THE PRIVATE COMPETITION ENFORCEMENT REVIEW

FOURTEENTH EDITION

Editors

Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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Editors
Ilene Knable Gotts and Kevin S Schwartz

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

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law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In South Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions, such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority

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acts that a private action will be decided by the court. Of course, in the UK – a jurisdiction that has been one of the most active and private-enforcement friendly global forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, the Netherlands, Norway, South Korea and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will, in certain circumstances, award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

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punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can obtain unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and South Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, South Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, the Netherlands, South Korea, Spain and Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In South Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require

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parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
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Chapter 1

EUROPEAN UNION

William Turtle, Camilla Sanger and Olga Ladrowska[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In recent years, the private competition litigation landscape in the EU has been shaped by the implementation of the Damages Directive. The Damages Directive was intended to achieve greater harmonisation between private competition enforcement regimes across Member States, in pursuit of the express aim of the European Commission (the Commission) to encourage greater private enforcement of competition law. However, while the Damages Directive was successful in prescribing a series of minimum requirements, Member States retain discretion over a range of areas and there remain significant variations between national regimes. In many jurisdictions, the effect of the implementation of the Damages Directive has been to create a unique regime for competition claims that is distinct from general civil litigation claims.

On 14 December 2020, the Commission published a report on the implementation of the Damages Directive (the Implementation Report).[2] Although the Commission observed that it is too early for a thorough review of the application of the key rules of the Damages Directive, the Implementation Report drew a generally positive conclusion as regards the consistent implementation of the Damages Directive across Member States. The Commission also noted its own initiatives to ensure the effectiveness of the Damages Directive and praised the guidance given by the Court of Justice of the European Union (CJEU) concerning private damages actions.

In terms of competition litigation activity in individual Member States, as recently noted by the Commission in the Implementation Report, there has been a significant upward trend across the EU. Of particular note are the follow-on competition claims arising from various Commission decisions that have been litigated (often in parallel) in multiple Member States.

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1 William Turtle and Camilla Sanger are partners and Olga Ladrowska is an associate at Slaughter and May. The authors would like to thank Madison Vincent for her assistance in preparing this chapter.

2 Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (SWD(2020) 338 final).

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II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), alongside Regulation 1/2003,[3] provide the foundation of the legislative framework for private competition law enforcement: these directly applicable provisions afford EU citizens the substantive right to bring damages claims for harm suffered as a result of a breach of EU competition law.

These legal instruments do not, however, address the procedural elements of private competition law enforcement. Until the introduction of the Damages Directive, there was no single EU legal instrument addressing how competition claims could be brought in practice. As discussed in Section I, the Damages Directive set out to create 'a more level playing field for undertakings operating in the internal market'[4] by stipulating the minimum requirements that Member States' national laws must meet.

Despite this, the extent of harmonisation should not be exaggerated. The Damages Directive did not address a number of important practical matters, such as costs and funding, collective redress and injunctive relief. Moreover, for issues such as jurisdiction and governing law, it remains necessary to turn to other pieces of EU legislation (see below). Even where the Damages Directive does address a particular issue, there is scope for divergence in the interpretation (and therefore the implementation) of its provisions. This is apparent in, for example, how certain Member States have chosen to treat the provisions relating to limitation.

The Damages Directive contains a provision setting out the conditions for the temporal application of its procedural and substantive provisions.[5] Member States had to ensure that: national measures adopted to comply with substantive provisions did not apply (1) retroactively;[6] and (2) to actions for damages of which a national court had taken jurisdiction prior to 26 December 2014.[7]

i Limitation

The Damages Directive introduced a minimum limitation period of five years for cartel damages claims.[8] This five-year period does not begin to run until the infringement ceases and a claimant is aware of (or can reasonably be expected to be aware of) the behaviour constituting the infringement, the fact that the infringement caused him or her harm and the identity of the infringer.[9]

The Damages Directive also includes a provision to suspend the limitation period during an investigation and any subsequent appeal process. This suspension must end no

3 Regulation (EC) No. 1/2003 of 16 December 2002.
4 Recital 9, Damages Directive.
5 Article 22, Damages Directive.
6 Article 22(1), Damages Directive.
7 Article 22(2), Damages Directive.
8 Article 10(3), Damages Directive. The limitation period in a number of jurisdictions (e.g., the Netherlands) already met this requirement, while in others (e.g., Germany and Spain), it was extended by the national implementing legislation.
9 Article 10(2), Damages Directive.

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earlier than one year after the infringement decision has 'become final' (the meaning of which is open to some debate).[10] The limitation period must also be suspended for the duration of any consensual dispute resolution process.[11]

These provisions have significantly extended the limitation periods in a number of Member States.[12] Pre-implementation, this was an area where there was wide divergence between Member States, both in terms of the length of limitation periods and the point at which they began to run: compare, for example, the UK (six years after the cause of action accrued) with Spain (one year from the date the injured party discovered the harm). This meant that limitation periods often used to play an important role for claimants when selecting the jurisdiction in which to bring a claim.

Nonetheless, some differences between Member States remain. The Damages Directive does not prevent Member States from imposing limitation periods in excess of five years or absolute limitation periods.[13]

The CJEU has recently considered the scope and effect of limitation provisions in competition claims in *Cogeco Communications Inc*.[14] While the Damages Directive did not apply to the facts at issue, the CJEU held that overly restrictive limitation periods in place before the application of the Damages Directive may be incompatible with EU law.[15]

10 Article 10(4), Damages Directive. There has been some criticism (for example, by the City of London Law Society in its response to the UK government's consultation on the national legislation implementing the Damages Directive) that Article 10(4) is not clear as to whether an appeal on penalty alone will suspend the limitation period, and whether an appeal by one addressee suspends the limitation period for all addressees. Such questions were previously addressed by the English courts in relation to the former limitation provisions in the cases of *BCL Old Co v. BASF* [2009] EWCA Civ 434 and *Deutsche Bahn AG v. Morgan Advanced Materials plc* [2014] UKSC 24.

11 Article 18(1), Damages Directive. Recital 48 states that 'consensual dispute resolution mechanisms' will include out-of-court settlements, arbitration, mediation and conciliation.

12 By way of example, consider a scenario in which the Commission opened an investigation in 2018 in respect of behaviour that took place between 2010 and 2016, and reached an infringement decision in 2021, with an appeals process lasting until 2024. In this case, the limitation period would only begin to run in 2025, and would last a minimum of five years, until 2030. Therefore, the company would be at risk of a damages claim for almost 15 years after it ceased its anticompetitive conduct.

13 The Damages Directive does allow for long-stop dates to be put in place. Recital 36 states that 'Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation'. For example, in the Netherlands, a 20-year long-stop limitation period will apply, starting on the date on which the damage was inflicted, irrespective of the victim's awareness.

14 Case C-637/17, *Cogeco Communications Inc v. Sport TV Portugal and Others* (2019). Another question about the operation of the limitation provisions under the Damages Directive was recently referred to the CJEU by a Spanish court in Case C-267/20, *AB Volvo and others v. RM*.

15 On the facts, the CJEU considered the legality of a Portuguese three-year limitation period that commenced on the date on which the claimant became aware of its right to compensation, irrespective of whether the claimant was aware of the identity of the defendant(s) or the full extent of its loss. The CJEU held that this limitation period was incompatible with Article 102 of the Treaty on the Functioning of the European Union and the EU law principle of effectiveness.

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ii Jurisdiction

Under EU law, jurisdiction is regulated by the Recast Brussels Regulation,[16] which applies to proceedings issued on or after 10 January 2015. Under the Recast Brussels Regulation, the default jurisdiction rule is that a claim should be brought in the courts of a Member State where the defendant is domiciled.[17] There are, however, a few exceptions to this rule and two are frequently relied on in the context of competition claims.

First, where there are multiple defendants domiciled in different Member States, a claimant can opt to bring a claim in any of those jurisdictions. A defendant may then become an 'anchor defendant', with others being joined to that claim, provided that the claims are so closely connected that it is expedient to hear them together so as to avoid the risk of irreconcilable judgments resulting from separate proceedings.[18]

Second, in matters relating to tort, delict and quasi-delict, a claimant can bring a claim in the courts of a Member State that is 'the place where the harmful event occurred or may occur'. In the context of competition claims, the CJEU has confirmed that this means a Member State where the cartel was definitively concluded or a Member State where the claimant company has its registered office.[19] Further, in its recent *Tibor-Trans* judgment,[20] the CJEU noted that 'the place where the harmful event occurred or may occur' can also cover the place where a market was affected by a competition law infringement, such as the place where prices were distorted and in which the victim claims to have suffered damage.

In relation to parties' agreements on forum, the CJEU has recently offered some guidance on the enforceability of jurisdiction and arbitration clauses in competition claims. In *Apple Sales International*,[21] the CJEU held that the mere fact that a jurisdiction clause does not explicitly refer to claims based on competition law does not automatically prevent it from applying to actions for damages for abuse of dominance based on Article 102 TFEU. The decision is arguably inconsistent with the CJEU's earlier decision in *CDC*,[22] which held that an explicit reference to claims based on competition law is a prerequisite for applying a jurisdiction agreement to cartel-related claims based on violations of Article 101 TFEU.

iii Governing law

For events that gave rise to damage after 11 January 2009, the governing law applicable to a restriction of competition is determined by the Rome II Regulation.[23] Under the Rome II Regulation, the governing law will be the law of the country where the market is affected.[24] When the market is affected in multiple countries, a claimant may choose to base its claim on the law of the Member State where it is bringing its claim, as long as the market of that Member State is directly and substantially affected by the restriction of competition that gives

16 Regulation No. 1215/2012 of 12 December 2012 (the Recast Brussels Regulation).

17 Article 4(1), Recast Brussels Regulation.

18 Article 8(1), Recast Brussels Regulation.

19 Article 7(2), Recast Brussels Regulation. See Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and Others* (2015) and Case C-27/17, *AB flyLAL-Lithuanian Airlines v. Starptautiska lidosta 'Riga' VAS* (2018).

20 Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV* (2019).

21 Case C-595/17, *Apple Sales International et al. v. EBizcuss.com* (2018).

22 Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and Others* (2015).

23 Regulation No. 864/2007 of 11 July 2007 (the Rome II Regulation).

24 Articles 4 and 6, Rome II Regulation.

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rise to the claim.[25] This enables claimants to have their case for competition damages heard by one court applying one law, even where more than one defendant is involved or damage occurred in several EU Member States.

Generally, the Rome II Regulation allows parties expressly to agree a law to govern their non-contractual obligations, either before or after the occurrence of an event that gives rise to damage.[26] However, in the context of competition claims, such agreements are ineffective insofar as they aim to displace the applicable law determined in accordance with the default rules.[27]

In recent years, Member State courts have considered the application of choice of law rules under the Rome II Regulation (and the respective national rules pre-dating the Rome II Regulation) in the context of competition law claims.[28] This developing jurisprudence may result in a preliminary ruling request to the CJEU.

III EXTRATERRITORIALITY

EU competition law applies to any conduct that has an appreciable effect on trade between Member States. The EU courts and the Commission have long considered to what extent, and in what circumstances, EU competition law can apply extraterritorially (i.e., to non-EU undertakings and to conduct that takes place outside the EU) without infringing the principles of public international law. The two main legal tests that have been developed to limit the extraterritorial reach of EU competition law are the implementation test[29] and the qualified effects test.[30] The former requires that the practices that restrict competition are implemented in the EU (e.g., by direct sales into the EU). The latter requires that such practices have immediate, substantial and foreseeable effects in the EU. The relationship between the implementation test and the qualified effects test was clarified in *Intel*,[31] where the CJEU observed that the tests pursue the same objective and that EU competition law is applicable if either one is satisfied.

In recent years, Member State courts have started to examine the limits of the extraterritorial application of EU competition law in the context of private enforcement,[32] and it remains to be seen whether a consistent approach will be adopted across the EU.

25 Article 6(3)(b), Rome II Regulation.
26 Article 14, Rome II Regulation.
27 Article 6(4), Rome II Regulation.
28 See, for example, *Deutsche Bahn AG & Others v. MasterCard Incorporated & Others* [2018] EWHC 412.
29 See, for example, Case C-89/85, *A Ahlström Osakeyhtiö and others v. Commission of the European Communities* (1994).
30 See, for example, Case T-102/96, *Gencor v. Commission* (1999).
31 Case C-413/14, *P Intel Corp v. Commission* (2017).
32 See, for example, *Iiyama (UK) Ltd & Others v. Samsung Electronics Co Ltd & Others* [2018] EWCA Civ 220.

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IV STANDING

Any individual or undertaking may claim compensation before national courts for harm suffered as a result of an infringement of EU competition law.[33] The exercise of the right to sue is governed by national law provisions in the particular jurisdiction in which an action is brought, but the rules and procedures facilitating such actions cannot be less favourable than those governing similar actions resulting from infringements of national law.[34]

The causal relationship between the harm and the infringement need not be direct; and the Damages Directive explicitly granted indirect purchasers standing to sue.[35] A party need not have a contractual link to a cartelist and will have a claim against cartelists where its loss was suffered as a result of the actions of an undertaking not party to the cartel (having regard to the practices of the cartel), namely where that undertaking sets prices higher than would otherwise have been expected under competitive conditions (umbrella pricing).[36] In recent years, Member State courts have heard numerous cases involving indirect purchasers.

V THE PROCESS OF DISCOVERY

The move towards harmonisation of the disclosure regimes across Member States was one of the most significant changes brought about by the implementation of the Damages Directive. Previously, there was a wide disparity between jurisdictions with sophisticated and well-established disclosure regimes (such as the UK), which were considered claimant-friendly, and jurisdictions where extensive disclosure did not feature in civil litigation (notably Germany and the Netherlands, although these nevertheless remained popular jurisdictions for bringing proceedings for other reasons). EU legislators considered the lack of extensive disclosure regimes in such countries to be an obstacle to effective private enforcement of competition law, on the basis that it maintained the information asymmetry that may exist between a party allegedly having suffered loss and an infringer of competition law.

To address this, the Damages Directive requires Member States to ensure that national courts are able to order defendants or third parties to disclose relevant evidence that lies within their control in response to a reasoned justification by a claimant.[37] Member States must also ensure that national courts are able, on the request of a defendant, to order a claimant or a third party to disclose relevant evidence.[38] To address concerns regarding excessive disclosure or fishing expeditions, the Damages Directive stipulates that national courts must be able to limit disclosure to what is proportionate, having regard to the legitimate interests of all parties concerned.[39] While Member States must ensure that national courts have the power to order

33 Article 3(1), Damages Directive.
34 Article 4, Damages Directive.
35 Article 12(1), Damages Directive.
36 Case C-557/12, *Kone AG and others v. ÖBB-Infrastruktur AG* (2014).
37 Article 5(1), Damages Directive.
38 id.
39 Article 5(3), Damages Directive. Competition authorities are also expressly permitted to submit observations to the national courts on the proportionality of such disclosure requests (Article 6(11)).

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the disclosure of relevant confidential information, national courts must concurrently have at their disposal effective measures to protect such information[40] and to give full effect to applicable legal professional privilege rules.[41]

For legal systems unaccustomed to extensive disclosure exercises, these new rules have started to cause significant cultural change (although a combination of transitional rules[42] and the need for national courts to acclimatise means it is likely to be a number of years before the full effects become apparent). In particular, the references in the Damages Directive to disclosure of 'relevant categories of evidence'[43] marked a significant change in jurisdictions where disclosure was previously limited to specific documents identified in a disclosure request. However, while there is likely to be some degree of harmonisation between Member States going forward, the Damages Directive only fixed minimum requirements[44] and a number of jurisdictions have taken the opportunity to go further by creating a substantive right to disclosure (as opposed to giving national courts mere discretion). It remains to be seen whether these regimes will develop to match the extensive disclosure seen in the UK.

As a further protection against excessive disclosure, the Damages Directive contains a number of limits on the disclosure of evidence included in a competition authority's file. In particular, leniency statements[45] and settlement submissions,[46] as well as verbatim quotations from such documents,[47] are granted absolute protection from disclosure.[48] Disclosure of the following materials from a competition authority's file is permissible, but only after the competition authority has closed its proceedings: information prepared specifically for the proceedings of a competition authority; information drawn up by the competition authority and sent to the parties in the course of its proceedings; and settlement submissions that

40 Article 5(4), Damages Directive. For instance, through redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in aggregated or otherwise non-confidential form (see Recital 18).

41 Article 5(6), Damages Directive.

42 For instance, the new provisions on disclosure only apply to claims where proceedings were commenced on or after 27 December 2016 in Germany and 27 May 2017 in Spain.

43 Article 5(2), Damages Directive.

44 Article 5(8), Damages Directive.

45 Defined as an oral or written presentation voluntarily provided to a competition authority (or a record thereof) describing the provider's knowledge of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, and not including pre-existing information (i.e., evidence that exists irrespective of the proceedings of a competition authority (e.g., contemporaneous documents)) (Articles 2(16) and 2(17), Damages Directive).

46 Defined as a voluntary presentation to a competition authority acknowledging the provider's participation in an infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure (Article 2(18), Damages Directive).

47 Recital 26, Damages Directive.

48 Article 6(6), Damages Directive. Previously, national courts were expected to undertake a balancing exercise of weighing up the need to facilitate private enforcement of competition law by allowing disclosure of leniency documents versus the public interest in protecting the effectiveness of leniency regimes.

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have been withdrawn.[49] Even then, national courts should (as part of the proportionality assessment) consider the need to safeguard the effectiveness of public enforcement when choosing whether to order disclosure of such documents.[50]

The CJEU examined the scope of publication of leniency material in a Commission decision in the *Evonik Degussa* and *AGC Glass Europe* cases.[51] In *Evonik Degussa*, the CJEU found that the content of a leniency statement can be referred to in a Commission decision, provided that the source cannot be identified and the precise contents of the submission cannot be reconstructed. These principles were affirmed in *AGC Glass Europe*. These decisions form part of an ongoing line of cases concerning the confidential nature of materials relating to Commission decisions, which is particularly important in the context of competition claims in national courts.

On 20 July 2020, the Commission published a Communication on the protection of confidential information by national courts in private enforcement of EU competition law proceedings.[52] The aim of the Communication is to provide practical guidance to national courts in choosing effective measures to protect confidential information when ordering disclosure of relevant evidence in the context of private damages actions. The Communication discusses a number of specific measures, including redactions, confidentiality rings and closed hearings.

VI USE OF EXPERTS

The Damages Directive is silent on the issue of experts, but the Commission recognises the importance of expert advice in private competition actions and has published, commissioned and contributed to various guidelines for judges and other practitioners on obtaining and assessing expert evidence.[53] This is driven in particular by the complexities of quantifying harm, which in practice requires significant data, with both claimants and defendants routinely engaging economic experts to assess the amount of loss suffered.

The use of experts and their role in court proceedings vary among Member States. Rules differ, for example, regarding whether experts should be party-appointed or court-appointed and the weight given to their findings. Dutch, French and German courts are willing to deal directly with economic reports prepared by experts appointed by the parties, for example, while judges in certain other jurisdictions tend to rely solely on court-appointed experts when addressing economic questions.

Member States also differ significantly with respect to the partiality of party-appointed experts, and consequently the weight the court places on such expert evidence. For example,

49 Article 6(5), Damages Directive.

50 Article 6(4)(c), Damages Directive.

51 Case C-162/15, *P Evonik Degussa v. Commission* (2017) and Case C-517/15, *AGC Glass Europe and Others* (2017).

52 2020/C 242/01.

53 See, for example, ‘Communication from the Commission regarding guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser’ (2019/C 267/07); ‘Study on the Passing-on of Overcharges’, RBB Economics et al. (2016); ‘Communication from the Commission on quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ (2013/C 167/07); and Commission Staff Working Document: ‘Practical Guide – quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ (SWD(2013) 205).

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in English courts, party-appointed experts owe a duty to the court, while in Germany there is no express requirement towards objectivity and so party-appointed experts are treated as potentially partisan extensions of the party in question.

Experts need not always be economics or accounting professionals. There is a growing trend in competition cases for industry experts to testify, lending their knowledge of the dynamics and operation of certain markets, particularly in cases concerning complex distribution chains. This serves the dual purpose of educating the court on the market in question and ensuring that economists approach the relevant questions using correct assumptions.

VII CLASS ACTIONS

Following over a decade of discussions about the need for EU-wide standards for collective redress, on 4 December 2020 the EU published the Representative Actions Directive[54] in the Official Journal of the European Union. It entered into force on 24 December 2020, and Member States have two years to implement it and a further six months to apply its provisions. The legislation forms part of the 'New Deal for Consumers' introduced by the Commission in April 2018 to further legal protections of consumer rights.

The Representative Actions Directive sets out minimum requirements for collective redress mechanisms across Member States. It aims to empower reputable consumer organisations (qualified entities) to initiate representative actions on behalf of consumers for infringements of EU law. While protecting consumers from 'mass harm', the Representative Actions Directive also contains a number of safeguards to prevent system abuses. In particular, it (1) introduces the loser-pays principle, ensuring that the unsuccessful party bears the litigation costs, and (2) allows national courts to dismiss manifestly unfounded cases at an early stage. The infringements for which representative proceedings may be brought must relate to EU laws that are set out in Annex I to the Directive and include legislation relating to data protection, liability for defective products and sale of consumer goods. Crucially, the Representative Actions Directive does not cover actions in respect of competition law.

At the moment, the availability of collective redress mechanisms, and safeguards against the abuse of such mechanisms, is not consistent across the EU. On the one hand, some Member States (including Belgium, France and Lithuania) have actively promoted collective redress since 2013. On the other, there are a number of Member States that do not at present provide for any possibility of collective redress for damages arising from breaches of EU law.[55] How Member States will implement the key provisions of the Representative Actions Directive and the impact it will have on enforcement of consumer rights remains to be seen. In relation to private enforcement of competition law, while the Representative Actions Directive does not cover competition damages actions, some Member States already

54 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

55 See the Commission report on the practical implementation of the Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (January 2018).

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have collective redress mechanisms that can be used in this area. It remains to be seen whether the implementation of the Representative Actions Directive will have any effect on further development of such mechanisms.

VIII CALCULATING DAMAGES

With a view to assisting in relation to the issue of quantification, in 2013 the Commission published a Communication on quantifying harm in competition law damages actions,[56] together with a more detailed Practical Guide,[57] to provide national courts and parties to damages actions with an overview of the main economic methods and empirical insights available. The Practical Guide covers various techniques for estimating prices in a counterfactual non-infringement scenario, including observation of comparator data, interpolation and regression analysis.

While the right to compensation is an EU right, the actual methodology for quantifying damages is largely a matter for national law. However, the following broad principles have been established at an EU level under the Damages Directive.

a There must be a rebuttable presumption that cartels cause harm. This presumption was deemed necessary because the inherently secret nature of cartels may create an information asymmetry between parties that makes it more difficult for claimants to obtain the evidence necessary to prove the harm.[58]

b Compensation must place claimants in the position in which they would have been had the infringement of EU competition law not been committed. Compensation must therefore cover actual loss, loss of profit and interest, and should not result in overcompensation, whether by means of punitive, multiple or other damages.[59]

c National courts are entitled to estimate the amount of harm a claimant has suffered if it is impossible or excessively difficult to quantify that harm on the basis of the evidence available.[60]

d Member States must nonetheless ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.[61]

e Where requested, and if they deem it appropriate, national competition authorities (NCAs) may provide guidance to national courts on the determination of the quantum of damages.[62]

56 'Communication from the Commission on quantifying harm in actions for damages based on breach of Article 101 or 102 of the Treaty of the Functioning of the European Union' (2013/C 167/07).

57 Commission Staff Working Documents: 'Practical Guide – quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (SWD(2013) 205).

58 Article 17(2) and Recital 47, Damages Directive.

59 Article 3, Damages Directive.

60 Article 17(1), Damages Directive.

61 id.

62 Article 17(3), Damages Directive.

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IX PASS-ON DEFENCES

Member States are required under the Damages Directive to ensure the availability of the passing-on defence. This means that any defendant may invoke as a defence that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof that any overcharge was passed on falls to the defendant, who may in turn reasonably require disclosure from the claimant or from third parties.[63]

The Damages Directive also addresses the position of indirect purchasers, making it easier to claim damages incurred as a result of any overcharge that was passed on down the supply chain. Although the burden lies with the indirect purchaser to prove the existence and extent of any pass-on, there is a rebuttable presumption that this burden is satisfied if the indirect purchaser can establish that: the defendant has committed an infringement of competition law (which is automatically the case in any follow-on action); the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser has purchased the goods or services that were the subject of the infringement, or has purchased goods or services derived from or containing them.[64]

The passing-on defence was already recognised in many Member States prior to implementation of the Damages Directive, but some changes to national legislation have been required, for example, to transfer the burden of proof from the claimant to the defendant (as in France) or to introduce a presumption in favour of indirect purchasers (as in Hungary and the Netherlands).

On 9 August 2019, the Commission published guidelines designed to assist national courts in estimating the passing-on of overcharges.[65] The guidelines set out the applicable legal framework and discuss the economics of pass-on (including the economic theory and quantification methods). The Implementation Report noted that while it is too early to draw any conclusions about the impact of the guidelines, they provide a useful reference point for national judges when assessing damages.[66]

X FOLLOW-ON LITIGATION

The Damages Directive was intended to facilitate greater follow-on litigation in the Member States, as well as to ensure the optimal interaction between private and public enforcement.

To this end, the Damages Directive provides that a final decision by a Member State's NCA (or review court) finding an infringement irrefutably establishes that infringement for the purposes of follow-on litigation in the courts of that Member State.[67] An equivalent EU-level provision, preventing national courts from taking a contrary view to the Commission where the Commission has found an infringement, has been in place for some time.[68]

63 Article 13, Damages Directive.

64 Article 14, Damages Directive.

65 'Communication from the Commission regarding guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser' (2019/C 267/07).

66 For example, the UK's Supreme Court specifically referred to the guidelines in *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC and others* [2020] UKSC 24.

67 Article 9(1), Damages Directive.

68 Article 16(1), Regulation (EC) No. 1/2003, codifying Case C-344/98, *Masterfoods Limited v. HB Ice Cream Limited* (2000).

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The Damages Directive further provides that a final decision in another Member State must be taken at least as prima facie evidence by a court that an infringement occurred.[69] It is noteworthy that some Member States have already gone further in this regard, with German law providing that a final decision by any Member State's NCA will be treated as binding proof of an infringement before the German courts. Implementation has differed significantly across other Member States ranging from Austria (which has followed Germany's approach) to Hungary (which has taken a more restrictive approach by implementing a rebuttable presumption of an infringement in this situation). Regardless of these discrepancies, the overall effect should be to reduce the base evidentiary hurdle to establishing a breach of competition law for follow-on claimants in the EU.

As explained above, the Damages Directive also introduced changes to other key issues that affect follow-on damages, such as limitation and disclosure. The net effect has been to increase venue choice for claimants, with many jurisdictions where the private enforcement regimes were arguably underdeveloped now adopting broadly similar rules.

XI PRIVILEGES

The Damages Directive stipulates that Member States must ensure that national courts give full effect to applicable legal professional privilege under EU or national law when ordering the disclosure of evidence.[70] It is otherwise silent on the issue of privilege. There is no requirement to apply EU privilege laws,[71] meaning that the privilege regimes of individual Member States will be applicable to damages proceedings brought in national courts.

The rules protecting communications between a lawyer and his or her client vary considerably between Member States. Broadly, a distinction can be drawn between common law and civil law jurisdictions, with the scope of privilege generally more extensive in the former.[72] This stems from the fact that disclosure obligations in civil law jurisdictions were typically (prior to the implementation of the Damages Directive) much narrower than they were under common law.[73] This reduced the need for the protection of sensitive legal advice in such jurisdictions. Overlaying this broad distinction is a patchwork of different specific rules. For example, German law has a limited concept of legal privilege. In Ireland, Poland, the Netherlands and Portugal, legal privilege is recognised for in-house counsel as well as external counsel. In the Netherlands, privilege is extended to communications with lawyers qualified outside the European Economic Area.

It will be interesting to observe whether Member States with narrower concepts of legal privilege adapt their regimes in light of the increased disclosure obligations under the Damages Directive to provide defendants with additional protection.

69 Article 9(2), Damages Directive.

70 Article 5(6), Damages Directive.

71 Note that under EU law, legal professional privilege is considered a limitation on the Commission's investigatory powers and has consequently been defined narrowly. For example, the EU concept of privilege does not extend to advice given by in-house counsel.

72 In common law jurisdictions (such as Ireland and Cyprus), privilege will protect confidential documents or communications that have been created for the purpose of giving or obtaining legal advice or in preparation for litigation.

73 For example, under English common law, a party is required to disclose all documents: on which it relies; which adversely affect or support its or another party's case; or that it is required to disclose by a relevant practice direction.

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XII SETTLEMENT PROCEDURES

While the Recitals to the Damages Directive emphasise that damages actions represent only one element of an effective private enforcement system (which should also involve consensual dispute resolution),[74] the Damages Directive does not mandate any alternative dispute resolution mechanisms. Nor does it regulate settlement procedures generally. However, it did introduce three measures aimed at incentivising the use of consensual dispute resolution mechanisms and increasing their effectiveness.

First, as noted above, to provide both sides with an opportunity to engage in settlement discussions before bringing proceedings, limitation periods must be suspended for the duration of a consensual dispute resolution process.[75] Likewise, if proceedings have already been issued, national courts may suspend their proceedings for up to two years to enable settlement discussions to take place.[76]

Second, the Damages Directive provides that a competition authority may consider compensation paid as a result of a consensual settlement as a mitigating factor when making its decision in imposing a fine.[77]

Third, and most significantly, the Damages Directive sought to ensure that an infringing party that pays damages through consensual dispute resolution should not be placed in a worse position in relation to its co-infringers than it would otherwise have been absent the consensual settlement. This might be the case, for example, if a party, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement, and therefore remains open to contribution proceedings from other co-infringers. To address this, Member States must ensure that, following a consensual settlement, the claimant's claim is reduced by the settling co-infringer's share of the harm[78] (which is not necessarily the amount it has actually paid),[79] and the claimant can only pursue its remaining claim against non-settling co-infringers.[80] Importantly, non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.[81] This creates significant incentives for defendants to offer an early settlement.

Further, in addition to a class actions regime (discussed in Section VII), a number of Member States have collective settlement regimes pursuant to which groups of claims can be settled, including on an opt-out basis. In the Netherlands, the Dutch Act on the Collective Settlement of Mass Claims similarly provides for an opt-out mechanism that facilitates collective settlement through a binding declaration from the Amsterdam Court of Appeal.

74 Recital 5, Damages Directive.
75 Article 18(1), Damages Directive.
76 Article 18(2), Damages Directive.
77 Article 18(3), Damages Directive.
78 Article 19(1), Damages Directive.
79 According to Recital 51 of the Damages Directive, 'the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party'.
80 Article 19(2), Damages Directive.
81 id.

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XIII ARBITRATION

Arbitration is listed among the consensual dispute resolution mechanisms that are actively promoted by the Damages Directive.[82] Although the Damages Directive does not prevent claimants from submitting damages claims to arbitration, it is silent on more specific issues such as whether (and how) to include contractual arbitration clauses in respect of competition claims.

Arbitration is still relatively rare as a means of resolving competition disputes in Europe, due in part to an inherent tension between arbitration as a private system of dispute resolution and EU competition law as a public system designed to protect consumer welfare and the integrity of the internal market. There are other more specific obstacles to the widespread adoption of arbitration in this field; for example, competition claims often involve a large number of claimants or defendants, or both, from different levels of the distribution chain, which can be problematic where each party has an independent contract with its own arbitration clause (or lack thereof).

On the other hand, both arbitration and competition law claims invariably arise in an international context, and arbitral tribunals are accustomed to complex, multiparty cases. A decision by the English High Court[83] to stay court proceedings so as to give effect to an arbitration clause indicates that competition arbitration may be becoming increasingly accepted in the sphere of private enforcement.

XIV INDEMNIFICATION AND CONTRIBUTION

The Damages Directive requires Member States to ensure that cartelists are jointly and severally liable for the full harm caused by the infringement to which they are a party and that the claimant has the right to full compensation from each of the infringers.[84] However, in relation to immunity applicants, it provides that they should only be jointly and severally liable to their own direct and indirect purchasers, and should only be liable to other injured parties where full compensation cannot be obtained from the other infringers.[85]

The Damages Directive further provides that Member States must ensure that any individual infringer can recover a contribution from co-infringers, in accordance with the relative responsibility for the harm of each co-infringer.[86] Again, a carve-out is in place to ensure that immunity applicants can only be required to contribute an amount up to the harm caused to their own direct and indirect purchasers.[87] The Damages Directive does not define what is meant by relative responsibility for harm and this is left for Member States to decide.[88] Notably, the Damages Directive does not specify a limitation period for contribution claims, meaning that this too will be a matter to be decided at a national level.

82 See Recital 48, Damages Directive.

83 *Microsoft Mobile OY (Ltd) v. Sony Europe Limited et al.* [2017] EWHC 374.

84 Article 11(1), Damages Directive.

85 Article 11(4), Damages Directive.

86 Article 11(5), Damages Directive.

87 id.

88 Recital 37, Damages Directive does provide that relevant criteria for assessing contribution to harm will include turnover, market share or role in the cartel.

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As long as they have not led an infringement,[89] coerced other undertakings to participate in an infringement or previously been found to infringe competition law,[90] small and medium-sized enterprises (SMEs) also gained protection from joint and several liability.[91] Absent these circumstances, SMEs are liable only to their own direct and indirect purchasers, provided that their market share was below 5 per cent at some point during the infringement and that applying normal joint and several liability rules would irretrievably jeopardise their economic viability.[92]

These changes represent a novel development for many jurisdictions, including France, Germany and the Netherlands, and could complicate the recovery process for contribution claimants.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The UK formally ceased to be a Member State of the EU on 31 January 2020, with the transition period ending on 31 December 2020. Up to this point, the UK had been one of the most important jurisdictions within Europe for private enforcement actions, and claimant firms have expressed confidence that it will remain so. The UK's ongoing status as a centre for private competition law enforcement will, to a significant extent, depend, however, on whether claimants will be able to continue to rely on infringement decisions issued by the Commission as a basis for founding a follow-on claim in the UK courts. It remains to be seen how the UK courts will approach cases following on from Commission decisions issued after 31 December 2020. Practically, however, it is likely that claimants would still be able to initiate claims based on breaches of EU competition law (and rely on the relevant Commission decisions) if these claims are framed as foreign tort claims.

More generally in relation to EU law, as the Commission recently observed in the Implementation Report, it is only over the next few years that the full effect of the Damages Directive will become clear. It seems likely at this stage that its major impact will be to increase venue choice for claimants, as jurisdictions that might not previously have been considered become more appealing to claimants.

Finally, the upward trend in private competition law activity across the EU is likely to continue and may even be further bolstered by the increased availability of direct litigation funding (including from non-traditional sources, such as private equity houses). These higher levels of activity should, in turn, lead to further clarification of the relevant law at both the EU and Member State levels.

89 Article 11(3)(a), Damages Directive.
90 Article 11(3)(b), Damages Directive.
91 Article 11(2), Damages Directive.
92 id.

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Appendix 1

ABOUT THE AUTHORS

WILLIAM TURTLE

Slaughter and May

William Turtle is a partner in the competition group. He has extensive experience in a wide range of competition and regulatory matters, including global investigations, merger control and antitrust. On the contentious side, he has advised on a range of multi-jurisdictional stand-alone and follow-on damages actions as well as on appeals before the Competition Appeal Tribunal and European courts. William is recognised as a leading competition lawyer by *Who's Who Legal: Competition*.

CAMILLA SANGER

Slaughter and May

Camilla Sanger is a partner in the dispute resolution group. Her practice includes handling complex commercial disputes, often involving multiple jurisdictions, with particular expertise in competition litigation and regulatory investigations. Camilla has acted on a large number of high-profile follow-on and stand-alone damages cases, including before the Court of Appeal. A particular focus of her practice is on class and group action claims. Camilla is recognised in *Who's Who Legal Future Leaders: Competition* and has been named a 'next generation lawyer' in both commercial litigation and competition litigation in *The Legal 500: UK*. She is frequently asked to speak at panel events on private enforcement issues.

OLGA LADROWSKA

Slaughter and May

Olga Ladrowska is an associate in the dispute resolution group. She has experience advising clients on a wide range of contentious commercial matters, with a particular focus on competition litigation. Olga has acted on complex multi-jurisdictional follow-on and stand-alone damages cases, including before the Court of Appeal. Prior to joining Slaughter and May, Olga completed a PhD in private international law at the University of Cambridge.

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SLAUGHTER AND MAY

One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
william.turtle@slaughterandmay.com
camilla.sanger@slaughterandmay.com
olga.ladrowska@slaughterandmay.com
www.slaughterandmay.com

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