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

263
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
Ashur 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

264
David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/14/2019 12:27:42PM
via free access
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
Index

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 cartels
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

266

David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/14/2019 12:27:42PM via free access
Index

damages, measure of 5.07, 5.12
documents held by national competition authority, disclosure of 4.032–4.034
evidence proposals 4.059–4.060
indirect purchaser standing 3.035
limitation periods 5.49–5.53
NCA decisions, evidential value of 4.088
partial passing-on 3.063
passing-on defence 3.066
Regulation 44/2001
Art 28, Commission proposal and 7.077–7.080
Commission review of 7.083–7.085
White Paper 0.09, 2.63
burden of proof to establish passing-on 3.054
collective action 6.047–6.050
indirect purchaser standing 3.032, 3.033
passing-on defence 3.064
common law damages actions for breach of
EU competition law 2.19–2.23
England and Wales 2.19–2.21
Ireland 2.22–2.23
compensation as policy objective
collective action 6.002, 6.013
indirect purchaser standing and passing-on
3.005, 3.008
competition culture 6.002, 6.042
competition enforcement in the EU 0.07
antitrust enforcement by public enforcement authority 0.04, 0.07, 6.001
decentralisation of enforcement of antitrust rules 0.08
private enforcement see private enforcement
public enforcement, meaning of 0.07
see also public authorities/public enforcement
modernisation of 0.08
compounding and discounting damages 8.095–8.098
Connor, John M. 8.018
consumers
collective action see collective action/redress
consumer injunctions 6.038
unfair terms in consumer contracts 6.037
contribution
Commission’s proposal on contribution 5.78–5.87
cartel settlements 5.79–5.80
determining contribution 5.78
leniency, application to see under leniency/leniency programmes
national law system of contribution 5.78
immunity recipients, contribution claims against 5.86
joint and several liability 5.76–5.80, 5.86
UK 5.77
cost-based approach 8.069–8.071
comparator-based approaches, as 8.069
variable costs 8.069–8.070
counterfactual scenarios see under abusive conduct; cartels
cross-sectional analysis 8.061–8.064
advantages and disadvantages 8.064
nature of 8.062
regression techniques 8.063
Cyprus
collective action scheme absent 6.072
exemplary damages 5.24
Czech Republic
collective action scheme absent 6.072

damages, measure of 5.07–5.46
Commission proposal 5.07
exemplary damages 5.07
EU law 5.21–5.46
national law 5.24–5.46
nature of 5.21
UK see under United Kingdom (UK)
 presumption of harm 5.13–5.20
burden of proof on defendant 5.13–5.14
EU law 5.17
impact of 5.14–5.16
national law 5.18–5.20
types of damage recoverable 5.08–5.12
‘lost sales effect’ 5.08–5.10
pecuniary loss 5.08
restitutio in integrum (actual loss/loss of profit) 5.11–5.12, 5.24, 5.34

damages, quantification of 8.001–8.112

267

David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/14/2019 12:27:42PM
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
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
deerence
deerence 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
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
David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/14/2019 12:27:42PM
via free access
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
exclusionary abuse see under abusive conduct
exemplary damages see under damages, measure of
exploitative abuse see under abusive conduct

Germany
basis of damages actions for breach of EU competition 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
opt-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 4.104–4.105
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

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
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
disclosure

documentary evidence, access to 4.031
French blocking statute 4.049–4.055
indirect purchaser standing and passing-on 3.081–3.083

burden of proof 3.083
admissibility of passing-on defence 3.083
NCA, consultation of 5.69–5.71
NCA decisions, evidential value of 4.109

270
Commission’s position on indirect standing see under Commission, EU
indirect purchaser standing 3.014, 3.029–3.031
partial passing-on 3.061–3.063
passing-on defence 3.037–3.043
passing-on defence and unjust enrichment 3.037, 3.044–3.052
indirect purchaser, definition of 3.012
indirect purchaser standing 3.001, 3.011–3.021
EU approach 3.014, 3.018, 3.029–3.031, 3.068
evidentiary obstacles, overcoming 3.019–3.020
importance of 3.013
judicial and academic controversy 3.014–3.017
remoteness of claims 3.013
representative/class actions 3.018
national law 3.067–3.088
England and Wales 3.069–3.073
France 3.081–3.083
Germany 3.074–3.080
Italy 3.084–3.088
passing-on defence 3.022–3.027
consequences of invoking defence 3.024–3.027
consequences of not recognising defence 3.025
passing-on, nature of 3.023
unjust enrichment, avoiding 3.025
theoretical underpinnings 3.001–3.027
awarding damages to different levels of claimants 3.001–3.003, 3.009
clash of policy objectives 3.004, 3.008–3.010
compensation/fairness as policy objective 3.005, 3.008
deterrence as policy objective 3.006, 3.008, 3.009, 3.016
economical litigation as policy objective 3.007, 3.008
indirect purchaser standing 3.001, 3.011–3.021
passing-on defence 3.022–3.027
US see under United States (US)
infringement, proving see proving the infringement
IPRs protection Directive 6.039
Ireland
basis of damages actions for breach of EU competition law 2.22–2.23
courts as ‘specialist authorities’ 5.64
disclosure/discovery of documents 4.036
exemplary damages 5.24
Italy
basis of damages actions for breach of EU competition law 2.55–2.59
collective action 6.148–6.149
indirect purchaser standing and passing-on 3.084–3.088
claims by indirect purchasers in theory applicable 3.087
defence of passing-on not specifically recognised 3.085–3.086
NCA decisions, evidential value of 4.109
joint and several liability 5.75–5.87
contribution 5.76–5.80, 5.86
UK 5.77
Commission’s proposal on contribution 5.78–5.87
cartel settlements 5.79–5.80
determining contribution 5.78
leniency, application to see under leniency/leniency programmes
national law system of contribution 5.78
meaning of 5.75
Lande, Robert H. 8.018
Landes, William M. 3.009, 3.010, 3.016
Latvia
basis of damages actions for breach of EU competition law 2.36–2.38
collective action scheme absent 6.072
legal framework 1.01–1.18
application to damages actions for breach of EU competition law 1.17–1.18
case law of ECJ on remedies 1.01–1.06
doctrines of equivalence and minimum effectiveness 1.01, 1.03
private actions for breach of EU competition law 1.05, 1.06
rights to remedies, move from1.07–1.16

271
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 4.065–4.070
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
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,
underlying 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
cooperaion 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
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/Shevill 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
general jurisdiction/Art 2(1) 7.016–7.017
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

274

David Ashton and David Henry - 9781782540762
Downloaded from Elgar Online at 01/14/2019 12:27:42PM via free access
Index

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/Shevill/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
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
everest, 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
cautions 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
Commission decisions/Art16 Regulation 1/2003 4.078
Cypern judgment 4.082–4.085
defence 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

276
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
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, 3.014–3.015, 3.028, 3.099–3.111
‘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