The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

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The City of London Law Society Competition Law Committee

RESPONSE TO BIS CONSULTATION DOCUMENT "DAMAGES FOR BREACHES OF COMPETITION LAW: IMPLEMENTING THE EU DIRECTIVE"

1. Introduction

The City of London Law Society ('CLLS') represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by a specialist Competition Litigation Working Party comprised of the following members of the Competition Law Committee and nominated experts from member firms of the CLLS:

- Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
- Tom Cassels, Partner, Linklaters LLP;
- Tadhg O'Leary, Associate, Allen & Overy LLP;
- Mathew Rea, Partner, Bryan Cave LLP;
- Francesca Richmond, Associate, Baker & McKenzie LLP;
- Matthew Scully, Partner, Clifford Chance LLP;
- Kim Dietzel, Partner, Herbert Smith Freehills LLP;
- Mark Simpson, Partner, Norton Rose Fulbright LLP;
- Howard Cartlidge, Partner, Olswang LLP; and
- Patrick Boylan, Partner, Simmons & Simmons LLP

2. The Consultation Questions

Question 1

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

X Yes No Not sure

A: We agree that it would be appropriate to implement the Damages Directive as a single regime that will apply to both UK and/or EU competition law. The alternative of a two-tier system with different rules would offer few benefits and likely lead to uncertainty and satellite litigation.

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?

X Yes No Not sure

A: We believe the limitation period should remain.

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?

X Yes No Not sure

A: As an overall point, we note that in relation to limitation periods legal certainty is essential. Claimants need to be sure of the deadline within which they need to bring claims, and defendants need to know when they are no longer at risk of damages actions.

It is therefore crucial that ambiguity is avoided so far as possible. We therefore are firmly of the view that it is inappropriate to adopt a copy-out approach in relation to limitation. There are a number of ambiguities within the relevant provisions which need to be resolved on implementation in order to provide the necessary clarity and avoid costly and time-consuming satellite litigation, along the lines of what has been experienced in relation to the CAT's previous limitation periods (and which the alignment of the limitation periods in the CAT and the High Court by the Consumer Rights Act 2015 was designed to remedy).[1]

With that in mind, we agree that legislative change is needed to reflect the provisions of Article 10(2) and Article 10(4) as to the commencement and suspension of limitation periods, as well as Article 18(1) in relation to the suspension of the limitation period for the duration of a relevant consensual dispute resolution process, but that this should not be undertaken via a copy-out approach, and legislative clarity should be provided so far as possible.

In particular:

- Article 10(2) provides that limitation periods shall not begin to run until the infringement has ceased. In relation to standalone claims the alleged infringement may be ongoing (and may remain so until any judgment mandating a change in behaviour, for example in an abuse of dominance case). This gives rise to the prospect that there is no or an indefinite limitation period in such cases. This is not satisfactory and therefore needs to be remedied (for example via the introduction of an absolute limitation period (subject to concealment) as permitted under Recital 36 of the Directive).

- Article 10(2)(a) provides that a claimant must know or can reasonably be expected to know that the relevant behaviour constitutes an infringement of competition law before the limitation period begins to run. In standalone cases a claimant cannot know for certain that an infringement exists prior to judgment; this will in fact be a key contention in dispute. Similarly, Article 10(2)(b) provides that a claimant must know/can reasonably be expected to know that the infringement caused harm to it; in both standalone and follow-on cases this cannot be known for certain prior to judgment and will be a key issue in dispute. Therefore implementation should provide that knowledge in these circumstances requires only that the claimant has sufficient knowledge to be able to sufficiently plead liability and loss such that its claim is not subject to strike-out.

[1] As noted below, in relation to the European Mediation Directive and the European Alternative Dispute Resolution for Consumer Disputes Directive the UK implementing legislation provided greater detail than was contained in the EU Directives so as to make clear when limitation periods would be suspended for the duration of mediation/ADR processes and when they would restart. A similar approach should be adopted here.

- Article 10(4) requires that Member States ensure that the limitation period is suspended if a competition authority takes action, and that this suspension shall end at the earliest one year after the infringement decision has "become final" (i.e. that it "cannot be, or can no longer be, appealed by ordinary means" (Article 2(12)) or the competition authority's proceedings are otherwise terminated. This risks replicating the time consuming and costly preliminary litigation which arose in relation to the previous CAT limitation period, namely whether an appeal on penalty alone should suspend the limitation period and whether an appeal by one addressee suspends the limitation period for all addressees. We therefore believe it is essential that the implementation of this requirement should explicitly resolve these issues (reflecting the judgments of the Court of Appeal and the Supreme Court on the equivalent previous CAT rules).[2]

- It should be provided expressly that the Foreign Limitation Periods Act 1984 continues to apply in competition cases notwithstanding the implementation of the Directive. Again, this will save costly litigation of the kind we currently see in the CAT.

- Finally, as discussed further below, in relation to suspension of the limitation period for the duration of any consensual dispute resolution process under Article 18(1), it needs to be absolutely clear precisely when (and by what means) the limitation period is suspended (for example clarity is required as to whether the limitation period is only suspended by way of written agreement, or evidence of mediation or by some other means), and what event would restart the running of the limitation period after the failure or termination of consensual dispute resolution.

Question 4

Do you agree that the start of the limitation period provided for in the Directive should only apply from commencement of the implementation instrument?

X Yes No Not sure

A: We agree that the new limitation requirements should apply only from commencement of the implementation instrument and to causes of action accruing from that date. It is important that the legislation is very clear what this means in practice, in particular in relation to continuous (alleged) infringements and those which are known (or could reasonably be expected to be known) as at the implementation date.

If either an infringement has allegedly been committed and/or any loss has allegedly arisen prior to commencement, the current limitation rules should apply to the entirety of the claim (including where such loss is alleged to be on-going).

In relation to alleged infringements on-going as at the commencement date and which are known/could reasonably be discovered by the claimant (i.e. where the limitation period has already commenced under the current Limitation Act regime) it should be made clear that claims can only be brought in relation to the preceding 6 year period (i.e. the limitation period cannot be extended 'backwards' to allow a claim to be brought in respect of the whole period in which the continuous breach is alleged to have occurred).

[2] *BCL Old Co v BASF* [2009] EWCA Civ 434, *Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24.

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?

Yes X No Not sure

A: We do not consider that there are any benefits in the Directive being implemented on the October 2016 Common Commencement Date. In fact, we consider that the truncated drafting and consultation process required to achieve implementation of the Directive on that date risks introducing flaws in the implementing text which will increase the costs to business from uncertainty and satellite litigation.

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.

Yes X No Not sure

Comments:

We have significant concerns about the Government's proposal to achieve implementation by "copying out" all substantive provisions of the Directive including tho0073e parts of the Directive that the law in the UK already provides for. This will unnecessarily introduce new uncertainty in areas where we currently have certainty under existing legal principles. At the very least, a copy-out approach should only be applied in those areas where amendments to the existing legal position are necessary, and in those cases careful consideration must be given to the drafting to minimise potential uncertainty that could arise from the Directive language.

Should the Government adopt its proposed copy-out approach, provision ought to be made for the new law to be interpreted in line with existing case law for issues already addressed in the UK system. A failure to do so will result in unnecessary satellite litigation – with significant delay to the legal process and increased costs for all parties – which will inevitably compromise the competitiveness of the UK as a forum for competition litigation.

Implementation date (Consultation paper, paragraphs 7.19 to 7.20)

We note the statement that the Government believes that there are advantages for business in implementing the Directive on the nearest Common Commencement Date (CCD), in October. The Consultation paper does not articulate what these advantages might be, and we are not sure what advantages early implementation would provide.

We would also question the necessity or appropriateness of achieving implementation in line with a CCD. The Directive is designed to support the litigation and resolution of competition claims. It does not introduce any new regulatory requirements on businesses for which they will need to plan or make necessary adjustments to their business practices to ensure compliance.

In fact, given the wide-ranging and fundamental issues that we have identified in the Government's proposals for implementing the Directive, we consider that it is essential that this legislation is not "rushed through" and that full consideration is given to the consultation responses received. This is all the more so given, as we understand, many other Member States do not intend to implement the Directive significantly in advance of the transposition date of 27 December 2016. In particular, we are concerned about what we understand to be the Government's intention not to consult on the wording of the implementing text. As we have explained below, the Government's intention to "copy out" the provisions of the Directive will create a number of areas of uncertainty about how the courts in the UK are going to interpret the new rules. This is likely to result in satellite litigation which will add further cost and complexity to competition litigation, entirely contrary to the purpose of the Directive.

For this reason, we believe it is essential that the Government takes its time to carefully consider the drafting required to implement the Directive. It is concerning that the Consultation paper does not state that the Government intends to consult on draft legislation, as has occurred (or will occur) in many other Member States. If a broader public consultation on the draft text is not to be undertaken, we would strongly recommend that Government seeks the input of legal experts in this area – including CLLS's expert competition litigation sub-group – to review the draft implementing text before it is finalised.

Proposed approach to implementation (Consultation paper, paragraphs 7.21 to 7.23)

The substantive provisions of the Directive largely mirror the existing UK regime. This means that, in almost all respects, UK law is already compliant with the terms of the Directive. There are some limited exceptions which have been identified in the Consultation Paper, which will require amendment to UK law, however, in the vast majority of cases, no amendments are required.

However, as is stated at paragraph 7.23 of the Consultation Paper, we understand that it is the Government's intention to "copy-out" all of the substantive provisions of the Directive into UK law. This is the case regardless of whether UK law is already compliant with the terms of the Directive. The rationale for this approach is apparently to provide "certainty" for claimants and businesses.

Our view is that, rather than creating certainty, the copy-out approach will give rise to significant new uncertainty for both claimants and defendants about how the courts will interpret the new provisions in the Competition Act and the new procedural rules**.**

For example, as we explain above in relation to limitation periods, there is a problem in merely copying-out the provisions of Article 10(2) in relation to stand alone claims (i.e. claims that are not based on a pre-existing infringement decision). This would result in claimants potentially being able to claim for a period much longer than six years. This runs contrary to the position recently confirmed by the Court of Appeal in **Arcadia Group Brands Limited & ors v. Visa Inc. & ors.**

Similar problems arguably arise in relation to: (i) quantification of damages; (ii) indirect purchaser claims; (iii) passing on; (iv) joint and several liability; and (v) the extent of available disclosure.

Over the past ten years, we have seen many of these issues litigated (on some points, some all of the way to the Supreme Court) at great expense to both claimants and defendants. This process has provided greater certainty for litigants which has made the UK an attractive jurisdiction for damages claims to be

brought. Any attempt to copy out the Directive wholesale risks prejudicing this certainty and will inevitably give rise to significant satellite litigation, which risks undermining the attractiveness and competitive advantage that the UK currently enjoys as a preferred forum for competition litigation.

We therefore strongly recommend that the Government only applies a copy-out approach to those provisions of the Directive where amendments to the existing legal position are necessary. Even in these areas, it may not be appropriate to copy the language word-for-word – careful consideration must be given to the drafting to minimise potential uncertainty that could arise from the Directive language.

Should the Government adopt its proposed copy-out approach, provision ought to be made for the new law to be interpreted in line with existing case law for issues already addressed in the UK system. A failure to do so will result in unnecessary satellite litigation with significant delay to the legal process and increased costs for all parties which will inevitably compromise the competitiveness of the UK as a forum for competition litigation. As noted above, to minimise this risk, we believe it is imperative that the Government seeks the input of legal experts in this area, including CLLS's expert competition litigation sub-group to review the draft text.

Disclosure and penalties (Consultation paper, paragraphs 7.25 to 7.26)

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. We agree that this can be effected by amending the Civil Procedure Rules (changes to the Competition Appeal Tribunal Rules may also be required) and with the impact statement assessment of cost implications. Changes will also be required to implement Article 6(5) on temporary protection for 'grey-listed' documents.

We note that when making such amendments we consider that BIS should make clear that the protections for leniency documents and settlement submissions extend to quotations from these included in other documents (as provided for within Recital 26 to the Directive).

We note that there have been wider issues around the protection of confidential information, including confidential decisions, produced by regulatory authorities and the timing of disclosure of contemporaneous documents submitted to regulatory authorities in support of leniency applications while investigations remain ongoing.

We agree that it is appropriate to allow the courts to address these matters on a case by case basis in order to arrive at solutions proportionate to the particular facts of any case. However, there have been some instances where an approach inconsistent with the policy position taken by the Commission has been adopted by English courts, for example, ordering inspection of confidential versions of Commission decisions irrespective of the potential to implicate non addressees. It may be helpful to issue guidance to the courts as to the guiding principles on disclosure in competition cases and the weight that might be afforded to the views of regulatory authorities on timing for disclosure where investigations remain open and/or non confidential reasoning is yet to be published.

In addition, we note that at Section 7.23 BIS states that, while many of the disclosure provisions of the Directive are already provided for in the UK, BIS intends to adopt a copy-out approach so that existing UK legislation contains all the relevant provisions of the Directive. We are unsure as to whether BIS intends indeed to copy out all of the Directive's provisions or only to do so where existing UK law does not currently provide for what is required by the Directive.

As noted in the Consultation document, in relation to some elements the existing disclosure regime in England and Wales goes beyond the requirements of the Directive. Article 5(8) of the Directive makes clear that Member States are permitted to maintain rules that would lead to wider disclosure of evidence. We believe that implementation should not reduce the existing scope of disclosure in competition cases. We therefore consider that a full copy-out approach is inappropriate and unnecessary, and would in fact give rise to disputes about the extent of disclosure in competition cases (in particular where claims concern both competition and non-competition causes of action).

Passing on Defence & Quantification of Damages (Consultation paper, paragraphs 7.27 to 7.30)

Article 14.1 of the Directive (Indirect Purchasers) provides that the burden of proving "the existence and scope" of passing-on of an overcharge to an indirect purchaser shall rest with the claimant, but Article 14.2 provides that the indirect purchaser "shall be deemed to have proven that a passing-on to that indirect purchaser occurred" when the indirect purchaser has satisfied the conditions in Article 14.2. It is not clear whether the shift of the burden in Article 14.2 relates solely to the "existence" of the passing-on or whether it also goes to "scope", and to what extent the indirect purchaser benefits from the presumption of harm in Article 17.2 once and if the conditions in Article 14.2 are satisfied. In order to avoid satellite litigation, it would be helpful to have legislative clarity as to who bears the burden of demonstrating the "scope" of the infringement in circumstances where the indirect purchaser claimant has satisfied the requirements of Article 14.2.

No mention is made of the manner in which Article 15 (Actions for damages by claimants from different levels in the supply chain) will be implemented into national legislation. Article 15 provides that Member States shall ensure that national courts are able to take account of, among other things, actions for damages and judgments relating to claims that relate to the same infringement, but brought by claimants at different levels in the supply chain. The intention of Article 15 is to avoid multiple liability or the absence of liability for the relevant infringer. The Directive does not provide guidance or a mechanism for this to be achieved and legislative clarification would greatly help in avoiding satellite litigation. For example:

a) Will findings as to the level of overcharge and/or passing-on in a case at one level in a supply chain be binding in any cases brought by claimants at other levels of the same supply chain or merely have persuasive value?

b) If such findings are to be binding, does that mean that the customer at one level in the supply chain has standing to intervene in a claim started by a customer at a different level in the same supply chain, in order to influence the finding on overcharge and/or passing on? If such findings are not to be binding, how will the courts avoid the risk of cases at different levels in the same supply chain reaching different conclusions as to the level of overcharge and/or passing on, leading to possible multiple liability or the absence of liability?

c) Will the same principles apply in relation to so-called "umbrella overcharges"?

In relation to the quantification of damages, we note that you propose to leave it to the courts and the CAT to determine what level of harm can be assumed to have been incurred (under Article 17(2)) and you do not propose to provide a guideline figure as to the level of assumed harm. We agree with this approach. However, on that basis, we are unclear why the publication

of specific guidance for the courts and the CAT on this point will be required. If the usual principles and standards of quantification of damage and loss are to be applied, then there would seem to be limited need for specific guidance to be given. If a different or lower standard is to be applied to calculating assumed loss in competition damages cases (which is not required by the Directive and is in our view unwarranted) then we would suggest that such new standard be made clear in the implementing legislation, rather than in guidance for the courts.

We also consider it unnecessary to provide that the courts and the CAT may estimate the amount of harm caused. As the Consultation indicates, the courts and the CAT can and do already assess loss based on the submissions of the parties and their experts, and use the appropriate methodology for doing so. They can and do make a pragmatic assessment of the degree of certainty to which damages need to be pleaded and proved (as emphasised within Devenish Nutrition v. Sanofi-Aventis).[3]

Joint & Several Liability (Consultation paper, paragraphs 7.31 to 7.33)

In respect of paragraphs 7.31 to 7.33 of Consultation Document, we note that this does not mention the right to contribution as provided for by Article 11(5). If explicitly providing for joint and several liability (although this concept already exists in English law), then this should also deal with contribution. Article 11(5) provides that contribution amounts should be determined in accordance with "relative responsibility for the harm," and that this is a matter for national law (Recital 37). We consider that the implementing instrument should provide that this is to be interpreted in the same manner as the test in s.2(1) Civil Liability (Contribution) Act 1978 (or otherwise provide legislative clarity on the meaning of "relative responsibility for the harm" in this context).

We also note that no mention is made of the manner in which Article 19 of the Directive (Effect of consensual settlements on subsequent actions for damages) will be provided for in domestic legislation. The state of English law on this point has been a subject of much debate and would greatly benefit from legislative clarification.

The Directive does not resolve some of the key outstanding points of uncertainty, in particular:

a) It is unclear how a settlement involving a purchaser at one level of the supply-chain will affect the rights of purchasers at other levels in the supply chain; and

b) Again, Article 19(1) of the Directive does not define "the settling co-infringer's share of the harm" (Recital 51 stating that the relative share should be determined "in accordance with the rules otherwise used to determine contributions amongst infringers), which is likely to be a key area of contention when the law is applied. By way of elaboration, it is entirely unclear how the amount of this "share" is to be determined (and how, if at all, the relevant test differs from that in s.2(1) Civil Liability (Contribution) Act 1978), particularly in circumstances where the settling co-infringer will no longer be a party to proceedings. If legislative clarity is not provided (for example that this is to be interpreted in the same way as the test in s.2(1)), there is a substantial risk of satellite litigation (by way of illustration, there is a real danger that remaining parties will be required to

[3] [2007] EWHC 2394 (Ch); [2008] EWCA Civ 1086. We also note that the CAT in *2 Travel Group plc (in Liquidation) v Cardiff City Transport Services Ltd* ([2012] CAT 19) did not adopt the approach of either of the parties' experts to the counterfactual, but instead adopted its own assessment of the counterfactual based on the evidence and argument put to it (noting that this approach involved 're-working calculations done by the experts or adopting an approach which – although it draws on the work of both experts – adopts neither approach completely').

undertake economic analyses of the settling co-infringer's affected commerce, overcharge and "umbrella effect" without assistance from the settling co-infringer).

We consider that legislative clarity on these points would greatly reduce the scope for satellite litigation.

Consensual dispute resolution (Consultation paper, paragraphs 7.34 to 7.36)

We note that Article 8 of the European Mediation Directive (Directive 2008/52/EC) already made explicit the need for national rules on limitation not to impact on the ability of parties to go to court or to arbitration if their mediation attempt fails. A statutory instrument was passed in the UK to implement this provision of the European Mediation Directive, which made amendments to primary and secondary legislation (including the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and the Prescription Act 1832) to exclude time spent mediating in computing time limits that expire while a relevant mediation is ongoing (in the case of cross-border disputes). Similarly, a statutory instrument was passed in the UK to implement the European Alternative Dispute Resolution for Consumer Disputes Directive (Directive 2013/11/EU), which had the effect of extending the standard 6 year limitation period for bringing court proceedings (in disputes covered by the ADR Directive) by a period of 8 weeks in cases where ADR is ongoing at the expiry of the 6 year period (mirroring an amendment previously made to implement a similar provision in the European Mediation Directive). In both cases, the UK's implementing legislation provided greater detail than was contained in the EU directives so as to make clear when limitation periods would be suspended and when they would restart.

The Directive will also need to be specifically implemented. Further, the provisions in the Directive on the suspension of the limitation period will also need clarification in order to reduce the potential for satellite litigation.

We consider that changes should be made to national legislation so that it is absolutely clear precisely when (and by what means) a limitation period is suspended in the context of a consensual dispute resolution process (for example clarity is required as to whether the limitation period is only suspended by way of written agreement, or evidence of mediation or by some other means). Similarly, we consider that it is essential to identify in national legislation the events that would restart the running of the limitation period after the failure or termination of consensual dispute resolution.

It would also be sensible to define the concept of consensual dispute resolution explicitly in the implementing legislation so as to avoid any doubt as to what constitutes this form of dispute resolution.

Conclusion

We have significant concerns about the Government's proposal to achieve implementation by merely "copying-out" all substantive provisions of the Directive including those parts of the Directive that the law in the UK already provides for.

This approach is likely to create new uncertainty in areas where there are currently none under existing legal principles. We would direct your attention above to the areas where we believe it is essential that the implementation of the Directive requires a more careful and comprehensive approach.

We also believe that early implementation is unnecessary. The benefits of early implementation are not spelt out in the Consultation document. We see no need to press for early implementation as the reforms are not about regulatory requirements imposed on business which need advance notice. They are provisions designed to support litigation and the resolution of competition claims.

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 CLLS Competition Law Committee Competition Litigation Working Party would be happy to be part of that process.

Rushing through implementation using "a copy-out" approach is likely to create a number of areas of uncertainty about how the courts in the UK are going to interpret the new rules . This will lead to satellite litigation, add complexity to competition litigation but moreover would unnecessarily impose further costs on business and consumers in the litigation process.

The City of London Law Society

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