COMPETITION APPEAL TRIBUNAL

Minutes of the meeting of the Tribunal User Group

held on 2 March 2016 at 4.45pm

at Victoria House, Bloomsbury Square, London WC1A 2EB

Attendees:

On behalf of the Tribunal:
Sir Peter Roth – President
Charles Dhanowa – Registrar
Renella Reumerman – Référendaire
Hilary Boyle – Référendaire

On behalf of the Users:
Nicola Boyle – Partner, Hausfeld & Co. LLP
Euan Burrows – Partner, Ashurst LLP
Helen Davies QC – Barrister, Brick Court Chambers
Jonathan Hofstetter – Partner, Hill Hofstetter Limited
Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP
Tom de la Mare QC – Barrister, Blackstone Chambers
Catriona Munro – Partner, Maclay Murray & Spens LLP
Paolo Palmigiano – Chairman, Association of European In-house Competition Lawyers
Polly Weitzman – General Counsel, Office of Communications
Roland Green – Deputy General Counsel and Senior Legal Director, Competition and Markets Authority (CMA)
Simon Jones – Director, Litigation, CMA

From the Department for Business, Innovation and Skills (BIS):
Carl Davies – Competition and Consumer Policy
Peter Durrant – Competition and Consumer Policy
Rameen Naylor-Ghobadian – Legal Advisor, Competition and Consumer Policy

Apologies:
Sarah Cardell – General Counsel, CMA
Jon Turner QC – Barrister, Monckton Chambers
Stephen Wisking – Partner, Herbert Smith Freehills LLP*

**Provided written comments prior to the meeting*

1. President's introduction

1.1 The President welcomed everyone to the User Group meeting and explained that the primary purpose of this meeting was to consider the BIS consultation document (the "Consultation Document") concerning implementation in the UK of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (the "Damages Directive"). To this end, representatives of BIS were in attendance to outline the current status of the implementation process and how it was envisaged that it would proceed over the coming months, and to hear the views of the members of the User Group.

2. BIS presentation

2.1 Peter Durrant gave a brief presentation outlining the current status of the implementation process. He noted that the Damages Directive had to be implemented by 27 December 2016. Most of the requirements were already present in UK law, and the provisions of the Damages Directive would essentially bring other EU Member States into line with the UK. The Consultation Document published by BIS on 28 January 2016 summarised the changes that would be required to implement the Directive in the UK.

2.2 It was noted that there had only recently been significant changes to private actions for damages under the Consumer Rights Act 2015. The further changes necessitated by the Damages Directive would involve amendments to primary and secondary legislation, in particular the Competition Act 1998 (the "CA 98"), the Civil Procedure Rules ("CPR") and the Tribunal's Rules. The deadline for responses to the Consultation Document was 9 March 2016 and it was envisaged that there would be an informal consultation after the deadline.

2.3 The President then proposed that the group discuss the various issues raised in the Consultation Document in the order in which they appeared in that document.

3. Discussion of the issues raised in the Consultation Document

Dual or single regime

3.1 This issue related to whether there should be a dual regime, whereby there would be one set of substantive and procedural requirements for private actions involving infringements of EU competition law and another for private actions involving infringements of UK competition law, or a single regime, whereby there would be a single system which would apply irrespective of whether UK or EU competition law or both was applied. According to the Consultation Document, the Government believed that it should implement the Directive as a single regime.

3.2 The unanimous view of the User Group was that there should be a single regime.

Limitation periods (Article 10)

3.3 On a general level, the provisions of Article 10 were thought to be unclear and raised a number of difficult points. These included:

How to identify when the limitation period starts running or is suspended

3.4 The concern was expressed that the amount of time within which claims could be brought was potentially indeterminate unless there was clarity as to when the limitation period started running. The wording of Article 10(2)(a) ("…*can reasonably be expected to know…of the behaviour and the fact that it constitutes an infringement of competition law…*") was considered to be particularly problematic. The example was given of a standalone abuse of dominance case where the claimant would not know that there had been an infringement of competition law until that had been decided by a court.

3.5 It was suggested that knowledge for the purposes of Articles 10(2)(a)-(b) should be defined as sufficient knowledge to plead a case. This would at least make the position clear, albeit that it was thought that this position would be markedly different to the existing English case law under section 32 of the Limitation Act 1980.

3.6 In interpreting the limitation provisions of the Directive, it was suggested that assistance could perhaps be gleaned from the relevant Recital, namely Recital 36. The view was expressed that the lack of clarity in Article 10 could give rise to *Marleasing* or *Francovich* points arising in the future.

3.7 As to Article 10(4), it was thought that the limitation period provided for in that Article was extensive. Some certainty as to what constituted a domestic investigation by a competition authority would be desirable in this context.

Whether, for any competition law-based claim, the limitation period would be extended for all the hybrid claims that could go with the main claim

3.8 It was noted that an increasing number of claims alleging competition law infringements involved, for example, deceit or conspiracy claims. This might give rise to the complication of different limitation periods within the same clam under the limitation provisions in the Directive. It was agreed that it would be very important to identify the precise category of claims to which the limitation provisions of the Directive applied.

3.9 The view was again expressed that the limitation provisions in the Directive were unclear. While the limitation provisions could cover all claims based on facts founding a claim under section 47A of the CA 98, they would not necessarily apply to all claims arising.

Whether the limitation period for claims other than in Scotland should be reduced to 5 years

3.10 Some User Group members were in favour of a reduction in the limitation period to 5 years for claims other than in Scotland, on the basis that the actual time period was largely irrelevant in light of the new start and end points. Retaining a distinction between Scotland and elsewhere in the UK in this regard was a further complication that was not necessarily needed.

3.11 Irrespective of what the limitation period actually was, there was unanimous agreement that a common limitation period should apply to section 47A claims brought in the Tribunal.

Whether the regime would apply in the same way to the High Court as to the Tribunal

3.12 Similarly, there was agreement that there should be no disparity between the application of the Damages Directive regime to the High Court and to the Tribunal. This point applied more generally, and not only in relation to the limitation provisions.

Implementation date

3.13 The User Group members did not think that it would be feasible in practice to implement the Directive earlier than necessary. An October transposition date, as suggested in the Consultation Document, was not considered to be realistic.

Disclosure (Articles 5 to 7)

3.14 The main features of the disclosure provisions of the Directive, including the prohibitions relating to leniency statements and settlement submissions, and the provisions relating to disclosure by competition authorities, which included the Commission itself, were noted.

3.15 As regards leniency statements and settlement submissions, a discussion ensued as to how far the protection would have to extend. It was suggested that the relevant parts of documents referring to leniency statements or settlement submissions should also be protected. It was noted in this regard that the definitions in Article 2 should be adhered to, but beyond that it was likely to be a matter for the courts to resolve. In general, it was thought that the question of whether leniency documents should be protected was a policy one and a balance had to be struck so that leniency was not undermined.

3.16 The view was expressed that in the context of damages claims which were brought in parallel with ongoing Commission investigations, the provisions of Article 7(2) did not necessarily reflect the existing position under English law. There could be a particular problem with Article 102 cases.

3.17 Turning to the question of disclosure by competition authorities, it was observed that this was not highlighted in the Consultation Document, but that the existing CPR rules in relation to third party disclosure could perhaps be applied in this context. Some issues would arise, including who would bear the costs of the exercise (this was usually the party seeking disclosure), and what would have to be shown in order to get disclosure. It was not thought that there would be anything to prevent the competition authority from providing disclosure if its reasonable costs were paid. It was noted that the Tribunal's Rules (as of 1 October 2015) provided for third party disclosure and that these rules should be looked at.

3.18 In general, it was thought that Article 5 offered the clearest example of where the English courts had a different starting point to other Member States. There would therefore be a risk in taking a "copy-out" approach in relation to disclosure, as it could be possible to read into Article 5 a narrower approach to disclosure than is currently available in the English courts. BIS confirmed that the default position in general was to take a "copy-out" approach, unless it did not work in practice. If there was a compelling case that English law already satisfied the requirements of the Directive, then that case should be made by way of response to the Consultation Document.

3.19 The position in Scotland was thought to be slightly different as in Scotland a party had to specify what disclosure it wanted and how this related back to the pleaded claims. BIS confirmed that it was liaising with the Scottish courts in relation to disclosure.

Passing-on defence (Article 13)

3.20 There was a discussion as to whether passing-on was a defence or a question of evidence. The Directive specifies that it is a defence. It was queried whether the law would be changed to say this, especially in light of the presumption of harm. BIS confirmed that the Commission was of the view that it should be a defence and would be examining the transposition in this regard very closely.

3.21 It was observed that the burden of proof was clear and that this was perhaps the real issue. The burden of proof would, however, depend on where the claimant was in the chain and whether a presumption of harm applied.

3.22 It was suggested that if passing-on was treated as a defence this would be a matter of substantive law, whereas if it related to the burden of proof then it would be procedural. However, the provision in the Directive appeared to be a mixture of substance and procedure. The answer would depend on whether passing-on was regarded as a measure of loss or not.

3.23 It was observed that it would be difficult to deal with these and other issues in prescriptive legislation, and that many of these issues were very difficult to deal with in the abstract without having had actual experience of cases. In practice, procedural rules would have to be interpreted in a way that gave effect to the provisions of the Damages Directive.

Quantification of harm (Article 17)

3.24 It was noted that Article 17 provided for the national competition authority to assist the court upon request. As the Article did not compel the national competition authority to assist, there was unlikely to be any need to change existing law. BIS clarified that the reference to "guidance" in this section of the Consultation Document was a reference to the guidelines to be issued by the Commission pursuant to Article 16.

Joint and several liability (Article 11)

3.25 It was observed that Article 11 was extremely complicated and likely to be difficult to apply in practice.

3.26 It was not thought that the contribution provisions in Article 11(5) were directly analogous to those in the Civil Liability (Contribution) Act 1978 (the "1978 Act"). Article 11(5) covered the amount of harm as well as the protection of the immunity applicant from contribution. Any such contribution was not to "*exceed the amount of the harm it caused to its own direct or indirect purchasers or providers*".

3.27 However, an immunity applicant might not have had any customers. A discussion ensued as to whether, in practice, the immunity applicant would be joined to the proceedings and what the limitation period would be in that scenario.

3.28 It seemed that BIS might have to go beyond the language of the Directive, as it appeared to re-write normal contribution claims. As such, the 1978 Act might have to be amended to allow for a claim against the immunity applicant.

3.29 By way of a solution it was suggested that it could be provided that the 1978 Act did not apply to claims under section 47A of the CA 98, and that Article 19 of the Directive could be dealt with in the same context. There was general agreement that BIS would need to look at the provisions of the 1978 Act and the existing provisions of the Tribunal's Rules relating to contribution. It would also be important to have clarity in relation to the limitation position. It was noted that under Rule 39 of the Tribunal's Rules, an additional claim such as a contribution claim is treated as a claim.

3.30 The President said that this was an extremely important area in practice and that it would be useful to see a draft proposal from BIS when the thinking on this issue had been refined.

Consensual dispute resolution (Article 18)

3.31 It was agreed that when implementing Article 18(1) on the suspension of limitation periods for the duration of a consensual dispute resolution process, it should be clearly specified what consensual dispute resolution means for these purposes. It was noted that "*consensual dispute resolution*" was defined in the Directive as "*any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages*". It appeared that there would have to be a process that had been agreed to, and that, for example, simply writing a letter to start a negotiation would not suffice to suspend the limitation period in this context.

3.32 It was also noted that national courts could stay proceedings at their discretion under Article 18(2).

3.33 It was not thought that any legislation would have to be amended to deal with Article 18(3) which permits a competition authority to take compensation already paid into account as a mitigating factor prior to the imposition of any fine. The competition authority was likely to do this in any event.

Miscellaneous issues relating to implementation

3.34 A number of other issues arising from the Consultation Document or the provisions of the Directive were raised by the members of the User Group in the course of the meeting. These included:

Whether the Damages Directive had changed the nature of the relevant tort

3.35 It was suggested that the new presumption of harm, amongst other things, meant that the nature of the relevant tort had been changed by the Damages Directive. It was not clear to the members of the User Group that a tortious claim would still be a claim for breach of statutory duty in the strict sense. One suggestion was that the operative question for a claim under section 47A of the CA 98 should be whether an allegation of infringement of competition law was an essential component of the cause of action.

Non-availability of exemplary damages (Article 3(3))

3.36 It was noted that Article 3(3) precluded the recovery of exemplary damages and that exemplary damages falling outside *Devenish* would no longer be available under English law.

Prima facie evidence requirement (Article 9(2))

3.37 A query was raised as to whether the prima facie evidence requirement in Article 9(2) with regard to the final decisions of national competition authorities or review courts in other Member States reflected the existing position in England as a matter of law. It was thought that, at common law, rulings of foreign regulatory authorities were not admissible. The position in, for example, Germany, in contrast, was that the relevant foreign decisions were binding.

3.38 To the extent that Article 9(2) affected the burden of proof or created a presumption, it represented an important change. This issue would have to be addressed, and careful thought would have to be given by BIS to where the bar should be placed and how high a hurdle was being set.

Avoidance of overcompensation (Article 12(2))

3.39 It was observed that Article 12(2) (which provides for Member States to avoid overcompensation by laying down appropriate procedural rules to ensure that the compensation does not exceed the overcharge) potentially overlooked the possibility of volume effects and cost-plus pricing. Even if an overcharge was passed-on in full, there could be substantial volume effects.

Claimants from different levels in the supply chain (Article 15)

3.40 The provisions of Article 15 were raised and it was noted that they were not dealt with in the Consultation Document. It was thought these provisions meant there would be a a heightened imperative for related claims to be tried and heard together. The approach taken by the German courts in this regard was noted. In Germany, if a party wanted to plead passing-on, the party to which an overcharge had allegedly been passed-on had to be brought before the court.

3.41 The Directive required Member States to ensure full compensation but not over-compensation (Article 3). However, there could be a multiplicity of claims in different jurisdictions and as such Article 15 had to be reflected. In practice, there would be a need for co-joinder, or to somehow adopt the US approach of bringing all class action litigation across multiple States into a single court. It was thought that Article 15 should perhaps be read with the provisions of the Recast Brussels Regulation on related actions.

3.42 It was possible to envisage a scenario where defendants were sued in separate actions by claimants at two different levels of the supply chain and as a result were ordered to pay back more than 100% of the overcharge. In such a case, it was possible that they could bring a *Francovich* type claim against the State.

Temporal application (Article 22)

3.43 It was noted that Article 22 of the Directive provided that the national measures adopted in order to comply with the substantive provisions of the Directive were not

to apply retroactively. This raised the issue of whether the determination of a provision of the Directive as being procedural or substantive was a matter for national law or for EU law. If it was a matter of national law then, for example, the stance in the Consultation Document that the start of the limitation period was a substantive matter was potentially incorrect.

3.44 A further query was raised as to the meaning of the words "*do not apply retroactively*" in Article 22. BIS confirmed its understanding in this regard was that the Directive was to apply prospectively.

3.45 It appeared to the members of the User Group that there were two possibilities with regard to the temporal application of the Directive: either it would apply to proceedings initiated after transposition, or it would only apply to facts occurring after its transposition. It was pointed out that if the latter approach were taken, the Directive would not be of practical relevance for some time, with the exception of Article 102 cases.

3.46 The general consensus was that it would make far more sense if the Directive were to apply to proceedings instituted after the date of transposition. For example, if the Directive applied in other jurisdictions before the UK, litigation may be brought in those jurisdictions rather than here. BIS emphasised that both approaches needed to be tested and that there would be liaison with the Commission and other Member State representatives. Stakeholder views would of course be taken into account. BIS' intention was that all amendments necessitated by the Directive would apply from the same point in time.

3.47 It was suggested that an approach similar to the original section 47A of the CA 98 and Rule 31(4) of the old Tribunal Rules could be taken, namely that the new regime should apply unless it would have the effect of reviving a claim that was already time-barred. A revival of a claim that was already time-barred would be unfair. However, if the claim was still in time, then extending the limitation period would not be a substantive change.

Next steps

3.48 BIS confirmed that it would liaise with the Registrar to set up a further User Group meeting when the consultation responses had been reviewed. The draft statutory instrument would also be provided to the members of the User Group, either at the next meeting or at a subsequent meeting. The President suggested that it might be appropriate to convene a further meeting in May.

3.49 This concluded the discussion on the Consultation Document.

4. Claims under the European Economic Area Agreement (the "EEA Agreement")

4.1 The President briefly raised a separate issue on which he wished to canvass the User Group's views. He noted that while section 47A of the CA 98 covered claims relating to infringements of Chapters I and II of the CA 98, and Articles 101 and 102 TFEU, it did not expressly cover infringements of the EEA Agreement. It did not appear that the Tribunal would have jurisdiction to determine any such claims, but nor did it appear that there was any policy decision behind this apparent omission. The President asked the User Group members if it would be desirable to amend section 47A so that it expressly covered infringements of Articles 53 and 54 of the EEA Agreement. There was unanimous agreement that such an amendment would be desirable.

4.2 The President noted in this regard that, given the allocation of jurisdiction between the Commission and the EFTA Surveillance Authority, there was unlikely to be a need to make express reference in section 47A to decisions of the EFTA Surveillance Authority, as the practical reality was that the relevant decision would be a Commission decision. There was no objection to this approach.

4.3 The President and the Registrar would take this matter forward with BIS in due course.

5. Any other business

There was no other business. The President thanked those present for their helpful comments, and the meeting concluded at 7pm.

6. Date of next meeting

A proposed date for a follow-up meeting with the User Group members and BIS will be notified to the members in due course.