

The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective

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I. Introduction

On 26 November 2014, acting on a 2013 Commission proposal and after more than a decade of debate and negotiation, the European Parliament and the Council of the European Union adopted under the ordinary procedure¹ the Directive on Antitrust Damages Actions (hereafter the Directive).² The Directive aims to harmonise the existing national rules governing actions for damages for infringements of the EU competition law rules and insofar as applied in parallel with those rules, infringements of the rules of national competition law. The harmonisation is justified by the belief that ‘divergent’ national rules could practically ‘jeopardise the proper functioning of the internal market’.³ Consequently, the alignment of procedures is required to ensure that the victims of competition law infringements do not need to shop around Europe for the forum that gives them the best conditions, as all the Member States provide a level playing field in terms of enforcing EU rights.

Private enforcement of competition law is currently centred in the three most claimant-friendly jurisdictions: the United Kingdom, Germany, and the Netherlands. In other Member States private enforcement of competition law, especially in the form of damages actions, has been almost nonexistent.⁴

Given that the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, the Directive was issued on the dual legal bases of Articles 103 and 114 TFEU. Specifically, the Directive seeks to remove a number of obstacles to damages actions brought before national courts by

Key Points

- The selected EU Member States (i.e. Belgium, Latvia, Lithuania, and Luxembourg) have faced technical and linguistic intricacies in their attempts to align the Antitrust Damages Directive’s provisions with national rules.
- It seems that the copying/literal method combined with the minimalistic approach dominated in this transposition process, especially in newer small Member States.
- In the context of the elaboration and gold-plating methods, the paper also discovered some deviations or uncertainties which require to be settled in the future.

victims of anticompetitive behaviour, by providing rules on the parties’ access to evidence, limitation periods, the passing-on defence and a rebuttable presumption that cartels cause harm. The Directive was issued to ensure a minimum standard of protection, as a ‘floor of rights’ which the Member States must not derogate from, but upon which they may advance by setting superior standards.⁵ The Member States were given two years to implement the Directive. Yet, it seems that the implementation of the Directive has been no less intricate for most Member States, than the production of the Directive by the EU. Even though the deadline to transpose the Directive was on 27 December 2016, the majority of the Member States failed to meet this deadline.⁶ Only 10 Member States (Denmark, Finland, Hungary, Ireland, Italy, Lithuania, Luxembourg, the

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1 Article 294 TFEU.

2 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 Text with EEA relevance *OJ L* 349, 5.12.2014, p. 1–19.

3 Recital 6, Directive 2014/104/EU.

4 Ashurst Report, 2004. Also see B. Rodger, Competition Law: Comparative Private Enforcement and Collective Redress across the EU, Alphen aan den Rijn, Kluwer law international, 2014, 302p.

5 Deakin and Wilkinson, 1994, ‘Rights versus efficiency? The economic case for transnational labour standards’, *ILJ*, 23, 289–310.

6 On 24 January 2017 the letters of Formal Notice were sent to 21 Member States which failed to communicate full transposition by 18 January 2017.

Netherlands, Slovakia, and Sweden) notified the Commission by 20 February 2017 of their full transposition of the Directive. After further encouragement, in July 2017, the Commission sent reasoned opinions to Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta, and Portugal for failing to notify the Commission of their national transposition measures.⁷ Bulgaria and Greece implemented the Directive in early 2018; and finally Portugal was the last Member State to adopt measures transposing the Directive.⁸

While there are lessons to be learnt from the implementation experience of each Member State, the paper focuses on four small Member States in Eastern and Western European region. They are Belgium, Latvia, Lithuania, and Luxembourg. Specifically, the paper will investigate the approaches to the transposition of the various provisions of the Directive undertaken in the selected countries and the challenges faced in their attempt to align the Directive's provisions with their national legal systems. It will also note the extent to which new changes can better facilitate antitrust damages claims in practice.

After this introduction (Section I) followed by the underpinning theoretical foundation and methodology employed (Section II), the paper is structured as follows. Section III outlines the consultation and implementation process of the Directive in the chosen jurisdictions followed by the Directive's transposition scope and the right to full compensation in Section IV. Sections V–XI then deliberates in-depth analysis of the transposition of the specific provisions of the Directive in Belgium, Latvia, Lithuania, and Luxembourg with the concluding remarks being distilled in Section XII.

II. Theoretical foundation and methodology

While there is extensive literature on scarce private enforcement of competition law in the EU and the need for the Antitrust Damages Directive,⁹ and the relationship between private and public enforcement,¹⁰ there is barely any literature on the transposition of the Directive in various jurisdictions, especially in smaller less 'visible' jurisdictions. Indeed, currently the literature focuses on large Member states, such as the UK and

Germany with already litigation-friendly jurisdictions.¹¹ Given that the Directive aims to level the playing field for antitrust damages across Member States, the experiences of the transposition of the Directive in other jurisdictions with little private enforcement is utmost essential. Therefore, closing the gap in the literature and to raise the visibility of smaller Member States in the EU, this article focuses on four countries in Eastern and Western Europe, such as Belgium, Latvia, Lithuania, and Luxembourg. By no means, this paper suggests that these four countries are representatives of this region. Yet, comparatists predominantly argue that fewer jurisdictions should be compared for proper representation of their systems, especially taking into account linguistic barriers. In this case four EU official languages were used such as Dutch, French, Latvian, and Lithuanian. As a result, some preferences had to be made. Equally, in order to depict a broader understanding of whether all small Member States face similar challenges, two newer small Member States (i.e. Latvia and Lithuania) and two 'old' Member States (i.e. Belgium and Luxembourg) were chosen. Latvia and Lithuania and then Belgium and Luxembourg have a close geographical proximity to each other, which works in favour of the comparative method.

As far as the methodology is concerned, apart from the comparative method, empirical research has been undertaken with materials being obtained predominantly from the primary sources, in some instances interviewing members of working groups for further clarification. Furthermore, comparative research gives more weight to legal research, as it is not only limited to comparing the specific provisions of several jurisdictions, but it also acknowledges the background by which these are sustained, for instance, insightful debates of the working groups involved in designing the transposition proposals. Yet, this study refrained from large scale comparison of these jurisdictions, such as the spirit and style as well as the method of thought and procedures of these systems were depicted solely to the extent essential to better exhibit the transposition of the Directive.

The paper also builds on the analysis of the implementation modalities in the selected jurisdictions. Pursuant to Article 288(3) TFEU the Member States

7 http://europa.eu/rapid/press-release_MEMO-17-1935_en.htm.

8 Law No. 23/2018 of 5 June.

9 A. Komninos, 'New Prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages' [2002] 39 *CMLRev* 447; Dunne, N, 'The Role of Private Enforcement within EU Competition Law' [2014] 16 *CYELS* 143–187; R. Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem', *MJELC*, 20(1), (2013): 12–34.

10 Wouter P.J. W., 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *WComp*, Issue 1, pp. 3–26; Hüscherlat, K and Peyer, S. 'Public and Private Enforcement of Competition Law A Differentiated Approach', CCP Working Paper 13-5, 2011.

11 Rodger, B J (2017) 'Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules.' *ECLR*, 38 (5). pp. 219–227

have choice of form and methods of achieving the binding result prescribed by a directive. They do not have an obligation to transpose Directive's provisions provided provisions in conformity with that directive already exist within the legal system of the Member State in question. Yet, if this is not the case, the Member States generally face two interconnected yet distinct principal choices regarding methods of transposition. First, there is a choice between the copying method of transposition (also known as literal transposition) and the elaboration method of transposition.¹² Secondly, there is a choice between the minimalistic and the non-minimalistic method of transposition, known as gold-plating. While the copying method is self-explanatory, when it comes to the elaboration method of transposition, two variations of this method are usually distinguishable, namely the elaboration-concretisation method and the elaboration-reformulation method of transposition. The former method of transposition refers to a situation when relevant provisions of a directive are concretised in the national transposition measure in order to become fully and effectively justiciable. Whereas the later (rewording) method of transposition 'entails reformulation of the relevant parts or provisions of a directive for the purpose of ensuring coherent, smooth, effective and proper operation of the national transposition measure within the surrounding national legal landscape'.¹³ This method could be risky as the Commission can initiate proceedings following the Article 258 TFEU procedure for the incorrect implementation, especially if the Directive contains a clearly precise requirement (i.e. a rebuttable presumption that cartels cause damage as established by the Antitrust Damages Directive).

With regard to the second facet is concerned, minimalistic transposition does not exceed in any way the minimum requirements of a directive—it does not go beyond

the minimum aspects required by a directive. Gold-plating, on the other hand, exceeds the minimum requirements of a directive, i.e. goes over minimalistic transposition. Therefore, these transposition modalities will be explored in the context of the transposition of the specific provisions of the Antitrust Damages Directive in Belgium, Latvia, Lithuania, and Luxembourg.

III. The transposition of the Directive

Even though most Member States struggled to implement the Directive by 27 December 2016, Luxembourg was one of the few Member States to transpose the Directive before the deadline. The transposition act in Luxembourg was signed by the Minister of Economic Affairs and the *Grand Duc* on 5 December 2016¹⁴ and it entered into force on 11 December 2016, meaning that Luxembourg will be one of the first countries to apply the Directive in practice.¹⁵ With a slight delay, Lithuania was next to implement the Directive, where *Seimas* (the Lithuanian Parliament) adopted the amended Law on Competition (prepared by the Ministry of Economy (*Ūkio Ministerija*)) which transposed the Directive as a matter of urgency. The Lithuanian president approved the revised law,¹⁶ which was then signed on 18 January 2017 and came into force on 1 February 2017. The Belgian transposition Act was adopted on 6 June 2017 and entered into force 10 days after its publication in the Belgian Official Journal, i.e. on 22 June 2017.¹⁷ Even though Latvia was one of the first Member States to partially adopt the Directive, there has been a prolonged transposition process.¹⁸ Finally, on 5 October 2017 the *Saeima* (the Latvian Parliament) after the final reading adopted the amendments to the Competition Law and the Code of Civil Procedure implementing the Directive, which came into legal force on 1 November 2017 almost a year passed the deadline.¹⁹

Specifically, the legislative proposal to transpose the Directive into Luxembourgish law²⁰ took the form of a

12 Other synonymous designations of this method include one-to-one transposition, verbatim transposition or copy-out: see Regulatory Impact Unit, Transposition Guidance (2013), para.2.18. Kral, R, On the choice of methods of transposition of EU Directives, *ELRev*, 2016.

13 Kral provided expanded discussion on the variations of transposition processes. For further reading, see Kral, R, On the choice of methods of transposition of EU Directives, *ELRev*, 2016.

14 It was published on 7 December 2016 in the Luxembourgish Official Journal - *Mémorial A* du 7 décembre 2016, n°245 (2016).

15 See Arrêté royal grand-ducal du 22 octobre 1842, N° 1943c/1297.

16 The President of Lithuania has the veto right. For instance, the amendments to the Law on Competition (No XII-1027) dated 15/7/2014 to change Article 36 in order to set a maximum fine imposable by the Competition Council was vetoed by the President.

17 Wet 6 juni 2017 Boek XVII van het Wetboek van economisch recht. The several other provisions the title of the act refers to are part of Book IV

on the protection of competition and of Book XVII, Title 2 on collective redress.

18 http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html. This also notes that Latvia has implemented Article 17(2) of the Directive.

19 The Competition Council of the Republic of Latvia, Injured parties finally have a facilitated possibility to claim for compensation for damages, Press Release 11.10.2017.

20 *Projet de loi relatif à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence, Exposé des motifs*, http://www.cc.lu/uploads/tx_userccavis/4609_Violations_du_droit_de_la_concurrence_actions_dommages_et_interets_PL_4609SMI.pdf, p. 7 (accessed on 15 March 2018).

proposal for a special act²¹ by amending some provisions of the Luxembourgish Competition Act of 2011.²² There is a general practice in Luxembourg not to include rules with a limited scope of application in codes with a general scope, such as the *Nouveau Code de Procédure Civile* or the *Code Civil*.²³ The provisions of the special act apply in addition to the general rules of tort law relating to damages. In case of a conflict between the general rules and the rules of the special act, the latter prevail.²⁴

In Lithuania, there were two possible options considered for the transposition of the Directive. The first option was to amend both the *lex generalis* – the Civil Code and the Code of Civil Procedure and a *lex specialis* – the Law on Competition, whereas the second option was to transpose the Directive solely in the Law on Competition. The first route was quickly dismissed given the particularities imposed by the Directive that do not sit neatly with the Lithuanian standard provisions (i.e. the Directive's imposed rebuttable presumption that cartels cause harm, different limitation period etc.). Additionally, the procedure to amend general laws, such as the Codes is more complex in comparison to special laws. Similar to Luxembourg, Lithuania opted for the second option and transposed the Directive solely in the Law on Competition.

In Belgium, the Directive was transposed by inserting a Title 3 'The action for damages for infringements of competition law' in Book XVII of the Code of Economic Law, and by modifying several provisions of this Code.²⁵

In contrast to all countries discussed above, Latvia opted to transpose the Directive in both the *lex generalis* and a *lex specialis*, more specifically in the Code of Civil Procedure²⁶ and the Competition Law respectively with the proposal being prepared by the Ministry of Economy (*Ekonomikas Ministrija*)²⁷ and discussed with 15 other authorities, including the Competition Council of Latvia. Even though in Latvia some provisions of the Directive

were embraced in the Code of Civil Procedure, this does not mean these provisions will be applicable to different areas of law, as a new Chapter 30 covering 'Actions for damages from an infringement of the competition law' was formed in the Code of Civil Procedure.²⁸

IV. The scope of the application of the Directive and the right to full compensation

A. The scope of the application of the Directive

In all analysed countries, save Luxembourg, it is apparent that the new rules on competition law damages actions are applicable irrespective of whether it is competition law of a European (namely Articles 101 and 102 TFEU) or domestic nature (i.e. domestic equivalents – Articles 5 and 7 of the Law on Competition in Lithuania,²⁹ Article IV.1 and IV.2 of the Code of Economic Law in Belgium,³⁰ Sections 11 and 13 of the Competition Law in Latvia).³¹ In Luxembourg, however, the scope of application is rather confusing. From the wording of the Explanatory Memorandum it seems that actions for damages are possible not only for infringements of Articles 101 TFEU and 102 TFEU but also of purely national competition rules defined in the Competition Act. However, Article 1(10) of the Luxembourgish Act is in line with Article 2(3) of the Directive and provides that the Act covers only actions for damages caused by infringements of both Union competition law and national competition law *where that is applied in parallel* with Union competition law.³²

B. The Right to full compensation

The most important principle of the Directive is that anyone who has suffered harm caused by an

21 Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence, Mémorial A du 7 décembre 2016, n°245.

22 Loi modifiée du 23 octobre 2011 relative à la concurrence.

23 *Projet de loi, Exposé des motifs*, p. 2.

24 *Projet de loi, Exposé des motifs*, p. 2.

25 Belgian Official Journal 12 June 2017. The several other provisions the title of the act refers to are part of Book IV on the protection of competition and of Book XVII, Title 2 on collective redress.

26 Adding a new Chapter covering 'actions for damages from an infringement of the competition law', No. 90/TA-2542 (2016). In addition, Latvia recommended some amendments to documents associated to Competition law, such as Cabinet Regulation No. 179 of 29 March 2016, 'The Procedures for the determining of Fines for Violations Referred to in Section 11, Paragraph one and Section 13 of the Competition Law and Section 5, 6 and 8 of the Unfair Retail trade Practices Prohibition Law'.

27 The Competition Council of Latvia is subordinate of the Ministry of Economy.

28 No 90/TA-2542 (2016).

29 The scope is defined in Article 43 of the Law on Competition in Lithuania.

30 Documents Chambre of Representatives 54, 2413/001, p. 17. Art. 13 of the Draft bill delineated the scope of application of the Code of Economic law's title on damages actions for infringements of competition law by referring to 'actions for damages under Belgian law'. The Council of the State considered this unclear and advised to provide clarifications in the Explanatory Memorandum (Documents Chambre of Representatives 54, 2413/001, p. 85). A more solid solution was chosen and the text of the Article itself was modified, deleting the words '*in het Belgische recht*' (under Belgian law).

31 The scope is defined in Section 21(1) of the Competition law and Article 250⁶⁵ of the Code of Civil Procedure.

32 Preamble Directive 2014/104, para 9.

infringement of competition law, has the right to full compensation.³³ Prior to the Directive, this principle was unevenly enforced in different Member States leading to claimants ‘forum shopping’ for the most favourable jurisdiction. The Directive clearly elucidates that full compensation embraces actual loss (*damnum emergens*), loss of profit (*lucrum cessans*), plus the payment of interest.³⁴ Recital 12 further elaborates that the payment of interest is an essential component of compensation by taking into account the effluxion of time and is due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law.

Traditionally, in Lithuania damage is compensated from the day when it was caused, or if the damage appeared later, from the day of its appearance.³⁵ Yet, the Lithuanian civil procedure and case law allow only compensatory interest.³⁶ These are normally process interest calculated from the lodge of proceedings in courts; and interest is not always due from the moment when the harm was sustained.³⁷ Given that different calculations may be applied by other specialised laws, the amended Law on Competition literally followed the text of the Directive by stating that full compensation embraces actual loss, loss of profit and the payment of interest, which are calculated from the time when the harm occurred.³⁸ Before the transposition of the Directive, Latvia contained a general provision that a person who has incurred losses due to a violation of the Competition Law is entitled to seek compensation for losses from the violator and interest due, set by law.³⁹ Given that this provision did not meet the requirements of the Directive, the principle of full compensation was transposed almost by the letter in Section 21(1) of the Competition Law in Latvia.

In contrast to Latvia and Lithuania and their limitations of the right to full compensation, this right to full compensation was not included in the implementation act of Luxembourg because it already forms part of

Luxembourgish law.⁴⁰ Even though the principle of general law on damages existed in Belgium, it was, nevertheless, reassured in Article XVII.72 of the Code of Economic law.

While the Directive does not specify which national court should have jurisdiction for antitrust damages claims, both Latvia and Lithuania employed the element of elaboration-concretisation method and assigned one national court. For instance, Section 20(1) of the Latvian Competition Act provides that the claims for compensation of damages, as well as infringements of competition law, including infringements of a prohibition of unfair competition, is adjudicated on the basis of special jurisdiction to the Riga City District Court.⁴¹ Similarly, Vilnius County Court has exclusive competence to hear antitrust damages cases in Lithuania.⁴² Given that the complexity of competition cases requires judges’ high expertise and experience, which is especially lacking in newer Member States, it seems logical for there to be a single specialised court. This way it would be also easier to monitor damages claims data and therefore, to prevent any potential overcompensation.

V. Disclosure of evidence and its limits

A. Overview

Generally, it has been witnessed that in most Member States the access to evidence was one of the main obstacles to private enforcement.⁴³ Due to so-called ‘information asymmetries’ it was difficult for the victims to bring forward the necessary evidence held exclusively by the infringer or by third parties to prove their case. Therefore, the Directive encompasses some provisions to facilitate this access by introducing a more active role of judges in ‘disclosure of evidence’.

Before, there were different practices in all analysed countries. For instance, in Luxembourg the court could *ex officio* order all legally admissible

33 Article 3 of the Directive.

34 Article 3, Recital 12 of the Directive.

35 Article 6.288 of the Civil Code.

36 Article 6.261(1) of the Civil Code under contractual liability. There is also the principle of general delict which contains the right of compensation for damages. Yet, it does not specify what it actually entails. Article 6.263(2) of the Civil Code.

37 Explanatory Document of the Proposal to Amend the Law on Competition No. VIII-1099 (in Lithuanian), 10 February 2016. Lietuvos Respublikos Konkurencijos Istatymo Nr VIII-1099 Pakeitimo Projekto Aiškinamasis raštas, 2016.02.10.

38 Article 44(2) of the Law on Competition. Also see Table 1.

39 Section 21 of the Competition Law.

40 Advice of the *Association Luxembourgeoise pour l'étude du droit de la concurrence*, Document 6968/08, *Chambre des députés* 2015–2016, dd. 15.7.2016, p. 4.

41 This provision is also stated in Article 250⁶⁵ of the Code of Civil Procedure.

42 Article 51(2) of the Lithuanian Law on Competition.

43 Commission staff working document, Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the 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, SWD(2013) 203 final, 11.6.2013. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf (accessed on 20 April 2017).

measures of instructions.⁴⁴ If a party possesses evidence, the judge could, at the request of the other party, require him/her to produce it, if necessary under threat of a penalty or of drawing unfavourable conclusions from the failure to submit the document. The judge also could, at the request of either party, request or order if necessary under a penalty, the production of any documents held by third parties if there is no legitimate impediment.⁴⁵ Because these rules are more lenient than those of the Directive, Luxembourg decided to maintain its general rules also in antitrust damages cases.

In contrast to Luxembourg, neither Latvia nor Lithuania had a particularly friendly mechanism of access to evidence. Even though under Lithuanian civil litigation a request to access to evidence could be made,⁴⁶ it was difficult to obtain any form of evidence retained by the opposing party in practice. For instance, the judge of the Supreme Court of Lithuania Stripeikiene observed that ‘no requirement to disclose information is established in Lithuanian Law’.⁴⁷ This is about to change in Latvia and Lithuania as pursuant to the transposed provisions, even the defendant in possession of evidence needed to prove a potential damages claim is obliged to disclose such evidence upon request of the claimant.⁴⁸ A failure to do so would result in the fines being imposed.⁴⁹ In addition, Lithuania provides further provisions, which sparked some debates during the transposition process. For instance, any access to evidence in pre-trial situations is not possible. This was expressly dismissed as the Directive imposes an obligation on access to evidence once a claim has been lodged as interpreted by the Lithuanian working group.⁵⁰ Furthermore, to avoid any fishing expeditions, the access requesting party must reasonably specify such evidence. An ‘alien’ element unknown to the Lithuanian legal system is to order the disclosure of relevant categories of evidence. Therefore, the Law on Competition indicates that these categories of evidence must be

clearly defined specifying their nature, format, subject matter or content, and period when the requested documents were prepared.⁵¹ As a result of these detailed instructions, it is most likely that specified items of evidence instead of relevant categories of evidence will be favoured (at least by courts).

Under the general rules of Belgian civil procedure, the court may order any of the parties as well as any third party to submit the evidence it possesses.⁵² The conditions under which the court may exercise this power are, however, stricter than those determined by the Directive. Under the general rules of civil procedure, the court may only order a party or third party to submit documents when the following conditions are all satisfied: (i) the order needs to concern documents in a wide sense, written documents, pictures, recordings, digital data, passwords etc.; (ii) the document needs to contain evidence of a relevant fact, i.e. a fact of which evidence is useful; (iii) the document needs to be held by a party or third party (evidence of this fact needs to follow from serious, precise and concurring presumptions); (iv) the document needs to exist (not yet to be created); and (v) the party requesting the court to order submission of evidence needs to specify the evidence as precisely and narrowly as possible. Given that the concept of documents defined in Article 877 of the Code of Civil Procedure is narrower than the concept of evidence in the Directive as well as the impossibility to request disclosure of relevant categories of evidence, the Belgian legislator decided to transpose the content of Article 5(1) and (2) of the Directive in a new Article XVII.74. § 1 of the Code of Economic Law specifically dealing with access to documents in cartel damages cases and allowing the national court to order the claimant, defendant or a third party to disclose specified items of evidence or relevant categories of evidence which lies in their control upon request of a claimant or defendant who has presented a reasoned justification

44 Article 59 of the Code of Civil Procedure.

45 Article 60 of the Code of Civil Procedure.

46 For instance, Article 199 of the Code of Civil Procedure enables the claimant to request the court to order the disclosure of evidence from the defendant or third parties subject to the certain conditions (i.e. the relevance of such information to the case in question and the fact that the defendant or a third party actually possesses it).

47 J. Stripeikiene, ‘Klevo Lapas v. ORLEN Lietuva’ in G. Monti and P.L. Parcu (eds.), *European Networking and Training for National Competition Enforcers (ENTRANCE 2012). Selected Case Notes*, May 2014, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS, 68, San Domenico di Fiesole 2014, at p 37. Available at: http://cadmus.eui.eu/bitstream/handle/1814/31771/RSCAS_2014_68.pdf?sequence=1 (accessed 25 April 2017).

48 Article 52(1) of the Law on Competition in Lithuania; Article 250⁶⁵ of the Code of Civil Procedure in Latvia provides that the disclosure of evidence can be ordered upon a party’s request.

49 Article 52(9) of the Law on Competition in Lithuania refers that a fine on individual not complying with the court’s order is up to EUR 10,000. On the hand, Latvia introduced stricter rules where Article 250⁷⁰ of the Code of Civil Procedure refers that the court is entitled to impose a fine of up to EUR 14,000 for natural persons and up to EUR 140,000 for legal persons for failure or refusal to comply with the disclosure order or the destruction of the relevant evidence.

50 The working group which prepared the transposition of the Directive in Lithuania consisted of 10 main experts (in total) representing different institutions, including the Ministry of Economy, the Ministry of Justice, the Competition Council, and academics and practitioners with expertise in competition law and civil law and civil procedure.

51 Article 52(2) of the Law on Competition.

52 Article 871 and 877 of the Code of Civil Procedure.

containing available facts and evidence sufficient to support the plausibility of its claim for damages and provided that those specified items of evidence or relevant categories of evidence are circumscribed as precisely and as narrowly as possible. Similar to Lithuania, there were some concerns raised with regard to ‘categories of evidence’, as potentially the entire categories of evidence can be disclosed without individual judicial assessment of whether all the concerned documents belong to that category.⁵³

It seems that while most analysed countries employed the literal and minimalistic transposition approaches, Luxembourg opted for its own national rules of tort law.

B. Limits to the disclosure of evidence

1. Proportionality

The principle of proportionality plays a key role in the disclosure of evidence from the Directive’s perspective. Given that the rules of Belgian civil procedure do not provide a general requirement to limit access to documents to that which is proportionate as required by Article 5(3) of the Directive, the Belgian legislator provided a specific provision, Article XVII.74. § 2 of the Code of Economic Law, literally transposing this rule.

Similarly, in Luxembourg it has been chosen to introduce a provision limiting the production of documents to what is proportionate as well as the obligation of the court to take into account the legitimate interests of the parties and third parties and the Directive’s non-limitative list of criteria that can be used to determine what is proportionate. It is uncertain whether this will in practice lead to a more restrictive disclosure than if the rules of general civil procedure had applied.

In contrast to Belgium and Luxembourg, the principle of proportionality is well established in the Latvian and Lithuanian legal systems.⁵⁴ Nevertheless, it was transposed in Article 52 of the Lithuanian Law on Competition which specifically notes that the request for disclosure must be proportionate: the court will balance the legitimate interests of all parties involved in a claim and other third parties concerned, including legitimate interests of confidentiality. Equally, the disclosure

of evidence in Latvia is also subject to the principle of proportionality, as the court may refuse a request for evidence if it considers that the amount of evidence sought or the costs of obtaining evidence are not proportionate to the amount of the claim.⁵⁵

2. Confidentiality

Article 5(4) of the Directive requires the Member States to guarantee that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. When ordering the disclosure of such information, national courts must have at their disposal effective measures to protect such information. The Directive in this context opens the door for the elaboration method, as the Member States can determine the specific form these effective measures should take. Yet, it has not been properly utilised. For instance, Article 3(2) of the Luxembourgish Act mirrors recital 18 of the Preamble of the Directive and provides for conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. During the legislative process, the *Association luxembourgeoise pour l'étude du droit de la concurrence* (the ALEDC)⁵⁶ advised the legislator to include a list of cases in which confidentiality can be refused in order to limit the court’s wide (even discretionary) powers in this regard.⁵⁷ It further stressed the importance to specify when ordering the production of documents that such documents may not be used for other purposes than the action for damages (a similar provision was included in the Lithuanian Competition Law).⁵⁸ This advice was, however, not taken into account.

The Belgian Code of Civil Procedure does not contain a general regime of confidentiality protection, but only incidental applications thereof. Article 879 of the Code of Civil Procedure provides that the court, when ordering submission of a document determines the way and the period of time in which this should take place. This provision can be used to impose measures to protect

53 Advice of the Belgian Commission for Competition (hereinafter BCC). Full-text available on <http://www.ccecrb.fgov.be/txt/nl/doc16-1150.pdf>, p. 8. Note that the BCC is not the Belgian national competition authority, but an advisory commission that is part of the Central Economic Council, an institution at the service of the social dialogue. For further information, see http://www.ccecrb.fgov.be/txt/en/2011182_1.pdf. In Lithuania, see Lietuvos Respublikos Konkurencijos Istatymo Nr VIII-1099 Pakeitimo Projekto Aiškinamasis raštas, 2016.02.10 (Explanatory Document of the Proposal to Amend the Law on Competition No. VIII-1099, 10 February 2016).

54 Article 37(2) of the Code on Civil Procedure.

55 Article 250⁶⁵ of the Code of Civil Procedure.

56 The Minister of Employment, Economic Affairs and Consumers asked the BCC for its advice on the draft bill, see <http://www.ccecrb.fgov.be/txt/nl/doc16-1150.pdf>.

57 For instance, it could have provided that information is no longer protected when it becomes historical similar to the case law of the European Courts which hold that information loses its confidential character after 5 years.

58 Article 52(4) of the Law on Competition.

confidentiality. Given the absence of more specific provisions in the Code of Civil Procedure, the Belgian legislator chose to transpose Article 5(4) of the Directive almost literally in a new Article XVII.75 § 2 of the Code of Economic Law. Similar to Luxembourg, the Belgian Article, however, adds in a non-limitative way a number of possible measures of protection, inspired by the preamble of the Directive as well as the Belgian legislation and case law, such as the possibility of redacting sensitive passages in documents by requesting those holding the documents to submit non-confidential versions, instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form, conducting hearings in camera or limiting the number of persons who can take note of the documents.⁵⁹ The Explanatory Memorandum furthermore refers to other protective measures applied in Belgian case law, such as providing access to the documents at a place where the requesting party can only inspect them, but not make copies or take them along or allowing a person subject to professional secrecy to distinguish between confidential and non-confidential documents.⁶⁰ The Belgian legislator did not consider it necessary to transpose Article 5(6) of the Directive which provides that the Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence. This applies even without specific transposition.

Along similar lines, the Directive also inspired some further changes to the Lithuanian Law on Competition regarding confidential information.⁶¹ Article 52(5) of the Lithuanian Competition law provides that the court has the power to order disclosure of evidence containing confidential information, if it is relevant to the civil claim for damages. It also denotes several measures that could be undertaken by the court to protect this information: (i) by identifying the proceeding participants responsible for the protection of the confidential information; (ii) by prohibiting the confidential part of evidence to be used for any other purpose than for the claim in question; (iii) by instructing to prepare materials without confidential parts in order for it to be

available to all the parties to proceedings; (iv) prohibiting this information to be copied and/or disseminated; or (v) by imposing other measures to secure the confidential information.⁶² Similarly to Article 5(6) of the Directive, it is provided that the information covered under legal professional privilege as well as other information inadmissible as evidence in civil proceedings is not disclosable.⁶³ Latvia, on the other hand, utterly failed to exploit the elaboration method in this context and solely provided that a person whose information is given a status of restricted access information shall submit a corresponding derivative of the written evidence without the confidential parts.⁶⁴

C. Access to documents in the file of a competition authority: a three-grade list

The Directive introduced a three-grade list to note the extent to which documents and information in the file of a national competition authority (thereafter the NCA) must be disclosed upon request. First of all, it introduced some blanket prohibitions on courts ordering disclosure (the so-called 'black list'), such as leniency statements⁶⁵ and settlement submissions. Secondly, it embraced that other documents in the NCA's file either prepared by a party or by the NCA during the proceedings are open for disclosure only once those proceedings have been finished (referred to as the 'grey list'). Finally, the rest of the documents are denoted to the white list and are in principle disclosable.

It seems that all Member States discussed in this paper share similar experiences with a limited access to the documents of the NCA's file. For instance, before the transposition of the Directive, the power of courts to order the submission of documents in the Belgian Competition Authority's file were limited by Article IV.34 § 1 of the Code of Economic law, which imposes the obligation of professional secrecy on all members of the authority and on persons working for it and prohibits to disclose confidential data and information obtained in the exercise of their profession to any person or authority, except when they are called to testify in court.⁶⁶ A similar provision was in place in the

59 See Documents Chambre of Representatives 54, nr. 2413/001, p. 24–27. According to the BCC, the non-limitative enumeration of possible measures of protection should only be mentioned in the Explanatory Memorandum and not in the law itself (Advice BCC, p. 8). The legislator did not take this advice into account.

60 Documents Chambre of Representatives 54, nr. 2413/001, p. 27.

61 Article 21 of the Law on Competition.

62 Article 52(5) of the Law on Competition.

63 Article 52(6) of the Law on Competition.

64 Article 250⁶⁵ (4) of the Code of Civil Procedure.

65 For instance, Latvia introduced the restricted access to the information in the leniency application before fully transposing the Directive in May 2016. See Section 12¹(1) of the Competition law.

66 In addition, the previously applicable Article IV.45 § 2(2) of the Code of Economic Law prohibited persons having filed a complaint and all other natural or legal persons heard by the Competition college from having access to the investigation file and procedural file, unless the president of the college decides otherwise with regard to the procedural file. Following the transposition of the Directive, it is added to Article IV.45 § 2(2) that it applies without prejudice to the new Articles XVII.77 –XVII.79 of the Code of Economic Law.

Latvian Competition Law,⁶⁷ the Lithuanian Law on Competition⁶⁸ and the Luxembourgish Competition Act.⁶⁹

Therefore, the transposition of Directive facilitated access to documents in the file of NCA. For instance, the Belgian transposition Act introduced an exception to the above mentioned Article IV.34 § 1 of the Code of Economic law ‘in order to produce evidence according to the provisions of Book XVII, title 3, chapter 3’ which contains an almost literal transposition of Chapter II of the Directive (Disclosure of evidence). Along similar lines, this chapter was literally transposed in Latvia,⁷⁰ Lithuania,⁷¹ and Luxembourg.⁷²

Yet, as required by the Directive, the Member States must protect the information on the Directive’s grey and black lists. Lithuania opted for the literal and minimalist approaches and strictly followed the Directive’s narrow leniency definition applicable solely to a participant of a secret cartel despite the fact that the Lithuanian leniency policy incorporates wider rules on immunity from fines and reduction of fines for the parties to prohibited agreements regulated under either Article 101 TFEU or Article 5 of Law on Competition.⁷³ Given that the advantages of elaboration-reformation elements were not explored, the transposition of the Directive in Lithuania led to some confusion. The Lithuanian Competition Law refrained from either defining a ‘cartel’ (as provided in the Directive) or leniency policy (or leniency statement). Instead, mirroring the Directive for a presumption that cartel infringements cause harm Article 44(3) of the Law on Competition refers to infringements of Article 101(1) TFEU (and/or domestic equivalent Article 5(1) of the Law on Competition) but only in the context of horizontal agreements or concerted practices. Yet, Article 38(1)⁷⁴ on exemption from fines has a different ambit, as it is directed at an undertaking, which is a party to a prohibited agreement between competitors or is a party to a prohibited agreement between non-competitors for the direct or indirect price setting (fixing) as specified in Article 5(1)(1) of the Law on Competition⁷⁵ and given that it meets the specified conditions (which are

modelled on the EU leniency policy), it is exempted from the fines provided for this violation. Therefore, this perplexity will have to be clarified in future cases.

By contrast, Belgium employed the gold-plating approach going beyond the level of protection required by the Directive. Article IV.46 § 3 of the Code of Economic Law provides an absolute access prohibition with regard to all documents and information submitted by a leniency applicant, rather than just leniency statements, as denoted by the Directive.⁷⁶ Equally, the notion of cartel that is used in the Belgian leniency programme is wider than that used in the Directive.⁷⁷

VI. Effect of national decisions

While the Directive provides that an infringement of the competition law provisions established either by the NCA or the review court constitutes an irrefutable fact in the same Member State for a claim of damages, it is at least *prima facie* evidence of the fact that an infringement of competition law has occurred if this decision was concluded either by the NCA or review court of another Member State.⁷⁸ These provisions were duly transposed using the literal and minimalistic methods in Belgium, in Article XVII.82 of the Code of Economic Law, § 1 and § 2, in Article 51(3) and 51(4) of the Law on Competition in Lithuania, Article 250⁶⁹(1) and (2) of the Code of Civil Procedure in Latvia, and in Article 6(2) of the Luxembourgish Act respectively.

Interestingly, only the Lithuanian legislator used the words ‘*prima facie*’ evidence. In Belgium the expression *prima facie* is replaced with the provision that the evidence is at least accepted as ‘*un début de preuve*’, ‘*een begin van bewijs*’ (beginning of evidence).⁷⁹ This does not, however, change the meaning of the provision since the Explanatory Memorandum uses the concept *prima facie* evidence to explain the meaning of the concerned provision. Similarly, in Latvia the Latin term of *prima facie* is also circumvented. Instead, Article 250⁶⁹ of the Code of Civil Procedure refers that an infringement of competition law established by a decision of the NCA of

67 Section 10 of the Competition Law in Latvia.

68 Article 21 of the Law on Competition.

69 According to Article 27(3) of the Luxembourgish Competition Act 2011, the use of documents obtained as a result of a public enforcement procedure could not be used for any other purpose.

70 Article 250⁶⁷ of the Code of Civil Procedure; Article 21(5) of the Competition Law.

71 Articles 52 and 53 of the Law on Competition

72 Article 33 of the Luxembourgish Competition Act.

73 Article 101 TFEU (and Article 5 of the Law on Competition) infringements are not all of this nature. Rules on Immunity from fines and reduction of fines for the parties to prohibited agreements,

Competition Council of the Republic of Lithuania Resolution No. 1S-27, 28 February 2008, Vilnius.

74 Law on Competition.

75 Article 5(1)(1) of the Law on Competition is equivalent of Article 101(1) (a) TFEU.

76 The transposition Act modifies Article IV.46, § 3 of the Code of Economic law by adding ‘and the Articles XV.77, XV.78 and XV. 79’ and introduces the rules of the Directive on access to documents in the new Articles XVII.77–79 of the Code of Economic Law.

77 See *infra*, para 9.1.

78 Article 9 of the Directive.

79 Article XVII.82 § 2 of the Code of Economic Law.

another Member State is considered to be proven unless refuted by the defendant.

In Luxembourg, final decisions of NCAs and review courts of other Member States are accepted as proof that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.⁸⁰ The words '*prima facie*' have simply been eradicated. The resulting provision appears somewhat contradictory: does a final decision finding an infringement of competition law by a NCA of another Member State form in itself proof of the infringement or is it only an element to be assessed along with other evidence of the (non-) existence of the infringement? The answer is probably to be found in the interpretation of the word '*preuve*' in line with the English wording of the Directive: 'evidence' and not 'proof'. It is only a means of piece of evidence and not a proof in itself.

On a more general level, it can be questioned whether the different treatment of decisions of the own NCA and those of other Member States is justified.⁸¹ Potentially, this can be solved through the preliminary reference procedure in the future.

VII. Limitation periods

Pursuant to the Directive, the limitation period for bringing actions for damages is 5 years, which begin to run when the claimant has knowledge or should have had knowledge of all the circumstances: (i) the identity of the infringer; (ii) that the infringer violated either Article 101 or 102 TFEU (or domestic equivalents, if applicable); and (iii) that the claimant sustained harm as a result of that infringement.⁸²

Before the transposition of the Directive the least litigation 'friendly' jurisdiction was Lithuania, as the general limitation period for bringing civil damages claims in Lithuania is three years.⁸³ Therefore, Lithuania followed the Directive and transposed the 5-year rule specifically for the competition law infringements. Additionally, while using the gold-plating approach, the Lithuanian Law on Competition added further clarification on when the limitation period could be expanded.

For instance, provided that other individuals (save direct or indirect purchasers) who have suffered harm caused by other infringers (not by a SME, or an immunity recipient) have initially tried to get redress from other infringers but it was deemed to be impossible; in this case, they are allowed to claim damages from the SME or immunity recipient even if the 5 year limitation period has expired.⁸⁴ The Lithuanian working group decided to incorporate this additional provision in order to prevent any possible circumstances where the exercise of the right to full compensation is rendered to be practically impossible or excessively difficult.⁸⁵

In contrast to Lithuania, the limitation period for liability claims is in Luxembourg normally 30 years,⁸⁶ but is limited to 10 years when it relates to business transactions between traders or between traders and non-traders.⁸⁷ There is, however, some uncertainty as to whether the latter rule will apply to damages actions for infringements of the competition rules. Since the general rules of Luxembourgish law on limitation periods provide for a duration of the limitation period that exceeds the minimum duration of 5 years provided by Article 10(3) of the Directive, there was no need to implement this provision.⁸⁸

In Belgium, all personal claims are in principle time barred after 10 years. Yet, non-contractual liability claims are subject to a specific two-tier limitation period: 5 years following the day on which the victim obtained knowledge of the damage (or its increase) and the identity of the liable person, combined with an absolute time limit of 20 years following the day on which the event causing the damage occurred.⁸⁹ From the Explanatory Memorandum it seems to follow that depending on the contractual or non-contractual nature of the damages claim, the general limitation period for personal claims or the special rules for non-contractual claims are to be used.⁹⁰

In Latvia, the general prescription term for bringing civil damages claims is 10 years, which is longer than required by the Directive.⁹¹ Thus, this limitation period was reinstated in the revised Competition law together with the set of conditions defined by the Directive on when this period begins to run.⁹²

80 Article 6(2) of the Luxembourgish Act: '*en tant que preuve du fait qu'une violation du droit de la concurrence a été commise et, comme il convient, peut être examinée avec les autres éléments de preuve apportés par les parties*'.

81 This was questioned by the BCC, see Advice of the BCC, at p. 10.

82 Article 10(2) and 10(3) of the Directive.

83 Article 1.125(8) of the Civil Code.

84 Note: in this case the limitation period begins to run when all the circumstances defined in Articles 45(2)(2) or 45(4)(3) of the Law on Competition are discovered.

85 Article 4 of the Directive.

86 Article 2262 of the Civil Code.

87 Article 189 of the Commercial Code.

88 Note: instead, it transposed the Directive's rules on the moment from which the limitation period would run (Article 10(2) of the Directive was implemented in Article 14(1) of the Act).

89 Article 2262bis § 1 of the Civil Code.

90 Explanatory Memorandum, p. 46.

91 Article 1895 of the Civil Code.

92 Section 21⁴ of the Competition law.

In addition, Article 10 (4) of the Directive leaves it up to the Member States to determine whether a limitation period is either suspended or, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.⁹³ It seems that all analysed jurisdictions have preferred to suspend the investigation. Reflecting the Directive, in Latvia and Lithuania, the limitation period is suspended if the NCA opens the investigation with regard to an infringement of competition law to which the action for damages relates. In this case, the suspension ceases one year after the infringement decision has become final (no longer appealable) or after the proceedings are otherwise terminated.⁹⁴ In addition, in Latvia and Lithuania the limitation period is also suspended for the parties, which are trying to reach out of court settlement for the duration of settlement negotiations.⁹⁵ The Luxembourgish legislator adopted a minimalistic approach: the suspension ends one year after the infringement decision has become final or after the proceedings are otherwise terminated.⁹⁶ In Belgium, Article 10(4) of the Directive was transposed in Article XVII.90 § 2 of the Code of Economic Law. The Dutch language version of this provision mistakenly uses the term ‘*gestuit*’, which means interrupted. However, from the French language version, the Explanatory Memorandum⁹⁷ and the fact that the ‘interruption’ ends one day after the termination of the proceedings, it is clear that suspension (*schorsing*) is meant. In the case of interruption, there is no period of interruption to end, the original limitation period starts to run again at the moment of the interruption.

VIII. Joint and several liability and its exceptions

A. Joint and several liability

Article 11 (1) of the Directive requires the Member States to ensure that undertakings which have infringed competition law through joint behaviour are jointly and

severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until she/he has been fully compensated.

The concept of joint and several liability is a well-established principle in all discussed Member States.⁹⁸ Nevertheless, this principle was literally transposed in Latvia⁹⁹ and Lithuania.¹⁰⁰ On the contrary, Article 7 of the Luxembourgish act did not transpose the main principle but only the exceptions.¹⁰¹ The legislator probably assumed that there was no need to specifically transpose the principle of joint and several liability because it would form part of the general law of obligations.¹⁰² This approach was, however, criticised by the *Chambre de Commerce* which pointed out that in general civil law, joint and several liability (*solidarité*) between debtors is not presumed and that it can only result from the law itself or from a contractual provision.¹⁰³ This is indeed what is provided in Article 1202 of the Luxembourgish Civil Code with regard to *solidarité*. However, the case law has also created the doctrine of liability *in solidum*: when several parties contributed to the creation of the same damage, the entire damage can be claimed of either of them (without the possibility for the victim to be compensated more than once). The main effects of the liability *in solidum* are thus the same as that of *solidarité*. However, contrary to what applies in case of *solidarité*, a court decision given against one of the co-debtors does not bind the others, an action against one of the co-debtors does not interrupt prescription against the others and an appeal by one of the co-debtors does not benefit the others.¹⁰⁴

Belgian law uses a similar distinction between *solidarité* or *hoofdelijkheid* and liability *in solidum*.¹⁰⁵ However, contrary to the Luxembourgish legislator, the Belgian legislator chose to include in the transposition legislation a specific legal basis for the *responsabilité solidaire* or the *hoofdelijkheid aansprakelijkheid* of the parties that are

93 The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

94 Section 21⁴ (2) of the Competition Law in Latvia, Article 49(3) of the Law on Competition in Lithuania.

95 Article 49(3) of the Law on Competition in Lithuania and Section 21³ (1) of the Competition law. It only applies to the parties involved in the settlement.

96 Article 14(2) of the Act.

97 Explanatory Memorandum p. 48.

98 For instance, Article 6.279 of the Civil Code in Lithuania.

99 Section 21 of the Latvian Competition Law.

100 Article 45 of the Law on Competition.

101 See also the Advice of the *Conseil d'État*, Document 6968/03, *Chambre des députés* 2015–2016, dd. 24.5.2016, p. 4.

102 See also the Advice of the *Conseil d'État*, Document 6968/03, *Chambre des députés* 2015–2016, dd. 24.5.2016, p. 4.

103 Advice of the *Chambre de Commerce*, Document 6968/02, *Chambre des députés* 2015–2016, dd. 17.5.2016, p. 3. See also the Advice of the *Chambre des Métiers* which finds this Article insufficiently clear (Document 6968/05, *Chambre des députés* 2015–2016, dd. 7.6.2016, p. 2).

104 G. Ravarani, *La responsabilité des personnes privées et publiques*, Luxembourg, Pasirisie Luxembourgeoise, 2014, n° 1017–1018, p. 1003–1006; O. Poelmans, *Droit des obligations au Luxembourg*, Brussel, Larcier, 2013, 440.

105 Yet, when several persons by a common fault knowingly cause damage the liability will be *solidaire* in Belgium even though this is not explicitly provided by law, W. Van Gerven and A. Van Oevelen, *Verbintenissenrecht*, Leuven, Acco, 2015, 557; Cass. 3 mei 1996, *Arr. Cass.* 1996, 388.

liable for a competition law infringement.¹⁰⁶ Although most antitrust damages claim will be extra-contractual claims, they will be subject to slightly different rules (regarding the secondary consequences of the joint liability) than the claims that are subject to the general tort law regime, where liability *in solidum* is the norm.¹⁰⁷ The Directive uses the concept solidary liability, addressing the rules with regard to the primary consequences of solidarity (which are identical to those of liability *in solidum* in the Belgian and Luxembourgish legal system). Given that advantages of elaboration-reformation method have not been explored here to clarify these uncertainties, preliminary questions could be referred to the Court of Justice to explain the ‘secondary consequences’ of solidarity as defined in Belgian and Luxembourgish laws and whether the determination thereof is left to the national legislator based on the principle of procedural autonomy.

B. Exceptions to the joint and several liability

The Directive provides for exceptions to the joint and liability where the infringer is (i) a small or medium-sized enterprise (SME)¹⁰⁸, or (ii) an immunity recipient.

First of all, without prejudice to the right of full compensation a SME should be liable only to its own direct and indirect purchasers where: (a) its market share in the relevant market was below 5 per cent at any time during the infringement of competition law; and (b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value. The exception will, however, not apply where the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or (b) the SME has previously been found to have infringed competition law.¹⁰⁹

Secondly, an immunity recipient, on the other hand, should only be jointly and severally liable (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.¹¹⁰

While all analysed countries literally transposed the exceptions to joint and several liability, the gold-plating approach can be identified.¹¹¹ The Lithuanian Law on Competition deviated from the Directive by adding to the conditions for the SME exemption a third criterion, similar to that which the Directive provides for immunity recipients, namely that the exemption only applies where full compensation can be obtained from the other undertakings that were involved in the same infringement of competition law. Therefore, an SME is still liable towards other injured parties than its direct and indirect purchasers or suppliers if the other injured parties are not able to recover full compensation from the other infringers. Interestingly, the Belgian legislator also holds SMEs liable towards other injured parties where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law, similar to the rules of the Directive concerning immunity recipients.¹¹² In Latvia, a similar provision for a SME was also incorporated providing that ‘when the market participant¹¹³ shall be liable for the losses it caused to its own direct or indirect purchasers or suppliers, or also other persons, who cannot obtain full compensation from other market participants, who participated in the infringement of competition law.’¹¹⁴

The question arises whether this provision on the extended liability of SMEs is permissible. The Lithuanian legislator seemed to believe that this liability of SMEs was necessary as most companies in Lithuania fall under the SME category. Therefore, to ensure the exercise of the right to full compensation and in accordance with the principle of effectiveness enshrined in article 3 of the Directive, a fair balance should have been reached.¹¹⁵ Equally, given that the Directive’s provision on the SME exemption contains the words ‘without prejudice to the right of full compensation’¹¹⁶ seems to suggest that the Directive aims to limit the application of the SME exemption to ensure that the victims (other than the direct or indirect purchasers or suppliers of the SME) are not prevented from obtaining full compensation. Therefore, the implementation legislation would then be in line with the meaning of the Directive.

106 Article XVII.86 Code of Economic Law.

107 W. Van Gerven and A. Van Oevelen, *Verbintissenrecht*, Leuven, Acco, 2015, 565–566. See also the Advice of the BCC, p. 12.

108 A SME is regarded an entity with no more than 50 million turnover and fewer than 250 employees. As defined in Commission Recommendation 2003/361/EC.

109 Article 11(2) and (3) of the Directive.

110 Article 11(4) of the Directive.

111 Article 45(4) of the Law on Competition.

112 Chambre of Representatives 54, No. 2413/001, p. 41–42.

113 The notion of ‘market participant’ has an equivalent meaning of the EU concept of an ‘undertaking’.

114 Section 21 of the Competition Law.

115 Article 4 of the Directive. The Lithuanian explanatory memorandum prepared by the Ministry of Economy, 10/2/2016 (in Lithuanian). Lietuvos Respublikos Konkurencijos Istatymo Nr. VIII-1099 Pakeitimo Istatymo Projekto Aiškinamasis raštas.

116 Article 11(2) of the Directive.

Whether this is indeed the case, will ultimately be up to the Court of Justice to decide.

IX. Passing-on defence and indirect purchasers

Following the principle recognised by the Court of Justice that ‘any individual’ is to be able ‘to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition’¹¹⁷ the Directive states that both direct and indirect purchasers of the goods or services sold by an infringer are entitled to claim compensation.¹¹⁸ In order to avoid overcompensation, the Member States require to lay down procedural rules to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.¹¹⁹

While the Directive recognises the indirect purchaser’s right to claim damages, it instructs the Member States to provide that in such cases, the burden of proving the existence and scope of such a passing-on shall rest with the claimant (indirect purchaser), who may reasonably require disclosure from the defendant or from third parties.¹²⁰ This rule, that is an application of the *maxime Actor incumbit probatio*, will generally be in line with the existing rules of civil procedure of the Member States. The innovation the Directive brings is that it adds to this principle a rebuttable presumption holding that the indirect purchaser shall be deemed to have proven a passing-on where that indirect purchaser has demonstrated that: (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. The defendant (infringer of the competition rules) is entitled to rebut the presumption by demonstrating ‘credibly to the satisfaction of the court

that the overcharge was not, or was not entirely, passed on to the indirect purchaser’.¹²¹

When a claim for damages is brought by a party who is not at the end of the distribution chain, the defendant should be entitled to invoke as a defence fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on is to be on the defendant, who may reasonably require disclosure from the claimant or from third parties.¹²² The rules of the Directive do not, however, prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.¹²³

In order to avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or even to an absence of liability of the infringer, the Directive commands the Member States to safeguard that national courts in assessing whether the burden of proof is satisfied, can seize an action for damages.¹²⁴ The Directive finally provides that national courts must have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on¹²⁵ and that the Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.¹²⁶

Before the implementation of the Directive neither Lithuanian nor Latvian law specifically included indirect purchasers in damages cases and therefore, they had difficulties in proving their standing to initiate such claims. The revised Competition laws in both countries incorporated new notions of ‘direct purchaser’ (*tiesāis pircējs/tiesioginis pirkējas*) and ‘indirect purchaser’ (*netiesāis pircējs/netiesioginis pirkējas*)¹²⁷ and their explicit right to damages claims.¹²⁸ The Lithuanian and Latvian legislators literally transposed the Directive’s chapter on passing-on of overcharges almost by the letter.¹²⁹ Upon the receipt of the damages action claim, Vilnius County court will assess whether the share of any overcharge was passed on. These assessments will be calculated

117 Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* ECLI:EU:C:2001:465.

118 Article 12(1) of the Directive.

119 Article 12(2) of the Directive.

120 Article 14(1) of the Directive.

121 Article 14(2) of the Directive.

122 Article 13 of the Directive.

123 Article 12(3) of the Directive.

124 And without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012 (Art. 15(2) of the Directive). Yet, due account should be taken of the following: (a) actions for damages that are related to the same infringement of competition law,

but that are brought by claimants from other levels in the supply chain; (b) judgments resulting from actions for damages as referred to in point (a); (c) relevant information in the public domain resulting from the public enforcement of competition law.

125 Article 12(5) of the Directive.

126 Article 16 of the Directive.

127 These were transposed in Section 1 (8¹) and (7¹) in of the Latvian Competition Act and Article 3 (20) and (12) of the Law on Competition in Lithuania respectively.

128 Article 47(2) the Law on Competition in Lithuania, Section 21 of the Competition Law in Latvia.

129 Section 21 of the Competition Law in Latvia.

pursuant to the European Commission guidance.¹³⁰ In contrast to Lithuania, the revised Belgian law did not make any reference to the fact that the Commission would issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.¹³¹ There is no reference to any EU guidance in the Latvian Competition Law either, where the court has the right to estimate any overcharge passed on.¹³²

The Belgian legislator also almost literally transposed the rules relating to the passing-on of overcharges.¹³³ The right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge was included in Article XVII.83 § 2 of the Code of Economic Law. The specific transposition of the other parts of Article 12 of the Directive concerning the avoidance of overcompensation, the application of the rules on overcharges to supplies to the infringer and the power of the courts to estimate the share of the overcharge that was passed on, was not considered necessary since they are already part of Belgian law.

In Luxembourg, the rules of the Directive dealing with the relationship between the right to full compensation and the passing-on of overcharges,¹³⁴ the principle that it is up to the claimant to prove the existence and the amount of the overcharge,¹³⁵ and the reference to the Commission's guidance on passing-on in Article 16 of the Directive have not been transposed specifically. The idea is that these rules would not add anything to Luxembourgish law. The remaining articles were duly implemented.¹³⁶

It seems that whilst adopting the copying and minimalistic methods, the transposed provisions of the Directive in all analysed countries reinvigorated the indirect purchaser's right to claim damages and established the presumption of the passing-on defence.

X. Presumption of harm and quantification of harm

A. Presumption of harm

Building on the previous studies that more than 90 per cent of cartel agreements lead to harm, the Directive

created a rebuttable presumption that cartels cause harm. In line with Article 17(2) of the Directive, all the analysed countries literally transposed this rebuttable presumption.¹³⁷ The Luxembourgish Explanatory Memorandum stipulated that the presumption relates in particular to effects on prices. Depending on the facts of the case, cartels contain an increase in price or prevent a decrease in prices that would have occurred but for the cartel.¹³⁸ Yet, only Latvia employed the non-minimalistic method via its amendment of Competition law in 2016 by embracing a presumption that cartels cause damage and that cartels affect the price by 10 per cent unless it is proven otherwise.¹³⁹ It also transposed the Directive's definition of 'cartel'.¹⁴⁰ It seems unfortunate that other analysed Member States, especially Lithuania, did not take this path, as so far there has not been a single damages claim caused by a cartel in Lithuania. Equally, it transposed a narrow definition of cartel as noted by Article 2(14) of the Directive even though the Lithuanian national guidelines embrace a wider notion of cartel (i.e. including vertical agreements). By contrast, the Belgian definition employed the gold plating approach by explicitly adding that in addition to agreements or concerted practices between two or more competing undertakings or associations of undertakings cartels may include agreements and concerted practices with one or more non-competing undertakings or associations of undertakings.¹⁴¹ Therefore, this definition of a cartel has widened the scope of the application of the presumption that cartels cause damage in Belgium.

Finally, it is to be noted that this presumption in all selected Member States (except Latvia) only applies to the fact that damage was caused and not to its actual amount.

B. Quantification of harm

Article 17(1) of the Directive requires the Member States to ensure that neither the burden nor the standard of proof necessary for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In the absence of EU

130 Article 47(1) the Law on Competition.

131 Article 16 of the Directive.

132 Section 21¹ of the Competition Law with further details on overcharge being provided in Section 21² of the Competition Law in Latvia.

133 Articles 13, 14 and 15 of the Directive were transposed in Article XVII.83–85 of the Code of Economic Law.

134 Article 12(1)(2)(3) and (5) of the Directive.

135 Article 14(1) of the Directive.

136 The Directive's articles 13 and 15(1) were transposed in Article 8 of the Act. Directive's articles 14(2) and (4) were transposed in Article 9(1) and (2) of the Act respectively.

137 For instance, Article XVII. 73 of the Code of Economic Law in Belgium; Article 2 of the Luxembourgish Act; Article 44(3) of the Law on Competition in Lithuania.

138 *Projet de loi, Exposé des motifs*, p. 5.

139 Section 21(3) of the Competition Act. Hungary was one of the first countries to introduce this rule.

140 Section 2¹(2) of the Competition Law.

141 Article 1.22(12) of the Code of Economic Law. This definition is inspired by the definition of cartel in the leniency guidelines of the Belgian Competition Authority and the ECN model leniency programme 2012. Documents Chambre of Representatives 54, 2413/001, p. 10.

rules on the matter, the national courts of the Member States have to determine the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. This quantification could be established by taking into account the asymmetry of information between the parties and by comparing the way in which the concerned market would have evolved in the absence of the infringement. Article 17(1) of the Directive was not transposed specifically in Belgium, as these requirements are satisfied by the general rules of Belgian law that the court has to estimate the damage. Instead, Belgium transposed the provision that a NCA may, upon request of a national court, assist the court with respect to the determination of the quantification of damages where the NCA considers such assistance to be appropriate.¹⁴² In addition, existing Belgian law allows courts to order expertise measures in order to evaluate the amount of damages.¹⁴³ The Explanatory Memorandum noted that it would be ‘opportune’ to take the Commission’s Practical Guide on the quantification of damages into account.¹⁴⁴

The Luxembourgish Act does not contain rules on the quantification of the harm. Instead, the Explanatory Memorandum referred to the Commission’s communication on the quantification of the harm resulting from infringements of the competition rules and the accompanying practical guidelines, which may help the claimant to submit to the court the factual elements relating to the quantity of damages requested and to help the defendant to respond to these elements. Yet, the *Conseil de la Concurrence*, considered this guidance, however, difficult to apply making the quantification of the harm a heavy task for civil judges.¹⁴⁵ Interestingly, there is visibility of the elaboration-concretisation and gold-plating

methods in this context in Lithuania, as the Lithuanian courts and experts will have an obligation to emulate the European Commission’s Communication on quantifying harm in antitrust damages actions and the Practical Guide¹⁴⁶ even though it is not requested by the Directive.¹⁴⁷ Given that the Guide provides different calculation models, it remains to be seen which model will be favoured in Lithuania and how effectively it will be transposed in practice.

XI. Consensual dispute resolution

To reduce the burden of courts, the Directive allows damages claims to be settled following out of the court procedures. Article 18(1) of the Directive requires the Member States to ensure that the limitation period for the parties (involved or represented in consensual dispute resolution) to bring an action for damages is suspended for the duration of any consensual dispute resolution process, but for up to a maximum of two years.¹⁴⁸ In addition, the NCAs may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.¹⁴⁹ The Member States also should ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm that the infringement of competition law inflicted upon the injured party.¹⁵⁰

Articles 18 and 19 of the Directive are transposed almost word by word in Belgium, Latvia,¹⁵¹ Lithuania,¹⁵² and Luxembourg.¹⁵³ Article 11(1) of the Luxembourgish Act adds, however, that an appeal to arbitration suspends the limitation period for bringing actions for damages for infringements of the competition rules when the arbitration clause has been annulled. It is interesting to note that Article 18(3) of the Directive has not been

142 Article 17(3) of the Directive was transposed into Article XVII.77 § 2 of the Code of Economic Law.

143 Article 962 of the Code of Civil Procedure. A similar rule was proposed in Luxembourg. *Projet de loi, Exposé des motifs*, p. 16.

144 P. 15.

145 Advice of the *Conseil de la concurrence*, Document 6968/04, *Chambre des députés* 2015–2016, dd. 1.6.2016, p. 4.

146 Communication on quantifying harm in antitrust damages actions, 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, Accompanying the Communication from the Commission 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.

147 Article 44(4) of the Law on Competition defines that when it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available, the court informs the parties that an estimated amount of damages will be established. The estimated amount of damages is determined after taking into consideration the Commission’s recommendations on damages

quantification. Experts must always follow the Commission’s recommendations in their damages calculations pursuant to Article 44(5) of the Law on Competition.

148 Article 18(2) of the Directive.

149 Article 18(3) of the Directive.

150 Article 19(1) of the Directive. In principle, any remaining claim of the settling injured party is to be exercised only against non-settling co-infringers, who shall not be permitted to recover contribution for the remaining claim from the settling co-infringer (Article 19(2)). However, unless the terms of the contractual settlement provide otherwise, the settling injured party may exercise the remaining claim against the settling co-infringer if the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party (Article 19(3)).

151 Section 21³ of the Competition Law. Yet, a duration for up to a maximum of two years was not transposed in the Latvian Competition Law.

152 Articles 48 and 50 of the Law on Competition.

153 Articles 11 and 12 of the Luxembourgish transposition Act.

implemented specifically in Luxembourg. Probably, the legislator found that the wording of Article 20(2) of the Luxembourgish Competition Act already leaves room to take damages paid as a result of consensual settlements into account when determining the amount of the fine.¹⁵⁴

These rules were also transposed almost word by word in Belgium,¹⁵⁵ except for an unfortunate change of the order of words in the rule relating to the NCA's power to consider compensation paid as a result of a consensual settlement and prior to a decision imposing a fine to be a mitigating factor¹⁵⁶ as well as the replacement of the Dutch wording of the Directive '*buitengerachtelijke geschillenbeslechting*' by '*minnelijke oplossing van geschillen*'.¹⁵⁷ Yet, neither of these divergences, has legal consequences.

XII. Concluding remarks

A robust transposition mechanism took place in all Member States analysed in this paper causing some significant delays in some countries, such as Latvia. The article revealed that all discussed countries had to face some technical and linguistic intricacies in their journey of the transposition of the Directive and encountered some challenges in their attempt to align the Directive's provisions with their national rules.

Specifically, the paper has addressed the approaches undertaken in the transposition process of the Directive in Belgium, Latvia, Lithuania, and Luxembourg, as the extent to which the transposition of various Directive's provisions took place especially in the context of two main modalities (i.e. the copying v. elaboration methods and the minimalistic v. non-minimalistic approaches). As anticipated 'old' small countries (especially Luxembourg and to a lesser extent Belgium) had more confidence in their national legal systems, namely in their general rules of tort law relating to damages. For instance, Luxembourg was 'selective' in relation to which Directive's provisions should be transposed. Indeed, the rules concerning the power of the court to

order the disclosure of evidence circumscribed as precisely and as narrowly as possible on the basis of available facts in the reasoned justification have not been transposed since the general rules of civil procedure in Luxembourg are more lenient and therefore, the position of the claimant in this respect would not be improved. Whereas the copying/literal method combined with the minimalistic approach dominated in newer Member States, especially Lithuania where the provisions of the Directive were transposed almost 'by the letter', despite the fact that some principles such as proportionality are already well established in the national legal system. The copying/literal approach provides some sort of 'security' against any future actions by the European Commission under Article 258 TFEU. It also presents more legal certainty to national courts.

Furthermore, the paper has also examined whether the elaboration and gold-plating methods have been utilised. For instance, Belgium went beyond the level of protection required by the Directive vis-à-vis an absolute access prohibition with regard to all documents and information submitted by a leniency applicant, rather than just leniency statements, as denoted by the Directive.¹⁵⁸ Additionally, it also expanded the definition of cartel embracing both horizontal as well as vertical arrangements. Therefore, this definition of a cartel has widened the scope of the application of the presumption that cartels cause damage in Belgium. Along similar lines, Latvia exploited the gold plating approach in stating that a rebuttable presumption that cartels affect the price by 10 per cent, therefore, facilitating the claimant's burden of proof, as quite often quantification of damages is another hurdle for private enforcement. Furthermore, both Latvia and Lithuania employed the element of elaboration-concretisation method by assigning one national court for antitrust damages claims. The elaboration-concretisation and gold plating methods are also visible in Lithuania in the context where the Lithuanian courts and experts will have an obligation to follow the European Commission's Communication on quantifying harm in antitrust damages actions and the Practical Guide¹⁵⁹ even though it is not requested by the Directive.¹⁶⁰

154 This provision states that fines for infringements of Article 101 and 102 and their national equivalents are proportionate to the seriousness and the duration of the infringement, the situation of the undertaking or group to which the undertaking belongs and the possible repeated character of the infringements.

155 Articles IV.70 and XVII.88–89 of the Belgian Code of Economic Law.

156 Article IV.70 of the Code of Economic Law.

157 Article XVII.89 of the Code of Economic Law.

158 The implementation Act modifies Article IV.46, § 3 of the Code of Economic law by adding 'and the Articles XV.77, XV.78 and XV. 79' and introduces the rules of the Directive on access to documents in the new Articles XVII.77–79 of the Code of Economic Law.

159 Communication on quantifying harm in antitrust damages actions, 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, Accompanying the Communication from the Commission 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.

160 Article 44(4) of the Law on Competition defines that when it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available, the court informs the parties that an estimated amount of damages will be established. The estimated amount of damages is determined after taking into consideration the Commission's recommendations on damages quantification. Experts must always follow the Commission's recommendations in their damages calculations pursuant to Article 44(5) of the Law on Competition.

Finally, the non-minimalistic method was exploited in all analysed countries (save Luxembourg) in the context of joint and several liability by subjecting the SME exemption from joint and several liability to a condition where the Directive only mentions explicitly with regard to immunity recipients. This means that a SME is still liable towards other injured parties than its direct and indirect purchasers or suppliers if the other injured parties are not able to recover full compensation from other undertakings involved in the same infringement. It is uncertain, however, whether this constitutes a deviation from the intention of the EU legislator who may have considered that this condition was implied in the phrase

that the SME exemption is ‘without prejudice to the right of full compensation’. Future preliminary reference can unravel this uncertainty. Such proceedings may also solve other questions that were left open by the Directive, such as the so-called secondary consequences of the joint and several liability.

Lastly, after the deliberations provided in this paper, the near future will confirm the extent to which the transposed provisions of the Directive will facilitate private enforcement of antitrust damages actions in these Member States.

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