

Table of Contents

<i>Table of Cases</i>	xxi
<i>Table of Legislation</i>	xxxiii
<i>List of Contributors</i>	xlix

I. EU COMPETITION LAW PRIVATE ENFORCEMENT AND THE ANTITRUST DAMAGES DIRECTIVE

1. Damages Actions in the Enforcement of EU Competition Law	3
<i>Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos</i>	
1. Introduction	3
1.1 Introduction to EU competition law	4
1.2 Public enforcement of EU competition law	5
1.3 EU law private enforcement developments	7
1.4 The experience of damages actions in the EU	14
1.5 Collective redress	16
1.6 US antitrust private enforcement and experience	18
1.7 EU private international law rules	20
2. Conclusions	23
 2. Promotion and Harmonization of Antitrust Damages Claims by Directive 2014/104/EU?	 24
<i>Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos</i>	
1. Introduction	24
2. The Path to the Adoption of the Directive	24
3. The Goals of the Directive	27
4. The Directive: Legal Grounds and Rules	28
4.1 Why a Directive?	28
4.2 Eroding and encroaching upon national remedial autonomy	29
4.3 Content of the Directive	31
5. Assessment of the Directive: Scope and Nature of Its Rules	45
5.1 Shortcomings and neglected issues	46
5.2 Limited treatment	47
5.3 Inherent biases	48
5.4 Uniform EU playing field?	50
6. The Implementation of the Directive	51
7. Conclusions	55

II. THE MEMBER STATE REPORTS ON TRANSPOSITION OF THE DIRECTIVE

61

3. Belgium

Caroline Cauffman

1. Transposition Background and Process	61
2. Scope of the Transposition Measure	62
2.1 Substantive scope	63
2.2 Temporal scope	63
3. Key Issues	63
3.1 Terminological differences between the Directive and its transposition	65
3.2 Access to documents	72
3.3 Effect of decisions of competition authorities	72
3.4 Time-barring deadlines	74
3.5 Solidary liability	76
3.6 Passing-on of overcharges	
3.7 Presumption and quantification of harm by cartels or other antitrust infringements	77
3.8 Consensual dispute resolution	78
3.9 Collective enforcement	79
3.10 Parent company liability	79
4. Concluding Remarks	80

82

4. Cyprus

Maria Ioannidou

1. Transposition Background and Process	82
1.1 Cypriot competition regime	82
1.2 Competition litigation	84
1.3 Transposition process	86
2. Scope of the Transposition Measure	89
3. Key Issues	90
3.1 Definitions	91
3.2 Limitation periods	91
3.3 Binding force of decisions of other Member States	92
3.4 Parent company liability	94
3.5 Presumption and quantification of damage by cartels or other antitrust infringements	94
3.6 Distribution of liability between co-infringers	96
3.7 Access rules	96
3.8 Specific provisions on collective enforcement	98
3.9 Judicial system (jurisdiction for private enforcement actions)	98
3.10 Special guidance	99
4. Concluding Remarks	99

101

5. France

Muriel Chagny

1. Transposition Background and Process	101
1.1 Overview of the French private enforcement context	101
1.2 Transposition process	102

2. Scope of the Transposition Measure	105
2.1 Substantive scope	105
2.2 Temporal scope	105
3. Key Issues	106
3.1 Concept of undertaking	106
3.2 Binding effect of competition authorities' decisions	107
3.3 Presumption of harm	110
3.4 Passing-on of overcharges	111
3.5 Types of harm and assessment of damages	112
3.6 Joint and several liability and recovery of contribution from co-infringers	114
3.7 Consensual dispute resolution	116
3.8 Time-barring deadlines	117
3.9 Access to evidence	119
3.10 Class actions	121
4. Concluding Remarks	122
 6. Germany	 124
<i>Christian Kersting</i>	
1. Transposition Background and Process	124
2. Scope of the Transposition Measure	127
3. Key Issues	129
3.1 Definitions	129
3.2 Binding force of decisions of other Member States	129
3.3 Parent company liability for fines	130
3.4 Group liability for damages	131
3.5 Presumption of damages and quantification	136
3.6 Joint and several liability and recovery of contribution from co-infringers	137
3.7 Immunity recipients	138
3.8 Small and medium-sized enterprises	140
3.9 Disclosure of evidence	143
3.10 Limitation periods	146
3.11 Organisation of the judicial system	148
3.12 Publication of decisions imposing fines	148
3.13 Passing-on defence and indirect purchasers	149
3.14 Settlements	152
3.15 Personal liability of managers towards injured parties	154
3.16 Costs of third-party notices	155
4. Concluding Remarks	156
 7. Greece	 158
<i>Maria Ioannidou</i>	
1. Transposition Background and Process	158
1.1 Overview of the Greek private enforcement context	158
1.2 Transposition background	160
1.3 Transposition process	161
2. Scope of the Transposition Measure	163
2.1 Substantive scope	163
2.2 Temporal scope	164

3. Key Issues	165
3.1 Limitation periods	165
3.2 Binding force of decisions of other Member States	166
3.3 Joint and several liability	167
3.4 Parent company liability	168
3.5 Presumption of damage by cartels and quantification	169
3.6 Method for quantification of damages by national courts	170
3.7 Passing-on defence and indirect purchasers	171
3.8 Access rules	172
3.9 Specific provisions on collective enforcement	176
3.10 Organisation of the judicial system	177
3.11 Consensual dispute resolution	178
4. Concluding Remarks	180
8. Hungary	180
<i>Csongor István Nagy</i>	
1. Transposition Background and Process	180
2. Scope of the Transposition Measure	182
2.1 Substantive scope	182
2.2 Temporal scope	183
3. Key Issues	183
3.1 Time-barring deadlines	185
3.2 Binding force of decisions of other Member States	185
3.3 Parent company liability	
3.4 Presumption and quantification of damages by cartels or other antitrust infringements	186
3.5 Criteria for presumption of distribution of liability between co-infringers and right of return between co-infringers	189
3.6 Access rules	189
3.7 Specific provisions on collective enforcement	190
3.8 Organization of the judicial system	191
4. Concluding Remarks	191
9. Ireland	193
<i>Mary Catherine Lucey</i>	
1. Transposition Background and Process	193
2. Scope of the Transposition Measure	198
2.1 Substantive scope	198
2.2 Temporal scope	199
3. Key Issues	199
3.1 Right to full compensation	199
3.2 Disclosure of evidence	200
3.3 Effect of NCA decisions	203
3.4 Limitation period	205
3.5 Joint and several liability	206
3.6 Passing on	206
3.7 Quantification	207

3.8 Consensual dispute resolution	207
3.9 Incorrect or incomplete transposition	207
4. Concluding Remarks	208
10. Italy	209
<i>Susanna Lopopolo</i>	
1. Transposition Background and Process	209
1.1 Italian legislative and jurisprudential context	209
1.2 Transposition process and 'location' question	210
2. Scope of the Transposition Measure	211
2.1 Substantive scope	212
2.2 Temporal scope	212
3. Key Issues	213
3.1 Disclosure of evidence	213
3.2 Protection of evidence included in the file of a competition authority	216
3.3 Penalties	217
3.4 Binding force of NCA decisions and judicial review	219
3.5 Time limitation rule	221
3.6 Joint and several liability	223
3.7 Parental liability	224
3.8 Passing-on of overcharges	225
3.9 The use of AGCM expertise in quantifying damages	226
3.10 Consensual dispute resolution	228
3.11 Collective redress	229
3.12 Specialised courts	230
4. Concluding Remarks	230
11. Lithuania	232
<i>Jurgita Malinauskaite</i>	
1. Transposition Background and Process	232
1.1 Overview of the Directive and assessment of its impact on the Lithuanian legal system	232
1.2 The consultation process	234
1.3 Impact assessment	236
2. Scope of the Transposition Measure	238
2.1 Substantive scope	238
2.2 Temporal scope	240
3. Key Issues	240
3.1 The right to full compensation	240
3.2 Access to evidence and disclosure of evidence	241
3.3 Effect of national decisions and limitation periods	245
3.4 Joint and several liability	247
3.5 Passing-on of overcharges	248
3.6 Quantification of harm	248
3.7 Consensual dispute resolution	250
4. Concluding Remarks	251

12. Luxembourg	253
<i>Caroline Cauffman</i>	
1. Transposition Background and Process	253
1.1 General overview of the transposition procedure	253
1.2 Overview of the main reflections made by the relevant bodies	254
2. Scope of the Transposition Measure	258
2.1 Substantive scope	258
2.2 Temporal scope	259
3. Key issues	260
3.1 Not specifically transposed provisions	260
3.2 Protection of confidential information	261
3.3 Principle of joint and several liability	262
3.4 Probative value of decisions of NCAs of other Member States	263
3.5 Presumption and quantification of harm by cartels	263
3.6 Time-barring deadlines	265
3.7 Sanctions	265
3.8 Payment of costs	266
3.9 Actions for damages by claimants from different levels in the supply chain	266
3.10 Consensual dispute resolution	267
3.11 Parent company liability	267
3.12 No specific provisions on collective enforcement	268
4. Concluding Remarks	268
13. The Netherlands	270
<i>Jeroen Kortmann and Simon Mineur</i>	
1. Transposition Background and Process	270
1.1 The Dutch private enforcement context	270
1.2 The Dutch transposition process: general observations	272
1.3 The transposition of Directive 2014/104/EU into Dutch law	272
1.4 General approach: no 'translation of the untranslatable'	274
2. Scope of the Transposition Measure	275
3. Key Issues	276
3.1 No exemption for Dutch farmers	276
3.2 Limitation periods	276
3.3 Effects of NCAs' final infringement decisions	279
3.4 Disclosure and protection of documents	280
3.5 Evidentiary presumptions: damage and passing-on	280
3.6 Joint and several liability	281
3.7 Parental liability	282
3.8 Effect of consensual settlements on subsequent actions for damages	284
3.9 Prevention of contradictory judgments and overcompensation	285
3.10 Collective redress	286
3.11 No specialized court structure	287
4. Concluding Remarks	288

14. Poland	290
<i>Maciej Bernatt and Maciej Gac</i>	
1. Transposition Background and Process	290
1.1 The main stages of the implementation process	290
1.2 Persons/authorities involved in the implementation process	291
1.3 The main criticism of the implementation process	292
1.4 The main objectives of the implementation and its possible impact on Polish law and the economy	292
1.5 The method of implementation	293
2. Scope of the Transposition Measure	293
2.1 Substantive scope	293
2.2 Temporal scope	294
3. Key Issues	294
3.1 Novel aspects	294
3.2 Incorrect transposition: effect of NCAs' decisions	297
3.3 Incomplete transposition: passing-on of overcharges	298
3.4 Problematic issues	298
4. Concluding Remarks	300
15. Portugal	304
<i>Miguel Sousa Ferro</i>	
1. Transposition Background and Process	304
2. Scope of the Transposition Measure	307
3. Key Issues	309
3.1 Pre-trial discovery	309
3.2 Partial centralization of private enforcement at the specialized Court	310
3.3 Access rules	312
3.4 Time-barring	313
3.5 Protecting failed settlement talks	315
3.6 Binding force of public enforcement decisions	316
3.7 Concept of undertaking and parent company liability	317
3.8 Presumption of proportion of responsibility for joint liability	319
3.9 Quantifying damages	319
3.10 Promoting the Portuguese opt-out regime (' <i>actio popularis</i> ')	320
3.11 Centralizing information on private enforcement cases at the PCA	322
3.12 Legal privilege	323
3.13 Effect on trade between Member States	323
4. Concluding Remarks	324
16. Spain	326
<i>Francisco Marcos</i>	
1. Transposition Background and Process	326
2. Scope of the Transposition Measure	329
3. Key Issues	331

3.1 Jurisdiction: competent courts	331
3.2 Right to full compensation	332
3.3 Responsibility of infringers: joint and several/parental liability	335
3.4 Passing-on of the harm and indirect purchasers/suppliers' claims	337
3.5 Limitation period	339
3.6 Alternative dispute resolution	340
3.7 Measures to facilitate claims	342
3.8 Collective claims and consumer redress	354
4. Concluding Remarks	356
17. Sweden	358
<i>Lars Henriksson</i>	
1. Transposition Background and Process	358
1.1 New legislation on antitrust damages	360
2. Scope of the Transposition Measure	362
3. Key Issues	363
3.1 Preconditions for liability in Swedish law	365
3.2 New rules on joint and several liability	366
3.3 New rules on limitation periods	366
3.4 Elements of the right to full compensation	367
3.5 New rules on interest in arrears on damages awarded	369
3.6 Quantification of harm	370
3.7 Passing-on of overcharges in Swedish law	371
3.8 The right to recover damages from other infringers	372
3.9 Procedural rules for cases involving antitrust damages	373
3.10 Rules on disclosure of evidence	374
3.11 Prohibition against presenting certain written evidence	374
3.12 Binding effect of national decisions	375
3.13 Incorrect or incomplete transposition	375
4. Concluding Remarks	378
18. United Kingdom	
<i>Barry Rodger</i>	
1. Transposition Background and Process	378
1.1 Overview of the UK private enforcement context	378
1.2 Transposition process	380
2. Scope of the Transposition Measure	382
2.1 Substantive scope	382
2.2 Temporal scope	383
3. Key Issues	383
3.1 Limitation periods	388
3.2 Binding force of competition authority decisions	390
3.3 Disclosure and protection of documents/admissability of evidence	393
3.4 The presumption of harm and quantification of damages	397
3.5 The passing-on defence and indirect purchasers	398
3.6 Joint and several liability	399
3.7 Parent company liability	400
3.8 Consensual dispute resolution	401
3.9 Collective redress	401

3.10 Litigation costs and funding	403
3.11 Specialised court structure	405
4. Concluding Remarks	406

III. COMPARATIVE ANALYSIS OF THE TRANSPPOSITION PROCESSES AND OUTCOMES

19. Transposition Context, Processes, Measures, and Scope	411
<i>Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos</i>	
1. Introduction	411
2. Member States' Competition Litigation Context	411
3. Implementation Timescale	414
4. Responsible Authorities and Stakeholders' Level of Debate	419
5. Transposition Measure Type	424
6. Scope of the Transposition Measures: Substantive and Temporal	428
6.1 Substantive scope	428
6.2 Temporal scope	433
20. Transposition: Key Issues and Controversies	440
<i>Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos</i>	
1. Introduction	440
2. Who Is Liable and under Which Conditions?	440
3. Joint Liability, Immunity Recipients, and SMEs	444
4. Access to Evidence	447
4.1 General issues	447
4.2 Changing judicial culture and legal instincts	448
4.3 Various procedural issues	449
4.4 Protection of confidentiality and limits to use of evidence	451
4.5 Sanctions	453
4.6 Requesting documents from competition authorities	454
5. Specialized Courts	455
6. Limitation Periods	457
7. Binding Force of Public Enforcement Decisions	461
8. Compensation, Quantification, Passing-on, and Presumptions	464
8.1 Compensation	464
8.2 Damages, quantification, and presumptions	465
8.3 Indirect damages and passing-on	468
9. Consensual Dispute Resolution: Settlements and ADR	470
10. Collective Redress	473
11. Other Issues	478
21. Concluding Remarks	481
<i>Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos</i>	