INDEX

abusive conduct 8.005–8.009, 8.044–8.051
  damage caused by abusive
    behaviour/counterfactual scenario
    8.074–8.083
  exclusionary abuse 8.078–8.083
  exploitative abuse 8.075–8.077
  economic actors damaged by
    exploitative/exclusionary conduct
    8.049–8.051
  competitors as key victims 8.051
  exclusionary abusive practice, parties
    harmed by 8.050
  exploitative abusive practice, parties
    harmed by 8.049
  purchasers of dominant firm harmed
    8.051
  exclusionary abuse, types of damage
    caused by 8.048
  exploitative conduct, types of damage
    caused by 8.045–8.051
  positive effects on competition 8.047
  positive effects for purchasers through
    profit sacrifice 8.046
  price discrimination effect on welfare
    8.047
  tying, effects of 8.047
  welfare implications 8.045
  exploitative or exclusionary conduct 8.008
  abuse of a dominant position 8.044
  increases in prices 8.044
  illustration: quantification of damages in
    exclusionary abuse case 8.084–8.094
  actors affected by exclusionary abuse
    8.085
  damage estimation in exclusionary abuse
    complex 8.084
    phase one 8.086–8.087
    phase two 8.088–8.089
    phase three 8.090–8.094
  primary goal to increase profits by
    softening competition 8.006, 8.008
  quantifying damages in abusive conduct
    cases 8.074–8.094
    damage caused by abusive behaviour/
      counterfactual scenario 8.074–8.083
    illustration: quantification of damages in
      exclusionary abuse case 8.084–8.094
  quantifying damages by
    counterfactual/but-for scenario 8.009
  restricted competition leading to welfare
    losses 8.005
  applicable law 7.092–7.130
  competition-based litigation/Art 6(3)
    7.099–7.101
    no derogation 7.101
  desirability of lex fori approach 7.114
  reservations against 7.114–7.118
  effects-based approach/Art 6(3)(a)
    7.119–7.123
    basis of 7.121
  effects-based approach, problems with
    7.124–7.127
  functioning of Art 6(3)(b) 7.102–7.111,
    7.119
    application 7.104
    'direct and substantial effect', meaning of
      7.106–7.110
    limitations on application of lex fori
      7.103–7.105
    US law, compared 7.112–7.113
    general rule/Art 4 7.097–7.098, 7.123
    tort claims, approaches to 7.098
  Mosaikbetrachtung
    concurrent matter of jurisdiction/
      applicable law, as 7.128–7.130
    effects-based approach, problems with:
      7.124–7.127
Index

Rome II Regulation and *lex fori* approach 7.094–7.096
Commission proposal for harmonisation 7.094–7.095
*see also* private international law aspects
Ashurst study 0.09, 0.10
assignment of claims 6.033, 6.150–6.156
assignment model as synergistic approach to litigation 6.151
Austria
courts as ’specialist authorities’ 5.64
documentary evidence, access to 4.028–4.030, 4.032
autonomy *see under* Member States

Belgium
basis of damages actions for breach of EU competition law 2.47–2.49
collective action scheme absent 6.072
NCA, consultation of 5.72
Bernheim, B. Douglas 8.058
Brussels Convention (1968) 7.006, 7.007
burden of proof
infringement, proving 4.002
*see also* proving the infringement
passing-on in EU law 3.053–3.060
burden on defendant 3.053–3.055, 3.058–3.059
question of fact, as 3.056–3.058
shifting 3.056
presumption of harm 5.13–5.14
*see also under* individual countries
cartels
Commission settling 4.003
contribution 5.79–5.80
damage caused by cartels 8.005–8.043
economic actors damaged by cartels 8.020–8.035
harm inflicted by cartels, estimation of 8.002
higher prices and lower quantities resulting 8.007
illustration 8.036–8.043
price/quantity effects accruing in vertical value chain 8.036–8.043
restricted competition leading to welfare losses 8.005
types of damage caused by cartels 8.010–8.019
economic actors damaged by cartels 8.020–8.035
downstream effects 8.029–8.031
effects on producers of complements 8.032
horizontal effects 8.021
non-horizontal and non-vertical effects 8.021
range of economic actors affected by anti-competitive conduct 8.023
summary of effects analysis 8.033–8.035
upstream effects 8.024–8.028
vertical effects 8.021
estimating number of cartels 8.002
primary goal to increase profits by softening competition 8.006–8.007
private litigants *see* private litigants’ access to documents in EU cartel actions
quantification of damages in cartel cases 8.053–8.073
constructing counterfactual scenario 8.054
cost-based approach *see* cost-based approach
cross-sectional analysis *see* cross-sectional analysis
difference-in differences method *see*
difference-in differences method
nature of counterfactual scenario 8.053
profitability-based approach *see*
profitability-based approach
quantifying damages by counterfactual/but-for scenario 8.009
simulated comparator markets *see*
simulated comparator markets
time series analysis *see* time series analysis
types of damage caused by cartels 8.010–8.019
cartel-induced price increases, substantial variance in 8.019
cartelisation leading to transfer of wealth/inefficiencies 8.010–8.012
extent of price increase or quantity reduction 8.014–8.015
magnitude of damage dependent on range of factors 8.013
market characteristics, cartels changing 8.017
mark-ups/overcharge calculations, empirical studies on 8.018
productive and dynamic inefficiencies 8.016, 8.017
quantity effects neglected 8.018
causation 5.03–5.06
but-for test 5.03
choice of court 7.050–7.051
complexity of issue 5.06
choice of court see under private international law aspects
Civil Justice Council 6.026
civil law damages actions for breach of EU competition law 2.24–2.61
Germanic systems of law 2.24–2.46
Denmark 2.24–2.25
Germany 2.26–2.32
Greece 2.33–2.35
Latvia 2.36–2.38
Lithuania 2.39–2.43
Netherlands 2.44–2.46
Romanistic systems of law 2.47–2.61
Belgium 2.47–2.49
France 2.50–2.54
Italy 2.55–2.59
Spain 2.60–2.61
collective action/redress 6.001–6.173
assignment of claims 6.033, 6.150–6.156
collective action at EU level 6.034–6.071
collective action as a matter of EU law 6.034–6.040
EU policy developments 6.041–6.071
collective action as matter of EU law 6.034–6.040
consumer injunctions 6.038
data protection rules 6.040
IPRs protection Directive 6.039
unfair terms in consumer contracts 6.037
effective complement to public enforcement, as 6.002, 6.003
EU policy developments 6.041–6.071
Commission's consultation paper (2011) 6.057–6.060
Commission's joint information note 6.055–6.056
Commission proposal/2013 collective redress initiative 6.061–6.071
draft Directive 6.051–6.054
Green Paper 6.044–6.046
preference for horizontal approach 6.043
White Paper 6.047–6.050
Member States, collective action in 6.072–6.156
collective action introduced 6.004
collective action schemes, absence of 6.072
Denmark 6.127–6.134
divergent systems as obstacle to inter-Member State action 6.004
effective redress not always provided 6.006
France 6.142–6.147
Italy 6.148–6.149
limitations on who can bring claims 6.005
Netherlands see under Netherlands
opt-in and opt-out systems 6.005, 6.017
Sweden 6.135–6.141
UK see under United Kingdom
opt-in collective action 6.005, 6.015–6.024
advantages 6.019–6.021
drawbacks 6.022–6.024
EU policy preference for 6.017
nature of 6.018
standing 6.015, 6.016
opt-out collective action 6.005, 6.025–6.032
advantages 6.026
disadvantages 6.027–6.032
nature of 6.025–6.026
standing 6.015, 6.016
rationale for collective action 6.008–6.013
administrative advantages 6.012
compensation and deterrence objectives, attaining 6.013
correlation between no collective action/sub-optimal enforcement 6.008
importance in balancing resources/claimants' bargaining positions 6.010
positive impact on litigation by consolidating actions 6.009
‘rational apathy problem’, overcoming 6.009
tactical litigation risk, avoiding 6.011
terminology 6.014
US, class actions in see under United States (US)
comity principle
nature of 4.066
resisting disclosure, reliance on 4.065–4.067
Commission, EU
cartel cases
extensive resources required 4.003
settling under settlement programme 4.003
see also cartel
collective action 5.23
consultation paper (2011) 6.057–6.060
draft Directive 6.051–6.054
Green Paper 6.044–6.046
Impact Assessment 6.027
joint information note 6.055–6.056
minimal harmonised requirements, proposals for 6.041
opt-out system, main arguments against 6.027
policy initiatives 6.003
proposal/2013 collective redress initiative 0.10, 6.061–6.071
recommendation 0.10, 6.003, 6.013, 6.043, 6.061–6.068
White Paper 6.047–6.050
see also collective action/redress consultation of 5.65
decisions of Commission/Art 9
Regulation 1/2003 4.086–4.087
commitment decisions, nature of 4.086
evidential value 4.087
not proof of infringement in follow-on actions 4.087
decisions of Commission/Art 16
Regulation 1/2003 4.072–4.081
effect of Art 16(1) 4.074
interconnection between procedural aspects/appeal on substance 4.079–4.081
judgment of English Court of Appeal in Crehan 4.082–4.085
negative duty of abstention 4.074
scope of rule 4.075–4.078
see also evidential value of prior administrative decisions
disclosure
Commission documents, access to see under documentary evidence, access to documents held by national competition authorities 4.032–4.034
limiting discoverability in US courts see under United States (US)
proposals for disclosure 4.059–4.060
draft Directive
burden of proof to establish passing-on 3.054
collective action 6.003, 6.051–6.054, 6.069–6.070
indirect purchaser standing 3.033–3.034
limitation periods 5.47, 5.48
passing-on defence 3.065
withdrawal 0.09–0.10
exemplary damages 5.23
Green Paper 0.09, 5.23, 5.82
collective action 6.044–6.046
harmonisation of rules on non-contractual obligations 7.094–7.095
indirect purchaser standing 3.032–3.036
rebuttable presumption of passing-on 3.034–3.036
stand-alone and follow-on actions 3.034
leniency programmes see leniency/leniency programmes
national courts, cooperation with 7.008
passing-on defence 3.064–3.066
private enforcement initiative 0.08–0.14
Ashurst study 0.09, 0.10
proposal, legislative 0.10, 3.054, 3.068
burden of proof to establish passing-on 3.054
causation 5.06
contribution see under contribution
## Index

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>damages, measure of 5.07, 5.12</td>
<td>8.001–8.112</td>
</tr>
<tr>
<td>documents held by national competition authority, disclosure of 4.032–4.034</td>
<td></td>
</tr>
<tr>
<td>evidence proposals 4.059–4.060</td>
<td></td>
</tr>
<tr>
<td>indirect purchaser standing 3.035</td>
<td></td>
</tr>
<tr>
<td>limitation periods 5.49–5.53</td>
<td></td>
</tr>
<tr>
<td>NCA decisions, evidential value of 4.088</td>
<td></td>
</tr>
<tr>
<td>partial passing-on 3.063</td>
<td></td>
</tr>
<tr>
<td>passing-on defence 3.066</td>
<td></td>
</tr>
<tr>
<td>Regulation 44/2001</td>
<td></td>
</tr>
<tr>
<td>Art 28, Commission proposal and 7.077–7.080</td>
<td></td>
</tr>
<tr>
<td>Commission review of 7.083–7.085</td>
<td></td>
</tr>
<tr>
<td>White Paper 0.09, 2.63</td>
<td></td>
</tr>
<tr>
<td>burden of proof to establish passing-on 3.054</td>
<td></td>
</tr>
<tr>
<td>collective action 6.047–6.050</td>
<td></td>
</tr>
<tr>
<td>indirect purchaser standing 3.032, 3.033</td>
<td></td>
</tr>
<tr>
<td>passing-on defence 3.064</td>
<td></td>
</tr>
<tr>
<td>common law damages actions for breach of EU competition law 2.19–2.23</td>
<td></td>
</tr>
<tr>
<td>England and Wales 2.19–2.21</td>
<td></td>
</tr>
<tr>
<td>Ireland 2.22–2.23</td>
<td></td>
</tr>
<tr>
<td>compensation as policy objective</td>
<td></td>
</tr>
<tr>
<td>collective action 6.002, 6.013</td>
<td></td>
</tr>
<tr>
<td>indirect purchaser standing and passing-on 3.005, 3.008</td>
<td></td>
</tr>
<tr>
<td>competition culture 6.002, 6.042</td>
<td></td>
</tr>
<tr>
<td>competition enforcement in the EU 0.07</td>
<td></td>
</tr>
<tr>
<td>antitrust enforcement by public enforcement authority 0.04, 0.07, 6.001</td>
<td></td>
</tr>
<tr>
<td>decentralisation of enforcement of antitrust rules 0.08</td>
<td></td>
</tr>
<tr>
<td>private enforcement see private enforcement</td>
<td></td>
</tr>
<tr>
<td>public enforcement, meaning of 0.07 see also public authorities/public enforcement</td>
<td></td>
</tr>
<tr>
<td>modernisation of 0.08</td>
<td></td>
</tr>
<tr>
<td>compounding and discounting damages 8.095–8.098</td>
<td></td>
</tr>
<tr>
<td>Connor, John M. 8.018</td>
<td></td>
</tr>
<tr>
<td>consumers</td>
<td></td>
</tr>
<tr>
<td>collective action see collective action/redress</td>
<td></td>
</tr>
<tr>
<td>consumer injunctions 6.038</td>
<td></td>
</tr>
<tr>
<td>unfair terms in consumer contracts 6.037</td>
<td></td>
</tr>
<tr>
<td>contribution</td>
<td></td>
</tr>
<tr>
<td>Commission’s proposal on contribution 5.78–5.87</td>
<td></td>
</tr>
<tr>
<td>cartel settlements 5.79–5.80</td>
<td></td>
</tr>
<tr>
<td>determining contribution 5.78</td>
<td></td>
</tr>
<tr>
<td>leniency, application to see under leniency/leniency programmes</td>
<td></td>
</tr>
<tr>
<td>national law system of contribution 5.78</td>
<td></td>
</tr>
<tr>
<td>immunity recipients, contribution claims against 5.86</td>
<td></td>
</tr>
<tr>
<td>joint and several liability 5.76–5.80, 5.86</td>
<td></td>
</tr>
<tr>
<td>UK 5.77</td>
<td></td>
</tr>
<tr>
<td>cost-based approach 8.069–8.071</td>
<td></td>
</tr>
<tr>
<td>comparator-based approaches, as 8.069</td>
<td></td>
</tr>
<tr>
<td>variable costs 8.069–8.070</td>
<td></td>
</tr>
<tr>
<td>counterfactual scenarios see under abusive conduct; cartels</td>
<td></td>
</tr>
<tr>
<td>cross-sectional analysis 8.061–8.064</td>
<td></td>
</tr>
<tr>
<td>advantages and disadvantages 8.064</td>
<td></td>
</tr>
<tr>
<td>nature of 8.062</td>
<td></td>
</tr>
<tr>
<td>regression techniques 8.063</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td></td>
</tr>
<tr>
<td>collective action scheme absent 6.072</td>
<td></td>
</tr>
<tr>
<td>exemplary damages 5.24</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td></td>
</tr>
<tr>
<td>collective action scheme absent 6.072</td>
<td></td>
</tr>
<tr>
<td>damages, measure of 5.07–5.46</td>
<td></td>
</tr>
<tr>
<td>Commission proposal 5.07</td>
<td></td>
</tr>
<tr>
<td>exemplary damages 5.21–5.46</td>
<td></td>
</tr>
<tr>
<td>EU law 5.22–5.23</td>
<td></td>
</tr>
<tr>
<td>national law 5.24–5.46</td>
<td></td>
</tr>
<tr>
<td>nature of 5.21</td>
<td></td>
</tr>
<tr>
<td>UK see United Kingdom (UK)</td>
<td></td>
</tr>
<tr>
<td>presumption of harm 5.13–5.20</td>
<td></td>
</tr>
<tr>
<td>burden of proof on defendant 5.13–5.14</td>
<td></td>
</tr>
<tr>
<td>EU law 5.17</td>
<td></td>
</tr>
<tr>
<td>impact of 5.14–5.16</td>
<td></td>
</tr>
<tr>
<td>national law 5.18–5.20</td>
<td></td>
</tr>
<tr>
<td>types of damage recoverable 5.08–5.12</td>
<td></td>
</tr>
<tr>
<td>‘lost sales effect’ 5.08–5.10</td>
<td></td>
</tr>
<tr>
<td>pecuniary loss 5.08</td>
<td></td>
</tr>
<tr>
<td>restitutio in integrum (actual loss/loss of profit) 5.11–5.12, 5.24, 5.34</td>
<td></td>
</tr>
<tr>
<td>damages, quantification of 8.001–8.112</td>
<td></td>
</tr>
</tbody>
</table>

267

David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/22/2019 05:34:34AM via free access
### Index

- Abusive conduct, damages caused by: see under abusive conduct
- Approach for determining damage, comparator-based 8.052
- Cartels, damages caused by: see under cartels
- Damages caused by abusive behaviour/counterfactual scenario 8.074–8.083
- Exclusionary abuse 8.078–8.083
- Exploitative abuse 8.075–8.077
- Further aspects of damage quantification 8.095–8.100
- Accuracy of statistical methods 8.101–8.103
- Compounding and discounting damages 8.095–8.098
- Estimation of after-effects 8.099–8.100
- Remoteness and causality 8.104–8.108
- Illustration: quantification of damages in exclusionary abuse case 8.084–8.094
- Actors affected by exclusionary abuse 8.085
- Damage estimation in exclusionary abuse complex 8.084
  - Phase one 8.086–8.087
  - Phase two 8.088–8.089
  - Phase three 8.090–8.094
- Magnitude of damage caused by competition law violations 8.002
- Need to calculate specific level of damages for each victim 8.052
- Quantification of damages in abusive conduct cases 8.074–8.094
- Damage caused by abusive behaviour/counterfactual scenario 8.074–8.083
- Illustration: quantification of damages in exclusionary abuse case 8.084–8.094
- Quantification of damages in cartel cases 8.053–8.073
- Constructing counterfactual scenario 8.054
- Cost-based approach: see cost-based approach
- Cross-sectional analysis: see cross-sectional analysis
- Difference-in differences method: see difference-in differences method
- Nature of counterfactual scenario 8.053
- Profitability-based approach: see profitability-based approach
- Quantifying damages by counterfactual/but-for scenario 8.009
- Simulated comparator markets: see simulated comparator markets
- Time series analysis: see time series analysis
- Damages, underlying right to 2.01–2.71
- National law bases for damages actions for breach of EU competition law 2.18–2.71
- Civil law 2.24–2.61
- See also Civil law damages actions for breach of EU competition law
- Common law 2.19–2.23
- See also Common law damages actions for breach of EU competition law
- National law analysis: the fault requirement 2.68–2.71
- Tortious nature of litigation for breach of EU competition law 2.62–2.68, 7.004
- Right to damages as matter of EU law: Crehan 2.03–2.17
- Further developments: Manfredi judgment 2.16–2.17
- Proceedings in the English courts 2.03–2.11
- UK reference to ECJ 2.12–2.15
- Data protection 6.040
- Deference
  - Deference to Commission decisions 4.082–4.083
  - Loyal cooperation principle 4.082
- Denmark
  - Basis of damages actions for breach of EU competition law 2.24–2.25
  - Choice of court 7.007
  - Collective action 6.127–6.134
  - Hybrid collective action system 6.017
  - Deterrence as policy objective
  - Collective action 6.002, 6.010, 6.013
  - Indirect purchaser standing and passing-on 3.006, 3.008, 3.009, 3.016
  - Difference-in differences method 8.065–8.066
  - Data constraints 8.086
Index

disadvantages 8.066
nature of 8.065
‘direct and substantial effect’, meaning of 7.106–7.110
US 7.112–7.113
direct effect 1.14, 2.08, 3.029
discounting and compounding damages 8.095–8.098
documentary evidence, access to
  access to documents held by Commission 4.006–4.020
cartel damages actions 4.008–4.020
  access to documents held by defendants 4.036–4.056
civil law systems 4.036
common law system 4.036, 4.037–4.056
  access to documents held by national competition authorities 4.021–4.035
Commission proposal on disclosure 4.032–4.033
  national courts, role of 4.025, 4.029, 4.034
  access to documents held by third parties 4.057–4.058
Commission’s proposals on evidence 4.059–4.060
  proposal to introduce common law system 4.059
  role of national courts 4.060
Evidence Regulation 4.050–4.056
formal discovery system in EU law absent 4.006, 4.036
leniency programmes see under leniency/leniency programmes
public access to documents held by EU institutions 4.006–4.007, 4.036
  exceptions to general right of access 4.007, 4.012–4.020
  rules on 4.007
domicile of parties
inside the EU 7.007, 7.016–7.019, 7.042
outside the EU 7.013–7.015
  application of lis pendens 7.081–7.082
litigation involving parties outside EU 7.086–7.091
dominant position, abuse of see under abusive conduct
effectiveness principle 1.01, 1.03
causation 5.06
collective action systems discouraging claims 6.006
damages, measure of 5.07, 5.12
compensatory damages 5.34
limitation periods 5.47
effet utile 2.15
equivalence principle 1.01, 1.03
causation 5.06
limitation periods 5.47
Estonia
  collective action scheme absent 6.072
  NCA, consultation of 5.74
European Convention of Human Rights (ECHR)
  access to justice (Art 6) 6.030
European Court of Justice (ECJ)
  case law on remedies 1.01–1.06
  collective action 6.034–6.035
documentary evidence see documentary evidence, access to
establishment of right to damages as matter of EU law: Crehan 2.12–2.15
  further developments: Manfredi judgment 2.16–2.17
  indirect purchaser standing 3.029–3.030
  exemplary damages 5.22
  founding jurisdiction in tortious actions 7.023–7.025
  application of Bier/Shevill jurisprudence 7.026–7.036
  Art 5(3) as basis for torpedo litigation 7.037–7.041
negative duty of abstention, doubtful cases of 4.074
no jurisdiction in private party actions for breach of competition law 1.02
passing-on defence 3.037–3.043
  partial passing-on 3.061–3.063
  unjust enrichment, and 3.037, 3.044–3.052
references to ECJ by national courts 5.65
teleological style of argumentation 2.07
Evidence Regulation 4.050–4.056
evidential value of prior administrative decisions 4.071–4.109

269
## Index

Commission decisions/Art 9 Regulation  
1/2003 4.086–4.087  
commitment decisions, nature of 4.086  
evidential value 4.087  
not proof of infringement in follow-on actions 4.087

Commission decisions/Art 16 Regulation  
1/2003 4.072–4.081  
effect of Art 16(1) 4.074  
interconnection between procedural aspects/appeal on substance 4.079–4.081  
judgment of English Court of Appeal in Crehan 4.082–4.085  
negative duty of abstention 4.074  
scope of rule 4.075–4.078

NCA decisions 4.088–4.109  
Commission proposal 4.088  
Germany 4.104–4.108  
no rule as to evidential value in private litigation 4.088, 4.089  
Romanistic jurisdictions 4.109  
UK 4.090–4.103  
prior administrative infringement decision as proof of infringement 4.071  
evidentiary issues see proving the infringement  
eclusionary abuse see under abusive conduct  
exemplary damages see under damages, measure of  
exploitative abuse see under abusive conduct

Finland  
NCA, consultation of 5.73  
*forum non conveniens* doctrine 7.008, 7.009

France  
basis of damages actions for breach of EU competition law 2.50–2.54  
choice of law 2.50–2.54  
competition law damages actions as claims in tort 2.68  
fault requirement for non-contractual claim satisfied by illegality 2.70  
collective action 6.142–6.147  
documentary evidence, access to 4.031  
French blocking statute 4.049–4.055  
indirect purchaser standing and passing-on 3.081–3.083

Germany  
basis of damages actions for breach of EU competition law 2.26–2.32  
choice of law 2.26–2.32  
competition law damages actions as claims in tort 2.68  
intention or negligence, proof of 2.28, 2.71  
collective action  
assignment of claims 6.152–6.155  
oop-out actions prohibited 6.029  
documentary evidence, access to 4.021–4.027  
exemplary damages 5.24  
indirect purchaser standing and passing-on 3.074–3.080  
availability of 3.075–3.078  
burden of proof 3.079–3.080  
limitation periods 5.48, 5.62–5.63  
suspending 5.62, 5.63  
NCA, consultation of 5.68  
NCA decisions, evidential value of 4.104–4.108

NCA, consultation of 5.69–5.71  
courts bound by decisions 4.104–4.105  
presumption of harm 5.18  
Schutznorm concept 2.08

Greece  
basis of damages actions for breach of EU competition law 2.33–2.35  
harm, presumption of see under damages, measure of  
harmonisation of remedies 1.09, 1.15  
draft proposal for harmonising regulation 1.16  
Hovenkamp, Herbert 3.015

Hungary  
damages/presumption of loss 5.19  
indirect purchaser standing and passing-on 3.001–3.111  
EU law 3.014, 3.018, 3.028–3.066, 3.068  
burden of proof to establish passing-on see under burden of proof  

270  
David Ashton and David Henry - 9781782540762  
Downloaded from Elgar Online at 01/22/2019 05:34:34AM  
via free access
Index

direct rights 1.11–1.13, 1.17
directly effective rights 1.14
distinguishing between rights and remedies 1.09
fixing boundaries between remedial/procedural rules sensu stricto 1.15–1.16
procedural autonomy principle 1.07
remedies and pure rights and obligations 1.11, 1.12, 1.13
rights to enforce 1.10–1.13, 1.17
leniency/leniency programmes 4.007, 4.011, 4.023–4.024
balancing exercise to be carried out 4.029, 4.034
Commission proposal 4.032
Commission’s attempts to limit discovery in US courts 4.061–4.070
importance of leniency programmes recognised 4.067–4.069
reliance on comity 4.065–4.067, 4.070
joint and several liability 5.81–5.87
conditional rebate 5.82
contribution claims against immunity recipients 5.86
immunity recipients, liability of 5.85
immunity recipients, protection afforded to 5.84
leniency documents not held by third parties 4.057
national leniency programmes 4.042–4.048
policy considerations behind leniency 5.32
safeguarding effectiveness of 4.024–4.027, 4.030
lex fori
desirability of lex fori approach 7.114
reservations against 7.114–7.118
limitations on application of lex fori 7.103–7.105
Rome II Regulation, and 7.094–7.096
Commission proposal for harmonisation 7.094–7.095
liability
immunity recipients, liability of 5.85
joint and several see joint and several liability
strict liability 2.69, 2.70
limitation periods 5.47–5.63
EU law 5.47–5.53
proposal, limitation period in 5.49–5.53
rules on limitation periods determined by national law 5.47, 5.54
national law
Germany 5.48, 5.62–5.63
UK 5.48, 5.50, 5.55–5.61
lis pendens
application to parties domiciled outside the EU 7.081–7.082
forum shopping 7.053
multiple litigation, addressing 7.053
connected but not identical actions 7.070–7.071
Commission proposal, and 7.077–7.080
connected but not identical actions 7.068–7.069
English authorities on 7.072–7.076
irreconcilability for purposes of Art 28(3) 7.066–7.067
Lithuania
basis of damages actions for breach of EU competition law 2.39–2.43
loyal/sincere cooperation principle 2.07
deference to Commission decisions 4.082
Luxembourg
collective action scheme absent 6.072
measure of damages see damages, measure of
Member States
autonomy in procedure and remedies 1.01, 1.07, 1.15, 6.004
equivalence and minimum effectiveness conditions 1.01
general obligation to ensure effectiveness of EU law 1.01, 1.04
harmonisation of remedies 1.09, 1.15
collective action in Member States 6.072–6.156

272
collective action introduced 6.004
collective action schemes, absence of 6.072
Denmark 6.127–6.134
divergent systems as obstacle to
to effective inter-Member State action 6.004
effective redress not always provided 6.006
France 6.142–6.147
Italy 6.148–6.149
limitations on who can bring claims 6.005
Netherlands see under Netherlands
opt-in and opt-out systems 6.005, 6.017
Sweden 6.135–6.141
UK see under United Kingdom
see also collective action/redress
damages actions for breach of EU
competition law see damages,
deriving right to
EU law ensuring effective protection of
individuals’ rights against 1.05
indirect purchaser standing/passing-on see
indirect purchaser standing and
passing-on
national competition authorities see
national competition authorities
(NCAs)
national courts see national courts
national law see individual countries
minimum effectiveness see effectiveness
principle

national competition authorities (NCAs) 0.08,
4.004
access to documents held by see under
documentary evidence, access to
consultation of 5.66–5.74
France 5.69–5.71
Germany 5.68
other jurisdictions 5.72–5.74
UK 5.67

evidential value of prior administrative
decisions 4.088–4.109
Commission proposal 4.088
Germany 4.104–4.108

no rule as to evidential value in private
litigation 4.088, 4.089
Romanistic jurisdictions 4.109
UK 4.090–4.103
see also evidential value of prior
administrative decisions
national courts 0.08
Commission decisions, and see evidential
value of prior administrative decisions
Commission’s proposals on evidence
4.059–4.060
cooperation with Commission 7.008
direct effect 1.14
disclosure applications
balancing exercise in 4.029, 4.034
wide margin of discretion in 4.025
expertise, recourse to see recourse to
expertise of public authorities by
national courts
giving effect to EU law rights and
obligations 1.01
private damages claims 1.05, 1.06
references to ECJ 5.65
national law see individual countries
ne bis in idem principle 5.29–5.30
Netherlands
basis of damages actions for breach of EU
competition law 2.44–2.46
choice of court/application of Art 6(1)
7.052
collective action 6.110–6.126
Art 3:305a Burgerlijk Wetboek
6.111–6.112
assignment of claims 6.156
bundled claims 6.113–6.116
Wet Collectieve Afhandeling
Massaschade (2005) 6.117–6.126
Commission decisions/Art 16 Regulation
1/2003 4.079–4.081
opt-out collective action system 6.017
passing-on see indirect purchaser standing and
passing-on
Portugal
opt-out collective action system 6.017
Posner, Richard A. 3.009, 3.010, 3.016, 8.018

273
Index

presumption of harm see under damages, measure of
prices see under abusive conduct; cartels
prior administrative decisions see evidential value of prior administrative decisions
private enforcement
Commission's private enforcement initiative see under Commission, EU damages
actions for breach of EU law committed by another individual 1.05, 1.06
measure of damages see damages, measure of
EU law not providing substantive or procedural rules in private disputes 1.02, 1.04
increased interest in 0.08
indirect purchasers see indirect purchaser standing and passing-on
individual rights
access to court and to class of action to protect right 1.10
direct rights 1.11–1.13, 1.17
establishing causal relationship, difficulties of 3.030
see also causation
rights to enforce 1.10–1.13, 1.17
meaning of 0.07
obligations imposed on private undertakings 1.08, 1.18
procedural issues in private actions 0.12, 0.13
proliferation of competition law damages actions likely 0.13
proving the infringement see proving the infringement
settlement of actions before final decision, frequent 0.11
private international law aspects 7.001–7.130
applicable law see applicable law choice of court 7.005–7.091
Art 5(3) as basis for torpedo litigation
7.037–7.041
Bier/Shivill jurisprudence and competition-based litigation
7.026–7.036
causation 7.050–7.051
choices of court, variety of 7.010–7.012
Commission proposal and Art 28
7.077–7.080
connected but not identical actions
7.068–7.071
consolidation of claims/Art 6(1) 7.012, 7.042, 7.065
Dutch courts' application of Art 6(1)
7.052
English authorities on Art 6(1) 7.043
founding jurisdiction in tortious actions/Art 5(3) 7.023–7.025
governing law: Regulation 44/2001
7.006–7.009
lis pendens see lis pendens
litigation involving parties domiciled outside EU 7.086–7.091
parties domiciled outside the EU and Regulation 44/2001 7.013–7.015
special jurisdiction: Art 5(3) and Art 6(1) 7.018–7.022
'undertaking', interpretation of EU law concept of 7.045–7.049
EU harmonised rules 7.002, 7.008
national boundaries, litigation effects cutting across 7.001
private litigants' access to probative documents in EU cartel damages actions 4.004–4.070
Commission documents, access to see under documentary evidence, access to
claims for damages, bringing 4.004
follow-on actions 4.004
existence of right to inspect evidence dependent on national/EU law 4.005
procedural autonomy principle see under
Member States
profitability-based approach 8.071–8.073
increases/decreases in profits as indicator for damages 8.071
measuring profitability 8.072–8.073
proving the infringement 4.001–4.109
access to evidence/documents, importance of 4.003
prior administrative decisions see evidential value of prior administrative decisions
private litigants see private litigants’ access to documents in EU cartel actions
public authorities/public enforcement antitrust enforcement preserve of 0.04, 6.001
collective action as effective complement to public enforcement 6.002, 6.003 see also collective action/redress evidential value of decisions in actions by public authorities 4.074
expertise, recourse to see recourse to expertise of public authorities by national courts
public enforcement, meaning of 0.07
punitive damages see exemplary damages under damages, measure of
quantification of damages see damages, quantification of ‘rational apathy problem’ 6.009
recourse to expertise of public authorities by national courts 5.64–5.74
EU law: consultation of the Commission 5.65
national law: consultation of the NCA 5.66–5.74
France 5.69–5.71
Germany 5.68
other jurisdictions 5.72–5.74
UK 5.67
specialist authorities, meaning of 5.64
Regulation 44/2001
Art 2(1)/general jurisdiction 7.016–7.017
Art 5(3)
application of Bier/Shvetz/jurisprudence 7.026–7.036
founding jurisdiction in tortious actions 7.023–7.025
special jurisdiction 7.018–7.022
torpedo litigation, as basis for 7.037–7.041
Art 6(1)/consolidation of claims 7.012, 7.042, 7.065
Dutch courts’ application of 7.052
English authorities on 7.043–7.044
special jurisdiction 7.018–7.022
Art 27/lis pendens 7.054, 7.055–7.062, 7.063, 7.064
connected but not identical actions 7.070–7.071
Art 28/lis pendens 7.012, 7.054, 7.063–7.065
Commission proposal, and 7.077–7.080
connected but not identical actions 7.068–7.069
English authorities on 7.072–7.076
irreconcilability for purposes of Art 28(3) 7.066–7.067
Commission review of 7.083–7.085
parties domiciled outside the EU 7.013–7.015
replacing Brussels Convention 7.006
scope 7.008
uniform rules of jurisdiction for defendants domiciled in Member States 7.007
remoteness
damage quantification 8.104–8.108
remoteness of claims 3.013
restitutio in integrum (actual loss/loss of profit) 5.11–5.12, 5.24, 5.34
rights
individual rights see under private enforcement
legal framework see under legal framework
Rome I Regulation 7.004, 7.094
Rome II Regulation 7.004
Art 4/general rule 7.097–7.098, 7.123
Art 6(3)/competition-based litigation 7.099–7.101
Art 6(3)(a) 7.119–7.123
Art 6(3)(b), functioning of 7.102–7.111
Art 6(4) 7.101
legislation, adoption as 7.096
lex fori approach, and 7.094–7.096
Schwartz, Marius 3.010
simulated comparator markets 8.067–8.068
artificially constructed counterfactual model, as 8.067

275
Index

fundamental conceptual problems 8.068
sincere cooperation principle see loyal/sincere cooperation principle
Slovakia
- collective action scheme absent 6.072
Slovenia
- collective action scheme absent 6.072
Spain
- basis of damages actions for breach of EU competition law 2.60–2.61
- opt-out collective action system 6.017
- substantial and procedural issues
- causation see causation
damages, measure of see damages, measure of
- expertise, recourse to see recourse to expertise of public authorities by national courts
- joint and several liability see joint and several liability
- limitation periods see limitation periods
Sweden
- collective action 6.135–6.141
- courts as ‘specialist authorities’ 5.64
time series analysis 8.055–8.060
- advantages and disadvantages 8.055
- before-and-after method 8.055–8.057
- caution required in focusing on prices after cartel ended 8.060
- empirical example of before-and-after estimation 8.058
- nature of method 8.055
tortious nature of litigation for breach of EU competition law 2.62–2.68, 7.004
- actions tortious rather than contractual 2.63, 2.64, 7.004
- agreements in contravention of competition law void/nullity 2.65, 2.66
- tying 8.047
- ‘undertaking’ in EU law, interpretation of 7.045–7.049
United Kingdom (England and Wales)
- basis of damages actions for breach of EU competition law 2.19–2.21
- causation 5.03–5.06
- but-for test 5.03
- standard of proof 5.05
- collective action 6.043, 6.073–6.109
- Competition Act (s 478) 6.084–6.091
- further policy developments 6.092–6.109
- GLOs 6.081–6.083
- integral to legal system 6.074
- representative actions 6.076–6.080
- statutory provision 6.073
Competition decisions/Art16 Regulation 1/2003 4.078
- Crehan judgment 4.082–4.085
deferece 4.082–4.083
- competition law damages claims as tort of breach of statutory duty 2.68, 2.69
- strict liability 2.69, 2.70
damages, exemplary 5.24–5.46
- assessing 5.40
- exceptional remedy 5.2
- guiding principles 5.40–5.41
- intentional or reckless breaches 5.38
- ne bis in idem principle 5.29–5.30
- purpose/object 5.32, 5.39, 5.40
- when awarded 5.25, 5.27, 5.29, 5.38, 5.43
damages/presumption of loss 5.20
disclosure of documents/National Grid 4.036, 4.037–4.056
- balancing exercise 4.044–4.045, 4.048
- disclosure and inspection of documents 4.039
documents held by third parties, access to 4.058
- Evidence Regulation 4.050–4.056
- French blocking statute 4.049–4.055
- history of discovery 4.038
- legitimate expectations 4.044
- national leniency programmes 4.042–4.048
- proportionality 4.045
- withholding documents from inspection 4.040–4.048
establishment of right to damages as
matter of EU law: Crehan 2.03–2.17
proceedings in the English courts
2.03–2.11
indirect purchaser standing and passing-on
3.069–3.073
burden of proof 3.070
defence of passing-on 3.069–3.073
government consultation 3.071
OFT view 3.070
joint and several liability 5.75
contribution 5.77
jurisdiction 7.027–7.029
Art 6(1) Regulation 44/2001, authorities
on 7.043–7.044
Art 28 Regulation 44/2001, authorities
on 7.072–7.076
knowledge
imputing knowledge of parent’s conduct
to subsidiary 7.049
required on part of defendant to found
damages claim 7.049
limitation periods 5.48, 5.50, 5.55–5.61
harmonising limitation periods
5.60–5.61
statutory basis for limitation periods 5.55
NCA, consultation of 5.67
NCA decisions, evidential value of
4.090–4.103
CAT decisions 4.091
damages actions following public
infringement decision 4.090–4.091
identity of parties on whom
administrative decisions binding
4.098–4.103
OFT decisions 4.091
scope of follow-on actions under
Competition Act 4.092–4.097
teleological style of argumentation 2.07
United States (US)
antitrust injury 2.08
concept of 3.090–3.091
class/collective action 6.157–6.173
Class Action Fairness Act (2005)
6.169–6.173
common feature of antitrust enforcement
3.018, 6.007
effectiveness 6.007
Federal Rules of Civil Procedure (R 23)
6.158–6.168
indirect purchaser actions 3.111
opt-out system 6.020
Commission’s attempts to limit discovery
in US courts 4.061–4.070
importance of leniency programmes
recognised 4.067–4.069
reliance on comity 4.065–4.067, 4.070
disclosure/discovery of documents 4.036
broad extent of discovery 4.062
evidential value of decisions in actions by
public authorities 4.074
foreign purchasers, damages actions in US
by 7.003
indirect purchaser standing 0.04,
‘co-conspirator’ exception 3.107
‘cost-plus’ exception 3.107
‘direct’ and ‘indirect’ purchasers 3.036
direct purchasers, nature of 3.103–3.104
limitations in relation to indirect
purchaser actions 3.099–3.102
‘ownership or control’ exception 3.106
rule in Illinois Brick 3.099–3.104
rule in Illinois Brick, efficiency of
3.110–3.111
rule in Illinois Brick, exceptions to
3.105–3.109
leniency programme 4.067
passing-on defence 0.04, 3.092–3.098
disallowed 3.092–3.096
private antitrust enforcement 0.04
Sherman Act 3.091
direct and substantial effect, conduct
having 7.112–7.113
unjust enrichment
avoiding 3.025
passing-on defence, and 3.037,
3.044–3.052
Van Gerven, Walter 1.15–1.16
Werden, Gregory J. 3.010, 8.018

277