Executive Summary

EU Directive 2014/104/EU (the “Damages Directive”) was due to be transposed into Member States’ national laws by 27 December 2016 and is intended to harmonise the rules governing actions for damages relating to infringements of competition law.

While a number of Member States are yet to transpose the Damages Directive despite the deadline having passed, some clear differences in approach are emerging regarding the extent of its retroactive application, most notably as regards the applicable limitation period.

From the perspective of legal certainty, it is important that the potential for retroactive application is as limited as possible and those Member States that are yet to implement should seek to learn from those ahead of them. However, a cautious approach to retroactive application may lead to significant delays for claimants in getting the benefit of the Damages Directive. Member States therefore need to strike an appropriate balance.

The differing transitional regimes being adopted by Member States in this regard mean that, while the Damages Directive is intended to introduce greater consistency between competition damages regimes in different Member States, the process of assessing and managing litigation risk in the short term has been complicated.

Retroactivity prohibition in the Damages Directive

Article 22(1) of the Damages Directive provides that Member States should ensure that the substantive (as opposed to procedural) provisions of the Damages Directive do not apply retroactively. However, the Damages Directive is silent as to whether each of the provisions in the Damages Directive should be considered substantive and therefore fall within the scope of the prohibition.

Moreover, even if a given provision is substantive, there are a number of different ways in which the prohibition on retroactive effect could be
interpreted and applied. In particular, the Damages Directive provides for a minimum five-year limitation period, which does not start to run until the infringement has ceased and certain knowledge conditions are satisfied; it is not clear from the wording of the Damages Directive whether this new limitation period should only apply to claims that arise following implementation or whether it should also apply to claims that have already arisen (in the latter scenario, this would potentially extend or revive limitation periods that commenced prior to implementation).

In order to illustrate the potential variety of approaches, we have examined the positions in Germany, the UK, the Netherlands and France, which represent some of the key European jurisdictions in which competition damages claims are brought.

The various approaches to implementation

Germany

In Germany, the Damages Directive will be implemented by way of amendment to the Act Against Restraints of Competition (the “ARC”). The implementing Act was adopted on 31 March 2017. The new rules are expected to enter into force in April 2017.

Most of the new rules under the Damages Directive will not be retroactively applicable in Germany. The amended ARC specifies the rules which only apply to claims arising after 26 December 2016, which include the presumption that cartels cause harm, the new rules on joint and several liability, the new rules on settlement and the new rules on passing-on (subject to some exceptions).

With regard to the limitation rules, the amended ARC provides that, as a general rule, the new limitation rules will apply only to claims arising after 26 December 2016. For other claims, the limitation rules will only apply if they are not time-barred before the amended ARC has entered into force.

Consequently, if the amended ARC enters into force, the limitation period for claims before the German courts will be extended from three years (the current limitation period) to five years (the new limitation period) even if the limitation period is already running. A firm facing litigation exposure as a result of involvement in a competition law infringement for which the limitation period was due to expire in 2017 is therefore likely to face two further years of exposure.

It should be noted that the new rules only apply retroactively with regard to the length of the limitation period, but not the beginning or the suspension of the limitation period.

The UK

The UK government implemented the Damages Directive on 8 March 2017, by way of the succinctly named “Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017” (the “Regulations”). The Regulations provide clear guidance as to whether each part of the Damages
Directive will apply retroactively and, moreover, nothing other than the disclosure provisions (which are already largely adhered to in England) applies retroactively.

Regarding limitation specifically, the UK government has confirmed that it considers the limitation conditions of the Damages Directive to be substantive and therefore subject to the prohibition on retroactive application. In addition, the Regulations:

> ensure that the UK approach to implementation does not revive time-barred claims; and

> only apply the new limitation provisions to claims where both (a) the infringement begins, and (b) the harm occurs, after commencement of the implementing legislation.

As a result of this approach, any new claims which are issued after implementation of the Damages Directive in respect of infringing behaviour which is alleged to have started before the implementation date will be subject to the existing limitation regime. For a claim to be subject to the new regime, the infringement would have to commence after implementation; given the length of many infringements and the subsequent investigations, this could mean that it is many years before claims under the new regime come before the English courts.

The length of the English limitation period remains unchanged and, as such, claims post-dating the issuing of an infringement decision by more than six years will generally continue to be time barred. However, the Regulations have resulted in changes to the existing law regarding when the limitation period begins and provide for suspension of the limitation period during any investigation by an antitrust authority or a legal challenge to the authority’s decision.

**France**

In France, the Damages Directive was implemented on 10 March 2017. The transitional regime provides that any provision of the transposing law which results in an extension of the limitation period is applicable only if the limitation period had not already expired on 11 March 2017 (therefore preventing any time-barred claims from being revived).

In respect of claims for which the limitation period was running at the time of implementation, the transposing law provides that the new limitation period applies, but that the time elapsed must be taken into account when applying the new limitation period.

In respect of claims for which the limitation period had not yet begun to run at the time of limitation, the general French transitional rules stipulate that the new provisions will only apply to facts generating liability which occur after the new law was enacted. Therefore, in theory, for claims issued after 11 March 2017 but relating to anticompetitive infringements (facts generating liability) prior 11 March 2017, the transposing law should not apply. On this basis, those provisions would only apply to infringements which take place
following transposition (i.e. similar to the position under the UK Regulations and with the same consequent delay for claimants).

For the rest of the provisions of the Damages Directive, the transposing law provides that they should apply as of the day after the law was published, being 11 March 2017. The only exception is the disclosure provisions, which apply to claims issued on or after 26 December 2014 (i.e. the date of publication of the Damages Directive).

The Netherlands

The Dutch government implemented the Damages Directive on 10 February 2017 by way of the Implementatiewet Richtlijn privaatrechtelijke handhaving mededingsrecht (the “Dutch Implementation Act”)\(^1\) – see our previous alert.

The Dutch Implementation Act specifically allows the retroactive application of certain procedural rules and the new limitation regime, albeit for a limit period of time. Pursuant to Article III of the Dutch Implementation Act, the new rules concerning the length of the limitation period and the beginning thereof, disclosure, the binding nature of decisions of the Authority for Consumers and Markets (“ACM”) and the involvement of the ACM in proceedings, will in principle apply to all existing and future claims unless proceedings were brought before the Dutch courts before 26 December 2014. This means that any claim relating to infringing behaviour which is alleged to have started before the implementation date and for which proceedings were/are initiated after 26 December 2014 will be subject to the new rules on the length and commencement of limitation.

The material impact of the retroactive application of these new limitation provisions is however limited, given that the new rules are almost identical to the general rules on limitation under Dutch law. As such, under the new regime, claims will continue to expire five years after the moment the infringement ended and the claimants could have reasonably known the extent of their damages and the person(s) liable for such damages.

It should also be noted that the Dutch Implementation Act does not allow retroactive application of any other substantive provisions, including the new rules on suspension of the limitation period, passing-on, joint and several liability, the exceptions for immunity recipients as well as the new settlement provisions. Under general Dutch transitional rules, this means that for a claim to be subject to the new regime, the infringing behaviour should have occurred after the entry into force of the Dutch Implementation Act.

Comment

The Damages Directive does not offer much guidance as to precisely how Member States should comply with the prohibition on the substantive (as opposed to procedural) provisions of the Damages Directive being applied retroactively, nor does it specify precisely which provisions are substantive.

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\(^1\) See our previous client alert, “EU Antitrust Damages Actions Directive implemented in the Netherlands”, here.
In deciding which approach to adopt, Member States need to strike a balance between ensuring legal certainty (i.e. avoiding retroactive changes to the law) and providing claimants with swift access to the rights and protections provided by the Damages Directive.

The approach taken in Germany regarding limitation will be good news for claimants, who will have more time to bring claims even where those claims arose long before implementation. By contrast, the approach taken in the UK will mean that claimants are denied the benefit of the new limitation regime for many years to come.

Regardless of the balance struck in relation to the key issue of limitation, however, Member States should take care to ensure that their implementing legislation provides as much clarity as possible, in order to avoid delays caused by the protracted litigation that would otherwise be necessary to provide clarity.

However, even this will not resolve the unfortunate fact that the wide margin for variation between Member States’ approaches goes against the Damages Directive’s stated aim of harmonising the law of Member States. The resulting differing transitional regimes being adopted by Member States mean that the process of assessing and managing litigation risk in the short term has been complicated.