PARLIAMENTARY DEBATES

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OFFICIAL REPORT

Sixth Delegated Legislation Committee

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

Wednesday 22 February 2017

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not later than

Sunday 26 February 2017

The Committee consisted of the following Members:

Chair: Nadine Dorries

Austin, Ian *(Dudley North)* (Lab)
† Barclay, Stephen *(Lord Commissioner of Her Majesty's Treasury)*
† Bruce, Fiona *(Congleton)* (Con)
† Chalk, Alex *(Cheltenham)* (Con)
† Debbonaire, Thangam *(Bristol West)* (Lab)
† Esterson, Bill *(Sefton Central)* (Lab)
† Gibson, Patricia *(North Ayrshire and Arran)* (SNP)
† Hayes, Helen *(Dulwich and West Norwood)* (Lab)
† Henderson, Gordon *(Sittingbourne and Sheppey)* (Con)
† James, Margot *(Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy)*
Jones, Graham *(Hyndburn)* (Lab)
† Kawczynski, Daniel *(Shrewsbury and Atcham)* (Con)
Leslie, Chris *(Nottingham East)* (Lab/Co-op)
† Letwin, Sir Oliver *(West Dorset)* (Con)
† Metcalfe, Stephen *(South Basildon and East Thurrock)* (Con)
† Morton, Wendy *(Aldridge-Brownhills)* (Con)
† White, Chris *(Warwick and Leamington)* (Con)

Gail Bartlett, *Committee Clerk*

† attended the Committee

Sixth Delegated Legislation Committee

Wednesday 22 February 2017

[Nadine Dorries *in the Chair*]

Draft Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017

2.30 pm

The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Margot James): I beg to move,

That the Committee has considered the draft Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

It is a great pleasure to serve under your chairmanship, Ms Dorries. I will set out why I believe the draft regulations are an important tool in helping wronged businesses and consumers to access redress for breaches of competition law, and why the Government's approach to implementation of the damages directive is in the best interests of UK businesses, consumers and competition authorities. I will then set out our approach to some of the key measures in the directive and explain how the draft regulations, supported by case law and court rules, will implement the directive and preserve important elements of existing UK law.

The damages directive aims to make it easier for consumers and businesses to bring private action claims for damages. It applies only where there has been a breach of European competition law, either on its own or alongside a breach of national competition law. The directive covers a range of issues affecting a claimant's ability to access compensation, including a claimant's access to information to support their claim, the time a claimant has to bring about a claim, and incentives for businesses to settle early. It also offers certain protections for small business defendants, cartel leniency applicants and commercially sensitive information held by defendants.

I am pleased to say that the UK has long been at the forefront in Europe when it comes to providing access to damages for breaches of competition law. Through the Consumer Rights Act 2015, we made it easier for consumers to get their money back from unscrupulous businesses by widening the jurisdiction of the Competition Appeal Tribunal, promoting collective proceedings—in particular by introducing opt-out collective actions and opt-out collective settlements—and providing the Competition and Markets Authority with the authority to approve voluntary redress schemes. I am also pleased to say that, thanks to careful negotiation, the directive recognises the strengths of the UK regime and is closely based on it. The regulations required careful drafting to ensure full implementation and reflect the strong message that we received from stakeholders that we should preserve UK case law and well-understood practices.

I will now set out the Government's approach to implementation and explain why we think that our proposed route is the most effective in the long term. In our consultation with stakeholders, we proposed the normal "copy out" approach to implementing the directive and argued that that was the clearest way to ensure that the directive was implemented in full. However, consultation respondents highlighted the fact that the "copy out" approach risked undermining important, established UK case law and creating confusion where there is currently a good understanding of the regime. As a result of that feedback, we reconsidered our implementation approach. Given our well-established regime and rules, an approach to implementation that relied as much on case law and court rules as on regulations seemed more appropriate. We will therefore leave in place existing provisions in UK law that meet the requirements of the directive, including case law, and make changes to UK legislation only to implement outstanding provisions that are not currently covered in UK competition law and practice.

I turn briefly to the issue of gold-plating directives. As I explained, the damages directive is required to apply only to damages sought for breaches of European competition law or where a business has contravened both UK and European competition law. Owing to the close relationship between articles 101 and 102 of the treaty on the functioning of the European Union and chapters I and II of our own Competition Act 1998, the Government intend to apply the provisions to cases following breaches of UK law even when no parallel breach of European competition law exists. Although that is technically gold-plating, it will mean a simpler regime for businesses to comply with and will limit the amount of satellite litigation about which regime applies in a particular case. This approach was strongly endorsed by stakeholders during our consultation.

I will now discuss an issue that has driven considerable debate during the implementation process—the temporal application of the new requirements and how we handle the transition from one regime to the other. The directive states that its substantive provisions should not be applied with retrospective effect, whereas procedural provisions can be backdated. However, the directive does not specify which measures are substantive and which procedural, so to ensure clarity, the regulations distinguish substantive provisions from procedural. The Government have decided that substantive new rules will apply only to claims where both the infringement and the harm occurred after the coming into force of the implementing legislation. Procedural provisions will apply to proceedings that begin after the commencement of the implementing legislation, and may apply to cases in which the harm or infringement took place before the coming-into-force date. All provisions of the regulations are substantive, save for the provisions on disclosure and the use of evidence.

I am aware of concerns that this approach could mean that the substantive provisions of the directive do not have effect for some time. It has also been suggested that the approach could lead to claimants seeking to bring forward their claims in more favourable jurisdictions. I believe that taking the approach that I have set out achieves a balance between allowing consumers access to the reformed regime and not putting defendant businesses in an unfair position. I should also stress that, unlike some EU member states, we are certainly not starting from scratch. Our existing regime will ensure that consumers and businesses can have access to suitable redress, including damages, even if the new provisions do not have an immediate practical impact.

As I explained, the regulations contain only those elements that the Government believe must be included as they are not already provided for in UK law or practice. For example, it is a key tenet of the directive that a cartel causes harm. That principle is not currently codified in UK law so, through part 4 of the regulations, the Government are introducing a rebuttable presumption that where a cartel has been uncovered, it has caused harm to consumers or businesses.

The regulations will also introduce a ban on exemplary damages, ensuring that consumers recover only what they have lost. In other areas, we are implementing a combination of changes to primary legislation and changes to court rules. For example, there are strong rules already in place to govern the disclosure of documents in cases. The court rules will be amended to ensure that those are in line with the directive.

The regulations improve the protection from disclosure for cartel leniency statements and settlement submissions. I believe that that will help to protect the leniency and settlement processes, which are important for effective enforcement against cartels.

The regulations deal with two further issues that I will draw to the Committee's attention. The directive puts in place protections for small and medium-sized enterprises that are part of a cartel. Although it is right that errant SMEs should pay their fair share back to consumers, we should do what we can to prevent SMEs from going out of business as a result of their involvement in a cartel. For that reason, the regulations contain measures to ensure that SMEs can be held liable only to their own direct or indirect purchasers when in a cartel. SMEs lose that protection if they are the cartel's ringleader, have coerced other businesses to join or have previously been found to have infringed competition law.

As is the case under the Competition Act 1998, the regulations create a stand-alone regime for limitation or prescriptive periods for private claims. The time periods for making a claim remain at six years for claimants in England, Wales and Northern Ireland and five years for claimants in Scotland. The directive requires a change to the UK's interpretation of the point at which the limitation period starts and the circumstances under which they are suspended. The limitation period starts when the competition infringement has ceased and a claimant knows or can reasonably be expected to know the identity of the infringer and that an infringement has occurred and harm has occurred arising from the infringement.

The regulations ensure that the limitation period is suspended in various circumstances—for example, where a competition authority in the UK or the EU is investigating the behaviour to which the complaint relates. The regulations contain provisions that I believe balance the right of consumers to have a reasonable time to bring their claim with the need for businesses to understand their contingent liabilities.

We have taken an approach to the implementation of this directive that ensures that victims of anti-competitive behaviour can access the right level of compensation. It balances the needs of consumers with the protection of important commercial information and the need to support our leniency and settlement regime. I believe that the regulations will enable businesses and consumers to benefit from the strengths of a regime that remains the envy of many across Europe.

2.41 pm

Bill Esterson (Sefton Central) (Lab): I broadly agree with the Minister. We support the implementation of the regulations. It is absolutely right that we do so, because this is about ensuring fair markets and, as she said, the protection of consumers and of smaller businesses. It is really important for the success of our vibrant economy that we do all those things and, as she said, that we retain the principle that cartels cause harm.

It is very good to hear the Minister express support for that principle. Opposing undercutting and exploitation is crucial, and that applies to suppliers, workers and consumers. The regulations are consistent with those principles. She mentioned the Consumer Rights Act and how the regulations build on legislation already on the UK statute book. She also mentioned the fact that this country has a proud record and is ahead of the curve on many of the areas she covered.

I am happy to support the regulations. However, a number of questions arise from what the Minister said and from the legislation, not least what will happen to the regulations after we leave the European Union. Many businesses wish to avoid divergence of regulation as far as possible. What is the Minister's response to that?

The Minister said that the provisions may take some time to take effect. Perhaps she could be a bit more prescriptive in describing the timescale. It might be suggested that she is saying they will not take effect at all because we will have left the EU before they come into effect, which would seem rather odd, to say the least. Will she explain the exact position of the regulations after we leave the EU and say whether, indeed, they will come into effect at all before we leave the EU?

The Minister mentioned what happens down the supply chain and the way that SMEs are involved. My understanding, from what she said, is that the regulations allow a degree of protection for smaller firms that are involved through supply chains. Something that springs to mind is the way in which the Groceries Code Adjudicator operates. The GCA has only direct suppliers in scope. There are about 7,000 of them, and something like 300,000 indirect suppliers in the grocery market. I appreciate that the Minister may need to come back to me on this, but I wonder whether the regulations have implications for the way in which the GCA operates. Would they result in a change in its role and would they draw in indirect suppliers in the grocery sector? That point occurred to me as I listened to the Minister.

The energy market is a good example of long-standing concern about cartels in this country. The Competition and Markets Authority inquiry looked at the problems of cartels and the big six. There is significant concern, some of it voiced by the Government—I think the Prime Minister has mentioned it—about continuing problems in the energy market and high prices, which have risen significantly in recent times.

The inquiry discussed the challenge of vertical integration and the relationship between supply and retail. It considered whether the relationship was healthy and whether the way in which the big six operated meant that more intervention was needed to help consumers and smaller entrants to the market. Will the regulations assist with challenges in the energy market? Will they, in the Minister's opinion, be part of an opportunity for new entrants and consumers to challenge pricing and the service they receive in the energy market?

We fundamentally support the regulations, because in principle they are helpful to the achievement of fair markets and enterprise. We shall not oppose them. However, if the Minister can answer my questions either today or in writing, I shall be extremely grateful.

The Chair: Ms Gibson.

Patricia Gibson (North Ayrshire and Arran) (SNP) *rose—*

The Chair: Please sit for a moment. It is normal and acceptable etiquette always to let the Bench know before a debate if you are going to represent your party and want to speak. Failing that, it is acceptable and appropriate to rise to catch the eye of the Chair—you should have been called before the Opposition spokesman. Peering gently and shyly at me is not a way to let me know you want to speak. In May, it will be two years since the general election and it would be appropriate if members of your party began—I have to make such remarks in almost every Committee—to abide by the acceptable rules of debate.

2.48 pm

Patricia Gibson: Thank you, Ms Dorries; I apologise. I have served on such Committees before, but have always just caught the Chair's eye. As you say, that is perhaps not the way to do it.

I am pleased that in the drafting process for the statutory instrument the Department for Business, Energy and Industrial Strategy liaised with the Scottish Government, among others. Members of the Committee would all agree that consumers and businesses should not be disadvantaged by businesses that choose to operate in an anti-competitive manner. It is important that if that happens those affected should be able to claim damages to cover the amount they have lost as a result of that behaviour. The reforms to the Consumer Rights Act 2015 were welcome improvements to such access to redress. My question to the Minister is simple and short. Will she explain the implications of the decision to leave the EU for the UK Government's understanding of EU competition law?

2.49 pm

Margot James: I thank hon. Members for their questions. I shall first answer the shadow Minister's question on Brexit, together with that of the hon. Member for North Ayrshire and Arran. In line with other European directives, all European law will be transposed into UK law via the great repeal Bill, and this measure is no exception. It is not necessarily possible to give a view about what will happen next in all cases, but I can safely say that the Government will not only transpose the directive into UK law but will recommend that it remains UK law. We have always been against cartels, and we remain against cartels. We accept that there are advantages in the parts of the directive that we have introduced and which will strengthen UK competition law vis-à-vis cartels. As for the time it will take for the measure to take effect, it was initially a bit more difficult for me to understand that.

Bill Esterson: If this remains in UK law and European competition law changes over time, what would happen?

Margot James: I cannot comment on changes that may or may not take place in the European Union in years to come, but I can answer the question that the hon. Gentleman originally asked about what would happen to the regulations. They will be transposed into UK law, and there will not be any change to them thereafter. There may be improvements to UK competition law, but that will no longer be determined by the EU after we have left.

Sir Oliver Letwin (West Dorset) (Con): Does my hon. Friend agree that the regulations are a matter of UK law anyway? They do not need to be transposed and they will persist. If one inspects the regulations, one finds a rather interesting example of a general phenomenon, as it is only in proposed new sections 3(1)(d) and 3(2) that any change in reference is required. One simply needs to eliminate reference to the EU competition authorities. The rest of the measure is built round the CMA and UK law, and presents a rather interesting example of the relative simplicity of the great repeal Bill manoeuvre in many cases, although not all. It is probably worth noting that and using it as an example in future.

Margot James: I thank my right hon. Friend for adding value to the debate and for his observations.

Turning to the question of why it may take some time to bring the regulations into effect, I should like to underline the fact that the bulk of protection against cartels is dealt with in case law and UK courts, and that will continue to give redress to SMEs and consumers. On the specific question of the parts of the directive that we have introduced in UK law, the timing will depend on the nature of the competition infringement, and it may take 10 or 15 years for a cartel to be uncovered and prosecuted. Until then, the current UK regime will, as I have said, provide effective protection.

The hon. Member for Sefton Central made the point that the additional protection that the new framework will give to SMEs is welcome. I remind hon. Members that SMEs are more often victims of cartels than participants. He asked about the Groceries Code Adjudicator and whether the regulations would have any effect on that office. They do not affect the operation of the GCA, because it deals with different aspects of protection for supply chains. Any supply chain that is affected by a cartel issue will have access to protection under the regime that we are discussing. Any other aspect of abuse in the grocery supply chain will go to the GCA, as happens at present.

Finally, the hon. Gentleman asked about the energy market and whether we expect more use of this regulatory framework in dealing with abuses, particularly price rises. The CMA report last summer provided a framework for strong objections to some of those price rises. Ofgem has pronounced that, in its view, the recent price rises to which he alluded are not justifiable.

I do not really see any connection with the idea of a cartel. The issues that the hon. Gentleman mentioned are real, and I share his concern at some of the price rises, as does Ofgem, but they are not the product of a cartel. If they were, we would see them across the board. Of course, the big six, to which he referred, account for just 81% of the market, whereas 13 years ago they accounted for 99%. There is a lot more competition in the energy market now, with up to 40 companies

operating, and the share of the market held by other companies is increasing with speed, so I do not think the issues to which he alluded have anything to do with a cartel.

I am grateful to the Committee for its consideration of the regulations. I believe that I have set out an approach to the implementation of the damages directive that achieves full implementation in a way that works in the best long-term interests of UK consumers and businesses.

Question put and agreed to.

2.57 pm

Committee rose.