

UK COMPETITION LAW ASSOCIATION

Consultation Response

BIS: Implementing the EU Directive on damages for breaches of competition law

9 March 2016

1. Introduction

1.1 This document is submitted on behalf of the UK Competition Law Association (“**CLA**”) in response to the consultation launched on 28 January 2016 by the Department for Business Innovation and Skills (“**BIS**”) on “Implementing the EU Directive on damages for breaches of competition law” (the “**Consultation**”).

1.2 CLA is affiliated to the Ligue Internationale du Droit de la Concurrence. The members of CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of CLA is to promote the freedom of competition and to combat unfair competition.¹

1.3 CLA welcomes the opportunity to respond to this Consultation on implementing the EU Damages Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the “**Damages Directive**” or “**Directive**”).

2 General Comments

2.1 Before responding to the specific questions raised in the consultation, CLA seeks to highlight a number of overarching concerns it has regarding this Consultation.

2.2 First, CLA is concerned that BIS may not be planning to consult on the draft legislation prior to its implementation. Indeed, the Consultation reveals that BIS is currently considering whether to implement the Directive on the October

¹ Further details on CLA can be found on our website at <http://www.competitionlawassociation.org.uk/>.

2016 Common Commencement Date. This timescale would not likely permit time for proper consultation on the draft legislation particularly when BIS plans to publish its response to the Consultation up to three months after close of the Consultation on 9 March 2016. As the Directive does not need to be implemented until 27 December 2016, we would strongly recommend delaying implementation past the October 2016 Common Commencement Date to the extent necessary to permit proper consultation on the draft legislation, even if implementing the Directive proves to some extent to be a copy-out exercise. CLA believes that it is equally important to have a period of consultation on any new Civil Procedural Rules and/or Competition Appeal Tribunal Rules, as well as any related guidance (and to allow sufficient time for the Competition Appeal Tribunal Guidance to be updated) prior to their implementation.

- 2.3 CLA believes that the need to consult on the draft legislation and draft rules of court is perhaps highlighted by recent experience relating to the Consumer Rights Act 2015 and the transitional provisions contained in the Competition Appeal Tribunal Rules 2015. While BIS consulted on the draft Competition Appeal Tribunal Rules 2015, Rule 119 of the Competition Appeal Tribunal Rules 2015 was added only after the consultation period had ended (and in light of comments from respondents during the consultation process that transitional provisions were needed given the way in which the Consumer Rights Act 2015 dealt with limitation issues). However, Rule 119 was not subject to consultation. It now appears that operation of the transitional provisions in Rule 119 may subject standalone claims arising prior to 1 October 2015 to the old limitation rules under section 47A of the Competition Act 1998, rules which had been designed for follow-on actions. As a result, bringing a standalone claim, or indeed a hybrid standalone/follow-on action, before the Competition Appeal Tribunal (“CAT”), where the cause of action accrued prior to 1 October 2015 will likely be fraught with difficulties from a limitation perspective for years to come and act as a deterrent to bringing claims.² Although Rule 119

² At the very least, there will be considerable time and money spent on litigating precisely how the transitional regime under Rule 119 should operate. This does not seem to gel well with the UK Government’s intention to establish the CAT as the major venue for competition actions in the UK, to harmonise limitation as between the High Court and CAT, and to facilitate collective actions by consumers and businesses particularly in circumstances where it was previously too uneconomic or risky to bring such actions. Given the potential for similar ambiguities to arise in relation to

does not perhaps have a direct parallel within the provisions of the Directive, implementation of the Directive does raise some similarly complex issues, including as regards limitation. A further example of this type of complex issue is how to reconcile Articles 13 (defendant has burden of proving passing on) and Article 14(2) (presumption of passing on in the case of indirect purchasers) with a view to ensuring, on the one hand, that there will be no overcompensation given the potentially conflicting presumptions in those two provisions and, on the other hand, that compensation reaches those claimants who have actually suffered loss. Further examples of the complex issues raised by the Directive are provided below.

2.4 Second, CLA would highlight the difficulties associated with commenting on such a high-level Consultation document. At present, details as to how precisely BIS will implement the Directive are somewhat sparse and far from worked out, and BIS does not provide any guidance on the choices that it is proposing to take where the Directive gives discretion (such as on the type of interest to be awarded under Article 3(2)). However, the details, and particularly the wording, will of course be key to ensuring that implementation of the Directive is effective and does not in any way undermine the existing regime put in place by the UK Government with a view to ensuring that the United Kingdom is at the forefront of private competition law damages actions within the EU. It is also naturally difficult to provide meaningful feedback on the current proposals absent sufficient “meat on the bones”. In this context, CLA would also highlight the risk of claims and satellite litigation in the event that claimants’ and/or defendants’ rights are inadequately adopted and protected, particularly given that the *Francovich* criteria appear to be satisfied by the Directive.

2.5 Third, the Consultation makes clear that BIS is planning a copy-out approach regarding a good number of the Directive’s provisions. While CLA is aware that this is the approach increasingly adopted by the UK Government to

implementation of the Directive (including in particular in relation to the question of limitation) and the importance to business of legal certainty in this area, we consider it vital in order to avoid unnecessary litigation and the consequent burden on business that the legislative changes/court rules are carefully considered, including by those within the legal community with experience in litigating such issues.

implementing directives, CLA has significant concerns regarding this proposed approach. This is in part because the language of the Directive itself lacks precision in a number of areas and so, if a copy-out approach is adopted, this lack of precision will be copied into UK legislation and lead to a considerable amount of satellite litigation as to how precisely the new regime should operate (for example in relation to its limitation provisions), giving rise to significant burden for business. Moreover, CLA is conscious that the current UK litigation regime, including the Civil Procedure Rules, has been carefully designed and crafted over many years and adopting a copy-out approach without detailed and careful consideration as to its impact certainly risks undermining that regime. We highlight a number of areas below where a copy-out approach will be problematic, including in relation to contribution, joint and several liability, limitation, and passing-on, although our analysis is by no means intended to be exhaustive.

2.6 However, if BIS is not convinced about the considerable risks associated with a copy-out approach and does by and large adopt a copy-out approach, it would nevertheless be helpful to see precisely how the copy-out approach will work in practice particularly with respect to how the new provisions will mesh with existing UK rules. To that end, as noted further below, CLA is concerned that BIS appears to be underestimating the number of legislative instruments that will need amending. In addition to the Competition Act 1998, Civil Procedure Rules, and Competition Appeal Tribunal Rules 2015, the Civil Liability (Contribution) Act 1978, and perhaps the Limitation Act 1980 will also require potentially complex amendments.

2.7 With those preliminary comments, we provide below our responses to the Consultation's specific questions.

3. Response to Specific Questions

Q1. Do you agree that implementing the Directive as a single regime would be the right approach?

3.1 CLA agrees that implementing the Directive as a single regime is the right approach. We agree that it would cause confusion and uncertainty for

businesses and consumers to create two separate systems, one applicable to breaches of EU competition law and another applicable to breaches of UK competition law, and that having two systems would likely lead to increased satellite litigation as to the applicable regime. Not only can it be difficult to determine whether anti-competitive behaviour only affects trade within the UK or whether it also affects trade between Member States, but the threshold for an effect on trade between Member States is low with the result that a separate system applying only to breaches of UK competition law might be used in only a relatively small number of cases. Also, to the extent that the system applying to breaches of UK competition law was more favourable to bringing competition damages actions (which may be the case in some instances), it is of course arguable that, in accordance with the principle of equivalence (as reiterated in Article 4 of the Damages Directive), the same procedures should in any event apply to bringing damages actions for breaches of EU competition law.

Q2. Do you agree that the current limitation period of 6 years in England, Wales and Northern Ireland and 5 years in Scotland should remain? If not, what period (it must be at least 5 years) should there be?

3.2 On the whole, CLA agrees that the current limitation period of 6 years in England, Wales, and Northern Ireland (and 5 years in Scotland) should remain.

Q3. Do you agree that there is a need for a new trigger point for limitation periods in order to implement the Directive fully?

3.4 CLA agrees that, while some of the provisions within Article 10 are broadly similar to those that currently apply under the Limitation Act 1980, some revisions will need to be made in order to reflect Article 10(2) of the Directive. In addition, it will be necessary to implement Article 10(4) of the Directive so that the limitation period is suspended during administrative proceedings by the UK competition authorities or European Commission in relation to any damages action to which the breach of competition law being investigated relates, as well as Article 18(1) as regards the suspension of the limitation period for the duration of a relevant consensual dispute resolution process.

- 3.5 Further to the comments within Section 2 of this response, limitation is an issue in relation to which CLA does not consider it appropriate to adopt a copy-out approach. The ability of claimants and defendants to establish when a claim is in time with sufficient legal certainty is crucial. There are ambiguities within Articles 10(2), 10(4), and 18(1) of the Directive which CLA submits should be resolved on implementation to avoid unacceptable uncertainty and the prospect of significant satellite litigation on limitation – such uncertainty and satellite litigation was experienced as regards the previous CAT limitation period (under the old section 47A Competition Act 1998 and Rule 31 of the Competition Appeal Tribunal’s 2003 Rules). New provisions on limitation within the Consumer Rights Act were designed to remedy this – giving rise to significant cost in terms of time and expense for business (as well as the possibility of claimants’ claims becoming time-barred based on uncertain legislation and defendants being subject to the prospect of indefinite limitation periods, contrary to their very purpose). In resolving these ambiguities, however, care will need to be taken in order to avoid challenges to the implementing legislation (including potential references to the European Court of Justice) by parties who consider implementation to be inconsistent with EU law – this would of course be at odds with the aim of seeking to resolved ambiguities on implementation.
- 3.6 First, the requirement within Article 10(4) that the suspension of the limitation period while a competition authority takes action ends at the earliest one year after the infringement decision has “become final” (*i.e.*, that it “cannot be, or can no longer be, appealed by ordinary means (Article 2(12)) risks replicating the issues that arose in relation to the previous CAT limitation period, namely whether an appeal on penalty alone should suspend the limitation period³ and whether an appeal by one addressee suspends the limitation period for all addressees.⁴ In the interests of legal certainty and with a view to avoiding a repeat of this costly and time-consuming litigation, CLA considers that implementation of this requirement should explicitly resolve these issues

³ See *BCL Old Co v BASF* [2009] EWCA Civ 434.

⁴ See *Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24.

(reflecting the judgments of the Court of Appeal and the Supreme Court⁵ on the equivalent previous CAT rules). However, in doing so, provision might be made for any ambiguity as to the nature of the appeal (*i.e.*, whether relating to substantive findings or penalty only) to be resolved in favour of the claimants given that it is claimants who must rely on publicly available information (often notices of appeal drafted by defendants' lawyers) in assessing whether an appeal is substantive and therefore whether an infringement decision has yet "become final".

3.7 Second, Article 10(2)(a) provides that a claimant must know or can reasonably be expected to know that the relevant behaviour constitutes an infringement of competition law before the limitation period begins to run. Similarly, Article 10(2)(b) provides that a claimant must know/can reasonably be expected to know that the infringement caused harm to it. These provisions potentially delay considerably when the limitation will start to run at least compared with the current Limitation Act 1980 regime in which limitation starts to run when the claimant has sufficient knowledge to be able sufficiently to plead liability and loss such that its claim is not subject to strike-out. Ultimately, the courts will need to consider the level of knowledge required by the claimant before the limitation period will start to run, which will need to be determined on a case-by-case basis as the criteria in Article 10(2)(a) and (b) are fact-specific.

3.8 Third, the Directive is not clear as to what constitutes a sufficient "consensual dispute resolution" mechanism such as to suspend the application of the limitation period under Article 18(1). Does this encompass only formal processes (for example involving the appointment of a third party such as a mediator in order to assist the parties to reach an out-of-court resolution), or the mere expression of a willingness to engage in without prejudice discussions? Given the significance for limitation purposes of actions being characterised as consensual dispute resolution and the importance of legal certainty in this area (and the need to ensure that one party cannot unilaterally trigger a suspension of the limitation period on this ground), CLA considers that, when implementing this provision, it should be made clear that the limitation period is only

⁵ See footnotes 3 and 4 above.

suspended if (and for as long as) the parties expressly agree to engage in consensual dispute resolution within the meaning of Article 18(1), *i.e.*, that which has the consequence of suspending the limitation period. This reflects the current position (which works well) by which parties to competition disputes can agree to toll the limitation period for a defined period while they attempt to reach an out-of-court solution. It should also make clear that the suspension applies only to those parties who have agreed to engage in this process.

- 3.9 Finally, while views differ, it should be considered whether to provide that the Foreign Limitation Periods Act 1984 continues to apply only to claims that fall outside the scope of the Directive, and that limitation periods for claims to which the Directive applies must be at least 5 years (in accordance with Article 10(3)).

Q4. Do you agree that the new limitation requirements should only apply from commencement of the implementation instrument?

- 3.10 This question involves important issues of law, which have implications for the new regime as a whole rather than just relevant limitation periods. It also introduces important issues as to whether different aspects of the reforms affect substantive or procedural rules. This is an important distinction in that the European Court of Justice has held that procedural rules generally apply to all proceedings pending at the time when they enter into force, whereas substantive rules will not generally be permitted to have retroactive effect (*i.e.*, in the sense of their application being permitted to determine a set of given set of facts that existed prior to their entry into force).⁶

- 3.11 If the view were taken that the changes including the new limitation requirements should, for example, apply only to infringements that start after commencement of the implementation instrument, the effects of the new limitation provisions of the Directive will not be felt in the United Kingdom for

⁶ See, *e.g.*, Case C-17/10 *Toshiba Corporation*, judgement of 14 February 2012, para. 47. Under English law, the effects of limitation periods are generally regarded as procedural rather than substantive, although this is in the sense that they operate to bar a remedy and do not to extinguish the claim itself. See, *e.g.*, *The South West Strategic Health Authority v Bay Island Voyages* [2015] EWCA Civ 708, paras. 26-27.

many years to come. Given that other EU Member States might take a different view on this point and their regimes might as a result be seen as more favourable for bringing damages actions, it is important that this issue be given careful and thorough consideration.

3.12 It appears to CLA that the two main options available if the new limitation rules are to be regarded as substantive are as follows:

- a. claims which remain extant following the commencement date of the transposition instruments are to be governed by the new limitation rules;
or
- b. only claims arising from conduct itself taking place after the transposition date will be governed by the new limitation rules, although as noted above this will mean they cease to have any application for many years to come.⁷

3.13 If the more restrictive approach in 3.12 (b) is adopted, questions arise as to whether the new limitation provisions should be applied not only to infringements starting after the commencement date of the transposition instrument but also to infringements on-going at the time of commencement.

3.14 It also leaves open other questions such as how infringements should be treated where the current limitation period has already started to run but not expired as at the date of commencement of the transposition instrument – should the new limitation requirements apply to any claims for which limitation has not yet expired as at the date of commencement of the transposition instrument but with the new limitation provisions not operating to re-activate limitation where limitation has expired under the Limitation Act 1980?

3.15 Further issues include: (a) whether the suspension provisions of Article 10(4) should apply not only to claims to which the new limitation provisions apply but also to claims for which the limitation period under the current Limitation

⁷ Questions will also arise of course as to how new procedural measures introduced by the Directive should be dealt with and whether, for example, new procedural measures (such as protection of leniency materials) might apply to claims arising prior to implementation of the Directive.

Act 1980 regime has not yet expired as at the date of commencement of the transposition instrument; (b) whether, if a claim has not been brought within 6 years of the limitation period starting to run but where the infringement continued beyond that 6-year period, there should be a bar on claiming for losses suffered more than six years prior to the limitation starting to run; and (c) whether extensions under Article 10(4) should affect at all the length of time for which losses can be claimed or whether the effect of this provision should be the same as section 32 of the Limitation Act 1980.

3.16 While there are differing views among members on how best to deal with the complex issues raised by the Directive's limitation provisions, CLA would suggest that possible approaches to resolve the above questions in a lawful manner consistent with the policy objectives of the regime could be:

- a. in respect of procedural measures: the general presumption should be that, as procedural issues arise after the commencement date, the new procedural measures should apply both to cases already lodged at the commencement date and to actions lodged after the commencement date. However, clear transitional provisions will need to be drawn up and careful consideration given to any situations in which it might be inequitable or impracticable for the new procedural measures to apply to cases already lodged at the commencement date;
- b. in respect of substantive measures (including, if appropriate, limitation): implementation of the new regime should not serve to revive claims that, as at the commencement date, had already expired under the old limitation rules, but should otherwise apply to claims which are extant as at the commencement date.

3.17 Ultimately, given the importance and significance of these issues (including the potential to impact on whether other EU jurisdictions might be preferred over the United Kingdom), CLA would recommend that BIS take legal advice before adopting a particular approach. CLA also looks forward in due course to having an opportunity of reviewing and providing comments on the approach to be adopted.

Q5. Do you agree that the benefits of implementing the Directive on the October 2016 Common Commencement Date outweigh the costs of early implementation?

3.18 For the reasons explained in Section 2 of this response, CLA believes it is vital that there is proper consultation on the draft legislation (and rules of court) prior to implementation. Accordingly, CLA would strongly recommend either delaying implementation of the Directive past the October 2016 Common Commencement Date to the extent necessary to permit such a consultation or at the very least to adopt a timetable that allows for further meaningful consultation within the October 2016 timeframe – however, the latter course may well prove difficult given the intervening purdah period.

Q6. Do you agree that the provisions in paragraphs 7.1 to 7.36 implement effectively the relevant Articles of the Directive? If you do not agree, please explain where you feel UK legislation does not implement the requirements of the Directive.

Existing UK law which meets the requirements of the Directive

3.19 Section 7.21 of the Consultation explains that this part of the Consultation sets out those areas where BIS “*intends to take no action or to copy out the Directive*”. At Section 7.23, however, BIS states that, while many of the provisions of the Directive are already provided for in the United Kingdom, BIS intends to adopt a copy-out approach so that existing UK legislation contains all the relevant provisions of the Directive. We are therefore unsure as to whether BIS intends indeed to copy out all of the Directive’s provisions or only to do so where existing UK law does not currently provide for what is required by the Directive (as is permitted under the Directive). Moreover, CLA is conscious that a number of areas existing UK law in fact go further than is required by the Directive and CLA is keen to ensure that implementation of the Directive, especially if a wholesale copy-out approach is adopted, does not in any way reduce the scope of, or undermine, UK law in the area of competition damages actions. In CLA’s view, given that the existing regime in the United Kingdom is broader than the Directive in a number of respects (*e.g.*, as regards disclosure), a copy-out approach across the board is not the best solution.

Moreover, as discussed above in relation to limitation periods, copy-out is not an appropriate solution where the Directive leaves points open or where ambiguities exist within the Directive; BIS needs to lay down UK rules in these areas in order to avoid unnecessary and costly litigation as to the meaning of these provisions within the UK context where it is able to do so.

Disclosure and penalties

- 3.20 As noted in the Consultation document, disclosure is a well-established concept in the United Kingdom. CLA believes that the existing disclosure regime in England and Wales covers, and indeed goes beyond, the elements required by Article 5 of the Directive. Article 5(8) of the Directive makes clear that Member States are permitted to maintain rules that would lead to wider disclosure of evidence and so it appears that no copy-out is required in relation to Article 5, and would in fact give rise to disputes about the extent of disclosure in competition cases given the narrower requirements within Article 5(1) for example. It would also lead to potentially differing disclosure regimes where claims are brought that rely in part on competition law and in part on other grounds.
- 3.21 Article 6 relating to disclosure of evidence included in the file of a competition authority and Article 7 that places limits on the use of evidence obtained solely through access to the file of a competition authority will both require transposing into UK law (both in relation to the absolute protection for leniency documents and settlement submissions required by Article 6(6), discussed in the Consultation document, and also in relation to the temporary protection for certain items of evidence while proceedings of a competition authority are ongoing as required by Article 6(5)). CLA agrees that amendments to the Civil Procedure Rules (and potentially also to the Competition Appeal Tribunal Rules) will also be required.
- 3.22 On the other hand, CLA is of the view that Article 8 of the Directive dealing with penalties is already covered by existing law in England and Wales and therefore does not require any changes to the existing UK regime, as are the provisions as to confidentiality within Articles 5(3)-(4).

Passing on defence

3.23 As BIS notes in the Consultation, it is a matter of debate as to whether English courts would identify the existence of a passing-on “defence” as there has been no case to date in which an English court has needed to rule definitively on this issue. However, many cases have proceeded on the basis that the passing-on “defence” exists and it is likely that passing-on arguments would be accepted on the basis of general principles of tort. Arguably, this was the position adopted, for example, by the parties in *Cooper Tire*⁸ prior to its settlement. There is a question, however, whether passing on would be treated as a defence proper under English tort rules or whether it would be dealt with as a normal part of causation and quantification of loss (*i.e.*, a claimant should only receive damages for losses actually suffered). However, given the requirement of the Directive, the UK Government will need explicitly to provide for a passing-on defence, thereby making clear that the burden of proof falls on defendants.

3.24 CLA considers that Article 14 of the Directive (providing for a presumption that the overcharge has been passed onto indirect purchasers in certain circumstances) will also need to be explicitly provided for.

Quantification of damages

3.25 CLA considers that it would be helpful expressly to provide that the courts and the CAT may estimate the amount of harm caused, although CLA acknowledges that the courts can already make a pragmatic assessment of the degree of certainty to which damages need to be proved. A key question is what is meant by “estimate”. Unlike other Member States, CLA does not believe that the United Kingdom needs to differentiate between proof of an exact amount and proof of what can be regarded as an estimate. However, if this is required, then express powers to estimate under other relevant articles must also be included so as not to exclude such powers by implication. CLA considers that BIS will also need to legislate to provide for a rebuttable

⁸ *Cooper Tire and Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others*; *Cooper Tire and Rubber Company and others v. Shell Chemicals UK Limited and others*.

presumption that cartel infringements cause harm pursuant to Article 17(2) of the Directive.

- 3.26 CLA notes BIS's proposal to publish guidance for the courts and the CAT in the area of quantification of damages but queries the extent to which this is needed given that such guidance already exists from the European Commission and English judges are already well placed to make decisions on quantification of damages.

Joint and several liability

- 3.27 CLA agrees it makes sense to legislate for joint and several liability, including the required exemptions to this principle in the case of SMEs and those who have received immunity under a leniency programme, as set out in Article 11 of the Directive.

- 3.28 The Consultation document states that the joint and several liability provisions of the Directive will require changes to the Competition Act 1998. However, CLA is of the view that changes may also be required to the Civil Liability (Contribution) Act 1978 (the "CLCA"), the Civil Procedure Rules, and the Competition Appeal Tribunal Rules. Moreover, a further issue that does not appear to have been considered by BIS as yet is the treatment of contribution proceedings in multiple countries – this will require some scrutiny.

- 3.29 Article 11(5) of the Directive requires that Member States ensure that an infringer may recover a contribution from any other infringer and that the amount of contribution shall be determined in the light of the infringer's relative responsibility for the harm caused by the infringement of competition law. Article 11(5) also introduces a cap on the liability for contribution of an infringer that has benefitted from immunity from fines under a leniency programme (*i.e.*, the infringer granted immunity is liable only for the harm caused to its own direct or indirect purchasers or providers), while Article 11(6) deals with situations where harm is caused to persons other than direct or indirect purchasers of the infringers. Under the CLCA, the amount of contribution recoverable from any person is such as may be found by the court to be just and equitable having regard to the extent of that person's

responsibility for the damage in question. Accordingly, this test may need to be modified in the case of competition law damages actions. Alternatively, the implementing instrument should provide that the concept of “relative responsibility for the harm” is to be interpreted in the same manner as the equivalent test under the CLCA. It would also be helpful to amend the Competition Appeal Tribunal Rules to clarify this point with respect to contribution claims brought in the context of proceedings before the CAT.

3.30 In addition, Article 19 of the Damages Directive sets out the consequences of consensual settlements on claims for contribution. Article 19(2), for example, provides that non-settling co-infringers shall not be permitted to recover a contribution from a settling co-infringer. Moreover, the effect of Article 19(1) is that Claimant’s claim is reduced by the settling co-infringer’s share of the harm regardless of the actual amount of the settlement. This means that a settling co-infringer will not be liable for any future damages even if its settlement was for less than its share of the harm. Again, these provisions of the Directive will likely require changes to the CLCA and to ensure that claimants have some clarity on what proportion of the claim they should appropriately be settling with a settling co-infringer.

Consensual dispute resolution

3.31 CLA agrees that it will be necessary explicitly to provide for suspension of the limitation period in circumstances where consensual dispute resolution is undertaken in accordance with Article 18 of the Directive and the trigger point for this suspension, as discussed above. It is important that such suspension only occurs in circumstances where the parties have expressly agreed to engage in a process that suspends limitation.