



Competition Law Forum

BIS consultation: Implementing the EU Directive on damages for breaches of competition law

Introduction

This paper is submitted to the Department for Business, Innovation & Skills (BIS) by the Competition Law Forum (CLF),¹ as a response to its public consultation “Implementing the EU Directive on damages for breaches of competition law”.²

BIS is seeking views on the implementation of the EU Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union,³ in particular:

- Whether to implement a separate regime for breaches of European competition law (including where European competition law is applied in parallel with UK competition law) to sit alongside the regime for cases under UK competition law (“dual regime”); or whether to apply the changes required by the EU Directive to cases brought as a result of breaches of either European or UK law (or both) (“single regime”);

¹ The Competition Law Forum (CLF) was set up by the British Institute of International and Comparative Law in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum comprises of leading legal practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Liza Lovdahl Gormsen, at l.lovdahlgormsen@biicl.org or +44 207 862 5164.

² The members of the CLF consultation group are: Liam Colley, Alix Partners; Christopher Hutton, Hogan Lovells; Cordelia Rayner, Hogan Lovells; Hugh Stokes, VISA Europe; Kate Rhodes, VISA Europe; Stephen Dnes, Preiskel & Co and Timothy Cowen, Preiskel & Co. The group’s chairman is Dr Liza Lovdahl Gormsen, BIICL. Emily Daniels acted as rapporteur.

³ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union OJ L349/1 of 5 December 2014. Hereafter the ‘EU Directive’.

- How to handle the EU Directive's provisions on limitation periods for bringing claims for damages; and
- Whether we should aim to implement the changes on the October 2016 Common Commencement Date or delay implementing the changes until 27 December 2016.⁴

The CLF welcomes the opportunity to respond to the consultation. This response does not purport to reflect the views of all CLF members or of their firms or necessarily the views of all individual members of the working group.

⁴ Competition Policy – Consultation: Implementing the EU Directive on damages for breaches of competition law' page 4, point 2.4. Hereafter 'BIS consultation document'. Document available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf

Single vs. Dual regime

Both the single and the dual regime pose a number of advantages and disadvantages for consumers, the courts and the Government. These will be outlined in this section. It is important to stress that unlike certain Member States, such as Spain and Finland, the UK has an existing legal framework in place, including the Competition Act 1998 and the Consumer Rights Act 2015, allowing consumers to take private damage action in case of competition law infringements.⁵

Single regime: advantages and disadvantages

One of the aims of the EU Directive is to improve the conditions for consumers to exercise the rights that they derive from the internal market.⁶ This aim would be satisfied through legal certainty for consumers, should a simpler, single regime be chosen as opposed to one which requires the determination of jurisdiction. A single regime also removes the need for investigating and determining if a competition issue is to be considered under European competition law or UK competition law, which in itself can be highly difficult depending on availability of information.

Furthermore with a single regime, consumers would not need to determine which regime applies (thus avoiding so-called ‘satellite litigation’), which would lower legal costs, and thus would promote the EU Directive’s aim to ensure the effective protection of consumers’ right to compensation.⁷ Consumers would also most likely see a reduction in legal fees due to lawyers’ familiarisation of a single regime and legal processes, thus supporting further the access to compensation. It would also create short-term efficiency in the courts from ratification, due to familiarisation of the legal processes.

Moreover, according to BIS’ Impact Assessment, while costs to the courts are higher than for a dual regime, a single regime would equally provide

⁵ Consumer Rights Act 2015 (c. 15), Schedule 8.

⁶ EU Directive, *supra* note 3, preamble [9].

⁷ *Ibid*, preamble [22].

higher economic benefits,⁸ thus supporting the single regime as an attractive option. On a policy perspective, based on the assumption that the UK remains a member of the European Union, a single regime would also strengthen the unity between UK law and EU law.

The main disadvantage of a single regime could be that EU cases may take longer to resolve, and thus a uniform regime that does not take this into account could impact on damages claims. It could therefore create backlog in the courts, should the courts not be sufficiently equipped to organise both sets of case-loads. This may be compounded by the fact that the UK is currently the most popular jurisdiction for competition damages actions,⁹ although, following the standardisation of such actions across the EU through the EU Directive, this may be less of an issue in the future.

Similarly, it would be difficult to remedy individual inefficiencies in the procedures encountered for EU and UK cases through such a regime. Thus, in the case of the length of the resolution of cases, for example, it may not be possible to work some method of remedying this into the procedure. However, considering that the EU Directive is based loosely on the UK regime as it currently stands,¹⁰ this should not be a major issue.

Concurrently this would also mean that any amendments made to the law at the EU level on procedural issues would affect national competition cases as well.

⁸ UK implementation of the EU Damages Directive (2014/104/EU) Impact assessment (DBIS, 2015) 2-4.

⁹ Commission, 'Impact Assessment report: Damages actions for breach of the EU antitrust rules' COM(2013) 404 final, [52].

¹⁰ BIS consultation document, *supra* note 4, point [1.4].

Dual regime: advantages and disadvantages

Having a dual regime would simplify the initial implementation of the EU Directive (i.e. a full ‘copy out’),¹¹ and thus the EU Directive may be implemented sooner and more efficiently. Furthermore, a ‘copy out’ of the EU Directive would virtually guarantee consistency of UK law with EU law on this particular area, and thus the initial administration of implementing the EU Directive would be carried out more smoothly.

This copy-out method does not necessarily secure legal certainty however, if the provisions themselves are not altogether sufficiently clear for practical use, thus being detrimental for both consumers and businesses. It thus would remain for BIS (hopefully with guidance from the legal community) to determine which provisions, if any, should be copied verbatim, and which would require altering or paraphrasing in order for these to be applied successfully in UK law. This may result in just as much work being undertaken in order to comply with the requirements of the EU Directive. A ‘copy out’ method is also problematic in that it conflicts with the essence of European directives; such an implementation of law is typically associated with regulations, and thus the discretionary nature of the EU Directive would be lost.

Nonetheless amendments to the processes could be specialised between the two regimes, remedying individual problems for each, potentially leading to increased long-term efficiency in the courts, and producing better results for consumers. Specialisation would be possible with regard to treatment of cases dealing with UK or EU law in terms of process and approach; lawyers would hence be able to specialise in either domestic or EU competition law damages litigation processes, potentially leading to more tailored advice. Equally there is the potential to apply different limitation periods for each of the regimes, in that the current UK limitation period could be maintained for UK law cases.

Despite these relatively minor advantages, such a system would have the unfortunate effect of creating less certainty for consumers as to which

¹¹ Ibid, point [7.6].

regime would apply to their claim, and would increase costs for individual cases due to inevitable ‘satellite litigation’. With a dual regime, it may be difficult to determine which regime applies, depending on the complexity of the case in issue, thus making such a regime unattractive. Similarly, there may be the danger of a case being overturned on the basis of new evidence showing that the jurisdiction used was inappropriate, e.g. if a case was considered to be UK-only, but later evidence shows that it should have fallen under the EU procedure. This may consequently produce a negative effect on trade between the UK and Member States on the basis of insufficient legal certainty on UK competition litigation.

According to BIS’ Impact Assessment, national courts would face lower costs compared to having a single regime.¹² This however is to be balanced by the lower economic benefits brought through a dual regime; benefits which are significantly lower than for the single regime.¹³ Considering that UK competition law infringements are likely to engage in both UK and EU issues, it seems redundant to have a distinction between the procedures for competition damages claims, especially as, as the law currently stands pending the referendum, UK law is required to take EU law into account.

Interim view on single vs. dual regime

For the reasons above, the CLF is not in favour of implementing a separate regime for breaches of European competition law. Adopting a dual regime would mean that in any dispute the existence of an infringement between Member States would become critically important and it can be difficult to distinguish between cases which have an entirely domestic effect and those which have an effect between Members States. This legal uncertainty and consequent additional costs for preliminary investigations into jurisdictions has led the CLF to conclude that a single regime would be more effective for UK law.

¹² Impact Assessment, supra note 8, 4.

¹³ Ibid, 2-4.

It is understood that BIS may wish to exercise a copy-out method in order to meet only the basic requirements of the EU Directive. However, owing to the potential language and consequential application issues in copying the EU Directive's wording, it is both possible and encouraged that BIS meet the basic requirements of the EU Directive through other means, i.e. through combining the rules with current UK law to maintain a single regime.

The CLF encourages BIS to adopt a single regime although it is acknowledged that a single regime may not at this stage be possible as the existing UK legislation on limitation periods is inconsistent with the limitation periods stipulated in the EU Directive. It is this point that we wish to address next.

Limitation Periods for bringing claims for damages

The requirements for Member States' laws, in respect of the limitation period of private damages claims for breaches of competition law, are set out in Article 10 of the EU Directive.

The EU Directive

Article 10 Limitation periods

- (1) Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
- (2) 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:
 - (a) of the behaviour and the fact that it constitutes an infringement of competition law;
 - (b) of the fact that the infringement of competition law caused harm to it; and
 - (c) the identity of the infringer.
- (3) Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
- (4) 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.

The Consumer Rights Act 2015 states that the limitation periods which shall apply to private competition law actions will be based upon the Limitation Act 1980.¹⁴ Accordingly, therefore, the appropriate provision for the implementation of the EU Directive is:

¹⁴ Consumer Rights Act 2015, Sch. 8, para 8(1).

Limitation Act 1980

9 Time limit for actions for sums recoverable by statute.

(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Also of importance in the Limitation Act is Section 32(1)(b):

32 Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to subsection (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(...)

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(...)

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

This provision would apply in the case of secret cartels, and thus the starting point for the limitation period would be affected by public knowledge of the cartel. This however does not necessarily comply with part 2(b) of Article 10 of the EU Directive.

As is rightly pointed out in the BIS consultation document, UK law already satisfies the first factor, i.e. the minimum length of the limitation period.¹⁵ What therefore remains is an amendment to the law regarding the conditions for the starting and postponement of the limitation period. The BIS consultation document considers the issue of the starting point of the limitation period, proposing to copy out the provisions of the EU Directive.¹⁶ What is not expressed however is where the words of the EU

¹⁵ BIS consultation document, *supra* note 4, points [7.9]-[7.13].

¹⁶ *Ibid* [7.14]-[7.16].

Directive are to be copied out; in other words, it does not state if the provision would be inserted into the proposed Competition Damages Bill, thereby rendering Sch. 8, para 8(1) of the Consumer Rights Act both redundant and contradictory, or in the Limitation Act itself, thereby potentially affecting many other UK laws on damages actions. The alternate option alluded to in the consultation, is to rely upon pre-existing limitation law.¹⁷ This option is questionable, owing to both legal certainty and the need to rely on what is considered by some commentators to be complex case law.¹⁸ This hence may not provide consumers with adequate legal certainty, and could provoke the EU to investigate the UK's compliance with the EU Directive. On the basis therefore that the provisions will be codified in UK law, the CLF wishes BIS to clarify where the EU Directive is to be copied.

Regarding the confines of the limitation period, the law itself tries to balance its interest in the finality of limitation periods with the fact that some illegal practices will be concealed. It is a long-standing proposition that time only begins to run once hidden conduct could reasonably be known, leading to some degree of latitude where certain competition law infringements are hidden, as with a secret cartel.¹⁹ An added complication in a competition law case is that there are frequently complex administrative proceedings alongside potential private claims, raising the question at what stage the administrative proceedings put a potential litigant on notice of the conduct for litigation to begin to run. For example the situation may be distinguished between a hard core cartel and a potential breach of Article 102; while the former may be clear-cut, the existence of the latter is up for judicial deliberation. It seems prudent therefore to introduce simpler, more certain rules on the point at which the limitation period starts to run.

Following *Visa*²⁰ and *Toshiba Carrier*²¹ the current position can be summarised, as according some latitude on timing in those cases where

¹⁷ BIS consultation document, supra note 4, point [7.16].

¹⁸ Peter Scott, Mark Simpson and James Flett, 'Limitation periods for competition claims - the English patient' (2011) 4(1) Global Competition Litigation Review 18, 24.

¹⁹ See e.g. *KME Yorkshire Ltd & Ors v Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190

²⁰ *Arcadia Group Brands Ltd & Ors v. Visa Inc & Ors* [2014] EWHC 3561.

²¹ *KME Yorkshire*, supra note 19.

infringements are concealed, with the flip side that well-known *potential* infringements can potentially raise a duty to commence litigation. In *Visa*, for instance, the public availability of information regarding Visa's interchange fee arrangements was held to be a factor suggesting that time had started to run. This may be sensible, but in complex cases where nuanced points are placed before regulators, it may be unreasonable to place a claimant under a duty to commence proceedings early and the EU Directive rightly recognises this by providing for a stay during administrative proceedings.

To take a topical example, time would nearly have run out in the EU Commission's current Google search case, if the start of the investigation in 2010 were taken to have placed litigants on notice. This undesirable effect in long and heavily lobbied proceedings drives the requirement in Article 10(4) of the EU Directive to suspend proceedings during administrative review. However, there are reasons to suspect that merely copying out the Article into domestic law, as proposed by the consultation, will not lead to clarity. A good way of achieving clarity would be to focus on the wording of the EU Directive itself. Rules on limitation might need expressly to take into account complex issues such as concealment, where evidence of concealment is found by the Commission and other competition authorities using their powers to obtain evidence otherwise unavailable in disclosure. This may affect the position of stand-alone claims and raises the fact that stand-alone claims and follow-on claims may reach different results.

An additional consideration is whether there should be provision for deliberate ploys to slow down the administrative process so as to stretch the limitation period. In follow-on cases, information contained within the infringement decision is helpful to bringing a claim. If time is held to run from the prohibition decision date rather than the publication date of the public version, a potent incentive arises to delay the publication of the infringement decision, as the result will be that a greater proportion of the damage will be out of time. It is very much hoped that the extremely slow process of agreeing redactions in EU Commission decisions is not related to this aspect of timing. There is no reason in principle why the domestic transposition cannot require the stay for administrative

proceedings in Article 10(4) of the EU Directive to run until the public version of the decision is published, defeating this procedural abuse.

In addition, a plain reading of Article 10(2) of the EU Directive appears to alter the existing UK limitation regime significantly. A concern is that Article 10(2) took part of the existing test for a concealed tort, as set out in section 32 of the Limitation Act 1980, and coupled it with a requirement that time does not start to run until ‘the infringement of competition law has ceased’. While this additional provision is unlikely to cause problems in follow-on damages claims, in a stand-alone cartel damages action or an abuse of dominance action, the parties might only discover when the limitation period had started to run once the claim had been litigated. In extreme cases this could mean that the limitation period would go back 40 years or more. Even in a follow-on damages claim, the limitation period might not be known at the start of the claim, as if it were coupled with a stand-alone claim, there may be evidence of the defendant(s) breaching EU Competition law prior to the infringement period as found by the Commission, as very often such periods are determined by evidence that was readily available / provided to the Commission. Following disclosure in a civil trial however, there could well be proof that the infringement lasted longer than the period stated in the relevant Commission decision.

The definition of ‘reasonably be expected to know’ is hence key to the equation, and yet its actual practical definition is not adequately supplied. The risk is that Article 10(2) of the EU Directive could lead to potential uncertainty regarding the claimant’s knowledge of infringement and loss. While this may not specifically be an issue for follow-on cases, where there has been public enforcement, in the instance of standalone cases, this ambiguity has a significant impact. While stand-alone cases may not happen as often as follow-on cases, in (for example) abuse of dominance cases where a finding of an infringement is not necessarily immediately clear, there may indeed be an issue, due to the level of uncertainty. Consequently this uncertainty will increase the costs of bringing such cases, conflicting with the aim of allowing consumers to enforce their rights. The CLF is suggesting making it clear that ‘knowledge’ means ‘sufficient knowledge’ that would enable an allegation to be pleaded

without being struck out on summary judgement. Alternatively, the publication of guidance on the definition of ‘reasonably be expected to know’ would be highly beneficial, and that there should not be a delay by waiting for judicial interpretation on this point, as this uncertainty may dissuade potential claimants from exercising their rights. If BIS is apprehensive that such guidance would not comply with the EU Directive, it is suggested that BIS liaise with the European Commission to ensure precisely what the European Commission envisaged the EU Directive to mean.

Another potential negative side-effect of Article 10 of the EU Directive is that it could penalise parties who have openly liaised with regulators regarding their behaviour as, if they were subsequently found to have been in breach of EU Competition law, claimants could then bring actions against it for the full period in which the entity had been in breach. This could deter entities from approaching regulators, which would undermine stated public policy objectives.

Finally, the CLF endorses BIS’ view that Article 22 of the EU Directive is substantive and not procedural, which would imply that its effect should not be retrospective.²²

²² BIS consultation document, *supra* note 4, point [7.18].

Exemplary damages / unjust enrichment / overcharge

The EU Directive

Article 12 Passing-on of overcharges and the right to full compensation

- (1) To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.
- (2) In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.
- (3) This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.
- (4) Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.
- (5) Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

It appears that Article 12(2) of the EU Directive excludes the right to exemplary damage for breaches of EU Competition law in jurisdictions without such pre-existing rights, but it is not clear whether it excludes such rights in those jurisdictions where the right to exemplary damages already exists.

The consultation proposes express provision for the passing-on defence in law, which would allow defendants to argue that claims should not be allowed to the extent that the claimants passed on the overcharge. This provision would seek to implement the more general provisions in Article 12 of the EU Directive, which seek to exclude overcompensation.

The concern here seems superficially at odds with the intention to introduce damages and the ability to obtain full compensation for losses suffered from breach of the law. It is clearly right that overcompensation should not be the objective of damages for loss. Here it needs to be emphasised that English tort law does not generally provide a right to damages except for losses suffered. The genesis of Article 12(2) may have been derived from the United States position where triple damages claims are allowed for breach of competition law. As a result, the reference to overcompensation in Article 12(2) has raised many more questions than it has answered, except if considered as an attempt to clarify that things such as triple damages (such as are available in the United States), are not part of the objective.

Tortious damages are well known to the English courts and the judiciary regularly deal with the issue of compensation and the assessment of what loss has in fact been suffered. The claimant has to prove its loss; it is always open for the defendant to show that the claimant did not suffer loss for one reason or another, or that the claimant should not be entitled to the full amount of the loss claimed for one reason or another. There is hence no reason to 'gold plate' this in the implementation; the effect of passing-on can be taken into account as a factor for judges to consider when determining a claimant's right to full compensation.

An important practical result of the availability of a passing-on defence is that it may deter claimants from bringing claims where they have suffered loss. Care is needed to ensure that the basic aim of the new law is not undermined, since it is intended to introduce a broad right to full compensation for breach. If passing-on is elevated by statute above the level of a factor that the judiciary should take into account, it may result in even less claims being brought in the English courts: uncertainties in litigation are such that there is already great difficulty in bringing claims. Also, other jurisdictions are keen to attract legal business and may not accept the need for any gold plating.

The current English court practice and role of exemplary damages and unjust enrichment is possibly understated in the current consultation

document. The UK has existing law permitting exemplary damages claims in rare cases for flagrant infringements, and no case has been put forward for removing this flexibility in competition claims. Likewise, the interaction of unjust enrichment claims and competition law is not fully settled, even after *Devenish Nutrition*,²³ and again the possibility that unjust enrichment might be a suitable remedy should also be preserved. There may be scope to add to the provisions on damages to make it clear that Article 12(2) is not taken to exclude such claims. It is understandable that there may be a desire to remove exemplary damages from domestic cases for the sake of simplicity, and in order to avoid US-style litigation, but there are advantages to maintaining exemplary damages for specific cases, such as where there is a flagrant disregard for the law and basic compensation seems disproportionate to the level of harm. In the light of under-compensation potentially being a greater problem than over-compensation, the CLF urges BIS to consider fully if removing exemplary damages for domestic cases would be ultimately beneficial. Moreover, there is a concern that with the combined introduction of: (a) a presumption of full pass-on for indirect purchasers (with a very low evidential bar in relation to pass-on under Article 14 of the EU Directive) and; (b) opt-out class-actions available to indirect consumers, the UK regime may, to a certain extent, be entering uncharted waters in terms of the potential amount of litigation by indirect purchasers and use of opt-out class-actions. This “cocktail” means that cartels at any level of a supply chain could have an opt-out class action associated with it. This is in contrast to the US, which also has opt-out class actions, but indirect purchasers do not have standing at the Federal level.²⁴ That said, it is questionable how excessive the regime will be in practice, as for any purchaser (direct or indirect) it is still difficult to prove that an overcharge had been paid, i.e. that the purchaser had paid an overcharge and that it was not passed-on to their customers. In the case of any indirect purchaser, disclosure would be needed from those in the production chain between it and the defendant, including any direct purchaser(s). In addition, the simplification of the vertical pass-through of the overcharge may lead to unequal treatment of market actors that were equally harmed by the competition law infringement.²⁵

²³ *Devenish Nutrition Ltd v. Sanofi-Aventis Sa (France) and others* [2008] EWCA Civ 1086.

²⁴ Litigation by indirect classes is permissible at the state level – see for example *re Automotive Parts Antitrust Litigation* where there are multiple classes involved.

²⁵ Claudio Lombardi, ‘The passing-on of price overcharges in European competition

Article 17 and related "guidance"

The EU Directive

Article 17 Quantification of Harm

- (1) Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.
- (2) It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.
- (3) Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

BIS' consultation document states that these changes will require the publication of guidance for the courts and the CAT.²⁶ The CLF believes that were BIS to create such guidance, this could prove to be very helpful, especially in addressing how the EU Directive is to be applied when encountering UK-specific issues, such as evidence rules and specialist tribunals. However, we would encourage BIS to clarify (a) what is meant by the word "estimate"; (b) what guidance BIS was proposing in this regard and how would this relate to the European Commission's Practical Guide; (c) what weight would be accorded to such guidance; and (d) from whose perspective Article 17 of the EU Directive requires it to be "excessively difficult precisely to quantify the harm". On this last point one, concern is that, for example, a sophisticated corporate would find quantification of harm more straightforward than SMEs. Consequently, Article 17(1) risks a slide into a needs-based provision of an estimate. What also remains to be considered is which body would be best

damages actions: A matter of causation and an issue of policy', Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No. 8/15, page 8.

²⁶ Consultation document, supra note 4, point [7.30]

equipped to publish such guidance. Depending on the context and subject of the guidance, it may be more appropriate for another body to address it; for example, procedural guidance may be better dealt with by the CAT, with substantive guidance from (for example) the CMA. The CLF would be grateful if BIS could clarify these points.

Implementation date

The EU Directive should only be implemented once the full legal and policy implications have been considered, which may mean a delay to the proposed implementation date of October 2016.

Conclusion

The CLF encourages BIS to implement the EU Directive as a single regime in order to ensure adequate consumer protection, higher economic benefits and preserve legal certainty. Unlike many other European Member States, the UK has a clear and efficient existing legal framework in place which governs actions for damages claims as set out in the Competition Act 1998, the Consumer Rights Act 2015 and the Limitation Act 1980 and those limitation periods should remain in force.

The CLF has particular legal and competition policy concerns around Articles 10, 12 and 17 of the EU Directive and maintain that these elements of the EU Directive should not be copied out until the full impact of the text as stands is considered. The CLF would be concerned if these Articles were directly transposed into UK law as currently worded, and urges BIS to re-examine their wording, which, in their current form, create substantial complications in relation to legal uncertainty. There is also the risk that, transposed as currently worded, these Articles may unduly prejudice any future competition law claims. Moreover, as the EU Directive is a directive, and not a regulation, the UK is not required to transpose the wording verbatim, as the nature of a directive is to allow member states discretion and flexibility in order to ensure that implementation is undertaken in the best interests of the each individual member state. As such, CLF urges BIS to consider a balanced and logical

interpretation of how these Articles may be transposed into UK law due to the unintended consequences that direct copy-out implementation may incur, i.e., implementing the EU Directive as a regulation, which could give rise to vast competition law policy implications to the detriment of consumer protection and certainty of the rule of law.