

Contents

<i>Table of Cases</i>	xvii
Irish Cases	xvii
EC Cases	xviii
United Kingdom Cases	xix
United States Cases	xx
Australian Cases	xxi
Miscellaneous Legislation	xxiii
 1: INTRODUCTION	 1
Overview	1
Structure of the Book	4
Some Issues Not Addressed in this Book	6
 2: DAMAGES ACTIONS: ENFORCEMENT OR COMPENSATION	 9
Introduction	9
The Purpose of Private Actions: Enforcement Privatised?	10
The Commission Initiative	10
Private Actions to Enforce Competition Law	10
Views of the Commissioners and Staff of the Commission	11
The White Paper: A Shift in Emphasis?	14
Community Law on the Concept of Private Enforcement	16
Private Antitrust Law Enforcement: The American Model	19
Antitrust Modernization Commission	23
Commission Following the American Model?	24
Private Enforcement of the Competition Rules in Ireland	25
The Competition Act 1991 and Competition (Amendment) Act 1996	25
Competition Act 2002	28
Ireland Post 2002 Act: A Mixed Model with a Hole in it	28
Private Action as Enforcement Tool: Is it an Appropriate and/or an Effective Concept?	30
Wils' Three Tasks of Antitrust Enforcement	31
Clarifying and Developing the Law	31
Deterrence and Punishment	36
Pursuit of Corrective Justice through Compensation	48
Conclusion	49

3: DAMAGES ACTIONS FOR COMPENSATION: WHO CAN SUE AND FOR WHAT?	51
Introduction	51
Who is Actually Injured and Therefore Can or Should Sue in Damages?	52
Unidentifiable Victims	53
Primary Victims	54
Secondary Victims	55
Tertiary Victims	58
Secondary Victims Revisited: Indirect Purchasers and the Passing on Defence	58
The US Experience of Indirect Purchasers and the Passing on Defence	60
Federal Law, <i>Hanover Shoe</i> and <i>Illinois Brick</i>	60
A Different Approach in Various States	61
A Solution to <i>Illinois Brick</i>	63
The Commission's Solution to the Indirect Purchaser and Passing on Conundrum	63
Ireland and the Problem of Indirect Purchasers and the Passing on Defence	65
The Complex Compromise Solution	66
Defining Damages in Private Competition Cases: The Commission Initiative	67
<i>Manfredi</i> Answers the Question	70
Harm and Full Compensation for Loss Suffered	72
Legislating for Quantification of Damages	72
Damages but Not Restitutionary Damages	74
Defining Damages in Competition Cases in Ireland: <i>Donovan v ESB</i>	79
Damages in <i>Donovan</i>	80
Quantifying Damages	82
The 'But-for World'	82
A Variety of Methods for Quantifying Loss	83
Simple Calculation Methods	83
More Complex Calculation Methods	84
The Sampling Method	85
The <i>Ex Aequo et Bono</i> Quantification	85
Some Criticism of Proposed Guidelines	86
Summing Up	87
Conclusion	87
4: COLLECTIVE REDRESS	89
Introduction	89
Recap: Legal Requirement for Effective Redress	90
The Debate in Europe	93
Funding the Action	96
Defining, Representing and Controlling the Group or Class	97
Quantification and Distribution of Damages	98
Two Options for Redress: the Commission's Proposals in the White Paper	100

Overview of the US Class Action	102
Reasons for this Overview	102
Some Standout Features of the US Class Action	103
Rule 23 of the Federal Rules of Civil Procedure	105
Class Certification	107
Clayton Antitrust Act and Treble Damages	108
<i>Cy-près</i> Doctrine	108
Some concerns with the US Class Action Procedure	111
Abuses exaggerated	114
A Case Study of Abuse in Class Actions: The <i>Mirfasihi</i> Settlement	117
A Case Study of Success in Class Actions: The NASDAQ antitrust litigation	119
Steps towards Reform: The Class Action Fairness Act 2005	123
The UK Models for Collective Redress	124
Reasons for this Overview	124
Collective Redress in the UK: A Lively Debate	125
Overview of the Law on Collective Redress	130
The Test Case, Joinder and Consolidation of Actions	130
Representative Actions	131
Group Litigation Orders	134
Section 47B of the Competition Act 1998	135
The CJC Recommendations	137
The UK Government's View on the CJC's Recommendations	137
BIS Consultation in 2012 on 'Private Actions in Competition Law: A Consultation on Options for Reform'	138
Conclusion	139
5: COLLECTIVE REDRESS FOR BREACH OF COMPETITION LAW IN IRELAND	140
Introduction: Collective Redress in Ireland, the Need, the Law and the Policy	140
The Legal Need to Safeguard Citizens' Rights under the Treaty	141
Irish Shortcomings on the Legal Right to Sue under the Treaty	143
Does the Competition (Amendment) Act 2012 Solve the Problem?	144
No Right of Action for Consumers with Small Claims?	145
State Liability to Compensate Victims of Infringements?	148
Some Reasons for Introducing Class Actions in Irish Law	150
A Benefit to the State as Defendant: Army Hearing Loss Cases	150
The Law in Ireland on Multi-Party, Representative and Class Actions	152
Consumer Protection Act 2007	152
Law Reform Commission and Multi-party Litigation	153
Representative Actions	153
Joinder and Consolidation	156
The Test Case	157
The Competition Authority's Evolving View	157
Cost to the Economy	158
No Reward for Plaintiffs	160

Counter Arguments to the Competition Authority's View	161
Small Sums in Damages Dispersals	161
Difficulty Proving Loss	162
Class Action Settlements	162
Disproportionate Rewards for Lawyers	165
Initiation of Cases by Legal Firms	166
Competition Authority Submission to Commission Green Paper on Damages Actions	166
Towards a Coherent European Approach to Collective Address	167
Public Policy in Ireland on Damages and Collective Redress	169
Concerns Raised by the Department of Enterprise, Trade and Employment	169
Procedural Autonomy of Member States	170
Principle of Effectiveness or ' <i>Effet Utile</i> '	171
Does the Commission have Competence to Legislate and Harmonise Procedural Rules?	172
Exclusive Competence of Commission and Subsidiarity	174
Legal Basis for Harmonising National Procedural Rules in Competition Damages Actions	176
Public Policy and Collective Redress	177
Department's View on Collective Redress	179
Conclusion	181
6: LITIGATION FUNDING, CONTINGENT FEES AND THE LAW OF CHAMPERTY	182
Introduction	182
The Funding Barrier to Private Actions	182
The Law on Maintenance and Champerty	184
Maintenance	185
Champerty	185
Trilogy of Irish Cases on Maintenance and Champerty in Ireland	186
Contingency Fees and Conditional Fee Agreements	189
Contingency (or Contingent) Fee Agreements	189
Conditional Fee Agreements	192
Silence of the Commission on Contingency and Conditional Fees	192
Are Contingency or Conditional Fee Agreements the Solution to the Funding Problem in Ireland?	193
Litigation Funding by Third Party Professional Funders	194
Maintenance and Champerty Again	197
Funding Litigation in Ireland: A Confused and Inconsistent State of Affairs	197
Legislation and Guidelines on Solicitors' Fees	198
'No Foal, No Ree' or 'No Win, No Fee'	201
Do 'No Win, No Fee' Arrangements Really Exist?	202

Public Policy on Maintenance and Champerty in the Irish Cases	203
Public Policy and the Law of Maintenance and Champerty in England and Wales	205
Legislative Change	205
Recent Case Law and Changing Judicial Attitudes to Funding Litigation	206
Developments in Australia	210
Conclusion: Litigation Funding and Contingency or Conditional Fees for Damages Actions in Ireland?	212
7: INCENTIVISING PRIVATE ACTIONS	213
Introduction	213
The Green Paper and Double Damages	213
The Case for Multiple Damages	217
Double Damages: A Punitive Remedy	221
Double Damages: Overcompensation for Plaintiffs?	223
Double Damages in Ireland: A Fanciful Idea?	227
An Alternative Approach	228
The Department's Response	230
Double Damages for Competition Law Infringements?	231
Conclusion: Double Damages for Standalone Actions	232
8: RECENT DEVELOPMENTS	233
Introduction	233
The Financial Crisis and Ireland's Bailout	233
Structural Reforms: Competition Conditions	234
Competition (Amendment) Act 2012	236
Divorcing Public and Private Enforcement	237
Injunctions	238
<i>Res Judicata</i>	241
Conclusion	243
9: CONCLUSIONS	244
Findings and Recommendations	244
Private Actions for Damages in Ireland: Why and How?	245
Private Actions for Damages in Ireland – Why?	245
Private Actions for Damages in Ireland – How?	246
The Need for Effective Collective Redress	246
Litigation Funding	248
Incentivising Private Actions	248
Competition (Amendment) Act 2012	249
Conclusion: Damages Actions in Ireland, Where are we Now?	249

<i>Bibliography</i>	251
Books and Chapters in Books	251
Journal Articles	252
Consultations, Reports, Submissions, Papers	255
Newspaper Articles	257
Speeches and Conference Papers	258
Legislation, Notices, Parliamentary Debates, Press Releases and Miscellaneous Sources	258
<i>Index</i>	261