

INTRODUCTION

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This book sets out the current state of the law, both at European Union (EU) and Member State level, in relation to actions for damages for loss caused by infringements of Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).¹ This two-tier framework for the bringing of damages actions has given rise to the adoption of several Commission papers on the subject,² and the reader is referred to these and other publications³ for the surrounding policy debate. We will discuss and analyse the relevant policy proposals in the chapters that follow, but our purpose is not to make policy recommendations. **0.01**

In terms of methodology, the approach adopted has been to start from EU law, meaning both positive law available in relation to the issues considered as well as any law that can be referred to by analogy, and also policy developments in the field. We then move on to consider the relevant law of the Member States, either used as a means of comparison to EU law, or, as often, in the absence of such law. Finally, we also examine the US system, which is arguably the most mature regime in this field, as a source of comparison to existing, or missing, EU law. **0.02**

As regards national law, we have not exhaustively examined the law of all 27 Member States in relation to each issue. Instead, we have adopted a comparative approach whereby we have selected representative jurisdictions from the major European legal families.⁴ This has involved, in the majority of cases, looking at developments from the UK, Germany and France, but we have **0.03**

1 Such actions are referred to throughout, in short hand, as 'damages actions', or 'damages for breach of EU competition law', or another similar term.

2 See the Commission's Green Paper (COM(2005)672) and accompanying Staff Working Paper (SEC(2005)1732) of 19 December 2005, and its White Paper (COM(2008)165) and accompanying Staff Working Paper (SEC(2008)404) of 2 April 2008. References to the 'Green Paper' and 'White Paper' throughout this book are to these documents.

3 See, for example, Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, 31 August 2004, and CEPS/EUR/LUISS, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 21 December 2007, which formed the background to the Commission's Impact Assessment of 2 April 2008 (SEC(2008)405) (the 'Impact Assessment'), adopted at the same time as the White Paper.

4 See further Chapter 2 for the identification of the major European legal families in this regard.

brought in developments from other jurisdictions as and where relevant when considering any given issue. In the present state of law and policy, the UK and Germany are, in some respects, the most fertile grounds in Europe for bringing antitrust damages actions.⁵ Moreover, they are of particular interest, as they are currently undergoing extensive antitrust reform.⁶

0.04 It should be noted at the outset that the situation in the EU stands in marked contrast to that in the US, where the contours and parameters of private antitrust enforcement are deeply ingrained in the legal system. As such, the US is by a significant margin ahead of the EU in terms of developing the intricate legal rules concerning private damages actions, such as indirect purchaser standing and passing-on. This can to a large extent be explained by the fact that the vast majority (approximately 90 per cent) of antitrust proceedings in the US are initiated by private parties,⁷ while in the EU, by contrast, antitrust enforcement remains the quasi-exclusive preserve of the public enforcement authority. As such, the weight accorded to the objectives to be attained by a system of private damages actions can be, and likely is, to a certain degree different between the two systems.

0.05 In the chapters that follow, we analyse certain key issues on a selective basis. Those issues are, briefly stated, indirect purchaser standing and passing-on, collective redress, and the relevant private international law, namely choice of court and, in the absence of a fully harmonised set of substantive rules as a matter of EU law, the national law applicable to the claim. We have also made a selection of evidential and procedural issues, one of the most important of which is the currently vexed question of access to the file for the purpose of

5 As a general statement of policy in Germany, see for example *Bundeskartellamt*, 'Private Kartellrechtsdurchsetzung: Stand, Probleme, Perspektiven' (2005), which stated that '*Private Kartellrechtsdurchsetzung spielt in Deutschland eine wichtige und wertvolle Rolle*' (which can be translated as '*private antitrust enforcement plays an important and valuable role in Germany*').

6 In May 2012, the German Federal Government published its draft of the 8th amendment to the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB). In the UK, the outstanding recent development is the consultation by the Department for Business, Innovation & Skills (BIS), 'Private Actions in Competition Law: A Consultation on Options for Reform', April 2012, and BIS, 'Private Actions in Competition Law: A Consultation on Options for Reform – Government Response', January 2013). The former is referred to throughout as the '*2012 BIS consultation*', and the latter as the '*2013 BIS response*'.

7 See DTI, 'A World Class Competition Regime' (July 2001), at Chapter 8, para 1. The fact that litigation outweighs public enforcement in the US has, however, attracted criticism from some commentators: '*[t]he privatization of antitrust enforcement has many negative consequences. Private litigants often have interests that conflict with those of the intended beneficiaries of antitrust law—i.e. consumers—and can misuse antitrust to facilitate rather than thwart anticompetitive behavior. Further, judges tend to limit their decisions in private litigation to the facts specific to each case. Thus, the fact that most antitrust liability rules are created in private litigation where courts err on the side of deliberate under-inclusion tends to dilute the strength of antitrust norms in public litigation*' (D.A. Crane, 'Antitrust Antifederalism' (2008) 96(1) *California Law Review* 1, at 38).

substantiating a damages claim. Finally, we conclude with a chapter on the quantification of damages, authored by specialist economists.

This book is not intended as an exhaustive reference work containing details of all competition-related litigation brought in the Member States. Our intention has rather been to introduce the issues, explaining them to an audience which is not necessarily expert, and placing the whole field of competition law litigation in a theoretical, practical and comparative context. **0.06**

I COMPETITION ENFORCEMENT IN THE EU

The antitrust rules contained in the TFEU are enforced both by way of decision taken by competition authorities and other public authorities,⁸ and litigation brought before the courts by private parties in relation to an alleged infringement of the competition rules by another private party.⁹ While by 'public enforcement' is intended the application of those rules by public authorities, so-called 'private enforcement' consists in their application in civil disputes between private parties and in civil proceedings. Despite the restricted subject-matter of this book, it should be recalled that private enforcement of antitrust rules can take different forms, notably nullity of contracts if they infringe Article 101 TFEU¹⁰ (see Article 101(2) TFEU) or Article 102 TFEU, injunctive relief and damages actions. **0.07**

II THE COMMISSION'S PRIVATE ENFORCEMENT INITIATIVE

There has been an increased interest in the private enforcement of EU competition law in recent years. This process received a significant boost from **0.08**

8 In certain Member States, as is the case in the US, infringement decisions are taken by courts on the introduction of an action by the competition authority. This is the case in Austria, Finland, Ireland and Sweden (in Sweden this model applies only in those cases in which the imposition of fines is sought by the national competition authority). The use of the term 'competition authority' throughout includes reference to courts acting in such a capacity.

9 In the literature and policy documents, these modes of action are often referred to, respectively, as '*public*' and '*private enforcement*' of competition law. In respect of the latter, this may be a misnomer, as the purpose of the action from the point of view of the claimant is not law enforcement, but the specific remedy sought pursuant to a right, whether that be monetary (damages), or, for example, behavioural, such as an action for injunctive relief. The notion of '*private enforcement*' probably derives ultimately from the vocabulary adopted by the Commission in its policy documents, since from the perspective of this institution, competition-related litigation has the primary function of supplementing or, in the wake of the modernisation reform, even replacing the Commission's enforcement activity, where an absence of adequate resources may so require.

10 The editorial style adopted throughout is to use current Treaty references and terminology, even when the source material predates the Lisbon Treaty.

the modernisation of the enforcement of EU competition law carried out around the turn of the millennium, as well as judicial developments at around the same time. Regulation 1/2003¹¹ aimed at decentralising the enforcement of the antitrust rules by fostering the involvement of national competition authorities and national courts in the application of these rules. Its Article 6 gave the courts of the Member States the power to apply Article 101(3) TFEU, decisions as to the applicability of which had previously been the exclusive competence of the Commission under Article 9(1) of Regulation 17/62.¹² Around the same time, in the *Crehan* judgment of 2001,¹³ the Court of Justice¹⁴ (ECJ) ruled that the full effectiveness of Articles 101 and 102 TFEU demands that *everyone* who has suffered a loss because of an infringement of the rules laid down in these articles be able to recover those losses from the infringer.¹⁵

0.09 As mentioned above, in order to advance its policy aim of facilitating the bringing of antitrust damages claims, the Commission started looking at the issue in 2003 with the launching of the Ashurst study, which led to the adoption of the Green Paper in 2005. This was followed by the White Paper in 2008, and shortly afterwards the Commission attempted to adopt a legislative proposal in the field as almost the final act of the tenure of Commissioner Kroes at DG Competition.¹⁶ In a notorious series of actions, this initiative was apparently pulled from the agenda of the College meeting at the last moment as the result of political pressure put on the President of the Commission.

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- 11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p 1).
 - 12 Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13, 21.2.1962, p 204). The Commission had gone further in its White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999)101), stating that national courts were the most appropriate forum for the enforcement of EU competition law. This is because they are in a position, in contrast to the Commission, to award damages, para 46 '*The national courts for their part are in a better position than the Commission to accede to certain requests by complainants: they can act rapidly through interlocutory proceedings and, unlike the Commission, can grant damages to those who have been the victims of infringements.*'
 - 13 Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297. This judgment is referred to throughout as '*Crehan*'.
 - 14 The abbreviation 'ECJ' is used throughout to refer specifically to the 'Court of Justice', as defined in Article 19(1) of the Treaty on European Union (TEU). 'General Court' is used as per the same provision.
 - 15 As recently reiterated in Case 360/09 *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011 (not yet reported) at para 28. Furthermore, in its judgment of 6 November 2012 in Case C-199/11 *Europese Gemeenschap v Otis NV and others* (not yet reported), the ECJ extended this principle to cover competition law damages actions brought before a national court by the Commission itself, holding as follows at para 36: '*... EU law must be interpreted as meaning that ... the Commission is not precluded from representing the EU before a national court hearing a civil action for damages in respect of loss caused to the EU by an agreement or practice prohibited by Articles 81 EC and 101 TFEU which may have affected certain public contracts awarded by various institutions and bodies of the EU, there being no need for the Commission to have authorisation for that purpose from those institutions and bodies.*'
 - 16 Proposal for a Council directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty, 2009, referred to throughout as the '*draft Directive*'.

After the withdrawal of the so-called 'draft Directive', DG Competition became embroiled in the morass of the Commission's initiative on collective redress, which stretched over several years during the term of the Barroso II Commission, and is indeed still on-going.¹⁷ However, a long-awaited second shot at a legislative initiative, without a provision on collective redress, has recently been adopted,¹⁸ together with a recommendation and a communication on collective redress.¹⁹ Analysis of these documents at the relevant pages throughout this book rounds the story off, for the time being at least, almost exactly ten years since the tender documentation for the Ashurst study was drawn up. **0.10**

While, at first sight, it may be argued that the bringing of private damages actions has not proven to be the panacea that it was envisaged to be,²⁰ such an assessment is overly simplistic and fails to take into account a number of issues. For example, a significant number of private damages claims is often settled before a final decision is reached.²¹ While settlement is to be encouraged as it will often be in the best interests of the parties concerned, this arguably prematurely curtails the development of case law in the area. **0.11**

17 See further Chapter 6.

18 Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)404). References to 'the proposal' or 'the Commission proposal' throughout should be understood as references to this document, unless otherwise stated. At the same time, the Commission adopted a communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (C(2013)3440), as well as an accompanying Staff Working Document ('Practical Guide') on quantifying harm (SWD(2013)205).

19 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the member States concerning violations of rights granted under Union law (C(2013)3539), and Communication on 'towards a European horizontal framework for collective redress' (COM(2013)401). These are referred to as 'the recommendation on collective redress' and 'the communication on collective redress' respectively.

20 See, for example, the speech by then Commissioner Kroes, 'Damages Actions for Breaches of EU Competition Rules: Realities and Potentials', Speech/05/613 of 17 October 2005: 'Let me make it clear from the outset that I am convinced that there is great potential in advancing damages cases for breach of the European Competition Rules. Not because I think any of us want to go down the track of litigation culture for its own sake. But rather I think Europe and its businesses and citizens would profit from a stronger competition culture, and an appropriate degree of private enforcement can promote this. A competition culture helps create a fertile environment for business. It contributes to sustainable growth and economic and social welfare for our citizens. And, in other words, it contributes directly to Europe's top priorities.'

21 Witness in this respect two such illustrative examples from the UK: *Healthcare at Home v Genzyme* [2006] CAT 30, and Case No 1078/7/9/07 *The Consumers' Association v JJB Sports Plc*. The former was the first time a private action for damages was brought pursuant to section 47A of the Competition Act 1998 following a decision by the Office of Fair Trading (OFT). It was subsequently settled and an order was granted by the Competition Appeal Tribunal (CAT) on 11 January 2007. An interim award was made, but the issues of quantum and exemplary damages were not decided. The latter was the first collective action for damages brought before the CAT under s47B of the Competition Act 1998. Ultimately the case was settled, and the claim withdrawn (see further Chapter 6 for an extensive discussion). For an in-depth study, see B. Rodger, 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000–2005' [2008] ECLR 96.

- 0.12** Important yet difficult matters of a procedural nature have also occupied the courts with respect to damages actions. As the number of private actions brought before national courts increases, the courts have been faced with novel procedural points of law that have to be addressed. At times, these issues are often litigated all the way to courts of last instance, further prolonging the commencement of any substantive assessment of a private damages claim.
- 0.13** Moreover, the paucity of extensive and consistent European-wide empirical evidence on the matter belies the fact that there is a growing trend of private damages claims being brought before national courts.²² For example, the considerable number of cases concerning procedural issues before national courts attests to this growing trend.²³ Indeed, it is the authors' contention that, as the procedural landscape of private actions becomes clearer, claims will be brought in increasing numbers, despite competition law cases being notoriously complex and difficult to run.²⁴ In that sense, once the docket of procedural cases is cleared, further claims can be brought with a better view as to the procedural requirements. Furthermore, these developments are being accompanied by legislative reform in a number of Member States, such that in our view it is likely that competition law damages actions in the EU will proliferate.²⁵

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- 22 There have been some useful empirical studies on particular countries such as the United Kingdom. See B. Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004' – Parts I–III in [2006] ECLR 241–248; 279–292 and 341–350, and B. Rodger, 'Competition Law Litigation in the UK Courts: A Study of all Cases 2005–2008' – Parts I and II in [2009] GCLR 93–114 and 136–147; in relation to Germany (albeit limited to two years), see S. Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence' [2012] *Journal of Competition Law and Economics*, 8(2) 331–359.
- 23 As a snapshot, if we take two jurisdictions commonly considered to be among the most advanced in the field of competition law damages actions (England and Wales and Germany), it is evident from the procedural cases that are currently pending that there is an appetite for private litigation. Two such examples in Germany are *CDC Hydrogen Peroxide v Akzo* (pending before the *Landgericht* Dortmund), and *HUK Coberg v AGC and others* (pending before the *Landgericht* Düsseldorf). In the UK, the Supreme Court recently heard its first competition case, which concerned a procedural issue (*BCL Old Co Limited and others v BASF plc and others* [2012] UKSC 45; see further Chapter 5), and has granted leave in another (*Deutsche Bahn AG and others v Morgan Crucible Company plc and others*, UKSC 2012/0209, leave granted on 21 December 2012; again, see further Chapter 5).
- 24 An illustrative example of this is the fact that only recently a Dutch court gave its first substantive damages judgment for an infringement of competition law (see case LJN BZ0403, *Rechtbank* Arnhem, 208812, *Tennet TSO BV v ABB BV*, judgment of 16 January 2013).
- 25 To take but one example, on 1 March 2013 amendments to the Austrian *Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen* (Austrian federal law on cartels and other restrictions of competition) came into force, changing the law governing the bringing of damages actions in Austria. §37a now provides that the civil courts are bound by a finding of infringement by the *Kartellgericht* (Austrian Cartel Court), other Member State competition authorities, or the Commission: '*Ein Zivilgericht ist an eine in einer rechtskräftigen Entscheidung des Kartellgerichts, der Kommission der Europäischen Union oder einer Wettbewerbsbehörde im Sinn der Verordnung (EG) Nr. 1/2003 getroffene Feststellung, dass ein Unternehmen die in der Entscheidung angeführte Rechtsverletzung rechtswidrig und schuldhaft begangen hat, gebunden.*'

Ultimately, it remains evident that, notwithstanding the slow start, private enforcement in the EU is a topic of the utmost importance to practitioners and in-house counsel because they will increasingly have to advise on the complex matter of antitrust damages exposure. **0.14**