

Update on Competition Damages Claims

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Update on competition damages claims

- Key changes arising from implementation of the EU Damages Directive
 - United Kingdom
 - Netherlands
 - Germany

- Key developments – class actions
 - United Kingdom
 - Netherlands

UK Implementation of the EU Damages Directive 2014/104/EU – Tony Woodgate

- Implemented into UK law on 9 March 2017 by the *Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017*.
- UK rules already largely in line with the requirements of the Directive. The Regulation does however amend the Competition Act 1998, the Civil Procedure Rules and the Competition Appeal Tribunal (CAT) Rules in some significant respects, including:
 - disclosure;
 - limitation periods; and
 - presumptions relating to liability
- Transitional provisions also apply.

Limitation Period

- The general limitation periods are unchanged (6 years in the UK other than Scotland, 5 years in Scotland), BUT
- Importantly different rules identify the start date.
- The limitation period will start to run on the later of:
 - the day on which the relevant infringement ceases, or
 - the day on which the claimant knows or could reasonably be expected to know of the infringement (claimant must be aware of the infringer, their behaviour, the loss or damage suffered as a result and that it is a breach of competition law).
- If a UK or EU competition authority begins an investigation, the limitation period is suspended from the date the investigation commences, up until one year following the end of an investigation (critically important for follow-on claims).
- The limitation period is suspended if the parties enter a consensual dispute resolution process.

Transitional Provisions

- Substantive - apply to claims where the infringement takes place after 9 March 2017
- Procedural - apply to all proceedings which begin after 9 March 2017
- **Substantive provisions:** (Parts 2 to 5, 8 and 9 of Schedule 8A): Parts 2 to 5 include the passing on presumption, exemptions for SMEs, the presumption of harm caused by a cartel and limitation periods. Parts 8 and 9 cover the unavailability of exemplary damages, contribution principles and consensual settlements.
- **Procedural provisions:** (Paragraphs 4(7) and (8) and 5(3) and (4) and Parts 6 and 7). Part 6 relates to disclosure (including “black” and “grey” lists), and Part 7 to the use of evidence.

Germany – Transposition of the Damages Directive - Martin Gramsch

- Law passed through Parliament in March 2017
- New rules aim to strengthen the position of claimants
- Disclosure rules
 - Claim to produce evidence to proof damages and defence
 - Reimbursement of necessary costs
- Extension of statute of limitation to 5 years
- Various presumptions will be introduced
 - Cartel leads to damages
 - Price increase is passed onto indirect customers
 - Risk of double payment

Implementation of the EU Damages Directive in the Netherlands (I/II) - Johan Polet

- Dutch Civil Code and Code of Civil Procedure amended as per 10 February 2017
- Various Directive provisions not implemented as Dutch law is already considered to be in line with it
- Further quality impulse of established legal framework
- Infringements of Dutch competition law currently excluded from scope of implementation act, however a new bill is proposed that declares the rules binding on national cases too

Implementation of the EU Damages Directive in the Netherlands (II/II)

- Some notable amendments:
 - Introduction of presumption of harm in case of existence of a cartel
 - Explicit acknowledgement of passing-on defence
 - Joint and several liability for all cartelists
 - Rules on gathering and protection of documents, notably regarding documents from competition authorities files

Proposal on Collective Redress of Mass Damages (I/II)

- On 15 November 2016, a new bill was submitted to further amend the Dutch Civil Code and Code of Civil Procedure and to offer an efficient and effective method for collective redress
- The bill intends to find a balance between the interests of injured parties to materialise their rights, and the interests of alleged perpetrators to be protected against unfounded and frivolous claims
- Currently, representative organizations in a Dutch collective action can only seek a declaratory judgment on the defendant's liability towards the class of victims they represent
- After such declaration, aggrieved parties will usually seek damages through settlement (potentially through the WCAM-legislation) or by commencing additional proceedings individually

Proposal on Collective Redress of Mass Damages (II/II)

- Some notable characteristics of the proposal:
 - The prohibition to seek (monetary) damages for representative organizations will be abolished
 - Admissibility requirements for representative organisations to be increased (e.g. in terms of governance, finance and representability)
 - If several representative organizations bring a claim alleging to represent similar interests, the Court will appoint one lead plaintiff
 - Opt-out system
 - District Court of Amsterdam has exclusive jurisdiction

UK Collective Proceedings Orders - Chris Owen

- UK Consumer Rights Act 2015 introduced a new class action mechanism.
- Claims can be brought either on an opt-in or opt-out basis, by class members or third party representatives.
- Claims to be brought in the Competition Appeal Tribunal (CAT).
- No need to identify individual claimants in opt-out cases; the claim will be brought on behalf of the whole group (claimants will be automatically included).
- For opt-out collective proceedings, any class member who is not domiciled in the UK at a time specified must opt in to ensure that the proceedings are brought on its behalf (section 47B(11), Competition Act 1998).
- First stage is to seek a Collective Proceedings Order (CPO).

Cases brought to date under the new opt-out procedure

- **Gibson/Pride:** First class action, brought by the National Pensioners Convention ('NPC').
- Follow-on action relating to infringement of competition law through a form of RPM.
- CAT has adjourned the CPO application with permission for the Applicant to file and serve an amended Claim Form.
- Principles applied by the CAT to the CPO are novel to UK law – CAT has looked to Canadian common law and is examining complex economic arguments at an early stage.
- **Walter Merricks/MasterCard:** Former financial services ombudsman Walter Merricks bringing a \$19 billion collective action against MasterCard on behalf of UK consumers – biggest claim in UK legal history.
- CPO hearing has taken place – judgment awaited.

Questions?

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