

EXPLANATORY MEMORANDUM TO

THE CLAIMS IN RESPECT OF LOSS OR DAMAGE ARISING FROM COMPETITION INFRINGEMENTS (COMPETITION ACT 1998 AND OTHER ENACTMENTS (AMENDMENT)) REGULATIONS 2017

2017 No. 385

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of this instrument

- 2.1 This instrument implements a European Directive (2014/104/EU) concerning claims for damages resulting from a breach of European antitrust prohibitions. The aim is to make it easier for consumers and businesses to claim for damages or full compensation following harm caused by, for example, cartels and concerted practices or abuse of a dominant position in a market place.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Competition is a reserved matter. Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland
- 3.2 During the drafting of this Statutory Instrument, Officials of BEIS liaised with the Office of the Attorney General (OAG), the Scottish Government, the Scottish Courts Service and the Northern Ireland Courts. None of them has objected to the proposed approach.
- 3.3 The 21-day rule for affirmative regulations does not apply to these regulations. The UK has well-developed mechanisms for allowing claims for breaches of both European and domestic competition law. The Directive was based closely on the UK model. Many of the requirements of the Directive were already part of the UK law. The transposition deadline is set out within the Directive, which has been in force since December 2014, and those affected by the Regulations could reasonably expect this legislation to come into force shortly after, if not on, that date.

Other matters of interest to the House of Commons

- 3.4 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 This instrument makes changes to UK primary legislation in order to improve the ability of consumers and businesses to claim for damages following breaches of UK and European competition law.

- 4.2 The Directive primarily concerns claims for damages following breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) as well as national competition law (as defined in Art. 2(3) of the TFEU)¹. Articles 101 and 102 concern matters such as cartels and concerted practices or abuse of a dominant position in a market place.
- 4.3 Whilst the Directive only considers claims for damages involving breaches of European competition law, this instrument applies the same measures to claims for damages following breaches of UK competition law. This is intended to ensure a consistent regime which minimises the chances of satellite litigation on which regime applies.
- 4.4 As a result, this instrument relies for vires on section 2(2) of the European Communities Act 1972 and section 209 of the Enterprise Act 2002 (which allows the Secretary of State for BEIS to make regulations to eliminate or reduce differences between the Competition Act 1998 (CA98) and European competition law). The use of section 209 of the Enterprise Act 2002 means that this instrument is subject to the affirmative resolution procedure.
- 4.5 The Directive will be implemented through a light-touch approach which intends to minimise disruption and retain as much as possible of the existing legislation and case law of the current UK regime. As set out below, there are some areas where we have had to introduce new legislative provisions, including in relation to the Directive’s limitation provisions and the disclosure and use of evidence.
- 4.6 The draft Directive was considered by the European Scrutiny Committee on 27 November 2013 and 5 February 2014.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding Human Rights:

“In my view the provisions of the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The TFEU and CA98 prohibit certain behaviours to ensure that consumers and businesses are not disadvantaged by businesses which choose to operate anti-competitively. Where businesses do operate anti-competitively, it is important that those affected can claim damages to recover the amount that they have lost as a result of that behaviour.

¹ Known as “antitrust provisions”.

- 7.2 The UK has a well-established process for providing access to damages for breaches of competition law. The UK's regime was significantly reformed in 2015 by the Consumer Rights Act in order to further improve access to redress by allowing for opt-out collective actions and recognising voluntary redress schemes in statute.
- 7.3 The Directive implemented by this instrument is closely based on the UK's regime. The UK has a well-established and well-understood canon of case law and procedure in relation to claims for competition damages. To protect this regime and create minimal disruption for businesses and consumers, this instrument makes changes to the UK law only to implement the areas which are not covered by existing case law or procedure. Changes are being made in parallel to the Civil Procedure Rules, the Competition Appeal Tribunal Rules and the Northern Ireland and Scotland Court Rules.
- 7.4 This instrument is intended to implement the Directive in such a way that it preserves as much of the existing UK regime as possible. It will, for example, apply equally to opt-in and opt-out collective actions for damages and will apply to both follow-on and stand-alone actions (i.e. those actions which follow a decision by the competition authorities and those which do not). It is also intended to have a minimal impact on the UK's cartel leniency regime in order to retain its effectiveness in uncovering cartels.
- 7.5 The Directive applies procedural and substantive rules to all private actions where harm has been suffered. The definition of 'competition claim' in the regulations therefore encompasses actions whatever the remedy being claimed, whether damages or injunctions or a combination of both.

Implementation and transposition – A Single Regime

- 7.6 The Directive only applies to claims for damages following breaches of Article 101, 102 of TFEU or national competition law when applied in parallel with those Articles.
- 7.7 However, due to the close links between Article 101 and 102 and Chapter I and Chapter II of CA 98, respondents to our consultation unanimously supported it also applying to claims for damages following breaches of Chapters I and II, even when it is not applied in parallel to Articles 101 and 102. The rules and processes that apply will be the same whether the case being pursued is a 'national' (UK only) case, or cross-border with an EU element. This is intended to support a simpler regime and to limit the potential for satellite litigation about which regime applies to a particular case. Accordingly, as mentioned above, we are also relying on section 209 of the Enterprise Act 2002, in addition to section 2(2) of the European Communities Act 1972, to transpose the Directive.
- 7.8 Whilst this approach is gold-plating the implementation of the Directive, the Impact Assessment demonstrates that this is justified as it will lead to a net benefit for businesses.

Indirect purchasers and the passing-on of overcharges

- 7.9 The most obvious victims of cartels and other anti-competitive behaviour are the suppliers and purchasers who deal directly with those businesses which are acting anti-competitively. However, indirect purchasers and suppliers can also be affected as a result of overcharges being passed on through the supply chain.

- 7.10 The Directive aims to ensure that businesses that pass on an overcharge resulting from, for example, a cartel, cannot claim compensation, but that those businesses and consumers who are indirect victims of the cartel can still get access to full compensation.
- 7.11 The well-established principles of tort law establish the right of indirect purchasers and the principle of passing-on. In addition the recent case of *Sainsbury's Supermarkets Ltd v Mastercard* at the CAT has explicitly set out both the rights of indirect purchasers and the validity of the passing-on defence. As such, we have not made explicit provision for these measures in this instrument.
- 7.12 This instrument addresses the burden of proving that an overcharge has been passed on, and ensures that the burden rests with the defendant not the claimant, as required by the Directive. It will also introduce the requirement that the burden is on the defendant to disprove the loss by an indirect purchaser where:
- the indirect purchaser has shown that the defendant has committed an infringement;
 - this has resulted in an overcharge; and
 - the indirect purchaser has purchased goods or services which were the object of the infringement.

Small and medium-sized enterprises (SMEs): liability for damages

- 7.13 This instrument will limit the liability of an SME to the loss or damage caused by the actions of that SME if the SME's share of the market was less than 5 per cent for the duration of the offence or to pay damages would make the SME economically unviable. This protection does not apply if the SME led the infringement, coerced others to infringe or has previously infringed competition law.

Presumption of harm, liability of immunity recipients and contribution of participants in cartels

- 7.14 The Directive states that there must be a rebuttable presumption that cartels cause harm. As this does not exist in UK competition law, this instrument will introduce such a presumption.
- 7.15 This instrument also limits the liability of cartel leniency applicants who have been granted immunity from financial penalties imposed by competition authorities. As with SMEs, this instrument limits the liability of immunity recipients to the loss or damage caused by the actions of that business. It also limits the amount that an immunity recipient can be required to pay co-infringers who are seeking to recover damages contributions paid on behalf of other infringers.

Limitation and prescriptive periods

- 7.16 The limitation and prescriptive periods for bringing a claim for competition damages in the UK are already in line with those required by the Directive. This instrument ensures that the starting point for the limitation and prescriptive periods is in line with the Directive's requirement that a claimant is aware of the identity of an infringer, that an infringement has occurred and that the claimant knows he has been harmed before the limitation period starts.
- 7.17 This instrument creates a standalone limitation regime in the Competition Act. This will preserve certain provisions from the Limitation Act 1980, the Limitation

(Northern Ireland) Order 1989 (extending the limitation for claimants who are under a disability) and provisions in the Limitation Act 1980 and the Limitation (Northern Ireland) Order 1989 (relating to new claims or counter claims brought within the limitation period). In addition provision is made in relation to the suspension of the prescriptive period during a period of disability in Scotland.

- 7.18 This instrument will also ensure that the limitation period is suspended where a competition authority (either in the UK or elsewhere in the EU) is investigating the behaviour to which the complaint relates, as required by the Directive. The suspension will begin on the day that the competition authority commences a formal investigation and will end one year after the authority's investigation ends.
- 7.19 Similar to suspension for competition authority investigations, this instrument will ensure that limitation periods are suspended where the parties to the claim agree to enter into consensual dispute resolution (CDR), including specific requirements about when the suspension will start and end.
- 7.20 Under existing UK law, consumers, businesses or their representatives can bring a collective claim for damages. The regime, established under Schedule 8 of the Consumer Rights Act, allows for the suspension of limitation periods to allow the court to assess the legitimacy of the collective action or for claimants to choose whether to opt in to or to opt out of the collective proceedings without harming their ability to bring an individual claim. This instrument preserves the effect of section 47E(4)-(6) of the CA98 in order to ensure that these rights are not adversely affected.

Disclosure and use of evidence

- 7.21 There is some overlap between the Directive and existing UK legislation and court rules around disclosure and the use of evidence. For example, the proportionality requirements of the Directive will be effectively reflected in the UK regime through changes to the court rules, whereas the other provisions are already provided for in national law.
- 7.22 Through this instrument and further changes to court rules, we will ensure that leniency statements and settlement submissions (and quotations from them) are protected from disclosure and admissibility as evidence. This will not restrict the admissibility of evidence which has been obtained lawfully through routes other than the competition authority's file.
- 7.23 This instrument will also restrict disclosure of investigation materials held in a competition authority's file until that authority's investigation has ended. This instrument ensures that courts should only order the disclosure of material held in a competition authority's file if it cannot reasonably be provided from any other source.
- 7.24 The Directive requires that national courts should be able to require third parties to disclose relevant information. In most of the UK, provision is already made for third-party disclosure. However, the High Court in Northern Ireland can only order disclosure against non-parties in personal injury cases or cases involving death. This instrument, therefore, includes a provision to give the High Court in Northern Ireland the power to order disclosure by non-parties in proceedings to which the Directive applies.
- 7.25 This instrument also provides that decisions by competition authorities in other EU member states which identify a competition infringement will be considered as prima facie evidence of that infringement in the UK courts.

Exemplary damages

- 7.26 This instrument prohibits the award of exemplary damages against a defendant. This is to ensure that affected businesses and consumers are not over-compensated for the harm they have suffered.

Contribution and consensual settlements

- 7.27 The Government considers that some of the Directive's requirements relating to CDR (where the parties agree to engage in a procedure to resolve the case out of court) already exist in UK law and practice. For example, UK courts already have the power to suspend proceedings and manage cases, including where the parties agree to CDR, which combines a balance between the power to allow stays to encourage settlement and ensuring that cases progress in a timely manner.
- 7.28 Although the Civil Liability (Contribution) Act 1978 and, for Scotland, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 already contain comprehensive provisions on the relative contribution of infringers, the Directive has more specific requirements which are not currently present in UK law. This instrument, therefore, sets out provisions to limit the liability of infringers that engage in CDR. It also provides that claimants cannot seek over-compensation by reducing by the settling infringer's share of the loss or damage the total amount of the damages they can claim.

Application

- 7.29 The Directive states that substantive provisions can not be applied retroactively, whereas procedural provisions can, but it does not specify which measures are substantive and which are procedural.
- 7.30 This instrument sets out that the substantive new rules will apply only to claims where both the infringement and harm occurred after the coming into force of the implementing legislation. Procedural provisions will apply to proceedings which begin after the commencement of the Statutory Instrument and may apply to cases where the harm or infringement took place before the commencement date
- 7.31 To ensure clarity, this instrument distinguishes substantive provisions from procedural provisions in the implementing legislation. It identifies the provisions relating to passing-on, SMEs, the presumption of harm, limited liability for immunity recipients, limitation and prescriptive periods, the bar on exemplary damages, and CDR as substantive provisions.

Consolidation

- 7.32 The Government is not considering a formal consolidation of the CA98 or any other enactments amended by this instrument at this time.

8. Consultation outcome

- 8.1 A consultation was conducted between 18 January and 6 March 2016 with competition law practitioners, businesses, competition authorities and consumer representatives. There were 26 written responses to the formal consultation, mainly from competition law practitioners.
- 8.2 The views of the majority of respondents to the consultation, agreed that implementing the Directive as a single regime was the most practical and pragmatic

approach avoiding the uncertainty that could arise from having separate UK and EU regimes.

8.3 In the consultation document, the Government proposed implementing the Directive on 1 October, earlier than required by the Directive. We stated that this would be going beyond the requirement of the Directive. However, we considered that businesses would find it advantageous.

8.4 A majority of respondents suggested that a later implementation date would be preferable (allowing for more time to ensure that the implementing legislation was effective and a longer familiarisation period for business).

8.5 The Government agreed to work to implement the Directive by 27 December 2016.

9. Guidance

9.1 As the new regime will be similar to the existing regime, there will be no further guidance published.

10. Impact

10.1 The impact assessment carried out by the Department suggested the impact on business, charities or voluntary bodies is that:

- i) annual legal costs to firms involved in private actions cases would be around £3.2m. Under the “loser pays” principle of UK law, these costs fall on businesses that are either non-compliant with existing competition law or have unsuccessfully brought private actions cases;
- ii) access to redress for harm for firms and consumers suffering detriment from breaches of competition law is likely to be worth an annual benefit of £1.46m; and
- iii) Potential benefits from deterrence, lower pricing and deadweight has been estimated to be in the region of £11.47m annually.

10.2 The impact on the public sector is an estimated increase in caseload to the courts of approximately 2.5% at an estimated annual cost of around £26,000. As set out above this is offset by the potential annual benefit of £11.47m.

10.3 The Impact Assessment is submitted with this Memorandum and has been published alongside the consultation document available on the BEIS website (<https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive>)

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 As mentioned above, we have provided for an exception to joint and several liability in circumstances where the defendant is an SME or an immunity recipient under a leniency program. We have provided that an SME defendant is only liable to persons who purchased a product or service directly from the SME (direct purchaser) or an indirect purchaser in certain circumstances. This will help to protect the firm from disproportionate damages that could affect its status as a going concern.

12. Monitoring & review

- 12.1 A review provision, as required by section 28 of the Small Business, Enterprise and Employment Act 2015, is not appropriate in this instrument. The regulatory provisions that are being amended are contained in primary legislation, and are outside the scope of the policy objectives as set out in the statutory guidance, which relate to the inclusion of review provisions in secondary legislation.
- 12.2 The Enterprise and Regulatory Reform Act 2013 requires that Part 1 of the CA98 is reviewed no later than 1 April 2019. As the provisions being amended are within that Part, they will be subject to that statutory review.

13. Contact

- 13.1 Peter Durrant at the Department for Business, Energy and Industrial Strategy telephone: 020 7215 8223 or email: peter.durrant@beis.gov.uk can answer queries regarding this instrument.