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## Implementation of the EU Damages Directive into Member State law

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# Private damages actions before and after the Implementation of the Directive

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## ABSTRACT

*The majority of Member States have implemented the European Directive on Private Damages Actions for Breach of Competition Law, into their respective law, albeit with some delay. In particular, England, Germany, and the Netherlands, but also France and Italy have faced a certain number of private damages actions well before the implementation of the new regime. Partly the national rules and legal innovations have inspired the European legislator.*

La majorité des États-membres de l'Union européenne a transposé la Directive européenne sur les actions en dommages et intérêts du fait de pratiques anticoncurrentielles, quoiqu'avec quelques mois de retard, dans leurs droits respectifs. Ce sont notamment l'Allemagne, l'Angleterre et les Pays-Bas, mais aussi la France et l'Italie, qui ont connu un certain nombre d'actions privées bien avant la transposition du nouveau régime. Ce sont en partie les règles et innovations juridiques nationales qui ont inspiré le législateur européen.

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## Overview

### I. France

1. In France, the work for the transposition of the Directive began in the first term of 2016. Due to constitutional reasons, some parts of the Directive should be transposed through a law, but the government decided not to go before the Parliament and to adopt an ordinance. The process was achieved on March 9, 2017, with the adoption of the Ordinance No. 2017-303, which has been completed by a decree. The new texts entered into force on March 10, 2017, without retroactive application, except for the provisions dealing with access to evidence.

2. Several remarks can be made on the drafting process.

- First, in France, texts in competition matters are usually under the responsibility of the Ministry

of Economy, but here the leading ministry was the Ministry of Justice. This is easy to understand since most of the new rules are modifying civil procedure rules and rules on liability.

- Second, and it is rather unusual for this kind of text, the ministry of Justice organised some informal consultations with the stakeholders (mainly with associations of specialised lawyers, academics) before writing a first draft. A short public consultation of two weeks was organised afterwards in September 2016 on this first draft. Pursuant to the comments received, some changes were introduced, mainly on technical points. Furthermore, the Ministry of Justice took the opportunity of partially implementing another directive, the Directive 2016/943/EU on business secrets.

- Third, the amended draft written by the Ministry of Justice was, as usual, reviewed by

the Conseil d'État. Before issuing the official review, the counsellor in charge of the matter also organised informal meetings with judges and academics to receive comments. New changes were again introduced. Most of them are justified by constitutional reasons, to be in line with the respective fields of law and decree, or are technical improvements.

3. On the final result, short comments can be made since the political line was clear. The Ministry of Justice has been required to work on a “a minima” implementation. The consequences are twofold:

– First, there is no change in the Civil Code or in the Civil Procedure Code. The new texts have been inserted in the book IV of the Commercial Code (hereafter “Com. C.”) dealing with competition law. This book now contains a new title VIII: “*Des actions en dommages et intérêts du fait des pratiques anticoncurrentielles*” (Damages actions for anticompetitive practices). These are deemed to be “special rules”. Therefore, general rules on liability and procedure remain in force for all issues not covered in the new title. In most cases, rules of the Civil Procedure Code will be applicable, but, if an administrative judge has jurisdiction to deal with the case, rules of the Administrative Justice Code will be applicable.

– Second, it explains that the new provisions are strictly limited to damages actions. They do not cover other types of private actions such as actions for breaches of contracts, nullity... That is the main issue raised by this text, since there are in France many contractual actions, mainly in the field of distribution.

However, there is an exception to the principle of a limited implementation. The new rules apply to every infringement of antitrust rules, both European and French ones. In French law, it covers not only the equivalent of Articles 101 TFEU and 102 TFEU, like violations of Articles L. 420-1 and L. 420-2 Com. C., but also specific French anticompetitive practices, like the prohibition of too low prices and new specific prohibitions of Articles L. 420-2-1 and L. 420-2-2 Com. C.

4. To conclude, the new texts seem to be in line with the Directive, even if the government did not take the opportunity to deal with all issues raised by the private enforcement in the French context. However, the courts will probably have to deal with many difficult issues, like for instance the identification of the persons who are liable. The French texts refer to the legal person, either individual or natural person, and not to the undertaking, which exists neither in civil law nor in civil procedure rules. However, in Article L. 481-2 Com. C., which deals with the binding effect of CA's decisions, there is an indirect reference to the parent company to which infringement has been attributed. It will be the choice of the victim to also sue the parent company.

L. I.

## II. Germany

5. On June 9, 2017, the Ninth Amendment of the Gesetz gegen Wettbewerbsbeschränkungen (“German Act against Restraints of Competition—ARC”) entered into effect, introducing important changes to German competition law. Whilst the implementation of the EU Damages Directive<sup>1</sup> remains the main reason and subject matter of the reform, the German legislator also used the amendment as an opportunity to adapt German competition law to the challenges of the digital economy, through a broad range of additional modifications. On March 9 and 30 2017, the German Parliament (Bundestag and Bundesrat) adopted the final text of the Ninth Amendment. The text is based on two different proposals. Its main basis is the Regierungsentwurf (Draft Law)<sup>2</sup> issued by the Federal Government on September 28, 2016. The Economic Committee of the Bundestag proposed further modifications,<sup>3</sup> which the Parliament subsequently adopted as the definitive new law. The German legislator decided to forego the possibility of transferring the changes required by the Directive to other branches of German tort law. In some cases, rather the opposite is accurate for Germany—e.g., the limitation period of damage claims starts in accordance with the commencement of the standard limitation period<sup>4</sup>, i.e., only at the end of the year in which the damage arose (§ 33h para. 2 ACR 2017).<sup>5</sup>

### 1. Coming into force and scope *ratione temporis*

6. The majority of the new provisions come into force with retrospective effect as of December 27, 2016 (§ 186 para. 3 ARC). Yet, the new substantive law on damages only applies to claims for damages arisen or arising after December 26, 2016. There are extra rules with regard to the provisions on limitation and suspension of the limitation period. These provisions are applicable even to pre-existing claims, provided they have not already been time-barred at the time of the coming into force of the new provisions. Thus, the legislator tries to preclude, all disputes relating to the scope *ratione temporis* of these provisions, which have been crucial in many cases German courts have to and had to deal with in the past.

### 2. First wave of reforms by the Seventh Amendment in 2005

7. The Seventh Amendment of the German Act against Restraints of Competition renewed the legal framework

1 Directive 2014/104/EU.

2 Bundestagsdrucksache (Bundestag Document) No. 18/10207.

3 Bundestagsdrucksache No. 18/11446.

4 See the general rule in § 199 para. 1 Bürgerliches Gesetzbuch (German Civil Code).

5 See *infra* Topic 4: Limitation periods – Germany.

of private damages actions in the case of violation of competition law for the first time in Germany in 2005. At that time, German law had already featured many of the Commission's proposals as published in its Green Book dating from 2005. The legislator, *inter alia*, significantly broadened the circle of potential claimants by abandoning the quite narrow "Schutzgesetzfordernis," "Protective Law Requirement," as established by different German courts. As the meaning of this criterion was not very clear, and some authors and lower courts argued that even direct purchasers had no standing to sue the members of a cartel, as the conspiring parties did not specifically direct their cartel against their commercial partners, but rather, only aimed at raising prices.<sup>6</sup> Other important changes and innovations in the field of private antitrust actions that were present in the German law of 2005 are as follows:

- A provision on the "passing-on-defence," at once restricting, but not excluding the possibility for defendants to invoke it (§ 33 para. 3 sent. 2 ARC 2005);
- The granting of prejudgment interest in favour of victims of a violation as of the moment in which the damage occurred (§ 33 para. 3 sent. 4 and 5 ACR 2005);
- The binding effect (and not only *prima facie* evidence) of decisions issued by competition authorities—even including those arising other Member States, and thus going beyond the requirements of Article 9, paragraph 2, of the Directive;<sup>7</sup>
- The suspension of the period of limitation during administrative procedures (§ 33 para. 5 ARC 2005);<sup>8</sup>
- The possibility for the judge to reduce unilaterally the value in dispute (and thus reducing the legal costs for the claimant) in order to reduce the financial risk of instituting legal proceedings for claimants (§ 89a ARC 2005);
- The right of associations to claim the absorption of the infringing party's profit (*Vorteilsabschöpfung*). However, one must mention that this instrument has never been used in practice, as the association in question has to deliver the profit to the Federal Budget (§ 34a ARC 2005).

6 For more details, see W. Wurmnest, A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition, 6 *German Law Journal* 1174 (2005), online available at [https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b8f51a2eeb817f29ab4316/1454961947041/GLJ\\_Vol\\_06\\_No\\_08\\_Wurmnest.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b8f51a2eeb817f29ab4316/1454961947041/GLJ_Vol_06_No_08_Wurmnest.pdf).

7 See *infra* Topic 3: Binding effect of decisions of national authorities – Introduction with remarks on Germany.

8 See *infra* Topic 4: Limitation periods – Germany.

### 3. Case law

8. The quite famous *ORWI* judgement of the Bundesgerichtshof (German Federal Court of Justice) in 2011<sup>9</sup> led to further clarifications including the so-called pass-on defence, the standing of indirect purchasers, joint and several liability of co-infringers and the price effects in the time after a cartel agreement had come to an end. Other court judgments contributed to clarifying important issues and to building up a quite exhaustive body of case law. For instance, it is settled case law in Germany that there is *prima facie* evidence that at least long-lasting cartels lead to inflated prices, and thus to damages sustained by those purchasing the cartelised product.<sup>10</sup> Later, the Directive required from the legislators of the Member States the adoption of a corresponding provision (Art. 17 para. 2 Directive), which was codified by the German legislator in § 33a para. 2 ARC 2017. The study of the huge number of decisions<sup>11</sup> concerning the scope of the binding effect of administrative decisions (§ 33b ACR 2017)<sup>12</sup> might help to understand possible problems of the new provision, and might provide some suggestions as to how to deal with them. In fact, even before the implementation of the Directive, virtually all decisions imposing a fine for competition law infringements are followed by one or more private damages actions by alleged victims of the infringement seeking redress.

### 4. Measures the German legislator had to implement

9. Despite a yet quite elaborated legal framework, the German legislator needed not only to modify some already existing provisions, but also was required to implement several completely new provisions of the Directive. Amongst these new provisions, the most important change for Germany were the provisions on *inter partes* document disclosure.<sup>13</sup> It must be emphasised that the German legislator even went as far as to create a substantive right to disclosure, which can be claimed both, in the context of a pending damages action as well as in a separate proceeding—e.g., in order to facilitate out-of-court settlements.

The amendment also aligns the German liability regime to that of the EU. As is well-known, under EU competition law, the existing "single economic entity

9 For more details, see Bien, *Concurrences*, No. 1-2012, Art. No. 42396, pp. 231–233.

10 Landgericht (Regional Court) Mannheim, Judgment of 4 May 2012, 7 O 436/11 Kart – *Feuerwehrfahrzeuge* (Wirtschaft und Wettbewerb DE-R, p. 3584, 3588.)

11 E.g., Bundesgerichtshof (Federal Court of Justice), Judgment of 12 July 2016 - KZR 25/14 – *Lottoblock II*, *Neue Juristische Wochenschrift* 2017, p. 1714; Landgericht (Regional Court of) Köln, Judgment of 17 January 2013 - 88 O 1/11 – *Deutsche Telekom*, Beck Rechtsatz 2013, No. 08412; Oberlandesgericht (Higher Regional Court of) Düsseldorf, Judgment of 29 January 2014 – VI-U (Kart) 7/13, Beck Rechtsatz 2014, No. 1737, *Wirtschaft und Wettbewerb*, DE-R, p. 4477 seq.

12 For more details *infra* Topic 3: Binding effect of decisions of national authorities – United Kingdom with remarks on Germany.

13 See *infra* Topic 1: Disclosure of documents that lie in the control of the parties – Germany.

*doctrine*<sup>14</sup> allows the Commission to impose a fine not only against the subsidiary having performed the infringement, but also against the parent company even in cases in which the parent company had no knowledge of its subsidiary's actions. The Commission considers that the “undertaking” that committed the infringement is not necessarily the same as the legal entity within a group of companies whose representatives actually took part—e.g., in cartel meetings. Already in the Eighth Amendment of 2013, the German legislator tried to close possible enforcement gaps, by introducing the possibility for the Bundeskartellamt (Federal Cartel Office) to impose fines on a legal entity that is the legal successor of an entity having committed the infringement. In its most recent Ninth Amendment of the ARC, the German legislator takes a further step by introducing new rules on the liability of parent companies and of legal successors in § 81 para. 3a–3e ARC 2017, thus bringing German liability law largely in line with the European model. Interestingly, the German legislator, in defiance of the requests made by many scholars, has not carried out the changes necessary to apply the same concept in civil law cases. Practice has to wait for clarification of the meaning of the term “undertaking,” as used in Article 1, paragraph 1, Directive by the ECJ.

F. B.

### III. Italy

10. The Damages Directive is an exercise in frustration and a glaring example of how EU competition policy may lose its legitimacy in the eyes of the European citizen. The Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, prepared for the Commission in 2004, which is really in many ways the first formal step undertaken by the Commission on the way to the Directive, opened by stating that “*the picture*” emerging from the study was “*one of astonishing diversity and total underdevelopment.*”

11. Commissioner Kroes referred to such statement in her speech at the Harvard Club in 2005—pre-dating the adoption of the Green Paper, the first official act properly by the Commission, stating: “*(...) my spontaneous feeling is that private enforcement is by nature complementary to and even strengthens the enforcement actions taken by competition authorities.*” In short the Commission had noticed that private enforcement was in a lamentable state and that the only way to get it on its feet was going to be giving some kind of boost to private, stand-alone private enforcement. This would, in addition, so Ms. Kroes again, have the benefit of allowing competition agencies to focus more on their enforcement priorities.

12. Now, you could be for or against a US-type of enforcement, but clearly the US experience gives us a huge range of devices which any European Union or Member State body may choose from in order to make antitrust private enforcement effective: jury trials, pre-trial discovery, opt-out class actions (references to collective actions abound in the earlier Commission's documents but they tend to disappear from the scene later on), punitive damages (which the Directive now even effectively bans, rather incongruously given its EU status and hardly an incentive to more effective enforcement), third-party funding, contingency fees, etc. By merely reading the Directive now, some twelve years down the line, you have the clear impression that the system may have gone awry: the whole Directive hinges clearly on the assumption that most enforcement will be follow-on (a sobering result, given the premisses, as said), and only enhances very timidly (and, in so far as particular jurisdictions may already have an efficient system, does not enhance at all) the efficiency of the private enforcement national systems, first of all in the more sensitive areas, i.e., evidence gathering and collective actions.

13. That said, the Italian law enforcing the Directive is most notable for the rather unusual rapidity which characterised its adoption. It is mainly a diligent and technically savvy (except for a few quirks here and there, as we shall see) transposition of the text of the Directive, with a limited amount of independent thinking.

C. O.

### IV. Netherlands

14. Although the Directive allows, at least with regard to some issues, that the Member States implement wider measures than the Directive provides for,<sup>15</sup> the Netherlands has chosen to do no more than the Directive requires. This is in accordance with the Dutch so-called “Directions for law making.”<sup>16</sup> Therefore, the Dutch implementation legislation applies only to cross-border infringements of competition law and to the so-called parallel application of competition law (in case an infringement of national competition law has an effect on the trade between the Member States).<sup>17</sup> The government intends to make the provisions of the Implementation Act applicable to strictly national cases, but will do so in a separate act. That act must still be put before parliament.

15. The Dutch implementation legislation consists of the Implementation Act Directive Private Enforcement of Competition Law (*Implementatiewet richtlijn*

14 See in particular ECJ, Judgment of 10 September 2009, Case C-97/08 – *Akzo Nobel NV and Others v. Commission*.

15 For example, with regard to disclosure: see Art. 5, para. 8, Directive.

16 Aanwijzing 331 of the Aanwijzingen voor de regelgeving.

17 Explanatory Memorandum (*Memorie van Toelichting*), Tweede Kamer 2015 – 2016, 34 490, No. 3.

*privaatrechtelijke handhaving mededingingsrecht*).<sup>18</sup> A draft of the implementation legislation was published in October 2015. It was subject to an Internet consultation from 8 October 2015 until 22 November 2015. This led to twelve reactions. Some of the reactions gave rise to amendments, mainly on technical points. The amended draft act was put before parliament on 12 February 2016. The Act was published in the State Gazette (*Staatsblad*) on 9 February 2017. It entered into force on the subsequent day, i.e., 10 February 2017.<sup>19</sup>

**16.** The Implementation Act provides for additions to the Civil Code (*Burgerlijk Wetboek*; Book 6; Articles 6:193k through 6:193t were added)<sup>20</sup> and the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*; Articles 161a and 844 through 850 were added).<sup>21</sup> In addition, Article 44a of the Code of Civil Procedure was amended<sup>22</sup> in order to enable the court to resort to the National Competition Authority (*Autoriteit Consument en Markt* or “ACM”) for help with the determination of the quantum of damages.<sup>23</sup>

**17.** Article III provides for the temporal application of these new or amended provisions, but only in part. Taken literally, it provides that Article 6:193s Civil Code and the pertinent provisions of the Code of Civil Procedure will not apply to cases of which the court was seized prior to 26 December 2014. This is the implementation of Article 22 of the Directive. Article 22, paragraph 1, Directive provides that its substantive provisions must not apply retroactively. Article 22, paragraph 2, Directive then says that all other provisions (the non-substantive provisions) shall not apply to actions for damages of which the court was seized prior to 26 December 2014. National law determines when the court is seized of an action.<sup>24</sup> Pursuant to Article 125, paragraph 1, Code of Civil Procedure, a court is seized of an action as soon as a writ of summons (*dagvaarding*) has been served on the defendant. At this stage, the court is not necessarily aware of the action. The writ of summons must set a date for the defendant to appear before the court (this is an administrative appearance for the record only). No later than one day before this date, the claimant must file the writ of summons with the court.<sup>25</sup> If he or she fails to do so, and does not repair this failure within fourteen days, the court is no longer deemed to be seized of the action.<sup>26</sup> In theory, it is therefore possible that claimants, who served a writ of summons before 26 December 2014 but set a date of appearance after this day, did not file their writ of summons with the court. Rather, they may have

started a new action in order to be able to make use of the procedural provisions of the Implementation Act.<sup>27</sup>

**18.** Article 22, paragraph 1, Directive did not need separate implementation. In principle, the material provisions apply from the day on which the Implementation Act came into force.<sup>28</sup>

**19.** Article III Implementation Act erroneously refers to Article 6:193s Civil Code. This is a provision on the statute of limitation. That is a substantive provision.<sup>29</sup> This happened, because the draft Implementation Act that was put up for consultation contained an Article 6:193m that provided that the infringer commits a wrongful act towards a party that suffers damages as a result of the infringement.<sup>30</sup> This was considered superfluous. Therefore, the original Article 6:193m was deleted and the other provisions were renumbered. As a result, the original Article 6:193s, which was a non-substantive provision,<sup>31</sup> became Article 6:193r and Article 6:193t became Article 6:193s.

**20.** The Netherlands has already seen quite significant activity in the area of private enforcement of competition laws. Damages claims have been filed in The Netherlands in relation to the airfreight cartel, the sodium chlorate cartel, the elevator cartel, the paraffin wax cartel, the CRT cartel and the gas insulated switchgear cartel to name but a few. As a result, a body of law already developed prior to the introduction of the Directive and the Implementation Act, often building on provisions in our Civil Code or Code of Civil Procedure that existed already. As a consequence, the legislator found that a number of provisions of the Directive did not need implementation. This, *inter alia*, applies to:

- Article 3, paragraph 2, Directive that the party that suffered harm is entitled to full compensation and that this must include actual loss and loss of profit, plus the payment of interest. It was considered that these principles are already part of Dutch law. That is true. However, an issue may arise if interest in the meaning of the Directive means the actual interest that could have been obtained on a savings account for example. In The Netherlands, claimants will need to rely on statutory interest,<sup>32</sup> absent a separate implementation of Article 3, paragraph 2,

<sup>18</sup> *Stb.* 2017/28.

<sup>19</sup> Art. IV Implementation Act.

<sup>20</sup> Art. I Implementation Act.

<sup>21</sup> Art. II under B and under C Implementation Act.

<sup>22</sup> Art. II under A Implementation Act.

<sup>23</sup> As per Art. 17, para. 3, of the Directive

<sup>24</sup> Explanatory Memorandum, p. 26.

<sup>25</sup> Art. 125, para. 2, Code of Civil Procedure.

<sup>26</sup> Art. 125, para. 3, Code of Civil Procedure.

<sup>27</sup> This may, of course, have implications for the satisfaction of statutes of limitation. Under Dutch law, the original writ of summons would interrupt the statute of limitations (cf. Art. 3:316, para. 1, and Art. 3:317, para. 2, Civil Code).

<sup>28</sup> Cf. Art. 68a, para. 1, Transition Act Civil Code; “old” law may remain applicable if the damage arose or came to light after the entry into force of the new law, but arises from the same event that caused damage the liability for which is governed by the “old” law; cf. Art. 173, para. 1, Civil Code.

<sup>29</sup> Cf. Art. 15, sub h, Rome II.

<sup>30</sup> [https://www.internetconsultatie.nl/implementatiewet\\_richtlijn\\_privaatrechtelijke\\_handhaving\\_mededingingsrecht](https://www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht).

<sup>31</sup> It provides that the court may stay the proceedings for up to two years in case of extrajudicial dispute resolution (cf. Art. 18, para. 2, Directive).

<sup>32</sup> Art. 6:119 Civil Code.

Directive. This statutory interest is fixed by the government from time to time and may be less or more than the actual interest on a savings account from time to time.

– Article 3, paragraph 3, Directive which says that full compensation shall not lead to overcompensation.

F. K.

## V. United Kingdom

**23.** First, a disclaimer: I have been asked to report on the United Kingdom. However, I will largely restrict my remarks to the law of England and Wales. This is not because I have inside information about a future break-up of the United Kingdom after Brexit. Nor is it because of any presumption of English superiority over the Scots. The reason is primarily that I know too little about the separate legal system that is Scots law to say anything meaningful about it, at least not without talking nonsense. The Northern Irish system is not as distinct from the English legal system as Scots law, but especially in the institutional rules there are differences as well. In my contributions to this *Concurrences* issue, I will endeavour to mention divergences from English law in Scotland and Northern Ireland where they are of relevance to the implementation of the Directive. Concentrating on the law of England and Wales is perhaps justifiable in so far as the majority of competition law actions are, and at least until Brexit will continue to be, brought in London.

### 1. Brexit

**24.** Before turning to the implementation of the Damages Directive in the UK, it is necessary to address the elephant in the room. It is unclear what the effects of Brexit on private damages actions in the UK will be, largely because no-one knows what shape Brexit will take. A quick recap for those just awaking from a coma: In the autumn of 2015, the Conservative party under David Cameron's leadership received an unexpected absolute majority in an election fought on a manifesto that promised to keep the UK in the Single Market but to hold an In/Out referendum about the UK's membership in the EU. On 23 June 2016, the voters decided by 51.9% to 48.1% to leave the European Union. David Cameron stepped down, and none of the previous Leave campaigners stepped up. Theresa May became Prime Minister without election in the party after the challengers withdrew. Having campaigned (very half-heartedly) for Remain, the new Prime Minister sought to brandish her Leave credentials and stepped up the anti-EU rhetoric at the Conservative party conference in October 2016<sup>33</sup> and her Lancaster

House speech in January 2017.<sup>34</sup> Freedom of movement of workers and oversight by the Court of Justice of the European Union were defined as being red lines for Her Majesty's Government, and leaving both the Single Market and the Customs Union was determined to be a necessary consequence. It emerged that the EU did not particularly fancy giving the UK an EU à la carte, so that it looked as if things were tumbling inexorably towards an increasingly hard Brexit, at a minimum leaving the Single Market and the Customs Union, perhaps even without an exit deal. After having ruled out holding a snap election several times, Theresa May changed her mind in light of the 20% poll lead of the Conservatives over Labour in spring 2017 in order to form a “*strong and stable government*.” The result of the general election held in June 2017 was that the Conservatives lost their absolute majority in Parliament, with a surprisingly strong showing of Labour under the socialist leader Jeremy Corbyn, resulting in a hung parliament and a government (propped up by an understanding with the Northern Irish party DUP) that was described as “weak and wobbly” rather than “strong and stable.” Talk of a softer Brexit, with overtures towards Single Market/EEA membership (the “Norway solution”), or even remaining in the EU, has begun to gain a little traction, but freedom of movement of workers and Court of Justice oversight are still considered red lines by the current Prime Minister Theresa May. Something would have to give for the EEA solution — or even remaining in the EU — to become viable. Doubts have been raised about PM Theresa May remaining in office, having lost even the support of the right-wing press, and being described as a “*dead woman walking*” by the former Chancellor George Osborne.<sup>35</sup>

**25.** Given the twists and turns over the last year, which would have made William Shakespeare envious, I will refrain from making any predictions about the future of Brexit. Perhaps this is what “*Brexit means Brexit*” stands for. Especially if a harder form of Brexit materialised, this would arguably make private enforcement in the UK less attractive. Recognition and enforcement of the judgment would not benefit from the Brussels I (Recast) Regulation any more.<sup>36</sup> Even before the informally so-called “Great Repeal Bill” (technically: the “European Union (Withdrawal) Bill”) was introduced on 13 July 2017, it was considered likely that the current

<sup>33</sup> See the transcript in Theresa May's keynote speech at Tory conference in full, *The Independent*, 5 October 2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html> (or watch at <https://youtu.be/08JN73K1JDC>).

<sup>34</sup> See the transcript in Theresa May's Brexit speech in full, *The Telegraph*, 17 January 2017, <http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/> (or watch at <http://www.bbc.co.uk/news/av/uk-politics-38687842/theresa-may-s-brexit-speech-in-full>).

<sup>35</sup> Samuel Osborne, George Osborne says Theresa May is a « dead woman walking - it's just how long she's going to remain on death row », *The Independent*, 11 June 2017, <http://www.independent.co.uk/news/uk/politics/george-osborne-theresa-may-dead-woman-walking-death-row-andrew-marr-show-a7784181.html>.

<sup>36</sup> Specifically for competition law: Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 9–10; F. Wagner-von Papp, Competition Law in EU Free Trade and Cooperation Agreements (And What the UK Can Expect after Brexit) (March 1, 2017), forthcoming in *European Yearbook of International Economic Law* 2017 (*EYIEL* 2017), working paper at <https://ssrn.com/abstract=2961721>, section 5.2. Generally, see A. Dickinson, Back to the future: the UK's EU exit and the conflict of laws, *Journal of Private International Law* 2016, Vol. 12(2), 195–210; M. Lehmann and D. Zetzsch (2016) Brexit and the consequences for commercial and financial relations between the EU and the UK, *European Business Law Review* 2016, Vol. 27(7): 999–1027.

binding effect of Commission decisions would be abolished.<sup>37</sup> The Bill now confirms this fear. It provides that a court or tribunal “is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court” and “need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so”.<sup>38</sup> The Competition and Markets Authority can, after exit day, only apply the Competition Act 1998 (not Articles 101 and 102 TFEU), will lose access to the European Competition Network, and may therefore also become a less important source of infringement decisions on which domestic follow-on actions could rely. Accordingly, most commentators see the attractiveness of the UK as a forum for damages actions as waning, at least for follow-on actions based on Commission decisions issued after exit day.<sup>39</sup> Others are more optimistic and have pointed out that some of the very attractive features of the UK system would still draw claimants to courts in the UK regardless of Brexit.<sup>40</sup> Perhaps. Not being able to rely on Commission decisions for follow-on actions is clearly a serious drawback, as are the complications in the laws of conflicts. Be that as it may, we will turn to the, *for now*, attractive features of the UK private enforcement regime.

## 2. Private enforcement before and after implementation

**26.** The UK has long been one of the most attractive jurisdictions for private enforcement. Especially the well-established disclosure regime favourable to claimants, which is described in more detail in the separate contribution on *inter partes* disclosure, gives the UK an advantage over its “competitors” in other EU Member States. Even before the Damages Directive was implemented, the legislator had introduced further features that strengthen the attractiveness of the UK system: the Consumer Rights Act 2015 gave in s 81 effect to Schedule 8 of that Act, which changed the Competition Act 1998 by introducing various collective

proceedings including opt-out proceedings,<sup>41</sup> allowed stand-alone claims (as well as follow-on claims) to be brought in the Competition Appeal Tribunal (CAT), and harmonised the limitation periods in the High Court and the CAT to six years.<sup>42</sup>

**27.** Most of the UK private enforcement regime had already complied with the requirements of the Damages Directive. The remaining implementing changes were made by “The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017,” Statutory Instrument 2017 No. 385,<sup>43</sup> which, under its very helpful Regulation 1(1), may be cited as “The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017”—a very catchy short title. I will rebel and simply call them the “2017 Regulations.” They were made on 8 March 2017, and in accordance with regulation 1(2) came into force on 9 March 2017.

**28.** The 2017 Regulations primarily modify the Competition Act 1998 by its regulation 2, which gives effect to Schedule 1 of the 2017 Regulations. In particular, Schedule 1 of the 2017 Regulations inserts the new Schedule 8A into the Competition Act 1998.

**29.** Part 1 of this new Schedule 8A to the Competition Act 1998 (para. 1 to 7) contains definitions, implementing, with modifications, Article 2 of the Damages Directive. Part 2 of Schedule 8A (para. 8 to 11) contains rules on pass on, implementing Chapter IV of the Damages Directive. Part 3 (para. 12) implements the SME protection contained in Article 11(2), (3) of the Damages Directive. Part 4 deals with cartels (as defined in para. 4), establishes the presumption of harm (para. 13 implementing Art. 17(2) of the Damages Directive), and deals with the liability of immunity recipients and the corresponding contribution issues (para. 14 to 16). Part 5 of Schedule 8A (para. 17 to 26) covers the limitation and prescriptive periods. Here, the differences between the legal systems in England and Wales, Northern Ireland and particularly Scotland do play a role. The limitation period in England & Wales and Northern Ireland is six years, the prescriptive period in Scotland is five years,<sup>44</sup> but provision is made for the beginning of these periods in paragraph 19, and for the suspension and extension of these periods in paragraphs 20 to 25, in particular suspension during the investigation by the competition authority (para. 21), during consensual dispute resolution (para. 22), and during collective proceedings (para. 23). Part 6 deals with disclosure. As will be explained below, the disclosure

<sup>37</sup> Sir Peter Roth, a judge at the High Court and the president of the Competition Appeal Tribunal (CAT), has even called this conclusion “inescapable.” P. Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 9 (but noting that in a stand-alone action, such a decision would be taken into account).

<sup>38</sup> Clause 6 of the European Union (Withdrawal) Bill. The Bill and its progress can be accessed at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

<sup>39</sup> See, for example, Richard Whish, Brexit and EU competition policy, *Journal of European Competition Law and Practice* 7(5) (2016), 297–298, and the interview An Antitrust Conversation with Richard Whish QC, December 2016, <http://www.nortonrosefulbright.com/knowledge/videos/144930/private-enforcement-of-competition-law-in-the-eu>; Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 10; John Ratcliffe & Cormac O’Daley, Brexit and Competition Law: What to expect, *WilmerHale briefing*, 15 September 2016, <http://www.jdsupra.com/legalnews/brexit-and-competition-law-what-to-72034/>.

<sup>40</sup> Jenny Rayner, Interview with Edward Coulson & Julia Joseph: What does Brexit mean for public and private enforcement of competition law in England and Wales?, *LexisPSL*, 26 July 2016, [http://www.blpaw.com/media/download/What\\_does\\_Brexit\\_mean\\_for\\_public\\_and\\_private\\_enforcement\\_of\\_competition\\_...pdf](http://www.blpaw.com/media/download/What_does_Brexit_mean_for_public_and_private_enforcement_of_competition_...pdf) (the ‘positive’ effect that they identify, namely that after Brexit claimants would not have to wait for final judgments by the Court of Justice, is illusory: after Brexit, such actions would have to be stand-alone actions, and such actions can be brought in parallel already today).

<sup>41</sup> The first application for a collective proceedings order (CPO) under the new rules was made in *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9 ([http://www.catribunal.org.uk/files/1257\\_Dorothy\\_Gibson\\_Judgment\\_CPO\\_CAT\\_9\\_310317.pdf](http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Judgment_CPO_CAT_9_310317.pdf)).

<sup>42</sup> Consumer Rights Act 2015, c. 15, <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>, in Schedule 8.

<sup>43</sup> [http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi\\_20170385\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi_20170385_en.pdf).

<sup>44</sup> In Scotland, both “limitation” and “prescription” exists, but the former is applicable only to personal injury claims. Prescription, unlike limitation, extinguishes the obligation completely.



rules in the UK had already exceeded the standard of the Damages Directive, and so the main modifications are the restrictions of disclosure in the cases of the grey and black lists of Articles 6 and 7 of the Damages Directive for investigation materials, and in particular settlement submissions and leniency statements (para. 28, as defined in para. 4(4), (5), (6) and para. 5), investigation materials (para. 29, as defined in para. 3(3)). The only *extension* of the disclosure regime that was necessary to implement the Damages Directive was to enable courts in Northern Ireland to order disclosure in paragraph 31 (a power that had already existed in England and Wales and Scotland). Part 7 implements in paragraphs 32 to 34 the limitations of admissibility of evidence contained in Article 7 of the Damages Directive. Paragraph 35 implements Article 9 by qualifying decisions by other Member States' competition authorities or review courts as *prima facie* evidence. Part 8, consisting only of paragraph 36, prohibits the award of exemplary damages in competition proceedings.<sup>45</sup> Part 9 covers consensual settlements and the effects on contribution, implementing Article 19 of the Damages Directive and changing the previous default rule for who bears the shortfall in the case of a consensual settlement that underrepresents the share of the settling infringer. This will be explored in more detail below in the section on the effect of consensual settlements.

**30.** If it were not for Brexit, the established practice on disclosure, the undoubted expertise in particular of the Competition Appeal Tribunal, and the new possibility of opt-out proceedings would seem to make the UK a Mecca for damages claimants. Competing jurisdictions vying for these damages actions may still hope for British self-mutilation through a hard Brexit.

F. W.-v. P. ■

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<sup>45</sup> For the narrow circumstances in which exemplary damages were available, see the summary in F. Wagner-von Papp, *Implementation of the damages directive in England and Wales, On-Topic Implementation of EU Directive 2014/104/UE, Concurrences* No. 2-2015, reprinted in *Concurrences 2017 English Edition*, 23, para. 6 and 7.