

EU Competition Litigation  
*Transposition and First Experiences  
of the New Regime*

Swedish Studies in European Law  
Volume 12

Edited by  
Magnus Strand  
Vladimir Bastidas Venegas  
Marios C Iacovides

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © The editors and contributors severally 2019

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©.

This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union, <http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: EU Competition Law and the New Private Enforcement Regime: First Experiences from Its Implementation (Conference) (2017 : Uppsala universitet). | Strand, Magnus, editor. | Bastidas Venegas, Vladimir, 1974- editor. | Iacovides, Marios C., editor. | Swedish Network for European Legal Studies, sponsoring body.

Title: EU competition litigation : transposition and first experiences of the new regime / edited by Magnus Strand, Vladimir Bastidas Venegas, Marios C Iacovides.

Other titles: European Union competition litigation

Description: Oxford, UK ; Chicago, Illinois : Hart Publishing, 2019. | Series: Swedish studies in European law | "All the topical contributions included here spring from the conference, EU Competition Law and the New Private Enforcement Regime: First Experiences from Its Implementation, which was held in Uppsala on 13 and 14 May 2017 at the initiative of the Network [Swedish Network for European Legal Studies] and in collaboration with Uppsala University"—ECIP editorial preface. | Includes bibliographical references and index.

Identifiers: LCCN 2018057168 (print) | LCCN 2018058979 (ebook) | ISBN 9781509922024 (EPub) | ISBN 9781509922017 (hardback)

Subjects: LCSH: Antitrust law—European Union countries—Congresses. | Actions and defenses—European Union countries—Congresses. | Damages—European Union countries—Congresses. | International and municipal law—European Union countries—Congresses. | European Parliament. 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—Congresses.

Classification: LCC KJE6456.A8 (ebook) | LCC KJE6456.A8 E9 2017 (print) | DDC 343.2407/21—dc23

LC record available at <https://lcn.loc.gov/2018057168>

ISBN: HB: 978-1-50992-201-7  
ePDF: 978-1-50992-203-1  
ePub: 978-1-50992-202-4

Typeset by Compuscript Ltd, Shannon  
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



To find out more about our authors and books visit [www.hartpublishing.co.uk](http://www.hartpublishing.co.uk). Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

*The Presumption of Harm  
and its Implementation  
in the Member States' Legal Orders*

PIETER VAN CLEYNENBREUGEL\*

I. INTRODUCTION

**T**HE OBLIGATION IMPOSED on Member States to explicitly acknowledge that cartels are presumed to cause harm is one of the key novelties introduced by Directive 2014/104/EU (the Directive).<sup>1</sup> As a result of that presumption, for the purpose of damages actions, harm to consumers and competitors is presumed to be present whenever a cartel is in place. As a legal presumption, it would allow claimants to proceed more easily with their action and to obtain damages for competition law infringements more effectively.<sup>2</sup> Although the presumption of harm seems straightforward in both its purpose and focus, its exact scope of application, as a matter of both EU and Member States' national law, has not received much attention, especially in contrast with other rules and presumptions included in the Damages Directive. Insight into that feature is nevertheless more necessary now than ever if only to avoid the presumption becoming an empty shell devoid of practical use.

The purpose of this chapter is to shed light on the interpretation problems accompanying the presumption of harm in the wake of transposition of the Damages Directive. To that end, the second section of this chapter will explore the legal nature and the scope of application of the presumption of harm underlying the Damages Directive. That analysis allows the inference that underneath

\* Professor of European Union law, Liège Competition and Innovation Institute, University of Liège, Belgium, pieter.vandclaynenbreugel@uliege.be.

<sup>1</sup> 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, [2014] OJ L349/1.

<sup>2</sup> That position would allow claimants to exercise their right to full compensation more effectively, as stated in Art 1(1) of Directive 2014/104 (n 1).

the surface of a clear and logical presumption, Member States still retain an important degree of autonomy in shaping and transposing the presumption. Acknowledging this potential for varied transpositions, the third section will summarise how the presumption has been transposed in the laws of seven Member States. That overview, although not fully representative of the varieties in place at the level of the Member States, permits a focus on key remaining interpretation and application problems accompanying the presumption of harm. The chapter will therefore conclude that even after the transposition deadline, many open questions remain to be addressed and resolved on this subject matter in the years to come.

## II. THE LEGAL NATURE AND SCOPE OF APPLICATION OF THE PRESUMPTION OF HARM

According to Article 17(2) of the Directive, it shall be presumed that cartel infringements cause harm. This presumption, which forms part of a provision devoted to the *quantification* of harm, has been inserted in order, according to the Commission,

to remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices.<sup>3</sup>

It goes beyond the purpose of this chapter to revisit the origins of the presumption of harm in the Damages Directive.<sup>4</sup> Suffice it to say here that the Commission only introduced the presumption in the wake of an economic study – which has been the object of criticism<sup>5</sup> – pointing at the quasi-permanent presence of harm for others when a cartel is in place.<sup>6</sup> Translating the findings of that study into law, the Commission opted for a legal presumption as phrased in Article 17(2) of the Directive. This section offers some background on the legal nature (A.) and the scope of application of the presumption (B.) before questioning the impact on both nature and leeway granted to Member States when transposing the presumption (C.).

<sup>3</sup>Recital 47 in Directive 2014/104 (n 1).

<sup>4</sup>For an analysis in that regard, see M Iacovides, ‘The Presumption and Quantification of Harm in the Directive and the Practical Guide’ in M Bergström, MC Iacovides and M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Oxford, Hart, 2016) 298–300.

<sup>5</sup>See C Weidt, ‘The Directive on Actions for Antitrust Damages after Passing the European Parliament’ (2014) 35(9) *European Competition Law Review* 438, 442.

<sup>6</sup>See Oxera and a multi-jurisdictional team of lawyers led by A Komninos, ‘Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts’, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf), and also Iacovides, ‘The Presumption and Quantification of Harm in the Directive and the Practical Guide’ (n 4) 299.

## A. Legal Nature

In formulating the presumption of harm, the Directive did not explicitly elaborate on the legal nature of such a presumption. The common definition of a presumption is an *act of accepting that something is true until it is proved not true*;<sup>7</sup> while a *legal* presumption refers to the inscription of such an act of acceptance in a legal instrument (statute, regulatory practice or precedent case). As a result, as a matter of law, it will be accepted that certain facts are true, unless you prove up to a certain legal standard that those facts are not correct in the specific case at hand.<sup>8</sup>

The adoption or recognition of legal presumptions is most likely to alter the *burden of proof* imposed on litigating parties. To the extent that constituent elements triggering the legal presumption have been proven, claimants will be deemed to have adduced, to a sufficient legal standard, proof that specific behaviour was engaged in. The defendant party subsequently bears the burden of proving that the presumption cannot apply to the factual situation at hand, by virtue of being rebutted or inapplicable. As such, reliance on presumptions generally has the effect of shifting the legal burden of proof from the claimant to the defendant party. Such effects may be inscribed in the law itself, as a legal consequence of the presumption at hand, or may factually follow from the application of the presumption in itself.<sup>9</sup> In the latter case, the burden of proof is not formally shifted, but the type of evidence to be adduced by either party will be centred on the scope and extent of the presumption at play in the specific case.

Legal presumptions also affect the *standard of proof* and the legal tests that need to be fulfilled in order for a certain kind of behaviour to be deemed present. Whereas, in general, the party claiming something has to prove its claim to a sufficient legal standard – *actori incumbit probatio* – presumptions have the effect of allowing such party to infer the proof of its claim from the presence of ‘shortcut’ elements. Those shortcut elements are then to be considered as sufficient indications of the presence of illegal or potentially illegal behaviour. In competition law, such shortcuts would point towards a presumption of harmful or anticompetitive intent on the part of businesses or to the presumptive existence of anticompetitive effects. In both instances, adducing elements that could

<sup>7</sup> A presumption is defined as ‘a legal inference that must be made in light of certain facts. Most presumptions are rebuttable, meaning that they are rejected if proven to be false or at least thrown into sufficient doubt by the evidence. Other presumptions are conclusive, meaning that they must be accepted to be true without any opportunity for rebuttal’, [www.law.cornell.edu/wex/presumption](http://www.law.cornell.edu/wex/presumption).

<sup>8</sup> P Ibáñez Colomo, ‘Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy’, LSE Law, Society and Economy Working Paper 29/2014, [www.lse.ac.uk/collections/law/wps/WPS2014-29\\_Colomo.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf) 15.

<sup>9</sup> F Castillo de la Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ (2009) 32(4) *World Competition* 505, 516.

trigger the presumption thus suffices to infer anticompetitive intent or prima facie anticompetitive effects. As such, those presumptions facilitate the task of detecting, addressing and ending infringements in specific case situations,<sup>10</sup> without full evidence of illegal behaviour having to be adduced.

In that regard, an additional familiar distinction is also made between conclusive and rebuttable presumptions. A conclusive presumption means that the opposing or defendant party cannot rebut – through factual evidence – the claim made by the enforcement authority in a specific situation.<sup>11</sup> A rebuttable presumption operates in a slightly different fashion. In that situation, the offering of probable evidence triggers the presumption that sufficient evidence to hint at illicit practices is present. Such presumptions point towards situations where conclusions can be inferred on the basis of probabilities reflected in certain evidence.<sup>12</sup> Proof to the contrary could be adduced, most likely by the opposing party, following the application of the presumption. In case evidentiary materials are to be rebutted, it may suffice that the defendant or opposing party claims that evidence to the contrary may convincingly be offered, rebutting the presumption of evidence *à charge* with evidence *à décharge*.

The presumption of harm included in the Directive clearly fits the above-mentioned conceptual description of a legal presumption. It allows claimants to shortcut their analysis by acting on the belief that a cartel has indeed caused harm. As an evidentiary rule, the presumption of harm in Article 17(2) of the Directive is not conclusive. The Directive acknowledges explicitly that the infringer should be able to rebut the presumption, showing that the claimant concerned did not suffer harm as a result of the cartel. In its current set-up, the presumption additionally also has an impact on both the burden and standard of proof. On the one hand, the presumption allows a claimant for damages to limit his action to asserting evidence of a cartel and to proceed with the quantification of damages suffered. The applicant no longer needs to show that actual harm was suffered; it instead falls upon the defendant to prove that no harm was done to the applicant in the case at hand by engaging in cartelism. As such, the general obligation imposed on the applicant (*actori incumbit probatio*) to prove the existence of harm is replaced by an obligation on the defendant to prove that no harm was done in any circumstances. On the other hand, the operation of this presumption tends to modify the standard of proof required in order to successfully claim damages in the context of competition law infringements. Whereas, in traditional instances of non-contractual liability law, a claimant

<sup>10</sup> D Bailey, 'Presumptions in EU Competition Law' (2010) 31(9) *European Competition Law Review* 362. See also C Ritter, 'Presumptions in EU Competition Law', available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2999638](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999638), accessed 16 January 2018.

<sup>11</sup> See on such 'assumptions' A-L Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (Paris, LGDJ, 2008) 535 and Ibáñez Colomo, 'Intel and Article 102 TFEU Case Law' (n 8) 14.

<sup>12</sup> Bailey, 'Presumptions in EU Competition Law' (n 10) 363.

had to prove a fault, harm and a causal link between both, the presumption effectively lowers the standard to do so by considering that no evidence on the existence as such of harm has to be adduced. At the same time, however, the presumption does not discharge a claimant from the obligation to prove a causal link, and therefore, the extent of the harm caused.<sup>13</sup>

## **B. Scope of Application**

Although the presumption offers an evidentiary rule capable of shifting both the burden and altering the standard of proof, its scope of application is far from absolute. In its current set-up in Article 17(2) of the Directive, it is effectively circumscribed by two conditions limiting its applicability.

First, the presumption only applies in relation to cartels. The Directive defines a cartel as

an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.<sup>14</sup>

Preamble 47 explains in that regard that ‘it is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm’. Although it logically follows on from this that unilateral abusive behaviour does not benefit from the presumption, it would be incorrect to state that the applicability of the presumption extends to all types of collusive behaviour covered by Article 101 TFEU. Indeed, the presumption only applies to the extent that a cartel is in place. From the definition of a cartel given in the Directive, it would seem that both horizontal and vertical agreements or concerted practices could enter the scope of a ‘cartel’ envisaged by the Damages Directive. At the same time, the Directive’s definition does not seem to include decisions by associations of undertakings and does not offer a closed list of restrictive practices deemed to reflect the presence of a cartel. The examples stated in the Directive all seem to qualify as the most obvious ‘restrictions by object’, raising the question whether, as regards the Directive, other restrictions by object and ‘restrictions by effect’ prohibited by Article 101(1) TFEU would also qualify as cartels. As the definition leaves it

<sup>13</sup> See the chapter by K Havu in this volume.

<sup>14</sup> Art 2(14) of Directive 2014/104 (n 1).

open to Member States to qualify other types of behaviour as cartels, it would seem that there is nothing that impedes that transposed laws offer more detailed definitions in this regard. In any case, it will fall upon judges in Member States – and at the Court of Justice of the European Union – to interpret the definition of a cartel in accordance with EU law.

Second, the presumption only relates to the existence of harm emanating from a cartel. It does not allow claimants to escape from having to quantify the harm suffered. In that context, the presumption serves above all as an obligation on national judges not to dismiss cases for lack of proof of harm. From that perspective, the presumption of harm allows Member State judges to proceed more easily to the quantification stage, not losing time on questioning whether harm is in place. Article 17(1) of the Directive adds to this that Member State judges should be able to estimate the harm caused by the anticompetitive behaviour concerned. It would not, however, seem to prevent a judge from estimating that the harm done amounts to a quantified amount of zero. The quantification of damages remains a matter for Member States' jurisdictions, to be determined on the basis of national private law, albeit in accordance with the principles of equivalence and effectiveness.<sup>15</sup>

### **C. Transposing the Presumption of Harm: Still Room for Member State Variation?**

On the basis of the analysis of the nature and scope of the presumption of harm developed above, one might at first sight conclude that Member States do not have much leeway in shaping the presumption in their national laws. From that perspective, Member States have to provide for an evidentiary rule that lowers the standard required to prove harm for the applicant and need to put in place a legal framework that enables the defendant to rebut the presence of harm in the context of damages actions. On top of that, Member States have to impose such a presumption only in relation to cartels as defined in the Directive. Beyond those minimum requirements, however, there are three ways in which Member States still retain a degree of autonomy in how to transpose the presumption. It is interesting to note that the degree left to Member States enables them both to extend and to limit the scope of application of the presumption of harm.

Firstly, the Directive remains silent on the actual harm that is presumed. It would therefore not seem unlikely for a Member State to circumscribe or limit the presumption to a specific type of harm being incurred and to ask for other kinds of damage to be proven in a more explicit way by the claimant. Taking a hypothetical example, a national legislator would be able to limit the

<sup>15</sup> Art 17(1) of Directive 2014/104 (n 1).

presumption of harm to the establishment that cartels lead to only certain types of economic damage, eg reputational damage, to a claimant, quantifying the damages awarded on the basis of the national rules regarding those particular damages. The Directive only states that the principle needs to be accompanied by rules making the standard and burden of proof required for the *quantification* of harm not impossible or excessively difficult.<sup>16</sup> No reference is made to the existence of all kinds of harm, leading to the conclusion that the legislator could, in principle, limit the presumption of harm to a single type of harm.

Secondly, the presumption only applies in relation to cartels as defined by the Directive. The definition offered in the Directive outlines the minimum conditions under which certain agreements or practices are considered to be cartels. That definition is not exhaustive and could include practices not mentioned explicitly therein. Nothing would seem to prevent a Member State from adding certain categories of cartel-like behaviour to the definition in the Directive. In the same way, nothing would seem to impede that the presumption is also extended to include unilateral anticompetitive behaviour. The Directive does not impose maximally harmonised standards in this regard,<sup>17</sup> leaving room for Member States to extend the scope of the presumption of harm. As a result, Member States in this instance could opt for a more expansive interpretation of the presumption of harm.

Thirdly, the presumption is rebuttable indeed, but the Directive remains silent on what kind of rebutting evidence needs to be adduced and when this would be sufficient. Again, it will fall upon the Member States to lay down more detailed procedural rules. Those rules have to respect the principles of equivalence and effectiveness as a matter of EU law.

It follows from the above that although the presumption of harm has to be incorporated in the laws of the Member States, those states are free to tailor and operationalise the presumption to the specificities of their own legal order. It is therefore important to analyse how the presumption has been interpreted, in an attempt to uncover the remaining interpretation and application gaps any current set-up may result in at Member State level.

### III. THE IMPLEMENTATION OF THE PRESUMPTION OF HARM IN MEMBER STATES' LAWS: OPEN ISSUES

The transposition of the presumption of harm does not seem to have varied very much across different Member States (A.). The limited variety notwithstanding, the ways in which the presumption has been transposed still allow

<sup>16</sup> Again, in Art 17(1) of Directive 2014/104 (n 1); Art 17(2) does not refer to those principles.

<sup>17</sup> See the chapter by M Hjærtström and J Nowag in this volume.

for application and interpretation problems to remain in place. It goes without saying that those problems will have to be addressed at some point by Member States' courts and the Court of Justice of the European Union in the years to come (B.).

### A. Transposing the Presumption into the Law of the Member States

As far as the Directive is concerned, the presumption of harm has a rather specific role in a relatively limited context. It functions as a tool to permit national judges to proceed more easily to an estimation of harm in the specific context of a cartel. It was therefore to be expected that Member States would also transpose the principle in an equally narrow fashion. This section offers an overview of the way in which seven Member States (France, Austria, Germany, the Netherlands, Belgium, the United Kingdom and the Republic of Ireland) have translated the presumption of harm into their national laws on damages actions. Although this hardly offers a full overview, these seven Member States at least allow us to sketch the quasi-uniform and limited ways in which the presumption of harm has been transposed.

In France, Directive 2014/104 has been transposed by means of an Ordonnance of 9 March 2017, which has modified the French Code de Commerce.<sup>18</sup> According to newly inserted Article L. 481-7 of the Code, it is presumed that all '*ententes*' between competitors cause harm, until proof to the contrary is delivered (by the defendant). Neither the Ordonnance nor the Decree accompanying it<sup>19</sup> defines the notion of '*ententes*' explicitly. In a Report to the President of the Republic accompanying the new legislation, the French legislature nevertheless indicates that the notion of '*entente*' refers to all violations of Article L.420-1 of the Code de Commerce, which is the equivalent of Article 101 TFEU.<sup>20</sup> To the extent that this would be the case, not only cartels as defined in the Directive, but also other restrictive agreements, decisions or practices that do not as such constitute cartels, would trigger the presumption of harm under French law. In doing so, the legislator extends the scope of the presumption beyond what is implied in the Directive. At the same time, however, French law seems to limit the scope of the presumption to cartels '*entre concurrents*'. Although this feature is not defined, you could argue

<sup>18</sup> Ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, available at: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>19</sup> Décret n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, available at: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>20</sup> Rapport au Président de la République relatif à l'ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, available at: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

that this would imply that the presumption only applies in relation to horizontal restrictive practices, as has also been the case in Austria.<sup>21</sup> In addition, the Ordonnance defines clearly the types of harm that can be presumed: losses suffered because of overcharges or not being able to lower prices, profits forgone because of a lower volume of sales, the loss of a chance and moral losses.<sup>22</sup> In the absence of case-law, it remains to be seen what kind of losses can be presumed to directly flow from the existence of an *'entente'* under French law at this stage.

The Austrian transposition of the Directive resembles its French counterpart. According to §37 of the Austrian Competition Act, a cartel 'between competitors' is supposed to cause harm.<sup>23</sup> Although the Act incorporates the definition of a cartel developed in the context of the Damages Directive, it explicitly limits the scope of the presumption only to cartels between competitors (*zwischen Wettbewerbern*), which again seems to imply only horizontal agreements and concerted practices. In addition, Austrian law allows for the rebuttal of the presumption, but does not explain how it can be rebutted in detail. Austrian law also does not define the type of harm that a cartel is presumed to cause.

In doing so, both the Austrian and French legislators seem at first sight to rely on a narrower interpretation of the cartel notion than the one proposed by the EU Directive, which is not explicitly limited to horizontal agreements. It remains to be seen whether this interpretation is considered compatible with the definition of a cartel in the Directive, which does not *prima facie* limit its scope to horizontal agreements. This is undoubtedly a matter that will fall upon the Court of Justice to clarify shortly.

The German, Belgian and Dutch transpositions of the Directive have stayed closer to the letter of Article 17(2) of the Directive. According to §33 of the German Competition Act, a cartel is presumed to cause harm. That presumption could nevertheless be rebutted. The German Act has copied the definition of a cartel as proposed by the Damages Directive, and only applies that definition in the context of the presumption of harm.<sup>24</sup> The Belgian Act transposing the Directive also relies on the Directive's definition of a cartel, before stating that an infringement of competition law committed by a cartel is presumed to cause harm, unless the infringer succeeds in rebutting the presumption.<sup>25</sup> In the Netherlands, Articles 193k-m were added to the sixth book of its Civil Code.

<sup>21</sup> §37c Kartellgesetz 2005, available at: [www.jusline.at/gesetz/kartg/paragraf/37c](http://www.jusline.at/gesetz/kartg/paragraf/37c).

<sup>22</sup> Art L481-3 Code de Commerce.

<sup>23</sup> See n 21.

<sup>24</sup> §33, Gesetz gegen Wettbewerbsbeschränkungen (GWB), available at: [www.gesetze-im-internet.de/gwb/BJNR252110998.html](http://www.gesetze-im-internet.de/gwb/BJNR252110998.html).

<sup>25</sup> Loi du 6 juin 2017 portant insertion d'un Titre 3 'L'action en dommages et intérêts pour les infractions au droit de la concurrence' dans le Livre XVII du Code de droit économique, portant insertion des définitions propres au Livre XVII, Titre 3 dans le Livre Ier et portant diverses modifications au Code de droit économique (1), available at: [www.ejustice.just.fgov.be](http://www.ejustice.just.fgov.be).

Those provisions confirm that a cartel infringing competition law is presumed to cause harm, relying on the definition of a cartel as stated in the Directive.<sup>26</sup> No specific provision is made regarding the possibility to rebut the presumption or to the legal nature of the presumption as a matter of German, Belgian or Dutch law. In those three legal orders, the notion of harm is to be defined in accordance with the principles applicable in their non-contractual liability laws.

The United Kingdom shows a similar pattern of transposition. The UK Transposing Regulations confirm the existence of a rebuttable presumption of harm in the context of cartels, relying fully on the cartel definition proposed by the Directive. The implementing legislation contains neither specific rules on the types of harm nor on the specific requirements to rebut the presumption. That matter remains to be determined in accordance with the principles and precedents applicable in tort law.<sup>27</sup> The Republic of Ireland transposed the presumption in the same way as the United Kingdom.<sup>28</sup>

The non-exhaustive overview offered here shows that most Member States included in the seven state regimes compared have relied on quite a literal transposition of the presumption as stated in the Directive. At the same time, however, diversified transposition developments can also be detected in France and Austria. At this stage, it would still be too early to state that the different transpositions also have an impact on how the presumption will be interpreted in practice. That is something that remains to be seen in the years to come. For now, you could conclude by saying that there exists variety in the interpretation of the presumption, albeit to a relatively limited extent.

## **B. Open Issues Remaining after Transposition**

Although the transposition of the presumption of harm has given rise to some varieties, the overall picture sketched in the previous subsection is that Member States have generally stuck to copying the presumption as stated in the Directive in their own national laws. It is nevertheless submitted that sticking to the presumption as crafted by the Directive is not entirely unproblematic, as the

<sup>26</sup> See Art 193k-l, inserted by Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), available at: <https://zoek.officielebekendmakingen.nl/stb-2017-28.html>.

<sup>27</sup> Point 13 of Sch 8A attached to the 1998 Competition Act, inserted by The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, available at: [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>28</sup> Part 5(2) of SI No 43/2017 – European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, available at: [www.irishstatutebook.ie](http://www.irishstatutebook.ie).

invocability and day-to-day application of the presumption is fraught with uncertainty. In terms of application and successful invocability, the nature of the harm caused and the interpretation given to the cartel definition remain points of contestation (i.). In terms of the day-to-day application by Member States' courts, issues arise regarding the rebuttal of the presumption and the practical implementation of the presumption in conjunction with the quantification of harm (ii.). In order to avoid the presumption of harm becoming an empty shell, highlighting those problems and addressing them will be a necessity in the years to come. This subsection summarises the challenges brought about by the presumption and offers suggestions on how to address them more directly.

*i. Envisaged Invocation Problems*

As far as the possibility of successfully invoking the presumption of harm is concerned, at present two elements continue to pose problems to its successful and streamlined application across the European Union. With slightly more attention being paid to those issues at the EU level, however, the problems identified could be alleviated rather easily.

Firstly, the successful invocation and application of the presumption of harm can be limited by means of a strict interpretation of the notion of harm. Although the Directive prescribes that cartels are supposed to cause harm and that this harm relates in principle to a rise in prices or not being able to lower prices,<sup>29</sup> it does not require Member States to accept that cartels cause all kinds of economic, personal or moral harm. Indeed, it can be submitted that the open-ended nature of the presumption of harm only requires that Member States presume a certain kind of harm, the extent of which is subsequently to be quantified by the judicial body concerned in accordance with national law and the guidance principles offered in the notice on the quantification of harm.<sup>30</sup> To that extent, it is not unlikely that a court in a Member State legal order considers that a cartel is only presumed to cause certain types of harm, eg reputational harm and that other types of harm have to be adduced more explicitly. In the absence of a CJEU judgment explaining whether a limitation of the presumption of harm to reputational damage squares with the principle of effectiveness or of a modification to the Directive, Member States' courts in principle remain at liberty to interpret the presumption as they please. It would therefore not be unlikely that the presumption will be interpreted narrowly at best or be downplayed at worst. The French legislature has clearly defined the different types of harm that can be caused by a cartel. Perhaps linking a legislative or judicial definition of harm to the harm presumption across the different legal

<sup>29</sup> Recital 47 of Directive 2014/104 (n 1).

<sup>30</sup> See the Commission's guidance principles in that respect, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf).

orders of the Member States legal orders more directly might be a good idea. The Commission could call upon the Member States to streamline their different private law approaches in that regard by means of a guidance document, even though the use of soft law is most likely to trigger objections, both from the point of view of EU law and the principle of legal certainty and from the point of view of national legal orders wanting to safeguard the integrity and coherence of their own private law system.

Secondly, questions remain regarding the relationship between the presumption and the cartel definition. As highlighted earlier in this chapter,<sup>31</sup> the Damages Directive offers a definition of a ‘cartel’ outlining different forms and types of behaviour that should be considered cartelists. The EU legislature has nevertheless made it clear that the types of behaviour included in that definition are not exhaustive.<sup>32</sup> Member States should therefore be at liberty to interpret the notion of a cartel more widely than the definition offered by the Directive. The French transposition seems to offer an example of this, as it has interpreted the notion of a cartel to include, on the one hand, more types of behaviour than those listed in the Directive’s definition, while on the other, it only seems to limit them to horizontal business relationships.<sup>33</sup> To the extent that the definition of a cartel differs from Member State to Member State, it is most likely that the application and successful invocability rates of the presumption will differ as well. That in itself could give rise to some kind of forum shopping, as some Member States may tolerate the presumption of harm more easily. It remains to be seen to what extent the possibility of such forum shopping results in Member States’ courts or legislators limiting the extent of the presumption of harm to instances covered by the cartel definition in the Directive or in continuing to extend the presumption beyond that definition in order to attract more damages claims in their courts.

### *ii. Envisaged Day-to-Day Application Problems*

In terms of the day-to-day application of the presumption of harm by national courts, the Directive also left two gaps that have not directly been addressed in the Member States’ transpositions studied in this chapter.

Firstly, the conditions to be fulfilled in order to successfully rebut the presumption of harm remain unclear, which may have an impact on the invocability of the presumption. It would seem that Member States’ legislators and judges remain at liberty to interpret the scope for rebuttal more widely or more narrowly, as long as the EU principles of equivalence and effectiveness are respected.<sup>34</sup> This is likely to give rise to a variety of rebuttal regimes that could

<sup>31</sup> See section II.B above.

<sup>32</sup> Art 2(14) of Directive 2014/104 (n 1) refers to ‘practices such as, but not limited to’.

<sup>33</sup> See n 22.

<sup>34</sup> Art 4 *juncto* 17(2) of Directive 2014/104 (n 1).

make the presumption of harm inapplicable in practice. Neither the Directive nor the transposed legal regimes studied in this chapter directly address the rebuttal of the presumption. As such, its application at Member State level remains open for now. Again, a more streamlined Commission initiative, offering more concrete guidance on how to organise the rebuttal stage, would be a welcome addition to the legal regime in place.

Secondly, the application of the presumption of harm is closely related to the assessment to be made of the quantification of harm.<sup>35</sup> The presumption allows Member States' judges to proceed immediately with the quantification of the harm suffered, as the fact that harm has been caused is deemed to be established in a private damages action as long as the infringer does not succeed in rebutting the presence of harm. The Commission has adopted guidance on how to quantify harm and requires national judges to estimate the amount of harm if no exact quantification can be made.<sup>36</sup> In the same way, national competition authorities can be asked to intervene in quantification assessments.<sup>37</sup> The different models and techniques offered by the Commission in its practical guidance all assume that a cartel causes a certain kind of economic harm. However, as was stated above,<sup>38</sup> the presumption could in practice be limited to only certain heads of damages, eg damages for reputational harm. To the extent that the presumption is interpreted in this narrow fashion, the models and techniques outlined in the practical guidance offered by the Commission to quantify economic damage could still be discarded rather easily by the Member States' courts. Therefore, should the Commission update its guidance, it would seem appropriate to link it more explicitly to the presumption of harm and to be clearer on the types of harm that are to be presumed present. Doing so might discourage Member States' courts from discarding the guidelines and would offer at least some guidance to those courts. That is all the more relevant given the absence of CJEU case-law on the matter and the fact that it may take a few more years before the first references for a preliminary ruling on the interpretation of the Directive will emerge.

#### IV. CONCLUSION

The presumption of harm included in Article 17(2) of the Damages Directive requires Member States' courts to presume that cartels cause harm, allowing claimants to immediately bring arguments relating to the quantification of such harm. The presumption, although very clear at first sight, leaves issues relating to its scope of application unresolved, allowing for varied transpositions

<sup>35</sup> See also Iacovides (n 4) 299.

<sup>36</sup> See n 30.

<sup>37</sup> Art 17(3) of Directive 2014/104 (n 1); see also the chapter by M Iacovides in this volume.

<sup>38</sup> Subsection III.A.i.

in Member States' private laws. This chapter has offered an overview of the legal nature and scope of application of the presumption, prior to analysing how the presumption has been transposed into the laws of seven Member States (France, Belgium, the Netherlands, Germany, Austria, the United Kingdom and Ireland). The overview leads to the conclusion that the presumption has been transposed rather literally in most legal orders, although France and Austria have added their own accents. It has therefore been submitted that the invocation and day-to-day application of the presumption of harm in disputes before Member States' courts are not entirely unproblematic. The chapter has highlighted some concerns and called for a more streamlined follow-up approach by the European Commission in an attempt to avoid the presumption from becoming an empty shell. The application of the presumption in the years to come will highlight the extent to which more guidance at EU level may indeed prove necessary.