



Department for
Business, Energy
& Industrial Strategy

COMPETITION POLICY

Damages for breaches of competition law –
government response to consultation



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Contents

Executive summary	3
Consultation process and responses received	4
The government's approach to implementation	5
Application of provisions and transitional arrangements	5
Definition of national competition authority	6
Implementing as a single regime	7
Length of limitation and prescriptive periods	8
Limitation knowledge requirements and suspension of the limitation period in various circumstances	10
Application and limitation periods	12
Implement early	15
Disclosure, use of evidence and penalties	16
Passing on of overcharges and the passing-on defence	18
Quantification of harm and the presumption of harm	20
Joint and several liability	21
Consensual Dispute Resolution (CDR)	23
Other issues raised	25
Effect of national decisions	25
Consulting on the legislative text	25
Rule 119 of the CAT Rules	26
Application to Schedule 10 of the Transport Act 2000	27
Annex A – Consultation questions	28
Annex B – List of respondents	29

Executive summary

The UK government believes that a strong competition regime is good for businesses, consumers and growth. Effective redress for breaches of competition law is an important factor in both compensating victims and in deterring future breaches.

In January 2016 the UK government published its consultation on its approach to implementing the Damages Directive 2014/104/EU (“The Directive”), which aims to bring a more standardised approach to redress across the EU and make it easier for victims of anti-competitive behaviour to claim compensation. The Directive governs actions for damages following infringements of EU law or where EU law and national competition law have been breached in parallel. It aims to make it easier for victims of anti-competitive behaviour to claim compensation and to improve the interaction between private damages claims and public enforcement across the EU. It gives victims across Member States easier access to the evidence they need to prove the harm suffered and more time to make their claims.

We asked a number of questions, specifically focussing on whether to implement the Directive as a single regime, the appropriate time to implement the Directive and how to apply the new rules around limitation periods.

Member States have until 27 December 2016 to implement the Directive.

The UK has a well-developed mechanism for allowing claims for breaches of both European and domestic competition law. During the negotiation of the Directive, the UK successfully ensured that it was based closely on the UK model. As such, and following responses to the consultation, we believe that it would be appropriate to take a light-touch approach to implementing the Directive. Many of the requirements of the Directive are already part of the UK law and implementation will require relatively small changes to the substantive law. We do not propose to take a ‘copy out’ approach in this instance¹.

Having considered the responses received, the government will take a light-touch approach to implementation, relying wherever possible on existing legislation, case law or Court Rules. Where necessary we will legislate to ensure that we fully implement the Directive.

¹ Transposition Guidance: How to implement European Directives effectively, April 2013. www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf – “always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts or going beyond the minimum requirements of the measure that is being transposed.”

Consultation process and responses received

The consultation ran for 6 weeks and closed on 6 March 2016. During this time we met a number of stakeholder groups to discuss our approach to implementing the Directive (including the Competition Law Forum (CLF), City of London Law Society and the Competition Appeal Tribunal (CAT) User Group).

We received 26 written responses to the consultation from a range of stakeholders; most were from practicing competition lawyers but responses were also received from regulators, the Competition and Markets Authority (CMA), consumer representative bodies and individuals.

The government's approach to implementation

1. In this section we set out the main changes required to implement the Directive. Before addressing these changes we should clarify our approach to copy out.
2. The UK is one of a small number of European Union (EU) Member States to have an existing regime dedicated to damages claims following breaches of competition law. The purpose of the Directive is to bring other Member States up to the same level as the UK, enabling consumers across the EU to bring damages claims following breaches of EU competition law. Preserving the integrity and efficacy of the UK's existing regime has presented some challenges, but the government believes that the approach set out below will ensure an effective regime which fully implements the Directive.
3. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the EU. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.
4. In the consultation document the government proposed adopting a copy out approach to implementation. Respondents to the consultation highlighted that this approach risked undermining important UK case law and risked creating confusion where there is currently a good understanding of the regime. Following respondents' comments, the government reviewed its approach to copy out in relation to the Directive. We consider that, as the UK already has well-established rules governing claims for competition damages which are similar to the regime set out in the Directive a lighter touch approach to implementation is more appropriate. This means that, where provisions that meet the requirements of the Directive already exist in UK law (including case law and common law), we are leaving those in place and only making changes to UK legislation or Court Rules to implement the outstanding provisions. We believe that this will allow us fully to meet our obligation to implement EU legislation whilst ensuring minimum disruption to the UK regime.

Application of provisions and transitional arrangements

5. A number of comments in response to the consultation focused on the way in which the UK would apply the provisions of the Directive and how we would handle the transition from the old regime to the new regime. The Directive states that substantive provisions should not be applied retroactively, whereas procedural provisions can, but it does not specify which measures are substantive and which are procedural.
6. Respondents to the consultation felt that, in defining whether measures applied retroactively, we needed to achieve a balance between allowing consumers access to the reformed regime while not putting defendant businesses in an unfair position. Some competition legal practitioners felt that limiting access to the new rules to cases where the behaviour which led to the breach of competition law happened after implementation could be harmful to consumers. However, some business respondents felt that allowing cases to be brought in relation to behaviour which occurred before

implementation could be considered to be against the transitional provisions as set out in Article 22 of the Directive.

7. The government has decided that the substantive new rules will apply only to claims where both the infringement and harm occurred after the coming into force of the implementing legislation. We consider that this is the fairest approach. Procedural provisions will apply to proceedings which begin after the commencement of the implementing legislation and may apply to cases where the harm or infringement took place before the coming into force date.
8. To ensure clarity the government will distinguish substantive provisions from procedural provisions in the implementing legislation.

Definition of national competition authority

9. During consideration of legislative changes, the government was approached to clarify whether the measures implementing the Directive should apply to concurrent regulators as they do to the CMA. A national competition authority is defined in the Directive as an authority designated by a Member State pursuant to Article 35 of Regulation (EC No1/2003).
10. Article 35 requires that Member States designate the competition authority or authorities responsible for the application of Articles 81 and 82 (now 101 and 102) of the Treaty. Concurrent regulators are designated as national competition authorities² and as such fall within the definition of national competition authority in the Directive.

² Regulation 3 the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004/1261

Implementing as a single regime

The issue and proposal

11. The Directive is designed to help consumers and businesses to access redress for anti-competitive behaviour following breaches of EU competition law. It applies only to cases where there is a breach of EU competition law (i.e. in instances where either EU, or both EU and domestic law have been breached) and not when only domestic law applies.
12. As set out in the consultation, the government believes that if we were to apply the requirements of the Directive only to cases involving EU competition law, this would result in a two-tier system with one procedure applying for cases involving EU competition law and another for cases brought solely under UK competition law.
13. The government set out that, as the two regimes would be very similar, this would lead to uncertainty, confusion and higher familiarisation costs for businesses. It might also result in an increase in satellite litigation as claimants and respondents might not agree on which set of rules apply.
14. Therefore, the government stated its intention to implement the Directive as a single regime where the same rules would apply irrespective of the legal basis of the original competition breach.

The question

15. We asked: "Do you agree that implementing the Directive as a single regime would be the right approach?"

Summary of responses

16. 25 organisations responded to this question and one did not comment. There was unanimous agreement from those who commented (100%) that the Directive should be implemented as a single regime.
17. Respondents stated, for example, that: "A dual regime is likely to create confusion for claimants as well as lead to legal uncertainty and satellite litigation" and that a "Single regime avoids additional familiarisation costs."
18. Hausfeld wrote: "Claims for breaches of competition law frequently invoke breaches of both EU and UK competition laws. Applying different regimes to the same claim would cause enormous uncertainty to litigants on both sides, and could lead to an unworkable regime where requirements conflict – leading to satellite litigation as the effects of inconsistencies are worked out."

The government's decision

19. The government will implement the Directive as a single regime which has the same procedures whether the original breach was of EU or domestic competition law.
20. While a single system will go somewhat beyond the requirements of the Directive, we believe that this will provide certainty for businesses and consumers, and remove any confusion caused by having separate procedures.

Length of limitation and prescriptive periods

The issue and proposal

21. A limitation period (prescriptive period in Scotland) is the time limit within which a claim must be commenced. It is designed to provide sufficient time for a claimant to bring a claim and certainty for a defendant that they will not face claims after the expiry of the limitation period.
22. The Directive sets out in Article 10(3) that: "Member States shall ensure that the limitation periods for bringing actions for damages are at least five years."
23. Changes brought about on 1st October 2015 by the Consumer Rights Act 2015 (CRA) have already implemented the requirement that claimants should have at least 5 years during which to bring a claim. In England, Wales and Northern Ireland the limitation period is 6 years and the prescriptive period is 5 years in Scotland.

The question

24. We asked: "Do you agree that the current limitation period of 6 years in England, Wales and Northern Ireland and 5 years in Scotland should remain? If not, what period (it must be at least 5 years) should there be?"

Summary of responses

25. There was clear agreement that the limitation periods should remain as they are across the UK (54%), with only a few respondents (15%) in favour of harmonising the limitation and prescriptive period. The remaining responses were not sure or did not comment directly.
26. Most respondents agreed that the current limitation periods were appropriate. Bird and Bird stated that this provision "has already been implemented in the UK" and "adequately balances the interests of claimants to allow a considerable length of time to bring a claim and the policy considerations of finality and certainty of the law of limitation."
27. Some respondents were not in favour of keeping the current limitation periods, and were keen for a single standardised limitation period. Freshfields said: "The limitation period should be reduced from 6 years to 5 years. We suggest that the government [take] the opportunity to reduce the limitation period in the UK to a uniform five years".
28. Some respondents voiced concerns about rule 119 of the CAT Rules which was implemented as part of the CRA (October 2015). We address this issue later in the document.

The government's decision

29. The current limitation periods in force in the UK meet the requirements of the Directive, and offer certainty to business. We therefore do not intend to make changes to the respective limitation periods themselves.
30. We will, therefore, keep the period in line with the current provisions of the Limitation Act 1980 (6 years in England and Wales), the Limitation (Northern Ireland) Order 1989 (6 years in Northern Ireland) and the Prescription and Limitation (Scotland) Act 1973 (5 years in Scotland).

31. As set out below, there are certain other existing provisions which affect the way that the limitation period currently operates in competition claims. As a result, it is necessary to include these existing limitation provisions in the Regulations to create a single and self-contained limitation regime for competition claims in the UK.

Limitation knowledge requirements and suspension of the limitation period in various circumstances

Issue and proposal

32. At consultation, we proposed changes to the starting point for the limitation period and the circumstances under which limitation periods are suspended in order to implement the requirements of the Directive.
33. The Directive sets out in Article 10(2) that:
- “Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
- of the behaviour and the fact that it constitutes an infringement of competition law;
 - of the fact that the infringement of competition law caused harm to them; and
 - the identity of the infringer.”
34. In addition, at Article 10(4), the Directive also sets out that:
- “Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.”
35. At present, the competition limitation provisions do not contain the “discoverability” element which is set out in the Directive, nor do they provide for suspension of limitation in the circumstances set out in the Directive.
36. In the consultation document we stated that it was the government’s intention to copy out the provisions of the Directive relating to the new limitation “discoverability” and suspension requirements.

The question

37. We asked: “Do you agree that there is a need for a new trigger point for limitation periods in order to implement the Directive fully?”

Summary of responses

38. 13 out of 26 (50%) agreed that we should change the trigger point for the start of the limitation period in order to comply with the Directive. Only 2 (8%) of the responses received were against the proposal.
39. The City of London Law Society (CLLS) was concerned that “This gives rise to the prospect that there is no, or an indefinite limitation period in such cases.”
40. Blackstone commented that they “agree that a ‘copy-out’ of the Directive ... would ensure that there is clarity as to the precise rules.”

The government's decision

41. The government has decided to amend domestic limitation provisions and create a standalone competition limitation regime in the Competition Act 1998 (CA98).

The following changes will be made to UK legislation:

- The starting point for the limitation period

The government will copy out the provisions for the limitation knowledge requirements so that, under the new regime, the limitation period will start once the anti-competitive behaviour has ceased and a claimant can reasonably be expected to know of that behaviour. The claimant should also know the identity of the infringer and have knowledge sufficient that he or she has suffered a loss as a result of the breach to bring a claim.

- Retention of the provisions of the Limitation Act 1980, Limitation (Northern Ireland) Order 1989 and the Prescription and Limitation (Scotland) Act 1973 relating to disability and new claims in action.

As explained above the government will retain certain limitation and prescription provisions, namely, those extending the limitation and prescription periods for claimants who are under a disability and those provisions in the Limitation Act 1980 and the Limitation (Northern Ireland) Order 1989 which relate to new claims or counter claims brought within the limitation period.

- Suspension of the limitation period during an investigation of a competition authority

The government will legislate to ensure that the limitation period is suspended where a competition authority (either in the UK or elsewhere in the EU) is investigating the behaviour to which the complaint relates as required by the Directive. The suspension will begin on the day that the competition authority commences a formal investigation and will end one year after the authority's investigation ends.

- Suspension of the limitation period during Consensual Dispute Resolution (CDR)

Similar to suspension for competition authority investigations, the government will also legislate to ensure that limitation periods are suspended where the parties to the claim agree to enter into CDR as required by the Directive. We will legislate to add specific requirements about when the suspension will start and end.

- Suspension of the limitation period for collective proceedings

Under existing UK law, consumers, businesses or their representatives can bring a collective claim for damages. The regime, established under Schedule 8 of the CRA, allows for the suspension of limitation periods to allow the courts to assess the legitimacy of the collective action or for claimants to choose whether to opt in to or opt out of the collective proceedings without harming their ability to bring an individual claim. We will preserve the effect of section 47E(4)-(6) of the existing CA98 regime in order to ensure that these rights are not adversely affected.

Application and limitation periods

The issue and proposal

42. As set out in the Directive, substantive measures cannot be implemented retroactively. The government believes that the substantive provisions include the limitation provisions.
43. The Directive sets out new rules for limitation, including changes to the criteria needing to be met in order for a limitation period to begin. As these criteria are different to those set out in existing domestic provisions, the question arises as to whether the new rules should be applied to competition infringements which began prior to commencement of the implementing legislation (and where the harm occurred straddles commencement or occurs after commencement) or whether they should be applied only to cases where all the elements of the infringement (and harm) occur after commencement.
44. The Directive provides at Article 22 that Member States should not apply substantive provisions of the Directive in a manner which is retroactive.
45. In the consultation document we set out that the government believes that the start of the limitation period is substantive, and accordingly intended to transpose the Directive so that the new limitation requirements should apply from the commencement of the transposition instrument.

The question

46. We asked: "Do you agree that the start of the limitation period provided in the Directive should only apply from commencement of the implementation of the instrument?"

Summary of responses

47. 16 (62%) of the 26 correspondents agreed that that the start of the limitation period provided in the Directive should only apply from commencement of the implementation of the instrument. Only 1 (4%) was against the proposal.
48. A number of respondents requested clarity regarding whether or not limitation was a substantive or procedural provision. 6 respondents put forward options as to how the limitation provisions could be interpreted (see below).
49. Some respondents were concerned that applying the new rules on limitation to existing cases could result in businesses taking on significant contingent liabilities for much longer than is currently the case.
50. Respondents to the consultation felt that, in defining whether measures applied retroactively, we needed to achieve a balance between allowing consumers access to the reformed regime while not putting defendant businesses in an unfair position. They felt that limiting access to the new rules to cases where the behaviour which led to the breach of competition law happened after implementation would be harmful to consumers and could result in infraction. However, some business respondents felt that allowing cases to be brought in relation to behaviour which occurred before implementation could be considered to be against the transitional provisions of the Directive.
51. A majority of respondents agreed that the limitation provisions set out in Article 10 should be considered substantive, and as such according to Article 22 new provisions should not be applied retroactively.

52. Respondents, including the Competition Law Association (CLA), Hausfeld and Blackstone, suggested that the requirements of the Directive could be interpreted in a number of ways. Listed below are the three common options which were put forward by respondents:
- Option 1 – apply to claims after the commencement date where the harm, but not the infringement, has occurred after the commencement date.
 - Option 2 – only apply to claims where the infringement and harm occurred after the commencement date.
 - Option 3 – apply to all claims brought after the commencement date irrespective of when the harm or infringement occurred.
53. Most respondents did not put forward a preferred option, though those that did suggested that either Option 1 or Option 2 would be preferred.
54. Hausfeld put forward – “that: a) claims for which the limitation period has not expired as at the implementation date (whether or not issued as at that date) should be subject to the Directive’s limitation periods; but b) claims that had already expired under the existing limitation rules as at the implementation date should not be revived by the Directive’s limitation periods.”
55. Blackstone suggested that there are strong arguments in favour of an approach whereby implementing measures apply to claims for which all the material events occur after commencement of those measures, as other approaches could result in retroactive application to substantive rules.
56. The CLA stated: “If the view were taken that the changes including the new limitation requirements should, for example, apply only to infringements that start after commencement of the implementation instrument, the effects of the new limitation provisions of the Directive will not be felt in the United Kingdom for many years to come. Given that other EU Member States might take a different view on this point and their regimes might as a result be seen as more favourable for bringing damages claims, it is important that this issue be given careful and thorough consideration.”

The government's decision

57. As the majority of concerns raised were about the impact of applying the limitation provisions retroactively, we have considered this issue in detail. As explained above, the government considers that the limitation provisions are amongst those substantive provisions which should not be applied with retroactive effect.
58. We have noted respondents' concerns that time-barred claims should not be revived and will ensure that our approach will not revive these claims.
59. As the Directive makes clear that substantive provisions should not be retroactive and it is accepted that limitation is a substantive provision, applying the new limitation periods to cases where the infringement started before commencement would not be in compliance with the requirements of the Directive. The approach would mean that at the time the person started the infringement behaviour they would not have known that the limitation period would be the new one. Defendants would therefore be potentially liable to competition claims for a much longer period than envisaged when the infringing behaviour commenced.

60. The government believes that, although there might be arguments claimants and defendants might be disadvantaged in certain circumstances, the long limitation periods which exist under the pre-commencement regime are sufficient to ensure that few, if any, claimants would be prevented from successfully launching a claim.
61. We will amend legislation to ensure that the Directive's approach to limitation applies only to claims where:
- the elements of the infringement begin; and
 - the harm occurs
- after the commencement of the implementing legislation. The government believes that this is the fairest approach in balancing the rights of claimants and fairness to infringers. This approach will be adopted in relation to all substantive provisions.
62. As set out above, procedural provisions will apply to proceedings which begin after the commencement of the implementing legislation, irrespective of when the infringement or harm occurred.

Implement early

Issue and proposal

63. The government is required to implement the Directive by 27 December 2016. In the consultation document, the government asked whether it would be better for businesses to introduce the new measures on the 1st October common commencement date.

The question

64. We asked: "Do you believe that the benefits of implementing the Directive on the October 2016 Common Commencement Date outweigh the costs of early implementation?"

Summary of responses

65. A majority of the respondents (82%) recommended that a later implementation date would be preferable or said they were not sure (allowing more time to be spent working through the legislative changes).
66. Blackstone, for example, considered that "the extra time available would be far better spent on a fuller consultation upon the actual measures proposed to modify various legislation."
67. The CLLS said that they "Do not consider that there are any benefits in the Directive being implemented [early]."

The government's decision

68. The government acknowledged the clear steer from stakeholders that it is more important to ensure that the implementing legislation is effective rather than introducing early. As such we have conducted further, informal consultation on the draft Statutory Instrument and will work to lay it before the implementation date. We will work to ensure that the Court and CAT rules amendments come into force on the same day as the implementing Statutory Instrument.

Disclosure, use of evidence and penalties

Requirements of the Directive and current UK position

69. The Directive sets out strict new rules on disclosure, which require that courts have the power to order the disclosure of relevant evidence from the defendant, claimant or third parties. These are set out in Article 5, 6, 7 and 8 of the Directive.
70. National courts can order companies to disclose evidence when victims claim compensation. The courts will ensure that disclosure orders are proportionate and that confidential information is protected.
71. Disclosure is a well-established concept in the UK, although the Directive introduces, at Article 5(3) an explicit requirement that national courts limit their disclosure only to evidence which is proportionate. Although there is overlap between the concept of proportionality in the Directive and that in the Civil Procedure Rules (CPRs), there are areas of divergence. For example, under the Rules, the issue of confidentiality is not a factor that is expressly to be taken into account in determining proportionality, but it is required by the Directive. Article 5 makes other provisions in relation to the protection of confidential information, legal professional privilege and the opportunity for the party from whom disclosure is sought to make representations to the court before disclosure is awarded.
72. Article 6 provides more specific provisions on disclosure in relation to evidence in the file of a competition authority. These include:
 - a. further proportionality factors (article 6(4));
 - b. restrictions on disclosure of certain information while a competition authority is still conducting investigation proceedings (article 6(5));
 - c. a prohibition on disclosure of leniency statements (whether or not withdrawn) or settlement submissions (which have not been withdrawn), and restrictions on whom the court may hear when determining whether information falls within these categories (article 6(6)-(7));
 - d. ensuring that disclosure from a competition authority is only available where no party or third party is reasonably able to provide that evidence (article 6(10); and
 - e. allowing a competition authority to submit its observations in relation to proportionality (article 6(11)).
73. Article 7 prohibits the use of the following in the course of a claim:
 - a. cartel leniency statements;
 - b. settlement submissions (which have not been withdrawn); and
 - c. evidence from a competition authority's fileunless that evidence is obtained lawfully from another source than a competition authority's file.
74. Article 8 makes provisions in relation to penalties that the court can award where there is destruction of evidence or a failure to comply with court orders.

75. In the UK, there are no specific provisions in law which deal with disclosure from the file of a competition authority as required by Article 6 of the Directive, and there is currently no absolute restriction on the disclosure of leniency documents. Article 6(6) states that:
- “Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:
- leniency statements; and
 - settlement submissions.”

Summary of feedback

76. 13 (50%) out of 26 provided comments on the implementation approach to disclosure and penalties.
77. Respondents considered that the requirements set out in Articles 5 and 8 of the Directive, which deal with the disclosure of evidence and penalties for failure to disclose, are provided for in domestic law.
78. The CLLS commented “We agree that disclosure is a well-established concept in the UK and that the principal change required to implement the Directive is the recognition of absolute protection from inspection for leniency documents.”
79. It was noted by respondents (including CLLS and Herbert Smith Freehills LLP) that some areas of the existing disclosure regime surpass the requirements of the Directive and were keen that implementation should not reduce the existing scope of disclosure in competition cases.
80. Respondents recognised that, in order effectively to implement Articles 6 and 7 of the Directive, changes would be needed to legislation or the court rules.

The government's decision

81. As set out above, there is some overlap between the Directive and existing UK legislation and court rules. For example, the government considers that it only needs to amend the court rules to ensure that the proportionality requirements of the Directive are effectively reflected in the UK regime, whereas the other provisions are already provided for in national law.
82. In relation to the provisions of both articles 6 and 7, these are not currently available in national law and so we will legislate through a combination of amendments to the CA98 and procedural rules. For example, in relation to leniency statements and settlement submissions, we will ensure that these (and quotations from them) are protected from disclosure and admissibility as evidence. This will not restrict the admissibility of evidence which has been obtained lawfully through routes other than the competition authority's file.
83. We agree with respondents that the courts already have various penalty awarding powers for failures of the type in Article 8, including costs awards and recourse to contempt of court proceedings.

Passing on of overcharges and the passing-on defence

Requirements of the Directive

84. The Directive sets out provisions to tackle the passing-on of overcharges (in Articles 12 to 16). This is the principle that, if an infringement has caused price increases which have been passed along a distribution chain, those who suffered the harm in the end can claim full compensation. Article 12 recognises that claimants may be several steps removed from the infringing company which is ultimately responsible for paying damages. In addition, it provides a defence for defendants against the claimants who have passed on the whole or part of the overcharge resulting from the infringement.
85. In the consultation, the government set out its intention to legislate to recognise both the rights of indirect purchasers and providers and the passing-on defence.
86. During consultation it was noted by stakeholders that this would be the first time that the passing-on defence would be codified in law and in the majority welcomed this.
87. At the time of the consultation, there was also a lack of case law on whether an indirect purchaser or provider can bring a claim or whether passing-on is available as a defence other than under ordinary tortious principles that an individual should be able to claim for loss caused to him or her by conduct liable to restrict or distort competition.

Respondent's comments

88. 16 (62%) of the 26 respondents provided comments on the implementation approach to passing on of overcharges.
89. There was some debate between respondents on implementation. For example, the CLA consider "that Article 14 of the Directive (providing for a presumption that the overcharge has been passed onto indirect purchasers in certain circumstances) will also need to be explicitly provided for."
90. In discussion with the CAT User Group, it was considered that the recently concluded case in *Sainsbury's Supermarket Ltd v Mastercard Incorporated and Others (1241/5/7/15 (T))* helped to establish the principle of a right of action for an indirect purchaser and the presence in UK law of the validity of the passing-on defence. There was more concern, though, that this judgment did not provide certainty that the requirement in Article 13 of the Directive that the burden of proving that the overcharge was passed on rests with the defendant.
91. The CLF urged the government "to consider fully if removing exemplary damages for domestic cases would be ultimately beneficial."

The government's decision

92. The Directive clearly states that exemplary damages should not be awarded and the government will legislate to ensure that exemplary damages cannot be awarded.
93. Since the consultation, there have been developments in case law which have clarified the rights of indirect purchasers in competition damages claims. In its judgment in the *Sainsbury's v Mastercard* case, the CAT set out that Sainsbury's was, itself, an indirect purchaser. That case also recognises the right of Mastercard to argue that Sainsbury's passed on any overcharge to its customers, thus establishing the principle of the passing-

on defence. The judgment did not, however, confirm where the burden of proof lay in proving that a charge had been passed on.

94. As there is now some clear case law establishing the rights of indirect purchasers (and by extension indirect providers) and the legitimacy of the passing-on defence, the government considers that, in accordance with the lighter touch approach to implementation, there is no need to legislate for these provisions. We will, though, amend the CA98 to ensure that it is clear that the burden of proving that an overcharge has been passed on rests with the defendant, in line with the final sentence of Article 13 of the Directive.
95. The burden of proof in respect of indirect purchasers in the Directive is a departure from ordinary principles that the claimant proves the loss suffered. The burden is shifted to the infringer. We will, therefore, legislate to meet the requirements of the Directive that an indirect purchaser will only need to show the following three elements in order to establish a claim:
 - a. the defendant has committed an infringement of competition law;
 - b. the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
 - c. the indirect purchaser has purchased goods or services that were the object of the infringement.
96. The same applies for indirect providers where there has been an underpayment and similar provision will be made.

Quantification of harm and the presumption of harm

Requirements of the Directive

97. Article 17 of the Directive provides that national courts can estimate the amount of harm suffered by a claimant where it is practically impossible or excessively difficult to quantify the harm suffered on the basis of the evidence available before the court or tribunal.
98. Article 17 also provides that there is a presumption that cartels cause harm, to ensure that an action does not fail simply because the losses cannot be measured at the outset.
99. In the consultation document the government proposed to explicitly provide that the courts and the CAT may estimate the amount of harm caused. We also stated that we did not propose to provide guidance as to how to estimate what harm has been caused, stating that we would leave this to the courts and the CAT.

Respondent's comments

100. Respondents considered that it was appropriate for courts to estimate harm, and that it was not necessary for the government to provide guidance, citing that existing guidance sufficed.
101. The CLA stated that it would be helpful to provide expressly that the courts and the CAT may estimate the amount of harm caused.
102. A number of respondents including the CLA and CLF assumed that the government would be producing guidance for the courts and CAT regarding the quantification of harm.
103. A number of respondents agreed that it should be made clear that damages can be estimated and that there should be a presumption of harm.
104. Which? stated: "We agree that it is necessary and appropriate to make clear that damages can be estimated. However we would encourage this to be done via the CAT Rules rather than guidance provided for the court and the CAT."

The government's decision

105. The government will amend legislation to give clear effect in UK law to the requirement of Article 17(2) of the Directive relating to the rebuttable presumption that cartels cause harm.
106. In respect of the estimation of harm, the government considers that this is already common practice in UK courts. Although a claimant must establish actual loss, in practice, the complexity of the exercise of establishing what the loss is means the court's or tribunal's approach is to extrapolate from expert reports analytical conclusions based on hypothetical scenarios, which can be said to be a form of estimation. We believe, therefore, that there is no requirement to amend UK legislation.
107. On Article 17 (3), which allows a national competition authority to assist a national court to determine the quantum of damages, if requested to do so, the CAT Rules already allow for asking third parties for information or issuing a summons. Other courts already have provision for assistance from assessors (via the Senior Courts Act 1982 (s.70), the County Courts Act 1984 (s.63) and Part 35 of the CPR). We will not, therefore, be amending UK legislation in relation to this provision.

Joint and several liability

Requirements of the Directive

108. The Directive states (in Article 11) that the parties to anti-competitive behaviour are jointly and severally liable for damages caused. In practice, this means that a claimant does not need to bring separate claims against multiple companies, each of which is responsible for a portion of the damages. Instead, a claimant can seek full compensation from any of the infringing companies. It is then up to that infringing company to claim compensation from the other companies in order to try to recover the portion of the damages for which that company was not responsible.
109. The Directive also includes some limits on joint and several liability for small and medium sized enterprises and immunity recipients where certain conditions are met, as well as limits on the amount of contribution an immunity recipient can pay out to other infringing companies.

Respondent's comments

110. 10 (38%) of 26 respondents provided comments on the implementation approach to joint and several liability.
111. Several respondents agreed that legislation is required to provide for joint and several liability.
112. Covington said: "The position under English law is that joint tortfeasors are joint and severally liable. We believe the Directive is consistent with national law and it important in transposing the Directive that this principle is retained."
113. Hausfeld said: "We support express legislative recognition of the joint and several liability of infringing companies, although we believe that changes will be needed not only to CA98 but also to the Civil Liability (Contribution) Act 1978 and, potentially, to the CPR and CAT Rules."
114. The CLA agreed that "it makes sense to legislate for joint and several liability, including the required exemptions to this principle."
115. Some respondents considered that further thought should be given to issues, such as time limits on bringing contribution claims, and the treatment of contribution proceedings in multiple countries.

The government's decision

116. In the UK, it is well accepted that a claimant may be jointly and severally liable, as required by Article 11(1). In line with the lighter touch approach to implementation, the UK will not legislate to expressly set out the joint and several liability of competition co-infringers.
117. However, there are certain provisions in the Directive which diverge from UK law. For example, as well as limits for small and medium sized enterprises and immunity recipients, there is the requirement for assessment of contribution between infringers to be based on their relative responsibility for the overall harm caused by the infringement of competition law (rather than just their relative responsibility for the harm caused to an individual claimant as is the current position). As such, the government will introduce

legislation to ensure that we fully implement the provisions of Articles 11(2) – (6) of the Directive. Where legislative changes are required, we will ensure that they are handled sensitively so that they fit with our current contribution regimes, as set out in the Civil Liability (Contribution) Act 1978 and (for Scotland) the Law Reform (Miscellaneous Provision) (Scotland) Act 1940.

Consensual Dispute Resolution (CDR)

Requirements of the Directive

118. Articles 18 and 19 of the Directive introduce measures designed to encourage and increase the effectiveness of CDR in order to help both parties save time and money by reaching an out-of-court agreement on the level of compensation. CDR could include arbitration, mediation or other, less formal, dispute resolution.
119. Article 18 of the Directive requires the explicit suspension of limitation in circumstances where CDR is undertaken and for courts to suspend proceedings for up to two years if the parties enter into CDR after the claim has been brought. The compensation paid by an infringer as part of a CDR process can also be considered as mitigation for fines imposed by competition authorities if the CDR happens before their final decision.
120. Article 11(5) of the Directive specifies that the amount of contribution shall be determined in the light of the infringer's relative responsibility for the harm caused by the infringement of competition law. Article 19 makes various provisions about the effect of consensual settlements on the competition claim and any contribution claims. The main aim behind these provisions is to ensure that a claim settled by CDR is not constantly reopened, and that an infringer should not be liable for more than its relative responsibility for the harm overall.
121. In the consultation document we stated that we would explicitly provide for this provision.

Respondent's comments

122. 11 (42%) of 26 respondents provided comments on the implementation approach to CDR.
123. The key concern for respondents in relation to CDR was the provisions which allow the suspension of the limitation period for CDR. Respondents suggested that it should be made clear what constitutes CDR for the purposes of suspending the limitation period and what would subsequently restart the limitation period. Respondents, including Herbert Smith Freehills and Hausfeld felt that it should not be possible for one party to be able unilaterally to trigger a suspension of the limitation period. Hausfeld also felt that it was important that suspension of limitation should only apply to those claimants involved in the CDR and not to all claimants.
124. Blackstone felt that Article 19 represented a welcome rebalancing of risk around CDR to ensure that it was more equally borne by the claimant and defendant and felt that there needed to be legislative change to reflect this.

The government's decision

125. The government considers that some of the requirements relating to CDR already exist in UK law and practice. UK courts already have the power to suspend proceedings and manage cases, including where the parties agree to CDR, which combines a balance between the power to allow stays to encourage settlement and ensuring that cases progress in a timely manner. We consider that it would be counterproductive to our regime to impose a limitation of 2 years, and not in the spirit of the Directive in relation to the problem this provision is trying to address. Changes relating to the suspension of the limitation period in the event of the parties entering into consensual dispute resolution are

addressed above. We do not believe that we need to legislate to implement Article 18(3) of the Directive as the CMA can already take mitigating factors into account when setting the level of fines. The government will keep the operation of this provision under review and will consider whether we should ask the CMA to consider changes to its guidance to reflect these provisions in the future.

126. In relation to the provisions in Article 19, we recognise that the Civil Liability (Contribution) Act 1978 and, for Scotland, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 already contain comprehensive provisions which many understand. However, the Directive has more specific requirements which are not currently present in UK law. We will legislate to ensure that the measures in Article 19 are implemented effectively and that they work with the existing regime.

Other issues raised

127. In the consultation we asked whether respondents had any further comments or concerns.
128. Three further issues were raised in response to the consultation: i) the effect of decisions of other Member states' national competition authorities; ii) a request for a consultation on the legislative text and iii) whether there was scope to revisit Rule 119 of the CAT Rules.

Effect of national decisions

129. Article 9(1) provides that the final decision of a national competition authority in relation to an infringement of competition law shall be deemed irrefutably established for the purposes of a claim. This is already provided in UK law at s58A of the CA98, which provision has been considered and clarified by the courts, including the Supreme Court.
130. Article 9(2) provides that similar decisions of a Member State competition authority or review court may be presented as prima facie evidence that an infringement has occurred. As this is not currently a part of national law, the government will legislate to transpose this provision.

Consulting on the legislative text

Issue raised by respondents

131. The consultation was designed to gather views on the main policy options when implementing the Directive, and was not intended to be a consultation on the legislative text.
132. A number of respondents put forward that they would welcome further consultation on the legislative text.
133. CLLS said: "The most important consideration, in our opinion, is that the government takes time to carefully consider the drafting required to implement the Directive and adequately consults (whether or not on a formal basis) with legal experts in this area to review the draft implementing text before it is finalised."

The government's decision

134. We have conducted an informal consultation on the legislative text with key stakeholders, including the CAT User Group and have taken on board a number of their comments.

Rule 119 of the CAT Rules

135. Rule 119 of the CAT Rules 2015 (“Rule 119”) was implemented as part of the Private Actions provisions under the CRA in October 2015.

136. Rule 119 provides that:

- (1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the “2003 Rules”) as if they had not been revoked.
- (2) Rule 31(1) to (3) of the 2003 Rules (setting a time limit of two years for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in
 - a. proceedings under section 47A of the 1998 Act, or
 - b. for collective proceedings .
- (3) A claim falls within rule 119 if:
 - a. it is a claim to which section 47A of the 1998 Act applies; and
 - b. the claim arose before 1st October 2015.
- (4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015(c) continue to apply to the extent necessary for the purposes of paragraph (2) above.

Issue raised by respondents

137. A number of respondents commented that Rule 119 had caused some uncertainty as to the limitation rules for collective claims. For example, Shepherd Wedderburn commented that: “Because of the continued application of rule 31(2) of the CAT Rules 2003, standalone claims brought even after the implementation date of the Directive, will be faced with the limitation period of two years; unless transitional rules prescribed in Rule 119 of the CRA are revised to reflect the implementation required by the Directive.”

The government’s decision

138. The government believes that consideration of Rule 119 is outside the scope of the implementation of the Directive. The government stands by its decision to introduce Rule 119 as part of the reforms to the private actions regime in 2015. The changes being introduced in order to implement the Directive will not affect the operation of Rule 119.

Application to Schedule 10 of the Transport Act 2000

139. The Transport Act 2000, as amended by the Local Transport Act 2008, gives local transport authorities in England and Wales various powers to develop their local transport policies. These include entering into various partnerships, agreements and schemes with bus service operators.
140. Schedule 10 to the Transport Act 2000 contains provisions applying competition tests in relation to these agreements. In particular, Part 2 of Schedule 10 only allows certain 'voluntary partnership agreements' (agreements between local authorities and bus operators) and 'qualifying agreements' (agreements between bus operators) if they meet certain criteria. This operates instead of the Chapter I prohibition set out in the CA98, but does not stop the operation of the prohibition in Chapter II of the CA98 or Articles 101 and 102 of TFEU.
141. Private actions for damages are still available if there has been an infringement under Part 2 of the Transport Act 2000, although such an action has never been brought.
142. In implementing the Directive, we have chosen to save the current regime for private actions for damages in relation to Part 2 agreements. As Part 2 of Schedule 10 to the Transport Act 2000 provides an alternative regime only for infringements of national competition law, the Directive does not apply. Through the Bus Services Bill, the government is seeking to legislate to improve bus services and encourage further cooperation between the CMA, local transport authorities and bus operators to lower the risk of competition infringements in this sector. We believe that the stability of the Transport Act 2000 regime justifies this small exception to our general approach of implementing the Directive as a single regime.

Annex A – Consultation questions

In the consultation document we asked the following questions:

Question 1 – Do you agree that implementing the Directive as a single regime would be the right approach?

Question 2 – Do you agree that the current limitation period of 6 years in England, Wales and Northern Ireland and 5 years in Scotland should remain? If not, what period (it must be at least 5 years) should there be?

Question 3 – Do you agree that there is a need for a new trigger point for limitation periods in order to implement the Directive fully?

Question 4 – Do you agree that the new limitation requirements should only apply from commencement of the implementation instrument?

Question 5 – Do you agree that the benefits of implementing the Directive on the October 2016 Common Commencement Date outweigh the costs of early implementation?

Question 6 – Do you agree that the provisions in paragraphs 7.1 to 7.36 implement effectively the relevant Articles of the Directive? If you do not agree, please explain where you feel UK legislation does not implement the requirements of the Directive.

Annex B – List of respondents

Berwin Leighton Paisner
Bird and Bird
Blackstone
Brick Court
CAA
Cartel Damages Claims (CDC)
City of London Law Society (CLLS)
Cleary Gottlieb Steen & Hamilton LLP
Competition Law Association (CLA)
Competition Law Forum (CLF)
Competition and Markets Authority (CMA)
Covington & Burley
Eversheds LLP
Freshfields
Hausfeld
Herbert Smith Freehills
Hogan Lovells
Richard Spencer
Malcay Murray & Spens
Monckton
Olswang LLP
Oxera
Dr Maria Ioannidou
Shepherd & Wedderburn
Which?
Competition Appeal Tribunal (CAT)



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