Managing Transposition and Avoiding Fragmentation: The Example of Limitation Periods and Interest

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I. LIMITATION PERIODS AND INTEREST IN COMPETITION DAMAGES

The uphill climb for competition damages claimants is steep, and particularly so for those who attempt stand-alone actions. They must prove there was an infringement of competition law, with all the difficulties connected to either Article 101 or Article 102 TFEU as well as to establishing a relevant market. Notwithstanding whether the action is a follow-on or stand-alone action, claimants must further prove they have suffered harm that was factually and legally caused by the infringement at issue, and prove the extent of that harm (dodging the pitfalls of the passing-on problem¹). Of course all these issues are surrounded by further complexities and details that must be overlooked here. However, there are two specific details that I wish to address, details that must be taken into account in any competition damages action. The details I have in mind are those of limitation periods and interest. It will be demonstrated that the transposition of Directive 2014/104² in Sweden will likely increase the awards of damages payable by reason of an infringement of...

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much has been said, and written, on the fragmentation of national private law under the pressure of EU law harmonisations. The aim of this chapter is not to add to the theoretical discussions on, for instance, what constitutes coherence or to trace the various causes for or consequences of fragmentation. Suffice it here to note that there is a perception of pressure. Under this view, which this author has encountered not only in legal writings but (and in particular) among government officials with the task of transposing EU law directives into national law, EU law gives rise to a fragmentation of national private law and there is little or nothing that can be done about it. It will be submitted that such defeatism can and should be nuanced. To that end, the aim of this contribution is to demonstrate that the common Swedish response to this ‘external pressure’, which has been to resort to minimum transposition, is liable to bring adverse consequences and that there are options to that response. Issues pertaining to limitation periods and interest on an award of damages payable due to a breach of competition law will be used to illustrate the point.

A few years ago I was very privileged to take part in a comparative study concerning interest on competition damages in the Member States, where the rules on interest in not all, but many Member States were studied. The analysis was focused on whether national rules were compatible with Directive 2014/104. The comparative interest project used a hypothetical scenario where harm had been caused by cartel-inflated prices. It was assumed that harm to an amount of 100 units had been suffered by a cartel victim in 1993, 1998, 2006 and 2008 (in sum 400 units of harm). In the scenario, the cartel was exposed in 2009, a final judgment ruling that the cartelists must pay damages was delivered in


5 Directive 2014/104 (n 2). The details on interest in the Directive will be described below.
2013 and final payment was made in 2014. The simplified question asked in this situation was how large an amount of interest on those damages was payable in the respective Member States. Calculations varied wildly, from a nominal amount that would under certain circumstances be payable under French law to an amount of interest equivalent to the original amount of damages payable under Dutch law.\(^6\) If national limitation periods had been taken into account, I am convinced that new and partly other variations would have come into play.

In the context of this work, I became aware of the significance of interest in competition damages actions. That issue, which at first sight seemed a small detail, is a major concern for litigants. It also became apparent that the issue of limitation periods, not addressed in the interest project, was equally important and almost inseparable from the issue of interest. On closer scrutiny, these issues (and others related to the Directive that will not be discussed here) also became a striking example of the pitfalls of the minimum transposition of directives, which was the strategy chosen by the Swedish legislator with regard to Directive 2014/104. Therefore, I decided to study in some detail the approaches of the Nordic countries,\(^7\) and of Sweden in particular, to limitation periods and interest on competition damages in the process of transposing Directive 2014/104 into Swedish law.

The relevant details of Nordic laws will be described below. It is nevertheless useful to point out here that under all four systems studied, interest payable on an award of damages is traditionally categorised as interest for delay. Consequently, the interest rate is set comparatively high: a reference rate increased by 7 or 8 per cent is applied in all four countries studied. At such a rate, the amount of interest payable will typically rise quickly, even though the reference rates have followed the current global tendency towards lower interest rates. Before the transposition of Directive 2014/104, the high rate was balanced by a comparatively short period of interest accrual. As will be described below, the combination of this high traditional interest rate and the new EU rules on the period for interest accrual and on the limitation period caused some concern in the transposition of the Directive. In Sweden, at least, this combination threatened to give rise to draconian levels of interest. At the end of the day, this risk was largely avoided, but the amounts of interest payable have nevertheless been significantly increased – with regard to damages for an infringement of competition law, not for other infringements of market-related law. Amounts were increased in the other Nordic countries too, albeit to a lesser extent. In section IV, I will attempt to explain the choices made by

\(^{6}\)See Monti, ‘EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report’ (n 4) 18–19 for a table of the amounts of interest payable.

\(^{7}\)I have studied Danish, Finnish, Norwegian and Swedish rules, but the language barrier has kept me from including Icelandic law. Thanks are due to Assistant Professor Katri Havu for helping out with Finnish law material not available in Swedish or English.
the Swedish legislator. It is beyond the scope of this contribution to present any detailed analysis of the transposition in the other Nordic countries, but there will be some comparisons. Before plunging into the details of national law, however, the relevant passages in Directive 2014/104 will be presented in the following section.

II. DIRECTIVE 2014/104 ON LIMITATION PERIODS AND INTEREST

A. Limitation Periods

The relevant provision on limitation periods in the Directive is its Article 10. The complete wording of the Article will not be repeated here, but it should be highlighted that the limitation period for bringing an action for damages under the Directive is ‘at least five years’ under Article 10(3). It is accordingly possible for the Member States to enact longer limitation periods than five years. Moreover, and very importantly, Article 10(2) stipulates that the limitation period may

not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

(a) of the behaviour and the fact that it constitutes an infringement of competition law;
(b) of the fact that the infringement of competition law caused harm to it; and
(c) the identity of the infringer.

These are far-reaching criteria, suggesting that there will be little room for defendants in competition litigation to argue that the limitation period has elapsed. However, Article 10(2) is somewhat checked by Recital 36, which in the relevant part includes a statement that

Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

Recital 36 thus implies that absolute limitation periods in national law, ie comparatively long limitation periods that begin to run, for example, at the

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9 Denmark and Norway have used this window of opportunity to include an absolute limitation period in their transposing legislation, while Finland and Sweden have not.
first harmful event or first occurrence of harm, should be considered compatible with the Directive as such. However, they will be subject to scrutiny under the EU law principle of effectiveness.\(^\text{10}\)

**B. Interest**

By contrast, there is no specific provision on interest in Directive 2014/104. It is only stated in Article 3(2) that the concept of ‘full compensation’, to which anyone who has suffered harm by reason of an infringement of competition law shall be entitled, includes ‘compensation for actual loss and for loss of profit, plus the payment of interest’. This echoes a holding of the Court of Justice in *Manfredi*, but no further details can be found there.\(^\text{11}\) To find further guidance, one should instead turn to Recital 12 of the Directive, which includes the following passage:

> Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

It should be noted that this is not an article of the Directive but only a recital, and thus the Member States are not formally compelled to transpose its semi-legal contents into their national laws. Even if Member States choose to follow its recommendations, it should further be noted that Recital 12 intends to leave a certain margin of appreciation to them. National classifications of the type of interest do not matter. It does not even matter if compensation for

\(^{10}\) The many-splendoured case-law and literature on this principle will not be cited extensively here. The development of this principle began in Case 33/76 *Rewe EU:C:1976:188* and Case 45/76 *Comet EU:C:1976:191*. Central case-law includes Case C-312/93 *Peterbroeck EU:C:1995:437* and Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini EU:C:2010:146*. An overview of the case-law and literature by this author is available in Strand (n 1) ch 2.

\(^{11}\) Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others EU:C:2006:461*, para 97. The Court has discussed certain details on how to establish the amount of interest payable under EU law in other contexts, however, and it is a matter of some debate whether these holdings can be transplanted into the competition damages context. The holdings at issue include Case C-271/91 *Marshall EU:C:1993:335*, para 31 and Case C-481/14 *Jorn Hansson EU:C:2016:419*, para 53. This author would generally recommend caution against such analogies between EU law contexts.
the effluxion of time is awarded by alternative means. Moreover, Recital 12 is entirely silent with regard to the rate of interest.

Having said that, it remains clear that Recital 12 includes a very specific recommendation on the period of time during which interest should accrue. This recommendation that interest ‘should be due from the time when the harm occurred until the time when compensation is paid’, albeit more vaguely phrased, was in fact intended by the Commission to be part of what is now Article 3 of Directive 2014/104. In the legislative process this was transferred to a recital, diminishing the legal force of the text which should now be read as a recommendation rather than as a rule of EU law which is to be transposed into national law. Further, the legal essence of the recital runs contrary to Nordic legal tradition, according to which interest on damages does not usually begin to accrue until the claim has been presented to the defendant. Under such circumstances it is somewhat surprising to see that all Nordic legislators have chosen (without discussing it in their travaux préparatoires, which is otherwise the custom regarding important legislative choices) to follow this recommendation. It may be that Recital 12 was taken as an indication of where EU case-law would eventually lead us irrespective of national choices. If so, that conclusion is debatable. For the purposes of this chapter, however, it is the choice as such which is interesting. I find it hard to shake off the impression that the Nordic legislators took the view that there was no choice. This perception of inevitable compulsion to comply even with a recital of an EU directive has inspired the discussion below.

III. TRANSPOSING THE RELEVANT PASSAGES INTO SWEDISH LAW

A. Swedish Law before Transposing Directive 2014/104

i. Limitation Periods

Before transposing Directive 2014/104, the Swedish limitation period for a claim for damages by reason of an infringement of competition law was ten years from the occurrence of harm, which is generally interpreted as meaning ten years

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13 Admittedly, the views and intentions of the EU legislator are relevant to the interpretation of EU law as shown in consistent case-law of the Court of Justice, see eg Case 26/62 van Gend en Loos EU:C:1963:1, 12; Case 283/81 CILFIT EU:C:1982:335, para 20; Case 14/83 von Colson EU:C:1984:153, para 26 and Case C-280/04 Jyske Finans EU:C:2005:753, para 32. Nevertheless, this author has been sceptical in following Recital 12 so closely, see M Strand, ‘Sweden’ in Monti (n 4) 309–11.

14 Konkurrenslagen (Competition Act, 2008:579) c 3, s 25(2). Before 1 August 2005 it was five years.
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from the occurrence of the harmful act or event.\textsuperscript{15} It is of no consequence to this rule whether or not the victim has gained knowledge of the fact that there had been an infringement and that it might have caused harm. This system, where knowledge of harm is of no consequence to the limitation period for damages claims, is motivated by reasons of legal certainty and applies generally under Swedish law.\textsuperscript{16} It should also be stressed that there are no absolute limitation periods of general application under Swedish law. Consequently, this ten-year period can be interrupted in various ways.\textsuperscript{17} None of these would be helpful to a victim who is unaware of his or her harm, however.

Seemingly in contrast, Danish, Finnish and Norwegian law on limitation periods in respect of damages claims have all included special rules under which the limitation period (three years in all three countries) does not begin to run until the victim has become aware of having incurred harm.\textsuperscript{18} There is nonetheless little difference if Sweden is compared to Denmark and Finland, as the latter two countries both have an absolute limitation period of ten years.\textsuperscript{19} The difference is greater in Norway where the absolute limitation period extends to 20 years.\textsuperscript{20}

\textit{ii. Interest}

Swedish courts will not award interest on a damages claim \textit{ex officio}. Instead, it is for the claimant to claim interest and the issues of interest and its rate are at the disposal of the litigating parties. There is a Swedish Interest Act but it is, in principle, subsidiary in character and yields to special statutory provisions and to contractual agreements on interest.\textsuperscript{21} For instance, courts will not award a higher interest amount than what the claimant requests. Consequently, a court will turn to the rules and rates in the Interest Act only to the extent that the parties disagree on the interest payable.

As mentioned above, the statutory rate of interest on damages is the interest for delay. Interest for delay is set as the so-called reference rate set twice a year (1 January and 1 July) by Riksbanken, the Swedish Central Bank, plus 8 per cent.\textsuperscript{22} The applicable rate follows the variations of the reference rate over time, and accordingly the amount of interest payable with regard to a

\begin{itemize}
\item \textsuperscript{15}J Hellner and M Radetzki, \textit{Skadeståndsrett}, 9th edn (Stockholm, Norstedts Juridik, 2014) 401.
\item \textsuperscript{16}Preskriptionslagen (Act on Limitation, 1981:130) s 2. On the reason for the rule see Hellner and Radetzki, \textit{Skadeståndsrett} (n 15) 401.
\item \textsuperscript{17}Listed in Preskriptionslagen, s 5.
\item \textsuperscript{19}\textit{Lov om forældelse af fordringer}, s 3(3)(2); \textit{Laki velan vanhentumisesta}, s 7(2).
\item \textsuperscript{20}\textit{Lov om forældelse af fordringer}, s 9(2).
\item \textsuperscript{21}Räntelagen (Interest Act, 1975:635) s 1.
\item \textsuperscript{22}ibid, s 6.
\end{itemize}
certain damages claim may need to be calculated separately for each half-year until payment. In contrast, which is of interest in this context, the statutory rate of interest on the restitution of payments pursuant to the annulment of a contract is the so-called interest on earnings, which is set as the reference rate plus 2 per cent. Neither of these rates is calculated on a compound basis, but only on a simple basis. Under Swedish law, compound interest will be available only if agreed upon. It is even uncertain in Swedish law whether interest is payable on amounts of interest on debts, where the main debt has not matured but, for example, an annual amount of interest has.

Under the Interest Act, interest on damages claims starts to accrue the 30th day following the claimant’s presentation of the claim for damages and the evidence that can reasonably be required from the claimant under the circumstances. However, interest will not start to accrue until the defendant has been provided with the presentation of the claim and the evidence. Interest will alternatively start to accrue on the date of service of an application for a payment order with Kronofogdemyndigheten, the Swedish Enforcement Authority, or a service of summons to court. By way of exception, interest starts to accrue from the day on which the harm was incurred if the cause of the harm was an intentional crime. However, a breach of EU or national competition law is not sanctioned as a criminal offence in Swedish law.

Interest ceases to accrue when the payment of the claim has been made. The Interest Act includes no rules on the suspension of the accrual of interest.

Generally speaking, the other Nordic countries have similar systems. For instance, statutory law on interest is at the disposal of the parties, and interest payable on a damages claim is legally considered or treated as interest on a late payment. As mentioned, interest rates are set in a similar way and at a

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23 ibid, s 5.
24 See NJA 1994 s 3 (Swedish Supreme Court); and S Lindskog, Betalning (Stockholm, Norstedts Juridik, 2014) 510–20 (in particular 517).
25 G Walin and J Herre, Lagen om skuldebrev m.m.: En kommentar, 3rd edn (Stockholm, Norstedts Juridik, 2011) 295–96; equally uncertain on this specific issue are M Mellqvist and I Persson, Fordran & Skuld, 9th edn (Uppsala, Iustus, 2011). The authors however agree that statutory interest cannot be calculated on compound basis in Swedish law.
26 Räntelagen, s 4 (3).
27 ibid, s 4(4).
28 ibid, s 4(5). There is a statement in the Swedish travaux préparatoires according to which it should be possible for Swedish courts to consider interest losses that have arisen before the claim for damages is presented in their determination of the amount of harm suffered (ie the principal amount), but leading commentators are sceptical as to this view; see Walin and Herre, Lagen om skuldebrev m.m (n 25) section 5.4.
29 Danish Lov om renter og andre forhold ved forsinket betaling (Act on interest and other issues concerning late payment, LBK nr 459 af 13/05/2014), s 1(3), Finnish Korkolaki (Interest Act, 633/1982) s 2, Norwegian Lov om renter ved forsinket betaling m.m. (Act Relating to Interest on Overdue Payments etc, LOV-1976-12-17-100) s 1.
30 This is not stipulated as such but is apparent from the names of the Acts in Denmark and Norway and from the wording of the rules in Finland and Sweden.
similar level: in Denmark and Norway at a reference rate plus 8 per cent,\textsuperscript{31} and in Finland at a reference rate plus 7 per cent.\textsuperscript{32} It is likewise a common main rule in the Nordic countries that interest on a damages claim begins to accrue when the claim is presented to the defendant.\textsuperscript{33}

There is nevertheless a difference, which is of some significance to the issues discussed here, between the Swedish interest regime and those in the other Nordic countries. As explained above, it is not considered possible for Swedish courts to award interest for the period at an earlier point in time (eg from the first occurrence of harm). Such a possibility is, in contrast, available under Danish statutory law\textsuperscript{34} and according to case-law in Finland (including competition damages case-law)\textsuperscript{35} and in Norway.\textsuperscript{36}

B. The New Swedish Rules

Directive 2014/104 has been transposed into Swedish law through the adoption of the Competition Damages Act which entered into force on 27 December 2016.\textsuperscript{37} The Swedish Act will not be surveyed as such here; suffice it to say that it has been designed as a minimum transposition measure and it sticks quite closely to the Directive.

\textit{i. Limitation Periods}

The Competition Damages Act has brought a significant change to the Swedish rules on limitation with respect to competition damages claims. As with so many other provisions in the Directive, Article 10 has been transposed almost verbatim. Thus, under section 6 of the Competition Damages Act, the

\begin{itemize}
  \item \textsuperscript{31} Lov om renter og andre forhold ved forsinket betaling, s 5; Lov om renter ved forsinket betaling m.m., s 3.
  \item \textsuperscript{32} Korkolaki, s 4.
  \item \textsuperscript{33} Lov om renter og andre forhold ved forsinket betaling s 3 ss 2-4, Lov om renter ved forsinket betaling m.m., s 2; Korkolaki, ss 7 and 9 (but cf s 8 on damages for harm caused by an intentional criminal act).
  \item \textsuperscript{34} Lov om renter og andre forhold ved forsinket betaling, s 3(5).
  \item \textsuperscript{35} K Havu, ‘Finland’ in Monti (n 4) 107–12.
  \item \textsuperscript{37} Konkurrensskadelagen (2016:964).
\end{itemize}
limitation period has been set to five years from the point when the infringement of competition law has ceased and the victim has or can reasonably be expected to have gained knowledge (i) of the behaviour and that it constituted an infringement; (ii) of the fact that the infringement caused harm to the claimant, and (iii) of the identity of the infringer. The Swedish legislator has not seized the opportunity offered in the Directive to set an absolute limitation period.

The other Nordic countries have similarly followed the Directive quite closely in this respect. They have prolonged their main limitation periods from three to five years and have faithfully transposed the more precise rules on when that period begins that are laid down in Article 10 of the Directive. As permitted under Recital 36 of the Directive, Denmark and Norway maintain their absolute limitation periods, while Finland has opted to eliminate it. Instead Finland has introduced a special rule on interrupting the limitation period, in essence creating three alternative limitation periods that must all have elapsed before a claim is barred.

### ii. Interest

It is striking to note that all four Nordic countries studied have, without any discussion in their travaux préparatoires, adopted the passage in Recital 12 of Directive 2014/104 concerning when interest should begin to accrue on a competition damages claim. There are possible differences in the nuances of how this has been phrased in the respective Acts, but the intention seems to have been to follow the wording of the Recital as closely as possible. Differences are more marked when it comes to the applicable interest rates. As above, I will focus here on the Swedish Act and only offer some comparative notes on the other Nordic countries.

It has been explained above that the Swedish legislator seems to have taken the view that it was better to meet the recommendation in Recital 12 than to reject it and risk having to comply with it anyway, for example, due to a preliminary ruling on when interest should begin to accrue on a competition damages

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38 Please note that at the time of writing Norway had not yet enacted its suggested new rules for the transposition of Directive 2014/104. The process seems to have been held up by an ongoing discussion on the enforcement of competition law between the EU and the EFTA countries. References to Norwegian rules below are therefore to the Horingsnotat (n 36) containing the suggested new rules.

39 Danish Lov nr 1541 af 13/12/2016 om behandling af erstatningssager vedrørende overtrædelser af konkurrenceretten (Act on the treatment of damages actions concerning infringements of competition law) s 15(1); Finnish Laki (1077/2016) kilpailukohteenorjat (Act on Competition Law Damages) s 10, Norwegian Horingsnotat (n 36) 48–51.

40 Lov nr 1541 s 15(3); Horingsnotat (n 36) 51.

41 Laki (1077/2016) s 10(2).

42 Danish Lov nr 1541, s 3(3); Finnish Laki (1077/2016) s(2); Norwegian Horingsnotat (n 36) 66 (s X-2), Swedish Competition Damages Act, c 3 s 1(2).
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claim. However, this obviously entails a risk of draconian amounts of interest due to the high interest rates applicable to damages claims under Swedish law. In order to avoid that risk, the legislator chose to introduce a novelty: the interest rate applicable before the traditional starting point was set at a different, lower rate than the one applicable during the normal period of accrual. In essence, the pre-transposition rules have been maintained for the purposes of the normal period of accrual, that is, from the service of the claim until the final payment of the claim, including the main rate for damages claims. However, there will be a new and additional period of interest accrual which begins at the occurrence of harm and ends when the traditional period begins. During this period of time, interest shall accrue at the rate traditionally used for the restitution of payments pursuant to the annulment of a contract, which is set as the reference rate plus 2 per cent.43

A similar solution including two different interest periods has been chosen in Finland and in Norway.44 In Denmark, however, it seems the same interest rate will apply from the occurrence of harm until the final payment of the claim.45

IV. THE PRACTICAL CONSEQUENCES OF THE TRANSPPOSITION

In this section it will be attempted to illustrate the very far-reaching practical consequences of the new rules in Sweden by using a simple example.46 The example chosen will be the one mentioned in section I, which was designed for the purposes of an all-European comparative study.47 Please recall that the example assumes that harm amounting to 100 units has been caused by cartel-inflated prices in 1993, 1998, 2006 and 2008 (in sum 400 units of harm, for simplicity presumed to have been suffered on 30 June each year). The cartel was exposed in 2009 and came to the knowledge of the claimant in that year. It will further be assumed that the defendant was served notice of the claim on 30 June 2010, that a final judgment ruling that the defendant must pay damages was delivered in 2013 and that final payment of the claim was made on 1 January 2014.

43 The Competition Damages Act, c 3, s 1(2). This is known in Swedish law as interest on earnings, see section III.A.ii above.
44 Finnish Laki (1077/2016) s 2 ss 2 and the travaux préparatoires (HE 83/2016 vp), Norwegian Høringsnotat (n 36) 18–19 which is admittedly not quite clear on this. cf on Norwegian law Hjelmeng, Ørstavik och Østerud (n 36) 18.
45 Lov nr 1541, s 3(3). Danish law empowers courts to adjust the amount of interest payable if special reasons prevail, but the Supreme Court did not do that in U2005.2171H (GT-Linien) even though it must be presumed that the amount of interest in that case was extraordinarily high.
46 Calculations in this section have been checked by an economist, for which I extend my gratitude to the Tidsskrift for Rettsvitenskap.
47 Monti (n 4). It is not possible to present the calculations made in detail here. See instead Strand (n *) and cf the Monti Report for more details. A significant difference between this chapter and the Monti Report is that I have included the changes made with respect to limitation periods.
Under the pre-transposition rules in Swedish law, any claims with regard to harm incurred in 1993 and 1998 would have been barred but damages would be payable for harm incurred in 2006 and 2008 (200 units). Interest would have accrued from the date of service on 1 July 2010 until final payment on 1 January 2014. Under such circumstances, and applying the real interest rates applicable in Sweden during the interest period thus specified to calculate the interest accrued on the respective amounts of harm suffered in 2006 and 2008 respectively, the total amount of interest payable on the claim would have been 65.6 units. Add the sum principal amount of 200 units, and the total award of damages would have been 265.6 units. 48

Under the new rules, however, no claims will be barred. Harm suffered in 1993 and 1998 can thus be included in the principal amounts claimed (sum total 400 units). The interest rate will be differentiated so that the new, lower rate applies before service of the claim and the traditional rate after that point. 49

Under this new system, the total amount of interest payable on the claim is 294.7 units. Add the sum principal amount of 400 units, and the total award of damages amounts to 665.6 units. 50

The increase in the amount of interest alone is thus almost 250 per cent. The total amount of damages increases with over 160 per cent. As competition litigation usually concerns claims for millions of SEK or EUR, and notwithstanding that the increase of this example cannot speak for every real scenario that might occur (the percentages may be lower or higher), it is concluded that the increases of awards under the new rules, compared to the previous, will be very significant indeed.

V. DISCUSSIONS AND CONCLUSIONS

A. Concerning Limitation Periods and Interest per se

It can be concluded that, as a consequence of the new rules on limitation and interest, the amounts payable in competition damages awards in Sweden will increase. This will probably contribute to a greater incentive to litigate, which may in turn contribute to deterrence from infringements of competition

48 Please find tables presenting the calculation in Strand (n *) and attached at the end of this chapter.
49 Another complicating factor is that the reference rate was not, before 1 July 2002, necessarily changed on 1 January and 1 July (as the practice is now). This has been taken into account in my calculations.
50 Please find tables presenting the calculation in Strand (n *) and attached at the end of this chapter.
law and thus to competition law compliance. If so, the Directive will have accomplished one of its explicit aims.51

From the perspective of a Swedish litigating party, however, it appears entirely arbitrary to give such preferential treatment to competition damages over similar forms of damages claims. Why should damages, for example, for an intrusion into trade secrets not be treated in the same way?52 In both cases there is interference with the competitiveness of an undertaking in the market, an interference which is often revealed only after some time. Seen from the point of view of a company which has suffered harm by reason of an intrusion into its trade secrets it must seem unjust that limitation periods and interest rules are not as preferential to them as they would be if the obstruction of fair competition had instead taken the form of an infringement of competition law.

Likewise, a company that has unwittingly taken part in a cartel must find it blatantly unfair that a competition transgression should lead to such extraordinary repercussions.

It was pointed out in section I that differentiation can be a good thing. The balance between uniformity and specialisation in law must be addressed in each individual field, and of course there should be enough flexibility to allow for courts to reach equitable solutions in particular situations. Nevertheless, this author subscribes to the view that any legislator must make an effort, particularly in our present state of multi-level law and threatening legislative elephantiasis, to keep the system of rules coherent unless there are overriding reasons for creating a special regime. For instance, in Swedish public procurement law a damages claim against the purchasing agency must be brought before the competent court within one year from the completion of the contract.53 In that situation any claimant will be able to quickly assess the amount of harm suffered and other relevant circumstances. In essence, well-founded differences between damages regimes should be accepted, whereas random fragmentation must be avoided.

With regard in particular to the Swedish transposition of Directive 2014/104, I cannot see any reasons in legal policy that would justify a special regime of

52Damages for such intrusion has not been harmonised under EU law; there is only a very general reference to the availability of civil remedies in Art 6 of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1.
53Lagen (2016:1145) om offentlig upphandling (Public Procurement Act) c 20, s 21.
limitation and interest for competition damages that would not be equally valid for other instances where an infringement causing harm, and/or the harm itself, are revealed only after some time. I have mentioned intrusion into trade secrets as an example. Note that Danish, Finnish and Norwegian law have had special rules on limitation periods that target the problem of unknown harm since before the transposition of Directive 2014/104. Furthermore, there has been a certain amount of leeway for courts to award interest from the occurrence of harm, although their transpositions of Directive 2014/104 add some foreseeability on when this should be done. Therefore, it cannot be argued that such solutions with a broader field of application are unknown to Nordic legal tradition.

On the contrary, it is submitted that they would work very well in a Swedish context. Now, the minimum transposition chosen gives the impression that the Swedish legislator only opted for a minimum solution, confining what they perceived to be overriding EU law requirements to as narrow a scope as possible. Few litigants will be happy with such an explanation. Consequently, it is submitted that the Swedish legislator should consider a broader reform concerning limitation periods and interest for any instance of unknown harm.

What has been argued here arguably applies, *mutatis mutandis*, to many aspects of the Competition Damages Act. Since it has been drafted to stay very close to the text of Directive 2014/104, certain of its provisions are phrased in a manner that is odd or even alien to the Swedish system of private law and civil procedure. As a consequence, Sweden now has a special regime which is quite important as part of the rules governing the Swedish market but with a very (even unjustifiably) narrow scope. To competition litigants some of the new rules will appear strange and arbitrary. For these reasons, it is submitted that the transposition of Directive 2014/104 should have been taken as an opportunity for broader reform not only of the rules on limitation periods and interest, but of all relevant statutory law in Sweden.

This is not to say that it is too late to initiate the necessary reform. A justified differentiation of rules on limitation periods and interest could begin by making a distinction between general rules on late payments and rules on damages payments, at least with regard to non-contractual damages payments. After all, the latter category of claims has many distinctive qualities: the claim is often disputed, litigation usually involves complicated evidence assessments, and it is common that the claimant (and even the tortfeasor) have been unaware of having suffered harm for a shorter or longer period of time. With such a distinction, the Swedish legislator would be able to make room for a new approach

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54 Perhaps the most obvious example is the Competition Damages Act, c 5, s 8, transposing Art 7 of Directive 2014/104. The purpose of the rule is to protect so-called whistleblowers under the leniency programme, but from a Swedish procedural law perspective, it is completely alien to our traditional principle of free submission and assessment of evidence (Rättegångsbalken (the Code of Judicial Procedure) 1942:740, c 35, s 1).
Of course, this is precisely the idea driving harmonisation in EU law; to achieve coherence across the jurisdictions of the Member States. On this idea and how the striving for intra-EU coherence nonetheless gives rise to the intra-Member State confusion discussed in this chapter, see K Havu, ‘Quasi-coherence by Harmonisation of EU Competition Law-related Damages Actions?’ in Letto-Vanamo and Smits, *Coherence and Fragmentation in European Private Law* (n 3) 25–42. For a historical perspective on the development from pre-modern fragmentation to the codifications of modernity and on to the re-fragmentation taking place in our times, see eg Letto-Vanamo, ‘Fragmentation and Coherence of Law’ (n 3). As is well known, FK von Savigny was quite sceptical about the benefits of the codifications taking place in his time; see *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer, 1814) 16–24.
to transpose a certain directive,\textsuperscript{56} or to take arms against the threat of fragmentation in order to maintain a coherent national system including the new private law rules.\textsuperscript{57} Furthermore, EU legislation is by no means the only way in which EU private law, which becomes part of the private law of every Member State, is being created. EU primary law, ie the Treaties, the Charter and the general principles of EU law, is also a relevant source of EU private law. The obvious example is of course the rule on the nullity of anticompetitive agreements in Article 101(2) TFEU, but there are other and less direct ways in which EU primary law becomes relevant in a private law context.\textsuperscript{58} There are seemingly endless private law consequences arising from the complexities of the interplay of EU law and national law in general, under doctrines and principles such as EU law precedence, the direct or exclusionary effect of EU law, consistent interpretation, and the principles of equivalence and effectiveness. Moreover, EU Regulations are capable of being directly applicable in private law relations, as follows from Article 288(2) TFEU. In this chapter, however, focus will be on issues related to the transposition of EU directives in the field of private law.

It is beyond the scope of this contribution to evaluate the many transposition strategies tested by national legislators in the EU, such as minimum transposition or so-called supererogatory transposition.\textsuperscript{59} Every strategy has its risks and its benefits. Minimum transposition – which often seems to be the Swedish option in order to minimise the impact of EU legislation – is liable to create a patchwork of specialised regimes, disrupting the coherence of national private law and endangering the possibilities of drawing conclusions by analogy that have contributed so much to the success of modern law.\textsuperscript{60} On the other hand minimum harmonisation may be a way to constrain what is perceived, by the
national legislator, as the adverse impact of unwanted new rules. Supererogatory transposition may be even more problematic as it leads to the problem of fragmented legal acts, where the aspects of the national act that are transposing the directive are to be interpreted and applied with the EU law method, while aspects that may fall outside the directive (or even outside the scope of EU law as such) can be interpreted and applied using the traditional national method. Consequently, the act itself may become a minefield for those who try to read it as a coherent whole.

Recently it was pointed out by one of the leading private law authors in Sweden, Johnny Herre, that the Swedish legislator does not give priority to more far-reaching legislative reforms that could satisfy the need for systematic coherence. Instead, Herre submitted, legislative work is carried out on ad hoc basis in order to address what is perceived to be the most acute issues, and in particular the legislator has become too preoccupied with transposing EU legislation to give proper attention to maintaining the national system. The result, Herre argued, was ‘fragmentation’. Herre thus expresses the perception of pressure identified in section I. Nevertheless, Herre might very well agree with this author that this situation is avoidable, and ultimately hinges upon how the national legislator approaches the task of transposing an EU directive into national law.

The perception of pressure from the EU against national private law must not lead to defeatism or to settling for putting the ‘blame’ for fragmentation on the EU. Several commentators have argued that the problem of fragmentation should, or can only, be remedied by the EU legislator, either through more harmonisation or by creating a uniform, but optional, European civil code. This author is inclined to respectfully disagree: the fragmentation of national private law cannot be blamed on the EU and other supernational or transnational ‘norm bringers’ only; choices made by the Member States (whether or not these choices are made consciously) play a significant role too. It is obvious, if nothing else than from the failure of the Common European Sales Law, that systematic and coherent EU private law will not fall from the Begriffshimmel any time soon. Instead, we need to work with what we have, where we are. To borrow a line from the sociologist Clifford Geertz, we are

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63 See eg Leible (n 57) 1265, and the Panel Discussion report in R Schulze and H Schulte-Nölke (eds), European Private Law – Current Status and Perspectives (Munich, Sellier – de Gruyter, 2011) 265–78.
today suspended in webs of simultaneous and multi-layered tendencies towards coherence and fragmentation originating from several different sources of law, and we must each learn to live with it and to work with it. The EU has rightly been criticised for inconsistent terminology in private law legislation, and the EU legislator must – as it has tried to do in recent years – take it upon itself to remedy this flaw. Nonetheless it is for the Member States and for each Member State alone to assume responsibility for making a whole functioning system of private law from the jigsaw puzzle of national private law and EU private law. This chapter aims to illustrate what can happen if Member States do not rise to this challenge, and offers a few pointers regarding the way forward. If the position thus advocated here is accepted, it becomes obvious that the responsibility of making a coherent whole of national law and EU law in the process of transposing a directive falls on the national legislators.

Consequently, EU law has broad and multi-faceted implications for national private law. Indeed, within the scope of application of EU law, it may be that we can discern a growing field of EU private law. As a consequence, judges and private lawyers throughout the EU must work to understand how the interplay between EU law and national law works in private law. In order for this interplay to work in a satisfactory manner, however, it is necessary that legislation transposing EU directives maintains the high standard of quality that is demanded for any act of legislation. To do that we must strive to avoid fragmentation as such, as has been argued above, but perhaps a more pressing need is to deal with the perception of outside pressure that lingers in private law. It is submitted that this perception itself, blaming the ‘blind and blunt’ EU legislator for any and all fragmentation, is the first and foremost cause for concern regarding poorer quality of legislation and law enforcement in Europe.

Insofar as lawmaking is concerned, whether prompted by the transposition of directives or by necessary adaptations to other aspects of EU law, officials in the national legislatures must, on the one hand, be intimately familiar with the principles governing interaction between EU law and national law. Familiarity, in this context, does not only denote acquaintance with the principles but also an in-depth understanding of how they have been developed, expressed and used in the case-law of the Court of Justice and how they interrelate (or seem to interrelate, for indeed this is not always easily discerned), including a capacity to identify problematic issues. On the other hand, an as intimate familiarity with the field of national law at stake is equally necessary. If the legislative process

64 ‘[M]an is an animal suspended in webs of significance he himself has spun’, a view that Geertz himself attributes to inspiration from Max Weber; C Geertz, The Interpretation of Cultures (New York, Basic Books, 1973) 5.

65 eg by Leible (n 57) 1257 and by J Herre, ‘Obligationsrätt i Norden – nuläge och utmaningar’ (n 62) 284.
is based on these two fundamental conditions, then (and, it is submitted, only then) will the national legislator have the necessary tools in place to identify relevant options and to reach informed decisions. The process of transposing a directive into national law should always include a readiness to seize the opportunity to introduce a broader reform of the national sets of rules and regulations that are concerned, to the benefit of everyday legal practice.\(^{66}\)

In the counselling and adjudication of legal matters, big and small, that take place every day in the Member States, we must never stop to strive for the same high quality in our interpretation and application of rules in or derived from EU law as we do with regard to purely domestic law. To that effect, it must be finally accepted that EU law is no longer outside the system, but rather inside it; private law practice in EU Member States is governed by (at least) two legal systems that operate in parallel or, sometimes, even simultaneously. In Sweden a great deal of hard work remains in order to reach that point, while for instance Denmark seems to have made greater progress.\(^{67}\)

One consequence of that work will be the need to nuance the perception in private law (and other fields of national law) of pressure coming from outside the system. National legislators must ensure that they are able to make conscious choices of when to opt for minimum transposition and when to initiate a broader reform in order to maintain a systematically coherent body of national law – and when and how to use all the myriad of choices that lie between these extremes. Such an in-depth, constructive and creative understanding of the interrelationship between EU law and private law entails what is seemingly a paradox: EU law dictates the methods and techniques to be used for the interpretation and application of EU law, but in the Member States we are free (albeit to a varying degree) to set the legal context in which EU law norms are to be interpreted and applied. This choice of legal setting can be used in order preserve traditions, and to promote legal coherence. By remaining aware of these opportunities – this normative discretion but nonetheless normative responsibility – we can, it is submitted, acquire a nuanced attitude to the interplay of EU law and national private law that could in turn vouch for high quality in the transposition and implementation of directives. In order to avoid unwarranted fragmentation of national law we must stop succumbing to the transposition of directives, and rise to managing the integration of directives into the bigger regulatory context.

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\(^{67}\) That is, judging from the active and creative attitude to EU law displayed by Danish courts in cases such as C-94/10 Danfoss EU:C:2011:674 and C-441/14 Dansk Industri EU:C:2016:278.
Table 1 Calculation of interest on the principal award under previous Swedish rules

<table>
<thead>
<tr>
<th>Date Range</th>
<th>Interest Rate</th>
<th>Sum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 July 2010 – 31 December 2010</td>
<td>8.5%</td>
<td>8.6 units</td>
</tr>
<tr>
<td>1 January 2011 – 30 June 2011</td>
<td>9.5%</td>
<td>9.4 units</td>
</tr>
<tr>
<td>1 July 2011 – 30 June 2012</td>
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<td>20.0 units</td>
</tr>
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<td>1 July 2012 – 31 December 2012</td>
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<td>9.6 units</td>
</tr>
<tr>
<td>1 January 2013 – 31 December 2013</td>
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<td>18.0 units</td>
</tr>
<tr>
<td>Sum total of interest:</td>
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<td>65.6 units</td>
</tr>
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Table 2 Calculation of interest on the principal award under new Swedish rules

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<th>Date Range</th>
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<th>Sum</th>
</tr>
</thead>
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<td>1 July 1993</td>
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<td>0.0 units</td>
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<tr>
<td>2 July 1993 – 7 October 1993</td>
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<td>2.1 units</td>
</tr>
<tr>
<td>8 October 1993 – 3 January 1994</td>
<td>7.0%</td>
<td>1.7 units</td>
</tr>
<tr>
<td>4 January 1994 – 3 July 1994</td>
<td>6.5%</td>
<td>3.2 units</td>
</tr>
<tr>
<td>4 July 1994 – 3 October 1994</td>
<td>7.5%</td>
<td>1.9 units</td>
</tr>
<tr>
<td>4 October 1994 – 3 July 1995</td>
<td>9.0%</td>
<td>6.7 units</td>
</tr>
<tr>
<td>4 July 1995 – 5 October 1995</td>
<td>9.5%</td>
<td>2.4 units</td>
</tr>
<tr>
<td>6 October 1995 – 2 January 1996</td>
<td>9.0%</td>
<td>2.2 units</td>
</tr>
<tr>
<td>3 January 1996 – 1 April 1996</td>
<td>8.0%</td>
<td>2.0 units</td>
</tr>
<tr>
<td>2 April 1996 – 1 July 1996</td>
<td>7.5%</td>
<td>1.8 units</td>
</tr>
<tr>
<td>2 July 1996 – 1 October 1996</td>
<td>6.5%</td>
<td>1.6 units</td>
</tr>
<tr>
<td>2 October 1996 – 2 January 1997</td>
<td>5.5%</td>
<td>1.4 units</td>
</tr>
<tr>
<td>3 January 1997 – 30 June 1998</td>
<td>4.5%</td>
<td>6.7 units</td>
</tr>
<tr>
<td>Harm to be compensated in damages: Add 100 units for 2nd instance of harm (sum 200 units)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date Range</th>
<th>Interest Rate</th>
<th>Sum</th>
</tr>
</thead>
<tbody>
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<td>4.5%</td>
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<td>2 July 1998 – 4 January 1999</td>
<td>4.0%</td>
<td>4.1 units</td>
</tr>
<tr>
<td>5 January 1999 – 5 April 1999</td>
<td>3.5%</td>
<td>1.7 units</td>
</tr>
<tr>
<td>6 April 1999 – 3 October 1999</td>
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<td>3.0 units</td>
</tr>
<tr>
<td>4 October 1999 – 3 April 2000</td>
<td>3.5%</td>
<td>3.5 units</td>
</tr>
<tr>
<td>4 April 2000 – 30 June 2000</td>
<td>4.5%</td>
<td>2.2 units</td>
</tr>
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<td>1 July 2000 – 2 April 2001</td>
<td>4.0%</td>
<td>6.0 units</td>
</tr>
<tr>
<td>3 April 2001 – 2 July 2001</td>
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<td>1.7 units</td>
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### Table 2 (Continued)

<table>
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</tr>
</thead>
<tbody>
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<td>4.0 units</td>
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<td></td>
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<td>1.7 units</td>
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<tr>
<td>3 April 2002 – 30 June 2002</td>
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<td>4.0 %</td>
<td>2.0 units</td>
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<td>1 July 2002 – 31 December 2002</td>
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<td>6.5 %</td>
<td>6.6 units</td>
</tr>
<tr>
<td>1 January 2003 – 30 June 2003</td>
<td></td>
<td>6.0 %</td>
<td>6.0 units</td>
</tr>
<tr>
<td>1 July 2003 – 30 June 2004</td>
<td></td>
<td>5.0 %</td>
<td>10.0 units</td>
</tr>
<tr>
<td>1 July 2004 – 30 June 2005</td>
<td></td>
<td>4.0 %</td>
<td>8.0 units</td>
</tr>
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<td>1 July 2005 – 30 June 2006</td>
<td></td>
<td>3.5 %</td>
<td>7.0 units</td>
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</tbody>
</table>

Harm to be compensated in damages: Add 100 units for 3rd instance of harm (sum 300 units)

<table>
<thead>
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<th>Start Date</th>
<th>End Date</th>
<th>Interest Rate</th>
<th>Sum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 July 2006 – 31 December 2006</td>
<td></td>
<td>4.5 %</td>
<td>6.8 units</td>
</tr>
<tr>
<td>1 January 2007 – 30 June 2007</td>
<td></td>
<td>5.0 %</td>
<td>7.4 units</td>
</tr>
<tr>
<td>1 July 2007 – 31 December 2007</td>
<td></td>
<td>5.5 %</td>
<td>8.3 units</td>
</tr>
<tr>
<td>1 January 2008 – 30 June 2008</td>
<td></td>
<td>6.0 %</td>
<td>8.9 units</td>
</tr>
</tbody>
</table>

Harm to be compensated in damages: Add 100 units for 4th instance of harm (sum 400 units)

<table>
<thead>
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<th>Start Date</th>
<th>End Date</th>
<th>Interest Rate</th>
<th>Sum</th>
</tr>
</thead>
<tbody>
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<td>1 July 2008 – 31 December 2008</td>
<td></td>
<td>6.5 %</td>
<td>13.1 units</td>
</tr>
<tr>
<td>1 January 2009 – 30 June 2009</td>
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<td>4.0 %</td>
<td>7.9 units</td>
</tr>
<tr>
<td>1 July 2009 – 30 June 2010</td>
<td></td>
<td>2.5 %</td>
<td>10.0 units</td>
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</table>

Interest after service of the claim is interest for delay.

<table>
<thead>
<tr>
<th>Start Date</th>
<th>End Date</th>
<th>Interest Rate</th>
<th>Sum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 July 2010 – 31 December 2010</td>
<td></td>
<td>8.5 %</td>
<td>17.1 units</td>
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<td>1 January 2011 – 30 June 2011</td>
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<td>9.5 %</td>
<td>18.8 units</td>
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<td>1 July 2011 – 30 June 2012</td>
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<td>10.0 %</td>
<td>40.0 units</td>
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<td>1 July 2012 – 31 December 2012</td>
<td></td>
<td>9.5 %</td>
<td>19.2 units</td>
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<tr>
<td>1 January 2013 – 31 December 2013</td>
<td></td>
<td>9.0 %</td>
<td>36.0 units</td>
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Sum total of interest: 294.7 units.