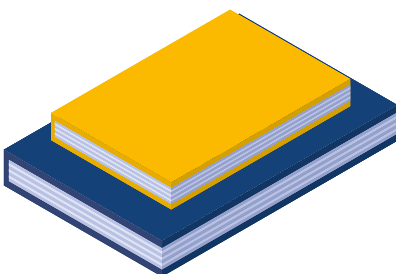
BUT WE ARE NEVER, EVER, EVER GETTING BACK TOGETHER?

THE UK, THE EU AND THE LAW OF LIMITATION

Authored by: Joseph Moore (Partner) and Imogen Nolan (Senior Associate) - Travers Smith

The Damages Directive, which was implemented in the UK on 9 March 2017 via schedule 8A of the Competition Act 1998, provides that the limitation period for competition claims begins with the later of the claimant's "day of knowledge" and the day on which the infringement of competition law ceased.[1] The latter aspect of the limitation period is commonly referred to as the "Cessation Requirement".



In the recent Court of Appeal decision in the Umbrella Interchange litigation,[2] the court was required to consider whether, by reference to two "post-completion CJEU decisions", namely, Volvo and Heureka,[3] the Cessation Requirement was incorporated into the English limitation rules in respect of claims which pre-date the Damages Directive (as implemented in the UK by schedule 8A of the Competition Act 1998). The decisions are referred to as post-completion CJEU decisions because they were handed down by the Court of Justice of the European Union after the implementation period completion day (31 December 2020), being the point at which the transitional (or implementation) period of Brexit ended.

Limitation issues have been relevant to a number of legacy follow-on damages claims making their way through the English courts and can have significant implications for the scope of the claim.

In the context of the Umbrella Interchange litigation, which includes the Merricks class action, the question of whether claims in respect of five of the 18-year claim period are time barred turns on whether the Cessation Requirement forms part of the pre-Damages Directive English limitation rules.[4]

The Judgment

The Court of Appeal's answer (like that of the CAT) to the question of whether the Cessation Requirement applies to pre-Damages Directive claims was a

1 See Article 10(2) of the Damages Directive and section 19 of Schedule 8A of the Competition Act 1998.

2 Umbrella Interchange Fee Claimants and Umbrella Interchange Fee Defendants [2024] EWCA Civ 1559.

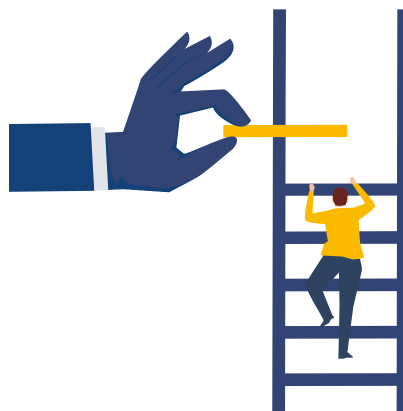
3 Volvo AB and DAF Trucks NV v RM (2022) (Case C-267/20) and Heureka Group a.s. v Google LLC (2024) (Case C-605/21).

4 The infringement period as set out in the Commission's Decision is 22 May 1992 to 21 June 2008. The impact of the Court of Appeal's decision is that claims would be time barred in respect of loss suffered before 20 June 1997.

resounding "no" for several (arguably unsurprising) reasons. First, while section 6 of The European Union (Withdrawal) Act 2018 (Withdrawal Act) permits the English courts to "have regard" to post-completion day CJEU decisions, they are not bound by them – a point which the UK Supreme Court (UKSC) made in the Lipton decision[5] handed down shortly before the hearing of the appeal in the Umbrella Interchange litigation. Unsurprisingly, the Court of Appeal said it would "take a lot of persuading" to not follow the Lipton decision. Therefore, while the Court was permitted to have regard to the post-completion decisions in Volvo and Heureka, it was not bound to follow them and considered it "inappropriate" to apply those cases to the (pre-completion) facts of the case.[6] Second, the Court of Appeal did not agree that certain pre-completion day CJEU authorities relied on by the Claimants established a Cessation Requirement under EU law. Third, a Court of Appeal decision from 2015 – Arcadia[7] –held that the English law limitation rules applicable to competition law infringements (for claims pre-dating the Damages Directive) did not infringe the principle of effectiveness notwithstanding the absence of the Cessation Requirement in English law. The Court of Appeal in the Umbrella Interchange litigation considered the decision in Arcadia, which "was decided on very similar facts", to be binding.

Perhaps most interestingly of all, the Court of Appeal was clear that Arcadia was correctly decided and that the principle of effectiveness did not necessitate the introduction of the Cessation Requirement into English law. Rather, the Court of Appeal held that the Cessation Requirement was introduced by the Damages Directive (as opposed to being an existing principle that was codified by that legislation), notwithstanding the CJEU's decision in Heureka (which adopted the contrary position in suggesting that the Cessation Requirement is an existing principle of EU law which pre-dates the Damages Directive). The Court of Appeal's (dim) view of the CJEU's decision in Heureka was made clear in paragraph 43 of its judgment, which reads:

"This court was not, even before completion day, bound by inchoate and unexpressed principles of EU law that were later enunciated in future EU law decisions".



What Next?

It will be interesting to see whether the Claimants apply for permission to appeal given the UKSC's decision in Lipton and if so, whether permission will be granted.

In any event, leaving aside the possibility of further consideration by the UKSC of how the terms of the Withdrawal Act ought to be interpreted, the impact of this decision regarding the limitation rules that apply to competition claims in the UK is likely to be limited, and as time passes, the rump of claims that would fall outside of the scope of Schedule 8A of the Competition Act (which brings into effect the Cessation Requirement provided for in the Damages Directive) will shrink even further. However, it remains to be seen whether the stark divergence between the UK and EU courts on the issue of whether the Cessation Requirement pre-dates the Damages Directive is an isolated incident, or whether it presages the beginning of a period of further divergence on matters of competition law.

5 Lipton v BA Cityflyer Ltd [2024] UKSC 24.

6 The Tribunal decided that Volvo did not establish a cessation requirement. The Heureka decision was handed down following the Tribunal's decision, but before the hearing in the Court of Appeal. As the Court of Appeal decided that Heureka clearly established a cessation requirement, the court was of the view that it would be academic to consider whether or not the Tribunal's analysis of Volvo was strictly correct: see paragraph 30.

7 Arcadia Group Brands Ltd v Visa Inc [2015] EWCA Civ 883.