ALERT MEMORANDUM

The UK implements the EU Antitrust Damages Directive

January 10, 2017

The Damages Directive[1] seeks to promote private enforcement of EU competition law before national courts across the European Union (the "**EU**"). The UK Regulations[2] implementing the Directive[3] were laid before Parliament on 20 December 2016 but will not come into force until after they have received formal Parliamentary approval (the "**Implementation Date**"). The Regulations will apply to claims brought on or after the Implementation Date, although the extent of their application differs depending on when the infringements to which the claims relate took place. The Regulations will make significant changes to rules governing antitrust damages actions:

- The Regulations make changes to the limitation periods for competition damages actions brought after the Implementation Date. Limitation periods will in these cases be suspended during investigations by competition authorities and during any consensual dispute resolution ("**CDR**") process.
- The Regulations introduce a presumption that cartel infringements cause loss or damage. In future, if there is a finding of infringement, it will be for the defendant to rebut the presumption of loss in any damages action.
- The Regulations change the rules on passing on. Indirect purchasers will benefit from a presumption that any overcharge suffered by direct purchasers has been passed on to them. Meanwhile, in order to raise passing on as a defence, an infringer will bear the burden of proving that any overcharge has been passed on by a claimant.
- The Regulations will, in most cases, prevent co-defendants from bringing contribution claims against a defendant that has settled with the claimant.
- Certain categories of information will become immune from disclosure, including leniency statements and settlement submissions. Pre-existing information and contemporaneous evidence will remain subject to disclosure, even if they were produced to a competition authority in the context of leniency or settlement discussions.

We discuss the changes in more detail in this Alert Memorandum.

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1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "**Damages Directive**" or the "**Directive**").

2 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the "**Regulations**").

3 Although the UK voted to leave the EU in June 2016, the UK remains a full member of the EU until exit negotiations are concluded. The UK Government confirmed that it would continue to implement and apply EU legislation during this period.

I. Background

1) Antitrust Damages Directive

The right of any natural or legal person to claim compensation for loss suffered as a result of an infringement of EU antitrust rules is well-established.[4] The European Commission, however, was concerned that the underdevelopment of national rules governing damages actions in many Member States prevented victims from effectively exercising their rights to claim compensation.

The Directive aims to make it easier for victims of anti-competitive behaviour to seek compensation from infringing parties before national courts in all Member States. In particular, the Directive seeks to harmonise rules governing limitation periods, the passing on of overcharges, the principle of joint and several liability, disclosure, and the quantification of harm.

2) UK approach to implementation

The UK Government consulted on the approach to implementing the Directive in early 2016. It concluded that, because the UK already had well-established rules governing rules for antitrust damages actions, an overall "lighter touch" approach to implementation would be more appropriate than copying out the Directive's provisions in their entirety. Under this approach, existing provisions that already meet (or exceed) the Directive's requirements will be left in place, and changes will be made only where necessary.

The Directive applies only to cases involving a breach of EU competition law, including where both EU and national competition law are infringed. Member States are not required to implement the provisions to claims that relate solely to infringements of national competition law. The UK Government considered, however, that having different rules depending on whether a damages action is based on EU or UK competition law would lead to uncertainty for businesses and consumers, not least because most damages actions are based on both EU and UK competition law. Therefore, although not required by the Directive, the UK Government has decided to apply the provisions of the Directive to all competition damages actions.

II. Implementation in the UK

1) Temporal application of the Regulations

The Regulations implementing the Directive will come into force on the Implementation Date. The Regulations distinguish between "substantive" and "procedural" provisions.[5] "Substantive" provisions of the Regulations apply only to the extent that a claim relates to loss suffered on or after the Implementation Date as a result of an infringement that took place on or after the Implementation Date. "Procedural" provisions of the Regulations apply to all claims brought on or after the Implementation Date, whenever the relevant loss was suffered and whenever the infringement took place.

Thus, a claim issued on or after the Implementation Date relating to loss suffered as a result of an infringement that took place before the Implementation Date is subject to the "procedural" but not the "substantive" provisions of the Regulations. The Regulations do not apply to claims issued before the Implementation Date.

2) "Substantive" provisions

Limitation periods

The limitation periods in the UK remain unchanged (*i.e.*, six years for England, Wales, and Northern Ireland and five years for Scotland). The Regulations, however, effect changes to the starting point of the limitation periods and set out circumstances under which limitation periods are suspended, leading to the creation of what the UK Government refers to as a "standalone competition limitation regime."

The Regulations copy out the Directive's requirement that limitation periods shall not run until the infringement has ceased and the claimant knows, or can reasonably be expected to know:

- Of the infringer's behaviour;
- That the infringer's behaviour constitutes an infringement of competition law;

[4] *See e.g.*, *Courage v Crehan*, Case C-453/99; *Manfredi*, Joined Cases C-295/04 to C-298/04.

[5] Article 22 of the Directive prohibits the retroactive effect of "substantive", but not that of "procedural", provisions, without, however, specifying which provisions are "substantive" and which are "procedural".

- That the claimant has suffered loss or damage arising from the infringement; and
- The identity of the infringer.

Arguably, existing UK limitation rules already had a similar effect and UK courts would have interpreted UK limitation rules consistently with the Directive in any event without the need for the copying out of the Directive's requirements.[6]

The Regulations provide for the suspension of the limitation periods during an investigation by a competition authority.[7] "Competition authorities" are defined as comprising the Competition and Markets Authority (the "**CMA**"), the UK sectoral regulators with concurrent competition powers,[8] the European Commission, as well as the competition authorities of other EU Member States. The suspension begins when the competition authority commences a formal investigation and does not end until one year after the investigation ends.

The Regulations also provide for the suspension of the limitation periods during any CDR process between the claimant and the defendant.[9] The suspension begins from the day on which the claimant and the defendant bilaterally agree to engage in the CDR process and either party can unilaterally end the suspension by withdrawing from the CDR process. There are no limitations on the length of the suspension on account of the CDR process.[10]

The Regulations further preserve the existing law that provides for the suspension of the limitation periods pending collective proceedings.

As a result of the automatic suspension of the limitation periods in circumstances laid down by the Regulations, defendants engaging in anti-competitive behaviour on or after the Implementation Date would potentially be susceptible to damages actions for a much longer period than at present.

Presumption that cartel causes loss

The Regulations provide that a cartel is presumed to have caused loss or damage. The finding of an infringement in a decision binding upon the courts will therefore, without more, entitle a purchaser from an infringer to bring a claim for loss or damage. The burden of rebutting such presumption of loss will be on the infringer.

Passing on of overcharges

Where an infringement led to price increases that were, in whole or in part, passed along the distribution chain by a direct purchaser, the issue of passing on arises. Indirect purchasers (*i.e.*, those further down the distribution chain) have to prove that the loss suffered by the direct purchaser was passed on to them, in order to establish that they suffered harm and are entitled to claim compensation from the infringer. Passing on, at the same time, provides a defence for infringers against claimants who have passed on the whole or part of the overcharge to their customers.

The UK Government considered that existing case law already established indirect purchasers' right to compensation and the availability of the passing on defence.[11] It considered, however, that there remained doubts as to where the burden of proof rested for the establishment of passing on.

The Regulations provide for a departure from the ordinary principles that a claimant must prove the loss it suffered. An indirect purchaser claimant is

6 Section 32 of the Limitation Act 1980 provides that the limitation period does not run during the period when any fact relevant to a claimant's right of action was deliberately concealed from it. This is commonly understood as meaning that the limitation period does not start to run until the date of the infringement decision in the case of a secret cartel: *see e.g.*, *BCL v BASF* [2012] UKSC 45.

7 For completeness, the courts already had the power under existing laws to order a stay of the proceedings, including pending an investigation by the competition authorities.

8 Civil Aviation Authority (CAA), Financial Conduct Authority (FCA), Payment Systems Regulator, Monitor, Northern Ireland Authority for Utility Regulation (NIAUR), Office of Communications (Ofcom), Water Services and Regulation Authority (Ofwat), Gas and Electricity Markets Authority (Ofgem), and Office of Rail and Road (ORR).

9 Parties may already enter into a voluntary standstill agreement suspending the limitation periods, including pending any CDR process.

10 Article 18 of the Directive provides that Member States shall ensure that national courts "*may*" suspend proceedings "*for up to two years*" pending the CDR process. The UK Government rejected the inclusion of a two-year limitation on suspension for the purposes of CDR, considering that such a limitation would be counterproductive and be counter to the spirit of the Directive.

11 *Sainsbury's v MasterCard* [2016] CAT 11. For completeness, the Competition Appeal Tribunal noted that passing on was not a defence as such but rather an aspect of the process of the assessment of damage to ensure that a claimant was not over-compensated.

deemed to have established that the overcharge has been passed on to it by showing:

- The defendant committed an infringement;
- The infringement resulted in an overcharge for the direct purchaser from the defendant; and
- The claimant has purchased goods or services subject to the infringement.

The Regulations also expressly place on the defendant the burden of proving that an overcharge has been passed on by the claimant.

As a result of the Regulations, direct and indirect purchaser claimants in damages actions will be able to rely on presumptions that they suffered loss as a result of an infringement that took place on or after the Implementation Date. Defendants, on the other hand, will have to rebut such presumptions using evidence that normally is in the claimants' or third parties' control or possession.

Exemplary damages

The Regulations prohibit the award of exemplary damages in antitrust damages actions.[12]

Joint and several liability

The principle that parties to anti-competitive behaviour are jointly and severally liable for the damage caused is well-established. This means that a claimant can seek full compensation from any of the infringers and that it is up to the defendant to claim compensation from the other infringers in respect of the proportion of the harm for which they are responsible.

The Regulations provide for derogations from this general principle in respect of defendants that are small and medium-sized enterprises ("**SMEs**"), immunity recipients,[13] and defendants that settled with the claimant.

In respect of an SME, the Regulations provide that the defendant is liable only for loss caused to its own direct and indirect purchasers, provided that:

- Its share of the relevant market during the infringement period was less than 5%;
- Its economic viability would be irretrievably jeopardized but for this provision;
- It did not lead the infringement or coerce others to participate in the infringement; and
- It has not previously been found to have infringed competition law.

In respect of an immunity recipient, the Regulations provide that the defendant is liable only for loss caused to its own direct and indirect purchasers and suppliers, except where a claimant is unable to obtain full compensation from other infringers (*e.g.*, due to their insolvency).

In respect of an infringer that settles with the claimant, the Regulations provide that the settling claimant will cease to have a right of action against the settling infringer regardless of the terms of the settlement, except where the other infringers are unable to pay damages (*e.g.*, due to their insolvency). However, it is possible to exclude expressly as part of the settlement the settling infringers' liability for other infringers' shares of the damage where the latter are unable to pay damages.

The Regulations provide that non-settling infringers are precluded from bringing a claim against the settling infringer by way of contribution. Until now, a defendant considering settlement has faced the risk of being brought back into the proceedings by non-settling infringers via contribution proceedings. The Regulations will go some way to ensuring the finality of a settlement in relation to a claim based on an infringement that took place on or after the Implementation Date.

3) "Procedural" provisions

Disclosure

The disclosure regime in England and Wales requires parties to damages actions to disclose all documents on which they rely, all documents which adversely

[12] Exemplary damages were in principle available and have been awarded in antitrust damages actions in the past: *2 Travel Group Plc (in Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

[13] Immunity recipients are undertakings that participated in an infringement but were granted immunity from financial penalties in return for blowing the whistle on the cartel under a cartel leniency programme run by an EU competition authority.

affect their own case, and all documents which adversely affect or support another party's case.[14]

Before the Regulations came into force, only limited categories of documents could be withheld from disclosure, including documents that are protected by legal professional privilege and, in some circumstances, cartel leniency statements.[15] [16] The Regulations set out broader categories of documents for which the UK courts may not order disclosure.

The Regulations prohibit the UK courts from ordering the disclosure of cartel leniency statements and settlement submissions that have not been withdrawn.

The Regulations also prohibit the UK courts from ordering the disclosure of the following documents before a competition authority ends its investigation:

- Information sent by the competition authority to an undertaking that is the subject of the investigation, *e.g.*, Statement of Objections, or Requests for Information ("**RFIs**");
- Information prepared by an undertaking for the purpose of the investigation, *e.g.*, responses to the competition authority's RFIs; and
- Settlement submissions that have subsequently been withdrawn.

However, such documents will be admissible as evidence if they are obtained lawfully through routes other than from the competition authority's file (*e.g.*, if they are voluntarily provided by the defendant that originally submitted the leniency statements and RFI responses).

Pre-existing information or contemporaneous evidence (*i.e.*, information that exists irrespective of a competition authority's investigations) is disclosable and admissible as evidence at any time, irrespective of whether it is submitted as part of an undertaking's leniency application.

Decisions of other Member States' competition authorities

Existing laws already provide that the decisions of the CMA, the concurrent regulators, and the European Commission are binding on the UK courts.[17]

The Regulations provide further that decisions of the competition authorities and national courts of other Member States, whenever they were handed down, may be presented as *prima facie* evidence that an infringement has occurred. The presentation of such evidence shifts the burden of proof on the defendant to show that it has not committed an infringement.

III. Further considerations

The Regulations make changes to UK law only where required or to ensure consistency of approach between cases concerning EU and UK competition law. This approach minimises the risk of uncertainty that a copy-out approach could have created as to the application of existing case law.

The Regulations clarify which provisions of the Directive have retroactive application by specifying which of the provisions are "substantive" and which are "procedural." It may nevertheless be some time before the practical application of the substantive provisions (*e.g.*, limitation periods) will be tested. There also remains the possibility of confusion for any claim brought in the UK after 27 December 2016 but before the Implementation Date.

Finally, it is uncertain to what extent the UK will need, or decide, to amend the provisions of the Regulations after the UK leaves the European Union.

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[14] Civil Procedure Rules, Rules 31.6 and 31.7 and the Competition Appeal Tribunal Rules 2005, Rules 60-65. The rules governing disclosure in Scotland and Northern Ireland are broadly comparable.

[15] Cartel leniency statements are information an undertaking voluntarily provides to a competition authority concerning a cartel and the undertaking's role in relation to the cartel specifically for the purposes of the competition authority's leniency programme.

[16] In Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, the Court of Justice of the European Union held that there was no absolute prohibition on the disclosure of leniency materials. Rather, national courts were required to weigh the risks of such disclosure undermining the effectiveness of the EU leniency programme against the right of compensation on a case-by-case basis. The English High Court applied *Pfleiderer* in *National Grid v ABB* [2012] EWHC 869 (Ch) and ordered disclosure of parts of the leniency statements in question.

[17] Competition Act 1998, section 58A.