

A COMPARATIVE VIEW OF THE IMPLEMENTATION  
OF THE EU ANTITRUST DAMAGES DIRECTIVE  
IN SIXTEEN MEMBER STATES\*

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**Abstract:** This paper looks at the implementation of the Directive UE 2014/104 in sixteen Member States (MS): Belgium, Cyprus, France, Germany, Greece, Hungary Italy, Lithuania, Luxembourg, Spain, Sweden, the Netherlands and the UK. It analyses the context in which the implementation took place and the process that lead to the adoption of measures in national law to transpose the Directive. It looks and compares the substantive and temporal scope of the national provisions in those MS. Finally, the solutions followed by each of those MS in addressing the several issues raised by the Directive (liability and compensation, joint liability, statute of limitations, quantification of harm, passing-on defence and indirect purchasers claims, access to evidence, specialized courts and collective redress).

**Keywords:** Competition Law, Directive, Implementation, Damages, Litigation, EU, Private Enforcement, Belgium, Cyprus, France, Germany, Greece, Hungary Italy, Lithuania, Luxembourg, Spain, Sweden, the Netherlands, UK.

\* Abridged and summarized from *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, eds. B. RODGER, M.S. FERRO & F. MARCOS, due for publication in 2018) (Chapters 19 and 20).

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## 1. Introduction.

Directive 2014/104/EU is the last step to date in the promotion and facilitation of private enforcement of competition law<sup>1</sup>. It is binding on the result that should be achieved, but it leaves MS the choice of the means of fulfilling that mandate in their national law, including the form, instruments and methods to be used (Article 288 of TFEU)<sup>2</sup>. In this paper we look at how it has been implemented in sixteen different MS<sup>3</sup>.

## 2. Transposition Context, Processes, Measures and Scope

This section will provide an overview of various aspects of the Directive transposition processes across the selected 16 Member States (MS). The first aspect concerns the competition litigation context in MS, and some of the national reports provided interesting discussion about the prior legal framework for private damages actions before their courts and a consideration of the extent to which the Directive and its transposition may provide an impetus for change (*infra* § 2.1). The remainder and majority of the paper will focus on particular aspects of the national processes involved in the adoption of the Directive transposition measures. It involves an in-depth qualitative and comparative analysis of the implementation of the key aspects of the debates and issues surrounding the substantive and temporal scope of the Directive's application, the transposition measures and the anticipated difficulties in their interpretation by the national courts. This will consider the implementation timescale (*infra* § 2.2), the responsible authorities and stakeholders driving the process and the level of debate involved (*infra* § 2.3), and detailed discussion of the nature of the transposition measures adopted across the States (*infra* § 2.4).

### 2.1. MS' Competition Litigation Context

Across the sample of MS there is a wide variance in the legal rules, mechanisms and processes available and competition law damages actions experience, although most of the rapporteurs shared a degree of uncertainty about the extent to which implementation of the Directive would make a radical difference to private enforcement practice in those States.

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<sup>1</sup> [Official Journal L 349 of 5 of December 2014](#). All articles and recitals mentioned in this paper are those of the Directive unless stated otherwise.

<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union ([OJ C 326 of 26/10/2012](#)).

<sup>3</sup> Because of the prevalence of private enforcement practice and significance of the Directive measures for competition litigation in certain States, all of the 'States with Considerable Private Enforcement Experience' within the EU are examined (Belgium, France, Germany, Italy, Spain, The Netherlands and the UK). Four additional countries with developing private enforcement experience are also included (Greece; Ireland; Portugal and Sweden). In addition, we included countries from the May 2004 Accession States (Hungary, Poland and Lithuania). Finally we selected 2 countries from 'States with Limited Private Enforcement Experience': Cyprus and Luxembourg.

As the Cypriot rapporteur noted, private competition law enforcement in Cyprus is almost non-existent, but it was suggested that enhanced public enforcement practice may thereby facilitate private litigation, in terms of litigation culture and the likelihood of follow-on actions. In France, the Ordinance of 1 December 1986, in spite of specifically dealing with the invalidity of contracts and clauses that did not comply with competition law, did not contain any specific provision dedicated to civil liability in case of anti-competitive practices. Law no. 2008-776 of 4 August 2008 subsequently brought about major reform. Although this law reshaped the institutional design regarding public enforcement; it did not provide any changes to private enforcement, and as the rapporteur noted, in France public enforcement holds a prominent position, whereas private enforcement is considered of lesser importance. Nevertheless, private enforcement is not as “underdeveloped” in France as has sometimes been suggested. Recent studies stress that French courts, while applying general civil liability and procedural law principles, have handed down over the years a significant number of decisions. The Paris Court of Appeal, which has a specialised chamber composed of highly qualified judges, has handed down - more significantly in the last few years - remarkable decisions both regarding “*follow-on*” and “*stand-alone*” actions. Overall, the level of private competition litigation in Greece is moderate according to the rapporteur, with the majority of cases constituting ordinary commercial stand-alone actions. Under Greek law, there has been no specific provision for damages actions following a competition law infringement. The general provisions of the Greek Civil Code (GCC) on contractual and tort liability apply. There is case law invoking EU and domestic competition law both as a shield and as a sword, yet these actions constituted ordinary commercial litigation and took place in the context of distribution, agency or franchising agreements, refusal to deal and discriminatory pricing. The Hungarian rapporteur observed that private enforcement practice has not been particularly flourishing in the Hungarian courts. There have been a few actions for damages, but a common feature of these cases is that an overwhelming majority of them concern public procurement cartels. Irish competition law has had specific provision for private actions since 1991 but the track record is similarly underwhelming with no awards of damages for infringement of EU law and only one reported case of infringement of Irish law. There have been two significant Irish follow on actions in relation to Irish Sugar though neither case came to judgment and there are also major ongoing cases commenced in relation to the EU-wide truck manufacturers cartel. The rapporteur suggests high litigation risk as the reason for the scarcity of competition litigation and the limited case-law offers little context to predict the effect of the Directive. In Italy the rapporteur noted that in recent years, the number of civil actions related to anti-competitive practices seems to be increased. Data produced by the Directorate General for Statistics of the Department of Judicial Organization of the Ministry of Justice verifies that there were 78 registered proceedings in 2014, 115 in 2015 and 71 in the first half of 2016<sup>4</sup>. The limited impact of private

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<sup>4</sup> See Analysis of Impact of Regulation accompanying Scheme of Legislative Decree, pp. 2-3 and R. CHIEPPA, *Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM*, in *Il Diritto Industriale*, 2016, p. 319.

enforcement to date is arguably the result of a disadvantageous legislative and institutional context. Indeed, in contrast with certain other Member States (hereinafter MS), Italy can be said to lack mechanisms in its legal system that can welcome damages claims. Accordingly, implementation of Directive 2014/104/EU required a variety of important amendments to the Italian legal system.

In the Netherlands there has been over the past decade an increasing number of antitrust damages actions filed in the Dutch courts, with several of these cases resulting in one or more court decisions. The rapporteur queried whether implementation of the Directive would have a limited effect on Dutch law. Nonetheless it was suggested that given the wording of many provisions of the Directive is ambiguous and/or does not sit easily with the terminology generally employed in Dutch law, dependent on how the courts interpret these provisions, the implementation of the Directive may significantly affect antitrust litigation. The Spanish rapporteur observed that in the absence of specific provision regarding damages claims in the Spanish competition legislation, Spanish courts have accommodated private actions within the existing legal framework for tort claims. So far, most private actions for infringement of competition law have been “stand-alone” commercial disputes concerning vertical restraints or abuse of dominance. Only recently has there been an increase in “follow-on” claims, most of which are still in progress (pending actions in court: envelopes cartel, milk processors’ cartel, property insurance cartel). Competition law and policy in the UK has undergone a radical transformation- a ‘sea-change’ - in the last 20 years. The Competition Act 1998 marked the start of the transformation to a more legalistic, prohibition-based set of provisions with clear sanctions and remedies. This was buttressed by the passing of the Enterprise Act 2002, which provided the Competition Appeal Tribunal with a range of functions,<sup>5</sup> in addition to its role in relation to follow-on damages actions. Institutional mechanisms and bodies have been introduced (the follow-on damages action, the CAT itself, the opt-out collective proceedings mechanism) which have sought to facilitate private enforcement. Slowly we have witnessed an increase in resort to the legal remedies available. It is clear that the UK courts, the High Court and CAT in particular, have developed as a key forum for international competition litigation, despite the relative dearth of final damages awards, and it remains to be seen whether this will be further facilitated by the implementation of the Directive, or be discouraged by the imminent departure of the UK from the European Union

## **2.2. Implementation Timescale**

The Directive itself made provision for the timescale for its implementation in Article 21 as follows:

### ***Article 21. Transposition***

***1. MS shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016.***

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<sup>5</sup> See D. Bailey, *Early Case-Law of the Competition Appeal Tribunal*, in B Rodger (ed) *Ten years of UK Competition Law Reform*, Dundee, DUP, 2010, Ch. 2.

Accordingly, the deadline for transposing the Directive into MS' legal systems expired on 27 December 2016, and it was clear that most MS failed to achieve this. On 24 January 2017, Letters of Formal Notice were forwarded by the Commission to 21 MS which had failed to communicate full transposition by 18 January 2017. Of the 15 States considered here, only Luxembourg and Sweden transposed the Directive within the timescale imposed. Subsequently, the Commission issued Reasoned Opinion, on 13 July 2017, to seven MS which still had not communicated the full transposition of Directive at that stage. As of 13 November 2017, 3 MS had still to communicate full transposition. These included two MS which form part of this project:- Greece and Portugal. We shall outline the varying timescales and dates of implementation across the States, which reflect a range of different and often very specific national processes and issues in relation to the transposition process. Sweden in particular is a good example of national processes commencing almost immediately following the adoption of an EU measure.

In MS where the Directive was not implemented in due time, and where actions may have been filed after the deadline and before the entry into force of the transposition, it is unlikely that issues of direct effect of Directive provisions will arise, given the absence of horizontal direct effect and the fact that antitrust infringements committed by entities falling within the concept of 'State' actors should be rare. It is more likely for the obligation of interpretation in conformity with EU Law<sup>6</sup> to be brought into play.

The Directive was implemented in Belgium over 6 months late by an Act of 6 June 2017. The Cypriot legislature undertook a serious attempt at the timely transposition of the Directive. However, the transposition took place approximately six months later than required when the Act was finally adopted by the Parliament on 7 July 2017 and published in the Official Gazette on 21 July 2017, the date of its entry into force. Cyprus had been on track for transposition within the deadline but it was decided ultimately that the draft Damages Act should be sent to the Committee for Legal Affairs, which delayed its final adoption although no changes were introduced at that stage. In France, after submission to the Council of ministers on the 8<sup>th</sup> of March 2017, Ordinance no. 2017-303 and decree no. 2017-305 of 9 March 2017 were adopted and entered into force on the 11<sup>th</sup> of March 2017.<sup>7</sup> The transposition was therefore completed just over two months after the deadline. Implementation in Germany was strangely delayed due to officials from the responsible Federal Ministry for Economic Affairs and Energy being involved in a time-consuming merger case. Subsequently, the law was signed on 1 June 2017 and entered into force on 9 June 2017. The transposition process in Greece was initiated very late, almost a year and a half after the adoption and publication of the Directive with the appointment of the Committee of Experts on 5 May 2016. The public consultation started on 15 September and ended on 29 September 2017. The Committee had completed its work by the end of July 2017. It completed and submitted the draft proposal dated 25 July 2017 to the Minister. The Parliamentary Committee on Production and Commerce discussed and voted in favour of the Draft Damages Act, on 13 February 2018, which was then introduced before the plenary session and adopted on 14 March 2018.<sup>8</sup> The Hungarian government submitted the bill to the parliament on 28 October 2016, and it was adopted with a couple of minor modifications

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<sup>6</sup> Case C-106/89 Marleasing EU:C:1990:395, paras 8-9.

<sup>7</sup> Both were published in the Official Journal of the French Republic on the 10th of March 2017.

<sup>8</sup> For the relevant documents (in Greek) see < [https://www.hellenicparliament.gr/Nomothetiko-Ergo/Katatethenta-Nomosxedia?law\\_id=1b52b71a-56dc-424d-a4d3-a87900f1202e](https://www.hellenicparliament.gr/Nomothetiko-Ergo/Katatethenta-Nomosxedia?law_id=1b52b71a-56dc-424d-a4d3-a87900f1202e) > (acceded 3 May 2018).

on 6 December 2016, entering into force on 15 January 2017. The Irish transposition measure was signed by the Minister on 13 February 2017 and the relevant official notice published on 17 February 2017. Nonetheless it was deemed to come into effect at an earlier period, on 27 December 2016, the implementation deadline. In Italy, after the first preliminary approval on 27 October 2016, the draft legislative decree was brought before the Parliamentary Committees whose opinions were sought. The draft was then sent back to the Council of Ministers which definitively approved it on 14 January 2017 and it was published in the Official Journal (*Gazzetta Ufficiale*) n. 15 dated 19 January 2017, entering into force late, on 3<sup>rd</sup> February 2017. As the rapporteur stressed, Lithuania was among the first 10 MS to transpose the Directive, although still missing the deadline by a little over a month. The process started a few months after the Directive was passed with a working group set up on 25 February 2015, a public consultation taking place in February 2016 and the first draft proposed to parliament in November 2016. The legislation was passed by parliament on 12 January 2017, signed 18 January 2016 and entered into force on 1 February 2017. The Luxembourg transposition process culminated with timely implementation of the Act which entered into force on 11 December 2016.<sup>9</sup> The Dutch has a short consultation period which lasted from 8 October 2015 to 22 November 2015. Subsequently the legislative proposal was sent to the Upper House for final approval on 24 November 2016. On 24 January 2017, the Upper House unanimously approved the proposal and the **Implementation Act** entered into force on 10 February 2017. In Poland the process was initiated in 2015 and consisted of various stages leading to the late entry into force of the law on June 27, 2017. The rapporteur suggested late implementation was partly due to political changes and also the lengthy consultation process. In Portugal, the implementation process is about to be finalised (awaiting publication). The delay may partly have been because of the number of phases in the Portuguese transposition process. The greatest delay occurred between the submission of the draft proposal to the Government and its submission to Parliament. But even before Parliament, the proposal was seemingly delayed by the Communist Party's belief that, by promoting competition, the proposal is somehow favourable to large companies and bad for consumers. The process for implementation of the Directive in Spain started on schedule in February 2015, with the appointment by the Ministry of Justice of a special group within the General Codification Commission (GCC) for the preparation of a proposal (2016 Proposal). However, Spain's political deadlock during 2016 delayed the implementation process until May 2017. Implementation was finally achieved by Royal Decree Law 9/2017, of 26th May 2017<sup>10</sup>. Sweden is an example of timely transposition, where the process began almost immediately after the Directive was adopted in 2014. The First draft of the transposition legislation was published on 6 November 2015, and circulated as customary for consultation, before it was enacted 3 December 2016 and entered into force on the deadline of 27 December 2016. The relevant government department in the UK, Business Innovation and Skills launched a lengthy period of consultation on the implementation of the Directive on January 28 2016. The length period after the consultation was closed and before the Department proceeded to the next phase of the process certainly caused the delay in implementation beyond the deadline. The Damages Directive Statutory Instrument (The Claims in respect of Loss or

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<sup>9</sup> It had been signed by the Minister and Grand Duc on 5 December 2016 and published in the OJ on 7 December 2016.

<sup>10</sup> The Transposition Decree entered into force on the date of its publication (27/5/2017) and was validated by Parliament the following month (22/6/2017). The Transposition Decree is now being discussed by Parliament through the fast-track legislative procedure before finally being approved as a regular bill.

Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 ‘the Regulations’) was laid before Parliament on 20 December, and was subject to Parliamentary debate and approval, before entering into force on the 9<sup>th</sup> March 2017, over two months late.

### **2.3. Responsible authorities and stakeholders, level of debate**

There was considerable variation across the MS in relation to responsibility for the transposition processes, who was responsible for overseeing the implementation, the form, level and extent of consultation undertaken with interested parties and stakeholders. To an extent, these reflect general differences in law-making processes across those States, and their specific processes for implementation of EU measures.<sup>11</sup> Some transposition processes were led by Justice Departments whereas various other States processes were driven by the relevant ‘Business’ or ‘Commerce’ Department, with the NCA in only one country (Portugal) having a direct involvement. The level of debate varied considerably across States from some very minimalist processes, involving little debate or consultation or impact assessments and a rather formalistic approach to the task, to some countries, notably Portugal and the Netherlands where there was considerable and extensive debate, even on the merits of aspects of the Directive itself. In some States, an expert committee or group of experts were appointed to help with the debate and development of the transposition measure, whereas other States (notably Germany and the UK) relied on civil servant officials to effectively lead the process, albeit bearing in mind the consultation processes. Furthermore significant external stakeholders were approached directly in some processes whereas in others there was a public consultation which was open to all interested parties. Some MS’ processes were fairly transparent, with all aspects of the process, consultation, responses published and available to interested parties whereas other processes have been slightly more clandestine, at least in certain phases of the process. There has been a wide range in level of impact assessment studies undertaken from in-depth in some countries (eg UK) to the absence completely of any form of impact assessment in others (eg the Netherlands). In Sweden, the preparatory works almost always include an impact assessment, based upon a constitutional requirement for public consultation. For this particular legislation which the Competition Authority is an important consultation body.

In Belgium there was fairly wide consultation by the Government, led jointly by the Ministry of Economic and Consumer Affairs and the Ministry of Justice, with the Federal Government Service for Justice, Competition Authority, Belgian Commission for Competition (‘BCC’), European Commission, Group of expert lawyers and Benelux working group on transposition. Nonetheless, the process was not particularly transparent with only the advice of the BCC published, and the advice on the Bill by the Council of State added as an annexe to the Bill. An impact analysis was carried out, and the Bill was considered to have minimal effect except for a positive impact in relation to SME’s.

In Cyprus, the initiative for the transposition was taken by the Ministry of Energy, Commerce, Business and Tourism. A key individual involved in the transposition procedure

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<sup>11</sup> See also for instance, *The Implementation of the EU Services Directive, Transposition, Problems and Strategies*; Stelkens, U, Weiß, W, and Mirschberger, M (Eds.) Asser Press( 2012); S Treumer, M Comba (eds) *Modernising Public Procurement: The Approach of EU Member States* (Edward Elgar, 2017).



commented that this choice was rather unusual for the Cypriot legal order, given that the initiative to introduce new legislation normally lies with the Ministry of Justice. Involvement of the Ministry of Energy, Commerce, Business and Tourism may have been in light of the nature of competition law and its importance for the domestic economy, commerce and business.

In France, the process began before the summer of 2015 under the responsibility of the Ministry of Justice and, more precisely, of the Civil Affairs and Seals Directorate (CASD). After assessing the issues raised by the transposition of the Directive, CASD created a working group that was asked to meet on a regular basis for several weeks. The task force included roughly twenty people bringing together law professors, economists, Supreme Court judges, judges from the Paris Court of Appeals, commercial court judges, lawyers, and both an official from the Competition Authority and an official from the French General Directorate for Competition, Consumer Affairs and Prevention of Fraud. Those participants were later invited to suggest suitable amendments to the report written by the CASD official specifically in charge of the transposition. CASD then organised interviews and written consultations to gather stakeholders' observations including those of the companies' and consumers' organizations' representative bodies. Later, CASD developed a preliminary draft ordinance and a decree which were subject to a two-week public consultation in September 2016. Some of the comments made during the consultation were taken into account and led to changes in the final draft of the transposition measure. The law-making process in France is in the hands of two bodies: Article 34 of the French Constitution requires that specifically designated areas of law be adopted through legislative procedure in Parliament, while the non-designated areas must, by default, be adopted by the executive body, in accordance with Article 37. As a result, some parts of the Directive needed to be transposed through a legislative procedure, whereas other parts only required to be transposed by a State Council decree. However, the French public authorities chose not to use the ordinary legislative process, involving two successive readings by the two chambers of Parliament to enact the provisions falling under Article 34 of the Constitution, but rather asked to be granted legislative power to draft an ordinance, which would later be ratified by Parliament. Using the mechanism provided by Article 38 of the Constitution, the Parliament delegated its legislative power to the government, which was therefore authorised for a limited amount of time and only in a specific domain to legislate, through an ordinance.

In Germany, the Federal Ministry for Economic Affairs and Energy was responsible for all aspects of the transposition drafting process. The German Monopolies Commission commented on the first draft as did the Bundesrat, the second legislative chamber. It was suggested that there was need for collective redress reform, but this was rejected by the government as unnecessary. During the process there was no detailed economic or impact assessment although there was a general anticipation that the Directive would produce an economic benefit in the form of reduced cartel activity.

In Greece, a Committee of Experts was appointed at the Ministry of Economy, Development and Tourism (General Secretariat for Commerce and Consumer Protection) in order to work on a draft legislative proposal. The Committee of Experts was only appointed by a Decision of the Minister of Economy, Development and Tourism on 5 May 2016 and it consists of 12 Members. The Members of the Committee, which include academics, judges and practitioners, have wide expertise on competition, private and civil procedural law.

Stakeholders could offer their views during the public consultation on the Draft Damages Act.<sup>12</sup> Following this, the Ministry may introduce further changes and introduce the draft legislation before the relevant parliamentary committee.

In Hungary, the law implementing the Directive was drafted and seen through the legislative process by the Hungarian Ministry of Justice, during which no expert committee was appointed to assist the drafting process.

Responsibility for transposition in Ireland lay with the Department of Jobs, Enterprise and Innovation.

In Italy, the Directive was transposed through Legislative Decree<sup>13</sup>. Indeed, Parliament empowered the Government with the task of implementation of the Directive by Law of 9 July 2015, No. 114<sup>14</sup> (then called *Legge Delega*) in order to allow for a faster transposition process, given the transposition deadline of 27 December 2016. An appropriate working group was set up at the European Policy Department of the Presidency of the Council of Ministers for this purpose. The Department of Justice, MISE and AGCM attended the meetings, although there was no involvement by other stakeholders.

In Lithuania, the process started a few months after the Directive was passed with a working group set up on 25 February 2015. Public consultation started in February 2016 leading to a first draft proposed to parliament in November 2016, during which time an impact assessment was undertaken. The process was led by the Ministry of Economy, the competition policy-maker in Lithuania since 2011, and the rapporteur did query the extent to which its role was to ensure the promotion of private enforcement or to ensure public enforcement was not undermined in the process, although the working group involved clearly represented diverse institutions. The impact assessment noted several positive impacts for the Lithuanian economy, notably by enhancing foreign direct investment but suggested a negative impact on Lithuanian state finance with an estimate of up to 50 additional cases before the Vilnius County court, though the rapporteur viewed this as an over-estimate.

In Luxembourg, the initiative for transposition was taken by the Ministry of Economic Affairs, which submitted a proposal to the Commission de L'Economie and considerable number of parties input advice at that stage. A considerable number of stakeholders were involved and made their views clear as part of the process, for instance the Consumer association stressed that the changes would only be effective if a parallel act on collective redress were to be adopted (and this did not happen). The Conseil de la Concurrence expressed concerns about the impact on public enforcement and also lamented the absence of a proposal on collective redress.

In the Netherlands, once a Directive has been adopted and published in the EU Official Journal, the Ministry of Foreign Affairs sends a notification letter to the department that is primarily for the Directive. The transposition plan is then presented to the Dutch Council of Ministers (*Ministerraad*), normally within a month after the official publication of the Directive. The Dutch Ministry of Security and Justice was given primary responsibility for

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<sup>12</sup> The public consultation started on 15 September and ended on 29 September 2017. In Greece, there is a legal obligation to publish all draft legislative proposals for public consultation. See <http://www.opengov.gr/home/category/consultations>

<sup>13</sup> Legislative Decree n.3 of 19 January 2017 of *Implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages in accordance with national law for infringements of the competition law provisions of the Member States and of European Union.*

<sup>14</sup> Available at <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2015-0731&atto.codiceRedazionale=15G00127&currentPage=1>

transposition of the Directive. Within that ministry, a permanent committee – the '*Vaste commissie voor Veiligheid en Justitie*' – was entrusted with the drafting of the legislative proposal for transposition. According to the explanatory memorandum, the Dutch Implementation Act will not affect the regulatory burden for citizens, and should not result in any (additional) compliance costs for businesses. However, the rapporteur was not aware of any in-depth (economic) impact assessment having been conducted.

The implementation process was initiated in Poland in 2015 with a panel responsible formed within the Civil Law Codification Commission. Finalising the transposition measure involved various stages starting with work on the 'assumptions'- fundamental principles behind the draft law implementing the Directive. Primary responsibility throughout rested with the Ministry of Justice, but the preparatory works were undertaken by the CLCC panel composed of a body of experts. After dissolution of the CLCC, implementation was undertaken by the Legislative Department of the Ministry which also co-operated with the Polish Competition Authority. The Ministry of Justice, criticised by the Ministry of Development, did not consider how the new law might affect competitiveness, although the draft law was accompanied by an Impact Assessment Report.

In Portugal the process was led by the Portuguese competition authority, and it is clear that this led to very serious and prolonged debate about the 'issues' also involving the substantive provisions in the Directive, albeit this was too late after the Directive had been passed. The process involved an expert working group, consultation with a variety of stakeholders, and various phases- five in total. This was clearly a transparent and lengthy public process including debate on the merits of the Directive provisions, which was rarely replicated in other jurisdictions. Nonetheless there was no impact assessment and significant delay and lack of transparency at the latter stages of implementation involving Government and Parliament approval.

The process for implementation started in Spain in February 2015, with the appointment by the Ministry of Justice of a special group within the General Codification Commission (GCC) for the preparation of a proposal (2016 Proposal)<sup>15</sup>. The GCC is an advisory institution utilized by the Ministry of Justice for the preparatory works of legislative texts in technical matters in which the Ministry takes the lead<sup>16</sup>. The GCC's proposal was publicised in January 2016 (The 2016 Proposal') but lately disregarded in the text finally adopted by the Government. No impact assessment was conducted at all.

In Sweden, the preparatory works as part of the transposition process were carried out by the Ministry of Enterprise and Innovation, although the reasons for them being undertaken by that Ministry rather than the normal public inquiry are uncertain. There was a brief impact assessment undertaken which established that, if anything, the new law would contribute to a more efficient system for obtaining damages.

The relevant UK government department, Business Innovation and Skills launched a lengthy period of consultation on the implementation of the Directive on January 28 2016.<sup>17</sup> As with all legislative proposals, the Government Implementation proposal included an impact

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<sup>15</sup> The group was composed of five law professors, an official from the Ministry of Economy and Competitiveness and a High representative of the Ministry of Justice (Deputy Director of legislative Policy, General Secretary of the Commission).

<sup>16</sup> This Commission is a technical body generally used for the planning and coordination of legislative reforms, aimed at ensuring the technical quality of the proposals.

<sup>17</sup><https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive>.

assessment focusing in particular on the costs to businesses of introducing the measures. There were a considerable number of responses to the consultation and this aspect of the process was particularly transparent with all responses being published on the consultation website.

#### **2.4. Transposition Measure Nature**

This subsection seeks to outline and compare and contrast the varied information provided regarding the types of transposition measure introduced across the different MS in order to implement the Directive.

In some MS the implementing rules made changes to the existing Civil (the Netherlands) or Commercial Codes (Belgium, France); in a significant number they amended the rules, or introduced new damages actions rules, within the general substantive competition law legislation (Germany, Hungary, Ireland, Lithuania, Luxembourg, UK); whereas in the several States the measures were introduced as some form of stand-alone competition law damages legislation (Cyprus, Greece, Portugal, Spain, Sweden).

To some extent the nature of the measures adopted reflected the level of serious and qualitative Parliamentary debate on the issues raised. This is exemplified by contrasting in particular the depth of reflection and analysis of the issues at least by Parliament in comparing the processes in the Netherlands and Sweden, with Ireland, Spain and the UK (despite the extensive consultation process at least in the latter). Of course the picture is not as simple or straightforward as suggested as the Swedish rules were previously in the main competition legislation and now moved to an autonomous Damages Act, and in others for instance Portugal, the implementing measure also introduced changes to other areas extraneous to competition law damages actions. There was some very limited information provided by some Member State rapporteurs on the method of transposition utilised by States, whether simply copy-out or gold-plating approaches were adopted. In general it appears that despite some limited gold-plating as evidenced particularly in relation to the substantive scope of the measures (see further *infra*), and some aspects of non-transposition of certain measures (primarily as unnecessary in a particular context), the consensus approach was to undertake a literal approach to transposition, by effectively for most Directive rules copying-out, as exemplified by the Luxembourg mantra of *'la directive, rien que la directive'* ('the Directive, nothing but the Directive'). Of course, this does not necessarily mean that the Directive's transposition in this manner will lead to mechanical and consistent application of its rules in competition damages litigation across the MS, without at least further important interpretative rulings by the CJEU in light of the effectiveness principle.

There was limited information here in relation to Belgium where the Directive was implemented by an Act of 6 June 2017 inserting a new Title in the Code of Economic Law and modifying several of its provisions. In Cyprus, the Directive was transposed in a single legislative text:- the 'Damages Act' as autonomous law. The Act has not introduced any changes in the general scope of the national legal framework, only in relation to damages actions for competition law violations. The rapporteur in Cyprus observed a general reluctance to deviate from the text of the Directive, although it was not a mere copy-paste exercise. It omitted certain provisions which elaborated general directions to MS, such as Article 4 on the principles of equivalence and effectiveness. Overall, the rapporteur considered that the final transposition

involved a mixture of copying and elaboration,<sup>18</sup> depending on the scope and wording of each provision.

The implementation of the Directive into French law led to the creation of a “Title VIII” dedicated to damages actions for anticompetitive practices in the “Book IV” of the Commercial Code on freedom of pricing and competition. The new twenty-six articles are divided into three chapters respectively “*De la responsabilité*” (on liability), “*De la prescription des actions*” (on limitation periods) and “*De la communication et de la production des pièces*” (on the communication and production of documents). The implementation also led to amendment of several articles in the Commercial Code; and changes to provisions on class actions in the Consumer Code. In addition, the Code of Administrative Justice was modified to include a specific chapter relating to damages actions for anticompetitive practices”. The courts will therefore apply civil law not only in the case of an absence of special provisions but also when a special competition rule raises an issue that has to be resolved.<sup>19</sup>

In Germany, it was decided that the transposition measures would be incorporated into the existing German Act against Restraints of Competition, ‘GWB’, which already contains substantive and procedural law provisions. Accordingly, only competition law is directly affected by the transposition and the Rapporteur suggested that it remains to be seen if the developments here influence other areas of German law, for instance in relation to liability for subsidiaries and the implications in this context for company law. Nonetheless, although at first the amendments were only intended to transpose the Directive, the process involved a more general overhaul including provisions on digital markets, merger control and liability of undertakings for fines. The latter provision was for the public enforcement context only and the legislator refrained from extending specifically to the civil liability of parent companies, an issue which will remain to be decided by the courts. The German transposition measure did not incorporate all the Directive’s definitions but this is not considered to be problematic as courts will be required to interpret in light of the Directive’s definitions on the basis of normal EU law interpretation requirements.

In Greece the transposition, as in Cyprus, was effected through a Damages Act applicable to competition damages actions only. The provisions implementing the Directive were set out in a new separate part of the Hungarian Competition Act (HCA). These provisions created a specialist competition damages regime, with no impact on the rules of general application and entailing no changes of general scope in the national legal framework. In Ireland, transposition was effected in the form of regulations contained in a statutory instrument (SI). The rapporteur indicated that this was largely a straight copy-out approach and confined to competition law actions, and stressed that an SI is delegated legislation permitted by Irish constitutional law implementing policies in a main measure and as such cannot go outside its parameters. In Italy a stand-alone Legislative Decree was considered appropriate, and there would be no change to existing provisions unless it was strictly necessary to coordinate substantive antitrust rules and

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<sup>18</sup> On the different transposition methods (distinguishing between forms and methods of transposition) see R Kral, “On the Choice of Methods of Transposition of EU Directives” (2016) ELRev 220. On transposition guidance see HM Government, *Transposition Guidance: How to Implement European Directives Effectively* (April 2013).

<sup>19</sup> The report submitted to the President of the Republic stresses that general liability and procedural rules “*will continue to be implemented as long as no special ones conflict with them*” R apport au Président de la République relatif à l’ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles ; JORF n°0059, 10 mars 2017.

procedural rules.<sup>20</sup> In Lithuania, the relevant measure sought to implement the Directive and also review some other substantive competition law provisions eg re state aid and revise the way the Lithuanian Competition Council is funded to ensure its independence. The rapporteur noted that the legislator opted for literal implementation and reproduced the directive text almost to the letter: a minimalist approach guided by harmonisation, effectiveness and security. The legislative options were to amend the *lex generalis* (civil code/code of civil procedure) or introduce a *lex specialis* (ie implement the Directive only in the competition law context). The second alternative was adopted and the implementation measure amended the Law on competition by adopting a new chapter on civil liability, introducing a specialised civil procedure in this context.

In Luxembourg, a proposal was made for a Special Act aligned with the Directive to change a number of provisions of the Competition Act 2011, as given the limited scope no changes should be made to the general Civil Code. It was also decided that not all Directive provisions needed implemented as there already existed rules to the same effect. Moreover, certain Directive provisions were not specifically implemented as it was considered that they applied in any event or national rules were more lenient/favourable (eg Arts 3 and 4 on full compensation and the effectiveness principle, and since the domestic limitation rules on limitation exceeded the Directive minimum stipulation it was not considered necessary to introduce specific rules on damages actions limitation periods).

The rapporteur for the Netherlands noted that in an ideal world, the Directive's provisions would have been implemented by amending the existing provisions of our Dutch Civil Code ('DCC') and Dutch Code of Civil Procedure ('DCCP')- in this way the structure of the codes would remain intact and unnecessary fragmentation of Dutch law would be avoided. The Directive was indeed implemented in a new, separate 'subchapter' 6.3.3B DCC, entitled "Infringement of competition law" (*Inbreuk op het mededingingsrecht*). The Directive's provisions regarding disclosure of evidence were implemented in a new subchapter of the DCCP. However, the rapporteur observed that in many instances the terminology employed by the Directive does not sit easily with the terminology generally employed in Dutch law. Perhaps unsurprisingly, therefore, the Dutch legislature has decided not to attempt to 'translate the untranslatable: *"to promote legal certainty, the proposal of law aims to be consistent with the Directive's terminology as much as possible"*.<sup>21</sup>

The Directive was transposed in Poland by the adoption of a new act on claims for damages for infringements of the competition law provisions given the specific nature of the directive, rather than amending the Civil Code or Code of Civil Procedure or the Competition Act, although this also necessitated some changes in existing laws. The rapporteur stressed that the Polish legislator refrained from going beyond the Directive in implementing, though there is some gold-plating involved: for instance the presumption of harm extends beyond cartel infringements and there is provision for representative bodies to bring damages claims.

In Portugal, transposition resulted in the adoption of an autonomous law on competition law damages actions, though it also required limited amendment to other laws. The discussions were limited to the competition law context, and did not consider wider reform of the Code of Civil Procedure.

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<sup>20</sup> Law n. 287 of 10 October 1990 (Antitrust Law); Legislative Decree n. 168 of 27 June 2003; Article 140-bis of Consumer Code; Articles 1223, 1226 e 1227 Civil Code;

<sup>21</sup> Explanatory memorandum, p. 7.

Implementation was achieved in Spain by Royal Decree Law 9/2017 ('Transposition Decree'). In addition to transposing the Directive into Spanish Law, the Transposition Decree transposed several other EU Directives concerning financial, commercial and health matters, and the free movement of workers. Decree Law is a temporary legislative instrument reserved for matters of extraordinary and urgent need and is subject to validation by Parliament (article 86 of the Spanish Constitution). The Transposition Decree is now being discussed by Parliament through the fast-track legislative procedure before finally being approved as a regular bill.

In Sweden, new legislation was introduced as the sole implementing tool of the Directive. The rapporteur noted that the right to damages has been an integral part of the Competition Act for years but it has now been updated and moved to a new separate Act in light of the Directive transposition process. As well as rules on substantive matters relating to damages it also covers procedural rules and complements the Swedish Competition Act and 2016 Act on Patents and Market Courts which reformed the adjudication process within the fields of IPRs and competition law in Sweden. The Swedish constitution requires rules of this nature to be made by legislation passed by Parliament, and it was accordingly decided to remove all the rules from the Competition Act and pass a new fresh Antitrust Damages Act.

In the UK, the relevant Government department noted that they had decided to adopt a 'light-touch' implementation approach, wherever possible relying on existing legislation, case law or Court Rules, and only where necessary legislating to ensure full implementation of the Directive. The Damages Directive Statutory Instrument- Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment) Regulations 2017 'the Regulations') effected the transposition. Indeed, despite the protestations, most of the relevant Directive provisions were effectively copied-out, and there was also some limited 'gold-plating' in relation to the substantive scope of the measure. The European Communities Act 1972 s 2(2) provides the power to adopt secondary legislation to implement EU law, and indeed virtually all EU Directives are implemented through Statutory Instruments.<sup>22</sup> This is a form of delegated legislation where there is minimal Parliamentary time and discussion, as in Ireland, and the statutory process here involved very limited debate in the House of Lords about the content of the Directive or the implementing Regulations.<sup>23</sup> The Regulations revise the existing provisions for competition law private enforcement in the Competition Act 1998, the primary substantive competition legislation in the UK which also contains provision on private enforcement, and are applicable only in the context of competition law damages actions.

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<sup>22</sup> See V Miller, "Legislating for Brexit: Statutory Instruments implementing EU law", House of Commons Library Briefing Paper No. 7867, 16 January 2017, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7867>.

<sup>23</sup> See, HL, Hansard 2 March 2017 Vol 779, [http://hansard.parliament.uk/Lords/2017-03-02/debates/B7A76017-415C-4C29-BA7B-768935AF1ED2/ClaimsInRespectOfLossOrDamageArisingFromCompetitionInfringements\(CompetitionAct1998AndOtherEnactments\(Amendment\)\)Regulations2017](http://hansard.parliament.uk/Lords/2017-03-02/debates/B7A76017-415C-4C29-BA7B-768935AF1ED2/ClaimsInRespectOfLossOrDamageArisingFromCompetitionInfringements(CompetitionAct1998AndOtherEnactments(Amendment))Regulations2017)

### **3. Scope of the Transposition Measures: Substantive and Temporal.**

#### **3.1. Substantive Scope**

Aside from the restriction to damages claims, the Directive provides for its scope as follows:-

##### *Article 1*

##### ***Subject matter and scope***

*1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law.....*

##### *Article 2*

##### ***Definitions***

*For the purposes of this Directive, the following definitions apply:*

(1) *‘infringement of competition law’ means an infringement of Article 101 or 102 TFEU, or of national competition law;*

(3) *‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;*



We will assess here the range of different ways in which this has been implemented across the MS<sup>24</sup>:-

As required by the limits of powers transferred to the EU, the Directive – Arts. 1(1) and 2(1) and (3) – only obliges MS to harmonize rules applicable to actions or damages (regardless of whether they are follow-on or stand-alone, individual or collective) when they relate to infringements of articles 101/102 TFEU and to analogous national rules when applied together with those Treaty provisions<sup>25</sup>.

As expected, almost every MS (with the exception, as of now, of the Netherlands and, possibly, Luxembourg)<sup>26</sup> decided to broaden the scope of the national transposition to include also infringements exclusively of the corresponding national competition law provisions. Indeed, it would be untenable (and would generate too much legal uncertainty) to establish more favourable rules for the defence of rights arising from EU law as opposed to national law, when the conduct in question is identical (absent the effect on trade between MS). This is known as the single-regime approach and this concept of a ‘single regime’ for damages actions has prevailed in most States, despite the inherent limitations in scope of the Directive. However, given the potential for multijurisdictional actions and forum-shopping, it is significant that most MS have not defined the scope of these laws as encompassing infringements of corresponding national provisions of other MS.<sup>27</sup> Exceptions to this trend are Hungary and Portugal. This means, for example, that while EU private international law may give claimants a right to sue in the defendant's MS of domicile, they may not have the right to use the Directive's transposition if the relevant effects occurred in their home State and there was no effect on trade between MS.<sup>28</sup> It is also worth noting that, if the courts of a MS are asked to settle a dispute relating to antitrust infringements subject exclusively to the competition law of a third State (non-EEA), none of the national regimes will be applicable thereto. This is another implication arising from Brexit. While it was theoretically possible (and was indeed discussed in some MS) for the national regimes to include infringements of State aid and merger control rules, no MS decided to do so. Nonetheless, some MS did expand the scope of the transposition by making it applicable to other national competition rules. The main example thereof is the application of the regime to abuse of economic dependence in France, Germany<sup>29</sup> and Portugal. However that option as not taken, for example, in Greece, where that prohibition exists, but is not included in the Competition Act.

Other types of infringing market behaviour, some of which are usually described as unfair trading practices, were also included within the scope of the regime, in full or in part, e.g. in

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<sup>24</sup> See for instance, A Piszcz, ‘Room for manoeuvre for Member States: issues for decision on the occasion of the transposition of the Damages Directive’ *Market and Competition Law Review* 1(1) (2017) 81-109.

<sup>25</sup> Article 3 Regulation 1/2003.

<sup>26</sup> In the case of the Netherlands, a draft Act has already been proposed to enlarge this scope to purely national infringements. And the Explanatory Memorandum to the Luxembourgish transposition indicates that the legislator intended to similarly widen the scope, but failed to fully reflect this in the letter of the law.

<sup>27</sup> In Sweden, infringements of antitrust rules of other MS are caught only to the extent that Art. 101/102 TFEU is also applicable.

<sup>28</sup> There is at least one precedent for this already, an action filed in the Netherlands relating to an infringement exclusively of Greek competition rules, *Macedonian Thrace Brewery S.A. v. Heineken N.V. and Athenian Brewery S.A.*, filed on 23 February 2017 before the District Court Amsterdam, C/13/626096, HA ZA 17-321.

<sup>29</sup> In Germany, the new regime is only partly applicable to abuse of economic dependence and to other prohibitions such as boycott.

France<sup>30</sup> and in Hungary.<sup>31</sup> National legislators also had the option of extending the scope beyond mere damages actions, but almost none have explicitly done so. This is important, because studies of the development of private enforcement in the MS indicate that the majority of private actions before national courts where competition law is invoked are not only damages' actions<sup>32</sup>. National regimes which merely copy the Directive's scope are not applicable to injunctions, requests for declaration of nullity and other claims, raised by the claimant or the defendant. It is arguable to what extent they will be applicable, for example, to claims of unjust enrichment, which can be common, particularly in civil law jurisdictions. The Portuguese proposed transposition explicitly provides that the new regime is applicable to "any claim" based on an infringement of competition law. A potential problem which does not seem to have been specifically addressed in any MS (nor is it clear that it could be adequately addressed) concerns *mixed actions*, involving claims, only one of which falls under this regime. Since the new regime's access rules and jurisdictional rules may have to be applied to any action with at least one antitrust claim, there is a risk for misuse where claimants may also be tempted invoke an antitrust infringement in addition to some other primary form of civil claim in order to benefit from this new, more favourable, procedural regime<sup>33</sup>. The following is a more detailed review of the specific national provision in this context.

The Belgian measure applies to both damages actions in respect of EU law and Belgian competition law infringements. In Cyprus, the Damages Act defines an "infringement of competition law" as an infringement of Articles 3 and/or 6 of the Competition Act and/or Articles 101 TFEU and/or 102 TFEU. Accordingly, similar to Belgium, the Cypriot legislature went a step further than the Directive, as the Damages Act is applicable to infringements of EU competition law and national competition law, even when there is no effect on trade. Indeed as the French rapporteur stressed in relation to the French transposition process, the single regime argument succeeded over a narrow interpretation, as the drafters were eager to "*ensure the effectiveness of the rules instituted by the directive and an equal treatment for all the victims of anti-competitive infringements*". Accordingly the rules apply irrespective of an affect on inter-state trade to any infringement of Article 101 and 102 TFUE and/or their French equivalent. Moreover, they also apply when specific national provisions prohibiting other anti-competitive practices are infringed,<sup>34</sup> albeit it was decided not to extend them to national rules on unfair competition,<sup>35</sup> even if they apply simultaneously with antitrust law in some cases. Although claims for an injunction or a declaration of invalidity are sometimes requested at the same time as damages –the transposition is restricted to damages actions. The rapporteur stressed that the German regime applies exclusively to competition law infringements, but has also been extended to cases involving purely domestic law as well as EU law. Moreover, although it

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<sup>30</sup>The regime is also applicable to "*new specific prohibitions regarding exclusive rights to import in overseas (art. L. 420-2-1 C. com) or taxi reservation centers (art. L. 420-2-2 C. com.)*", but not the national rules on unfair competition.

<sup>31</sup> Apparently, also in Bulgaria and Latvia (see Jerneva & Druvietė, 2017: 159; and Bodnár, 2017: 134). In Spain, rules on unfair competition were included within the scope of this regime in a draft proposal, but this was excluded from the final version.

<sup>32</sup> See B Rodger (ed) *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (2014 Kluwer Law International);

<sup>33</sup> See P LC Torremans "Private Enforcement of Competition Law in Intellectual Property Cases" in Bergström, Iacovides & Strand (eds) *Harmonising EU Competition Litigation, The EU Directive and beyond*, 2016, 124

<sup>34</sup> This covers Articles L. 420-2 clause 2 C. and L. 420-5 C. Com. prohibiting abuse of economic dependence and predatory pricing respectively but also, more recently, new specific prohibitions regarding exclusive rights to import in overseas (art. L. 420-2-1 C. com) or taxi reservation centers (art. L. 420-2-2 C. com.).

<sup>35</sup> These include provisions set out in Book IV, Title IV of the Commercial code and unfair competition law

doesn't apply to certain provisions of domestic law it generally applies to any infringement of European or German competition law. Similar to France, the Greek Damages Act seeks to cover both infringements of EU competition law as well as purely national law but does not extend to violations of unfair competition law. The Hungarian transposition is particularly interesting in that, in addition to Articles 101 and 102 TFEU and their Hungarian counter-parts (Sections 11 and 21 HCA), the rules are also applicable to the equivalent provisions of other MS of the EEA. It has to be noted that while these provisions, in principle, do not apply to the rules on unfair manipulation of business decisions. The Irish transposition Regulations are confined to damages actions but also apply to infringements of Irish competition law only. In Italy, the new rules will be applicable to individual and collective actions filed in Italy and based on infringements exclusively of Italian competition law or in relation to infringements of EU competition law, by itself or together with Italian competition law. It extends only to damages actions based on "antitrust infringements", excluding other types of practices such as unfair commercial practices, abuse of economic dependence, State aid and merger control.

The position is the same in Lithuania as Ireland and there was also a recommendation that the rules should extend to a particular provision of Lithuanian competition law applicable to infringements by public entities, an important aspect of the particular set of competition law controls there given the size of the public sector and the fact that most infringements are by public bodies there. This recommendation was rejected but the rules will apply to private damages actions against them if they act in their capacity as undertakings. The new provisions in the revised Act do not apply to other claims in relation to unfair competition or merger control or state aid cases and the rapporteur identified a perception that such fragmentation of potential competition law private enforcement cases may be unhelpful and lead to uncertainties and inconsistencies.

In Luxembourg, the scope of the transposition measure is less certain. As the rapporteur suggests, given that the wording of the legislation prevails over statements made during the legislative process (which suggested it also applied to infringements of national competition law), the conclusion is that the scope of the transposition measure is the same as the Directive.

On the other hand, it is clear that the Dutch Implementation Act applies only to actions for damages that are brought in relation to cross-border infringements, that is, infringements of Article 101 or 102 TFEU and/or national competition law provisions that are applied to the same case and in parallel to EU competition law. Accordingly, the scope here is more limited than most MS in that they explicitly do *not* apply to actions for damages that concern purely national infringements. Nonetheless, the Dutch legislature has stated that it intends to expand the scope of the new provisions to actions that concern purely national infringements through a separate proposal of law,<sup>36</sup> and the proposal for an opt-out class action damages procedure was most recently revised in January 2018.

The Polish position is the same as in many other States in applying to infringements of both national and EU law but not extending to actions based on unfair competition law. The Portuguese rapporteur noted the limited scope of the transposition in applying, like the Directive, only to damages actions, but on the other hand, the measure applies not only to EU and national law infringements, including the provisions on abuse of economic dependence, but even applies in relation to infringements of equivalent provisions of other MS. Moreover, there

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<sup>36</sup> Explanatory memorandum, p. 2.

was debate during the transposition process about extending its scope to the state aid and merger control rules although this did not materialise. The Spanish rules apply to compensation claims for EU and national law infringements, although In a significant departure from the 2016 Proposal, the Transposition Decree excludes from its scope qualified unfair competition acts despite the fact that Article 3 of the DCA such claims may also be deemed competition infringements. The Transposition Decree introduces supplementary rules concerning access to sources of evidence of competition infringements. Pursuant to Additional Provision 1 of the Transposition Decree, these rules only apply to “follow-on” claims initiated before Spanish courts, regardless of whether the infringement decision was adopted by the European Commission, the EU General Court, the EU Court of Justice, a Spanish competition authority, a Spanish court, or the competition authority or court of other MS. The Swedish rapporteur noted that the Government did not want different rules for infringements of EU and Swedish law and accordingly opted as with virtually all MS for the single regime approach whereby the new rules apply to both EU and Swedish competition law infringements. Similarly, in the UK, The Regulations apply to any competition damages claim under Para 2 (1) where there is an infringement of any of the 4 prohibitions (EU and national equivalents- Competition Act 1998 Ch1 and 2 prohibitions) without any requirement for parallel application of EU and national law in the proceedings. However, the Regulations do not apply beyond competition law damages actions, or in relation to infringements of other MS competition laws.

### **3.2. Temporal Scope**

At this stage it should be remembered that Article 22 of the Directive provides as follows:-

*1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.*

*2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.*

Accordingly, it provides for differential treatment of its provisions, dependent on whether they are considered to be substantive or procedural, with a general rule against retroactivity, although the latter may be applied in any proceedings where the court was seized after 26 December 2014 when the Directive was passed. We will here assess the range of different ways in which this provision has been implemented across the MS.

Understandably, defining the new regime's temporal scope proved to be one of the most divisive issues in the transposition of the Directive. The broad and imprecise drafting of article 22 of the Directive provided limited useful guidance. The variety of national solutions has made it clear that the uniformity of the application of EU Competition Law will only be achieved if the CJEU intervenes under the preliminary ruling procedure to impose a harmonious solution under the guise of the effectiveness principle. It is well-known that there are different approaches to the temporal application of legal rules across the MS. In particular different States differentiate between the treatment of certain rules as procedural and substantive, and may also have different interpretations generally regarding the temporal scope of new legal provisions.

Furthermore, the approach followed in the EU legal order is specific and may contradict the approach adopted at national level. This has potentially decisive effects, and poses great challenges to the primacy of EU law, as was recently evidenced in *Taricco II*.<sup>37</sup>

It is evident that only the CJEU can authoritatively interpret the temporal scope of the Directive. Consequently, to the extent that national courts are called on to apply the transposition of the Directive in cases where Art. 101/102 TFEU is applicable,<sup>38</sup> they will have to interpret those provisions in ways that ensures respect for the principles of equivalence and effectiveness, and guarantee the attainment of the goals of the Directive. Thus, it may be that the general rules and principles on temporal application of laws in their legal orders will have to be interpreted differently, in antitrust private enforcement actions. Generally, the MS have decided to replicate, or to stay close to, the ambiguity of the Directive's temporal scope provision. But this only means that the general rules of each legal order, in this regard, will apply, masking the level of heterogeneity in the different transposition measures, reducing transparency and contributing to legal uncertainty. Moreover, several MS have specified the temporal scope, for all or for only some of the provisions of the new regime, in ways manifestly contradicting each other and the caselaw of the CJEU.

Some problems may arise simply from the qualification of certain rules as procedural or substantive. In Portugal, for example, the law in part reproduces article 22, but adds (in line with its domestic characterisation) that the rules on burden of proof – e.g., all presumptions – are to be deemed as substantive in nature. Although some MS follow this approach, the majority treat all evidence and proof issues as procedural in nature. In the absence of authoritative guidance from the CJEU, in relation to follow-on actions initiated after the entry into force of the Directive and before the transposition will not, in that first group of MS, benefit from the binding effect of NCA decisions. In other MS, such as the UK, Poland and Sweden, the rule on the binding effect of national decisions is deemed to be procedural and immediately applicable. The CJEU's case-law indicates that, under EU Law, burden of proof rules should be applied to pending actions.<sup>39</sup>

Most access rules (including protection of confidentiality, grey and black lists and competition authority right to submit comments) have been deemed procedural in France, Italy, Poland, Sweden and the UK. But this would not necessarily be the case in other MS (e.g., in Portugal, where there was already an absolute protection of all documents submitted under leniency). The potential for conflicting approaches is made clear by the fact that sanctions for failure to cooperate with the court on issues of access to evidence are explicitly deemed procedural in France and substantive in Italy. Similarly, the reversal of the burden of proof as a result of this failure to cooperate is explicitly deemed procedural in France and substantive in Portugal. Again, the presumption of damages caused by cartels has been deemed a procedural rule in Hungary and a substantive one in Portugal. For those MS which have taken the opportunity to include jurisdictional provisions in their transpositions, to centralize private enforcement cases in a single court, it should not be assumed that this will apply to pending cases, as national options in this regard vary.

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<sup>37</sup>ECJ Judgment of 5 December 2017, *M.A.S. & M.B. (Taricco II)* (C-42/17), EU:C:2017:936. See also ECJ Judgment of 8 September 2015, *Taricco I* (C-105/14), EU:C:2015:555.

<sup>38</sup> Or even to apply other national rules which are called into play when litigating the right to compensation for infringements of Art. 101/102 TFEU, as discussed supra re substantive scope.

<sup>39</sup>See, e.g.: ECJ Judgment of 18 December 2014, *CA Consumer Finance* (C-449/13), EU:C:2014:2464, paras 22-23.

Time-barring rules have also been qualified as procedural under EU Law (notably in the *Taricco* judgments, mentioned above)<sup>40</sup>, and appear to be treated as such, e.g., in France and Germany, unlike their characterisation under for example the Greek, Hungarian, Italian, Portuguese and UK legal orders. This is likely to prove a particularly thorny issue. Defendants may argue that the traditional national rules on time-bar triggers and deadlines will have to be applied to facts that occurred before the entry into force of the transposition in each Member State.<sup>41</sup> Furthermore, it is not clear what the precise consequence of immediate application, in the case of time-barring should be. Some national transpositions have dealt specifically with this issue and in different ways. In France, Germany and Lithuania, limitation periods not yet lapsed under previous rules are extended according to the new rules, deducting time already elapsed.

The varying interpretations of the temporal scope of substantive provisions, in general, may also be of concern. Should the new rules be applicable:- 1) to infringements that occurred wholly after the entry into force of the new regime; 2) to infringements that started before and continued after; or 3) also to infringements that occurred entirely before (namely if damages occurred after) the entry into force?

Evidently, the 'solution' adopted in many MS is not clear and will be the subject of debate, which is in itself problematic, but the following are examples of the divergent approaches adopted and aspects of the on-going uncertainty, particularly regarding the extent to which the transposition undermines the objectives of the Directive and is contrary to the principles of effectiveness and equivalence. In France and Poland, the new regime will apply only to infringements that occurred after its entry into force.<sup>42</sup> It should be noted, however, that in Poland certain procedural provisions of the new regime, namely the provisions on a competent court, on a right of representative bodies to bring a claim, on a disclosure of evidence, on a binding force of the NCA's decision, on a calculation of damages, will be applicable to the proceedings initiated after its entry into force, regardless when the infringement took place (i.e. before or after entry into force of the new regime). In Lithuania, it will apply to infringements which are on-going or occurred entirely after entry into force. In Germany, substantive provisions apply as of the transposition deadline (even through the transposition entered into force after that point). In Luxembourg, the entire Act applies only to actions for damages initiated after it entered into force (unclear if also to past infringements). In Portugal, the Act's procedural provisions apply only to actions filed after its entry into force. It is manifest that many of the national approaches adopted mean that it will be years before the new regime will apply to private enforcement actions, especially in the case of follow-on actions, as made expressly clear by the rapporteurs for Ireland and the UK in particular.

For a decade or more to come, national courts will be faced with the need to decide

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<sup>40</sup>See also, e.g.: EGC Judgment of 22 April 2016, *Ireland v Commission* (T-50/06 RENV II etc.), EU:T:2016:227, paras 172-173; ECJ Judgment of 17 November 1998, *Aprile* (C-228/96), EU:C:1998:544, para 28; ECJ Judgment of 9 February 1999, *Dilexport* (C-343/96), EU:C:1999:59, paras 41-42; ECJ Judgment of 11 July 2002, *Marks & Spencer* (C-62/00), EU:C:2002:435, para 38; and ECJ Judgment of 24 September 2002, *Grundig Italiana* (C-255/00), EU:C:2002:525, para 37 *et ss.*

<sup>41</sup> *Taricco II* left open the door as to whether this may be an example of the limits to the primacy of EU Law, although that case dealt with criminal law and was justified accordingly, in an approach that may not necessarily be analogous and appropriate for antitrust infringements.

<sup>42</sup> It is not clear if this includes at least the ongoing part of continuous infringements. In Poland, if the infringement was initiated before the entry into force of a new regime, but has a continuous nature and leads to the injuries after its entry into force, the new law will be applicable to the damages actions regarding such injuries.

whether the new regime is applicable to the particular damages action and the extent to which the domestic rules previously in force require to be interpreted in harmony with the solutions codified in the Directive, in accordance with the principle of effectiveness. Indeed, they are already referrals pending before the CJEU on the question of the appropriate temporal rules.<sup>43</sup>

In Belgium the relevant legislation entered into force on 22 June 2017 and under the Belgian code of civil procedure, procedural rules normally apply immediately in relation to pending cases. Accordingly, in order to comply with article 22 of the Directive specific provision was required to ensure that the procedural rules in the Directive do not apply to claims brought before 26 December 2014. On the other hand, the Damages Act in Cyprus, does not directly address the issue and it is simply anticipated that the Cypriot courts will apply Article 22 of the Directive should a question arise in litigation.

Article 12 of the French Ordinance states that the provisions “*enter into force the day after its publication*” in the *journal officiel*, *i.e.* 11 March 2017. This Article also states that the provisions extend the duration of the statute of limitations when the limitation period has not yet expired at that given date. Moreover Article 6 of the French Decree, in accordance with article 22(2) of the Directive, stipulates that all procedural provisions apply to proceedings raised after 26 December 2014. According to Article 6 of the Decree, such immediate effect applies to all procedural provisions. In accordance with the French ordinary transitional rules, the remainder of the substantive provisions of the Ordinance, that are not governed by a more specific transitional rule, apply to infringements that occurred after the date of the entry into force. The previous rules continue to apply to damages claims arising out of infringements which took place before 11 March 2017. However, it is interesting to note the French rapporteur’s view that previous judge-made rules that would otherwise continue to apply in this area on the basis of the retroactivity prohibition, for instance regarding the burden of proof in relation to the passing-on defence, may potentially be reviewed in the light of the Directive’s provisions.

The German transposition provides that its measures, with the exception of s33c(5) (which applies to all actions raised after that date), apply to all claims which have arisen after 26 December 2016. Moreover, its substantive law provisions do not have retroactive effect as of 27 December 2016, the deadline for transposition of the Directive and not its entry into force in Germany. In Germany, there is a particularly complicated relationship between these rules and the time bar provisions, with two different limitation laws applying simultaneously, and the rapporteur notes that the retroactive effect of the procedural rule on limitation, as envisaged by the Directive, benefits possible claims who have not yet sued and whose claims have not become time-barred as the retroactive application of the new provisions gives them an additional two years.

Article 16 of the Greek Damages Act follows Article 22 of the Damages Directive, in drawing a distinction between substantive and procedural provisions relating to damages

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<sup>43</sup>See Case C-637/17. It is also possible that relevant issues in this regard may be discussed (or be implicitly tackled) in another pending referral, in Case C-724/17.

actions. In relation to the former, the Damages Act applies prospectively after its entry into force, whereas in relation to the latter, the relevant provisions of the Damages Act are applicable to damages actions filed from 26 December 2014 onwards. The Explanatory Memorandum clarifies that time-bar is not to be treated as procedural for these purposes.

The implementing provisions entered into force in Hungary on 15 January 2017. The rules on temporal scope, in general, follow Hungarian law's settled approach: while provisions of substantive law enter into force only *pro futuro*, that is, only cover acts that take place after entry into force, procedural rules may have immediate application. Accordingly, the provisions having a procedural nature are to be applied to claims for damages emerging from competition law violations that are submitted after 26 December 2014. On the other hand, the substantive law rules are applicable to acts that occurred after the implementing provisions' entry into force. It should also be noted for the sake of clarity that the rules on limitation and the presumptions are to be treated as substantive rules in this context.

In Ireland, the implementing Regulations do not apply to infringements that occurred before 27 December 2016- even though that is neither the deadline date for transposition nor the later date for entry into force of the measures!- and therefore as the rapporteur indicates there is likely to be a significant time before the regulations will be applied by the courts and unclear why Ireland did not avail itself of the possibility offered by article 22(2) regarding actions seized post 27 December 2014.

In Italy, in relation to the substantive provisions, a non-retroactivity principle (the so called *tempus regit actum*) applies, but this principle did not in fact require any specific transposition, since it is generally the rule in the Italian legal system<sup>44</sup>. On the contrary, as regards procedural provisions, Article 19, 1<sup>st</sup> paragraph of Legislative Decree No.3/2017 provides that the procedural rules might be applied to actions for damages that were filed after the Implementation Date. In addition, as the distinction between substantive and procedural provisions may be difficult to draw in some cases, Article 19 identifies precisely which are procedural provisions, namely: a) those provisions relating to production of evidence (articles 3,4,5 Decree) and the suspension of the limitation period in the context of a consensual dispute resolution process (article 15).

In Lithuania, the rapporteur stressed that in order to avoid retrospective effect, the new provisions are applicable only for infringements after the measures' entry into force, with the exception of the rules relating to the limitation period, as where the limitation period has not expired, the new expanded period is applied, but the period prior to entry into force is included in the calculation of the new 5 year period.

In Luxembourg, the Act applies to actions for damages started after it entered into force on 10 December 2016. The Dutch Implementation Act includes only one short provision: Article III. It follows from this provision that all new procedural provisions do not apply to actions for damages for which a national court was seized prior to 26 December 2014. T

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<sup>44</sup> Article 11 of Preliminary Provisions of the Civil Code.



The Netherlands legislature saw no need to implement Article 22(1) of the Directive, as under general principles of Dutch law, unless it is otherwise decreed a newly introduced provision of law does not have retroactive effect, but (only) 'immediate effect'. Nonetheless, as the rapporteur indicated, it is not entirely clear to what extent the immediate effect of the newly introduced provisions of the Dutch Civil Code implies that these (substantive) provisions may apply to claims for damages that accrued *before* the date of the Implementation Act (or indeed before the date of the Directive). Ultimately, this may well be a question of how the concept of "non-retroactivity" – as provided for in article 22(1) of the Directive – must be construed!

In Poland it is specified that the Act on Competition Damages ('ACD') does not apply retroactively in line with article 22 of the Directive, and is applicable only to claims that took place after the entry into force (query of anything re procedural). It should be noted, however, that certain procedural provisions of ACD, namely the provisions on a competent court, on a right of representative bodies to bring a claim, on disclosure of evidence, on the binding force of the NCA's decision, and on the calculation of damages, will be applicable to the proceedings initiated after its entry into force, regardless of when the infringement took place (i.e. before or after entry into force of ACD). Moreover, in the case of continuous infringements, initiated before the date of entry into force of ACD but leading to the injuries after this date, ACD will be applicable to the damages actions relating to such injuries. However, as the rapporteur notes, given that many actions are follow-on claims, there is consequently a real risk that many years will pass before actions will be brought under the ACD.

The Portuguese transposition measure replicated article 22 of the Directive in establishing no retroactive effect for substantive provisions, but diverted from it by stipulating that procedural provisions will not be applicable immediately, but only to new actions filed after entry into force of the transposition measure. In addition, the measure established the burden of proof as a substantive issue, although the rapporteur considered this to be problematic. It is uncertain if these two options are compliant with the Directive and/or in line with other MS identification of burden of proof issues as procedural in nature.

In Spain, the Transposition Decree provides that the new substantive rules introduced in the DCA are not retroactive. Only private claims initiated after the entry into force of the Decree will be governed by the new rules. Claims for infringements in which the previous one year statute of limitations has passed are extinguished; however, the rapporteur believes that new claims for on-going infringements or infringements that ceased within the one year limitations period should be allowed. The non-retroactivity of the rule extends even to those amendments of the CPA on access to sources of evidence which only apply to those proceedings initiated after the Transposition Decree has entered into force. Accordingly, the Spanish rules only apply after the late date of entry into force, but to any claims raised then (subject to limitations), and this also applies to the procedural provisions which do not take effect from 27 December 2014 as in many other countries.

In Sweden, it is a well-established principle of commercial law that new rules cannot be given retroactive effect. This implies that the subject-matter of the Directive must be applicable to claims for damages that have arisen only after the entry into force of the Antitrust Damages Act ('ADA'). The Government held that this follows from general principles of Swedish law and it was considered redundant to regulate this explicitly in the ADA. The opposite applies for national Swedish procedural rules in so far that such rules shall be applied immediately after entry into force of the ADA- namely the new rules on staying of proceedings, evidence and binding effect (ADA, chapter 5, section 5–9). Pending cases before the courts shall therefore be subject to the new rules, unless – as outlined in the Directive – cases have been brought before the courts prior to 26 December 2014.

The UK rules are set out in Part 10 of *The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017*. Para 42 provides that the substantive rules apply 'to loss or damage suffered on or after the relevant day as a result of infringement of competition law that takes place on or after that day', but notes that where the infringement takes place over a period this will be 'the first of those days'. The relevant day is the date the Regulations came into force. This effectively means that, for the majority of the substantive provisions of the Directive, there will be a considerable lag before the implementing measures are effective and the Directive will have any impact on competition damages actions before the courts in the UK (theoretically, long after the UK has left the EU!) The only parts which are not covered by those restrictions are parts 6 and 7 relating to disclosure and use of evidence, deemed to be procedural for these purposes, which will be applicable where proceedings begin after the entry into force of the Regulations (ie 9 March 2017).

## **4. Transposition Key issues and Controversies**

This section discusses how the MS have addressed most of the key issues and controversies arising in the context of the transposition of the Damages Directive. The issues of material and temporal scope – the latter arguably the issue in which the greatest heterogeneity of national solutions has been identified – have already been already discussed (*supra* §3.2).

### **4.1. Who is liable and under which conditions?**

As the Directive purposely chose not to explicitly address the substantive grounds and conditions for liability, it was left to the MS to specify what these may be, within the limits imposed by Arts. 101 and 102 TFEU, together with general principles of EU Law (such as the principle of effectiveness) and in accordance with a systemic and teleological interpretation of the Directive itself.

Although several rapporteurs discussed the issue, generally MS also did not include any special provisions in this regard in their transposition of the Directive, leaving it to the application of general rules of civil liability. While the end result is disguised by the absence of special provisions, this may lead to significant divergence in approach between the courts of different MS. Several legal debates are likely to arise.

One such controversy concerns fault, i.e. the degree of guilt or negligence required as a

basis for a right to compensation. Not all MS' general rules of civil liability adopt the same approach to this question.<sup>45</sup> Is a requirement that gross negligence be shown (see for instance Portugal) compatible with EU Law, considering that infringements of Art. 101/102 TFEU may occur with simple (or mere) negligence? Is it compatible with EU Law to require demonstration of negligence for a specific person in a leading position of the infringing undertaking (e.g. Sweden)? If the standard is different, and because a *res judicata* Commission or NCA decision will usually only prove the infringement, without necessarily having considered issues of guilt or negligence, it may still be up to the claimants in the action to adduce evidence of the requisite degree of fault. This was arguably not the purpose of the Directive, and could prove to be a major hurdle to successful litigation. Depending on the attitude of national courts,<sup>46</sup> such additional requirements may require access to evidence which has not collected by the competition authority and which may prove impossible to identify and obtain. Thus, the effectiveness of the right to compensation for damages caused by infringements of Art. 101/102 TFEU may be jeopardized.

Another controversy concerns the characterisation of the type of liability in question and the consequences thereof. While the Directive appears to assume that antitrust damages actions are based in tort (and there are several provisions of EU private international law which seem to suggest that EU Law requires that characterisation), in several MS some forms of competition law damages actions have, in the past, been understood to fall under contractual liability rules, at least whenever the infringement occurred in the context of a contractual relationship.<sup>47</sup> This has varying consequences in the MS. In some, the domestic rules on establishing liability in contract are easier to satisfy than the equivalent tort liability rules, which may make it more difficult for final consumers to obtain compensation than direct, usually more resourceful, clients. It may also have profound consequences for the determination of the law applicable to a dispute and the competent jurisdiction, albeit mitigated by the appropriate application of the rules in the Brussels Ia, Rome I and Rome II Regulations.

The most obvious legal controversy, at this level, which the Directive, unfortunately, chose not to address, concerns the liability of the parent company. It is settled that, in the public enforcement of EU antitrust rules, parent companies may be liable for the behaviour of their subsidiaries over which they (solely or jointly) exercise decisive influence, even if they were unaware of the antitrust infringing behaviour, and that this influence may be presumed if they (directly or indirectly) own all or nearly all the share capital of that subsidiary.<sup>48</sup> However, this question has not been settled in all the MS, regardless of whether NCAs apply only national or also EU competition law (positive examples are Austria, Italy, the United Kingdom and, in part,

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<sup>45</sup> See, e.g.: Piszcz, A., "Room for manoeuvre for Member States: Issues for decision on the occasion of the transposition of the Damages Directive", 1(1) (2017) *Market and Competition Law Review* 81, at 99; Strand, M., "Labours of Harmony: unresolved issues in competition damages", (2017) *European Competition Law Review* 38: 203, 204-205.

<sup>46</sup>In Sweden, for example, national courts appear generally to carry out an assessment of guilt closer to that found in the public enforcement of antitrust law, a lower threshold than under the general rules on tort.

<sup>47</sup>See: Sousa Ferro, M., 'Antitrust Private Enforcement in Portugal and the EU: the Tortuous Topic of Tort', (2016) 4 *Global Competition Litigation Review* 140.

<sup>48</sup> See, e.g.: Cortese, B. "Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability", in Bernardo Cortese (ed) *EU Competition Law. Between Public and Private Enforcement*, Wolters Kluwer 2014, 73-93; Koenig, C., 'Comparing Parent Company Liability in EU and US Competition Law', 41(1) (2018) *World Competition* 69.

Hungary). As was recently brought to the forefront by the infamous German “sausage gap”,<sup>49</sup> some NCAs have seen their attempts to comply with this aspect of EU Law blocked by national courts.<sup>50</sup> This led to the introduction of a harmonising provision in the proposed ECN+ Directive.<sup>51</sup>

More significantly, in the context of the Damages Directive transposition, the same issue of parental company liability will have to be considered in the private enforcement sphere. This has not as yet been addressed by the CJEU, and it is likely to raise the same constitutional issues and potential arguments regarding the limits to the primacy of EU Law, as in the public enforcement context. Although the issue was raised during the drafting of the Directive and in several of the MS transposition preparatory works (see, e.g., Netherlands), almost none chose to address it specifically (the exceptions being Portugal and Spain), instead leaving it up to the courts to decide on the relationship between liability in antitrust and the traditional company law notion of separate legal personality. Interestingly, Germany included measures in its transposition of the Damages Directive to try to resolve its “sausage gap” problem for public enforcement, but did not include any provision in relation to liability in private damages actions.

The use of concepts in the national *lex specialis* such as “undertaking” (e.g., Belgium, Luxembourg, Netherlands and Portugal), “agreement” (Cyprus) or “breach of antitrust law” (France), leading, directly or indirectly, back to the competition law concept of economic unit, may all have consequences for the scope of liability of parent companies, subject to interpretation by the national and European Courts<sup>52</sup>. Considering the traditional approach of many national courts to this issue in public enforcement, the outcome in many MS is fairly predictable. Absent clear instructions from the CJEU, it is suggested that most national courts are likely to refuse to find parent companies liable in line with the CJEU approach to public enforcement liability. The choice of MS legislators to remain silent on this issue is, thus, disappointing, but perhaps inevitable given the hostility of many national private law experts (and judges) to the suggestion that the general rules of parent company liability could be set aside in these situations. Before the courts of the Netherlands, parental liability in tort for antitrust infringements “*is a hotly debated issue*”, but one District Court has already ruled out parental liability in such contexts, in accordance with what is believed to be the dominant opinion amongst legal scholars.

In contrast, the courts of the United Kingdom<sup>53</sup> seem to approach the question on the assumption that the CJEU is likely to extend to the private enforcement sphere its case-law on this issue from the public enforcement side, and there is already, at least, one precedent where parental liability under the single economic unit doctrine was recognized. A similar approach

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<sup>49</sup> See e.g.: [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/26\\_06\\_2017\\_Bell\\_Wurstkartell.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/26_06_2017_Bell_Wurstkartell.html).

<sup>50</sup> See, e.g.: Sousa Ferro, M., ‘The Portuguese «Sausage Gap»: Parent Company Liability for Antitrust Infringements Not Yet Assured in Portugal’, 1(3) (2017) *European Competition and Regulatory Law Review* 266.

<sup>51</sup> See: Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017)142 final, Art. 12(3): “*Member States shall ensure that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings*”.

<sup>52</sup>In France, the discussion is made more complex by the replacement of a reference to liability of the “undertaking”, in a draft version, for a reference to liability of “natural or legal persons”.

<sup>53</sup> At least in England and Wales, and notably the Competition Appeal Tribunal (“CAT”) in 14 July 2016 Case 1241/5/7/15 (T) *Sainsbury’s Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 11.

was also taken in a case in Austria.<sup>54</sup>

The Spanish and Portuguese transposition measures stand alone in explicitly dealing with this issue. Both sets of measures establish rules for the civil liability of the parent company for antitrust infringements carried out by subsidiaries. The Spanish law excludes the liability of the parent when it was not able to exercise decisive influence over the subsidiary. The Portuguese law codifies the CJEU's case-law on the presumption of exercise of decisive influence for shareholdings of at least 90% in the subsidiary undertaking.

A potentially even more complicated issue concerns the liability of companies within the economic unit, which are not capable of having direct or indirect control over the company which carried out the infringement. Even in the public enforcement context, European case-law has not yet clarified if a subsidiary may be deemed responsible for the behavior of its parent or of a different subsidiary of the group, when it itself did not participate in the infringement.<sup>55</sup> None of the national transpositions explicitly address this issue (beyond the possible consequences which may derive from the use of concepts such as “undertaking”). The German provision which closed the “sausage gap” for public enforcement refers only to parent companies,<sup>56</sup> and accordingly does not provide for the imposition of fines on subsidiaries in these situations, nor does it consider the private enforcement context. In the United Kingdom, there are already contradictory rulings in this regard.<sup>57</sup> A Dutch court has also refused to find a subsidiary liable under the single economic unit doctrine (although, in the specific case, it was able to find it liable under general tort rules).<sup>58</sup>

Finally, in some MS, there has been some consideration given as to whether managers of undertakings may also be held jointly and severally liable for antitrust damages where they were directing or responsible for the actions leading to the infringement. In Germany, a Court of Appeals has interpreted general liability rules as allowing for this and already held managers liable in one case,<sup>59</sup> and the German transposition measure includes a provision which may be read as confirming this ruling. In Portugal, where managers can also be fined by the NCA for antitrust infringements, some authors suggest that civil liability is also a possibility.<sup>60</sup>

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<sup>54</sup>See Judgment of the Oberste Gerichtshof of 2 August 2012 (case no. 4 Ob 46/12m), para 7.4

<sup>55</sup>The issue has been addressed, but not decisively so, in: EGC Judgment of 11 March 1999, *Siderúrgica Aristrain Madrid*, T-156/94, EU:T:1999:53, paras 140-142, overturned by ECJ Judgment of 2 October 2003, *Siderúrgica Aristrain Madrid*, C-196/99 P, EU:C:2003:529, paras 98-100; and in EGC Judgment of 27 September 2006, *Jungbunzlauer*, T-43/02, EU:T:2006:270, paras 125-130. See also Opinion of AG Kokott in *Akzo Nobel*, C-97/08 P, EU:C:2009:262, para 97; and Opinion of AG Mengozzi in *Siemens Österreich*, C-231/11 P, EU:C:2013:578, para 80.

<sup>56</sup> See section 81, para 3(a), GWB.

<sup>57</sup> See Rodger, B. ‘Competition Law private enforcement in the UK courts: case-law developments 2013-2016’ [2017] GCLR 10(3) 128-144. See: CAT Judgment of 14 July 2016, *Sainsbury’s v MasterCard et al* (1241/5/7/15 (T)), paras 363(21) to (23); *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864; and *KME Yorkshire v Toshiba Carrier* [2012] EWCA Civ 1190. *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864; *e KME Yorkshire v Toshiba Carrier* [2012] EWCA Civ 1190. Cf *Provimi Ltd v Aventis Animal Nutrition SA* [2003] ECC 29, paras 25 to 31. In the public enforcement context, see Hughes, P. ‘Competition law enforcement and corporate group liability- adjusting the veil’ [2014] ECLR 68.

<sup>58</sup> Judgment of District Court for the Eastern Netherlands of 2 September 2014, *TenneT v ABB* (200.126.185, ECLI:NL:GHARL:2014:6766, JOR2014/1265)

<sup>59</sup> See: OLG Düsseldorf, 13/11/2013, VI-U (Kart) 11/13, WuW/E DE-R 4117, 4127 et seq.

<sup>60</sup> See, e.g.: Gomes Ramos, M. E., ‘Corporate indemnification: experiences in USA and developments in Germany, Italy and Portugal’, 4(2017) *European Company and Financial Law Review* 723. In the UK, see *Safeway Stores Ltd v Twigger* (CA), [2010] EWCA Civ 1472; [2011] 2 All E.R. 841; discussed in Rodger, B., ‘Competition law litigation in the UK courts: a study of all cases 2009-2012’, [2013] GCLR 6(2), 55-67. See also Robertson, A., ‘Pulling the Twigger: directors and employees back in the firing line for damages after *Jetivia* in the Supreme Court?’ [2015] 36(8) *ECLR* 325-326.

There is a case already pending before the CJEU (referred by a Swedish court) which asks the fundamental question at the base of most of liability issues discussed here, specifically whether the determination of who is liable is to be undertaken by applying EU law or national law. The referral proceeds to ask the CJEU, specifically, about the issue of parent company liability under the single economic unit doctrine and the extent to which it requires to be applied in parallel with case-law on that issue in the public enforcement side.<sup>61</sup>

#### 4.2. Joint liability, immunity recipients and SMEs.

Transposing the rules relating to joint liability, and particularly to the liability of immunity recipients and of SMEs,<sup>62</sup> has clearly led to discrepancies in approach between MS, including apparent infringements of the duty to faithfully transpose the Directive.

In contrast with many MS (such as Germany, Hungary, Ireland, Italy, Lithuania and the UK), in Belgium, France and Luxembourg these issues have so far been handled, under general rules, not as joint and several liability, but as *in solidum* liability, which is slightly different and less favorable to victims. While the French and Belgian measures seem to have ensured transposition in accordance with the Directive, the discrepancy was not resolved in Luxembourg, at least regarding so-called “secondary consequences”,<sup>63</sup> which may or may not also be affected by the Directive.

Some MS (see below) decided to provide guidance for the distribution of liability between co-infringers and for the exercise of the right of recovery, while others (e.g., Belgium and Hungary) discussed the issue in the drafting of the legislation but did not include any provision the final version of their transposition measure, leaving the courts to rely on general rules.

The French Act (following some prior rulings by national courts) requires liability to be distributed “*in proportion to the seriousness of their fault and to their causal contribution to the harm*” (and the same criteria have been included in a proposal for a reform of the general civil law rules). In Germany, the measure makes only a broad reference to causality. The Dutch and Swedish measures only make reference to the “*share of the harm*”. In Greece, it is stated that the damage must be equally allocated between co-infringers if the amount of each contribution cannot be determined (a fall back rule which is present also in other Member States, as the general rule in civil law). In Hungary, by general rules, any apportionment should be made according to culpability and, subsidiarily, according to contribution and, as a last resort, equally. In Ireland, general rules set fault as the sole criterion, and equal distribution as a last resort. In Spain, the general rule is apportionment according to share of the harm.

The (draft) Portuguese transposition is the only measure which actually included a

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<sup>61</sup> Case C-724/17 *Vantaan kaupunki*.

<sup>62</sup> See KOENIG, C. “Making contribution work: the liability of privileged and non-privileged injurers in EU competition law” (2018) *European Competition Journal* 14 (forthcoming); PEYER, S., “The Antitrust Damages Directive –much ado about nothing?” in Mel Marquis & Roberto Cisotta (ed.) *Litigation and Arbitration in EU Law*, Edward Elgar 2015, 33 at 41-43; TRULI, E., “Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements” 2016 *Journal of European Competition Law & Practice* 7/5: 299 at 307-308.

<sup>63</sup> In these jurisdictions, the consequences of joint liability addressed in the Directive are considered “primary consequences”. But there are “secondary consequences”, which remain untouched by the Directive and its transposition, and which are different in “solidarity” and “*in solidum*” situations, such as: whether an action against one infringer interrupts the limitation period against the other jointly liable infringers; whether remission of debt in favour of one infringer liberates all others, and under which conditions; and whether an appeal by one co-debtor benefits the others.

rebuttable presumption: the extent of the liability of each participating undertaking is “presumed to be equivalent to the average of their market shares in the markets affected by the infringement”. The same solution was considered in Sweden, following a ruling of the (now) Patent and Market Court that market shares could be used as guidance, but the Government believed an actual presumption would be incompatible with the Directive.

Concerns have been raised (see, e.g., Belgium) about the consequences of joint liability and the possible limitation of the exercise of the right of recovery for undertakings which do not appeal an infringement decision and are ordered to pay compensation for damages caused to clients of other participating undertakings who appeal the decision. Unless any judgment awarding compensation is suspended until the public enforcement infringement decision becomes *res judicata* in relation to any appealing parties, there is a risk that the decision may be wholly or partly overturned and the undertaking who has already paid compensation in lieu of the other participants will not have the right to be compensated by them.

The Dutch report stresses that it is uncertain whether infringing undertakings may be held liable for parts of the infringement in which they did not participate. This is especially relevant in the context of single continuous infringements, since an undertaking may be fined by a competition authority for participating in a broad-ranging cartel, of which it was aware, when its actual activities are only limited to a small part of it (usually in terms of products or geographic areas). Even if the requirements of the case-law on a single continuous infringement are met in the public enforcement context, it is not yet clear whether the undertaking in question can be held jointly and severally liable, in private enforcement actions, for those parts of the cartel in which it did not participate.

In Belgium, Germany and Lithuania, the restriction on the liability of SMEs has been tempered by making them subsidiarily liable to compensate other injured parties when full compensation could not be obtained from the other participants in the infringement (an extension of the same rule foreseen for recipients of immunity). In Germany, the limitation of liability of SMEs to their own direct and indirect purchasers has been restricted to only two of the provisions of national competition law, and not to other provisions which may arguably be considered to also pursue the same objectives as articles 101/102 TFEU, and it has been applied both to claims from injured parties and to co-infringers' claims for contribution (although this is not foreseen in the Directive, it was argued to be necessary for the effectiveness of the intended protection of SMEs).

In what may be argued to be a rectification of an oversight in the Directive, some MS (see, e.g., Germany and Portugal) have extended this limitation of liability for SMEs, not only to situations in which they acted as suppliers, but also for when they acted as purchasers. In the United Kingdom, one of the conditions for this protection of SMEs is that they held a market share of less than 5%, not at “any time” during the period of the infringement, as in the Directive, but throughout the period of the infringement. As to the exception which allows the exclusion of joint and several liability when it would irretrievably jeopardize the economic viability of the SME and cause the loss of value of its assets, it has been suggested in France (in a non-binding document of the legislative procedure) that courts may want to refer, for further guidance, to the Commission Guidelines on the method of setting fines.

In relation to immunity recipients, it has been noted that some MS refer to leniency for participants in “cartels” (e.g., Germany), not in “secret cartels” as in the Directive, but it is not evident that this will cause any actual discrepancies in practice. The German transposition

measure went beyond the Directive in explicitly stipulating that it is up to the injured parties to prove an inability to obtain compensation from other participants in the infringement, and in clarifying that, within the scope of the relevant exception, immunity recipients are not obliged to compensate claims which have become time-barred against the other infringers.

The Directive also requires MS to ensure that the limitation period for (exceptionally) seeking damages from immunity recipients is reasonable and sufficient, but most MS decided not to adopt a specific solution for this issue. It is not clear whether existing national general rules will be enough to ensure the attainment of this objective, absent adequate adaptation in light, e.g., of the principle of effectiveness. In Germany, the transposition measure provides that, in these cases, the limitation period will not start before it has been established that it was impossible to obtain full compensation from the other infringers, a provision which is likely to raise doubts and legal controversy.

#### 4.3. Access to evidence.

Access to evidence was identified as one of the main obstacles to successful litigation in the private enforcement of competition law across the EU. Accordingly, the Directive introduced a number of harmonizing provisions in this regard,<sup>64</sup> even though some rules here are aimed at protecting public enforcement rather than facilitating private enforcement. Nonetheless, in this area, there is an extraordinary heterogeneity between the legal orders of the different MS, made worst by an accentuated degree of legal uncertainty when interpreting and applying those national rules. This was so before the transposition of the Directive, and the effects of this heterogeneity are likely to linger in the interpretation of the new rules.

It should be noted from the outset that, while the legislative procedure in several MS brought to the forefront arguments that aspects of the new access rules were justified and appropriate and should be adopted with a broader scope of application than simply for antitrust damages actions, no MS took this step. An initial draft of the Spanish transposition proposed the introduction of new general rules in the Code of Civil Procedure, but this was eliminated from the final version. Thus, all MS have limited the scope of the new access regime to disputes which fall within the specific Damages Directive transposition measures, as defined in the respective MS measures (as noted *supra* §3, the scope of the national regimes varies significantly). In all MS, this is likely to raise concerns about potentially abusive reliance on allegations of antitrust infringements in cases which are more obviously based on infringements of contracts or other legal provisions, in order to benefit from this more favorable access regime. In most of the MS, where the national transposition measure is limited to claims for compensation, it means that parties who seek to prove identical antitrust infringements, but only to obtain a declaration of invalidity or an injunction, will not be able to exercise these rights of access to evidence.

In some MS (Ireland, Luxembourg, the Netherlands, Sweden and United Kingdom), it was believed that the existing national legal framework already largely assured the attainment

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<sup>64</sup> For an overview of these provisions see Chirita, A. C., “The Disclosure of Evidence under the ‘Antitrust Damages’ Directive 2014/104/EU” in Vesna Tomljenović, Nada Bodiroga-Vukobrat, Vlatka Butorac Malnar, Ivana Kunda Tomljenović, Bodiroga-Vukobrat, Butorac Malnar, Kunda (eds.) *EU Competition and State Aid Rules: Public and Private Enforcement*, 2017, 147-173.



of the Directive's objectives, and even provided a greater degree of access and protection of claimants' interests. Nonetheless several of the Directive's provisions were still transposed into these legal orders.

However, in the majority of MS, with stricter pre-existing rules and, in some cases, little or no existing culture of discovery of documents, the transposition of the Directive required the introduction of new rules, reproducing all or most of those found in the Directive. In Poland, in particular, it was deemed that the novelty of the new approach, in this legal order, required more detailed regulation at the procedural level.

The greater challenge in these MS will be to overcome the traditional legal instincts of the judiciary, who may tend to interpret the new rules in light of existing general principles of civil procedure. These existing general principles – the interpretation of which is often a matter of debate in each country – will make it difficult for courts to accept, for example, the idea that parties may need to have access to certain confidential information (and that proportional solutions for such access must and can be found): that it is possible to have access to categories of documents: or that a party must be able to be granted access to information which it is only superficially able to identify and which it cannot *a priori* be sure if it contains relevant information. It may be difficult for some courts to resist the imposition of a burden of justification of the access request which would be impossible to meet and thus deprive the right of access of its effectiveness.<sup>65</sup>

In relation to the first example, many MS (such as Belgium, Cyprus, France, Greece, Italy, Lithuania, Luxembourg, Poland and Portugal) have tackled this concern by providing a list of examples of measures which courts can adopt as compromise solutions to allow solutions in accordance with the principle of proportionality (limits to lawful use of information, redacted versions, non-confidential summaries, data-rooms, confidentiality circles, etc.). Others, such as the Netherlands, believed that national law already provided judges with the necessary instruments to attain those objectives. It is clearly arguable that absence of specification at EU level of what constitute legitimate grounds for confidentiality, and which situations usually render a document non-worthy of protection (e.g., information older than 5 years) is likely to result in heterogenous enforcement of EU Law across the Member States.

In France, a direct and immediate right of appeal to the President of the Paris Court of Appeal, against orders of disclosure of evidence, was instituted. A similar right of appeal was created in Germany and Poland<sup>66</sup> and may also exist in other legal orders under general rules (see, e.g., Ireland).

Requirements that evidence requested be identified “as precisely and as narrowly” as possible, and supported by available facts and evidence (e.g., Belgium, France, Spain), may reinforce the tendency of courts to be unreasonably demanding when assessing the justification of the request for access.

In this regard, it may be useful to look at how these issues have been tackled in jurisdictions with more experience in providing such access, namely in the context of antitrust damages actions, and which have already been required to strike a balance between protecting the effectiveness of rights of claimants and preventing abusive blanket discovery (“fishing

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<sup>65</sup> See, e.g., the varying attitudes of Greek courts in the case-law, concerning the implementation of equivalent provisions transposing Directive 2004/48/EC (Intellectual Property Rights Enforcement Directive).

<sup>66</sup> In Poland, the person ordered to disclose evidence may also request the order to be revised or repealed on the basis of subsequent changes in circumstances.

expeditions”). In Ireland, for example, the “necessity” of an item of evidence has been interpreted as something required to avoid an “unfair result of the proceedings” or required to dispose of the case more efficiently (cost saving), within an overall assessment of proportionality. The Irish Supreme Court has tied the assessment of proportionality to a finding of likelihood that a given document or category of documents will contribute to advancing the interests in question, but continues to affirm that, in most cases, a simple determination of relevance is sufficient to grant access. However, it has also decided that a party may not seek discovery of a document in order to find out whether the document may be relevant. It has been suggested that the standards so far applied in Ireland are more stringent than those which are provided by the Directive.

In Italy, courts can only order access to evidence upon request from one of the parties, and may not do so *ex officio*. The same will not be true in all MS, since some (e.g., Portugal) give courts greater leeway in the production of evidence, at least in some types of proceedings. In Spain, the transposition measure appears to limit the new access rules to follow-on claims, whereas much of the remainder of the new regime applies also to stand-alone actions, and this limitation is arguably incompatible with the Directive.

In France, it has been argued that the transposition seems to protect the interests of access to evidence only of claimants who allege a plausible harm caused by an antitrust infringement, and not of defendants or of claimants who invoke other interests. It was also noted that the rules on protection of confidentiality were seemingly meant to partly anticipate the transposition of Directive 2016/943/EU, on the protection of trade secrets. In Germany, the law not only specifies that defendants have the same rights of access (also in Portugal), but it further clarifies that these rights can be used by applicants in actions for negative declaratory judgments (i.e., the type of action associated with the infamous “Italian torpedo”).<sup>67</sup>

In Belgium, specific questions have been raised as to the type of evidence which can be obtained. On the one hand, the law grants access to “documents”, but this concept in national law seems to be narrower than the Directive’s concept of evidence.<sup>68</sup> On the other hand, Belgian courts have so far decided that only existing documents may be requested. One may argue that the Directive does not protect the right of access to evidence understood thus, and that the application of the principles of proportionality and effectiveness may actually lead to a different solution in certain cases. One party may need to know certain concrete information which the counterparty is in possession of and can immediately and easily identify and present to the court, but the party claiming access may have no way of knowing, much less of justifying, in which documents this information is included or from which it may be derived from. It may also require a disproportional workload for the requesting party and for the court to arrive at that information through the method of obtaining access to a great number of documents from which the information might then be derived (and protecting confidentiality of other information included in them), as compared to simply asking the other party for the information.

Questions have also been raised (see Belgium) as to the territorial scope of the powers of national courts, specifically whether they will be empowered to order access to documents held by persons in other Member States or in third countries, and, if so, whether the rules of those legal orders, namely relating to the protection of business secrets, will have to be complied with.

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<sup>67</sup> Sec. 33g(2)2 GWB.

<sup>68</sup> Cfr. the very broad concept of document in Irish law, or the enumeration of types of evidence in Spanish law, which even allows ordering entry into, and collection of evidence in, offices and private homes.

The issue may prove particularly important for access to documents held by the European Commission, especially considering the rather restrictive approach which has been taken by the EGC and CJEU in relation to requests for access to the administrative file by private litigants. On the other hand, there seems to be a far more cooperative attitude when requests for access come from national courts, in line with the principal of loyal cooperation.<sup>69</sup>

In some cases, parties may have an interest in having access to documents included in criminal proceedings. This may certainly be the case in MS which have introduced criminal sanctions for antitrust infringements, but also in others, when the facts underlying an antitrust infringement may also involve criminal procedures relating to corruption or to public procurement and concessions. This issue has been specifically tackled in the Hungarian transposition, ensuring protection against self-incrimination and allowing access only after the conclusion of the criminal procedure.

While the Directive only deals, explicitly, with rights of access in the context of a damages action already presented before a court, MS such as Germany, Portugal and Spain decided to introduce pre-trial (rather, pre-litigation) discovery mechanisms (i.e., actions to request access before an application for damages or other remedy is filed; in Ireland<sup>70</sup> and in England and Wales, these mechanisms are a commonly used tool in litigation, under general civil rules of procedure). In Germany, under pre-existing general rules no such mechanism appeared to be available. An autonomous action for disclosure of evidence is now possible, for the purpose of assessing the right to bring an antitrust damages action, and its initiation leads to the suspension of the limitation period. In Portugal, this autonomous action already existed in general rules, but was little known and never used outside of very specific contexts, and never in antitrust damages proceedings. The (draft) transposition Act includes a specific provision in this regard, with the objective of clarifying and promoting awareness about the possibility of using the pre-existing mechanism in this context.

In these legal orders, pre-trial discovery will often be essential for the success of the case, as access to evidence after the application has been filed may allow the applicant to meet the burden of proof, but would come too late to allow it to meet the burden of allegation of facts. The latter must be present in the application and cannot be added at a later stage, with national courts frequently being quite demanding about the degree of specification of the facts which must be alleged. Other MS, such as Lithuania, discussed the possibility of introducing pre-trial discovery (absent from their legal orders), but decided against it, following a minimalist approach to the transposition of the Directive.

German law mentions the possibility of preliminary injunctions to satisfy claims for handing over evidence, but only in relation to the binding decision of a competition authority (and, apparently, such injunctions will not suspend the limitation period). It is debatable to which extent the general rules relating to provisional measures, in the different MS, will be available, in law and in practice, to obtain access to evidence. But, in Portugal, a special set of provisional measures has been introduced, when these are deemed necessary to preserve

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<sup>69</sup>See, e.g.: CJEU Order of 6 December 1990, *Zwartveld*, C-2/88, EU:C:1990:440; GCEU Order of 29 November 2012, *Alstom*, T-164/12 R, EU:T:2012:637; recital 15 of Directive 2014/104/EU; and Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101/54, 27/04/2004), paras 21-26.

<sup>70</sup>In Ireland, courts may only order discovery if the applicant has previously requested the holder of the evidence to voluntarily disclose it.

indispensable items of evidence.

Few MS have decided to create special rules to address the problem of the costs of disclosure, on which the Directive is silent (although the assessment of these costs is necessarily included in the general assessment of proportionality, when deciding whether and how to grant access). In Germany, it has been stipulated that the person required to disclose evidence can demand reimbursement of all reasonable expenses from the requesting party. In Spain, applicants will be required to post a bond or pledge to guarantee the payment of the expenses arising from the disclosure. These provisions may not be entirely compatible with EU Law (namely, in light of the need to ensure effectiveness and the assessment of proportionality by the courts).

Regarding access to documents included in the files of competition authorities, all MS analyzed inevitably transposed the grey and black lists. Although the Directive contradicts the principles affirmed by the CJEU in its case-law on access to leniency applications in ensuring an absolute protection, instead of allowing for the theoretical possibility that, in an exceptional case, circumstances may make it necessary to have access to leniency statements, no MS has challenged this more restrictive approach in its transposition. There is case-law on disclosure in the UK which took on the *Pfleiderer* and *Donau Chemie* case-law, which will inevitably need to be reconsidered in light of these new provisions.

A specific problem with the black list is that the Directive seemingly overlooked a problem in its approach to protecting settlement submissions. It places “settlement submissions” in the black list, but then places “settlement submissions that have been withdrawn” in the grey list. The Commission and NCAs became convinced that this was a mistake which would seriously limit the willingness of undertakings to discuss settlements, for fear that claimants would have access to withdrawn submissions after conclusion of the public enforcement case. The Commission has tried to correct this in a subsequent soft-law document, arguably depriving the grey list provision of its *effet utile*.<sup>71</sup> Portugal has adopted the same approach in its (draft) transposition, on the one hand providing that it is possible to have access to withdrawn submissions, but then changing the Competition Act to make sure that no undertaking ever has to “withdraw” its submission; it can simply replace it with another and the previous one will be deemed “ineffective”. This, like the Commission's identical approach, may be incompatible with the express terms of the Directive. It leaves no room for the grey list provision to ever be applied, and there is no legal justification to deem that provision invalid. Specifically, it cannot be argued that access to withdrawn settlement submissions would violate the *nemo tenetur* principle, because such a document would not include a confession of guilt, merely a proposal to confess guilt, which was conditional upon facts which did not subsequently arise.

The Italian transposition has specifically foreseen a right of national courts to suspend the damages actions if access to grey listed documents is requested, so as to wait for the end of the proceedings, when those documents become available.

Some MS courts will have to deal with thorny temporal scope issues. In Belgium, France and Luxembourg, for example, access by third parties to confidential information held by the NCA has to date been prohibited by law. In Portugal, it was theoretically possible, but always refused in practice. In Belgium and Portugal, there was an absolute protection of documents

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<sup>71</sup>See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167/1, 02/07/2008), as amended (Communication from the Commission, OJ C 256/2, 05/08/2015).

submitted together with leniency applications (extending to pre-existing documents). Future requests of access to documents provided to these NCAs, protected under the pre-existing legislation are likely to be contested on the grounds of good faith and legitimate expectations of the parties who submitted them. It is unclear how courts will characterize these rules (procedural/substantive) and what temporal effects will be recognized.

In relation to Greece, it has been suggested that a third party seeking to have access to documents held by the NCA, even to non-confidential information included therein, will continue to have this right only in the context of a complaint it has filed before the NCA, and this would not be in line with the Directive. The Italian report has stressed that – as will also likely be the case in other MS – the right of access to documents held by the NCA, under Administrative Law, will still be applicable, which may lead to some uncertainty about the interaction of that regime with the transposition of the Directive.

In Sweden, doubts have been raised as to whether unlawfully obtained evidence, in breach of the protection afforded by the black and grey lists, is fully excluded from the courts' assessment, or if it may still be given some (limited) evidentiary value.

An additional problem which may become significant is that the drafting of some of the national transposition provisions appear to refer, exclusively, to documents held by the NCAs, and not to the same documents when held by their authors or third parties. Such rules will have to be carefully interpreted in order to ensure the effectiveness of the relative and absolute protections imposed by the Directive. In some cases, it is uncertain whether these provisions apply only to the national NCA(s), or also to documents in the files of the European Commission or NCAs of other Member States. Another issue which may be of great import, e.g., for trans-Atlantic private enforcement (but also, potentially, for the UK's leniency program after Brexit), is that no Member State seems to have extended the protection to equivalent documents from competition authorities of third States.

Cyprus has limited the right to use information from the file of the NCA for the purposes of applying national and EU competition law, which may be problematic, for example, in mixed actions, where the documents are relevant to prove facts which are alleged to constitute, simultaneously, infringements of antitrust and of other national rules (civil law, unfair commercial practices, etc.). Indeed, the same issue is likely to arise in other MS.

As for the right of the NCA to be heard before access is ordered, most MS have created mechanisms by which courts will notify the NCA or European Commission of a request for access to documents included in its files and invite it to submit comments. In Cyprus, the burden of notifying the competition authority is placed on the party requesting access. While the Directive's provision and the respective transposition measures were introduced with requests of access to documents which are obviously and knowingly held by a competition authority in mind, it should be noted that it is certainly possible for a private litigant to request access to documents which have been included in a file (– e.g., merger control) of a particular competition authority, without that litigant's, or even both litigants', knowledge.

No MS seemed to consider it necessary to create a special rule concerning the protection of legal privilege (see, e.g., Belgian and Lithuanian reports). However, this may prove to be a problematic issue, considering the discrepancy – well identified in the public enforcement sphere – between the scope of protection of legal privilege under EU Law (excluding in-house lawyers) and the scope of protection under the laws of many MS (including in-house lawyers).

Finally, a great number of MS created special sanctions in relation to infringements of the

access obligations (sometimes overlapping with existing sanctions in general rules of procedural and/or criminal law). Possible penalties vary drastically, with their effectiveness being questionable in several MS:<sup>72</sup>

- Belgium – 1,000 to 10,000,000 EUR;
- Cyprus – up to 250,000 EUR or/and imprisonment for up to 6 months;
- France – up to 10,000 EUR;
- Greece – between 50,000 and 100,000 EUR;
- Hungary – up to 160,000 EUR;
- Italy – between 15.000 and 150.000 EUR;
- Lithuania – up to 10,000 EUR;
- Luxembourg – between 251 and 45,000 EUR;
- Poland – up to 4,700 or up to 235,000 EUR, depending on behavior and interpretation of the law;
- Portugal – between 5,100 and 510,000 EUR;
- Spain – between 6,000 and 1,000,000 EUR.

Periodic penalty payments are also foreseen, e.g. in Belgium, Portugal and Spain.

In Ireland, no such financial penalties are provided. There, aside from procedural consequences, courts may, under general rules, require the documents ordered to be disclosed (bringing them into the custody of the court). Similar exercises of public authority are possible in other Member States. In many of these MS, it is as yet unclear how these provisions will interact with other possible misdemeanor or criminal consequences set out in general rules, such as the crime of disobedience of a court order.

One potential point of controversy, in a system where documents can only be requested from competition authorities if they cannot be obtained from other persons, is how courts should handle unlawful refusals by parties to submit documents which are also held by the Commission or an NCA. Should they immediately presume the fact in question to be proven, or should they order the competition authority to produce that document? It has been suggested that the implementation of this rule of the Directive will be problematic in practice (see France). In Spain, there are concerns that the duty of secrecy imposed on parties in a public enforcement case may be deemed incompatible with the disclosure of evidence in the framework of private enforcement actions.

To some national legislators, the Directive's solution seemed far too rigid and incompatible with the case by case approach to the assessment of proportionality put forward by the ECJ, e.g., in *Pfleiderer* and *Donau Chemie*. In Portugal, earlier drafts provided that national courts could order a competition authority to produce evidence, “*namely if no other party or third party can reasonably produce it*”. This would have fallen short of the prohibition required by the Directive, establishing instead a more flexible and tentative preference for access to be requested from other persons. At the last minute, the drafting was revised, to closely mirror the Directive.

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<sup>72</sup>In other MS, not reported here, such as Czech Republic and Croatia, it is possible to impose a fine up to 1% of the undertaking's turnover in the preceding year.

#### 4.4. Specialised Courts.

While the Directive was completely silent regarding which courts should hear antitrust damages actions, and on the characteristics of these courts, this was an issue of great concern in many MS, in parallel with the efforts that several have made to improve the availability and quality of the judicial review of public enforcement decisions. Until now, the position in most MS was that antitrust private enforcement actions would be assigned to a number of potentially competent courts, depending on the general rules on material and territorial competence.

This has remained unchanged in some cases, such as Cyprus, Germany, Hungary, the Netherlands, Poland and Spain. In Cyprus, it was argued that the limited number of cases did not justify specialization and that emphasis should be placed on training judges. In the Netherlands, commendable flexible national rules allow for innovative and efficient *ad hoc* solutions (entirely impossible in most MS), as was demonstrated in one case where the District Court of Eastern Brabant invited an experienced judge from the Amsterdam district to sit on the panel and preside over the case. In Poland, first instance jurisdiction is simply awarded to the several 2<sup>nd</sup> level “regional” courts, even though there is a specialized court for public enforcement competition cases. In Spain, first instance jurisdiction rests with the general commercial courts.

Ireland already included a “Competition List” (Competition Court) at the High Court, although seemingly limited to private actions with value exceeding 75.000 EUR. The United Kingdom has a well-established specialist Competition Appeal Tribunal, although its jurisdiction in competition law actions (extended by the Consumer Rights Act of 2015 to stand-alone, instead of just follow-on, actions) is not exclusive, and many private enforcement disputes have instead been litigated before the High Court. Italy has used the transposition of the Directive to achieve a degree of specialization at the first instance, but for these purposes has divided the country into three regions. Private enforcement actions will be heard by a Court section specialized in business claims in Milan for Northern Italy, in Rome for the Centre and in Naples for the South.

Several MS have taken the chance to concentrate jurisdiction for private enforcement actions at a single first instance court; notably Greece (special division created at the Athens Court of First Instance), Lithuania (Vilnius County Court), Portugal (Competition, Regulation and Supervision Court) and Sweden (Patent and Market Court).

Some MS hear these cases at first instance in collective tribunals consisting of a panel of judges or tribunal members (e.g., Netherlands and Poland), whereas others assign the cases to an individual judge (e.g., Portugal).

Interestingly, there are few MS who provide for specialization at any level of appeal or review court, even when they do so for 1<sup>st</sup> instance courts. This is bizarre, as it means that the rulings of specialized judges can be overturned by generalist judges, with more limited understanding of competition law. This can seriously jeopardise either/both the effectiveness and uniformity in the enforcement of EU Competition Law, or the effectiveness of judicial review.

In Greece, a special division is to be set up at the Athens Court of Appeal, but there is no specialization at the Supreme Court. Ireland, and the legal systems of the UK, have no formal specialization at appeal stage. Portugal is set to concentrate private enforcement actions in a single chamber of the Lisbon Appeal Court (different from the Court which hears public

enforcement appeals) and of the Supreme Court (but, in practice, this does not mean that the cases will be heard by specialist judges). In Sweden, a Patent and Markets Appeal Court has been instituted.

The absence of specialization at the highest level may be particularly problematic in some MS. In Portugal, for example, Supreme Court rulings are often far less well informed about competition law than those of the lower courts, and yet the higher court does not hesitate to rule on issues of competition law, usually with a perspective shaped by civil law and often incompatible with the interpretation set out by the CJEU. It should also be noted that, often, crucial and decisive issues within private enforcement actions will be decided by the Constitutional Courts of the MS, none of which has any specialization in competition law, and whose approach and degree of openness to EU Law varies.

The creation of specialized courts or chambers does not necessarily mean that the judges appointed to them are, themselves, specialized, specially in MS with an exclusive system of career magistrates and rather rigid rules for distribution of judges between courts. Moreover, it is often the case that the judges of the “specialized” courts will not have any advanced training or practical experience in competition law. In Portugal, for example, seniority takes precedence as a rule for assignment of judges, and knowledge of competition law is not even a factor in selecting judges for the specialized Court. This is exacerbated by a high rate of turnover of judges and the appointment of “permanent” judges who never actually take their seats, because they are serving as clerks in higher courts, and are replaced by “temporary” judges. More generally it is inevitably more difficult to find specialized judges at higher courts, since older generations of judges were less likely to have had formal training in competition law or to have been involved in many competition law cases throughout their careers.

Few MS seem to allow for recruitment of specialized judges from among practitioners or academics, or to allow economists to sit in a panel of judges (as exceptions, see, e.g., Sweden and UK).

Many MS which have opted to centralize jurisdiction in a single court or chamber have been confronted with the serious difficulty of how to define the scope of the court or tribunal’s jurisdiction. One particular problem is how to assign jurisdiction for mixed damages actions, which are based both on antitrust infringements and on other causes of action (e.g. general civil law rules). MS have either failed to address this entirely, or provided solutions which mean that mixed actions will (apparently) fall outside the jurisdiction of the specialized court. In either case, negative and positive conflicts of jurisdiction may be anticipated. In Greece, the law simply refers to actions under the new regime. In Portugal, jurisdiction is established for cases dealing “exclusively” with antitrust infringements. The vast majority of actions in the past have been mixed actions (e.g., also involving civil law issues), which means that the specialized jurisdiction will function only in a small percentage of antitrust private enforcement cases (predictably, mostly for follow-on actions).

Another problem is how to assign jurisdiction in cases where the antitrust infringement is only raised by the defendant (as a defence or in a counterclaim). It may very well turn out that these cases will not fall under the specialized jurisdiction in any MS. A further issue is whether or not jurisdiction covers only claims for damages or also extends to other types of claims (injunctions, invalidity...). The solution is often linked to the scope of the national transposition regime itself. Lithuania has determined that injunctions based on antitrust infringements are also to be heard by the specialized court. Ireland, Portugal and Sweden have established a broad



scope of jurisdiction, seemingly encompassing all other types of claims under antitrust law.

It is important to note that any cases incidentally raising issues of private enforcement of antitrust rules will continue to be heard by other types of specialized courts, according to the nature of the dispute, such as administrative courts and labour courts.

One of the Directive's objectives –duty to avoid actions for damages from claimants from different levels of the supply chain leading to absence of or over-compensation– raises specific challenges of coordination between different legal proceedings. Concentration of jurisdiction in a single court is not, necessarily, a complete solution for this problem (although it was one of the motivations for the specialized jurisdiction, e.g., in Greece and Lithuania). Indeed, even in MS where there has been specialization, cases can still be assigned to different judges at the court. While this will certainly make it easier for the judges to be aware of related pending actions, *ex officio*, it still requires the decisions in the various cases to be coordinated between different judges who must decide independently from each other. No MS seems to have adopted a specific solution for this problem, even though in many legislative processes it was noted that general national rules allowed for the attainment of the Directive's objective, albeit not guaranteeing it, if they were interpreted appropriately.

#### **4.5. Limitation periods.**

The rules on limitation periods, read together with the temporal scope of the Directive and its transposition, provide another of the greatest areas of divergence in approach across the MS.

Generally, all of the 15 studied MS have copied the Directive's provisions into their national law, or, at least, have copied the parts thereof which were not already clearly spelled out in the national general rules on time-barring. All MS have opted to limit the new rules on limitation periods to the scope of this regime, rather than revising their general limitation rules.

Nonetheless, the Directive itself took a rather limited approach to harmonizing time-limits. The express terms of the Directive imply that different limitation periods, running under different rules, will continue to apply in different MS. A minimum level of protection is guaranteed, but MS are allowed to provide for longer limitation periods if they decide accordingly.

Thus, for example, the Directive imposes a minimum 5 years limitation period, but allows longer periods to be set. Cyprus, Ireland and the UK (England and Wales) have opted to maintain their pre-existing 6 year time-period, and Luxembourg maintained its 10 (or 30) years deadline.

The Directive allows MS to choose whether the limitation period is suspended (eg. Belgium, France, Hungary, Poland, Portugal, etc.) or interrupted in light of certain events (see, e.g., Spain and Sweden; and Hungary, for exceptional circumstances such as acknowledgement of the debt), with the latter option leading to longer limitation periods. Nonetheless, there are also discrepancies over the legal consequences of suspension. In Hungary, for example, civil law has typically been interpreted as meaning that, instead of prolonging the deadline for the duration of the suspension, a suspension merely leads to the claimant having a short period (3 months or 1 year) to enforce the claim after the suspension has ceased. In the Netherlands, the transposition provides for an "extension", rather than a "suspension", meaning, apparently, that claimants will only have until the infringement decision becomes *res judicata*, plus one year, to

take action. It was widely debated whether this would be inconsistent with the Directive, but the Government decided that it would be compatible.

The Directive determines that the limitation period cannot begin to run before the conditions stipulated by its provisions are met, but it allows MS to set the starting time at a later moment. This option was taken in Germany, where, in line with the general rules of the Civil Code, the transposition opted for the limitation period to start running only at the end of the year in which the Directive's requirements are met. Additionally, rather than the deadline starting to run from the moment when the claimant could "reasonably be expected to know", German and Greek laws appear to be more protective of claimants, by focusing instead on the moment when they had knowledge or should have knowledge, but for their gross negligence, of the circumstances as set out in the Directive.

Doubts have already been raised (e.g., in Germany and Portugal) about how to interpret the Commission's requirement of knowledge that the behaviour constitutes an antitrust infringement, and whether national law and its interpretation will be compatible therewith. Because the precise determination of the existence of an antitrust infringement is, very often, dependent on access to confidential documents and on complex economic and legal assessments, injured parties may be in a position where they "suspect", and may even "believe", that there was an infringement, but cannot reasonably be said to "know" it. Knowledge, it may be argued, requires a degree of certainty which can only derive from a prior *res judicata* public enforcement decision, or from a clear cut antitrust infringement, which has already been confessed to or where none of its requirements is reasonably subject to dispute. Very few antitrust infringements will meet this test. For the majority of stand-alone antitrust infringements, this raises the spectre of the limitation period never beginning to run.

This specific discussion has received substantial attention in the UK, where concern has been expressed over whether the knowledge test associated with time-barring should not be placed in parallel with the ability of the claimant to satisfy the "statement of claim" test where one needs to show reasonable grounds for bringing the claim to prevent the action from being thrown out.

The Directive chose not to specifically tackle the absolute time limits set by some MS. As long as deadlines only begin to run, in the case of continuous or repeated infringements, at the earliest, on the day the infringement ceased, absolute time limits should not pose a problem when they are considerable (e.g., 20 years in Belgium, France, Greece and Portugal). However, the absolute time limit in Cyprus, Germany and Poland (although subject to slightly different rules) is 10 years, which may bring into question compliance with the principle of effectiveness.

However, an issue which may prove particularly controversial, and which arguably has led to the most diverse solutions in the MS, concerns the temporal succession of laws (see *supra* §3.2). The problem begins with the fact that many MS (e.g., Italy, Portugal, UK) consider time-barring rules to be substantive in nature, whereas the case-law of the CJEU has characterized them as procedural.<sup>73</sup>

In France, a special rule in the transposition measure clarifies that limitation periods

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<sup>73</sup> See, e.g.: CJEU Judgment of 17 November 1998, *Aprile*, C-228/96, ECLI:EU:C:1998:544, para 28; CJEU Judgment of 9 February 1999, *Dilexport*, C-343/96, ECLI:EU:C:1999:59, para 41-42; CJEU Judgment of 11 July 2002, *Marks & Spencer*, C-62/00, ECLI:EU:C:2002:435, para 38; CJEU Judgment of 24 September 2002, *Grundig Italiana*, C-255/00, ECLI:EU:C:2002:525, para 37 et ss.; GCEU Judgment of 22 April 2016, *Ireland v Commission*, T-50/06 RENV II, ECLI:EU:T:2016:227, para 172-173; CJEU Judgment of 8 September 2015, *Taricco I*, C-105/14, ECLI:EU:C:2015:555; CJEU Judgment of 5 December 2017, *M.A.S. & M.B. (Taricco II)*, C-42/17, ECLI:EU:C:2017:936.

which are ongoing, but have not yet expired by the entry into force of the new regime, are to be extended in accordance with the new rules, minus the time already elapsed. *A contrario*, this means that rights which have become time-barred under the pre-existing rules will continue to be deemed time-barred, even if they were not so under the Directive's rules. The same solution has been expressly provided for in Lithuania. A similar rule is included in the German transposition, but its effects are much more limited, as they seem to relate only to the extension of the deadline from 3 to 5 years, while the beginning and suspension of the deadline continues to be governed by the rules previously in force. In the United Kingdom, the new time-barring rules (which are more protective of claimants than pre-existing law) will only apply to infringements which began after the entry into force of the new regime, and do not even apply to continuous infringements which began before and cease after that moment, provisions which are arguably incompatible with the Directive.

This problem, which will surface in different ways in all MS, is also likely to raise difficult discussions regarding the extent to which the principle of effectiveness of EU Law (and, potentially, also of national law, depending on the legal order) already required the limitation period to be counted according to the rules set out in the Directive (at least when it comes to the starting point and period of suspension during investigations).

Such a wide array of differing solutions manifestly endangers the uniform application of the right to damages arising from infringements of Arts. 101/102 TFEU, and some of these approaches may very well be deemed to be incompatible with the Directive and/or with Arts. 101/102 TFEU and the principle of effectiveness.<sup>74</sup> In France, consumer protection class actions were already subject to the special limitation period of five years after the competition authority's final infringement decision, and all follow-on actions already benefitted from a suspensive period during the authority's investigation until the final decision or judicial ruling on appeal.

As noted above, in some MS, some antitrust disputes have been considered as contractual in nature, rather than falling under tort law, and are likely to continue to be characterised in this way in the absence of intervention by the CJEU. For instance, in Hungary, the legislator chose to avoid this problem by specifically providing in the transposition measure that tort rules would be applicable. This may also have consequences at the level of time-barring, whenever different general rules apply for different types of liability (e.g., Belgium). Several MS (see, e.g., Belgium and France) may have erroneously transposed the Directive in relation to the suspension of time-barring as a result of a competition authority investigation, by deeming that investigation as having ended, not, as required by the Directive, at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated, but on the day after the decision is adopted/becomes *res judicata*, or proceedings are otherwise terminated.

Some countries (e.g., France) deemed it necessary to introduce a special time-barring rule to ensure that persons injured by an immunity recipient are not prevented from obtaining full compensation if they wait for litigation brought by co-infringers to be concluded. The deadline for raising an action against immunity recipients will thus only begin to run after they are also able to claim against the co-infringers. Concerns have been raised in France about whether the absence of special rules to prevent time-barring when attempts at consensual dispute resolution

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<sup>74</sup> See pending referral in Case C-637/17 *Cogeco*, mentioned below.

fail complies with the Directive's objective in this regard. While there is a pre-existing rule to this effect in the French legal order, it relates only to mediation. Under Spanish Civil Law, when liability is joint and several, a claim started against one co-infringer interrupts the limitation period with respect to the other co-infringers.

Finally, it is worth noting that there is a pending case (referred from a Portuguese court) before the CJEU which seeks for clarification on the Directive's time-barring rules, but also, potentially, on the extent to which, in cases involving rights arising from the Treaty, pre-existing national time-barring rules have to be interpreted (or even set aside), to some extent, in line with the solution arrived at in the Directive, as an application of the requirement of the principle of effectiveness of Arts. 101/102 TFEU.<sup>75</sup>

#### 4.6. Binding force of public enforcement decisions.

The Directive requires MS to make their own authorities' final public enforcement decisions binding in follow-on actions (the 'irrefutable presumption'). It should be kept in mind that decisions of the European Commission were already binding, under Reg. (EC) 1/2003. This binding effect has been reproduced in the transposition procedure in several MS (even though CJEU case-law prohibits the reproduction by national legislators of rules from EU Regulations)<sup>76</sup>. The binding effect of EC decisions has also been acknowledged by the courts of some MS (see, e.g., France). In Cyprus, however, the Competition Act infringes EU Law by treating EC decisions only as *prima facie* evidence. But, aside from the position in Cyprus, the pre-existing Reg. (EC) 1/2003 rule did not appear to cause any significant concerns in the MS.

In contrast, the Directive's rule providing binding force on national infringement decisions has met with serious opposition and debate in many MS, where this concept may indeed run counter to established rules and principles of the domestic legal order. It is anticipated that attempts to assert the binding effect of NCA decisions, or of the judgments which confirm them, in MS such as Belgium, France, Italy and Portugal, will be challenged on the grounds that such a binding rule is unconstitutional. It will be argued that it is contrary to the principles of the separation of powers and independence of judges, and that it violates the rights of the defence. In some MS, the principle of independence of judges has been interpreted as meaning that under no circumstance can a judge (even at first instance) be bound by a ruling of another judge (even of the Supreme Court), except in the context of an appeal within a specific dispute, and the same principle applies *mutatis mutandis* to a decision of an administrative authority. The Directive thus introduces a fundamental shift in what is believed by many to be a core constitutional principle. Setting aside the discussion of the merits of this change, it is foreseeable that the CJEU, the ECtHR and some Supreme/Constitutional Courts will be asked to consider the issue and there may be some disagreement on the outcome, particularly, where the latter may invoke the limits to the primacy of EU law.

The issue is exacerbated in Italy, where the legislator has stipulated that *res judicata* decisions of the Italian NCA, which have not been appealed (and the deadline for appeal has

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<sup>75</sup> Case C-637/17 *Cogeco*. The discussion of these time-barring rules in the context of the temporal scope of legal provisions raises questions as to the limits to the primacy of EU Law and became particularly sensitive following the CJEU's surprising response to the Italian Constitutional Court's ultimatum on an issue of time-barring in criminal proceedings in the *Taricco* case – see CJEU Judgment of 5 December 2017, M.A.S. & M.B. (*Taricco* II), C-42/17, ECLI:EU:C:2017:936.

<sup>76</sup> See, eg, CJEU Judgment of 2 February 1977, *Amsterdam Bulb*, 50/76, ECLI:EU:C:1977:13.

elapsed), are not fully and immediately binding upon the national courts in private damages actions. In those cases, civil courts must still assess the evidence and facts of the case and are not bound by the NCA's decision if they deem it to suffer from an irreparable fundamental flaw, being illegitimate on procedural or substantive grounds (but having to respect any discretionary margin of the administration in that assessment). This appears to be a manifest infringement of the letter and objective of the Directive, being predicated precisely upon Italian constitutional concerns.

The Directive's rule is not entirely novel for every MS. In Germany, *res judicata* decisions of the German NCA and of the NCAs of other MS had been given binding effect prior to the Directive. The same was true for decisions by the national NCAs in the UK,<sup>77</sup> Ireland (where public enforcement decisions are adopted by the courts) and in Lithuania.<sup>78</sup> In Greece, while the NCA's decisions itself were not binding, review courts' rulings which upheld them were given binding status. France had already created an exception to facilitate consumer class actions, wherein *res judicata* NCA decisions were binding in follow-on actions.

Several MS transposition processes involved reflection on the value to be awarded to public enforcement decisions from other MS, and even proposed more ambitious solutions in draft Acts, which were ultimately abandoned (e.g., Ireland, Portugal and Spain). The debates certainly identified a degree of mistrust in the legal systems and judicial orders of other EU countries. In some MS, adoption of a binding effect rule was rejected on the basis of the argument that it could not be assured that decisions in other MS would be adopted with the same procedural guarantees and respect for fundamental rights of the defence, a surprising stance in a Union subject to the same fundamental rights, upheld, at the supranational level, by the ECtHR and CJEU. Notwithstanding, the matter arguably took up energy and time which was disproportionate to its practical relevance. Since each NCA only adopts decisions relating to effects felt on its territory, the cases where a decision from one MS will be presented to the court of another, subject to EU international private law rules, may turn out to be quite limited. To date there appears to be only one precedent involving this issue, in the Netherlands, relating to a Greek decision.<sup>79</sup>

Ultimately, no MS used its discretion to introduce provision to the effect that infringement decisions by other MS NCAs would have binding force in their own legal order (with the partial exception of Germany, discussed below). For Germany and France (in relation to consumer class actions), their transposition measures actually resulted in a step back from the solution previously adopted. Whereas all MS transposition measures fell short of establishing the binding effect (irrefutable presumption) of such other NCA decisions, divergent approaches have been taken to the legal value afforded to such decisions. Most MS rules consider them as constituting *prima facie* evidence, or 'the beginning' of evidence (see, e.g., Belgium, Cyprus, Greece, Ireland, Italy, Lithuania, Netherlands, Sweden and UK; also Germany, for decisions of other MS finding infringements exclusively of foreign competition law). France and Luxembourg simply refer to them as a piece of evidence (*preuve*). In Poland, a "factual presumption" was established, but the implications thereof are uncertain. The countries which

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<sup>77</sup> Although note here the difficulties in reliance on prior infringement decisions in certain CAT follow-on cases.

<sup>78</sup> As far as Lithuania is concerned, this is an issue subject to dispute, but this was the interpretation adopted by the Supreme Court in its single ruling on the matter.

<sup>79</sup> *Macedonian Thrace Brewery S.A. v. Heineken N.V. and Athenian Brewery S.A.*, filed on 23 February 2017 before the District Court Amsterdam, C/13/626096, HA ZA 17-321.

have gone furthest appear to be Hungary, Portugal and Spain, where the decisions create a rebuttable presumption (but, in Spain, only for findings of infringements of EU Competition Law), and Germany, where decisions of other MS are given fully binding effect, but only in so far as they find an infringement of EU competition law or of German competition law. An argument frequently heard in favor of the extension of the legal value was that it would be an advantage in a forum shopping war between the courts of different legal systems.

Another contestable set of issues concerned which decisions are binding and when. There seems to be general agreement that only affirmative decisions are binding, i.e., only the part of an infringement decision which actually finds an infringement, and to the extent to which it does. One consequence, as highlighted in the Spanish report, is that, while a finding on an effects restriction will obviously include the existence of effects on the market in the finding of the infringement itself, it seems arguable that, in infringement decisions on object restrictions, arguments on purported effects (e.g., to support the amount of fines) will not be binding on courts.

One might anticipate that commitment decisions would have no effect whatsoever, since they do not imply a finding of infringement. A French court has already taken this approach, albeit taking into account the commitment decision when discussing the existence of the infringement (namely, the presence of fault).<sup>80</sup> A similar approach was adopted by a Hungarian court.<sup>81</sup> Nonetheless, the CJEU has raised doubts in this context, at least regarding the effects of commitment decisions adopted by the EC, affirming, in a recent judgment, that these are still Commission decisions, and that national courts must “*take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue*”.<sup>82</sup>

The specificities of the Irish system, where NCA findings of infringement are made only by courts, have raised concerns that guilty verdicts will not be sufficiently reasoned and may cause difficulties for follow-on actions. In France, it has been clarified that a decision is considered final and binding on the courts from the moment its finding of infringement becomes *res judicata*. Thus, in the case of appeals limited to the amount of the fine, the finding of infringement itself is already binding, without having to wait for the result of any appeal which is not concerned with that finding.

A general problem, deriving from the Directive itself, is that decisions become binding when an ordinary appeal is no longer possible. But this does not ensure that an infringement decision will not be subsequently overturned (e.g., by a Constitutional Court ruling, or following an ECHR judgment) and this may lead to problems regarding its effect.

Finally, several reports indicate that legal controversies may be anticipated regarding who is bound by a finding of infringement. The most often debated issue is whether a decision addressed only to a subsidiary will also be binding against the parent company. In England, a court has already confirmed that there is only binding effect for legal persons who are

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<sup>80</sup> See judgment of 30 March 2015 of the Paris Commercial Court, *DKT v Eco emballages and Valorplast* (case no. 2012000109; but overturned on appeal).

<sup>81</sup> See Bodnár, P. M., “Hungary”, in PISZCZ, A. (ed.), *Implementation of the EU Damages Directive in Central and Eastern European Countries*, University of Warsaw Faculty of Management Press, 2017, p. 127, at p. 130.

<sup>82</sup> ECJ Judgment of 23 November 2017, *Gasorba* (C-547/16), ECLI:EU:C:2017:891. See Spanish Supreme Court (Administrative chamber, section 3) Judgment of 7 February 2018 (*Gasorba v. Repsol*), ROJ: STS 297/2018, ECLI:ES:TS:2018:297.

addressees of the decision.<sup>83</sup> The same position is suggested by the case-law of the French Supreme Court. The parent company's liability may still be established, but will have to be so on general terms, i.e. an unlawful action or omission must be attributed to the parent itself, with a causal link to the damage caused. In countries such as Ireland and Portugal,<sup>84</sup> the same issue arises in relation to private enforcement actions raised (also) against managers or directors.

A reference (from a Portuguese court) is already pending before the CJEU, which may lead to clarifying whether, on the one hand, these provisions of the Directive (and its transposition) are applicable to pending actions, initiated after December 2014, but also whether the principle of effectiveness already required national courts to recognise the binding effect of infringement decisions, even before the entry into force of the Directive.<sup>85</sup>

#### 4.7. Compensation, quantification, passing-on and presumptions.

The Directive's emphasis on the right to full compensation, and its prohibition of over-compensation, including by means of punitive and similar types of multiple or exemplary damages,<sup>86</sup> was not a novelty for the large majority of MS, and, accordingly, required no specific transposition (although, in some cases, the principle was reaffirmed in the transposition – see, e.g., Cyprus and Spain). In Hungary, it was necessary to create an exception for the general rule in that legal system allowing courts to reduce the amount of compensation awarded on the grounds of equity. In Ireland and in the UK, it required the introduction of a rule prohibiting the award of exemplary damages, which had previously been both theoretically possible and actually awarded by the English courts<sup>87</sup>. The practical impact of the change was limited, in Ireland, by the rarity of damages awarded in antitrust private enforcement actions. Moreover, in the United Kingdom, the award of exemplary damages had already been prescribed in 2015 in relation to collective consumer proceedings under the Consumer Rights Act 2015.

While it seems settled that the right to full compensation includes actual losses (*damnum emergens*), lost profit (*lucrum cessans*) and interest, the calculation of the latter has proven in particular to be very unclear, as was shown in a recent pan-European study.<sup>88</sup> Not only is there great legal uncertainty within many MS, but, the closer one analyses the methods of calculating interest, the greater the degree of heterogeneity of regulation one finds across the EU MS (what type of interest, how to quantify it, when does it begin to accrue, cumulative or alternative compensation for monetary depreciation, etc.). A right to full compensation arising directly from EU Law is incompatible with drastic variations in the amount of compensation one is entitled to, depending on which MS courts handle the claim or, more rigorously, depending on the national law applicable to each specific individual claim (within the same proceedings, identical claimants may be entitled to different interest, depending on the relevant applicable

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<sup>83</sup> *Emerson Electric Co v Morgan Crucible Co plc* [2011] CAT 4. Upheld in [2012] EWCA Civ 1559.

<sup>84</sup> In Portugal, for example, NCA decisions often apply fines, simultaneously, on undertakings and on their managers/directors.

<sup>85</sup> Case C-637/17 *Cogeco*.

<sup>86</sup> Although the issue has been raised, e.g., in Greece, moral damages should, in principle, not be deemed punitive damages. To the extent that their amount is still assessed on the basis of real damage caused, they are still aimed at placing the injured person, insofar as possible, in the situation he/she would have been in the absence of the infringement.

<sup>87</sup> *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19

<sup>88</sup> Monti, G. (Ed.), 'EU law and interest on damages for infringements of competition law: a comparative report', EUI Law Working Paper 2016/11, 2016, available at: <http://cadmus.eui.eu/handle/1814/40464>.

law). Some form of harmonizing intervention by the CJEU or the EU legislator would ameliorate the position here. The Directive's lack of harmonisation of this issue was disappointing, especially considering that the preliminary works that led to its adoption had identified the lack of consistency of national law in this regard.<sup>89</sup>

Innovative (in most MS) and very important for the success of damages actions was the introduction of the rebuttable presumption that cartels cause damages. This presumption is present in the transposition laws of all the MS. Nonetheless, in some MS there are doubts as to whether its scope will be broader than the Directive's. In Belgium, for example, the definition of "cartel" may include agreements and concerted practices between non-competing undertakings (see also the definition of this concept in Sweden).

Generally, MS have not extended the presumption to infringements based on decisions of associations of undertakings, even though there is often no difference between a cartel decided at meetings between competitors or at a meeting of an association of competitors. This is a weakness in the Directive itself which requires reconsideration and in the meantime it may raise arguments as to the infringement of the principle of equal treatment in some legal orders.

In France, case-law had already introduced, not just a presumption of damages (even if merely moral), but a non-rebuttable presumption, and not only for cartels, but also for infringements based on abuse of dominance.<sup>90</sup> While a rebuttable presumption will now have to be applied for cartels, it is unclear whether the new regime will require a change in approach in relation to infringements other than cartels. This is another area where the presumption might need to be amended in a future revision of the Directive. Practice shows that there are frequent stand-alone and follow-on abuse cases in the MS, and a rebuttable presumption of damages for these cases would contribute to removing a serious obstacle to successful damages actions.

In Germany, case-law already provided for a lowering of the burden of proof that cartels raise prices, but there was no presumption *per se*, and the *prima facie* assumption could be countered by defendants with relative ease (by showing atypical characteristics of the cartel in the question).

One MS that has already moved forward in this regard is Poland, where it was decided to extend the presumption of harm to all antitrust infringements (including vertical restraints and abuse of dominance infringements). Making Poland a more attractive jurisdiction was one of the considerations weighing in favour of this innovation. It has been argued that this may raise difficulties in application in relation to effects restrictions infringements. However, it may be noted that if a claimant has already managed to demonstrate that the practice had an anti-competitive effect (and is thus unlawful), an assumption that the anti-competitive effects caused damage does not seem entirely unreasonable.

Generally, there seems to be agreement that the presumption will only apply to the existence of the infringement. Thus, the presumption does not dispense with the need to prove causality (an issue specifically addressed in some MS, such as Greece, Italy and Portugal) and

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<sup>89</sup> See, e.g.: Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report*, 21 August 2004 (Ashurst Report 2004), paras 82 and 84-85; *Staff Working Paper Annex to Green Paper Damages actions for breach of EC antitrust rules*, COM (2005) 672 final, 19 December 2005, paras 40-41.

<sup>90</sup> See Judgment of the Paris Commercial Court of 30 March 2015, *DKT v Eco emballages and Valorplast* (case no. 2012000109); Judgment of the Paris Commercial Court of 30 March 2011, *Numéricable et a. v France Telecom* (case no. 2009073089); and Judgments of the Paris Commercial Court and of the Paris Appeal Court of 26 June 2013, *JCB Sales et a. v SA Central Parts*.



the *quantum* of harm.

While the claimant's burden of proof of these two elements remains, it must also be recognized that establishing causality should be relatively straightforward in cases of direct contractual relationships, and is made easier for indirect clients by the rule on the proof of passing-on.<sup>91</sup> As for proof of *quantum*, there is a necessary deviation from the general burden of proof. As the German Federal Court of Justice has already indicated, a presumption of harm logically implies a conclusion that there are damages (more than zero).<sup>92</sup> This is also a necessary consequence of the principle of effectiveness. In other words, the claimant will be entitled to "some" compensation, and his/her burden of proof only relates to "how much".

Rare among the laws of the MS is the Hungarian option, dating back to 2009, of imposing a rebuttable presumption that hard-core cartels (directly fixing prices, sharing markets or limiting output) cause a 10% price increase. The transposition measure kept this rule, with slight adjustments (it now also encompasses buyers' cartels). The national report highlights that this rule has a limited impact, since it does not cover other anti-competitive practices and it is useful only for surcharge damages, with the burden of proof for other types of damages (e.g., loss of profit) remaining unchanged. The 10% presumption has also now been introduced in Latvia.<sup>93</sup>

An issue which found constitutional obstacles in several MS was how to define the relationship between national courts and NCAs when quantifying damages. The Directive seems to imply that national courts may only "ask" for the NCAs help to quantify damages, and the latter are free to refuse.

On the one hand, this discussion seemed to be tied to the NCAs' misunderstanding of what would be at stake. Sometimes, in transposition debates, NCAs argued that they would not be able to assist national courts with quantification, because they rarely included quantification of damages in their investigations and infringement decisions. Nonetheless this overlooks the fact that a national court may want, or even need, the assistance of NCA economists to analyse the arguments of the parties regarding quantification, regardless of whether that issue, or indeed that anti-competitive practice, has been previously looked at by the NCA. Especially in small MS, with very few economists specialised in competition law, a court's best option for an expert may be the economists working at the NCA. Whether or not that expert has looked at the issue of quantification before, in that specific case, may be irrelevant.

On the other hand, in some MS, restricting a court's right to order an administrative authority to cooperate, by giving the NCA the power to decide whether it is convenient to assist the court, may violate the constitutional separation of powers by requiring the subjection of the administration to the courts. Even so, as a rule, MS overlooked this issue and simply copied the Directive's provision into their transposition measures. However, in Portugal, for example, the option was taken not to follow the Directive in this regard. The (draft) transposition measure indicates that the Portuguese NCA *must* assist national courts in quantifying damages, upon their request, but it may present the court with a justified request to be excused from this duty. In other words, the NCA may argue that it has limited resources and needs to prioritise its other public duties at that time, but it is ultimately for the court to decide whether to impose the

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<sup>91</sup> However, depending on interpretation of national rules on causality and the attitude of the courts, causality may prove to be a difficult hurdle, especially in abuse cases, as was seen, e.g., in the Lithuanian case *LUAB "Klevo lapas" v. AB "ORLEN Lietuva"* (Case No 3K-3-207/2010, 17 May 2010).

<sup>92</sup> *BGH*, 12/7/2016, KZR 25/14, *NZKart* 2016, 436, 441 – *Lottoblock II*; see as well *Kersting*, LMK 2016, 382038, sub 2c).

<sup>93</sup> Jerneva, J. & Druviete, I., "Latvia", In Piszcz, A. (ed.), *Implementation of the EU Damages Directive in Central and Eastern European Countries*, University of Warsaw Faculty of Management Press, 2017, p. 157.

obligation to cooperate.

In some MS, such as Cyprus, concerns were raised about the potential impact of a court's request for NCA collaboration on the burden of proof of damages, which rests with the claimant. This may be less of an issue in MS, such as Sweden, where it was already accepted that the courts could gather evidence *ex officio* in this regard. In Greece, it has been argued that the NCA's role is not to assist in private enforcement, and that such assistance may not be compatible with its public mission. MS such as Sweden and the UK ignored the debate by not transposing the Directive's rule, on the grounds that general rules already allowed for NCA assistance, although it is unclear to what extent they comply with the Directive's objective of allowing the NCA to refuse cooperation.

The Directive requires national courts to be empowered to estimate the *quantum* of damages, if precise quantification is impossible or excessively difficult. Several MS, such as Greece, Lithuania, Portugal and Spain, copied the Directive's rule. In Portugal, the initial intention was to simply refer to the general rule of civil law that already gave courts this power, but the Commission was worried that the use of the Portuguese term for "equity", in that provision, may cause confusion, given that a judgment in equity (in English legal terminology) is not what was intended by the Directive. But many other MS, such as Belgium, Cyprus, France, Germany, Hungary, Luxembourg and Sweden, decided that transposition was unnecessary, as the Directive's objective was already ensured by general rules. It has been noted, however, e.g. in Cyprus, France and Luxembourg, that it is arguable whether national law truly ensures the Directive's objective will be met, since this will largely depend on the interpretation adopted by the courts.

Swedish law is particularly interesting in this context. It allows courts to estimate damages, not only if it is impossible or excessively difficult to quantify the damages, but also if collating evidence can be presumed to cause costs or inconvenience that is disproportionate to the size of the damage and if the claim for damages concerns a small sum. This is a crucial point, because for many competition damages actions, especially those meant to compensate consumers and SMEs, it is not so much that it is difficult to quantify the damages *per se*, but rather that doing so would be costly and act as a disincentive on the exercise of the right to damages, making it either too risky or outright irrational. This pre-existing position in Swedish law seems like a meritorious interpretation of the consequences of the principle of effectiveness for the quantification of harm arising from infringements of Arts. 101/102 TFEU. Courts of all MS would be encouraged to adopt a similar approach.

Finally, most transposition procedures included debates on the difficulty of arriving at a method of quantifying damages and the need for guidance to be provided to the courts. The Explanatory Memoranda and other documents developed during the legislative procedure in several MS – e.g., Belgium, Greece and Luxembourg – suggest that courts should use the Commission's Practical Guide on the quantification of damages. Portugal has included a reference to the Guide in the transposition measure itself, but merely as a recommendation. Lithuania went further, and its rules actually require courts, and economists submitting economic evidence to courts, to follow the Commission's guidelines.

The European approach to indirect damages was already divergent from the US approach, where only direct customers or suppliers can usually file for damages. This philosophical trans-Atlantic gap, which would, theoretically, ensure a greater level of protection of end consumers (were it not for the procedural obstacles which still prevent their compensation in the EU), has

now been widened by the new rules of the Directive which have eased the burdens on indirect claimants.

While the Directive clearly intended that MS would introduce procedural rules to prevent over or under compensation, particularly in case of actions for damages issued by claimants from different levels of the supply chain, no MS actually introduced new specific rules. Nonetheless, some MS created new mechanisms to centralize information about on-going and past private enforcement actions (see, e.g., Portugal). While it was argued, during several MS legislative processes, that existing rules already allowed national courts to take measures necessary to ensure that objective (*maxime*, suspension of proceedings and summoning of third parties to intervene), there are good reasons to be sceptical that the objective will actually be met in practice (see, e.g., Netherlands). It is less a problem of awareness of other related cases – and whether a court can raise the existence of other actions *ex officio* (see, e.g., Belgium)–, but rather what the court should and will do after it becomes aware of such other cases.

Absent some kind of EU-wide mechanism for centralization of claims, there does not appear to be any general solution which would prevent abuse and potentially unfair outcomes. It must be recognized that existing legal provision is inadequate to ensure over and under-compensation as a result of parallel actions before different courts, and it also fails to tackle the risk of excessively lengthy procedures in some jurisdictions. In MS where generalist judges may appear to have shown, on occasion, a tendency to adopt delaying tactics and to embrace procedural routes to avoid having to decide a competition law dispute, the possibility of suspension of an action to await the result of another action may prove to be a dangerous tool. It should also be noted that even MS which have centralized jurisdiction in a single court may not avoid this problem completely, as cases may still be allocated to different judges or panels of that court.

The Directive establishes a presumption of passing-on, following proof by the indirect claimant of three requirements. MS have transposed this new rule into their legal orders, but questions have been raised (see, e.g., Germany) as to whether the Directive requires a presumption, not only of passing-on, but of a certain amount of passing-on. It is arguable that the presumption would apply to the full amount of the overcharge. On the other hand, others (see, e.g., Netherlands) prefer to adopt an approach analogous to that in relation to the presumption of cartel damages and argue that indirect claimants still have the burden of proving how much of the overcharge was passed-on.

It has been considered (see, e.g., Luxembourg) that the fact that the presumption of passing-on only works to the benefit of indirect customers, and not of the infringer, in claims by its direct clients, may be deemed a violation of the principle of equal treatment. In the Spanish report, it is argued that the presumption of passing-on is only applicable to first acquirers, and not to purchasers further downstream. In Germany, the new presumption applies only to Art. 101/102 TFEU and its national equivalents, but not to other provisions of national competition law.

In several countries, the relevance of some prior case-law on passing-on may now be questioned. In France, courts had previously indicated that it was up to the claimant to prove the absence or impossibility of passing-on, an approach that has now been reversed by its transposition measure. In Germany, the Federal Court had made the passing-on defence dependent on showing, not only that the overcharge was passed on, but also that the claimant had not incurred a loss of profit due to a reduction in the amount sold. While it will be difficult

for the defendant to prove passing-on or absence thereof, depending on whether the claim is by direct or indirect purchasers, this task is facilitated by the granting of rights of access for that purpose (this point has been specifically clarified in some transpositions, such as in Germany). The rapporteur suggests that German law has been too restrictive when it upholds claims for loss of profit only to the extent that these losses were caused by the passing-on of the overcharge. Arguably, this leaves out situations which should also be protected by the right to full compensation, such as loss of profit arising, not from the passing-on of the overcharge itself, but from the exclusion of demand from the market, if it is considered that no price increase was actually passed on to the excluded agents.

In the Netherlands, the Supreme Court already began interpreting national law, in this context, in light of the Directive, even before the transposition was in force. Similarly, the Directive's provisions on passing-on were also already discussed in the British *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* case.<sup>94</sup>

#### **4.8. Consensual Dispute Resolution: Settlements and ADR.**

There is no way of knowing, at present, how many antitrust damages disputes are settled out of court or through alternative dispute resolution mechanisms, much less is there data which might allow one to even begin to make an assessment of the effectiveness and fairness of results achieved in these contexts. In some MS (e.g., Netherlands and the UK)<sup>95</sup>, there is evidence of a significant number of court and out-of-court settlements of disputes. In the Netherlands, such settlements have had the added attractiveness, until now, of being the only way of engaging the representative opt-out mechanism established in Dutch law. Most arbitration processes remain confidential, making it impossible to have a complete understanding of the frequency with which this method is used to resolve antitrust disputes,<sup>96</sup> although some cases have been made public, namely following appeals to the national courts. In the UK, there seems to be anecdotal evidence of mediation being used in competition claims.<sup>97</sup> Therefore, the promotion of extra-judicial and voluntary dispute resolution mechanisms is an option which is necessarily taken in an environment of very little information about the reality being regulated. It is law mostly based on guesses, wishful thinking and good intentions.

Nonetheless, it is clear that promoting and facilitating ADR was an important component of the balance struck in the Damages Directive. However, debate during the transposition of the Directive by the MS was particularly barren in relation to this set of issues. While it was noted that the Directive would inevitably lead to some legal controversies, no MS tried to solve these in their national legislation.

Terminology was a special problem when addressing ADR and consensual dispute resolution. No single expression seemed to encompass all means of dispute resolution which were meant to be caught by the Directive's provision, and this difficulty was noted and debated in the legislative procedures of several MS (see, e.g., Belgium, Ireland, Portugal and UK). One

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<sup>94</sup> 2016] CAT 11.

<sup>95</sup> See Rodger, B, 'Private enforcement of competition law, the hidden story part II: competition litigation settlements in the UK, 2008-2012' [2015] GCLR 89-108.

<sup>96</sup> See Marquis, M and Cisotta, R, *Litigation and Arbitration in EU Competition Law*, (Edward Elgar, 2015); L G Radicali di Brozzolo 'Arbitration and Competition Law: the position of Courts and Arbitrators' (2011) 27 *Arbitration International* 1-26;

<sup>97</sup> See Rodger, B, 'Private enforcement of competition law, the hidden story part II: competition litigation settlements in the UK, 2008-2012' [2015] GCLR 89-108.

approach to the issue (see, e.g., Portugal) was to acknowledge the expression used was problematic and to list the types of dispute resolution mechanisms included therein, for the purposes of the transposition measure.

Art. 18(1) requires MS to ensure the suspension of the limitation period for the duration of any consensual dispute resolution process. MS were divided between those who considered it was better to transpose this provision directly, and those who believed that outcome was sufficiently ensured by existing general national rules.

Additionally, Art. 18(2) requires MS to guarantee that courts may suspend proceedings for up to two years if the parties are involved in an attempt at consensual dispute resolution. A few MS (e.g., France) did not find it necessary to transpose this provision, as they deemed this to already be possible under general rules. However, in some of those MS the scope of application of the national provision remains uncertain for example regarding who must exercise the right of initiative and which means of consensual dispute resolution are covered by existing national provisions. But most States transposed the rule, for clarity and more importantly, because, otherwise, national law would fail to provide for the 2 year time-limit required by the Directive. The legal systems of those MS which failed to transpose this rule could be incompatible with the Directive. Particularly interesting was the UK approach which believed the 2 year limitation violated the spirit of the Directive and, thus, refused to transpose it.

In Germany, it has been argued that the transposition measure is narrower than the Directive, since it could be interpreted as not being applicable to non-formal settlement negotiations between the parties. Even then, however, it would still be possible for parties to jointly request suspension of the court proceedings.

The suspensive rule is likely to raise practical problems for courts and litigants. In actions filed against several co-infringers, does a resolution attempt with just one or some of the defendants require the suspension of the proceedings against all? In Spain, it has been argued that suspension will only affect parties involved in the resolution process. But how does this work? It may be deemed that it is impossible for the action to move forward in relation to only some of the defendants. And what if there are different attempts at CDR, at different times, with different defendants? Is the 2 years limit an absolute maximum, or a limit per defendant? There are many uncertainties in the application of this provision.

The effects of consensual settlements on subsequent actions for damages, as provided for in Art. 19 of the Directive, are particularly obscure. Unsurprisingly, therefore, MS generally chose to stay clear of the issue altogether, either by not transposing the rules or by transposing them more or less *verbatim*.

Art. 19(3) is likely to prove particularly problematic, procedurally-speaking, unless the option provided for in the 2<sup>nd</sup> paragraph is used. If one party settles, should the court end the proceedings against that infringer, and continue it only for the remaining parties? But, if the 2<sup>nd</sup> paragraph option was not exercised, the settling infringer still has an interest in the outcome of the case, and, ultimately any judgment has to be drafted in such a way that will still allow the settling infringer to also be held jointly and severally liable if the other parties are unable to pay. How can this be achieved in practice? France has introduced a special rule in this regard, but it is unclear to what extent it will truly solve the issue.

Art. 19(4) is aimed at limiting the right of recovery between co-infringers, to take due account of any damages already paid under any settlements. But the precise meaning of the

provision is somewhat obscure, as the issue really arises upstream. No party should be ordered to pay compensation that includes (any) damages caused to a party who has already reached a settlement in relation to those damages as a result of Art. 19(1). This is the case even if the amount of damages agreed on in the settlement is smaller than the amount of damages identified by the court. Accordingly, it is not obvious how Art. 19(4) could ever be relevant in practice. It is also not obvious how settlements paid can affect the overall responsibility of a co-infringer for damages caused to other persons / damages who were not included in the settlements.<sup>98</sup>

The obscurity of the *ratio legis*, unsurprisingly, led to confusion during the transposition procedures in various MS. In Germany, for example, it was decided not to transpose this rule, because the risk which was believed to be contemplated therein did not exist in the German legal order. Other MS also did not transpose the rule (e.g., Greece), or more or less copy-pasted the Directive's provision (e.g. Lithuania, the Netherlands, Portugal).

Finally, the Directive also required MS to provide the possibility for NCAs to take into account voluntary payments of damages when setting fines for antitrust infringements (Art. 18(3)). This provision is not applicable to public enforcement decisions adopted after an infringing undertaking has been ordered (e.g. by a civil court or arbitral tribunal) to pay damages, since these mechanisms do not correspond to "consensual settlements". Some MS believed it unnecessary to transpose the provision, as its pre-existing rules already gave this power to the NCA (e.g., Germany and UK). Other MS added a provision to this effect (e.g., France, Greece), generally framing it as a mere possibility, meaning that NCAs are not obliged to take such payments into account, which is bound to create legal uncertainty during the judicial review of such fines. In Spain it has been highlighted that the mitigating factor may only function if payments have already been effectively made to the injured parties, a precautionary requirement that would seem to require the infringer seeking to benefit from this mitigating factor to present evidence of payments to the NCA.

#### 4.9. Collective redress.

To date in the EU, private enforcement aimed at compensating antitrust damages suffered by consumers and SMEs has been virtually non-existent.<sup>99</sup> The limited number of cases commenced have mostly been dismissed on procedural grounds or abandoned upon realization of the difficulties faced in ensuring effective redress.

Early on in the drafting of the Directive, it was decided that no provision would be included on collective redress (see recital 13). At the time, the omission was hailed as a victory by business lobbyists, but it soon became apparent that harmonization might have been in their best interest, and the absence of a specific Directive provision may prove in the long run to have been the best possible outcome for consumer interests.

This is because the EU legislator has, until now at least, fallen captive to the school of thought according to which opt-out representative mechanisms reminiscent in any way of the American class-action system must not be allowed, because they will easily lead to abuse. This

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<sup>98</sup> See Peyer In Marquis & Cisotta (Ed) *Litigation and Arbitration in EU Law*, 33 at 42-43 nd Koenig (2018) *European Competition Journal* 14 (forthcoming).

<sup>99</sup> See in particular, Rodger, B (ed) *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law International, 2014).

was reflected in the Commission's 2013 Recommendation,<sup>100</sup> which suggested an opt-in mechanism (all the while not excluding the possibility of opt-out in exceptional circumstances), even though there is no example, anywhere in the EU, of an opt-in mechanism ever leading to the compensation of a significant number of consumers.<sup>101</sup> At the same time, the few MS which have adopted opt-out representative mechanisms have incorporated various levels of safeguards against abuse, seeking to make sure their use is not incentivised by financial motivation, particularly on the part of the legal profession. Interestingly, such safeguards are absent and such motivation appears possible in certain opt-in mechanisms (e.g., where they allow for *quota litis* or success fee arrangements). Indeed, despite the Recommendation, subsequently the trend has been for some MS which until then only had opt-in collective redress procedures to adopt opt-out mechanisms (Belgium and UK), or to expand (current proposal in the Netherlands) or slightly revise (Portugal) existing opt-out mechanisms. Bulgaria, Denmark and Norway also have slightly varying models of opt-out mechanisms. In some MS, such as Greece and Hungary, an opt-out mechanism is available for consumer protection, but it can only be used (absolutely or in practice, in the vast majority of cases) to obtain an initial declaratory judgment as opposed to a direct claim for damages. Consumers are required subsequently to return to court to obtain their compensation, arguably depriving the mechanism of effectiveness.

The academic literature on collective redress seems to unanimously point to the value and utility of collective opt-out mechanisms,<sup>102</sup> but EU legislators in particular remain reluctant to embrace this, even in light of the unmistakable evidence that the opt-in mechanisms do not work, and cannot work. At the very least, it must be recognized that an opt-in mechanism is incapable of overcoming rational apathy for claims limited to very small amounts (where the opportunity-cost of obtaining information and taking the steps necessary to join the action exceeds the potential benefit).

Nonetheless, allowing opt-out representative actions is not a panacea. As the lack of attempts to use and lack of success of existing opt-out mechanisms has shown, there are many other details upon which will turn the success or failure of any representative mechanism, even an opt-out one. The detail of the mechanism instituted is certainly capable of limiting the effectiveness of the right to collective redress. Economic viability (reduction of financial risk and possibility of recouping costs in case of victory) is a particularly important concern. But the legal culture and attitude of judges towards collective redress may also be significant. In brief, it is arguable, based on the evidence of litigation practice to date, for example, in the UK, that private enforcement has been, and promises to remain for some time, almost entirely

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<sup>100</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201/60, 26/07/2013).

<sup>101</sup> In France, *UFC-Que-Choisir* was a follow-on case in the telecommunications sector. The opt-in action initiated by a consumers association was deemed inadmissible on procedural grounds, with courts affirming that the association could not, under French law, solicit consumers to join the action (as described in Ioannidou, M., *Consumer involvement in Private EU Competition Law Enforcement*, Oxford University Press, 2015, p. 128). In Spain, the *Ausbanc* case failed to move past initial procedural hurdles regarding legitimacy (Order of Provincial Court of Madrid (Sect. 28) of 30 September 2014, *Ausbanc v. Telefónica*, AAPM2461/2013, ECLI: ES:APM:2013:2461A). In the UK, two actions failed for procedural reasons, and the only successful one (opt-in) led to the compensation of a very small percentage of the universe of injured consumers, as described below. See the discussion of the 'replica kit' case in the UK by Rodger, B Chapter 13, United Kingdom, 'A licence to Print (Monopoly) Money? *Replica Football Kit and Toys and Games*, Resale Price Maintenance and the Competition Act 1998, in Rodger, B, (ed) *Landmark Cases in Competition Law: Around the World in Fourteen Stories* (Kluwer Law International, 2012).

<sup>102</sup> See, e.g., doctrine quoted in Section 5 of Chapter 1.

reserved for the protection of companies with deep pockets. Collective redress mechanisms appear to be working (e.g., in the trucks cartel), and promise to compensate SMEs, but only in follow-on actions and where (not so) small claims can be bundled together with very large claims. It is perhaps ironic that the European Commission repeatedly stresses an increase in the welfare of consumers as its ultimate goal, but none of its decisions has ever led to compensation of damages to end consumers, and the Damages Directive proposed by the Commission failed to address this issue entirely.

Most MS, such as Cyprus, Germany (despite the demands of the Bundesrat) and the Netherlands,<sup>103</sup> included no provisions on collective redress in their transposition of the Damages Directive. Some national reports even highlighted the absence of effective collective redress mechanisms for minor consumer claims, altogether, in the MS in question (e.g., Cyprus, Greece, Ireland and Luxembourg).

The Dutch legislator did not address collective redress in the transposition, but did announce the intention to adopt new legislation on this subject at a later date. Specifically, the Government expressed its intention to create an opt-out mechanism which, in the words of the Dutch rapporteurs, could prove to be a “game changer” in Dutch competition litigation. The pre-existing opt-out mechanism for settlements was deemed, theoretically, at least by some commentators, to be applicable to injured persons from other MS. Accordingly, the Government initially intended to expressly give the new opt-out mechanism universal scope, meaning that an action in the Dutch courts could be used to compensate consumers from all MS. This plan has since been dropped (moving to an opt-out system only for Dutch residents, with an opt-in option for residents in other MS), but the scope of application of such mechanisms is an issue that requires to be addressed by all MS. It may actually be contrary to EU Law for such mechanisms to treat nationals of other MS differently (principle of equivalence, non-discrimination, EU private international law, etc.), both in terms of right of initiative and in terms of their representation. Since there seems to be nothing to prevent the dutiful notification of consumers residing in other MS, on equivalent terms to those used to notify Dutch residents, in order to allow them to exercise the right to opt-out and of claim their part of the compensation, it seems difficult to justify the discrimination. It is interesting to note that the new law will also discriminate against Dutch nationals residing in other MS, who may also only be represented if they opt-in.

In the UK, the 1998 Competition Act allowed (since 2002) consumer representative follow-on actions, following the opt-in model. After the glorious ‘failure’ of the successful claim in the *Football Shirts* case (the mediated 20 GBP compensation made available to consumers was claimed by only 144 consumers, from an estimated population of 2 million injured consumers),<sup>104</sup> the OFT (predecessor to the CMA) concluded that the opt-in model was simply not working. After the adoption of the Directive, but independently from its transposition, the Competition Act was amended by the Consumer Rights Act 2015 (no further changes were made in the transposition), adding the possibility of an opt-out action before the CAT.

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<sup>103</sup> In the case of the Netherlands, the legislator has announced the intention to revise existing rules, to adopt an opt-out mechanism which will longer be limited (as it has been until now) to settlements.

<sup>104</sup> *Consumers' Association v JJB Sports plc* (CAT Case no 1078/7/9/07) See the discussion of the ‘replica kit’ case in the UK by Rodger, B. “United Kingdom, ‘A licence to Print (Monopoly) Money? Replica Football Kit and Toys and Games, Resale Price Maintenance and the Competition Act 1998’” in Rodger, B, (ed) *Landmark Cases in Competition Law: Around the World in Fourteen Stories* (Kluwer Law International, 2012).



Parliamentary debate led to the introduction of significant safeguards, including certification by the CAT based on the suitability of the opt-out model in the specific case and of the representative, as well as the prohibition of exemplary damages and of damages-based agreements. Subsequently, the details of the procedure were set out in Tribunal rules. To date, the new model has fallen short of expectations. The CAT's approach in the two cases brought so far, neither of which was certified for collective group proceedings,<sup>105</sup> has raised concerns about the extent to which this mechanism (as interpreted so far) will achieve compensation for mass damages caused to consumers. In the first case, the problem was the limitation of the procedure to a "follow-on" situation, albeit this was a problematic case because of the temporal scope of the changes introduced by the 2015 to extend the CAT's competence beyond follow-on actions.<sup>106</sup> Experience of other collective actions shows that it will seldom be beneficial or rational to make the action strictly follow-on, and instead stand-alone arguments will be mixed in, particularly given the tendency of competition authorities to be somewhat conservative in defining the material and temporal scope of infringements. The applicant not only had to withdraw its request, but ended up having to pay the defendant's costs. The outcome of the second case has potentially wider implications. In *Merricks v Mastercard*, the CAT refused certification because the applicant had failed to put forward a sustainable methodology to calculate and distribute compensation. Almost all mass consumer claims will face this problem. It is arguable that refusing certification on the basis of an inability to precisely quantify damages may be deemed to infringe the Directive and the effectiveness of the right to compensation for damages arising from infringements of Arts. 101/102 TFEU. Nonetheless, the facts of the case, involving £15bn of claims, by any adult who had purchased any goods from any merchant in the UK which had utilised the Mastercard scheme, and over a considerable number of years presented particular and insurmountable commonality and quantification issues that are unlikely to arise to the same extent even in other mass consumer actions. The question remains whether it is acceptable or inevitable, in our legal orders, for there to be no effective way of ensuring redress in such exceptional cases.

Despite its omission from the terms of the Directive, some Member States did include provisions on collective redress in their transposition measures, and we will consider these briefly here.

Belgium confirmed in its transposition process that its recently created consumer opt-out mechanism can be used for collective redress following antitrust infringements. Since the mechanism is used only for final consumers, special rules in the transposition prohibit the defendant from invoking the passing-on defence. The rapporteur questioned whether this may be too restrictive, considering the possibility of sale on second-hand markets. The possibility of suspension for 2 years during consensual dispute resolution has also been excluded in these cases, on the grounds that the general rules for this procedure already impose on parties a duty to negotiate a consensual settlement, but it is unclear to what extent such a justification ensures compliance with the Directive.

French law was revised in 2014 to allow for antitrust consumer representative actions, very much in line with the Commission's Recommendation. The transposition measure was

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<sup>105</sup> *Gibson v Pride Mobility Products* [2017] CAT 9; *Merricks v Mastercard* [2017] CAT 16.

<sup>106</sup> See A Andreangeli, 'The Changing structure of competition enforcement in the UK: The Competition Appeal Tribunal between present challenges and an uncertain future' (2015) 3(1) JAE 1-30; See B Rodger, 'The Consumer Rights Act 2015 and collective redress for competition law infringements in the UK: a class Act?' (2015) 3(2) JAE 258-286.

used as an opportunity to make further changes. The mechanism is opt-in, can only be used by authorised consumer associations, only to represent consumers (not SMEs), and is limited to follow-on actions, which drastically reduces its usefulness, as the mechanism will not be available for the many antitrust infringements. Jurisdiction for these collective actions, surprisingly, has not been centralized.

In Italy, the existing (opt-in) collective redress mechanisms of the Consumer Code were explicitly extended to encompass antitrust infringements by the transposition measure.

Portugal already had in place what is commonly deemed, at least theoretically, to be the most user-friendly opt-out system in the EU (constitutional right of *actio popularis*).<sup>107</sup> The (proposed) transposition has included some special rules to adjust this mechanism, both to make clear that it may be used in response to antitrust infringements, and to correct some shortcomings in the existing procedure.<sup>108</sup> The Portuguese mechanism has only once been used for consumer redress in the context of antitrust infringements.<sup>109</sup> That action has encountered significant procedural hurdles. After 3 years, the first instance generalist court deemed that the promoting NGO did not have standing, and an appeal is pending.

Poland included in its transposition a right for consumer and undertakings' associations to bring representative opt-in actions, in line with the Commission's Recommendation.

It should be noted that, in Europe, no MS has, as of yet, moved to a system where competition authorities themselves (in addition to imposing fines) are given the power to order infringing companies to compensate consumers. The Hungarian NCA has been given the right to initiate legal proceedings before a national court to arrive at that goal, already an interesting step forward. Unfortunately, this opt-out mechanism can only lead to the direct compensation of the victims when the damage is easily quantifiable from the start, which will almost never be the case, and otherwise consumers must file their own actions after the initial declaratory action. The EC and EU NCAs do not even notify Public Prosecutors of the adoption of decisions which could be the basis for consumer collective redress proceedings, even in MS where the Public Prosecutors' Office has the right to initiate such actions. It could be argued that such a duty of notification by the Commission derives from its duty of loyal cooperation with the Member States in ensuring the effective protection of rights and compliance with obligations arising from EU Law.

On a final note, collective redress must be distinguished from the acquisition and bundling

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<sup>107</sup> Under general rules, it may be used by Public Prosecutors, by any individual consumers or by any association whose statutes include consumer protection as a goal. There are no initial fees. Final court fees, even in the case of complete dismissal, can be significantly reduced. Courts are entrusted to be pro-active, and act, together with the Public Prosecutor, as guarantors of the rights of the represented persons and against any abuse. The Public Prosecutor can replace the applicant if he/she is deemed not to be serving the best interests of those represented.

<sup>108</sup> A major change has been the clarification that the mechanism can also be used to represent undertakings (not just consumers), and the extension of the right of initiative to associations of undertakings. Some clarifications have also been provided on how to calculate and distribute compensation, although many doubts will remain. As long as any claims exclusively deal with antitrust infringements (stand-alone or follow-on), they will be heard by the specialized Competition Court. If the case is successful, global compensation should be awarded, entrusted to the management of one person, and any remaining funds not claimed will be directed to a Fund to be set up by the Ministry of Justice, to promote access to justice. Unfortunately, the final draft of the rules do not seem to allow for recompense of legal fees and other costs incurred by the promoter of the action, which limits its use for charities or publicly funded organizations.

<sup>109</sup> See: Sousa Ferro, M., 'Collective redress: Will Portugal show the way?', (2015) 6 *Journal of European Competition Law & Practice* 299; and Sousa Ferro, M., Rossi, L., 'Private enforcement of competition law in Portugal – virtues and shortcomings of the *actio popularis*', in Benacchio, G. A., Carpagnano, M. (eds.), *L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013)*, Edit. Scientifica, 2014, p. 263.

of antitrust damages claims. This business model, first utilised in the EU by the organization Cartel Damages Claims, arrives at similar results as formal collective redress mechanisms, but it is inappropriate for compensation of small consumer claims, as the purchase of such claims proves economically unattractive. From a legal perspective, the model has already been successfully used in some MS, such as Germany (after initial resistance) and the Netherlands. The Directive contains language confirming its admissibility as a matter of EU Law.<sup>110</sup>

#### 4.10. Other issues.

One of the great obstacles to successful antitrust damages actions is lack of information. It is important for potential claimants to be aware of EC and NCA decisions, and accordingly publicity of decisions, with a sufficient level of detail, is a way of fostering private enforcement. Many MS already required such decisions to be made public, namely on the NCA's website. Germany has included a special provision which requires its NCA to publish its Art. 101/102 TFEU (and national equivalent) decisions on the internet, detailing minimum standards for the information to be provided, plus a recommendation that a general reminder is included (as practised in EC press releases), reminding injured parties that they can claim damages.

But it is also important to have access to information about, and to publicise, pending and past private enforcement actions. This is important, not only to promote a competition culture, including a culture of private enforcement, and to increase the deterrent effect, but also to allow parties and courts to be aware of other actions which may be relevant in preparing their claims and defence, in avoiding over or under-compensation, etc. Portugal has dealt with this concern by setting up a mechanism to centralise information on private enforcement actions. National courts are required to notify the Portuguese Competition Authority of any application or defence submitted to them which raises competition law issues, as well as of any court ruling in such cases. The PCA is obliged to keep an online database of these actions, and also to centralise compliance with Reg. (EC) 1/2003's obligation to notify the EC of court actions where Arts. 101/102 TFEU are raised.

Another issue which has been highlighted as, potentially, a very significant impediment to private litigation, and which has not been regulated at all by the Directive,<sup>111</sup> is costs. Of course, the principle of effectiveness will also impose limitations on MS' right to regulate court costs, but there has been no harmonisation of this matter, leading to legal uncertainty. Attitudes towards costs vary drastically between the MS. The average level of costs also varies drastically, from several million in some MS to a few thousand EUR in others. Ironically, MS which have so far been considered preferred destinations for litigation seem to be among those with the highest costs of litigation, notably the UK.

Not all MS apply a loser-pays rule. In some MS, even if an applicant is entirely successful, he/she is not entitled, under general rules, to be compensated for the entirety of (necessary and reasonable) legal fees and other litigation costs. This will often mean that small claims are economically irrational, as they will cost more to litigate than the compensation which is sought.

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<sup>110</sup> See Arts. 2(4) ("by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim") and 7(3) ("or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim") of the Damages Directive. See also Opinion of AG Jääskinen in Case C-352/13, *CDC Hydrogen Peroxide*, para 29.

<sup>111</sup> Except in relation to the possibility of imposing the payment of costs as a sanction in the context of the infringement of rules on access to evidence.

In fact, even if no economic experts are consulted, legal fees in even the simplest follow-on action will easily exceed several thousand EUR, meaning that only damages which are significantly above that level justify going to court. For claims up to and even over that figure (namely given the need to take risk into account), existing rules on costs may mean that there is no effective right to compensation. This issue will be of special concern in the context of collective redress, since, again, in some MS, even when NGOs and consumers are given the right to promote representative actions, they are not entitled, if successful, to recover their full legal fees, making the promotion of such actions a highly risky and necessarily charitable and costly endeavour. In MS with opt-out systems, promoters of these actions are also barred from obtaining a percentage of the damages awarded to those represented (see Portugal and the UK).<sup>112</sup>

In the UK, the requirement of up-front payments and the obligation to pay the, often very high, legal fees of the other parties in case of unsuccessful claims may dissuade private enforcement and may also potentially infringe of the principle of effectiveness. In England, cost rules vary between the High Court and the CAT, with the latter having a discretionary margin which seems to be used in such a way that tends to be favourable to claimants.

Equally worrying is the degree to which courts may require parties to pay for court appointed experts (*maxime*, economists), or to find that they have not met their burden of proof (e.g., in relation to quantification of damages) because they have not presented economic studies. Given the high costs of such experts and studies, requiring them may limit the *effet utile* of a party's right to sue for damages. In this regard, the Swedish approach is commendable, insofar as it considers disproportionate costs, in the case of small claims, sufficient grounds to allow courts to estimate damages, without requiring a precise quantification from the applicant.

As was highlighted in the German report, the possibility of court ordered third party intervention (such as co-infringers), the requirements for which vary throughout the MS, combined with the rules on distribution of costs, may drastically increase costs to be paid (they are usually multiplied by the number of parties) and further dissuade claimants. The German legislator has tried to deal with this problem by limiting additional costs, but does so by awarding the court a wide discretionary margin, and it is not clear how this makes a significant contribution to eliminating the legal uncertainty and financial risk for the applicant.

The prohibition of *quota litis* and strict rules on third party funding in many MS may stifle potential private enforcement. Additionally, in the context of forum shopping, it raises potentially controversial legal issues. Pending cases have already shown that lawyers from MS which allow contingency fees and third-party funding approach companies from MS where this is not allowed, proposing that they join their actions in a given MS where those practices are allowed, offering "no win, no fee" solutions. Where lawyers from the more restrictive MS are legally prevented from presenting competing fee and funding offers, it has been argued that such cross-border offers should be subject to the rules of the client's State.

Finally, it has long been known that the national courts of several MS, both in the public enforcement and in the private enforcement sphere, tend to adopt a very restrictive approach to

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<sup>112</sup> Note the increasing significance of third party funding of competition damages claims in the UK, See *Merricks v Mastercard* 'the Government in promoting the legislation therefore clearly envisaged that many collective actions would be dependent on third party funding, and it is self-evident that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages', [2017] CAT 16; para. 127.

the identification of an effect on trade between MS. In essence, throughout the EU, there is still a surprising prevalence of the notion that disputes between national companies do not fall under the rules of the Treaty, and that these would only be applicable if there an immediate and direct effect on cross-border trade, in the specific market in question.<sup>113</sup> This is clearly incompatible with the case-law of the CJEU and may have serious detrimental consequences for the enforcement and uniformity of application of EU Law across the MS.

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<sup>113</sup> Botta, M; Svetlicinii, A; and Bernatt, M 'The assessment of the effect on trade by the national competition authorities of the "new" Member States: another legal partition of the internal market?' C.M.L. Rev. 2015, 52(5), 1247-1275.