

The EU Antitrust Damages Directive: Transposition in the Member States

Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos*

*Reviewed by Silvia Bessa Venda***

I. Introduction

About a year after Member-States (MS) completed the transposition of the European Union Damages Directive, this book emerged and stood out in relation to other publications on the subject. We are living in a time of scepticism with regard to the effectiveness of the Directive and the first post-transposition actions, namely follow-on, begin to appear. The authors offer a complete and straight to the point analysis of the growing importance of private enforcement of competition law in the EU and anticipate questions to be dealt with in the coming years. In addition to the authors, renowned competition law specialists in the United Kingdom, Portugal and Spain provide a guide on the Directive's transposition in sixteen paradigmatic MS, providing the reader with about 485 pages for a wide understanding about the Directive's background, the legislation subsequently approved by the MS, and the remaining obstacles to the full effectiveness of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

II. Description

The book is divided into three main parts subdivided into chapters. With the exception of the last part, which contains the final remarks, each chapter has its own conclusions. This helps the reader retain the most

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** Senior Specialist Official at Entidade Reguladora da Saúde – ERS (Portuguese Healthcare Regulation Authority), Researcher at Católica Research Centre for the Future of Law, Contributor at the Observatory on Competition Law Enforcement, and PhD Candidate (EU Competition Law) at the Porto Faculty of Law, Universidade Católica Portuguesa.

important information before moving on to the next chapter. Parts II and III are interconnected, and the reading of the two together can be helpful. This caveat is also made by the authors in a subtitle of the preface, called book layout.

Part I

This part is divided into two chapters. The first chapter is essentially introductory. The authors briefly describe the developments in the enforcement (public and private) of EU competition law in the last decades, from the first rules introduced in the Treaty of Paris to the matters omitted by the EU Antitrust Damages Directive, such as collective redress. This includes Regulation 17, Articles 85 and 86 of the Treaty, and Regulation 1/2003, which granted national competition authorities the power to apply EU competition law. Furthermore, the authors explain the important role played by the European Commission (EC) and the Court of Justice of the European Union (CJEU) in this regard. Concerning private enforcement, they enunciate the steps that have been taken by the above-mentioned entities and that have culminated in the adoption of the Directive, with particular emphasis on the CJEU case-law. In addition, they compare the damages actions experience in the EU and in the United States. In this context, the book addresses four key issues for understanding the differences between the two systems: rules on discovery, funding, class actions mechanisms and damages calculation principles. Finally, the authors address EU private international law and the specific rules that determine the forum and the law applicable in competition law claims.

The second chapter provides a detailed description of the process that culminated in the transposition of the EU Antitrust Damages Directive, including the documents requested/produced by the EC and the CJEU case-law, from *Courage* (C-453/99) to *Köne* (C-557/12). In addition, the chapter describes the main substantive and procedural rules set out by the Directive. According to the authors, these rules were selected from the most successful MS regimes in antitrust damages actions (such as the United Kingdom, Germany, and the Netherlands). They also identify the rules aimed at facilitating the exercise of the right to compensation and the ones that pressured the second objective of the Directive: to safeguard the effectiveness of public enforcement. Finally, they explore the issues that, in their opinion, the Directive neglects, such as other private actions and alternative dispute resolution (ADR).

Part II

This is, by far, the largest part of the book. It analyses the transposition of the EU Antitrust Damages Directive in the sixteen MS (one per chapter). The chosen MS are Belgium, Cyprus, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Spain, Sweden, the Netherlands and the UK. Or, in the authors' words, seven MS with relevant experience in competition law, four MS whose experience in the matter is developing, three MS that joined the EU in 1 May 2004, and two MS with limited experience in private enforcement. Not only the high number of MS covered by the analysis, but also the concern of the authors in choosing contrasting legal frameworks in this matter is to be applauded. In addition, it should be noted that each analysis is subdivided into the same points: transposition background and process, scope of the transposition measure, key issues and concluding remarks. This organisation makes it easier for the reader to compare MS's approaches.

Part III

The final part is a comparative study of the information contained in the previous part. It is divided into three chapters. The first deals with the transposition process: type, timeline, responsible national entity, transparency of the process, participation of stakeholders, etc. At the beginning of the chapter, nine of the book's contributors provide an overview of the national legal frameworks before the Directive. The chapter ends with an analysis of the implementation of the Directive. MS have been almost unanimous in extending the substantive scope of the transposition to "purely national infringements". Yet, the definition of the transposition's temporal scope is one of the issues that has divided MS the most. According to the authors, this is essentially due to the vague solution provided by the Directive, which allows different interpretations.

In the second chapter, the authors analyse how MS have transposed the other key and controversial topics of the Directive. As underlined in this book, the Directive does not confer a complete legal framework, abstaining from regulating some issues and leaving MS room for discretion in others. The authors address each topic by noting the either the existence or absence of divergences in the transpositions, exploring examples thereof and addressing several matters such as liability (who, under what conditions, presumptions, derogations), access to evidence, specialised courts, limitation periods, damages quantification, collective redress and ADR. In the end, they address four issues usually less explored in legal writings,

but which may constitute significant obstacles to the growth of private enforcement of competition law. The first concerns the lack of access to information on decisions of competition authorities and past/ongoing antitrust damages actions. The second concerns legal uncertainty among MS regarding costs. In this context, they give several examples of different national rules, praising the Swedish approach to the proof of harm in small claims: courts may determine the damages without quantification by the applicant. According to them, this is only possible if the costs with economic studies are disproportionate. The prohibitions in force in some MS on funding offers and *quota litis* pacts are also addressed in this final part. Lastly, the authors recall that several MS remain reluctant as regards the application of the Treaty's rules to disputes between national companies, which is clearly contrary to the CJEU case-law.

In the final chapter, the authors recall the object of the book, resume the issues treated in each chapter, and draw their concluding remarks. According to them, the EU Antitrust Damages Directive omits issues which are important to increase the attractiveness of private enforcement, such as financing mechanisms and collective redress. The main final remark of the book, in our opinion, is the following: the minimum level of harmonisation provided by this Directive is reflected in the discrepancies between the national transpositions, and this will probably lead the CJEU to assess the compatibility of those new MS's legislations with the principle of effectiveness of EU law.

III. Critical analysis

Overall, *The EU Antitrust Damages Directive: Transposition in the Member States* is an outstanding effort to provide the reader with an overview of the legal framework applicable to private enforcement of competition law within the EU. Concentrating so much information in a single work requires a great capacity of systematisation. However, there are still differences in style and content between the approaches of the sixteen contributors.

Despite its level of detail, the book is very user-friendly. If any less positive criticism can be made, it is related to its overly descriptive character. Nevertheless, the objective of the book is centered on the debates that had taken place in the MS and the authors have made critical notes, e.g. concerning the Directive's preference for follow-on actions.

The book is definitively a reference in the current context of private enforcement of competition law.