IMPLEMENTATION OF THE ANTITRUST DAMAGES DIRECTIVE IN THE UK: LIMITED REFORM OF THE LIMITATION RULES?

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1. Introduction

This article will examine the implementation of the Antitrust Damages Directive in the UK, focusing on one central aspect, namely the reforms introduced to the rules on limitation (and prescription) of actions in a competition law litigation context. There has been considerable academic and practitioner literature about private enforcement of EU and domestic competition law in the last twenty years. Competition litigation has developed as a complement to public enforcement of competition law and to ensure that rights infringed by competition law breaches are compensated. The article will outline briefly the development of the laws, rights, procedures and mechanisms introduced through UK and EU law to facilitate private enforcement of competition law in the UK. There has been considerable domestic statutory development of the private enforcement architecture in the UK since the passing of the Competition Act 1998 and this has been supplemented at the EU level, in particular most recently by the adoption of the Antitrust Damages Directive. The Directive was finally introduced in 2014 after more than a decade of policy discussion at the EU level. The Directive seeks generally to introduce a set of provisions to establish a minimum level playing field of procedural and substantive laws to facilitate the recovery of compensation in relation to EU competition law infringements across the EU Member States courts. This article will outline generally the process of implementation of the Directive in the UK. A notable issue is the decision to apply the provisions of the implementing measures to actions involving both infringements of EU law and domestic competition law, despite the more limited EU law scope of the Directive itself. The article will focus on the limitation provisions in the Directive, given the centrality of limitation in the history of competition litigation in the UK, and the potential significance of the revisions to those rules which will be applicable in both an EU and domestic law context. The Directive implementation process in the UK demonstrates this polarisation both generally and specifically in relation to aspects of the revised limitation rules. Accordingly, after discussing the background to development of private competition law enforcement in the UK, the article will consider the interpretation and application of the limitation provisions in the domestic case-law over the last fifteen years. As will be noted, this has been an issue which has dominated the case-law particularly of the specialist Competition Appeal Tribunal. The article will then consider the impact of EU law and focus on the limitation provisions in the Directive and their implementation in the UK, assessing the potential impact on domestic court application of a key issue in competition litigation practice, namely the date the limitation period starts running.

2 Overview of the UK (and EU) Private Enforcement Context

It is important to stress at the outset that this article is focusing on developments in relation to private litigation involving both UK and EU competition law in the courts of the UK. First, much of the case-law reflects the potential for parties to bring proceedings on the basis of domestic and/or EU competition law. Second, the Enterprise Act 2002 made provision for follow-on actions in relation to prior infringements of both the domestic Competition Act prohibitions and Articles 101 and 102. Third, the litigation context in which EU or UK

competition law may be applied before the UK courts is to all extents and purposes identical, in terms of substantive law,[1] procedural law,[2] and more general issues such as collective redress, financing of actions and cost recovery rules.[3] Finally, despite the limited scope of the Antitrust Damages Directive, the UK government's implementing instrument makes its provisions applicable equally to infringements of EU and UK competition law.[4]

2.1 Private enforcement in the UK: legal and institutional infrastructure

It was clearly intended that the prohibitions introduced by the Competition Act 1998 should be enforceable by means of private law actions through normal court processes.[5] The Enterprise Act 2002 ('2002 Act') made further provision for encouraging private actions in relation to breaches of the 1998 Act prohibitions. Under the newly introduced s 47A of the 1998 Act,[6] the Competition Appeal Tribunal ('CAT'),[7] could award damages and other monetary awards where there has already been a finding by the relevant authorities of an infringement of the Chapters I and II prohibitions, or Arts 101 or 102 TFEU. [8] Section 19 of the 2002 Act added section 47B to the 1998 Act, allowing damages claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement[9] – a form of 'consumer representative action'.[10]

The ability to bring a follow-on claim before the CAT did not affect the right to commence ordinary civil proceedings. Accordingly, follow-on actions could, but were not required to, be brought before the CAT.[11] Stand-alone actions and non-monetary claims, prior to the Consumer Rights Act reforms in force as of 1st October 2015, could not be raised before the CAT. Given that claims against multiple parties often combine stand-alone and follow-on elements, such claims were outside the CAT's jurisdiction and had to be raised before the High Court.[12] Another rationale for a claim being raised before the High Court

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[1] See section 60 of the Competition Act 1998.

[2] Ibid. See B Rayment, 'The Consistency Principle: Section 60 of the Competition Act 1998' ch 4 in B Rodger(ed), *Ten Years of UK Competition Law Reform* (DUP, 2010).

[3] See B Rodger, 'The Consumer Rights Act 2015 and collective redress for competition law infringements in the UK: a class Act?' (2015) 3(2) JAE 258-286.

[4] BEIS, 'Implementing the EU Directive on breaches for breaches of competition law: government response' paras 19-20, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577228/damages-directive-consultation-response.pdf.

[5] See A. MacCulloch, 'Private enforcement of the Competition Act prohibitions' in Rodger, BJ and MacCulloch, *the UK Competition Act* above at Chapter 5. See J D C Turner 'The UK Competition Act 1998 and Private Rights' [1999] ECLR 62- 72.

[6] As introduced by s 18 of the Enterprise Act.

[7] For a fuller discussion of the CAT, its role, functions and case-load, see D. Bailey 'The early case law of the Competition Appeal Tribunal' Chap. 2 in Rodger (ed) 2010 supra.

[8] See M Furse 'Follow-On actions in the UK; Litigating Section 47A of the Competition Act 1998' (2013) European Competition Journal 9(1) 79-103.

[9] Section 47B(1) and (4).

[10] Case no 1078/7/9/07 *Consumers' Association v JJB Sports plc*. See discussion of the case and its background by Rodger, chapter 13, in B Rodger (ed) *Landmark Cases in Competition Law: Around The World in Fourteen Stories* (Kluwer Law International, 2012).

[11] As subsequently demonstrated for example in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France*), [2007] EWHC 2394, (Ch) and [2008] EWCA Civ 1086 (CA).

[12] See for instance *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd* [2010] EWCA Civ 864, CA. See also more recently, *Nokia Corporation v AU Optonics Corporation and* others [2012] EWHC 732 (Ch) and *Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch).

related to the fact that a CAT action could not be raised until all public enforcement appeal processes have been finalised.[13]

Since the Enterprise Act 2002 reforms, the CAT has played a significant role in UK competition law enforcement generally, it has a key specific function in relation to private enforcement, and its role has been significantly enhanced following the introduction of the Consumer Rights Act 2015.[14] That Act made various amendments to the Competition Act as of 1st October 2015, partly to enhance the role of the CAT as the specialist forum for competition law disputes in the UK.[15] A central aspect of the reform was the extension of the competence of the CAT under section 47A of the Competition to standalone actions in addition to 'follow-on' actions where there is a prior infringement decision.[16] This will mean that claimants will not have to wait until an infringement decision by the CMA or Commission becomes final before raising an action before the CAT.[17] Furthermore, the CAT now has power (at least in proceedings in England and Wales and Northern Ireland) to grant injunctions.[18]

2.2 EU Law Developments

Alongside the Commission's policy-making role, the European Court has played a fundamental role in shaping the development of competition litigation across the EU, including the UK, in a range of preliminary rulings on rights and remedies generally under EU law, and specifically in relation to EU competition law.[19] EU law requires Member States to provide effective protection of rights granted under Community law to individuals against other individuals,[20] but the general principle is that remedies for breaches of EU law rights are a matter for the national law.[21] The European Court's role and influence in relation to remedies for infringement of EU law was exemplified by its rulings in the *Manfredi* and *Crehan* litigation in the English and Italian courts respectively. The *Crehan* ruling[22] shed light on the extent to which EU law requires the effective harmonisation of national remedies to

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[13] *Emerson III* [2008] CAT 8 involving claims against parties who had appealed to the General Court; see also *National Grid Electricity Transmission Plc v ABB Ltd* [2009] EWHC 1326 (Ch).

[14] See B. Rodger, [2008] ECLR 96 supra.

[15] See A Andreangeli, 'The Changing structure of competition enforcement in the UK: The Competition Appeal Tribunal between present challenges and an uncertain future' (2015) 3(1) JAE 1-30; A Robertson 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) Competition Law Journal 275.

[16] Section 47A (2) extends the competence of the CAT to deal with claims involving 'alleged infringements'. See *Bord Na Mona Horticulture Ltd v British Polythene Industries plc* [2012] EWHC 3346 (Comm). paras 39-41.

[17] See the discussion further infra re the suspensive limitations on raising an action at the CAT prior to these changes. See P Akman 'Period of Limitations in follow-on competition cases: when does a 'decision become final?' (2014) 2(2) JAE 389-421.

[18] Section 47A(3).

[19] See for instance *Wyatt and Dashwood's European Union Law*, Hart Publishing, 2014, particularly Chapters 7-9. There has been considerable debate surrounding the relationship between Community supremacy and national procedural autonomy. See for example S Prechal, "Community law in the national courts: the lessons from Van Schijndel" (1998) CMLR 681; G De Burca, "National procedure rules and remedies: the changing approach of the Court of Justice", in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (1997), 37.

[20] Case 127/73 *BRT v SABAM* [1974] ECR 51.

[21] Cf AG Gerven in *HJ Banks v British Coal Corporation* (1994) 5 CMLR 30.

[22] Case C-453/99 *Courage v Crehan* [2001] I-6297. See A. Komninos 'New Prospects for private enforcement of EC Competition Law: Courage v Crehan and the Community right to damages' [2002] 39 CMLRev 447; A. Andreangeli, A '*Courage Ltd v Crehan* and the Enforcement of Article 81 before National Courts' [2004] ECLR 758.

ensure consistent treatment of EU competition law.[23] In the absence of EU rules governing the issue, it was for each legal system to determine how the rights derived from EU law were to be safeguarded: 'provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness).'[24] The *Manfredi* ruling reiterated the general principle.[25]
The principle of the effectiveness of EU law created rights is fundamental for national courts in dealing with claims (or defences) based on EU competition law and underpins the Antitrust Damages Directive[26] in the context of damages actions particularly as made clear in Recitals 3 and 4 and set out in Articles 3[27] and 4,[28] of the Directive. The enforcement landscape has been changing, albeit slowly, particularly since the Commission has sought to encourage private enforcement since the early 1990s,[29] partly to enhance the deterrence and effectiveness of EU competition law and alleviate its own resource limitations. The Ashurst Report and subsequent Green and White Papers on 'Damages actions for breach of the EC Antitrust Rules',[30] demonstrated the Commission's intention to consider further ways to facilitate private competition law enforcement across the EU. Following the Commission White Paper on damages actions for breach of the EC antitrust rules,[31] the subsequent Commission Consultation on 'Towards a Coherent European Approach to Collective Redress'[32] and 2013 Commission Communication[33] and Recommendation on Collective Redress[34] indicated a particular Commission focus on effective consumer redress. Nonetheless, the Commission led developments have culminated with the adoption (after considerable academic, practitioner and legislative debate) of the Antitrust Damages Directive in 2014.[35] The Directive required to be implemented by all Member States by 27 December 2016.[36] The Directive seeks to harmonise aspects of private litigation across the

[23] See also Case C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 considered further below**.**
[24] *Crehan*, at para 29.
[25] See *Manfredi* supra at para. 71.
[26] Effective judicial protection is enshrined in Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights as noted by Recital 4 of the Directive. See the discussion on effectiveness by Dunne, N, 'The Role of Private Enforcement within EU Competition Law' (2014) 16 Cambridge Yearbook of Eueopean Legal Studies 143-187 at 157 and 181-.
[27] See also Recital 10.
[28] Article 4 makes provision for the Principles of effectiveness and equivalence.
[29] See Notice on Co-operation between the Commission and the National Courts, OJ C39/6, 1993. See also Case T 24/90 *Automec Srl v Commission* [1992] 5 CMLR 431.
[30] Ashurst 'Study on the conditions of claims for Damages in case of Infringement of EC Competition Rules,' 31st August 2004, available on commission website at http://www.competition-commission.org.uk; Commission Green paper, 'Damages Actions for breach of the EC antitrust rules' Brussels, 19.12.2005 COM (2005) 672 final. See also T Eilmansberger 'The Green Paper on Damages Actions for breach of the EC Antitrust Rules and Beyond: reflections on the Utility and Feasibility of Stimulating Private enforcement Through legislative action' [2007] CML Rev 44(2) 431-478.
[31] At *http://ec.europa.eu/competition/antitrust/actionsdamages/ documents.html#link1.* 'A little more action please! The White Paper on damages actions for breach of the EC antitrust rules' [2008] C.M.L. Rev. 609.
[32] At http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html.
[33] Communication, Strasbourg, 11.6.2013 COM(2013) 401 final.
[34] Commission Recommendation *OJ L 201, 26.7.2013, pp. 60–65.*
[35] Directive 214/104/EU [2014] OJ L349/1.
[36] See http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html. See forthcoming project by Rodger, Marcos and Sousa Ferro on the implementation of the Directive across the EU.

EU,[37] although it only applies to infringements of national competition law to the extent that the relevant anti-competitive behaviour has an effect on inter-state trade.[38] It contains provisions *inter alia* to: provide easier access to evidence through minimum disclosure rules;[39] effectively limit access to leniency documentation,[40] provide for decisions of all NCA's to constitute proof of infringement before all Member State civil courts;[41] establish common limitation periods;[42] give protection to successful leniency immunity applicants, who will only be liable to compensate their own purchasers as opposed to other participants in an infringement who will be liable for the full harm caused;[43] establish rules on the passing-on of overcharges;[44] and, introduce a rule on presumption of harm.[45]

3. Implementation of the Directive in the UK

The relevant government department, Business Innovation and Skills launched a lengthy period of consultation on the implementation of the Directive on January 28 2016.[46] The consultation ran for 6 weeks and closed on 16 March 2016, involving meetings with stakeholders, elicited 26 responses, from competition lawyers, regulators, consumer representative bodies and individuals. BIS' successor Department, Business Energy and Industrial Strategy published the outcome of the consultation on 20 December 2016:- 'Implementing the EU Directive on Damages for breaches of competition law: government response'.[47] It was decided to adopt a 'light-touch' implementation approach, wherever possible relying on 'existing legislation, case law or Court Rules. Where necessary we will legislate to ensure that we fully implement the directive'.[48] The Decision confirms that despite the impending Brexit outcome, the UK remains a full EU Member State until the exit negotiations are completed and will continue to negotiate, implement and apply EU legislation. The Damages Directive Statutory Instrument- Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment) Regulations 2017 'the Regulations'), was laid before Parliament

[37] For general discussion, see N Dunne, 'Courage and Compromise: The Directive on Antitrust Damages' E.L.Rev. 2015 40(4) 581-597 and Liaonos, I, Davis, P and Nebbia, P, *Damages Claims for Infringement of European Competition Law*, OUP 2015, Chapter 3.

[38] See Recital 10 of the Directive and Lianos, Davis and Nebbia supra chapter 3 at paras 3.05-3.06. See also Dunne 2015 E.L.Rev supra at 584. As generally under EU law, where there is no effect on inter-state trade, the Directive is not concerned with the existence of variable rules on procedure and remedies as between different legal systems within a Member State as they apply to potential infringements of domestic (competition) law. Nonetheless see further infra.

[39] Antitrust Damages Directive Art 5.

[40] Ibid, Arts 6-7. This is arguably the most controversial provision. See Case C-390/09 *Pfeliderer AG v Bundeskartellamt* [2001] I-5161, and Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* [2013] 5 CMLR 19 and the voluminous academic commentary, eg A Singh, 'Disclosure of Leniency Evidence: Examining the Directive on damages actions in the aftermath of recent ECJ rulings' [2014] GCLR 200-213.

[41] Ibid, Art 9.

[42] Ibid, Art 10.

[43] Ibid, Art 11.

[44] Ibid, Arts 12-15.

[45] Ibid, Art 16.

[46]https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive.

[47]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577228/damages-directive-consultation-response.pdf

[48] Ibid, exec Summary p3.

on 20 December, and is subject to Parliamentary debate and approval.[49] As noted above, the Directive only applies where here is a breach of EU competition law, but the UK consultation document questioned the creation of a two tiered system if the required reforms only applied to EU law claims. There were concerns about uncertainty and confusion and the potential increase in satellite litigation and on the basis of consultation responses it was decided to implement the Directive as a single regime applying to all competition law damages claims irrespective of the legal basis of the original competition law infringement.[50] Accordingly, the reforms to limitation and prescriptive periods set out in Part 5 of the Regulations[51] apply equally to claims in respect of EU and UK competition law breaches.

As with all legislative proposals, the Government Implementation proposal included a detailed impact assessment focusing in particular on the costs to businesses of introducing the measures. The process and outcomes in relation to the various issues also demonstrate an underlying tension between access to justice for claimants (in particular consumers) and prejudice to businesses. This is a common theme in relation to the introduction of measures to facilitate private enforcement, is expressly recognised in the post-consultation document, for instance in relation to the application and transitional arrangements of the newly introduced measures. This perennial debate about achieving the appropriate equilibrium between facilitating the effectiveness of competition law rights on the one hand and avoiding excessive cost and potential liabilities for business as a result of excessive litigation underlies each of the key areas revised as a result of the implementation of the Directive, including the interpretation and application of the rules on limitation. This tension was also evidenced during the passage of the Consumer Rights Act 2015 in relation to the revised mechanisms introduced for collective redress,[52] with scaremongering about the introduction of an American style litigation culture which might simply 'distract' business. There is some academic scepticism of those business oriented views being depicted by Rathod and Vaheesan as the 'business victimhood mythology' which has skewed debate and limited the development of private rights of action even in the US.[53]

4. Prescription and Limitation

In order to facilitate competition litigation, there are three related issues which are of particular relevance in this context. The first relates to discovery by party litigants;[54] the

[49] Which introduces section 47F and Schedule 8A (Further Provision about claims in respect of Loss or Damage before a court or the Tribunal) to the Competition Act 1998. Other provisions will be implemented through rules made by Civil procedure Rules Committee, the Scottish Civil Council Justice Secretariat, and the NI Court of Judicature Rules Committee, respectively in addition to specific rules for the Competition Appeal Tribunal.

[50] See R Kral 'On the Choice of Methods of Transposition of EU Directives ' (2016) European Law Review 220.

[51] Note s 6 of the Prescription and Limitation (Sc) Act 1973.

[52] See B Rodger, 'The Consumer Rights Act 2015 and collective redress for competition law infringements in the UK: a class Act?' (2015) 3(2) JAE 258-286. See also Secretary of State for Business, Vince Cable, at 2nd Reading of the Bill in the House of Commons on 28 January 2014, Hansard, HC, 28 January 2014, Col 776. Baroness King of Bow, Grand Committee, House of Lords, 3 November 2014, col 570. See also at col 575 where she referred to a 'US-style litigation environment' in which she considered that opt-out collective proceedings could 'end up distracting businesses' and the evidence from the US was that they 'do not satisfy consumers' ..

[53] See J Rathod and S Vaheesan 'The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View from Across the Atlantic' (2015) 14 UNHLR 303-375.

[54] *Civil Procedure Rules* Part 31; in particular Part 31.6(b). See Rules 60-65 of the Competition Appeal Tribunal Rules 2015. The process is known as 'recovery' in Scots law. CPR Practice Direction 18 para. 1.2: 'A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable

second is the extent to which private actions may be facilitated by governmental enforcement action involving reliance on prior infringement decisions;[55] and the third is the limitation periods within which competition litigation must be raised. It is on this latter aspect that the remainder of the article will focus. First we will outline the development of the domestic competition limitation rules. Then we will look at European developments in this area notably the provisions in Art 10 of the Directive. Finally we will consider the implementation of the Directive's limitation rules and the extent to which this is likely to constitute a significant reform of the existing position under domestic law in the UK.

4.1 General Limitation Rules

With the exception of personal injury cases, English law generally allows for a 6 year limitation period.[56] There is, however, special provision for postponement of the limitation period in case of fraud, concealment or mistake under 32 of the Limitation Act 1980. In relation to secretive cartels in particular, s32(1)(b) has potential relevance where 'any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant'. In such cases, the time limit will not run until the claimant has discovered the concealment or could have done so with reasonable diligence.[57]
In Scotland, non-personal injury delictual claims have a prescriptive period of 5 years.[58] Generally the prescriptive period runs from the point when the loss, harm or damage occurred.[59] When the pursuer is unaware of the loss, harm or damage they have suffered, the prescriptive period runs from the point they did, or reasonably should have, become so aware.[60]

4.2 Limitation Rules at the CAT

The limitation rules for actions to be raised before the CAT have been the subject of extensive litigation and been particularly problematic for the CAT, especially in relation to

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the first party to prepare his own case or to understand the case he has to meet.' See *National Grid Electricity transmission plc v ABB Ltd and ors* [2014] EWHC 1555 (Ch). Article 5(1) of the Directive provides that where a claimant provides a 'reasoned justification',[54] national courts shall order disclosure of relevant evidence within their control by the defendant or a third party.

[55] Section 58A to the 1998 Act provides that in any action for damages for an infringement of the 1998 Act prohibitions or Articles 101(1) or 102, a court will be bound by a decision of the CMA or CAT that any of the prohibitions have been infringed, if the requisite appeal process has taken place or the period for appeal lapsed.
The Consumer Rights Act 2015 revised the scope of the current section 58A of the Competition Act 1998, with effect from 1 October 2015 (in relation to decisions made after that date). Subject to this temporal limitation, it provides that prior infringement decisions are binding both in relation to proceedings before the courts and the CAT under either Section 47A or 47B. Article 9(1) of the Directive provides that a final infringement decision by the national competition authority (or review court) in the court's own Member State 'shall be deemed to be irrefutably established for the purposes of an action for damages'. Section 58A of the Competition Act already makes provision for this and will not require amendment.

[56] *Limitation Act* 1980 s2.

[57] See for example *Arcadia Group Brands and others v Visa Inc and others*[2015] EWCA Civ 883 discussed further infra.

[58] Prescription and Limitation (Scotland) Act 1973 s6. See D Johnson, *Prescription and Limitation.* 2nd edn, W. Green/SULI, 2012)

[59] *ibid.* s11.

[60] *Ibid.* s11 (3).

the calculation of the period of limitations in follow-on actions where there are multiple infringers some of whom appeal the infringement decision of the competition authority and some of whom do not. This was a recurring problem in the UK in the context of follow-on actions before the CAT, up to the Supreme Court ruling in *Deutsche Bahn* and prior to the reforms in the Consumer Rights Act 2015.[61] Until the Consumer Rights Act 2015, the limitation rules before the CAT were distinctive from the 6 year limitation period for High Court claims, and dependent on the post-infringement appeal process.

There have been numerous judgments focused directly on time-bar issues by the CAT. The running of the relevant limitation period was at least partly dependent on when the underlying infringement decision of the competition authority became final and accordingly binding. In *Emerson I*[62] *the* Emerson claimants were seeking damages following the Commission decision in *Electrical and Mechanical carbon and Graphite Products*. Rule 31 of the Tribunal Rules[63] provided that a claim had to be made within 2 years of the relevant date, which is the later of the following –(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made; (b) the date on which the cause of action accrued. The claimants were direct purchasers of mechanical carbon and graphite products and sought exemplary damages. Morgan Crucible was a successful leniency applicant and did not bring an action for annulment of the relevant Commission decision, although other parties to the decision brought annulment applications before the General Court. The CAT emphasised that section 47A refers to any such appellate proceedings and therefore, although Morgan Crucible did not appeal, the time limit for raising an action would not start to run until the appeal process had been completed, and accordingly the action against Morgan Crucible was not time-barred. A similar issue arose in *BCL Old Co Limited v BASF and others* I,[64] a post-*Vitamins* indirect purchasers' claim. BASF appealed against the Commission decision to the General Court but did not appeal against the infringement, and thereby claimed that the possibility of appeal against infringement ended in January 2002. The General Court determined the appeal on 15 March 2006 and the CAT claim was commenced on 13 March 2008. The CAT considered in detail the earlier *Emerson I and III* rulings and held that the claim was not time-barred.[65] The Court of Appeal overturned the CAT's decision,[66] emphasising the distinction (made clear in s 47A(6)) between a decision that a relevant prohibition has been infringed and a decision imposing a penalty. Accordingly, the application for annulment of the fine did not extend the period within which a claim could be made, and the claim was accordingly time-barred. In *Deutsche Bahn AG v Morgan crucible Company Plc and others*,[67] the Appeal Court, overruling the CAT, held that the limitation period was suspended vis-a-vis a non-appealing addressee of a Commission decision. However, the Supreme Court,[68] ruled that a Commission Decision establishing infringement of article 81 (now article 101) constituted in

[61] P Akman 'Period of Limitations in follow-on competition cases: when does a 'decision become final?' (2014) 2(2) JAE 389-421.

[62] [2007] CAT 28.

[63] Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) adopted pursuant to Part 2 of Sch. 4 to the 2002 Act.

[64] [2008] CAT 24.

[65] See in particular at para. 34.

[66] [2009] EWCA Civ. 434, CA.

[67] [2012] EWCA Civ 1055. See the earlier CAT ruling at [2011] CAT 16 .

[68] *Deutsche Bahn AG and others v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24 On appeal from: [2012] EWCA Civ 1055.

law a series of individual decisions addressed to its individual addressees. Accordingly, the only relevant decision establishing infringement in relation to an addressee who does not appeal is the original Commission Decision, and therefore any appeal against the finding of infringement by any other party is irrelevant to a non-appealing defendant. Under section 47A(5), the date of the relevant infringement decision was the date of the Commission decision and therefore the follow-on claim for civil damages was out of time.
The outcome of the Supreme Court ruling in *BCL Old Co Ltd v BASF SE (formerly BASF AG*),[69] confirmed why in practice claims were raised in the High Court either to avoid the suspensive requirements inherent in the CAT jurisdiction or to take advantage of the longer 6 year limitation period as opposed to the more restrictive 2 year period at the CAT. Nonetheless, the Consumer Rights Act 2015 amended the Competition Act 1998 to introduce section 49E which aligns the limitation period for all claims arising before the CAT in proceedings under s47A (as revised) or collective proceedings with the relevant limitation rules in England and Wales and Scotland.[70]

4.3 EU Law and Limitation Periods: Article 10 of the Directive.

There has been limited consideration of the issue of limitation periods by the European Court in the context of competition litigation.[71] In *Manfredi*, the European Court merely stated that:' it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Art.81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.'[72] The Commission White Paper recognised the importance of imitation periods in providing legal certainty and also that they could potentially act as a significant obstacle to the recovery of competition law damages. The White Paper accordingly recommended a set of harmonised limitation rules for competition law damages actions. Consequently, the Antitrust Damages Directive makes specific provision in relation to limitation periods, with the limitation period set out in Article 10(3):- 'Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.' Article 10(2) provides that the period shall not begin to run before the infringement 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

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[69] [2012] 1 W.L.R. 2922. The SC held that the statutory limitation period for a claim for damages under the Competition Act s47A and the Competition Appeal Tribunal Rules 2003 r.31 was sufficiently clear, precise and foreseeable and did not breach European principles of effectiveness and legal certainty.

[70] And Northern Ireland, in accordance with the Limitation (Northern Ireland) Order 1989. Note that the limitation period is suspended during the certification process for collective proceedings under s47E(3) to (6). However, it should be noted that as a result of Rule 119 of the revised CAT rules (The Competition Appeal Tribunal Rules SI 2015/1648), the old Competition Act and Tribunal rules on limitation of actions (and the suspensive effect of appeal proceedings) will continue to apply to all claims (including in collective proceedings) to which section 47A applies where the claim arises before 1 October 2015. See discussion by De La Mare at http://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/.

[71] See for instance *Uniplex (Uk)Ltd v NHS Business Services Authority*, Case C-406/08 [2010] 2 CMLR 47 in relation to limitation periods for proceedings relating to public procurement under Directive 89/665.

[72] Case C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 at para. 82.

him; and (c) the identity of the infringer.' These requirements would appear to require a modified approach by the English courts at least to the issue of the limitation period starting point.[73] Furthermore, Article 10(4) requires the minimum limitation period to be interrupted/suspended during any competition authority investigation in to a competition law infringement to which the damages action relates, and the suspension should only end one year after the infringement becomes final.

5. Implementation of the Directive Limitation Rules in the UK

The introduction of a five year limitation period is relatively insignificant in itself, given the existing limitation periods in the different legal systems of the UK. After consultation on whether the different 5 and 6 year periods discussed above should remain, with a small minority of respondents suggested a uniform period of 5 years across the UK, the government decided that no changes were necessary to meet the requirements of the Directive, and therefore the different periods would be maintained as under the current legislation:- the Limitation Act 1980 (6 years) the Limitation (Northern Ireland) Order and the Prescription and Limitation (Scotland) Act 1973.[74] Although the adoption of the chequered flag period of 5 years in the Directive would suggest minimal upheaval, there are two mechanisms which are fundamental to the operation of the limitation rules in a competition law context, and which may result in a significant shift as a result of the implementation of the Directive limitation provisions. The first is the trigger or starter gun provision: when the limitation period actually starts to run; and the second is the yellow flag to suspend the operation of the limitation period. We will outline the latter briefly before focusing on the fundamental issue of when the limitation period actually starts to run.

Of course, as discussed above there were already suspensive provisions in relation to proceedings before the CAT under the old CAT rules, but given the limitation rules generally do not make any provision about infringement proceedings by competition authorities, it was decided that the Directive provision in Art 10(4) would be effectively copied-out in para 21 of Part 5 of the Regulations. This provides:-—(1) Where a competition authority investigates an infringement of competition law, the period of the investigation is not to be counted when calculating whether the limitation or prescriptive period for a competition claim in respect of loss or damage arising from the infringement has expired.

(2) The period of an investigation by a competition authority begins when the competition authority takes the first formal step in the investigation.

(3) The period of an investigation by a competition authority ends—

(a)if the competition authority makes a decision in relation to the infringement as a result of the investigation, at the end of the period of one year beginning with the day on which the decision becomes final, and

(b)otherwise, at the end of the period of one year beginning with the day on which the competition authority closes the investigation.

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[73] See discussion infra re Arcadia v Visa [2015] EWCA Civ 883 and the Limitation Act 1980 s32(1(b). In the Scottish context, see D Johnston, *Prescription and Limitation 2nd edn* (Green/Suli: 2012), and s 11(1)-(3) of the Prescription and Limitation (Sc) Act 1973, and in relation to s11(3) see for instance *Morrison v ICL*, [2014 UKSC 48.

It is arguable that the continued application of the old CAT limitation rules to claims arising prior to 1 October 2015 (as a result of the Tribunal Rules transitions provisions (Rule 119)) would contravene the Directive's minimum limitation period. But see Government response December 2016 supra para 38.

[74] See Regulations para 18.

This provision will be significant in practice given its application to investigations by the CMA, European Commission and other Member State competition authorities.

5.1 Triggering the Limitation Period

Nonetheless the most significant issue in relation to limitation generally, and specifically in the context of competition litigation is the date when the limitation period commences- the trigger point. This is particularly contentious in the competition law context[75] given the secretive nature of many of the types of anti-competitive behaviour which harm potential claimants, in particular collusive behaviour by cartelists, the core practice area for competition law damages claims. Accordingly, it is crucial to know when the claimant is deemed to be sufficiently aware as to trigger the start of the limitation period. Article 10(2) of the Directive provides that the period begins to run when 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 him; and (c) the identity of the infringer. Given the absence of a specific provision in the UK legal systems, the Government has decided to effectively copy out this provision. These are set out in Part 5 of the Regulations. Para 19(1) states that the limitation or prescriptive period begins on the later of the day the infringement ceases or the claimant's knowledge. The latter is according to para 19(1), when the claimant first knows or could reasonably be expected to know:-

(a) Of the infringer's behaviour;
(b) that the behavior constitutes an infringement of competition law;
(c) that the claimant has suffered loss or damage arising from that infringement; and
(d) the identity of the infringer

The key question is the extent to which the specific knowledge requirements in a competition law context will change the existing position in domestic law. As outlined above, the period in England and Wales is 6 years from the date on which the cause of action accrued- where the infringement occurred and the victim suffered damage. S 32(1)(b) of the Limitation Act provides that the limitation period does not begin, where any fact relevant to the claimant's right to action has been deliberately concealed by the defendant, until the concealment has been discovered, or could be with reasonable diligence. Some uncertainty surrounded the concept of reasonable diligence to discover the concealment. What level of information in the public domain would be sufficient to either constitute knowledge or the absence of reasonable diligence? It has been doubted, given the requirements for success in a damages action in relation for example to a secret cartel infringement of art 101, that the limitation period would ever commence, and whether the level of information publicised by competition authorities, at any stage of their investigations, would ever provide sufficient knowledge to potential claimants to trigger it.[76] A related issue here is whether claimants would have sufficient information to substantiate their claim in court. Accordingly, the limitation rules generally cannot be viewed in isolation, and in the English litigation process the question has been effectively whether the claimant can (or should be able to) satisfy the 'statement of claim' test such that the claim would not

[75] P Scott, M Simpson and J Flett 'Limitation Periods for Competition Claims- The English Patient' (2011) GCLR 18; V Soyes 'The Commencement of the subjective limitation periods in private competition litigation' (2013) GCLR 7.

[76] Soyez supra.

be struck out for a failure to disclose reasonable grounds for bringing the claim.[77] There are no specific rules for pleading and proof in competition litigation. In practice a significant number of claims in the English courts are considered at summary judgment stage,[78] and the approach by the courts to defendant's attempts to strike out claims and have them summarily dismissed under rule 3.4 CPR even before any evidence is adduced at trial is critical.[79] Essentially,[80] the court will not grant an application to strike out a claim generally unless it is bound to fail; and specifically where the claim is for damages arising out of a clandestine cartel, the court will adopt a more generous approach to pleadings.[81]

The Limitation Act provisions were finally considered by the English courts in a competition law context in *Arcadia v Visa*.[82] This involved claims brought by retailers against Visa Europe and Visa Inc for breach of EU, UK and Irish competition law in relation to the inflated price for accepting credit and debit cards as a result of the multilateral interchange fee ('MIF') set by Visa. It was held by the High Court that the level of information published by the Commission in 2001 and 2002 in two separate parts of the public enforcement process were sufficient for the claimants to establish the key ingredients of the claim. The Court of Appeal affirmed that none of the concealment issues raised by the appellant were sufficient to postpone the limitation period as they had sufficient facts to satisfy the statement of claim test at that stage. The Court of Appeal stressed that the Directive did not apply and that the application of the limitation rules in this way was not incompatible with the EU effectiveness principle. The court of Appeal noted (and affirmed the outcome):-

'29 The Judge accepted (at [101]) that the full picture was not available to the appellants. He concluded (at [108]), however, that the facts which were known, or discoverable by the exercise of reasonable diligence, by the appellants before 2007 were sufficient to enable them to plead a statement of claim which established a *prima facie* case and that the issue under section 32(1)(b) of the 1980 Act is not concerned with other facts which the appellants say they did not, or still do not, know. He said (at [109]) that the question was suitable for summary judgment and, for those reasons, granted the relief sought in the applications.'

Various issues arise for discussion in the wake of *Arcadia v Visa* and the implementation of the Directive's provisions. The first is the extent to which the approach adopted in *Arcadia* would be significant in cartel cases involving secret conduct where the question of limitation is raised, and whether this complete lack of information on the part of potential claimants may be overcome and a limitation point defeated by the 'limited' publicly available information in competition authority publications such as press releases. The second is the

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[77] See *Arcadia v Visa* supra.

[78] See B. Rodger 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I'[2006] ECLR 241; Part II [2006] ECLR 279; and Part III' [2006] ECLR 341. See also B Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008- Part I' (2009) Global Competition Litigation Review, 93-114; Part II, 136-147 and 'Competition Law litigation in the UK Courts: A study of all cases 2009-2012' [2013] 6(2) GCLR 55-67.

[79] Ibid.

[80] For application of the principles see *Bord Na Mona Horticulture Ltd v British Polythene Industries plc* [2012] EWHC 3346 (Comm).

[81] See *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd* [2010] EWCA Civ 864, CA . See for instance Sales J in *Nokia Corporation v AU Optonics Corporation* [2012] EWHC 731 (Ch) at paras 62-67. As Flaux J indicated in *Bord Na Mona*, supra, at para 30:- the 'court will tend to allow a more generous ambit for pleadings, where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of defendants..' The equivalent provision for the CAT is Rule 43 of the Competition Appeal Tribunal Rules 2015.

[82] [2015] EWCA Civ 883.

potential impact of implementing the Directive's specific limitation rules. This involves three points, each of which will allow for a more extended limitation period than (at least under English law) current provision. The first is the reintroduction in the UK context of a general suspensive requirement in relation to public authority competition investigations. The second, and arguably most contentious, is that Art 10(2) as implemented by para 19 of the Regulations prescribe the type of information the claimant must be aware of before the limitation period can commence. These requirements must be met irrespective of minimum statement of claim thresholds. Consequently, the level of required knowledge would certainly seem to be set at a considerably higher threshold than the discussion in *Arcadia v Visa* would suggest. It is also particularly instructive in this context to look at the position under Scots law of prescription generally. There are no cases in the Scottish courts on the interpretation of the prescriptive provisions in the Prescription and Limitation (Sc) Act 1973 in relation to competition claims. However, the Supreme Court considered the issue in *Morrison v ICL*,[83] a nuisance action on the issue of what is required for constructive knowledge and the prescriptive period of five years to commence. S 11 (1) provides that an obligation to make reparation becomes enforceable on the date when the loss, injury or damage occurred. S11(2) provides an equivalent provision to Art 10(2) of the Directive in establishing that the prescriptive period will not commence until the date when the act, neglect or default, ceased. Most importantly, Section 11(3) provided an exception where, upon the occurrence of the damage, the claimant was not aware, and could not with reasonable diligence have been aware, that "loss, injury or damage caused as aforesaid" had occurred. The question was whether the words "caused as aforesaid" meant that the claimant had to be aware only of the occurrence of the damage, or whether he had also to be aware that the damage had been caused by an act, neglect or default. The majority in the Supreme Court[84] ruled that the proper approach was to read the word "aware" as referring only to the fact of the damage. The minority dissented and Lord Hodge considered the correct interpretation of s.11(3) was that a claimant had to have actual or constructive awareness both that he had suffered more than minimal loss, and of the acts or omissions which had caused that loss. Interestingly, he noted as follows:- '……the Scottish Law Commission recorded in 1989 that…… there was doubt whether the discoverability formula in section 11(3) required knowledge of the cause of the damage. It recommended that the law be clarified by amending the legislation to state expressly that the discoverability formula included knowledge (a) that the loss, injury and damage was attributable in whole or in part to an act or omission and (b) of the identity of the defender. There has been no legislation to implement that report.'[85] However, the Directive provision on the level of knowledge required to trigger the commencement of the period would in effect overrule the position as set out in *Morrison*, and is different and more onerous, from a defendant's perspective than the position as set out in *Arcadia*.[86] The third point is that at least Scots law already makes provision for the prescriptive period not to commence until after the cessation of the illegal behaviour as now required by the Directive provisions. Accordingly despite the 5 year headline for the Directive's limitation provision, it is suggested that its implementation introduces fairly radical reform to the practise of competition litigation

[83] [2014] UKSC 48; 2014 S.C. (U.K.S.C.) 222; 2014 S.L.T. 791; 2014 S.C.L.R. 711

[84] Lords Reed, Neuberger and Sumption.

[85] See D Johnston supra, pp187-196.

[86] See *Uniplex (Uk)Ltd v NHS Business Services Authority*, Case C-406/08 [2010] 2 CMLR 47 in relation to limitation periods for proceedings relating to public procurement under Directive 89/665.

involving both EU and UK competition law, and certainly appears to recalibrate the procedural advantage in favour of claimants. However, this leads to a third issue, namely the question whether the new constructive knowledge requirements will be retained as part of the competition limitation rules in the legal systems of the UK post-Brexit when the UK is no longer an EU Member State.[87]

The fourth, final significant issue in relation to the implementation of the Directive's limitation provisions concerned whether they were to be implemented prospectively or retrospectively. Art 22 of the Directive provides that substantive provisions are not to be applied retrospectively. The consultation document proposed that the limitation provisions should be deemed to be substantive law and accordingly applicable only from commencement of the transposition instrument. A majority of respondents supported the latter approach on the basis of concerns that businesses would otherwise take on contingent liabilities for longer than currently.[88] The decision was taken that limitation is a substantive issue, that time-barred claims could not be revived as a result of implementation of the Directive[89], and accordingly the revised limitation provisions will only apply where the elements of the infringement begin and the harm occurs, after the commencement of the implementing legislation.[90] It is accepted, and in accordance with existing statutory provision and CAT case-law, that limitation periods are substantive legal provisions by nature.[91] Nonetheless, it is suggested that the non-application of the new limitation provisions in cases where the infringement has begun before commencement but is continuing, may be incompatible with the Directive which specifically provides that the limitation period will not commence until after the cessation of the infringing behaviour.[92]

6. Conclusions

The Antitrust Damages Directive sets out to facilitate competition law damages actions across the EU by providing a minimum level of harmonisation of aspects of the procedural and substantive laws of the Member States in relation to such litigation. Although the focus in much of the academic commentary has been on the relationship between discovery and leniency documentation, and the passing-on defence and standing for indirect purchasers, in practice the formulation, interpretation and application of the limitation periods are of fundamental significance to competition litigation practice. The article has discussed the implementation of the Directive in the UK with particular focus on the Directive Article 10 provision for a specialised set of limitation (and prescription) rules. Although *prima facie* the establishment of a minimum 5 year limitation period is one of plus ca change (with the 6 and 5 year periods in England and Wales and Scotland respectively being retained), it must be stressed that implementation of Article 10 introduces significant change to the determination of the limitation and prescription periods for competition damages actions in

[87] See Andreangeli supra.

[88] See discussion supra at 3. Implementation of the Directive in the UK.

[89] Government decision, December 2016 supra, paras 57-62.

[90] This may not be compatible with the Directive which focuses on when the activity ceases as the limitation period cannot start until that date.

[91] In England and Wales, see FLPA s 1; and in Scotland see s23A of the P and L (Sc) Act 1984; see also 1240/5/7/15 *Deutsche Bahn AG and Others v MasterCard Incorporated and Others*; *1244/5/7/15 Peugeot Citroën Automobiles UK LTD and Others v Pilkington Group Limited and Others*; [2016] CAT 14.

[92] Art 10(2).

relation to infringements of both EU and UK competition law. The most significant reform relates to when the limitation period begins to run- the trigger point. First, the Directive ensures that this will not take place until after the illegal activity has ceased. The second and potentially significant deviation from existing practice concerns the claimant knowledge requirements to trigger the limitation period.[93] These would appear to potentially shift the litigation balance in favour of competition law claimants vis-à-vis businesses which (allegedly) infringe competition law. This is no limited reform of the limitation rules in competition litigation practice. It will be interesting to note the extent to which this legislative reform is maintained post-Brexit.

[93] See