

Impact of the EU Private Damages Directive on private damages actions in England and Wales

1. INTRODUCTION

- 1.1 On 17 April 2014, the European Parliament adopted a directive on rules governing actions for damages under national law for infringements of the competition law rules of Member States and the European Union (the "**Directive**").¹ The Directive seeks to facilitate the bringing of private damages actions for competition law infringements in national courts and to harmonise the private damages regime across Member States. Commissioner Almunia considers the Directive to be one of the key legacies of his term as European Commissioner for Competition (which comes to an end in October 2014).²
- 1.2 The UK Government is also currently in the process of reforming the private damages regime in England and Wales by means of the Consumer Rights Bill (the "**Bill**").³ To-date the Courts of England and Wales, along with the UK Competition and Appeals Tribunal, have been popular venues for claimants seeking to bring both standalone and follow-on private damages actions.⁴ Therefore, the key question is whether the Bill will further enhance this position? Or will the Directive and Recommendations narrow the differential between the private damages regime in England and Wales and those in other Member States?

2. FEATURES OF THE DIRECTIVE AND RECOMMENDATIONS THAT WILL NARROW THE DIFFERENTIAL

- 2.1 Given that one of the aims of the Directive is to harmonise the private damages regime across Member States, it is not surprising that the Directive (and Recommendations) will narrow the differential between the private damages regime in England and Wales and the equivalent regimes in other Member States. Most notably:
- (i) *Disclosure of evidence* – England and Wales currently has a sophisticated and extensive disclosure regime. Moreover, the High Court has shown itself more willing than courts in other Member States to order disclosure of leniency materials when applying the *Pfleiderer*⁵ principles. However, the Directive will narrow the current differential by requiring national courts in all Member States to order proportionate disclosure in competition law cases, including of pre-existing leniency documents. In addition, the Directive will further reduce the claimant friendly nature of the private damages regime in England and Wales by preventing national courts from ordering

¹ Once approved by the Council of the European Union, Member States will have two years to implement the Directive into national legislation. The Directive is discussed more generally in Issue 17 of the Slaughter and May EU Competition & Regulatory Newsletter circulated on 25 April 2014.

² The European Commission has also published non-binding recommendations (the "**Recommendations**") which encourage Member States to implement certain reforms, some of which aim to facilitate private damages actions.

³ The Bill is currently at the Report stage in the House of Commons and is expected to receive Royal Assent towards the end of 2014. The UK Government considers that the Bill presents an opportunity to implement Directive ahead of the two year time limit.

⁴ A follow-on action is a claim where the alleged breach of competition law is already the subject of an infringement decision by a competition authority; a standalone action is brought where no such infringement decision exists.

⁵ In Case C-360/09 *Pfleiderer AG v Bundeskartellamt* (judgment of 14 June 2011), the European Court of Justice held that it is for national courts to decide on a case-by-case basis (under their national laws), whether to permit disclosure of leniency documents in the context of competition private damages actions.

disclosure of leniency statements or settlement submissions and only permitting the disclosure of certain other information (e.g. information prepared specifically for the antitrust investigation) after the relevant competition authority has closed proceedings.

- (ii) *Collective redress mechanism* – the Recommendations encourage all Member States to introduce “opt-in” collective redress mechanisms⁶, thus aligning the approach in other Member States with the current approach in England and Wales which already has an (albeit seldom used) opt-in collective redress mechanism.
- (iii) *The effect of national decisions* – claimants in England and Wales (and a small number of other Member States) have to-date been able to rely on a final decision of their national competition authority as proof in private damages actions that infringement occurred. Under the Directive, all Member States are required to adopt a similar approach and, in addition, to ensure that infringement decisions of national competition authorities in other Member States are treated as at least *prima facie* evidence in private damage actions.
- (iv) *Joint and several liability* – under the Directive, as is currently the case in England and Wales, parties that infringe competition rules may be held jointly and severally liable for the entire damage caused by the infringement (they then have the right to recover a contribution from other infringing parties). However, the Directive introduces a limited derogation from this principle for any party which has received full immunity from fines under a leniency programme (an “**Immunity Recipient**”). Immunity Recipients will only be liable to compensate their direct and indirect purchasers or providers, and not for the conduct of other cartel members, unless a claimant is unable to obtain full compensation from the other cartel members. Once transposed into UK law, this limited derogation will reduce the practical impact of the *Deutsche Bahn* judgment⁷ on Immunity Recipients although not on other non-appealing addressees.

3. FEATURES OF THE BILL THAT MEAN ENGLAND AND WALES WILL REMAIN A POPULAR JURISDICTION IN WHICH TO BRING PRIVATE DAMAGES ACTIONS

3.1 Whilst the Directive and Recommendations will narrow the differential between the private damages regime in England and Wales and the equivalent regimes in other Member States, in important respects the Bill goes much further and will enhance the attractiveness of England and Wales as a jurisdiction in which to bring private damages actions. Most notably:

- (i) “*Opt-out*” *collective redress mechanism* – the Bill proposes the introduction of an opt-out collective redress mechanism available to consumers and businesses. Whilst a range of safeguards have been included so as to guard against the development of a US-style class action culture (e.g. a prohibition on treble damages), opt-out mechanisms are considered to be more claimant friendly than opt-in mechanisms (as encouraged by the Recommendations) and are expected to lead to materially higher participation rates in competition law collective actions.

⁶ An “opt-in” collective action includes only those persons who have expressly joined the action. By contrast, an “opt-out” collective action is an action on behalf of all members of a broadly defined class of persons with the exception only of those who have expressly opted out of the action.

⁷ *Deutsche Bahn AG and others v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24 is discussed in detail in the Slaughter and May client briefing entitled “*The shifting sands of settlement*” circulated in May 2014. However, to summarise, the practical impact of the judgment is that non-appealing addressees of an infringement decision are likely to be sued in the England and Wales much earlier than other cartel members.

- (ii) *Jurisdiction of the specialist Competition Appeal Tribunal (the “CAT”)* – the key reforms proposed in this area are to: (a) extend the CAT’s jurisdiction to allow it to hear standalone as well as follow-on cases; (b) enable the CAT to grant injunctions to halt anti-competitive behaviour; and (c) introduce a fast-track procedure in the CAT for simpler competition claims allowing such claims to be resolved more quickly and inexpensively. The above reforms, combined with the CAT’s current efficient case management and flexible procedures, means that its popularity as a venue for bringing private damages actions is expected to increase.
- (iii) *“Opt-out” collective settlement mechanism* – both the Directive and the Bill seek to encourage consensual settlements. However, the Bill goes much further than the Directive (which, e.g., suspends the limitation periods for bringing an action for damages during the duration of the consensual dispute resolution process) and introduces an opt-out collective settlement regime to allow businesses to quickly and easily settle cases on a voluntary basis.

4. CONCLUSION

- 4.1 The Directive and Recommendations are part of an attempt by the EU to harmonise the position across Member States with respect to private damages actions, and thus reduce the scope for forum shopping. However, they are unlikely to have a significant impact (particularly in the short term, given the two year time limit Member States have to implement the Directive into national law) on the attractiveness of England and Wales vis-à-vis other jurisdictions for private damages actions in the EU.
- 4.2 Furthermore, not only is the private damages regime in England and Wales already ahead of the curve in several respects, but key aspects proposed by the Bill (in particular the opt-out collective redress mechanism) will significantly increase the claimant friendly nature of the regime in England and Wales. Moreover, the High Court and the CAT are used to applying these types of provisions and have established reputations for being able to handle complex antitrust cases. In short, for the foreseeable future, it can be expected that courts in England and Wales will continue to attract a high proportion of competition-law based claims for damages within the EU.

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