UK Government consults on implementation of the Damages Directive

1. Executive summary

1.1 New rules governing competition litigation in European Union (“EU”) member states will soon be written into the UK’s legal system. The changes will not be fundamental, but they will:

(i) give both claimants and defendants new tools in competition litigation (for example, in the areas of disclosure and defences);

(ii) likely affect competition damages actions based on UK competition law as well as EU competition law;

(iii) extend limitation periods in competition damages actions, allowing claimants to bring claims in respect of older infringements (although it is unclear precisely what claims will be affected); and

(iv) probably come into effect early (in October 2016), three months before the deadline for national implementation.

2. The EU Damages Directive

2.1 The EU’s flagship legislation in the sphere of competition litigation, the Damages Directive (2014/104/EU), was adopted on 26 November 2014. However, as with all EU directives, the Directive does not have direct effect in EU member states. Instead, member states have been given until 27 December 2016 to ensure consistency between their own national laws and the provisions of the Damages Directive. As a result, several countries, including Denmark, the Netherlands and Sweden, have already completed public consultations on their respective proposed implementation measures.

2.2 On 28 January 2016, the UK Government’s Department for Business, Innovation and Skills launched its public consultation process, seeking views on how to handle the transposition in the UK. The Government has invited responses to its consultation by 9 March 2016. The Government then intends to publish its response, setting out its conclusions, within three months of this date.

2.3 The consultation document is short - a mere 26 pages. This reflects the fact that the changes required by the Damages Directive in the UK, which already has a well-developed competition litigation architecture, will be incremental, rather than revolutionary. On the other hand, it is expected that the Directive will cause extensive changes in other member states.

2.4 The consultation document does not cover some of the more straightforward provisions of the Damages Directive. For example, the Directive requires member states to prohibit the disclosure of leniency statements and settlement submissions in civil litigation proceedings, and to guarantee the availability of the passing-on defence. Transposing these rules into domestic law is expected to be a relatively simple matter, and the UK Government has not considered it necessary to consult on them.
2.5 The UK Government has, however, raised a number of other specific questions in the consultation document. These include:

(i) whether to implement a special regime for breaches of EU competition law only, or to apply the changes required by the Damages Directive to breaches of UK competition law as well (i.e. even where there is no parallel breach of EU competition law);

(ii) how the Directive’s provisions on limitation periods should be transposed into the UK’s existing civil litigation regime; and

(iii) whether to implement the changes early (in October 2016) rather than waiting until the deadline in December 2016.

2.6 We explore each of these questions (and their relevance to the existing UK competition litigation landscape) briefly below.

3. Special regime for EU competition law breaches

3.1 In the UK, claimants can base claims for loss resulting from competition infringements on UK or EU competition law (or both). The UK’s domestic provisions are broadly identical to their EU counterparts, with the exception that the UK rules focus on conduct affecting trade in the UK (as opposed to trade between member states).

3.2 The Damages Directive affects the application of EU competition law (or EU and national competition law in parallel). The Directive does not therefore apply when only national competition law applies. If the UK Government were to adopt its normal approach of transposing verbatim the text of the Damages Directive into domestic legislation, this would create a two-tier system. The existing rules on competition damages actions would still apply to claims based solely on UK competition law, whereas a newly modified regime would apply to claims under EU competition law.

3.3 The UK Government’s inclination is against creating this two-tier system. The motivation behind this is a desire to avoid undue complexity: disparities between the tiers would likely lead to uncertainty and confusion for business, as well as higher familiarisation costs. Such an approach could also lead to satellite litigation, as parties argued about which regime covered their dispute (particularly in standalone claims where there would be no pre-existing decision identifying which laws had been infringed). It might also be argued that EU competition law and UK competition law were intended to be functionally the same, such that a uniform set of procedural rules ought to apply to both. On the other hand, some might see value in preserving the differences between the two regimes in the event that the UK were later to decide to exit from the EU.

4. Changes to the limitation period

4.1 The Damages Directive requires that the limitation period for private damages actions based on breaches of EU competition law be at least five years, starting only when: (i) the relevant infringement has ceased; and (ii) the claimant knows (or can be reasonably be expected to know) that the conduct took place, was unlawful, and caused it harm, and knows the identity of the infringer. In addition, the Directive provides that this limitation period must be suspended while the
European Commission or a national competition authority is conducting an investigation, and that this suspension must last until at least one year after the authority’s final infringement decision has been issued (or after its investigation is otherwise terminated).

4.2 The current limitation period applicable to competition claims is six years in England, Wales, and Northern Ireland, and five years in Scotland. The UK Government is therefore not proposing to make any changes to the length of the limitation period. However, the Government considers that changes will be required to the existing regime to reflect the Damages Directive’s requirements as to when limitation periods start to run and the circumstances in which they can be suspended.

4.3 Under existing UK legislation, where an infringement has been concealed (for example, as a result of the inherently secret nature of cartels), the limitation period does not start to run until the claimant has (or reasonably ought to have) discovered the concealment. While this position could arguably be interpreted as compatible with the requirements of the Damages Directive, the UK Government considers that it would be clearer to amend the rules to follow explicitly the language of the Damages Directive on this point.

4.4 Another feature of the existing rules is that where the infringement has not been concealed, the limitation period starts to run from the point at which the loss is suffered. The effect is that where a known infringement continues for an extended period of time, causing loss continually, claimants can only claim for losses suffered no more than six years prior to the claim being commenced (or five years in Scotland). Under the Damages Directive, the limitation period will only start running when the infringement ceases, allowing any claim commenced in time to cover all the losses caused by the continuous infringement.

4.5 In a similar vein, there is currently no rule of domestic law providing for any suspension of limitation periods during competition authorities’ investigations. Following implementation of the Damages Directive, the clock will be stopped while an authority’s proceedings are ongoing – and for at least one year after they come to an end.

4.6 The cumulative result of these changes, when coupled with the effects of compound interest, will likely increase the amounts at stake in competition damages actions. The delay to the start of the limitation period will mean that more conduct can be brought into the scope of well-timed claims. In addition, the possible suspension of the limitation period will mean that, where a competition authority conducts an investigation, the limitation period may still not have expired a decade or more after the relevant conduct took place. This may come as an unwelcome development to potential defendants, and will be a point to consider when deciding strategically how to respond to an authority’s investigation.

4.7 One important question that is left unresolved in the consultation document is precisely what claims will be covered by the new limitation rules. The Damages Directive provides that member states must not apply substantive provisions of the Directive retrospectively. The UK Government considers that changes to the limitation rules are substantive, with the result that this bar on retrospective application applies. Some may argue that this approach conflicts with the traditional academic understanding of limitation periods as matters of procedure. However, potential defendants will most likely welcome this approach, on the basis that they will not be subject to retrospective extensions of the limitation periods that already apply to existing claims against them.
4.8 Following its reasoning that the limitation rules may not be applied retrospectively, the UK Government has said that it intends to transpose the rules “so that the new limitation requirements apply from the commencement of the transposition instrument”. What is not clear is whether the new limitation rules will apply to all claims that are brought after the commencement of the instrument, or only to those that arise after that time. Claimants and defendants will want to examine the wording of the new rules closely to determine whether the answer emerges from the final drafting. In the absence of such clarity, the point may be open to debate in court.

5. Proposed implementation date

5.1 Although the UK Government has until 27 December 2016 to implement the Directive, it is minded to do so early to coincide with the Government’s common commencement date of October (common commencement dates are the six-monthly dates when most laws affecting businesses come into force).

5.2 Reactions to this proposal are likely to be mixed among both claimants and defendants, and will depend a great deal upon the facts of each case. Where, for example, much turns on the disclosure of leniency or settlement materials, defendants may favour early implementation. Conversely, where the new limitation rules would increase the amount in issue, an earlier date might favour claimants. The time difference is, however, small at only three months, and so the number of cases where this makes a significant difference is likely to be limited.