in different circumstances (albeit starting to run from the same point in time, in accordance with Article 11(2)).
44. Sections 49C-49E of the Consumer Rights Act 2015 give the CMA the power to approve redress schemes, either before or after an infringement decision has been reached, in accordance with regulations to be published by the Secretary of State. The CMA’s consultation on its draft guidance closed on 29 March 2015, and publication of the final version is still awaited at the time of writing.
45. These provisions are subject to an exception (contained in Article 19(3)) in circumstances where the non-settling co-infringers are unable to pay the damages that correspond to the remaining claim of the settling injured party. However, this exception may be expressly excluded under the terms of the consensual settlement, and it appears likely that this option will be exercised in the majority of cases in practice.
46. Article 19(2) expressly provides that the remaining claim of the settling injured party shall be exercised only against non-settling co-infringers, and that non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.
47. The Dutch regime has been in operation since 2005, pursuant to the Dutch Act on Collective Settlement of Mass Damage Claims, but as at the time of writing it has not yet been used in relation to a competition law claim. The UK regime, which is closely modelled on the Dutch approach, was recently introduced by the Consumer Rights Act 2015 and will enter into force on 1 October 2015.

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