

**Baker
McKenzie.**

Global Guide to Competition Litigation

2016



Global Guide to Competition Litigation

2016



Introduction

This is a guide to the litigation of civil claims grounded on a breach of competition law.

A range of procedural and substantive issues can arise when bringing or defending such claims for example, whether the claim is for damages or an injunctive remedy, or whether the claim arises from an infringement of competition law identified by a regulatory authority (a “follow-on claim”) or from an infringement alleged but not established by a regulatory decision (a “stand-alone claim”). We have included a quick reference table so that you can see the different approaches each jurisdiction applies to these issues.

Litigation strategy will often require accounting for claims in a number of jurisdictions and likely entail ongoing regulatory investigations or employment considerations. This can be complex and challenging both from a legal and risk management perspective. This guide aims to introduce you to the considerations you might factor into any such strategy.

The Baker & McKenzie Global Competition Litigation team would be happy to discuss any of the considerations with you further, taking account of the specifics of your situation. Our contact details can be found at the end of this guide.



Contents

Jurisdiction guides quick reference table	1
EU Antitrust Damages Directive (2014/104/EU)	4
Argentina	11
A. Availability of civil claims.....	11
B. Conduct of proceedings and costs.....	13
C. Relief.....	15
D. Emerging trends.....	15
Australia.....	17
A. Availability of civil claims.....	17
B. Conduct of proceedings and costs.....	19
C. Relief.....	22
D. Emerging trends.....	23
Austria.....	24
A. Availability of civil claims.....	24
B. Conduct of proceedings and costs.....	26
C. Relief.....	29
D. Emerging trends.....	29
Belgium.....	31
A. Availability of civil claims.....	31
B. Conduct of proceedings and costs.....	32
C. Relief.....	35
D. Emerging trends.....	36
Brazil.....	37
A. Availability of civil claims.....	37
B. Conduct of proceedings and costs.....	38
C. Relief.....	40
D. Emerging trends.....	40
Canada	42
A. Availability of private enforcement in respect of competition law infringements and jurisdiction	42
B. Conduct of proceedings and costs.....	45
C. Relief.....	48
D. Emerging trends.....	50
China.....	53
A. Availability of private enforcement in respect of competition law infringements and jurisdiction	53
B. Conduct of proceedings and costs.....	56
C. Relief.....	59
D. Emerging trends.....	60
Czech Republic.....	64
A. Availability of private enforcement in respect of competition law infringements and jurisdiction	64

B.	Conduct of proceedings and costs.....	65
C.	Relief.....	67
D.	Emerging trends.....	69
Egypt.....		70
A.	Availability of private enforcement in respect of competition law infringements and jurisdiction	70
B.	Conduct of proceedings and costs.....	72
C.	Relief.....	75
D.	Emerging trends.....	76
England and Wales		77
A.	Availability of civil claims.....	77
B.	Conduct of proceedings and costs.....	82
C.	Relief.....	89
D.	Emerging trends.....	92
France.....		93
A.	Availability of civil claims.....	93
B.	Conduct of proceedings and costs.....	95
C.	Relief.....	98
D.	Emerging trends.....	100
Germany.....		101
A.	Availability of civil claims.....	101
B.	Conduct of proceedings and costs.....	103
C.	Relief.....	106
D.	Emerging trends.....	107
Hong Kong.....		108
A.	Availability of private enforcement in respect of competition law infringements and jurisdiction	108
B.	Conduct of proceedings and costs.....	110
C.	Relief.....	113
Hungary		115
A.	Availability of private enforcement in respect of competition law infringements and jurisdiction	115
B.	Conduct of proceedings and costs.....	116
C.	Relief.....	119
D.	Emerging trends.....	120
India		121
A.	Availability of civil claims.....	121
B.	Conduct of proceedings and costs.....	123
C.	Relief.....	124
D.	Emerging trends.....	126
Italy		128
A.	Availability of civil claims.....	128
B.	Conduct of proceedings and costs.....	129
C.	Relief.....	131



D.	Emerging trends.....	132
Japan		133
A.	Availability of civil claims.....	133
B.	Conduct of proceedings and costs.....	135
C.	Relief.....	137
D.	Emerging trends.....	138
Mexico		139
A.	Availability of civil claims.....	139
B.	Conduct of proceedings and costs.....	140
C.	Relief.....	142
D.	Emerging trends.....	143
The Netherlands		144
A.	Availability of civil claims.....	144
B.	Conduct of proceedings and costs.....	145
C.	Relief.....	148
D.	Emerging trends.....	149
Poland		150
A.	Availability of civil claims.....	150
B.	Conduct of proceedings and costs.....	151
C.	Relief.....	153
D.	Emerging trends.....	154
Russia.....		155
A.	Availability of civil claims.....	155
B.	Conduct of proceedings and costs.....	156
C.	Relief.....	158
D.	Emerging trends.....	158
Spain		160
A.	Availability of civil claims.....	160
B.	Conduct of proceedings and costs.....	162
C.	Relief.....	164
D.	Emerging trends.....	165
Sweden.....		166
A.	Availability of civil claims.....	166
B.	Conduct of proceedings and costs.....	167
C.	Relief.....	170
D.	Emerging trends.....	171
Switzerland		173
A.	Availability of private enforcement in respect of competition law infringements and jurisdiction	173
B.	Conduct of proceedings and costs.....	174
C.	Relief.....	176
D.	Emerging trends.....	177

Turkey	178
A. Availability of private enforcement regarding competition law infringements and jurisdiction	178
B. Conduct of proceedings and costs.....	179
C. Relief.....	182
D. Emerging trends.....	182
United States	183
A. Availability of private enforcement in respect of competition law infringements and jurisdiction	183
B. Conduct of proceedings and costs.....	187
C. Relief.....	191
Contributing Authors	192



Jurisdiction guides quick reference table

	ARGENTINA	AUSTRALIA	AUSTRIA	BELGIUM	BRAZIL	CANADA	CHINA	CZECH REPUBLIC	EGYPT
COST OF BRINGING/DEFENDING AN ACTION	LOW	HIGH	MID	LOW	VARIABLE	VARIABLE	MID	LOW	LOW
ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?	UNDETERMINED	YES	YES	YES	YES	YES	YES	YES	YES
APPLICABLE LIMITATION PERIOD	INVESTIGATION: 5 years TORT: 2 years CONTRACT: 10 years	Section 87 claims: not time limited but discretionary	3 years from knowledge (capped at 30 years from date of damage)	Tort: 5 years from knowledge (capped at 20 years from date of damage) Contract: 10 years	3 years (5 years for class action brought by Public Prosecutor or duly organized association, and other entities determined by law).	Section 36 claims: 2 years of the offensive conduct or disposition of any criminal proceedings. Limitation for common law claims varies.	2 years from the date the injured party knew or should have known of the infringement	3 years from knowledge (capped at 10 years from date of damage or at 15 years from date of damage, in case that the damage was caused willfully)	3 years from date of knowledge (capped at 15 years from occurrence of damage). Extended where criminal law limitation period has not expired.
DISCLOSURE	VERY LIMITED	YES	VERY LIMITED	VERY LIMITED	LIMITED	YES – WIDE	LIMITED	VERY LIMITED	LIMITED
ARE CLASS ACTIONS AVAILABLE?	NO	YES OPT OUT	NO (note, right to claim can be purchased and collected into one action)	YES OPT IN and OPT OUT	Public lawsuits (i.e., brought by the Public Prosecutor or a duly organized association) or “Popular lawsuits” (filed by individuals with the specific claim for damages against Public entities)	YES	NO	NO	NO
ARE GROUP OR REPRESENTATIVE ACTIONS AVAILABLE?	YES (but limited to consumer collective action)	YES	LIMITED (consumer collective action possible)	YES	YES	YES	YES	LIMITED	YES (opt-in group actions only)
AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS	3 years	4+ years, variable	9 months–2 years	1–2 years	2–4 years	2–5 years; variable by province	6 months–3 years	2–3 years	2–3 years
HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?	YES (one abuse of dominance case)	YES	YES	YES	YES	YES	YES	YES	YES
HAS THERE EVER BEEN A DAMAGES AWARD?	YES	YES	YES	NO (all claims settled to date or otherwise pending determination)	NONE CONFIRMED PUBLICLY	YES	YES	NO (all claims settled to date or otherwise pending determination)	NONE CONFIRMED PUBLICLY
MEASURE OF DAMAGES AVAILABLE	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest) and civil sanctions (moral damages)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)
RIGHT TO SEEK CONTRIBUTION	YES (as part of the same proceedings)	NOT DETERMINED	YES (a claimant should not be pursued for all damage if it can be apportioned)	YES	NO	YES	YES	YES	YES
IS THE PASSING-ON DEFENSE AVAILABLE?	YES	YES	YES	NOT DETERMINED	NOT DETERMINED	NO	NOT DETERMINED	YES	YES

	ENGLAND AND WALES	FRANCE	GERMANY	HONG KONG	HUNGARY	INDIA	ITALY	JAPAN	MEXICO
COST OF BRINGING/DEFENDING AN ACTION	HIGH	MID	MID	HIGH	LOW	LOW	MID	MID	LOW
ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?	YES	YES	YES	NO	YES	NO	YES	YES	YES
APPLICABLE LIMITATION PERIOD	6 years	5 years from knowledge/manifestation of damage	3 years from end of year in which cause was discovered (recovery capped at 10 years from date of damage)	Actions brought by Hong Kong Competition Commission ("HKCC"): 5 years from end of infringement, or date HKCC became aware of it. Follow on damages actions: 3 years from final determination of infringement (including appeals)	5 years from damage (extended by 1 year from knowledge if damage is concealed)	A reasonable period, likely 3 years from the date of damage	Tort: 5 years from damage Contract: 10 years	Tort: 3 years from knowledge (capped at 20 years from time of tortious act) Contract: 5 years from breach	2 years (3 years and 6 months for class actions)
DISCLOSURE	YES – WIDE	LIMITED	LIMITED	UNTESTED, BUT LIKELY WIDE	LIMITED	LIMITED	LIMITED	VERY LIMITED	VERY LIMITED
ARE CLASS ACTIONS AVAILABLE?	YES	YES – LIMITED	NO	NO	NO	NO	YES (enacted January 2010)	OPT IN, to be introduced on October 1, 2016 (but limited to consumer complaints and still unclear whether to be used for recovering damages from competition violations)	YES
ARE GROUP OR REPRESENTATIVE ACTIONS AVAILABLE?	YES	LIMITED	IN PRACTICE (bundling of claims is possible)	Yes	LIMITED	LIMITED (opt-out collective consumer complaints)	YES	LIMITED	YES
AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS	1–4 years	1–2 years	2–3 years	UNTESTED, but likely to be 1-3 years	2–5 years	N/A	2–4 years	2–4 years	9 months– 2 years
HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?	YES	YES	YES	NO	YES	YES	YES	YES	NO
HAS THERE EVER BEEN A DAMAGES AWARD?	YES	YES	YES	NO	NO (first actions are pending determination)	NO	YES	YES	NO
MEASURE OF DAMAGES AVAILABLE	Compensatory (including loss of profit and interest). Exemplary damages may be recoverable.	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	UNTESTED	Compensatory (including loss of profit and interest). 10% overcharge assumed for hard-core cartels.	Compensatory	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	YES
RIGHT TO SEEK CONTRIBUTION	YES	YES (individuals should not be pursued for all damage if damage can be apportioned)	YES	NO	YES (leniency applicant may sometimes refuse to pay if claimant can recover from other cartelists)	NO	YES	YES	YES
IS THE PASSING-ON DEFENSE AVAILABLE?	YES, IN THEORY	YES	YES	UNTESTED	YES	YES, IN THEORY	YES	YES	YES, IN THEORY



	THE NETHERLANDS	POLAND	RUSSIA	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED STATES
COST OF BRINGING/DEFENDING AN ACTION	MID	LOW	LOW	LOW	LOW	MID	LOW	HIGH
ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?	YES	YES	YES	YES	YES	YES	NO	YES
APPLICABLE LIMITATION PERIOD	5 years from knowledge (capped at 20 years)	3 years (capped at 10 years from date of damage)	3 years from knowledge (1 year if claim is that underlying contract is void)	1 year from when damage apparent; 4 years if seeking nullity of contract and restitution	10 years from damage	1 year from knowledge of damage (capped at 10 years from date of conduct)	2 years from knowledge (capped at 10 years)	4 years in respect of claims based on federal law (limitation under state law varies)
DISCLOSURE	YES	LIMITED – specific disclosure	VERY LIMITED	LIMITED	YES	LIMITED (but parties to administrative proceedings may obtain file of competition authority)	LIMITED	YES – WIDE
ARE CLASS ACTIONS AVAILABLE?	LIMITED	YES	NO	NO	YES	NO	NO	YES
ARE GROUP OR REPRESENTATIVE ACTIONS AVAILABLE?	IN PRACTICE (bundling of claims is possible)	YES	LIMITED	LIMITED	YES	NO (but bundling of claims is possible)	IN PRACTICE (bundling of claims is possible)	YES
AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS	1–2 years	1–2 years	3–6 months	1–1.5 years	3–4 years	2 years	1 - 3 years	3 years
HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?	YES	N/A	YES	YES	YES	YES	YES (but no published decisions yet)	YES
HAS THERE EVER BEEN A DAMAGES AWARD?	YES (once, at first instance)	N/A	YES	YES	YES	YES	No published decisions yet	YES
MEASURE OF DAMAGES AVAILABLE	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Undetermined	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit) and punitive damages (treble damages) are also available	Compensatory (including less of profit and interest) and/or restitution. Treble damages are available automatically under federal law and also some state laws.
RIGHT TO SEEK CONTRIBUTION	YES	YES	YES	LIKELY	YES	YES	YES	NO
IS THE PASSING-ON DEFENSE AVAILABLE?	YES	NO (but a similar concept is arguable)	Undetermined	YES	YES	LIKELY (but difficult to rely on)	YES, IN THEORY	Not available under federal claims, but it is available under many state law claims

NOTE: This table is indicative as of March 2016 – all issues have not yet been finally determined in each jurisdiction.

EU Antitrust Damages Directive (2014/104/EU)

Introduction

Published in the Official Journal on December 5, 2014, the new EU Antitrust Damages Directive (the “Directive”) governs actions for damages under national law for infringements of EU and national competition laws, except for those national laws that impose criminal penalties on individuals.¹

We do not expect these reforms to lead to the emergence of a litigation culture akin to that in the US. However, there is likely to be an increase in the overall volume of claims. The Directive will also lead to a narrowing in the variation of national approaches to such infringements and provide some clarity to the law. Member States have until December 27, 2016 to transpose the Directive into national law.

This chapter contains an overview of the main provisions in the Directive: disclosure of evidence, the effect of national decisions, limitation periods, joint and several liability, the passing-on of overcharges, quantification of damages and consensual dispute resolution. This chapter will also briefly address the European Commission’s (the “Commission”) Recommendation on Collective Redress.

Directive objectives

The Directive’s primary objective is to ensure that anyone who has suffered harm caused by an infringement of competition law (either Article 101/102 TFEU or national competition laws predominantly pursuing the same objective) can effectively exercise their right to claim full compensation for that harm. This is achieved by the basic principle of “full compensation,” pursuant to which any person (natural or legal) that has suffered harm by an infringement of competition law has a right to full compensation which must place that person in the position they would have been in had the infringement not occurred.² This covers actual loss, loss of profit and interest, but not overcompensation. Therefore, punitive and multiple damages are not recoverable.³ This makes it clear that US-style “treble damages” are not available under the EU regime.

This primary objective is bolstered by the application of the principles of effectiveness and equivalence in Article 4 of the Directive. According to this provision, Member States must ensure that all national rules and procedures concerning claims for damages are designed and applied in such a way that they do not make it impossible or excessively difficult to exercise the legal right to full compensation. Furthermore, national rules must not be less favorable to victims than those governing similar actions for damages for infringements of national law.

A second key objective of the Directive is to attain a balance between promoting the private enforcement of competition law while maintaining the effectiveness of public enforcement, in particular leniency programs. This is achieved by addressing the rules and issues that had been perceived as uncertain and treated in differing ways by national courts, including the handling of leniency material and the timing of access to other material held on a competition authority case file.

Disclosure of evidence (Arts. 5–8)

The Directive introduces a minimum level of access to the evidence needed by parties to prove their claim, while distinguishing between categories of evidence designed to protect the Commission’s leniency and settlement programs. The Directive also sets out the types of penalties available to national courts of Member States in the event that these rules are breached. Despite these rules, it

¹ Article 1.

² Article 3.

³ Ibid.



remains likely that the cultural differences between Member States will result in some taking a more generous approach to disclosure than others.

Requirements for disclosure

The Directive proposes the following specific measures:

- *Reasoned justification*

Disclosure may be ordered where a claimant has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.⁴

- *Precise and narrowly defined*

Disclosure is limited to specific pieces of evidence or relevant circumscribed categories of evidence which should be as precisely and narrowly defined as possible on the basis of the reasoned justification.⁵

- *Proportionate*

Any disclosure must be proportionate. Proportionality is determined by considering the legitimate interests of all parties concerned, including: (i) the extent to which the claim/defense is supported by available facts and evidence; (ii) the scope and cost of disclosure; and (iii) the confidential nature of the evidence sought and the arrangements in place for protecting such confidential information.⁶

- *Protection of legal professional privilege*

When ordering the disclosure of evidence, national courts of Member States must ensure that full effect is given to legal professional privilege.⁷

- *Opportunity to be heard*

Those from whom disclosure is sought must be provided with an opportunity to be heard before disclosure is ordered.⁸

Categories of evidence

The Directive distinguishes three categories of evidence from the file of a competition authority:

- *Black list documents*, which may not be disclosed at any time: (i) leniency corporate statements; and (ii) settlement submissions.⁹ Such documents are considered to be vital for effective public enforcement.
- *Grey list documents*, which may be disclosed after a competition authority has concluded its proceedings: (i) evidence that was prepared by a person for the proceedings of a competition authority; (ii) information that was drawn up by the competition authority and sent to the parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn.¹⁰

⁴ Article 5(1).

⁵ Article 5(2).

⁶ Article 5(3).

⁷ Article 5(6).

⁸ Article 5(7).

⁹ Article 6(6).

¹⁰ Article 6(5).

- *White list documents*, which may be disclosed at any time: evidence on the authority's file which does not fall within the black list or the grey list categories.

If a party has obtained black list or grey list documents through access to a competition authority's file in the exercise of its rights of defense, those documents are not admissible in a private action for damages (at all, in the case of black list documents, or until after the authority has closed its proceedings, in the case of the grey list).¹¹

Penalties

National courts must be able to impose effective, proportionate and dissuasive penalties for breach of disclosure orders, destruction of evidence, failure to comply with obligations imposed by a national court order protecting confidential information or breach of the limits placed on the use of evidence.¹²

The penalties available to national courts include ordering the payment of costs and the possibility of drawing adverse inferences from breach of the rules, e.g., presuming the issue to be proven.¹³

Effect of national decisions (Art. 9)

Findings of an infringement in a final decision by a national competition authority, or a court on appeal from an authority, are binding on the national courts of the Member State concerned.

National decisions must be treated as at least *prima facie* evidence of an infringement before the courts of other Member States (this is an amendment from the controversial earlier draft which would have made decisions of Member State authorities binding on the courts of other Member States).

Limitation periods (Art. 10)

Member States must provide for a limitation period of at least five years. This will not start to run until the infringement has ceased and the claimant knows, or can reasonably be expected to know, the behavior and the fact that it constitutes an infringement of competition law, the fact that the infringement caused it harm, and the identity of the infringer.

Limitation periods are suspended during an investigation, and continue to run for at least a year after the infringement decision has become final or proceedings are otherwise terminated. This provision may extend limitation periods considerably in many Member States.

Joint and several liability (Art. 11)

Where infringing undertakings are responsible for the same harm, they are jointly and severally liable for loss suffered. Therefore, each co-infringing undertaking is bound to compensate for the harm in full, and the claimant may claim compensation from any of them until it is fully compensated.

However, if only one of the co-infringers were to pay the claimant full compensation, that undertaking could recover a contribution from the other infringing undertakings. The amount of contribution is determined by reference to their "relative responsibility" for the harm caused by the infringement.

Exceptions

The Directive does include some exceptions to joint and several liability:

- *Small and medium-sized enterprises (SMEs)*¹⁴ are liable to their own direct and indirect purchasers only, provided that: (i) their market share remained below 5% at any time during

¹¹ Article 7(1), 7(2).

¹² Article 8(1).

¹³ Article 8(2).



the infringement; and (ii) the normal rules would irretrievably jeopardize the SMEs' economic viability and cause their assets to lose all value. This exception does not apply where an SME was the leader or coercer or is a recidivist.

- Immunity recipients¹⁵ are jointly and severally liable to their own direct and indirect purchasers. They are only liable to other injured parties where those parties are unable to obtain full compensation from the other infringers. Consequently, a cartel immunity recipient will be liable in a contribution claim only for the loss that it has caused to its own direct and indirect purchasers.

The exceptions to joint and several liability and the contribution provisions in the Directive are likely to make quantifying each cartel's liability a complicated exercise. For example, it is not clear how "relative responsibility" will be determined and the comfort SMEs and immunity recipients should take from the exemptions to joint and several liability is questionable, given that those provisions are qualified.

Passing-on of overcharges (Arts. 12–16)

As mentioned, compensation of harm exceeding that caused by the infringement of competition law is to be avoided. In order to achieve this, the Directive provides that Member States shall lay down appropriate procedural rules to ensure that compensation at any level of the supply chain does not exceed the overcharge harm suffered at that level. This will not affect the right of an injured party to claim compensation for loss of profits due to the passing-on of the overcharge.¹⁶ The Directive also provides that national courts shall have the power to estimate pass-on. The Commission will publish guidelines for national courts on estimating pass-on.

The Directive confirms the availability of the "passing-on" defense, and that both direct and indirect purchasers are entitled to sue.¹⁷ This is contrary to the situation in some other jurisdictions, such as the US, where relief is available to direct purchasers only and there is no passing-on defense (although a number of Member States do allow indirect purchasers to claim).

The burden of establishing that claimants passed on any overcharge, and therefore have suffered no loss, falls to the defendant.¹⁸

Where an indirect purchaser claims that the overcharge was passed on to it, it is deemed to have proved this where it shows that the defendant has infringed competition law, that the infringement resulted in an overcharge for the direct purchaser, and that it purchased goods or services that were subject to the infringement (or derived from such goods or services). This presumption will not apply where the defendant can demonstrate credibly that the overcharge was not, or not entirely, passed on to the indirect purchaser.¹⁹

To avoid actions for damages by claimants at different levels in the supply chain leading to multiple liability or an absence of liability of the infringer, national courts assessing whether the burden of proof is satisfied must be able to take due account of judgments and actions for damages related to the same infringement but brought by claimants at other levels in the supply chain, as well as publically available relevant information resulting from the public enforcement of competition law.²⁰

¹⁴ Articles 11(2)–(3).

¹⁵ Article 11(4).

¹⁶ Article 12.

¹⁷ Article 13.

¹⁸ Article 13.

¹⁹ Article 14.

²⁰ Article 15.

Quantification of harm (Art. 17)

The burden and standard of proof required to quantify losses must not make it practically impossible or excessively difficult to claim damages. If it is impossible or excessively difficult to quantify loss precisely, national courts must be empowered to make an estimation. It will be interesting to see, in practice, the degree to which the courts will be prepared to estimate harm, with the approach to estimations likely being informed by national approaches in other areas.

Additionally, there is a rebuttable presumption that cartels cause harm, which applies to both direct and indirect buyers. This is helpful for indirect buyers as they are unlikely to have access to the information necessary to demonstrate that direct buyers have passed on a cartel overcharge to them. However, it raises the risks and complications of double recovery of damages, as infringers may be caught between presumptions favoring both direct and indirect buyers.

Consensual dispute resolution (Arts. 18–19)

Suspension

The Directive provides for the suspension of limitation periods for the duration of any consensual dispute resolution process, including settlement negotiations, arbitration and mediation. Further, national courts may suspend their proceedings for up to two years where parties are involved in consensual dispute resolution.

Where compensation is paid as a result of a consensual settlement, a competition authority may consider such compensation to be a mitigating factor in respect of its decision to impose a fine.

Variation to contribution rules

The contribution rules are modified where there is a voluntary settlement, so as to avoid overcompensation and limit clawback from settling defendants:

- Following a consensual settlement, the claimant's claim will be reduced by the settling co-infringer's share of the harm caused to the claimant (unless expressly excluded under the terms of the settlement).
- Any remaining claim of a settling claimant shall be exercised only against non-settling co-infringers. Non-settling co-infringers are not permitted to recover a contribution for the remaining claim from the settling co-infringer. However, where the non-settling co-infringers cannot pay the damages owed in respect of the remaining claim, the settling claimant may then pursue the settling co-infringer.
- When determining the amount of contribution that a co-infringer may recover from any other co-infringer, in accordance with their relative responsibility for the harm caused, national courts must take account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

We do not expect the Commission to find that all issues have been resolved by this reform, but the Directive will lead to a narrowing of the range of procedural approaches available at the national level and remove some of the uncertainty that might previously have discouraged some potential claimants from taking action.



The recommendation on collective redress

Background

Published in the Official Journal on July 26, 2013, the Commission's Recommendation on common principles of injunctive and compensatory collective redress mechanisms (the "Recommendation") is a nudge for Member States toward collective actions, the aim being to create a common approach to collective redress across the EU. Pursuant to the Recommendation, Member States were due to implement these common principles by July 26, 2015, although the Recommendation is not binding and so Member States are not obliged to follow it. The Commission is due to assess the success of the Recommendation by July 26, 2017.

While there has not been a notable wave of new collective action regimes as a result of the Recommendation, collective redress has increasingly been on the radar of a number of Member States, including the UK. For example, France adopted an opt-in collective action law in February 2014 (although limited to consumer claims), while Belgium has recently adopted a collective redress regime (covering both opt-in and opt-out actions) for certain types of contractual claim.

Common principles

In order to create a common approach, the Commission recommends that each Member State implement a number of basic principles, the most significant of which are outlined below:

- *Opt-in proceedings*

The claimant party should be formed on the basis of the express consent of the persons claiming to have been harmed. Any exception to this principle should be justified by reasons of sound administration of justice.

- *Standing*

Entities who can bring representative actions should be designated on the basis of clearly defined conditions of eligibility, which should include:

- i. that the entity is non-profit making;
- ii. that a direct relationship exists between the main objectives of the entity and the EU rights breached; and
- iii. that the entity has sufficient capacity (in terms of finances, human resources and legal expertise) to represent multiple claimants.

In addition to such designated entities, Member States should allow representative actions to be brought by entities certified on an ad hoc basis for a particular action. Alternatively, Member States should give public authorities power to bring representative actions.

- *Collective follow-on actions*

Collective redress actions should start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. Courts should avoid giving a decision which would conflict with a decision contemplated by the public authority.

- *Funding*

The claimant should declare to the court at the outset of the proceedings the origin of the funds being used to support the action.

If there is third party funding, the court should be able to stay the proceedings if there is a conflict of interest, the third party has insufficient resources to support the claimant, or the claimant has insufficient resources to meet costs if it were to lose the action. Further, any third party funder should be prohibited from seeking to influence procedural decisions (including settlements), providing financing to support an action against a competitor, or charging excessive interest on the funds provided.



Argentina

Esteban Rópolo

A. Availability of civil claims

1. Scope for civil claims in Argentina

Follow-on claims are available in Argentina. It is not yet clear whether stand-alone claims may be brought in this jurisdiction.

Article 51 of Competition Defense Law Nbr. 25,156 (the “Law”) establishes a right for individuals or companies affected by an anti-competitive act to sue the infringing party for damages. Usually, civil and commercial courts at the national or provincial level have jurisdiction over such claims at first instance. Presidential Decree 89/2001 regulates the Law but does not contain any specific provision as far as civil claims are concerned.

The right to sue includes damages suffered as a consequence of anti-competitive actions that have been sanctioned in a foreign jurisdiction but that also have effects in Argentina. According to the Civil and Commercial Procedures Code, claimants may choose to instigate an action in either the courts where the defendant is domiciled, or in the courts of the place where the anti-competitive act took place or had effect. Where a claim is based upon an infringement alleged to have taken place outside Argentina, it is as yet unclear whether an Argentine court would allow all damages suffered globally to be claimed in Argentina, or if recovery would be limited to damages suffered in Argentina.

To date, only one civil claim for damages has been brought in Argentina. Damages were awarded at first instance against the defendant, Yacimientos Petrolíferos Fiscales (“YPF”), in the amount of approximately USD3 million on the basis of a finding by the Argentine Secretary of Commerce that YPF had abused its dominant position in the oil and gas sector. However, that decision is currently under appeal.

The Competition Defense Commission and the Secretary of Commerce (jointly, the “Agency”) are responsible for investigating competition law infringements and initiating proceedings aimed at punishing such infringements where appropriate. Such proceedings may be initiated by the Agency in its own right or based upon a complaint filed by an affected private party. The Agency may decline to investigate a complaint if it considers that the complaint has no substance.

It is not currently clear whether an administrative finding of infringement by the Agency is a pre-condition to a civil action being brought or not. There are no examples to date of stand-alone actions being issued before Argentine courts.

If an administrative action has been initiated prior to or during any private competition law litigation, a claim related to the matter subject to investigation may be filed without obtaining prior permission from the Agency or the courts. However, where an Agency investigation is active, the courts will be obliged to stay any claims and wait for the Agency’s decision prior to issuing any final judgment on the civil action (Section 1101 of the Civil Code). Agency investigations take no less than five or six years, with the potential for appeal to the Federal Court of Appeals and, in extraordinary cases, the Supreme Court. Each stage of appeal may take 18 months or more.

2. Applicable limitation periods

The statute of limitation for instigation of an administrative investigation by the Agency is five years from the date on which the infringement was committed or the claimant could have become aware of the infringement, whichever event occurs later. It is not clear whether this limitation period also applies to civil claims issued before the courts or whether the general statute on limitation periods applies.

The general statute sets a period of two years in which to bring a tort claim, running from the date on which the infringement was committed or the date on which the claimant took notice of the infringement, whichever event occurs later. A regulatory finding of infringement will be considered sufficient notice of an infringement in the context of competition law claims. A limitation period of 10 years from the date of the breach applies in the context of contractual claims.

3. Appeals

A first instance decision in respect of a civil action may be appealed to the competent Court of Appeals on grounds of fact, law or both, within a period of five working days of the first instance judgment. Appeals take no less than 18 months to be resolved.

Further appeal to the Supreme Court is possible but the grounds for doing so are limited to specific constitutional issues. Examples include circumstances where the lower courts' decisions were arbitrary or infringed upon constitutional rights, such as the right of defense.

4. Availability of class actions for infringement of competition law and/or damages in Argentina

There is no formal class action procedure under Argentine law for competition law claims. However, a type of collective action is available in the context of consumer protection cases and, in theory, might be utilized in future in a competition law context.

Class representation first arose under Argentine law when the Argentine Federal Constitution was amended in 1994. As per Section 43 of the Constitution, standing to file collective claims may be granted to an affected party,²¹ to the Public Defender ("*Defensor del Pueblo*"), and to consumer associations authorized and registered to act as class representatives by law. There are several hundred such consumer associations registered with the various national and provincial registries.²²

Cases have been brought in which the "collective right" forming the base of a class claim has been easily identified (mostly in environmental cases), however, in other cases extensive legal debate took place in order to ascertain whether or not "collective" rights were affected (as opposed to individual rights). A category of collective rights has accordingly been developed by case law where a specified group of individuals holding similar or identical rights have "collectively suffered" as a result of the infringing activity of the defendant (examples include challenges to unsolicited or unlawful banking charges²³ and the defective provision of public services,²⁴ among many others).

In the above cases, initiated by different private consumer associations, the intervening courts ordered the reimbursement of unsolicited charges to the clients that paid them (*Banco Provincia* case), and invited any party that suffered damages to appear individually and provide proof as to the existence and extent of such a claim (*Edesur* case).

The dissenting opinion of the Supreme Court Justice Lorenzetti in *Mujeres por la Vida*,²⁵ and the subsequent opinion rendered by the Supreme Court in *Halabi*,²⁶ establish that standing to file

²¹ The term "affected party" is not defined clearly in the Constitution or in Argentine case law. Accordingly, the question of whether a person has standing to bring such a claim will be determined on a case-by-case basis.

²² Section 43 of the Argentine Federal Constitution.

²³ Camara Nacional de Apelaciones en lo Comercial, Sala C, *Unión de Usuarios y Consumidores c/ Banco de la Provincia de Buenos Aires s/ Sumarisimo*, October 5, 2005 (LL 1.11.05, F° 109.591; JA 14.12.05; ED 30/31.1.06, F. 53816).

²⁴ Camara de Apelaciones en lo Civil y Comercial Federal, Sala I, *Defensoría del Pueblo de la Ciudad de Buenos Aires c/ Edesur S.A.*, March 16, 2000, JA 2000-II-235.

²⁵ Corte Suprema de Justicia de la Nación, *Mujeres por la Vida—Asociación Civil sin Fines de Lucro—filial Córdoba—c/ E.N.; P.E.N.—Ministerio de Salud y Acción Social de la Nación s/ amparo*. 31/10/2006.

²⁶ Corte Suprema de Justicia de la Nación, *Halabi, Ernesto c/ P.E.N. s/ amparo ley 16.986*, February 24, 2009, Section 54 of the CPL.



“collectively suffered” claims will exist when: (i) there is a group of people that shares a similar situation; (ii) a single event damages that group of people, thereby creating a common factual scenario affecting the group; (iii) individual litigation would not be appropriate because of the particular circumstances of these cases; and (iv) even if all of the above requirements are not met, a class action may be accepted if the Argentine state has an interest in addressing the particular subject matter of the class action, based on its social importance. To date, the Argentine state has not identified private enforcement of competition law infringement as a matter of social importance.

The Supreme Court also noted in *Halabi* that to be certified as a class the members of the class should be identifiable, be represented and publicize the proposed action in order to avoid similar litigation (and so the potential for contradictory rulings). However, the Supreme Court has not yet given further guidelines regarding how such matters might appropriately be addressed. The requirements for certification will accordingly be considered by the courts on a case-by-case basis.

A recent amendment to the Consumers Protection Law (the “CPL”) determined that the ruling on any class action would be binding on all parties that might qualify as members of the class, regardless of whether they agreed to join the class, unless such members appear on the docket in order to express that they do not want to be bound by such judgment.²⁷

B. Conduct of proceedings and costs

5. Burden of proof

A claimant may rely on a regulatory decision that an infringement has occurred in order to establish the defendant’s liability to pay damages resulting from that infringement. However, the claimant must show, where not identified in the decision, the effect of the infringement upon it and the extent (monetary amount) of damages that it has suffered as a result of the defendant’s behavior.

If a defendant argues that, to the extent the claimant suffered any damage, the claimant has passed on losses to its own customers, the burden will be upon the defendant to prove that this occurred.

As noted above, at the time of writing, only one award of damages has been made by the Argentine courts and, since there is just one precedent on this matter, the courts have no developed standard of evidence for competition law matters. In principle, claimants will have to provide evidence that damage has been suffered and prove the amount of such damages. Such evidence may include expert economic evidence but it is worth noting that, in the one case determined to date, the Supreme Court was prepared to apply a rough “rule of thumb” approach in awarding damages.

6. Joint and several liability of cartel participants

Pursuant to Section 1081 of the Civil Code, participants in an illegal action are jointly and severally liable for the damages resulting from that action. This provision applies to cartel participants and to other participants in any willful breach of the competition law regulations (e.g., collective dominance, etc.).

A defendant may seek to join other cartelists in a claim but if he does not do so, separate action at a later date is not apparently possible in view of Section 1082 of the Civil Code, which provides that parties to an illegal activity may not seek a contribution from each other. So, one cartel member can be sued for all damage caused by the whole cartel and will not be able to claim a contribution from his co-cartelists if they are not joined to the claim proceedings.

²⁷ Section 54 of the CPL.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Discovery of documents is not available as a right to claimants under Argentine law. However, some measures are available to gather information needed to assert a claim. A claimant must apply to the Argentine court for assistance and this usually involves an application for documentation held by the other party or by a third party (e.g., documentary evidence of a cartel). The claimant must specifically identify the documents it wants and may not make a broad request so as to “fish” for relevant information.

Parties may also apply via the courts or to the Agency directly for access to the Agency’s investigation files so as to use these in evidence. The Agency does not have a specific policy on the disclosure of such information. Under Argentine law, if a court requests the release of an administrative file, the Agency will have to release it. The Agency may arrange with the court for the protection of certain confidential information but it cannot refuse to surrender a whole file to a court on the basis of confidentiality.

Parties are protected by a constitutional right not to incriminate themselves. However, if the court requires them to produce certain documents and it does not do so, the court may draw such inferences against the non-disclosing party, as it deems appropriate.

8. Pre-action disclosure

As explained, there is no disclosure in Argentina. However, some measures are available to gather information needed to duly assert a complete claim and these can be applied for before a claim is issued. Claimants must identify the documentation/evidence that is being requested as well as provide reasons as to why such documentation/evidence is necessary in making such an application.

9. Average length of time from issue of claim to judgment in Argentina

A claim in a civil/commercial court in the city of Buenos Aires typically takes no less than three years to reach a final judgment in the first instance. Considering that courts have very little experience whatsoever in competition law litigation, determination of such cases may take longer than ordinary commercial litigation.

10. Average cost from issue of claim to judgment in Argentina

The cost of litigation varies widely, depending on the complexity of the case.

A 3% court fee on the amount of the claim must be paid by the claimant upon filing the claim (a waiver may be requested in cases of claimants that can show a lack of economic means to pay the fee).

The court will always order a party who loses the case to pay both parties’ legal costs (including the fee paid by the claimant upon initiation of the claim) unless: (i) the case raises serious doubts as regards the facts or the application of the relevant law; or (ii) the arguments of the losing party are not totally dismissed. In these situations, each party may end up paying their respective costs.

In general, the losing party will pay costs amounting to between 11% to 25% of the total claim in the first instance, and a further 7% to 12% in the event of an appeal.

11. Third party/alternative funding

There is no rule preventing third party/alternative funding other than certain bar rules on the sharing of lawyers’ fees.



12. Alternative methods of dispute resolution

In principle, any compensation claim between two private parties may be subject to arbitration. However, this is not common and we are not aware that this has ever happened where the arbitral seat was in Argentina.

In some jurisdictions (like the city of Buenos Aires) mediation with a private mediator is mandatory prior to filing a claim for damages. Otherwise, the court will not accept the filing of a claim.

C. Relief

13. Availability of damages and quantification

Under the general principles of Argentine civil liability, the damages caused by an illegal action must be compensated fully. This compensation includes: (i) actual damages suffered (whether direct or indirect); and (ii) loss of profits.

In the YPF case mentioned above, the court adjudicated damages in the following way: (a) the difference between the price paid by the claimant to YPF and YPF's export price (just 30% of the total amount claimed by the claimant); (b) the loss of profits associated with the decrease in sales suffered by the claimant as a consequence of the higher price charged by YPF in Argentina (just 15% of the total amount claimed by the claimant); and (c) the difference between the price charged by YPF to the claimant and to other competitors of the claimant (50% of the amounts originally claimed by the claimant). However, the court appears to have determined these amounts in an approximate fashion and its judgment does not refer to any underlying economic analysis on how these amounts were determined.

Fines imposed by the Competition Defense Commission are not taken into account in calculating the amount of a damages award because, applying Argentine principles of civil liability, an award compensates for damage suffered by a claimant (whereas a fine is intended to punish the defendant). Furthermore, since a claimant has to prove all the damages suffered, the "passing-on" defense may be used by the defendant in order to argue that the claimant has not in fact suffered any loss.

14. Punitive and exemplary damages

No punitive damages or multiples of actual damages are available under Argentine law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Before the initiation of the proceedings or during them, courts may issue injunction orders and other interim remedies in respect of anti-competitive behavior. Injunction orders may include cease-and-desist orders with respect to certain conducts that are deemed to be, *prima facie*, against the law.

In order to obtain an injunction order, the applicant must provide: (i) evidence of the potential damages that will be suffered if the injunction is not granted, pending the determination of the proceedings (although the applicant need not show that it will suffer irremediable loss if the injunction is not granted); (ii) evidence that its claim as to the illegality of the respondent's actions is arguable and that it has a right to obtain the injunction; and (iii) a sufficient guarantee against any damages that might be caused to the respondent if the injunction is granted.

D. Emerging trends

Private competition law litigation is practically non-existent in Argentina. Only one case of private competition law litigation in Argentina has been reported publicly to date (as explained above, a damages claim against YPF – a local oil and gas company – for alleged abuse of a dominant position in the gas market). In this case, the first instance court awarded damages to the claimant of

approximately USD2 million based on a finding of infringement by the Agency. This award is currently on appeal.

The main reasons for the low level of private competition law claims in Argentina to date are that:

- (i) claimants can only obtain compensation if they can prove that damages have actually been suffered and it may be difficult to obtain evidence that damage has been suffered in this context;
- (ii) punitive damages are not available (thus reducing claimants' monetary incentive to initiate claims); and
- (iii) no class actions based on competition law infringements have yet been brought, or recognized as possible, under Argentine law (thus reducing the incentive to litigate in cases where a number of consumers have been affected but the amount of the damages effectively suffered by each one is low).



Australia

Georgina Foster

A. Availability of civil claims

1. Scope for civil claims in Australia

Stand-alone and follow-on civil actions are available in Australia.

A person (including a corporation) who has suffered loss or damage, or is likely to suffer loss or damage, as a result of a breach by another of the Competition and Consumer Act 2010 (Cth) (“CCA”), can bring proceedings against that other person in the Federal Court of Australia seeking compensation and other remedies (including injunctions, declarations and orders declaring all or part of a contract void).²⁸ A person who brings such proceedings is known as the “applicant” and the defendants to the proceedings are known as “respondents.”

The CCA prohibits a range of anti-competitive conduct, including cartel conduct, resale price maintenance, anti-competitive exclusive dealing, misuse of market power, anti-competitive mergers and acquisitions and other anti-competitive agreements, arrangements and understandings. Civil action can be brought in respect of all such infringements, but private litigants cannot seek an injunction to stop an anti-competitive merger or acquisition from proceeding.

Civil claims may be brought by both direct and indirect purchasers, as well as competitors and any other persons who have suffered or are likely to suffer loss or damage by reason of the contravening conduct.

Under the CCA, proceedings for compensation and other orders can also be brought against persons “involved in the contravention.” A person will be involved in a contravention if such persons: (i) have been knowingly involved in a contravention; (ii) induced a contravention; (iii) aided or abetted a contravention; or (iv) conspired with others to give effect to a contravention of the CCA.²⁹ Both natural persons (such as directors, officers or employees) and corporations can be liable for being “involved in a contravention.”

Proceedings for breach of the CCA can be brought against foreign corporations who have engaged in contravening conduct in Australia or, where the conduct takes place overseas, who are carrying on business in Australia.³⁰ However, ministerial consent is required to bring proceedings against foreign corporations for conduct engaged in outside Australia.³¹

2. Applicable limitation periods

The applicable limitation period depends on the section of the CCA under which proceedings are brought. Proceedings can be brought by a private litigant under Section 82 of the CCA seeking damages to compensate it for loss and damage suffered by conduct in contravention of the CCA. Proceedings under Section 82 must be commenced within six years of the date on which the cause of action that relates to the conduct accrued. The cause of action will accrue when loss or damage is suffered, rather than when it is discovered.³² For instance, in cartel cases brought by affected customers, this is likely to be the date goods were purchased at a cartelized price. There is no ability for this limitation period to be extended, including in cases where the defendant may have deliberately concealed its contravention of the CCA.

²⁸ CCA, Sections 80, 82 and 87.

²⁹ CCA, Section 75B.

³⁰ CCA, Section 5.

³¹ CCA, Section 5(3), (4).

³² *Wardley Australia Ltd v Western Australia* [1992] 175 CLR 514.

Compensation can also be sought by a private litigant under Section 87(1) of the CCA,³³ which is not of itself subject to any limitation period. Section 87 grants the court a broad discretionary power, which allows the court to make such orders as it considers appropriate to compensate a party to the proceedings, in whole or in part, for the loss or damage it has suffered, or to reduce or prevent the loss or damage. Section 87(1) does not grant a stand-alone right of action and the relevant limitation period that applies to the orders sought under Section 87(1) will depend on the provision under which the proceedings are instituted. Where proceedings are brought for an injunction under Section 80 of the CCA, which has no time limit, and compensation orders are sought under Section 87(1), no limitation period will apply. However, unlike Section 82, compensation orders under Section 87 are not as of right and any award of compensation is at the court's discretion.

3. Appeals

A judgment of a single judge of the Federal Court can be appealed to the Full Court of the Federal Court. The Full Court is usually constituted by three judges of the Federal Court. The Full Court can consider appeals on questions of fact as well as questions of law. Appeals can be brought as of right from a final judgment, however, leave to appeal is required to appeal from an interlocutory decision.

A party seeking to appeal the decision of the Full Court may seek special leave to appeal to the High Court of Australia, the country's ultimate appellate court. The criteria for granting special leave include that the proceedings involve a question of law that is of public importance or in respect of which the High Court is required to resolve differences of opinion within or between courts or where the interests of the administration of justice require consideration by the High Court.³⁴

4. Availability of class actions for infringement of competition law and/or damages in Australia

Class actions or "representative proceedings" can be brought in the Federal Court, including in proceedings for damages for breach of the prohibitions on anti-competitive conduct in the CCA. Part IVA of the Federal Court of Australia Act 1976 (Cth) ("FCA") sets out the detailed regime governing representative proceedings. The following criteria must be satisfied in order to bring representative proceedings in the Federal Court:

- (i) seven or more persons have claims against the same person;
- (ii) the claims of all of those persons are in respect of, or have arisen out of, the same, similar or related circumstances; and
- (iii) the claims of all of those persons give rise to a substantial common issue of fact or law.³⁵

Representative proceedings must include a description of the group of persons on whose behalf the proceedings are brought. This is usually done by defining the group of persons' common characteristics. For example, in a cartel class action, the group may be defined as persons who purchased certain types of goods in Australia within a defined period of time and can encompass both direct and indirect purchasers in this definition.

Federal Court representative proceedings operate on an "opt-out" basis, such that persons who are within the defined terms of the representative group will be bound by the outcome of the proceedings unless such persons opt out by a date fixed by the court. As part of the opt-out process, the court will

³³ Section 87 allows the court to make orders as it thinks fit to compensate a person for loss or damage suffered by reason of another party's contravention of the CCA. This can include an award of damages, as well as other orders such as declaring a contract void, amending a contract, etc.

³⁴ Judiciary Act 1903 (Cth), Section 35A.

³⁵ FCA, Section 33C.



require that a notice be published in such a manner as to alert group members to the proceedings and their right to opt out.

There have been a number of cartel class actions brought in Australia. To date, all of these proceedings have settled before any final hearing on liability or damages.

The Australian Competition and Consumer Commission (“ACCC”) also has the ability under Section 87(1B) of the CCA to bring proceedings on behalf of other persons in limited circumstances. Relevantly, to bring such proceedings those persons must consent in writing to the ACCC bringing proceedings on their behalf. The ACCC has not brought (and is unlikely to bring) any proceedings under this Section for breaches of the prohibitions on anti-competitive conduct to date.

B. Conduct of proceedings and costs

5. Burden of proof

The burden of proof for establishing that there has been a contravention of the CCA and the quantum of loss or damage that the applicant has suffered “by” the conduct in contravention lies with the applicant. The standard of proof in civil proceedings is the balance of probabilities.³⁶

Where a respondent relies on certain statutory defenses, such as the joint venture defense to cartel conduct, then the burden of proof will lie with the respondent to prove the application of that defense.

Section 83 of the CCA provides that findings in public enforcement proceedings can be used in subsequent civil proceedings. There is, however, some uncertainty as to the extent to which this provision applies to admissions made by respondents in public enforcement proceedings as part of the settlement of those proceedings, as opposed to findings made by the court after a hearing.³⁷

6. Joint and several liability of cartel participants

Under Section 82 of the CCA, an applicant may recover the full amount of their loss or damage from a person whose conduct in breach of the CCA caused that loss or damage. Where multiple respondents have engaged in conduct in contravention of the CCA, such as in cartel cases, those respondents will have joint and several liability to persons for the loss or damage suffered by their cartel conduct. Where proceedings are brought against multiple respondents, it is a matter for the court to apportion liability. There is not yet any established practice on how damages will be apportioned.

Where proceedings have only been brought against one or some of all potential respondents, there is an open question as to whether or not the respondents joined to the proceedings can bring a contribution claim against the other persons who engaged in the contravening conduct. Although cross-claims seeking contribution have been filed in at least one cartel class action to date as that matter settled prior to trial the question of contribution and apportionment between respondents has not yet been fully considered by the court.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Discovery is available in Federal Court proceedings with the court’s leave.³⁸ The court will not grant leave unless discovery is necessary for the determination of the issues in the proceedings³⁹ (although this threshold is likely to be satisfied in private competition law cases). Discovery can extend to all relevant documents that are within a party’s “possession, custody or power.” Documents that are

³⁶ Evidence Act 1995 (Cth), Section 140.

³⁷ See *ACCC v ABB Transmission and Distribution Ltd* [2002] 190 ALR 169 at 183–184.

³⁸ Federal Court Rules, O15 r 1.

³⁹ Federal Court of Australia, Practice Note CM 5 Discovery, August 1, 2011.

privileged (whether on the grounds of legal privilege, without prejudice privilege or public interest immunity) must be discovered, but are not available for inspection by the other parties to the proceedings.

Where documents contain confidential information, the court can make orders to protect the confidentiality of that information (for instance, restricting disclosure to external legal counsel on provision of a confidential undertaking).

Parties can also seek documents from third parties by issuing a subpoena for production. As with discovery, documents that are privileged must be produced to the court in response to the subpoena, but will not be available for inspection by the parties to the proceedings.

In terms of the ability of parties to civil proceedings to obtain access to ACCC documents, specific provisions were introduced to the CCA in July 2009, which are designed to protect what is known as “protected cartel information” from disclosure. Protected cartel information is information given to the ACCC in confidence that relates to a breach or possible breach of the prohibitions on cartel conduct. Section 157B provides that the ACCC is not required to produce protected cartel information to the court, except with the leave of the court. In determining whether or not to grant leave, the court must have regard to a range of matters, namely: (i) the fact that the information was given to the ACCC in confidence; (ii) the need to avoid disruption to national and international law enforcement; (iii) the fact that disclosure may discourage informants from giving protected cartel information in the future; (iv) the protection of the safety of the informant and persons associated with them; and (v) the interests of the administration of justice. Section 157C provides that the commission is not required to produce protected cartel information to a person, but can do so after having regard to the same factors that the court must have regard to under Section 157B.

Applicants in private proceedings have, however, been able to obtain access witness statements and documents relied upon by the ACCC in penalty proceedings it has brought in respect of the same cartel conduct.⁴⁰

Documents that are obtained in the course of court proceedings, such as by way of discovery or subpoena, are subject to an implied undertaking that such documents may only be used for the purposes of those proceedings (unless such documents are tendered or read in open court).

8. Pre-action disclosure

An application can be brought in the Federal Court for pre-action disclosure, known as “preliminary discovery.” Preliminary discovery can be sought to enable a prospective applicant to obtain information in order to decide whether to commence proceedings against a particular defendant where:

- (i) there is reasonable cause to believe that the applicant has or may have the right to obtain relief from a person whose description has been ascertained;
- (ii) after making all reasonable inquiries, the applicant has insufficient information to enable a decision to be made whether to commence a proceeding in the Court to obtain that relief; and
- (iii) there is reasonable cause to believe that that person has had or is likely to have had possession of any document relating to the question of whether the applicant has the right to obtain the relief, and that inspection of the document by the applicant would assist in making the decision.⁴¹

⁴⁰ See for instance *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCACF 32.

⁴¹ Federal Court Rules, O15A r 6.



9. Average length of time from issue of claim to judgment in Australia

The length of time from commencement of proceedings to judgment varies significantly depending on the complexity of the proceedings and the extent of interlocutory issues. Competition law proceedings, given their nature, tend to be complex. Accordingly it usually takes a significant period of time to obtain a final judgment. Consistent with this, to date most private competition law enforcement matters have taken a number of years. By way of illustration, cartel class actions have taken four years or more from commencement to finalization of the proceedings (even though those cases have settled prior to hearing).

10. Average cost from issue of claim to judgment in Australia

The costs of proceedings vary significantly and will be influenced by: (i) the extent of the matters in dispute and the complexity of those matters; (ii) the extent of discovery; (iii) the evidence required (including expert evidence); (iv) the extent of interlocutory disputes; and (v) the length of the hearing. Given the inherent complexity of competition law proceedings, such proceedings can cost AUD1 million or substantially more.⁴²

In Australia, the usual rule is that “costs follow the event.” This means that the successful party in proceedings will usually be entitled to obtain an order that the unsuccessful party pay their costs on what is known as a “party-party” basis. In practice, such orders do not compensate a party for their actual costs but only a portion of those costs (usually around 50% to 70% of actual costs).

In certain circumstances, costs may be awarded to a party on an indemnity basis. In particular, a party can seek to protect its position on costs through making a genuine attempt to reach a compromise in the proceedings. This can be done by either an “Offer of Compromise,” under the Federal Court Rules, or what is known as a “Calderbank Offer.” Under the Federal Court Rules, if a party makes an Offer of Compromise and it is rejected and the party making the offer obtains a more favorable result than the offer made, the court will award costs in favor of the offeror at a higher rate than would ordinarily be received by the offeror had they not made the offer from the date the offer is rejected.⁴³ There is a similar result for a Calderbank Offer. However, the requirements for a Calderbank Offer are less stringent and the court has discretion as to whether or not it awards indemnity costs for a rejected offer.

11. Third party/alternative funding

Third party litigation funding is allowed in Australia. The position on litigation funding was clarified by the High Court’s decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*⁴⁴ where it was held that it was not an abuse of process or contrary to public policy for proceedings to be funded and run by a litigation funder.⁴⁵ While litigation funders in Australia have, for the most part, funded securities class actions, the recent class action proceedings brought against a number of international air carriers in relation to the global air cargo cartel was funded by a professional litigation funder. Litigation funders will usually enter into funding arrangements pursuant to which they receive a certain percentage of the damages awarded in return for funding the cost of the proceedings.

Under Australian law, lawyers are permitted to enter into conditional fee agreements pursuant to which all or some of the fees and disbursements are payable in the event of a successful outcome to the proceedings. In some jurisdictions, lawyers are also permitted to charge a success or uplift fee (up to a certain percentage of the actual legal costs). Lawyers are not however permitted to enter into

⁴² In two recent cases, the applicant’s solicitors received payment of AUD25 million and AUD13 million respectively in legal fees as part of the settlement of the proceedings.

⁴³ Federal Court Rules, O23.

⁴⁴ *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 CLR 386.

⁴⁵ *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 CLR 386.

contingency arrangements with clients pursuant to which they are entitled to a percentage of the damages awarded.

12. Alternative methods of dispute resolution

Alternative dispute resolution, including arbitration, expert determination and mediation, is well established in Australia. In private competition law proceedings, the most common form of alternative dispute resolution is mediation. While parties to proceedings will often voluntarily participate in mediation, the Federal Court has the power to order parties to attend mediation, with or without their consent.⁴⁶

Parties can agree to refer disputes under the CCA to arbitration proceedings. However, arbitration proceedings are not a common form of dispute resolution in competition law cases in Australia.

C. Relief

13. Availability of damages and quantification

The Federal Court can make an award of damages to compensate an applicant for loss or damage suffered by conduct of other parties in breach of the CCA. Damages under the CCA are compensatory in nature and proof of actual loss is required before an applicant can recover damages.

The quantum of damages that an applicant can recover under the CCA is “the amount of” the loss or damage they have suffered by the conduct in contravention of the CCA. This means that an applicant would not be able to recover any loss or damage that they passed on to a downstream purchaser. The usual approach to determining the measure of damages under Section 82 of the CCA is to compare the position that the applicant is in with the position that they would have been in had the contravention not occurred.

In addition to damages, an applicant is also entitled to interest for the period from the date on which the cause of action arose to the date on which judgment is entered.⁴⁷ The rate of interest usually applied is the cash rate published by the Reserve Bank of Australia plus 4%.⁴⁸

14. Punitive and exemplary damages

In Australia, exemplary and punitive damages are not available for breaches of the CCA. This is because Sections 82 and 87 of the CCA are compensatory in nature.⁴⁹

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Under Section 80 of the CCA, the Federal Court may grant an injunction where a person has engaged (or proposes to engage) in conduct that constitutes or would constitute a contravention of the CCA. An application for an injunction may be made by any person, except for merger matters where only the ACCC may apply for an injunction.

An injunction can be sought on an interlocutory or interim basis, as well as on a final basis. Before the court will grant an interlocutory injunction it must be satisfied that there is a serious question to be tried and that the balance of convenience favors granting the injunction. Where an interlocutory injunction is granted, the party seeking the injunction will be required to give the “usual undertaking as to damages.” This is an undertaking by the applicant that it will pay such compensation, as the

⁴⁶ FCA, Section 53A.

⁴⁷ FCA, Section 51A.

⁴⁸ Federal Court of Australia, Practice Note CM 16, Pre-judgment interest, August 1, 2011.

⁴⁹ *Musca v Astle Corp Pty Ltd* [1988] 80 ALR 251, 262.



court may consider just, to any person (whether a party or not) adversely affected by the operation of the interlocutory injunction.

There are no limitation periods under Section 80. Delay, however, is a factor that the court will take into account in exercising its discretion to grant an injunction.

D. Emerging trends

There has been a slow growth in private competition law litigation in Australia over the past decade. A number of significant cartel class action proceedings have been instituted, and most (but not all) cases were brought as follow-on proceedings to ACCC enforcement action. As these cases have proven to be very costly and time-consuming for the applicant's lawyers, it is not expected that there will be any major increase in the number of cases brought. Further, to date, nearly all private competition law proceedings have settled well before the final hearing. This means that there is very little judicial guidance on many key issues in private competition law litigation, such as the quantification of damages or the ability to bring contribution claims against other participants in the anti-competitive conduct.

Austria

Andreas Traugott and Thomas Obersteiner

A. Availability of civil claims

1. Scope for civil claims in Austria

Stand-alone and follow-on civil actions are available in Austria.

Any natural or legal person that is affected by an infringement of Articles 101/102 TFEU or Sections 1-5 of the Austrian Cartel Act (*Kartellgesetz*, “Cartel Act”) may bring an action for damages pursuant to the Austrian law on damages, which is set forth in Section 1295 et seq. of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, “ABGB”) and specified in Section 37a of the Cartel Act. Austrian law provides that anyone who intentionally or negligently causes damage to another person shall be liable to compensate for the loss suffered.

2. Applicable limitation periods

The general limitation period for damage claims is three years from the moment a potential claimant has sufficient information to bring a claim, i.e., knowledge of the damage and the identity of the infringing party (Section 1489 ABGB). The absolute limitation period for damage claims is 30 years (Section 1478 ABGB).

It is on the defendant to prove that the claimant actually had sufficient information/knowledge more than three years before filing the claim, which is generally not an easy task. In a follow-on case regarding elevators and escalators, the defendants argued that many dozens of newspaper reports about a (confidential) infringement decision by the Cartel Court (the decision-making authority in public enforcement cases) from 2007 provided the claimant with sufficient information and hence triggered the limitation period. The defendants further pointed to a 2007 announcement of representatives of the claimant, which included details of the damage lawsuit it filed more than three years later. In this case – as in a few others – the Austrian Supreme Court (*Oberster Gerichtshof*, “Supreme Court”), however, decided that in follow-on proceedings it will usually be the publication of the final infringement decision which triggers the running of the limitation period.

That the commencement of the limitation period is not in every case linked to a previous finding of a violation by the competition authorities was established in another case. There, the action was held to be time-barred because it was filed more than three years after the defendant should have been aware of the violation of the competition rules. In this case, the claimant was itself party to the agreement, which was later found to be in violation of Articles 101/102 TFEU.

The newly adopted Section 37a of the Cartel Act sets forth that the running of the limitation period shall be suspended while a corresponding public enforcement procedure on the EU or national level is pending. The suspensory effect of such a proceeding only ends six months after the decision of the competition authority becomes final. This provision only applies to competition law infringements, which took place after February 28, 2013.

3. Appeals

The competence to hear actions for damages lies with the Austrian civil courts. The amount claimed and the legal nature of the defendant will dictate which court has jurisdiction. A district court (*Bezirksgericht*) is competent to hear claims of an amount up to EUR15,000. Claims exceeding an amount of EUR15,000 are heard by a regional court (*Landesgericht*).

Competition law issues are usually litigated before specialized chambers of ordinary civil courts, the commercial courts (*Handelsgericht*). Commercial courts are competent if: (i) the action is brought



against a defendant that qualifies as an “entrepreneur” (*Unternehmer*) under the Austrian Commercial Code (*Unternehmensgesetzbuch*, “UGB”); and (ii) the damage arose within a contractual commercial relationship.⁵⁰ The city of Vienna has a separate district court for commercial matters (*Bezirksgericht für Handelssachen Wien*, with the status of a district court) and a commercial court (*Handelsgericht Wien*, with the status of a regional court).

Decisions of district courts can be appealed to the competent regional court.⁵¹ Decisions of regional courts can be appealed to the competent court of appeal (*Oberlandesgericht*).

The appeal court may decide the merits of the case and confirm, revise or overturn the first instance judgment. However, the scope of appeal is confined to the motions and submissions made in the regional court. The appeal court may repeat or extend all or some of the proceedings, overturn the decision of the regional court and instruct the same to retry the matter, or reject the appeal.

Judgments of an appeal court may be challenged only on points of law. Such an appeal must be made to the Supreme Court in Vienna and is subject to various restrictions, depending on the matter in question. The Supreme Court will only accept an appeal for adjudication that raises legal issues of considerable importance. Appeals against second instance judgments are not allowed in disputes valued at EUR5,000 or less, regardless of whether such judgments raise an issue of legal importance. Further, if the value in dispute does not exceed EUR30,000 the appeal on points of law to the Supreme Court may also require leave to appeal from the court of appeal (directly or by means of a new application).

The Supreme Court is the highest court in civil cases. It decides on legal issues and is therefore bound in its judgment by the facts established in the lower courts. It only decides on the accuracy of the judgment made by the appeal court or highlights any invalidity and, to a limited extent, procedural errors in the previous proceedings. The Supreme Court may also decide on the matter itself (i.e., by confirming or amending the judgment), repeal the previous decisions and instruct the regional court or the court of appeal to retry the matter, or dismiss the action.

4. Availability of class actions for infringement of competition law and/or damages in Austria

Although, technically, Austrian law does not (yet) provide for a class or group action in the strict sense, there are a few ways in which claimants may group their claims and achieve efficiencies.

First, claimants may band together as co-claimants in a single lawsuit if the claims or the facts of a case are similar pursuant to Section 11 et seq. of the Austrian Civil Procedure Code (*Zivilverfahrensordnung*, “ZPO”). However, even if the claims are sufficiently similar to be joined in one proceeding, such claims remain separate from a procedural law point of view. This means that the court will rule separately on each claim and each co-claimant may at any stage withdraw his claim or negotiate a settlement.

Second, claimants may assign their claims for damages to a single entity for collection. This has emerged as the preferred approach by claimants. While in some cases smaller claimants assigned their claims to financially stronger claimants, claimants in other cases have founded legal entities (e.g., a *Verein*) to which they assigned their claims and which acted as the sole claimant in the proceedings. Lawsuits pooling several hundreds of individual claims have been filed through the use of mass assignments.

⁵⁰ The Commercial Code defines an enterprise as any economic activity intended to be performed permanently and independently in an organized manner, even if it is not aimed at realizing profit. The definition applies irrespective of size. Therefore, small enterprises (*Kleinunternehmer*) will also generally fall under the regime of the Commercial Code.

⁵¹ Exempted are appeals in cases where the value of the claim does not exceed EUR2,700. Appeals in such cases are restricted to grounds of nullity and questions of law (Section 501 ZPO).

Third, Austrian consumer organizations (*Verein für Konsumenteninformation*) and the Federal Chamber of Labor (*Bundesarbeitskammer*) may pursue claims of hundreds or even thousands of consumers. Such a claim also requires an assignment of individual claims to a single entity (e.g., the consumer organization itself). In the first private enforcement case in Austria, the Federal Chamber of Labor employed this technique and successfully took legal actions against members of a local driving school cartel (*Fahrschulkartell*).

B. Conduct of proceedings and costs

5. Burden of proof

The burden of proof lies, in principle, with the claimant who must prove that the following substantive criteria are satisfied:

- (i) an infringement of competition law;
- (ii) damage;
- (iii) a causal link between infringement and damage; and
- (iv) fault.

In principle, the court must be fully convinced of the evidence on which it bases its judgment. In practice, however, claimants benefit from an easing of the burden of proof. For example, by an objective standard of proof, a piece of evidence is deemed to be “true” if there is such a high degree of probability that it is close to certainty (i.e., no reasonable person would have doubts).

First, infringement decisions are binding on civil courts. According to Section 37a of the Cartel Act, findings of a competition law infringement by the Cartel Court, the European Commission or any other competition authority in a Member State have binding effect for follow-on claims.

Second, concerning damages, any evidence proving the damage is admissible, e.g., accounts showing a decrease in income. The civil courts may further decide to estimate the amount of damages on the basis of their “free conviction” pursuant to Section 273 ZPO. The courts may do so provided that the claimant established the occurrence of at least some damage and the precise amount cannot be determined (or not with reasonable efforts). Similarly, if the value of individual claims does not exceed EUR1,000, and the facts giving rise to the claim cannot be established without disproportionate difficulty, the court may determine the damage (Section 273 para. 2 ZPO). So far, the Austrian courts have applied this provision only once in the context of a competition infringement (*Fahrschulkartell*).

Third, recent case law states that, in case of infringements of “protective laws,” a lower degree of certainty should suffice to establish causality, i.e., the fact that the damage was caused by the infringement of the defendant. For the compensation of loss of profit, Section 1293 ABGB sets forth that it suffices if the profit was probable, i.e., the profit could have been expected under the circumstances.

Fourth, with regard to the question of fault, the burden of proof is usually reversed. Pursuant to pertinent case law, competition rules are considered “protective laws” (*Schutzgesetze*) according to Sections 1298 and 1311 ABGB, an infringement of which justifies such a reversal. Thus, a claimant would not be required to prove that the defendant acted with fault, but rather the defendant would have to show that he acted neither intentionally nor negligently. The Supreme Court has held that in the context of competition law infringements it is difficult to conceive circumstances where no fault can be attributed to the infringers.



Fifth, a claimant might further ease its burden of proof by relying on the concept of *prima facie* evidence, which is well established in Austrian civil procedure. Accordingly, a claimant may benefit from a reversal of the burden of proof if it establishes the existence of a typical link between a proven fact and another (not yet proven) fact. In previous cases, claimants attempted to employ this concept to meet their burden of proof with respect to individual harm suffered. They argued that the fact that a cartel infringement occurred provides *prima facie* evidence that their customers suffered damages. The court of appeals rejected this argument. It held that such a generalization is inappropriate and that there is no typical link between a cartel agreement and damages to customers. The Supreme Court has yet to address the role of *prima facie* evidence in the context of follow-on litigation.

6. Joint and several liability of cartel participants

Pursuant to Section 1302 ABGB, where several natural or legal persons acted together intentionally and caused damage by way of joint action, such individuals or legal persons are generally jointly liable for the whole damage. It is well established in Austrian jurisprudence that members of a cartel are jointly and severally liable for the entirety of the damage caused by the cartel.

If, however, the defendants can prove that they did not act jointly or intentionally (minor or major negligence) and specific parts of the damage can be allocated to each of the defendants, the defendants may each only be held liable for the part of the damage caused by them. If cartel members are jointly and severally liable, but claimants decide to take only one of them to court, that defendant is entitled to seek a contribution to damages from its fellow cartel members.

In the context of joint liability, the Supreme Court just recently addressed the question of whether all members of a cartel can be sued in the place where any one of them is domiciled (relying on Article 6 of the Brussels Regulation to say that the claims are connected). The Supreme Court stated that the joint liability of cartel participants establishes a connection between the claims, so as to allow an action in one jurisdiction to be applied against all alleged cartel members. The Supreme Court did not provide any further guidance on the requirements to establish such a liability.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Any type of evidence is admissible in Austrian civil proceedings, including tapes, films and digital files. Even evidence improperly obtained by the parties is admissible. The prevailing types of evidence are: (i) deeds and private documentation (Sections 292 to 319 ZPO); (ii) witnesses (Sections 320 to 350 ZPO); (iii) experts (Sections 351 to 367 ZPO); (iv) inspections (Sections 368 to 370 ZPO); and (v) questioning of the parties (Sections 371 to 383 ZPO).

The only exception to admissibility concerns evidence improperly obtained by the court itself (i.e., the method of obtaining evidence used by the court infringes constitutionally guaranteed rights). Such evidence is excluded, meaning that the use of such evidence would result in the nullity of the proceeding.

Witnesses may refuse to testify if this would: (i) expose them to a risk of criminal investigation (in particular Section 168b of the Austrian Criminal Code, *Strafgesetzbuch*, which prohibits bid-rigging); (ii) result in any financial disadvantage for themselves or for their partner or family members; (iii) constitute a breach of a professional secrecy obligation; or (iv) reveal business secrets (Section 321 ZPO). The same applies to the parties to the proceeding (Section 380 ZPO).

US-style procedural discovery does not exist. A party may only obtain a court order for the production of documents if the requesting party is able to either provide copies of the respective documents or is able to provide sufficiently detailed descriptions of such documents' content to allow for clear identification of the documents (Section 303 ZPO). Document production can be legitimately denied if, for example, production would cause harm to the disclosing party or disclose a business secret, or

if the requested document falls under professional secrecy (Section 305 ZPO). Such justification is excluded if the document was created by both the claimant and the defendant (Section 304 ZPO). While the court has no power to enforce the production of documents, it might nevertheless draw adverse inference of an unjustified refusal to produce documents.

Third parties can also be requested to produce relevant documents (Section 308 ZPO). The scope of this provision is limited to the production of known pieces of evidence and does not allow for “fishing expeditions.”

According to legal doctrine, evidence gathered through discovery in another country, where this is a legal means of collecting evidence, is admissible in Austrian proceedings.

Previously, Section 39 of the Cartel Act made access to the case file of a public enforcement procedure (including leniency documents) conditional on the consent of the parties to this procedure (which was usually not given). In a recent preliminary ruling proceeding (*Donau Chemie*), the European Court of Justice held that this rule is too rigid and thus liable to undermine the effective application of Article 101 TFEU. The current legal status is that Austrian courts should apply the balancing test suggested by the European Court of Justice in *Pfleiderer*. Thus, when confronted with a request for access to the file by a claimant, the competent court will balance the interest of the requesting party in a sound preparation of a damage action against the negative consequences disclosure might have on public interest in the effective enforcement of competition law (the attraction of leniency schemes in particular).

Legal privilege is not codified in Austrian law and has not been tested in domestic courts so far. While it is widely recognized that some form of legal privilege exists, its precise scope (i.e., whether it corresponds to the concept under EU law or differs in scope) is uncertain.

8. Pre-action disclosure

Pre-action disclosure is not available under Austrian law. Previous attempts by follow-on claimants to obtain disclosure of certain documents from cartel members in a preliminary proceeding by invoking reporting obligations under contract law (Section 304 ZPO in conjunction with Article LXIII of the Introductory Law to the Code of Civil Procedure – *Einführungsgesetz zur Zivilprozessordnung*) have failed. The Supreme Court held that such reporting obligation may not be used in order to overcome the difficulties of gathering evidence in competition litigation.

9. Average length of time from issue of claim to judgment in Austria

Depending on the complexity of the case, an action for damages will take between eight months and two years to be resolved at first instance. An appeal against a first instance decision takes approximately 9 to 12 months. Under certain conditions, in particular if a legal question of general interest is concerned and the claim exceeds a certain value threshold, a further appeal to the Supreme Court is possible, which may take a further 9 to 12 months (approximately). It is not possible to expedite proceedings.

The length of time it has taken to resolve civil claims based on violations of competition law indicates that the duration of these proceedings may be considerably longer than “ordinary” proceedings. There have been numerous claims submitted to the Austrian civil courts since 2010. However, to date, the courts have yet to adopt a final decision on the merits in any of these cases.

10. Average cost from issue of claim to judgment in Austria

Average costs cannot be estimated without taking various factors into account, such as the amount claimed, the length of the proceedings, the number of witnesses to be questioned, the appointment of expert witnesses, etc. The costs of individual procedures accordingly vary widely depending on the complexity of the case.



Court fees must be paid by the claimant upon filing any actions for damages. The fees are calculated on the basis of the amount claimed. Eventually, the costs (legal costs and court fees) have to be borne by the losing party. If a claimant succeeds in part, costs will be recovered in proportion to that success. Legal costs are reimbursed on the basis of a statutory tariff system.

11. Third party/alternative funding

Austrian law does not prohibit third party litigation funding. While third party funding has gained popularity in Austria in recent years, it is still in an early stage of development. Thus, many of the procedural specifics of externally funded cases (e.g., whether the funding agreements need to be disclosed) have not been addressed by the courts so far.

For example, claimants in a pending follow-on litigation relating to *payment card fees* received third party funding. The case is currently pending at the regional court level and the court has not decided over the disputed issues relating to external funding.

12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available. Claims may be subject to arbitration or mediation.

C. Relief

13. Availability of damages and quantification

There are two different forms of compensation for damages: (i) indemnity (*Eigentliche Schadloshaltung*); and (ii) full restitution (*volle Genugtuung*). Whereas indemnity covers the actual loss of property (e.g., financial loss caused by overcharges due to price-fixing), full restitution also covers loss of profits (e.g., lost business opportunities). If the defendant acted with minor negligence, only the actual loss is awarded. Full restitution, however, is the standard in follow-on cases, as an “entrepreneur” (*Unternehmer*) under the Austrian Commercial Code (*Unternehmensgesetzbuch*, “UGB”) is always liable for loss of profits, even if he only acted with minor negligence. Austrian law also provides for the right to recover interest.

Courts will determine quantum on the basis of a “but for” analysis but are generally free to choose the specific methodology. Litigation practice in follow-on cases has shown that courts exercise their discretion in line with the European Commission’s paper on quantification of damages, but eventually leave it to a court-appointed expert to choose the best calculation method for the specific case. In a currently pending case, for example, the court chose to compare different geographic markets. In another pending case, a comparison over time on the same market is envisaged.

14. Punitive and exemplary damages

Austrian law does not provide for punitive or exemplary damages in respect of competition claims.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Generally, two types of interim measures might be relevant in private competition litigation. The court may grant an interim injunction to: (i) maintain the status quo (e.g., to prevent further damage); or (ii) freeze assets of the defendant to ensure the enforcement of a potential judgment ordering payment of damages. Interim payments in respect of damages are not available.

D. Emerging trends

Private competition litigation is still on the rise in Austria. This is partially due to a recent amendment to the Cartel Act, which made it easier for claimants to succeed in court (e.g., binding effect of

infringement decisions, suspension of limitation periods, etc.). At the moment, discussions about legislative amendments surround the question of whether further changes are necessary in light of the EU Antitrust Damages Directive.

In addition, private enforcement was supported by the decision of the European Court of Justice in *Donau Chemie* in 2013. Due to this ruling, it is much more likely that claimants obtain (partial) access to the authority's case file (if their interests outweigh public interests), which will significantly improve their position in future cases. The increasing popularity of grouping claims through mass assignments and the availability of third party funding further promotes private enforcement.

Currently, a considerable number of proceedings are pending before the Austrian civil courts. The Supreme Court has (at least partially) ruled on a number of preliminary issues, such as joint liability, the admissibility of indirect purchaser claims and umbrella claims and limitation periods. So far, however, it has not rendered a major decision in which it awarded or declined to award damages. Thus, many questions regarding, e.g., the standard of proof and the quantification of harm are still open and are likely to be clarified once the pending cases reach the appeals stage.



Belgium

Kurt Haegeman

A. Availability of civil claims

1. Scope for civil claims in Belgium

Civil claims can be brought against any undertaking (defined as any natural or legal persons engaged in a commercial or economic activity) to compensate for damage caused by infringements of Article 101 or 102 TFEU or Articles IV.1 and IV.2 of the Belgian Competition Act 2013.

An action may be issued before the Belgian Court of First Instance or before the Belgian Commercial Court (all actions to date have been started in the Belgian Commercial Court). It is possible to bring an action against a director or employee under tort law where that director or employee has been closely involved in the infringing conduct. To date, no such personal actions have been brought in a competition matter.

A finding by the European Commission or the Belgian Competition Authority that an infringement has occurred is not a pre-condition to a claim for damages being brought, but the Belgian court will likely postpone any ruling on damages if parallel proceedings by the European Commission or Belgian Competition Authority are awaiting determination.

Actions can also be brought against a seller under Book VI. Market Practices and Consumer Protection of the Belgian Economic Law Code, where that seller engaged in a practice that restricts competition to the disadvantage of the interests of other sellers or consumers. A restriction of competition that affects the interests of other sellers or of consumers can be considered to be an unfair trade practice under Book VI. of the Belgian Economic Law Code. Challenging a restriction of competition as an unfair trade practice allows the claimant to make use of the special cease-and-desist procedure (as mentioned in section 15) that exists under Articles XVII.1 et seq. of the Belgian Economic Law Code, which allows the case to be processed in a speedy manner, similar to summary proceedings.

2. Applicable limitation periods

The limitation period for a damages action based on a non-contractual claim is five years from the day following that on which the claimant becomes aware of the damage and the person liable for that damage. The limitation period is capped and expires 20 years from the date on which the infringement founding the cause of action occurred.

The right to bring a claim under contract lapses after 10 years.

3. Appeals

Decisions of a lower court (be it the Court of First Instance or the Commercial Court) can be appealed to the Court of Appeal. This is an appeal *de novo*, i.e., the appellant may appeal both on issues of fact and on issues of law. If the Court of Appeal finds merit in one or more of the grounds of appeal of the appellant, it must redecide the case in its entirety.

A further appeal from the Court of Appeal to the Supreme Court is possible. Appeals to the Supreme Court are limited to issues of law or complaints that the judgment of the Court of Appeal lacks proper reasoning. In addition, subject to certain conditions, special procedures are available to anyone who was not a party to a case but whose rights have been adversely affected by the judgment (third party opposition), and to a defendant that was absent when the case was heard and judgment was rendered (appeal by way of a rehearing).

4. Availability of class actions for infringement of competition law and/or damages in Belgium

The Belgian Act on collective redress procedures (the “Act”), which entered into force on September 1, 2014, allows consumers to initiate collective proceedings against undertakings. The procedure can be initiated against any undertaking that has (allegedly) violated: (i) its contractual obligations; and/or (ii) one or more of the specific laws and regulations (and their implementing decrees) expressly listed in the Act (including, but not limited to, competition law and unfair market practices). Apart from breach of contract cases, collective redress procedures are therefore unavailable in certain specific areas of law.

The procedure can be instituted by a group of consumers who have individually suffered damages as a result of a common damage cause. However, consumers who want to file a collective damage claim can only do so through a group representative. Only certain associations, such as certain consumer organizations (e.g., Test- Aankoop), are allowed to act as a group representative. It is important to stress that these collective redress procedures are only available for cases in which the cause of the damage has occurred after September 1, 2014.

After a claim for collective redress has been found admissible, there are two possible systems the court could apply. The first is an “opt-in system,” under which every consumer who wants to join the group must expressly indicate that they want to be part of the group. This system is mandatory for consumers that do not usually reside in Belgium and/or in cases that concern moral or physical damage. In an “opt-out system,” all consumers who suffered the collective damages automatically belong to the group, unless certain consumers indicate they do not want to. Although the group representative can give suggestions about which system would be the most suitable one, in the end it is the court that has discretion to decide which one to choose.

The Act offers two alternative pathways to end the dispute: either party can ask the court to validate an “agreement for collective redress,” i.e., a negotiated settlement, or a “claim for collective redress” can be introduced before the court, which will hear the case and render a final judgment. If the parties are able to reach a settlement, a simplified procedure allows for the settlement to be validated by the court. By agreeing to a settlement, the defendant does not concede its liability or fault. If the parties are not able to reach a settlement, the case can be brought before the court. This will lead to a judgment, at least if the mandatory settlement period set by the court turned out not to be successful. In case there is a settlement, or if the court decided to grant compensation, a liquidator will be appointed by the court. The liquidator will supervise the payment of the settlement or compensation to the relevant consumers, i.e., those consumers included on the list of consumers that can benefit from the compensation agreed to or awarded by the court.

The courts of Brussels have exclusive jurisdiction to handle collective redress cases.

B. Conduct of proceedings and costs

5. Burden of proof

In cases where a prior decision of the Belgian Competition Authority or the European Commission has already established a competition law infringement, the claimant need only prove causation and loss in order to recover damages. Belgian courts cannot take decisions running counter to an infringement decision of the European Commission (and decisions by the competition authority will also be held to have high probative value by the Belgian courts). However, decisions of the competition authority or the European Commission finding that no evidence of an infringement exists do not prevent a Belgian court from making a different finding on the basis of evidence that has not been considered by the competition authority or the European Commission.



The burden of proof in establishing that an agreement merits exemption under Article 101(3) TFEU or Article IV(3) of the Belgian Competition Act lies with the party claiming the benefit of the exemption.

The causation that is required between damage and fault will, in principle, be examined on the basis of the doctrine of equivalence of conditions. According to this doctrine, a causal link will be deemed to exist in cases where the damage would not have arisen but for the fault of the defendant.

There is no “rule of thumb” for establishing damages in difficult cases. Very few damage actions have made it to the Belgian courts, and those cases that have been started are either still pending or have been settled out of court, so there is very little guidance in Belgian case law with respect to the calculation of damages in difficult competition cases.

6. Joint and several liability of cartel participants

There is no specific case law or rule on joint and several liability for damages in respect of private competition litigation in Belgium.

In general, if the infringement and resulting damage is attributable to several persons, such persons will be held liable for damages on a joint and several basis. So, if one defendant can prove that one or more of the other defendants are also liable, there is likely to be a possibility for contribution and indemnity among defendants.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Disclosure (in the sense of the US discovery model, i.e., the legal requirement for a party to proceedings to produce to the opposing parties “all documents relevant to the claim of the other party”) does not exist under Belgian law. However, when there are serious, specific and concurrent reasons to believe that one party possesses a certain document relevant to the dispute, the court may, either at the request of another party or at its own initiative, order the production of this document. This requires the requesting party to be able to precisely identify the document, which is not always straightforward in competition law cases.

As in most civil law countries, documentary evidence is the most important type of evidence in bringing a claim. Generally, in civil cases, written evidence is required for claims exceeding EUR375 and oral evidence may not be admitted to contradict or amplify the written evidence. There is an exception to this rule in commercial cases, which will generally apply in the context of competition litigation. In such commercial cases, a judge can allow witnesses to testify even if there is written evidence to support a claim.

Expert reports are often used in technically complex cases. A report may be ordered by the court at the request of one of the parties or on the initiative of the court. The expert’s role is set out in detail by the court and he can only advise on technical matters. The parties must cooperate with the expert (for example, attend meetings, inform the expert and provide appropriate documents). The final report of the expert is often an important piece of evidence but it is not binding on the court. Nevertheless, in practice, judges usually follow the expert’s conclusions.

In principle, the Belgian Competition Authority may be required by the court to produce documents gathered during its investigation, in order for these to be used in the proceedings.

8. Pre-action disclosure

Pre-action disclosure is not available under Belgian law.

9. Average length of time from issue of claim to judgment in Belgium

A claim typically takes between one and two years to reach a final judgment at first instance in Belgium, depending on the complexity of the case. An appeal will take two to three years. A further appeal to the Supreme Court will add another year or two to the duration of the proceedings (i.e., a total of up to seven years).

At first instance, an oral hearing before the court takes place after the exchange of briefs and supporting documents by the parties. If a timetable is set at the preliminary hearing (which will happen, unless both parties object), a trial date will be fixed shortly after the claim has been issued. If no timetable has been agreed between the parties or fixed at a preliminary hearing, the parties can request that the court set a trial date. After the oral hearing, the judge will deliberate and a written judgment should normally be given within one month (and must be given within three months).

10. Average cost from issue of claim to judgment in Belgium

The cost of litigation varies widely depending on the complexity of the case.

As of January 1, 2008, the winning party can be awarded a lump sum allowance by the Belgian court in respect of the costs of legal representation and fees. This allowance is calculated on the amount of the claim and can be adjusted by the judge at the request of the parties on the basis of the following four criteria:

- (i) the financial capacity of the losing party (a criterion used to assess whether the amount of compensation should be lowered);
- (ii) the complexity of the case;
- (iii) the amount of compensation contractually provided for by the parties with their representatives; and
- (iv) the reasonableness of imposing the costs requested.

Costs awards are determined by royal decree and range from EUR82.50 for small claims to up to EUR33,000 for claims above EUR1 million.

In cases where an expert is appointed, the judge can decide which advance payments should be made by the parties to cover the expert's fees and costs. At the end of the trial, the court decides which party will have to bear the expert's fees. The court usually orders the losing party to pay this cost.

11. Third party/alternative funding

There is currently no practice of third parties funding claims in competition cases before the Belgian courts. However, it is possible to purchase a right to claim and pursue it in one's own right.

That said, an old statutory rule provides that if a company purchases a *disputed* right of claim against another company, the latter (the defendant) can liberate itself by paying the price for which the claim was purchased by the former company (as well as the costs reasonably made in connection therewith and the interests calculated as from the day the purchase price was paid). This old statutory rule is meant to prevent speculation involving *disputed* rights and probably explains why we have seen Belgian companies like Cartel Damage Claims engage in buying up damage claims of companies affected by cartels in other jurisdictions such as Germany, but not in Belgium.



12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available. Claims can also be the subject of arbitration or mediation.

Arbitration

The 1966 European Convention for Uniform Arbitration signed by all the Member States of the Council of Europe was implemented in Belgium in 1972 and incorporated in the Belgian Judicial Code. The provisions of the Belgian Judicial Code regarding arbitration have recently been updated, building on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Brussels is an important arbitration center in Europe and its courts respect valid agreements to arbitrate disputes. The most important arbitration institution in Belgium is the CEPANI-CEPINA (Belgian Centre for National and International Arbitration), based in Brussels. There are no prohibitions on parties making use of any international arbitration institution. Arbitrations conducted under the auspices of institutions such as the ICC regularly take place in Belgium. There are also no prohibitions on ad hoc arbitrations being conducted in Belgium.

Mediation or alternative dispute resolution (ADR)

In general, a Belgian court will not enforce as mandatory an ADR clause in a contract; nor will it even exert any informal pressure on parties to attempt ADR before or during court proceedings. Therefore, for an ADR clause to be effective in Belgium all the parties to the contract must agree to refer their dispute to ADR at the time the dispute arises.

Several local courts, such as the Court of Antwerp, promote mediation. Professional judges act as mediators. During the proceedings, the court will send each party an invitation to present its case before the mediator, instead of continuing the proceeding. Parties can also choose this form of ADR in advance. The successful outcome of the mediation is a binding settlement agreement for the parties. If enforcement of a settlement agreement is necessary, the interested party can go to court to seek judicial ratification of this settlement agreement.

C. Relief

13. Availability of damages and quantification

Claimants may seek compensation for all damage suffered as a result of an infringement of competition law, including loss of profit and interest, in accordance with the judgments of the Court of Justice of the European Union in *Courage v Crehan* and *Manfredi*. The burden to prove the quantum of damages lies with the claimant.

Damages can be calculated by reference to the difference between the current situation of the victim and its hypothetical situation if the infringement had not occurred. The aim is to put the damaged party in the situation in which it would have been had the infringement or contractual breach not occurred.

It is arguable that the passing-on defense could be raised before the Belgian courts, since the claimant can only be indemnified for the damage it has actually incurred. However, no reported Belgian case law exists on this point.

In our view, the prior imposition of any fine will not normally be taken into account by the court in calculating damages (as fines do not go toward compensating third parties). However, there is no Belgian jurisprudence on this issue.

14. Punitive and exemplary damages

Punitive and/or exemplary damages are not available in Belgium. Courts can impose a penalty in circumstances where an order is not complied with (penalizing the non-compliant party either by reference to each day's delay in complying with the order or for each infringement committed after the order). This is payable to the other party.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Interim injunctions preventing the defendant from continuing to infringe competition rules against the applicant, pending full trial of the issues, may be sought from the civil courts in summary proceedings pursuant to Article 584 of the Belgian Judicial Code.

An application for interim measures is made to the president of the Belgian Court of First Instance, the Labor Court or the Commercial Court, depending on the subject matter of the dispute. In general, the request must be urgent and the claimant must face a threat of imminent damage if no interim measure is granted. The decision is provisionally enforceable, which means that an appeal can be brought against the decision, but the interim measure can be enforced until the time such an appeal is successful. A judgment in summary proceedings does not prejudice the outcome of proceedings on the merits.

An injunction can also be obtained from the president of a commercial court (in a manner similar to summary proceedings) pursuant to Articles XVII.1 et seq. of the Belgian Economic Law Code. Cases on infringements of competition rules are often brought on the basis of breach of these Articles, whereby the only relief possible is a cease-and-desist order, usually combined with a fine for any violation of a cessation order or for any delay in complying with the order. The injunction claim has to be instituted within one year from the facts on which the claim is based having taken an end.

16. Other types of relief

A claimant may bring an action before the civil or commercial courts with a view to obtaining a court order that prohibits certain behavior (i.e., interim relief or a cease-and-desist order in cases where “unfair trade practices” are involved). A party may also apply for a declaration of invalidity in relation to obligations, agreements or decisions which allegedly infringe competition law.

D. Emerging trends

Although to date only a few damage claims have been brought before the Belgian courts, it appears that following the case instituted by the European Commission in respect of the Escalators and Elevators cartel before the Brussels Court, and the EUR120 million settlement by Proximus of a damage claim brought by its competitors Mobistar and Base, an increasing number of companies are exploring the possibilities of bringing damage claims before Belgian courts. That said, companies will regularly use the threat of competition damages claims to secure settlements or other commercial advantages without the matter ever getting to court.



Brazil

Francisco Todorov, Bruno Burini and Mauro Gonçalves

A. Availability of civil claims

1. Scope for civil claims in Brazil

The right to bring a civil action to recover damages resulting from a breach of competition law in Brazil is guaranteed under statute. Article 47 of Law no. 12.529/2011 (the Brazilian Antitrust Law) expressly states that:

“The injured parties [...], shall be entitled to file action in order to, in the protection of their individual or homogeneous individual interests, obtain the cessation of practices which constitute infringement of the economic order, as well as the receipt of indemnification for the damages sustained, regardless of the inquiry or administrative proceeding, which shall not be stayed by virtue of the filing of the lawsuit.”

A prior finding by the Brazilian competition authorities that an infringement has occurred is not required to bring a claim (and such findings do not in any case bind the Brazilian courts). In fact, judicial private enforcement action is independent of administrative enforcement by the authority and claims can be brought even where no investigation into the conduct in question has been initiated.

In addition, the Public Prosecutor's Office (State and Federal) can file a public class action on behalf of an injured class to obtain compensation, a duty to do something or a prohibition from doing something, for any infringement of competition law, based on Law no. 7.347/1985 (the Brazilian Public Class Action Law). The same type of lawsuit can be brought by the Public Defender's Office, the Union, States, municipalities, agencies/authorities, public companies, foundations, semi-public corporations or duly organized associations, on behalf of their members. The basis and requirements for such actions are explained further at section 4 below.

2. Applicable limitation periods

The statute of limitations for private civil action to recover damages resulting from a breach of competition law is three years, based on Article 206, § 3º, V of the Brazilian Civil Code. In claims for damages, precedents have stated that the limitation period is triggered upon the date when the cause of action is discovered, but there is no settled case law in relation to competition law-based actions yet.

For public class actions seeking damages resulting from a breach of competition law, the limitation period is five years, according to the Superior Court of Justice, based on Article 21 of Law no. 4.717/1965 (the Brazilian Class Action Law).

In cases involving allegation of wrongdoing of a public employee there is no statute of limitations on related claims for damages. There are also a few lower court decisions which set out generally that in all cases involving the government or state-owned enterprises there should be no statute of limitations at all, but this position is currently in the minority and has no support in the higher courts at this time.

3. Appeals

Civil claims are brought before a state court (in the case of public class actions, claims may be brought before the federal court, depending on the nature of the claim). The decision in the first level court is made by a single judge. This decision can be appealed to the State Court of Appeals or Federal Court of Appeals, which has jurisdiction to review matters of fact and of law.

A further appeal is possible to a higher court on points of law only. If the issue subject to appeal relates to the application of acts, the appeal will be heard by the Superior Court of Justice. If the appeal is made on constitutional grounds, it is directed to the Brazilian Supreme Court.

4. Availability of class actions for infringement of competition law and/or damages in Brazil

As indicated above, the public prosecutor and certain entities are entitled to file public class action on behalf of a class of injured parties.

Specifically, according to Article 5, V, of Law no. 7.347/1985 (the Brazilian Public Class Action Law), any *association* bringing a claim in the general public interest must be at least one year old and have in its institutional objectives the protection of the environment, the consumer, the economic order, the free competition, or the touristic, aesthetic, historical or landscape heritage.

If the public prosecutor or any other entities described above file an action, then the injured parties themselves will not be directly involved in the conduct of the litigation. However, if a party that suffered a damage brings its own separate claim for compensation, these actions can be consolidated and addressed as part of the same proceedings.

The amount of the compensation secured by a class action can, depending on the nature of the claim: (i) go to a state-run fund managed by a committee, based on Article 13 of Law no. 7.347/1985 (the Brazilian Public Class Action Law) and ruled by Act no. 1.306/1994; or (ii) be individually pursued by every person damaged by the breach of competition law, and, after that, be applied to the fluid recovery system.

B. Conduct of proceedings and costs

5. Burden of proof

The burden of proof is not directly related to any particular standard of proof and will normally lie on the claimant. However, the Brazilian system accepts the fluid/dynamic distribution of the burden of proof, which means that the judge can, depending of the specific situation, place a burden of proof on the defendant regarding its arguments.

The judge can analyze and evaluate the claims in a lawsuit according to his own understanding of the facts and law, and is not bound by any decision of the Brazilian Competition Commission (“CADE”).

However, a decision by the CADE will typically carry significant weight in the courts and may be seen as a form of expert opinion on matters of competition law. Moreover, the claimant can use the evidence relied upon by any CADE decision (except for any confidential documents) as a basis for bringing a civil claim. However, to produce a finding of a violation of competition laws, the CADE need not determine whether the conduct in question actually produced any effects in the market. Therefore, even with a favorable CADE decision, the claimant still has to show that the conduct in question actually produced effects and that such effects caused injury.

In any event, as discussed, judges can disregard a CADE decision and determine a claim differently, although this is unusual.

6. Joint and several liability of cartel participants

There is no joint and several liability for damages between cartel participants that do not belong to the same economic/corporate group.

Each party to a cartel will be liable to injured parties only inasmuch as its own conduct caused damages to that party.



7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Except for expert evidence and testimonies (presented during a lawsuit), the claimant has a duty to present all evidence in its favor that is available to it at the moment of filing (more evidence can be presented as the case goes on, if not readily available at the beginning). If the claimant is aware of any particular document in the possession of the defendant, it may ask the court to order its attachment to the dockets. However, there is no general discovery that would require the parties to deliver any relevant document to the court.

The claimant can use as evidence the records of the CADE investigation, and such evidence will be considered documentary evidence. The defendant can contest that evidence, regardless of the view taken by CADE. Recently, the Superior Court of Justice decided that the CADE must cooperate with the course of the private damages action, which means that evidence produced in the course of the CADE investigation should be shared with the court reviewing the damages claim, provided that such disclosure does not jeopardize the CADE investigation itself.

The claimant can also present expert opinions on the issue of damages, or request the court to appoint an expert to carry out such analysis.

If in the course of an investigation any report or opinion issued by an attorney is attached to the records of the case, the party subject to investigation can request its removal from the file, on the grounds that it is an attorney-client communication and cannot be used as evidence against the company that received such advice.

8. Pre-action disclosure

A claimant may file a preparatory claim against the defendant for the production of specific document(s), based on Articles 305 and 396 of the Brazilian Civil Procedure Code.

9. Average length of time from issue of claim to judgment in Brazil

Litigation in Brazil can last for a very long time. For a first instance decision, the case can last between two and four years, but in certain cases can take even longer. After all appeals, the total length of litigation can easily exceed 10 years. For public class actions, the length of time can be even longer.

10. Average cost from issue of claim to judgment in Brazil

Direct court costs are not too significant, and do not act as a deterrent for litigation in Brazil. However, the length of a case can increase attorneys' fees and therefore costs overall.

The losing party will pay for any expert evidence produced at the request of the judge and will also be required to pay a certain amount of attorneys' fees to the winning party. The rule is not varied for associations, which must bear the costs if they lose (meaning that the members will likely be paying for such costs through their contributions to the association). Attorneys' fees are not awarded in public class lawsuits and "popular" lawsuits.

11. Third party/alternative funding

A third party may wish to fund the claimant in its litigation if it so wishes.

12. Alternative methods of dispute resolution

There is no legal rule in Brazil that prevents competition claims from being arbitrated or settled privately through mediation or direct negotiation by the parties.

Arbitration

Scope to arbitrate depends on the existence of an agreement through which parties appoint one or more arbitrators to resolve the dispute definitively. The arbitral award can be enforced by a state court, if not voluntarily complied with by the losing party.

Mediation

There is no mandatory mediation prior to litigation or arbitration. In some cases injured parties will not file a formal civil claim but instead approach addressees of a CADE decision and agree to a private settlement of damage claims. Such private settlements are legally valid and can be enforced in court.

C. Relief

13. Availability of damages and quantification

Damages have to be demonstrated by the claimant, and relate to either any actual loss or forfeited profits (if any can be shown in the context of a competition related claim). The judge may either stipulate the amount of damages to be awarded – based on any available evidence that would allow for such finding – or can determine that damages be quantified in separate subsequent proceedings. If addressed in separate proceedings, then an expert opinion can be sought by the court to determine the amount to be paid.

14. Punitive and exemplary damages

Punitive and exemplary damages are not available in Brazil, although “moral damages” can be claimed in cases where the injury caused substantial distress. It is arguable that “collective moral damages” might be claimed in the context of public class actions.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Injunctions and interim relief are generally available in litigation in Brazil, whenever the specifics of the case require immediate intervention by the court. For such relief to be granted, the claimant must show a likelihood of a successful claim, and a clear risk that inaction by the court can generate damages that may not be compensated in the future.

In the context of competition litigation, such claims can exist in case of: (i) refusals to supply; (ii) discrimination or any other type of commercial conduct that may generate ongoing damages; or (iii) a risk of foreclosure.

16. Other types of relief

In addition to damages, claimants can ask the court to order the cessation of the infringing conduct, which can be granted as interim relief or as a final order in the judgment.

D. Emerging trends

Private competition litigation is not common in Brazil, although the volume of claims being brought is growing. Claims are typically driven by a CADE finding that a cartel has taken place. However, in certain cases the courts have found differently from CADE on the issue of whether a violation in fact exists.



Therefore, whenever there is a CADE decision it is in no way certain that civil claims will be brought or, if brought, will be successful. Further, this type of claim is relatively new and, as such, there are no publicly available decisions as yet on issues such as damages calculation or of the evidentiary value of a CADE decision.

Canada

Kenneth Jull, Matthew Latella, Arlan Gates, David Gadsden and Eva Warden

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope of private enforcement actions in Canada

In Canada, private enforcement actions are statutorily available under Section 36 of the Competition Act⁵² (the “Act”). Section 36 allows for two different types of private proceedings for the recovery of damages resulting from competition law infringements:

- (i) an action for breach of one of the criminal provisions in Part VI of the Act, such as conspiracy (Section 45), bid-rigging (Section 47), false or misleading representations (Section 52), telemarketing (Section 52.1) and pyramid selling (Section 55.1); and
- (ii) an action for failure to comply with an order of the court or the Canadian Competition Tribunal (the “Tribunal”), such as an order to cease certain anti-competitive conduct.⁵³

A prior conviction or a finding of failure to comply with an order of the court or the Tribunal is not required for an individual or a company to initiate or succeed on a private enforcement action under Section 36.⁵⁴ However, a prior conviction or a guilty plea will alleviate the burden of proof on the private claimant.

In addition to the statutory rights of action, claimants in Canada’s common law provinces have recourse to certain recognized causes of action in common law that may be connected with economic torts related to competition issues, such as unlawful interference with contractual and economic relations, civil conspiracy and misrepresentation. Claimants often attach common law claims to their Section 36 private action to avail themselves of a wider range of remedies.⁵⁵ Similar tactics have been used in Quebec, relying on the civil liability regime under Chapter III of the Civil Code of Quebec.

A finding of infringement of an equivalent competition law in another country may practically increase the chances of a private enforcement action. While it has no legal consequence, a foreign finding of infringement may have persuasive weight in Canada. The success of a Canadian action following a foreign finding of infringement will depend on whether the evidentiary burden imposed by Section 36 is met and whether the Canadian court is entitled to take jurisdiction. Canadian courts in common law provinces will generally find jurisdiction over foreign companies and individuals where there is a real and substantial connection between the alleged misconduct and the jurisdiction of the court. In Quebec, the courts have traditionally adopted a narrower approach, refusing to find

⁵² RSC, 1985, c C-34.

⁵³ In addition to private action rights under Section 36, the introduction of Section 103.1, through an amendment to the Act in 2002, expanded private enforcement by allowing private parties to seek leave to bring an application before the Tribunal in respect of certain reviewable practices under Part VII of the Act, such as refusal to deal (Section 75), price maintenance (Section 76), and exclusive dealing, tied selling and market restriction (Section 77). The leave requirement in Section 103.1 is imposed to prevent frivolous claims being brought before the Tribunal. However, the remedies available in relation to these practices are essentially limited to an order prohibiting continuation of the conduct, and in some cases taking other steps to restore competition. Damages are not available. Accordingly, this chapter focuses on proceedings brought under Section 36.

⁵⁴ See, e.g., *Havana House Cigar & Tobacco Merchants Ltd v Naeini*, [1997] FCJ No. 1241.

⁵⁵ That said, the British Columbia Court of Appeal has clarified that Section 36 of the Act is not a “replacement” for an action in common law (in that case, for unlawful means conspiracy); at the same time, to the extent that a claim derives from non-observance of the Act and nothing else, the remedy provided by Section 36 is the “sole route to recovery.” See *Watson v Bank of America Corporation*, [2015] BCCA 362 at paras 58–59.



jurisdiction in cases where only pecuniary losses are suffered by the claimant and the foreign defendant has no “establishment” in Quebec.

2. Applicable limitation periods

A private claim under Section 36 must be made within the later of two years from:

- (i) the date on which the latest alleged offensive conduct occurred (or, in the case of an alleged breach of an order of the court or Tribunal, the day on which the order was contravened); or
- (ii) the date on which any criminal proceedings relating to the conduct at issue were finally disposed of.⁵⁶

The language used to describe the limitation period under the Act is somewhat ambiguous and has led to debates on the precise time at which the offensive conduct can be said to have occurred. It remains unclear how the courts will deal with limitation periods in cases where there is continuous misconduct or where the misconduct was concealed for a period of time.⁵⁷ The Federal Court of Appeal has held that the “ongoing effects” and “ongoing damages” doctrines do not apply to claims under Section 36 alleging violation of the Section 45 conspiracy provision of the Act. The Court declined to decide whether the “discoverability principle” is available for Section 36 claims.⁵⁸ According to that principle, the limitation period only starts when the claimant knows (or ought to have known) about the alleged anti-competitive conduct.

The meaning of “finally disposed of” in respect of criminal proceedings has also been questioned before the courts. For instance, it is unclear whether a stay of criminal proceedings or an acquittal can be considered a criminal disposition. It remains unclear, therefore, whether a private action can be started against a party that has not been indicted, even if more than two years have passed since the offensive conduct was carried out.

An additional contentious point is how the statutory limitation period interacts with other limitation periods under the common law or the Civil Code of Quebec. The Supreme Court of British Columbia refused to dismiss a claim on the basis that the two-year limitation period had lapsed, because an element of the claim involved a constructive trust, which was subject to a longer limitation period.⁵⁹ Similarly, claims under the general rules of civil liability under Article 1457 of the Civil Code of Quebec, brought in respect of a breach of a party’s duty to abide by applicable rules of conduct, have a limitation period of three years. Such claims have been pleaded in conjunction with claims brought under Section 45 of the Act.

Limitation periods for common law claims vary by province throughout Canada. In Ontario, a general limitation period of two years following the date on which the claim was discovered is applicable, with some limited exceptions.⁶⁰

⁵⁶ The Act, s 36(4).

⁵⁷ In dealing with most common law causes of action, it is common for the limitation period to run from the date on which the alleged misconduct was discovered. See: Limitations Act, 2002, SO 2002, c 24, Schedule B, ss 4, 15(2).

⁵⁸ *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, [2012] FCA 48 (CanLII). The Court of Appeal held that the offensive conduct was complete with the conclusion of the purchase agreement. The Court rejected the suggestion that the ongoing effects of the agreement or the ongoing damages caused to the claimant by the agreement extended the applicable limitation period.

⁵⁹ *Sun-Rype Products Ltd v Archer Daniels Midland Co*, [2007] BCSC 640, varied on appeal, 2008 BCCA 278.

⁶⁰ Limitations Act, 2002, SO 2002, c 24, Schedule B.

3. Appeals

Private action claims under Section 36 can be made before either a competent provincial court or the Federal Court. The Federal Court may only consider claims alleging violation of the Act and, unlike provincial courts, cannot consider related common law-based claims.

Canadian law provides a right of appeal on grounds of law, fact, or mixed law and fact, from all final decisions of the provincial or federal courts to the relevant courts of appeal. If unsatisfied with the decision of the appellate court, a party to the proceedings may file for leave to appeal to the Supreme Court of Canada (the “SCC”) on questions of law or mixed law and fact. The duration of the appeal process varies depending on the nature of the appeal and the courts involved, but is typically from 6 to 18 months.

A decision to reject certification of a class action in Canada is considered a final decision from which there is an automatic right to appeal.

4. Availability of class actions for infringement of competition law and/or damages in Canada

Class actions are available in all Canadian provinces, with the exception of Prince Edward Island,⁶¹ through enabling provincial legislation. The enactment of class action legislation has increased drastically the number of private actions brought under Section 36, specifically with respect to claims relating to the Act’s conspiracy provisions. It is now considered a near inevitability that a class action will follow significant convictions under the criminal provisions of the Act.

In Ontario, class actions are regulated under the Class Proceedings Act (the “CPA”).⁶² Under that legislation, a motion must be made to a judge of the Superior Court of Ontario for an order certifying the proceeding as a class proceeding and appointing the individual claimant who started the lawsuit as the representative claimant for the class.⁶³

Before certification of a class proceeding, the court must be satisfied that:

- (i) the pleadings in the action disclose a reasonable cause of action;⁶⁴
- (ii) there is an identifiable class of two or more persons that would be represented by the representative claimant;
- (iii) the claims of the class members raise common issues;
- (iv) a class proceeding is the preferable procedure for the resolution of the common issues; and
- (v) there is a representative claimant who would fairly and adequately represent the interests of the class; has demonstrated a workable method of advancing the proceedings on behalf of the class; and does not have an interest in conflict with the interests of the class members.⁶⁵

An order certifying a class proceeding is not a determination of its merits. However, the pressure that is brought to bear on a defendant once a class proceeding has been certified often results in the

⁶¹ However, courts in this province have the ability to certify class proceedings under existing procedural rules relating to representative proceedings.

⁶² SO 1992, c 6.

⁶³ Similar requirements exist in parallel provincial legislation across Canada.

⁶⁴ Certification will only be denied on this ground if it is “plain and obvious” that the pleading does not disclose a reasonable cause of action. See *Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Alberta v Elder Advocates of Alberta Society*, [2011] SCC 24 at para. 20; *Pro-Sys Consultants Ltd, et al v Microsoft Corporation, et al*, [2013] SCC 57 [“Pro-Sys”] at para. 63.

⁶⁵ CPA, s 5(1).



settlement of the action, as the certification generally constitutes a significant tactical advantage. Typically, defendants do not wish to have a class proceeding certified against them, as it would allow many claims that would not be litigated on an individual basis to be asserted en masse with minimal risk or cost to the members of the class.

There are different approaches to costs across Canadian jurisdictions. In Ontario and Alberta, the losing party, whether the claimant class or the defendants, may bear legal and other costs. Other jurisdictions, such as British Columbia, and Newfoundland and Labrador, generally do not award costs, except when the conduct of one of the parties is vexatious or abusive.

Following class certification, notice is provided to potential class members advising of the certification and their right to opt out, or for non-residents in some provinces, to opt in to the proceeding. Once the opt-out (or opt-in) period (which is, on average, 60 to 90 days) has expired, all class members are bound by any court orders made in respect of the class proceeding and are barred from commencing litigation in respect of the allegations raised in the class proceeding.

Once the class is established, the certified common issues of the proceeding will be litigated. The action on common issues will proceed much like traditional litigation, with documentary and oral discovery, pre-trial procedures, exchange of expert reports and, absent any resolution, trial.

The SCC confirmed the potential standing of both direct and indirect purchasers to assert a cause of action in class proceedings under the Act, in a trilogy of decisions relating to price-fixing allegations in late 2013 (the “2013 trilogy”).⁶⁶ Prior to the 2013 trilogy, courts heavily debated whether a class proceeding is the appropriate forum to address some claims, especially those made by indirect purchasers in class actions dealing with price-fixing allegations. In such actions, the claimants usually claim damages for “overcharge” resulting from price-fixing, and had grappled with the difficulties inherent in determining, on a class-wide basis, which members of the class bore the “overcharge.” As further discussed below, the SCC held in the 2013 trilogy that such difficulties should not be a reason to reject class certification.

As with individual proceedings brought pursuant to the Act, class action claimants will often plead related common law causes of action, such as negligent misrepresentation, along with alleged statutory breaches brought under Section 36.⁶⁷

B. Conduct of proceedings and costs

5. Burden of proof

Claimants in a Section 36 private action bear the burden of proving that there was an infringement of the applicable provisions of the Act, or that the defendant failed to comply with a court or Tribunal order, and that the claimants suffered actual loss as a result of the infringement or the failure to comply.

The burden of proof in all claims under Section 36 is the civil burden, which requires that the claimant proves the claims on a balance of probabilities. While there have been suggestions that establishing a violation of a criminal provision of the Act requires a higher burden of proof and greater care in

⁶⁶ *Pro-Sys; Infineon Technologies AG, et al v Option Consommateurs, et al*, [2013] SCC 59 [“*Option Consommateurs*”]; *Sun-Rype Products Ltd, et al v Archer Daniels Midland Company, et al*, [2013] SCC 58 [“*Sun-Rype*”]. According to the SCC, actions by indirect purchasers may be brought under the Act, and indirect purchaser class actions may be certified in common law provinces and Quebec.

⁶⁷ For example, in *Option Consommateurs*, the proposed class action asserted that the defendant microchip manufacturers failed to discharge statutory obligations under the Act and that their conduct amounted to a fault giving rise to civil liability under the Civil Code of Quebec.

scrutinizing the evidence,⁶⁸ the SCC in *FH v McDougall* held that the civil burden of proof is the only applicable standard in civil cases, even where the claim is related to a criminal conduct.⁶⁹

Section 36 provides a rebuttable presumption which eases the evidentiary requirements for private claimants. In cases where the private claim follows a criminal conviction by the courts, that conviction would qualify as sufficient proof of the defendant's breach of the relevant provision for the purpose of the civil claim as well. This presumption is aimed at facilitating claims by private parties that lack the statutory investigatory powers accorded to the Commissioner of Competition (the "Commissioner") and, through the Commissioner, the Competition Bureau (the "Bureau").

The requirement to prove actual damages may also raise questions as to whether a private claimant in fact suffered losses, notably where losses were passed on to other parties. However, the British Columbia Court of Appeal in the *Sun-Rype* case concluded that the so-called "passing-on defense" is not available in Canada, and that a defendant therefore cannot argue that the claimant has not suffered harm merely because an overcharge was passed on to other parties, such as end consumers.⁷⁰ In its ruling on appeal of this decision as part of the 2013 trilogy, the SCC upheld the rejection of the passing-on defense, while maintaining that passed-on losses – that is, the injury suffered by indirect purchasers – can form the basis of a claim.⁷¹ As explained in the Emerging Trends section below, the SCC acknowledged the plaintiffs' ultimate burden of proof in such proceedings, but held that permitting such actions does not risk double or multiple recovery by direct and indirect purchasers and that it would be inappropriate to dismiss the action because of evidentiary difficulties associated with claims from indirect purchasers.

6. Joint and several liability of cartel participants

Liability is generally joint and several between parties to an illegal cartel. This means that a private claimant, or a class of claimants, is able to bring an action for the entirety of the losses suffered against one or more, but not necessarily all, parties to an alleged cartel.

While Canadian courts have not issued a definitive ruling on this matter, it may be possible for one party to a cartel to initiate a cross claim, within an ongoing proceeding, against other parties to the cartel for contribution or indemnity. If successful, a defendant who has had to bear the full costs of damages in a private claim may be able to redeem a portion of the paid damages from other parties to the cartel.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Generally, parties to a civil claim have a duty to disclose all documents in their control, or that have been in their control, that are related to the action, whether or not the disclosure of such documents assists their case, with the exception of documents for which a legal privilege is being claimed.

⁶⁸ *Janelle Pharmacy Ltd v Blue Cross of Atlantic Canada*, [2003] NSSC 179 at paras 95–99.

⁶⁹ *FH v McDougall*, [2008] SCC 53.

⁷⁰ *Sun-Rype Products Ltd. v Archer Daniels Midland Company* [2011], BCCA 187. The Court of Appeal in *Sun-Rype* relied on a broad interpretation of *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, [2007] SCC 1, a SCC decision in which the passing-on defense was rejected in the context of a claim to recover the payment of an unlawful tax.

⁷¹ See *Sun-Rype* at para. 37. According to the SCC in *Sun-Rype*, the *Pro-Sys* decision (another of the 2013 trilogy of decisions) "conclusively" answered the question of passed-on losses in confirming that "the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses... [N]o insurmountable problem is created by allowing the claims in restitution to be brought by a class comprised of both direct and indirect purchasers. Unjustly obtained amounts are recoverable on the basis that they have been extracted at the plaintiffs' expense."



In private competition litigation, there are two scenarios for discovery and disclosure of documents. Where the Section 36 claim is a follow-on claim, namely a claim that follows a finding of conviction by a court in a criminal proceeding under the Act, claimants may be permitted access to evidence used in the criminal proceeding. For example, Sub-section 36(2) of the Act effectively allows claimants access to the “record of proceedings” of the court in which the defendant was convicted or in which the defendant entered into a guilty plea. This right is not conditioned on the approval of the Bureau.

If the civil claim has been started prior to criminal proceedings against the defendant, evidence that has been gathered by the Bureau during the course of an inquiry or an investigation may not always be available to private claimants until a conviction has been obtained. This is significant, bearing in mind the difficulty associated with gathering evidence without recourse to the statutory investigation powers given to the Commissioner. Civil proceedings brought by a private party and criminal proceedings related to the same alleged conduct may occur in parallel. While the court trying the civil action has the right to stay a civil proceeding where a criminal charge is pending, this is only granted in exceptional circumstances, where the defendant is able to show that the continuation of the civil proceeding will prejudice the criminal proceeding.

Attempts by Section 36 claimants to gain access to the Bureau’s investigation records, absent a criminal proceeding,⁷² have not always been successful. This is in part due to the Section 29 bar on the disclosure of evidence gathered by the Bureau to a third party, although the same provision contemplates such disclosure when necessary for the administration or enforcement of the Act. Legal and litigation privileges may also bar access to evidence gathered in the course of the criminal proceeding.

An issue that remains open is whether claimants in a Section 36 claim may make use of the earlier occurrence of discovery in United States proceedings. Canadian claimants seek at times to rely on evidence that has already been disclosed in similar claims in the United States, and their efforts have met with varying degrees of success. While some cases have denied such efforts, based on comity between American and Canadian courts, and in order to prevent claimants in Canada from accessing evidence earlier than the timeframe envisioned under Canadian law, other courts have held that such attempts do not raise concerns.

8. Pre-action disclosure

In Canada, pre-action disclosure, a remedy also known as a Norwich order,⁷³ is considered an extraordinary remedy which should only be granted in cases where disclosure of certain evidence is required to permit an action to proceed.

In Ontario, two recent cases, *GEA Group AG v Ventura Group Co*⁷⁴ and *York University v Bell Canada Enterprises and Rogers Communications Inc.*⁷⁵ have provided some clarity to the applicable test for ordering pre-action disclosure, however, these cases may be of limited application as they deal specifically with the pre-action disclosure of evidence from non-parties.

9. Average length of time from issue of claim to judgment in Canada

Canadian courts have different time limits, determined by provincial legislation, which generally govern the duration of civil claims. However, in complex competition litigation, and especially in

⁷² The SCC did permit claimants to access private communications of the defendants which were obtained by the Bureau through wiretapping in the course of a criminal investigation, where such evidence was ordered to be produced by the reviewing judge, in *Imperial Oil v Jacques*, [2014] SCC 66. The SCC explained that a Section 29 bar is subject to a court’s discretion to order disclosure.

⁷³ Arising from the English case of *Norwich Pharmacal Co v Comrs. of Customs and Excise*, [1974] AC 133 (HL).

⁷⁴ [2009] 307 DLR (4th) 329 (Ont SCJ).

⁷⁵ [2009] 311 DLR (4th) 755 (Ont SCJ).

class actions, set deadlines are commonly extended either by consent between the parties or as determined by the relevant court.

It is not uncommon for complex competition litigation to take from two to five years to reach a resolution.

10. Average cost from issue of claim to judgment in Canada

Costs incurred in pursuing competition law claims in Canada vary substantially depending on, inter alia, the causes of action pleaded, whether a related criminal proceeding has been commenced, the complexity of the legal issues in dispute, the number and nature of defendants involved and the availability of evidence. By way of example, for a relatively complex competition litigation proceeding involving claimed damages of CAD1 million, it would not be unusual for a claimant to incur legal costs in the range of CAD250,000 to CAD500,000 or even more.

Courts will generally order the losing party to pay part of the legal costs of the successful party at the end of the litigation. While the award may vary from case to case, courts will generally award between one-third and one-half of the successful litigant's costs, which is referred to as "party and party" costs or the partial indemnity scale. Where a court determines that a case was frivolous or vexatious, or in other extraordinary circumstances, costs may be awarded on a substantial indemnity scale, which will generally be between 60% and 80% of the successful party's costs.

Relevant to private action competition litigation, Section 36(1) specifically references that successful claimants may be awarded an amount "not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section." This may increase a successful litigant's chances of recovering costs.

11. Third party/alternative funding

Third party funding of private action litigation, including in respect of class actions, is permissible. Nonetheless, third party funding is still nascent in Canada and some provincial law societies are currently monitoring such funding and devising rules to regulate it.

Other potential alternative funding is by way of contingency fees, which are the preferred method of funding for class action litigation, and public funding in rare cases where the claimants require financial support.

12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available in Canada for civil claims in general. Such means include arbitration and mediation, however, these procedures are not often used in private competition litigation.

C. Relief

13. Availability of damages and quantification

Generally, damages, including claims for interest in most jurisdictions, are available under Section 36 so as to compensate the claimant for all losses suffered as a result of the alleged breach. It is insufficient for a claimant to simply prove the defendant's infringement of the applicable criminal provision; the specific breach must have caused demonstrable loss to the claimant.

In addition to damages, the claimant may recover both legal costs and costs incurred in investigating the claim. Investigation costs include the claimant's costs for carrying out surveys, conducting market analyses and economic studies, as well as other reasonable investigations. In practice, damages awarded by Canadian courts in competition cases are generally lower than those awarded in the United States.



To date, excluding settlements, damages have been awarded in a limited number of competition claims brought under Section 36. In *Maritime Travel Inc v Go Travel Direct.Com Inc.*,⁷⁶ the Court awarded general damages of CAD216,842 for conduct held to be contrary to the criminal misleading advertising provisions of the Act. In 2011, an Alberta court awarded CAD5 million in general damages in *321665 Alberta Ltd v ExxonMobil Canada Ltd*⁷⁷ as a result of the defendant's violation of the Section 45 conspiracy provision of the Act, however, that decision was later reversed on the merits by the Alberta Court of Appeal.⁷⁸

14. Punitive and exemplary damages

Canadian courts have held that punitive damages are not available for claimants in a Section 36 private action.⁷⁹ Nonetheless, under the common law, punitive damages may be available for some economic torts, including those that may be claimed in a competition-related action.

As a result, claimants may find it strategically desirable to frame their pleadings both as claims under the Act as well as common law causes of action, in order to avail themselves of the wider array of remedies available under the common law.

In general, however, punitive and exemplary damages are only awarded in Canada in rare circumstances. In *ExxonMobil*, the lower court ordered CAD500,000 punitive damages against each defendant. Notably, the claim alleged Section 36 violations as well as common law causes of action.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

The Act does not explicitly address whether interlocutory or permanent injunctions are available for private actions under Section 36. Canadian courts are divided over whether Section 36 claimants can have recourse to such remedies. The inherent jurisdiction of superior courts to do justice between parties has at times been taken to mean that the court may grant injunctive relief.⁸⁰ However, courts have generally found that injunctions are not available in competition-related actions, since the Act specifically refers only to damages (not mandatory orders) as a remedy under Section 36.⁸¹ In some cases, claimants will plead common law causes of action in conjunction with claims brought under the Act, in an effort to make use of the potential availability of injunctive relief.

To obtain an interlocutory injunction, the court will generally have to be satisfied that there is a serious issue to be tried, that refusing to grant the injunction will cause irreparable harm to the claimant's interest and that the "balance of convenience," assessed through balancing the alleged harm to the claimant with the affected interests of the defendants, favors granting an injunction.⁸² To obtain a final (permanent) injunction, the court will generally require that the court "fully evaluate" the parties' legal rights.⁸³

⁷⁶ 2008 NSSC 163, affirmed on appeal, 2009 NSCA 42.

⁷⁷ 2011 ABQB 292 (CanLII) [*"ExxonMobil"*].

⁷⁸ 321665 *Alberta Ltd v Husky Oil Operations Ltd*, [2013] ABCA 221.

⁷⁹ See, e.g., *Wong v Sony of Canada Ltd*, [2001] 9 CPC (5th) 122 (Ont SCJ).

⁸⁰ See, e.g., *Mead Johnson Canada v Ross Pediatrics*, [1996] OJ No. 4342.

⁸¹ See, e.g., *Price v Panasonic Canada Inc.*, [2000] OJ No. 3123 (Ont SCJ).

⁸² See *1711811 Ontario Ltd v Buckley Insurance Brokers Ltd*, 2014 ONCA 125 at para. 74, referring to *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

⁸³ *Ibid* at para. 79, citing *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, [2010] BCCA 396.

16. Other types of relief

No other types of relief are available for a private claim under Section 36.⁸⁴ If the action alleges common law causes of action, other forms of relief such as disgorgement or other equitable relief may be available.

D. Emerging trends

Pragmatic approaches to class action certification of direct and indirect purchasers

The treatment of Section 36 claims by indirect purchasers in class actions has emerged as an interesting point of contention and jurisprudential development. While earlier decisions generally denied certification of class actions based on Section 36, courts have recently granted certification for both direct and indirect purchasers on the basis of more pragmatic approaches.

In the 2013 trilogy, the SCC certified both a class of indirect purchasers, in *Pro-Sys*, and a mixed class of direct and indirect purchasers, in *Option Consommateurs*. In the former case, the SCC rejected the defendants' arguments that the risk of double or multiple recovery, and the "remoteness" of overcharge and "complexities" associated with tracing the loss, provided reasons to bar indirect purchaser actions. The SCC noted, however, that the indirect purchasers willingly assumed the burden of establishing that they had suffered loss and that whether the evidence would suffice to meet that burden was a factual question to be decided on a case-by-case basis.⁸⁵ In the latter case, the SCC similarly rejected a "blanket application of inflexible rules" in favor of a case-by-case approach, finding that there was no risk of double recovery in the case at hand since direct and indirect purchasers would be combined in a single group that would make a single claim of aggregate loss.⁸⁶ In the third decision, *Sun-Rype*, the SCC rejected certification of a mixed group of direct and indirect purchasers on the basis of insufficient evidence, but confirmed its conclusions from *Pro-Sys* that, notwithstanding the practical challenges associated with cases involving indirect purchasers, in principle indirect purchasers have the right to bring an action.⁸⁷

Criminal penalties under "per se" hard-core cartel provisions

The introduction in 2009 amendments to the Act of a *per se* criminal offense for hard-core cartel conduct such as price-fixing, output restriction and market allocation is expected to result in increased cartel prosecution and a corresponding increase in private actions. This is largely due to the lower evidential burden; formerly, an actual or likely anti-competitive effect – an "undue" lessening of competition – arising from the conspiracy had to be shown. The conspiracy amendments took effect in March 2010. The first criminal fine under the new *per se* offense was imposed in January 2012; since then, other criminal fines have been imposed against individuals and companies, in addition to sentences to imprisonment.

Expanding corporate criminal liability for cartel offenses based on "senior officer" conduct

Bill C-45, which was passed and came into force on March 31, 2004, amended the Criminal Code to provide that organizations are liable for the conduct of "senior officers." The statutory definition of a "senior officer" includes any representative who "plays an important role in the establishment of the organization's policies" or "is responsible for managing an important aspect of the organization's

⁸⁴ In contrast, in cases brought by private parties before the Tribunal under Section 103.1, behavioral orders may be made on an interim or permanent basis. For example, the Tribunal made an interim supply order requiring the Insurance Bureau of Canada to continue to supply online search applications to the Used Car Dealer Association of Ontario. See Interim Supply Order on Consent, October 20, 2011, available at http://www.ct-tc.gc.ca/CMFiles/CT-2011-008_Interim%20Supply%20Order%20on%20Consent_8_38_10-20-2011_3733.pdf.

⁸⁵ *Pro-Sys* at paras 34-45.

⁸⁶ *Option Consommateurs* at paras 114-115.

⁸⁷ *Sun-Rype* at paras 1, 17-20.



activities.”⁸⁸ While Bill C-45 did not go so far as to establish vicarious liability, it broadened the scope of corporate criminal liability by effectively replacing the traditional legal concept based on the fault of the corporation’s “directing mind(s),” the board of directors and those with the power to set corporate policy, with liability tied to the fault of all of the corporation’s “senior officers” as identified according to a functional analysis.⁸⁹

The *Global Fuels* case is the first to test the parameters of the corporate criminal liability provisions of the amended Criminal Code. The Quebec Superior Court held that the defendant company was guilty of cartel conduct due to its regional manager’s awareness of an illegal price-fixing strategy implemented by two of the territory managers he supervised and his failure to interfere, on the basis that the regional manager qualified as a “senior officer.”⁹⁰ The decision affirmed that the Criminal Code provisions for organizational liability as amended by Bill C-45 mark a fundamental change in the law of corporate criminal liability.⁹¹ In April 2015, the Quebec Superior Court imposed a CAD1 million fine on the corporation.⁹²

Increasing importance of corporate compliance programs

The Canadian model of corporate criminal responsibility as reflected in the *Global Fuels* case, together with the Competition Bureau’s recently updated Corporate Compliance Programs Bulletin (the “Bulletin”),⁹³ place new emphasis on the importance of implementing credible and effective corporate compliance programs.

The model of corporate criminal liability established by Bill C-45 recognizes defenses based on reasonable measures taken by senior officers with respect to those under their supervision. In this respect, it has become increasingly important for organizations to assess which of their officials may qualify as “senior officers” and implement due diligence programs designed for such personnel.

The Bulletin provides guidance on designing and implementing credible and effective compliance programs for the purpose of compliance with competition law. It emphasizes a risk-based approach to compliance and expands the recommended steps (as compared to the previous version of the Bulletin) to be incorporated into a compliance program. While the Bulletin does not appear to formally recognize compliance as a possible defense, its emphasis on tailored, internally developed compliance programs for organizations of all sizes, and vigilance in assessing their effectiveness, makes clear that the Competition Bureau has high expectations for proactively managed, effective compliance programs. Further, it underscores the importance of such programs in the context of all types of contravention under the Competition Act, including those that expose businesses to fines (or

⁸⁸ Criminal Code, s 2.

⁸⁹ See Todd L Archibald, Kenneth E Jull and Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Toronto: Canada Law Book, 2014), chapter 5: “The Changing Face of Corporate and Organizational Criminal Liability.” The law now only requires proof that those who controlled the operation of the organization were criminally liable, and not necessarily those who set policy (e.g., on the board of directors or as senior executives). Notably, the amended law also extends the scope of criminal liability to all “organizations,” defined so as to include any public body, body corporate, society, company, firm, partnership, trade union or municipality.

⁹⁰ *R c Pétroles Global inc*, [2013] QCCS 4262. The Superior Court found that the regional manager was a “senior officer” because he was responsible for the management of an important field of activity at Global Fuel, and knew of (but did not interfere in) the collusive activities of six territory managers under his supervision.

⁹¹ As confirmed in the lower court’s decision in the *Global Fuels* case, it is no longer necessary “to prove fault in the boardrooms or at the highest levels of a corporation: the fault even of middle managers may suffice.” *R c Pétroles Global inc*, [2012] QCCQ 5749 (CQ) at para. 75, citing Archibald, Jull and Roach (Toronto: Canada Law Book, 2004).

⁹² *R c Pétroles Global inc*, [2015] QCCS 1618.

⁹³ Published June 3, 2015, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>. The 2015 Bulletin updates and replaces an earlier version dated September 27, 2010.

administrative monetary penalties, under the civil provisions) and the recovery of damages by private parties.⁹⁴

⁹⁴ The Bulletin, Section 2.1, “Why is Compliance Important?”



China

David Fleming, Stephen Crosswell and Zhi Bao

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in China

Private enforcement under the AML

Article 50 of the Anti-Monopoly Law (“AML”) establishes the basis for private enforcement under the AML, providing that a “*Business Operator whose engagement in a Monopolistic Act has caused a third party loss shall bear civil liability according to law*”. Article 3 of the AML provides that, for the purposes of the law, Monopolistic Acts include:

- (i) entering into a “monopoly agreement” (which is defined as any “agreement, decision, or other concerted practice to eliminate or restrict competition, or other concerted behavior”, and includes both horizontal and vertical anti-competitive agreements);⁹⁵
- (ii) abuse of a dominant position;⁹⁶ and
- (iii) entry into a concentration which results in or could result in the elimination or restriction of competition in the market (i.e., mergers).⁹⁷

On its face, it would therefore appear that the AML opens the door to private enforcement against not just anti-competitive agreements and abuse of dominance, but also against mergers and other concentrations falling within the scope of the merger control provisions in the AML. The position on this remains uncertain. There has been some very limited commentary supporting this view. However, it is notable that no reference is made to the prospect of private action against mergers and other concentrations in the *Provisions of the Supreme People’s Court on the Application of Laws in the Trial of Civil Disputes arising from Monopolistic Practices* (“SPC Provisions”), which regulate private actions under the AML.

The SPC Provisions, issued by the Supreme People’s Court on May 8, 2012 and effective from June 1, 2012, give judicial guidance on the handling of anti-monopoly cases by the Chinese courts and were formulated in accordance with the AML, the Tort Liability Law, the Contract Law and the Civil Procedure Law of the PRC (“Civil Procedure Law”). The SPC Provisions allow for both stand-alone and follow-on private actions.⁹⁸ Claims may be brought in relation to Monopolistic Acts engaged in both within the PRC and outside the PRC, provided such conduct has the effect of eliminating or restricting competition in the domestic markets of the PRC.⁹⁹

⁹⁵ Anti-Monopoly Law Arts. 13–14.

⁹⁶ Anti-Monopoly Law Art. 17.

⁹⁷ Anti-Monopoly Law Art. 20. Concentrations include various forms of acquisitions and other methods of obtaining control over another business operator.

⁹⁸ SPC Provisions Art. 2, which requires the courts to accept stand-alone claims, including claims where the alleged Monopolistic Act is subject to investigation but the investigating authority is yet to confirm whether an infringement has occurred.

⁹⁹ Anti-Monopoly Law Art. 2.

Private enforcement under other competition-related laws

There are a number of laws other than the AML that authorize private enforcement against anti-competitive conduct. These include the Bidding Law,¹⁰⁰ the Price Law¹⁰¹ and the Anti-Unfair Competition Law.¹⁰²

Private enforcement against administrative monopolies

Chapter 5 of the AML prohibits administrative agencies and organizations tasked with the function of administrative public affairs from abusing their administrative powers, including by obstructing the free flow of goods between regions of the PRC, excluding or restricting Business Operators from outside the region from participating in local bids, discriminating between local Business Operators and Business Operators from other regions, forcing Business Operators to engage in Monopolistic Acts and formulating anti-competitive regulations. Although Article 50 of the AML appears not to extend to administrative monopolies, the SPC Provisions contemplate claims against public utilities or other Business Operators who are conferred by laws to process a dominant position. Claimants may also have a right of action against the relevant administrative agencies and organizations under Article 12(8) of the Administrative Litigation Law from May 1, 2015, which provides for suits by citizens, legal persons and other organizations where it is considered that the administrative organs of the State have abused their power to eliminate or limit competition.

2. Applicable limitation periods

The general statute of limitations for civil cases in the PRC is two years and applies also to AML and other competition-related litigation. The limitation period runs from the date that the injured party knew or should have known of an infringement upon its rights and interests.¹⁰³ However, if a claimant reports an infringement to a competition enforcement agency then the two-year limitation period is suspended in relation to claims that this claimant (and only this claimant) might have until such time as he knows or should know that the enforcement agency has either terminated the investigation or reached a decision as to whether an infringement has occurred.¹⁰⁴

Similarly, it is possible for the claimant to stop the clock on limitation simply by writing a “demand letter” to the intended defendant. A demand letter must clearly state the claims alleged.¹⁰⁵ A new limitation period shall be counted from the time such a letter is delivered to the other party.¹⁰⁶

Finally, in the absence of specific rules under the AML and other competition-related laws, the general rule is that the claimant’s right to commence an action shall lapse after 20 years from the date that the infringing act occurred – regardless of whether the two-year period has begun to run or has been suspended due to lack of knowledge, an investigation or otherwise.¹⁰⁷

3. Appeals

The Chinese judicial system has four levels: Primary People’s Courts, Intermediate People’s Courts, Higher People’s Courts and the Supreme People’s Court. In competition litigation, an Intermediate People’s Court generally serves as the court of first instance.¹⁰⁸ Each major court has an existing

¹⁰⁰ Art. 53, which imposes sanctions and liability for damages for bid-rigging.

¹⁰¹ Art. 41, which provides for civil liability for pricing violations.

¹⁰² Art. 20, which authorises private enforcement against anti-competitive violations of the Anti-Unfair Competition Law.

¹⁰³ General Provisions of the Civil Code of the PRC (“Civil Code”) Art. 135; SPC Provisions Art. 16.

¹⁰⁴ SPC Provisions Art. 16.

¹⁰⁵ Provisions of the Supreme People’s Court on Certain Issues Concerning the Application of the Statute of Limitations to Civil Case Trials Art. 10.

¹⁰⁶ Civil Code Art. 140.

¹⁰⁷ Civil Code Art. 137.

¹⁰⁸ SPC Provisions Art. 3.



intellectual property division which is tasked with hearing competition cases.¹⁰⁹ With approval from the Supreme People's Court, Primary People's Courts may also have jurisdiction as the court of first instance.¹¹⁰ Higher People's Courts should exercise jurisdiction in cases with substantial influence on their respective jurisdictional regions.¹¹¹ Finally, in cases with substantial national influence, the Supreme People's Court may serve as the court of first instance.¹¹²

Regardless of the court of first instance, litigants have the right to one appeal to the People's Court directly above the court of first instance.¹¹³ The court of second instance then renders a final judgment.¹¹⁴ As a result, parties may appeal to the Supreme People's Court only in cases originating in Higher People's Courts. Chinese law does not provide for appeal to the Supreme People's Court as of right. Though generally the court of second instance renders a final judgment, in some circumstances parties may obtain a rehearing under special proceedings.¹¹⁵ Under PRC laws, appeals can be made on all points, including the facts, application of laws and procedure.

In the PRC, retrials can be initiated by the court or by the parties.¹¹⁶ It is not uncommon for unsatisfied parties to apply for a rehearing. However, the People's Court directly above the court granting the final judgment has to review the application and then determine whether to rehear the case. If a retrial is warranted based on the review, generally the upper-level court shall itself rehear the case. However, the upper-level court is allowed to designate the court granting the final judgment as the court charged to first rehear the case.¹¹⁷

4. Availability of class actions for infringement of competition law and/or damages in China

Chinese civil procedure does not create an official basis for class action litigation. However, relevant laws do provide for joint actions when one or both parties to a dispute consist of two or more persons.¹¹⁸ The parties to joint actions may appoint a "litigation representative" to represent the parties in all procedural matters. In cases with numerous or unascertainable claimants the court may issue a public notice requesting claimants to register with the court and to elect a litigation representative.¹¹⁹ A judgment of the court with respect to registered claimants applies to all future registrants.¹²⁰ In such cases, the Civil Procedure Law provides (without detailed specifications) that the object of the claims should fall into the same category, and that the final judgment in such an action applies to all claimants registered. If any party not registered to the action files a similar claim within the statute of limitation, it will also be bound by the final judgment in the joint action case. The laws do not address what might happen if an unregistered claimant objects to being bound by the joint action judgment.

Lawyers have used this "litigation representative" method to simulate common law class action law suits. Theoretically, litigants in a competition damages case could employ this mechanism but it has not yet been tested in this context. It is important to note, however, that the lawyers involved are subject to the scrutiny of both the All China Lawyers Association ("ACLA") and the government in their conduct of the litigation. The ACLA has released guidelines regulating the behavior of lawyers

¹⁰⁹ Circular of the Supreme People's Court on Studying and Implementing Anti-Monopoly Law

¹¹⁰ SPC Provisions Art. 3.

¹¹¹ Civil Procedure Law Art. 19.

¹¹² Civil Procedure Law Art. 20.

¹¹³ Civil Procedure Law Art. 164.

¹¹⁴ Civil Procedure Law Art. 175.

¹¹⁵ Civil Procedure Law Art. 198.

¹¹⁶ Civil Procedure Law Arts. 198–199.

¹¹⁷ Supreme People's Court's Several Opinions on Accepting and Examining the Petitions for Retrial of Civil Cases Arts. 27–28.

¹¹⁸ Civil Procedure Law Arts. 52, 54.

¹¹⁹ Civil Procedure Law Arts. 53–54.

¹²⁰ Civil Procedure Law Art. 54.

who attempt to organize class actions (Guiding Opinions of the All China Lawyers Association on the Handling of Class Action Cases by Lawyers, “Guiding Opinions”). The Guiding Opinions define class action as joint action litigations or non-litigation cases (such as mediation, arbitration or administrative review) based on the same or similar facts or legal issues with more than 10 claimants.¹²¹ In such cases, the Guiding Opinions impose requirements on lawyers to report the case to the ACLA.¹²² The ACLA may convene meetings to discuss the lawyers’ handling of the class action cases¹²³ and for highly influential cases, the ACLA will report to the Ministry of Justice, and may express its opinions to the public with a view to support the lawyers.¹²⁴

B. Conduct of proceedings and costs

5. Burden of proof

For most claims, PRC courts require that the party making a claim bear the burden of proving its claims.¹²⁵

There are many exceptions to the general rule and the SPC Provisions provide for burden shifting in certain types of competition litigation. For example:

- (i) if a claimant seeks damages resulting from the existence of a horizontal agreement and has proven that the agreement exists, the burden of proof then shifts to the defendant to show that the agreement neither excludes nor restricts competition;¹²⁶
- (ii) in abuse of dominant position disputes, the claimant bears the burden of showing that the defendant holds a dominant position;¹²⁷ and
- (iii) if a claimant brings an action against a public utility company or other entity with legally granted monopoly status, the court may make a judicial determination as to the defendant’s dominant position.¹²⁸

Most commentators have concluded that, in essence, the SPC Provisions establish a presumption of dominance in respect of state-owned enterprises (“SOEs”).

The claimant may also present as evidence materials that the defendant has disseminated that claim dominance, such as public statements on a website.¹²⁹ Once the claimant satisfactorily establishes that the defendant holds a dominant position and has abused it, the burden shifts to the defendant to justify the alleged abusive conduct.¹³⁰

In the PRC, there is no specific standard of proof for competition cases. Article 73 of the Evidence Provisions provides that where both parties concerned produce contradicting evidence regarding the same fact but neither has enough evidence to rebut the other side’s evidence, the court must determine whose evidence prevails, taking the specific situation into consideration, and must then use the evidence that it considers prevails. Accordingly, customarily it is the principle of “on the balance of probability” that is adopted in civil cases in the PRC.

¹²¹ Guiding Opinions 1.1.

¹²² Guiding Opinions 3.1.

¹²³ Guiding Opinions 4.2.

¹²⁴ Guiding Opinions 4.3, 4.7.

¹²⁵ Provisions of the Supreme People’s Court on Evidence in Civil Procedures (“Evidence Provisions”) Arts. 4–7.

¹²⁶ SPC Provisions Art. 7.

¹²⁷ SPC Provisions Art. 8.

¹²⁸ SPC Provisions Art. 9.

¹²⁹ SPC Provisions Art. 10.

¹³⁰ SPC Provisions Art. 8.



PRC law does not state whether competition authority decisions constitute binding evidence in private actions.

6. Joint and several liability of cartel participants

No explicit legal basis exists to claim joint and several liability in PRC competition litigation.

The Civil Code allows claimants to seek joint and several liability in limited cases of partnerships, joint ventures created between two or more enterprises, agency relationships and debtor-creditor relationships.¹³¹ The PRC Tort Law (“Tort Law”) also sets out certain categories of joint and several liability for joint tortfeasors.¹³² In such cases the claimant may elect some or all of the infringing parties to assume liability for the entire cause of action, after which the infringing parties may seek compensation for excessive payments among themselves.

Competition litigation does not explicitly fall into any of the enumerated categories for joint and several liability, and it is still untested whether claims for breach of competition law are to be treated as tortious, thus opening up the possibility of claimants seeking joint and several liability between the defendants. However, Art. 4 of the SPC Provisions provides that jurisdiction over competition disputes is to be determined in light of the actual circumstances of a case in accordance with the jurisdiction provisions of the Civil Procedure Law and relevant judicial interpretations *regarding torts, contract disputes*, etc. This provision therefore suggests that claims for breach of the AML can be either tortious or contractual in nature.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

PRC civil procedure laws include an exhaustive list of categories of evidence that the courts may consider, namely documentary evidence, physical evidence, audio-visual materials, electronic data, testimonies of witnesses, statements of the parties, expert opinions and records of inquests.¹³³

Generally, a party must provide evidence to support each of its claims, though in situations where a party cannot collect evidence for reasons beyond its control, that party may petition the court to investigate and/or collect the evidence.¹³⁴ Consistent with inquisitorial court systems, the court also has power to initiate its own investigation.¹³⁵ This procedure for receiving court assistance in obtaining evidence does not create a US-style discovery system. Parties petitioning the court for assistance in collecting evidence must:

“clearly specify the basic information of the evidence, such as the name of the person investigated or the title of the entity, the dwelling place, the contents of the evidence to be investigated upon and collected, the reasons why the evidence needs to be investigated upon and collected by the People’s Courts and the facts to be proved.”¹³⁶

This requirement serves to prevent general discovery requests leading to fishing expeditions.

Chinese law does not contain a formal mechanism for parties to follow-on litigation to compel production of evidence uncovered in enforcement authority investigations. Generally, when courts initiate their own investigation they will communicate with government authorities which may possess relevant information. The court does not, however, have power to compel government authorities to produce evidence for parties to a civil litigation.

¹³¹ Civil Code Arts. 35, 52, 65, 87.

¹³² Tort Law Arts. 8-9.

¹³³ Civil Procedure Law Art. 63.

¹³⁴ Civil Procedure Law Art. 64.

¹³⁵ Civil Procedure Law Art. 67.

¹³⁶ Evidence Provisions Art. 18.

On the other hand, Chinese citizens, legal persons (including foreign-invested enterprises) and other organizations may gain access to government records in accordance with the Regulations of the People's Republic of China for the Disclosure of Government Information ("Disclosure Regulations"). The Disclosure Regulations do not include government enforcement actions and related evidence in their list of mandatory public disclosure, but Article 13 of the Disclosure Regulations permits the abovementioned parties to request other information based on special needs. If a government authority refuses to release information, the requesting party may commence administrative litigation in a People's Court to overturn the refusal.¹³⁷ In this manner it may be possible for parties to competition litigation to obtain access to information concerning private enforcement actions. However, the Disclosure Regulations explicitly prohibit the release of any information related to trade secrets without the consent of the trade secret owner.¹³⁸

The SPC Provisions create a specific regime with additional safeguards for the handling of state secrets, trade secrets, personal privacy and other confidential information of the parties. In particular, while evidence involving such kind of sensitive information is admissible, the court may take, or the parties may apply for, protective measures such as a private trial, restriction or prohibition of copying, counsel-only disclosure or the signing by the parties of a confidentiality agreement.¹³⁹

Finally, China does not recognize attorney-client privilege. Lawyers must keep confidential all information that the client does not wish the lawyer to divulge.¹⁴⁰ However, this obligation is excused when a lawyer obtains information concerning criminal acts jeopardizing state security, public safety or the personal safety of other persons.¹⁴¹ Further, the duty of confidentiality does not create a legal privilege between client and attorney. On the contrary, the relevant laws impose a duty on all individuals and entities with knowledge relevant to the case to testify in court, a duty which extends to lawyers and other professionals.¹⁴² The lack of legal privilege protection in the PRC raises significant issues in a litigation context.

8. Pre-action disclosure

PRC law does not require any mandatory pre-action disclosure specific to competition litigation. For civil litigation in general, however, parties must engage in a pre-trial exchange of evidence at a time that the parties agree upon or, if the parties fail to reach an agreement, at a time determined by the court.¹⁴³ The court presides over the exchange of evidence and keeps a record of objections to any exchanged evidence in anticipation of trial.¹⁴⁴

9. Average length of time from issue of claim to judgment in China

The length of time from the issue of a claim to judgment varies greatly depending on the factual circumstances and complexities of a specific case. In civil litigation, the court of first instance will generally render a decision within six months from the time that the court accepts the case. On appeal, higher level People's Courts usually enter a final judgment within three months of the date of appeal. Courts may extend the time for rendering a verdict upon approval from the chief of the court. Special proceedings may further extend the time required for parties to receive a final judgment.

While the time varies greatly depending on the case, recent statistics suggest that courts tend to take a longer time to render judgments in competition litigation than in other types of case. However, straightforward competition cases might take less than the average time. The below table illustrates

¹³⁷ Disclosure Regulations Art. 33.

¹³⁸ Disclosure Regulations Art. 14.

¹³⁹ SPC Provisions Art. 11.

¹⁴⁰ PRC Lawyers Law Art. 38.

¹⁴¹ PRC Lawyers Law Art. 38.

¹⁴² Civil Procedure Law Art. 72.

¹⁴³ Evidence Provisions Art. 38.

¹⁴⁴ Evidence Provisions Art. 38.



the length of time the courts of first instance and the appellant courts took to render judgments in various recent and significant competition cases:

Case Name	Length of time from filing of claim to judgment at the Court of First Instance	Length of time from filing of appeal to judgment at the Appellant Court
Rainbow v Johnson & Johnson (2013)	18 months	14 months
Qihoo 360 v Tencent (2014)	16 months	16 months
Huawei v InterDigital (2013)	14 months	5 months
Beijing Emiage Tech. Co. v Qihoo 360 (2015)	6 months	4 months

10. Average cost from issue of claim to judgment in China

Costs also vary greatly depending on the nature of the claim and the complexities of a particular case. Beyond fees for legal representation, parties must pay court costs, including case acceptance fees, application fees for specific court orders or actions, and expenses incurred by witnesses, authenticators, translators and adjusters (such as travel, accommodation, living allowances and compensation for missed work).¹⁴⁵ Case acceptance fees are calculated as a percentage of the amount of the claim.¹⁴⁶ Additionally, note that parties applying for interim measures, such as the preservation of property, must typically provide security in exchange for approval of their application.¹⁴⁷ That said, it can be anticipated that the cost of anti-monopoly proceedings in the PRC will be less than would be the cost of similar proceedings if run in more mature competition law jurisdictions.

11. Third party/alternative funding

PRC laws contain no specific prohibitions on third party funding. Should the third party funding take the form of law firm contingency fees, however, the fee may not exceed 30% of the award.¹⁴⁸

12. Alternative methods of dispute resolution

Chinese law provides several methods of alternative dispute resolution, including mediation and arbitration. Private anti-monopoly litigation does not fall on the list of non-arbitrable disputes, so parties have the option of arbitration provided they have entered into a valid arbitration agreement.¹⁴⁹

C. Relief

13. Availability of damages and quantification

Business Operators, who as a result of infringing Monopolistic Acts have caused losses to third parties, must bear civil liability “according to the law.”¹⁵⁰ The SPC Provisions specifically allow that claimants may receive compensation for losses from the infringer.¹⁵¹ Relevant law does not, however, provide guidance on the calculation of those losses. Judgments may include the reasonable expenses

¹⁴⁵ Measures on the Payment of Litigation Costs (“Payment Measures”) Art. 6.

¹⁴⁶ Payment Measures Art. 13.

¹⁴⁷ Civil Procedure Law Art. 100.

¹⁴⁸ Measures for the Administration of Lawyers’ Fees Art. 13.

¹⁴⁹ PRC Arbitration Law Art. 3.

¹⁵⁰ Anti-Monopoly Law Art. 50.

¹⁵¹ SPC Provisions Art. 14.

of a claimant in investigating and asserting its claim¹⁵² and also require that the losing party bear the winner's litigation costs.¹⁵³ Litigation costs include case acceptance fees, application fees and expenses incurred by witnesses, authenticators, interpreters and other individuals appearing in court, but do not include the losing party's legal fees.¹⁵⁴

Note that the SPC Provisions state that if an alleged monopolistic behavior has continued for more than two years, then damages will be calculated for only the two years prior to the date that the claimant commenced litigation.¹⁵⁵

14. Punitive and exemplary damages

Chinese law does not provide for punitive or exemplary damages in competition litigation.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

As part of its judgment, a court may order parties engaging in monopolistic behavior to “cease infringement.”¹⁵⁶

Currently, however, no basis for obtaining interim injunctions exists in competition litigation or in general civil procedure law. Indeed, the concept of preliminary execution (or advance enforcement) under the PRC laws is different from that of interim injunction. This concept means that the court can require the defendant to discharge certain obligations (usually make payments) even before the court issues the final judgment confirming such obligations. It usually applies in cases of indemnifications for personal injury, claims for alimony or claims for due salaries.

There is no mechanism in competition litigation that would be similar to “advance enforcement.” Since the advance enforcement applies in civil actions, theoretically it also applies to competition civil actions. However, in practice, it would be extremely challenging to obtain in a competition case as the central requirement for granting such a relief is that the facts of the case are very clear and that the rights and obligation of both parties are almost undisputed. In other words, the court has no doubt that such advance enforcement will be confirmed in the final judgment.

16. Other types of relief

The language of the SPC Provisions suggests the possibility of other relief beyond compensation and orders to cease infringement, allowing the court to prescribe other civil remedies in accordance with the law.¹⁵⁷ The Civil Code lists other possible methods of bearing civil liability which could apply to anti-monopoly cases.¹⁵⁸ These other methods of bearing civil liability include cessation of injury, removal of hindrance, elimination of danger, restoration to the original state, elimination of effects and restitution of reputation and offer of apology.¹⁵⁹

D. Emerging trends

In recent years, there has been a significant increase in the number of private competition actions. In the majority of cases, claimants have accused companies of abuse of dominant position, though there have also been a number of claims alleging vertical and horizontal anti-competitive agreements. Private actions have involved those between large companies, as well as actions initiated by

¹⁵² SPC Provisions Art. 14.

¹⁵³ Civil Procedure Law Art. 152.

¹⁵⁴ Payment Measures Arts. 6 and 29.

¹⁵⁵ SPC Provisions Art. 16.

¹⁵⁶ SPC Provisions Art. 14.

¹⁵⁷ SPC Provisions Art. 14.

¹⁵⁸ Civil Code Art. 134.

¹⁵⁹ Civil Code Art. 134.



individuals and small and medium - sized companies. There have been private actions in sectors ranging from seafood wholesaling to electricity supply.

Follow-on private actions

Tian Junwei (a consumer) v Abbott and Carrefour

Tian Junwei, a consumer in Beijing, brought a private antitrust action in December 2014 against Abbott China and Carrefour in the Beijing Intellectual Property Court, where the court accepted the case. Mr. Tian claimed that he suffered damage as a result of unlawful resale price maintenance in respect of an Abbott infant formula product he purchased in Carrefour. Resale prices were cut following the RPM investigation conducted by the competition authority (NDRC).¹⁶⁰ The plaintiff only claimed token damages of around RMB10 (approximately USD1.60). Mr. Tian alleges that Abbott and Carrefour agreed to maintain a higher retail price for the products to the detriment of consumers.

The two defendants both filed jurisdictional challenges to the Beijing Higher People's Court. On June 18, 2015, the Beijing Higher People's Court, in its final ruling, affirmed that the Beijing Intellectual Property Court has jurisdiction over this case.¹⁶¹ The case is currently pending before the Beijing Intellectual Property Court.

This lawsuit is the first follow-on action (i.e., a private action for damages filed after the conclusion of an investigation by one of the Anti-monopoly Enforcement Agencies) in the PRC. It is generally understood that it would be difficult for consumers to file and win private antitrust cases due to the heavy evidentiary burden and the complexity of the economic analysis that might be applied. Whether and how the NDRC's penalty decision would reduce such burden of plaintiff remains to be tested in this case. If the consumer wins this lawsuit (on the back of the NDRC's earlier findings), it may encourage more follow-on actions in China.

Private actions in the technology sector

In particular, private actions have been prominent in the technology sector. These private actions come at a time when Chinese competition authorities have strengthened antitrust enforcement in respect of intellectual property rights.

Qihoo 360 v Tencent

In a case involving Qihoo 360 Technology Co. Ltd. ("Qihoo 360"), a leading Chinese antivirus software company, and Tencent Holdings Limited ("Tencent"), a major Chinese Internet and social media company, Qihoo 360 alleged that Tencent had abused its dominant market position in the instant-messaging and service market by bundling its antivirus software with its instant-messaging software QQ Messenger. On October 16, 2014, the Supreme People's Court upheld the Guangdong High People's Court decision in 2013 by rejecting Qihoo 360's allegations.

This was the first judgment of the Supreme People's Court under the AML since it took effect in 2008 and is a landmark case in establishing the approach to market definition and assessment of what constitutes abuse of dominance under the AML. Market share was considered by the court to be only a rough and potentially misleading indicator when assessing the existence of a dominant market

¹⁶⁰ In August 2013, the NDRC fined six domestic and international baby formula companies a total of RMB668 million for unlawful RPM. The companies sanctioned include Abbott, Biostime, Dumex, FrieslandCampina, Fonterra and Mead Johnson. All the companies took corrective measures during and after the investigation including price cuts.

¹⁶¹ The ruling was made based primarily on Article 23 of the Civil Procedure Law and Article 3 of the Circular of the Supreme People's Court on Jurisdiction of the Intellectual Property Court. The Circular clearly indicates that the Intellectual Property Court has the jurisdiction over the first instance antitrust cases in the city where it is located.

position. High market share does not, the court said, directly translate into the existence of a dominant market position. The court found that Tencent had limited power to control prices, quality, quantity or restrictions on trading terms. Although the restrictions it imposed might have inconvenienced consumers, this was a dynamic and highly competitive market and the court held that there was insufficient evidence to prove that Tencent held a dominant market position or that it had abused its position in the instant-messaging and service market.

Huawei v InterDigital

In another case, Huawei Technologies Co. Ltd. (“Huawei”), a leading Chinese telecommunications equipment manufacturer and service provider, alleged that InterDigital, Inc. (“InterDigital”), a leading US developer of fundamental mobile phone technology, had abused its dominant market position in China and the US in the market for the licensing of essential patents through: (i) differentiated pricing, tying and a refusal to deal; and (ii) its refusal to license patents to Huawei on fair, reasonable and non-discriminatory (“FRAND”) terms. On October 28, 2013, the Guangdong Higher People’s Court upheld the Shenzhen Intermediate People’s Court’s decision by ruling that InterDigital had violated the AML by licensing standard essential patents to Huawei on unfairly high royalty rates. InterDigital was ordered to cease the alleged excessive pricing and improper bundling of patents, and pay Huawei approximately RMB20 million in damages.

This was the first competition case involving patent transfer and the first time a court has determined a FRAND royalty rate in China. This case sets a potentially important precedent for other complaints relating to standard essential patents.

After this case, ZTE (a leading Chinese telecommunication equipment manufacture and service provider) and Arima (a Taiwanese mobile phone manufacture) filed lawsuits against InterDigital, both accusing InterDigital of abuse of dominance and failure to comply with FRAND licensing obligations.

- (i) *Arima v InterDigital*: Arima filed a lawsuit against InterDigital to the Jiangsu Higher People’s Court on September 22, 2014. The plaintiff alleged that InterDigital abused its dominance by licensing its patents at excessively high prices, engaging in discriminatory treatment and imposing unreasonable trading conditions, and sought damages of RMB120 million. The antitrust dispute was ultimately settled by the two parties in June 2015. According to the settlement agreement:
 - (a) The parties agreed to maintain their existing patent license agreement.
 - (b) InterDigital agreed to abandon all litigation and arbitration challenging Arima’s use of its patents worldwide.
 - (c) Meanwhile, Arima agreed to withdraw its complaint filed with the Taiwan Fair Trade Commission.
 - (d) InterDigital agreed to pay compensation to Arima of an undisclosed amount.
- (ii) *ZTE v InterDigital*: On the other hand, the *ZTE v InterDigital* case is still ongoing. ZTE filed this lawsuit against InterDigital with two complaints at Shenzhen Intermediate People’s Court. The first complaint alleges that InterDigital has failed to comply with FRAND licensing commitments for the licensing of its Chinese SEPs. The second complaint alleges that InterDigital has abused its dominant market position by charging excessive royalties, exercising discriminatory treatment and imposing unreasonable trading conditions. For the first complaint, ZTE is asking the court to determine the FRAND rate and award litigation costs. As to the second complaint, ZTE is seeking damages in the amount of RMB20 million.



Private actions against state-owned enterprises and governmental agencies

There has been a gradual increase of private competition enforcement actions against SOEs and governmental agencies in recent years. For example, in January 2014, the Shanghai First Intermediate Court accepted a complaint filed by a consumer against the state-owned China Telecom alleging abuse of a dominant market position in the prices it charged for broadband internet and fixed-line telephone services. This case is currently ongoing.

In May 2014, the Guangzhou Intermediate People's Court accepted a complaint filed by a Chinese software company alleging the Guangdong Provincial Education Department was abusing its administrative power to restrict competition by handpicking another company as the exclusive software provider for a government-organized event. In February 2015, the Guangzhou Intermediate People's Court upheld the complaint, finding that the education department had abused its administrative power by handpicking the exclusive software for the government organized event. The case took 11 months.

The defendant has appealed to the Guangdong Higher Peoples' Court; this appeal is ongoing.

The lower court's judgment is noteworthy as it is one of the very few cases where the court has engaged in a meaningful analysis on whether a government authority has abused its administrative power or not. The Supreme People's Court organized an internal seminar to discuss the case, inviting antitrust practitioners and academics. It remains to be seen, however, whether this decision is upheld on appeal. These recent cases show that the Chinese courts are not unwilling to accept cases against SOEs and governmental agencies. However, to date there has been limited success on the part of the complainants.

Summary

A large number of the early private enforcement cases under the AML were unsuccessful. However, this is probably due in part to failures to identify a credible competition law theory of harm and lack of credible evidence to properly define the relevant market and demonstrate the defendant's anti-competitive behavior or abuse of dominance. There continue to be some uncertainties and hurdles for claimants in bringing private competition enforcement cases in China. However, recent court decisions, in particular the decision of the Supreme People's Court, have provided useful illustration on the courts' approach to private enforcement. It is expected that the number of private enforcement actions will continue to increase in the future and to become an increasingly important avenue for parties seeking redress for competition complaints.

Czech Republic

Martin Hrodek and Martina Závodná

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in the Czech Republic

Private enforcement actions may be brought against an undertaking in the Czech civil courts under Sections 2988 and 2990 of Act No. 89/2012 Coll., the Civil Code (the “Czech Civil Code”) in connection with Czech and EC competition rules (Sections 3 and 10 of Act No. 143/2001 Coll., on the Protection of Competition (the “Czech Competition Act”) and Articles 101 and 102 TFEU). A regulatory finding of infringement is not a precondition to civil action being brought in the Czech Republic.

Generally, it is not possible to bring a private enforcement action against a director or an employee directly, even if they have been closely involved in the infringing conduct. However, where an infringing undertaking has suffered loss as a direct result of the director or employee’s unlawful conduct, it may bring a claim for damages against that person.

2. Applicable limitation periods

Private enforcement generally results in damages claims, which are governed by the Czech Civil Code. The limitation period for claims based on infringements of competition law runs for three years from the date on which the claimant learned or could have learned of the existence of the damage suffered and the person responsible for causing it.

The applicable limitation periods are subject to a rule that no claim may be brought more than 10 years (or 15 years in case the damage was caused willfully) after the infringement occurred (regardless of whether it has been discovered or of whether an investigating competition authority has made a finding in respect of the matter). Because an infringement of this type will most likely be a continuous or repeated series of breaches, the period will start only when the infringing conduct is finally terminated. Limitation runs even if proceedings brought by relevant competition authorities have not been completed, and so a claimant may be obliged to file a petition prior to a legally binding decision being made by a competition authority that an infringement has occurred. The court may stay a claim where proceedings are pending before the relevant competition authority but is not required by law to do so.

3. Appeals

First instance judgments of the civil courts can be appealed to the competent second instance court in respect of a finding of infringement or an award of damages. The right of appeal is limited to demonstrating that the first instance court was wrong in law or in fact, or otherwise breached a procedural requirement. New facts and evidence may only be introduced for second instance consideration in limited circumstances (usually because they occurred after the first instance judgment was issued).

In certain limited circumstances, a judgment by the appeal court can be challenged before the Czech Supreme Court by an extraordinary appeal. Such an extraordinary appeal may only be filed in limited circumstances (generally in cases where the appeal court departed from established decision-making practice of the Supreme Court or where the appeal involves an issue of substantive or procedural law, which has not previously been considered by the Supreme Court or has been decided differently by the Supreme Court, or in the case that a legal issue is to be assessed differently by the Supreme Court). No new facts or evidence may be introduced in an extraordinary appeal.



Proceedings may be re-opened after a final and enforceable judgment has been issued if new circumstances (facts or evidence which were previously unknown) arise that, if known at the time the judgment was rendered, could have lead to a different judgment.

Finally, a complaint to the Czech Constitutional Court is a remedy of last resort, which will be available to claimants in case that their rights under the Czech Constitution or the Charter of Fundamental Rights and Freedoms have been breached as a result of the judgment or a procedural error made before the judgment was issued.

Only a party to the proceedings is entitled to file an appeal. The court will only allow intervention by a third party if it is able to demonstrate a sufficient interest in the dispute and its outcome.

4. Availability of class actions for infringement of competition law and/or damages in the Czech Republic

Class actions for damages are not provided for under the Czech civil procedural rules.

However, there are ways in which groups of claimants can bring an action against an entity contravening the competition rules. The Czech civil procedural rules provide for:

- (i) “accession to proceedings” where, on the claimant’s application, the court may join a third party to the proceedings with the claimant’s consent;
- (ii) “intervening participation” where a third party that demonstrates a sufficient interest in the outcome of the proceedings may join the claim as an intervening participant with the same rights and obligations as a regular participant; and
- (iii) the joining, at the court’s discretion, of two or more matters into a single set of proceedings, where the matters are related or involve the same participants.

B. Conduct of proceedings and costs

5. Burden of proof

The standard of proof for showing an infringement of competition rules in the Czech Republic is the ordinary civil standard (i.e., on the balance of probabilities). The claimant must establish that there has been an infringement of either the Czech Competition Act and/or the TFEU, the existence of loss (whether actual loss or anticipated profits) and the causal link between the infringement and any loss suffered. The burden of proving that an agreement may be exempted under Article 101(3) TFEU rests on the defendant.

There are no measures alleviating the burden of proof where the claimant finds difficulty in producing the requisite evidence.

In the event that there is a final and binding decision of the Czech competition authority or the European Commission declaring that there is an infringement of competition law, the Czech court is bound to adopt the findings reached and may not come to the conclusion that competition law was not infringed. The claimant may therefore rely on Commission and Czech competition authority decisions as evidence establishing an infringement. The claimant must still prove that the infringement caused him to suffer damage.

Czech courts may also have regard to findings reached by other national competition authorities as evidence that an infringement has occurred.

6. Joint and several liability of cartel participants

Where several persons are deemed responsible for causing the same infringement – for example by virtue of participating in a cartel – they will be held jointly and severally liable for damages resulting from that joint infringement. The claimant may accordingly sue one, several, or all members to the cartel agreement at once.

The court is not entitled to apportion liability between defendants at its own discretion – it must either apportion it in accordance with individual liability of the parties as found by the court or declare the parties to be jointly and severally liable.

The Czech Code of Civil Procedure allows third parties to be joined to proceedings, either at their own initiative or upon the application of an existing party to the proceedings (provided that such third party has sufficient legal interest in the outcome of the dispute, for example where it is bound to contribute to damages if the defendant loses). So, if not all those responsible for causing damage are sued, those that are defendants can seek to join the others to the proceedings. If the claimant objects to the third party's joinder, the court will be obliged to determine whether joinder is appropriate. It should be noted that a third party joined to proceedings in this way can take all actions in the proceedings save for actions which would (i) dispose of the proceedings or (ii) affect the subject matter of the proceedings (change of grounds of claim, conclusion of settlement of entire claim, etc.). Also, the court cannot impose an obligation on any third party joined in this way to pay damages directly to the claimant. If the third party is not joined, the claimant can seek damages in separate proceedings.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

The claimant must produce evidence to support its assertions (whether in respect of infringement or loss) – the court cannot add to the claimant's evidence by acting in an inquisitorial fashion or otherwise making its own enquiries.

If the claimant intends to rely on a particular document in the possession of the defendant or any third party, it may apply to the court to order the disclosure of such a document. The claimant must identify the exact document or a specific category of documents that should be subject of the disclosure by either another party to the proceedings or by a third party. Courts are generally reluctant to order production of documents and applications that are broad or generalized will not be upheld.

Once disclosure has been ordered, refusal to disclose may result in the court imposing a fine of up to CZK50,000 (approximately EUR1,800) on the relevant party (and continued or repeated failure to disclose can result in the imposition of additional fines up to approximately EUR1,800 per fine). However, the court may not draw any adverse inferences or make assumptions based on a refusal to provide documents.

The principal exception to disclosure is that privileged documents do not need to be produced, although privilege can be waived.

8. Pre-action disclosure

Pre-action disclosure is not available under Czech civil procedural rules. However, it is possible to obtain an interim order for access to documents prior to initiating proceedings where there is serious doubt that the evidence could not be obtained (or could be obtained, but only with great difficulty) at a later stage. The court will not make such an order if it considers that the evidence sought is unlikely to be relevant to the anticipated proceedings or if it considers that the real purpose of the petition is a fishing expedition on the part of the potential claimant.



9. Average length of time from issue of claim to judgment in the Czech Republic

A claim in the Czech civil courts typically takes between two and three years to reach a final judgment at first instance, depending on its complexity. Any subsequent appeal to the court of second instance would take a similar amount of time. Proceedings before the Czech Supreme Court might add another two years to the duration of the proceedings. Constitutional complaints can usually be concluded within one to two years. Thus, a case could last six to eight years if appealed to the highest level.

Czech civil procedural rules do not provide for expedition of proceedings in competition law cases. However, judgment may be issued on the claim in parts, establishing liability at the first stage and assessing damages at the second stage.

10. Average cost from issue of claim to judgment in the Czech Republic

The cost of litigation varies widely and depends on the complexity of the case. The value of the claim forms a basis for the calculation of the court fee, which is 5% of the amount claimed in the dispute, up to CZK40 million (approximately EUR1.45 million). If the amount claimed exceeds CZK40 million, the court fee amounts to CZK2 million (approximately EUR73,000) plus 1% of the amount exceeding CZK40 million. The maximum court fee is capped at CZK4.1 million (approximately EUR149,000).

Generally, the losing party will be ordered to pay the successful party's costs including the court fee, costs reasonably incurred in connection with the proceedings and costs of legal representation. However, in practice, only part of the actual cost of litigation is likely to be recovered by the winning party.

11. Third party/alternative funding

The claimant must bear the cost of the proceedings itself. Although there are no rules prohibiting alternative funding arrangements generally, contingency fees for legal representation are not permitted.

12. Alternative methods of dispute resolution

Parties may agree to submit their dispute to one or more arbitrators, pursuant to either Act No. 216/1994 Coll. (on Arbitration Proceedings and Enforcement of Arbitration Awards), or their chosen international arbitration rules.

Mediation is governed by Act No. 202/2012 Coll., on Mediation.

There are no formal rules as regards conciliation.

C. Relief

13. Availability of damages and quantification

Claimants may seek pecuniary damages to compensate them for actual losses and/or loss of profit, together with interest, in order to restore them to the position they would have been in "but for" the infringement. Pursuant to the provisions of the Czech civil law, the claimant can only be compensated for the damage that it has actually incurred and the damages awarded cannot exceed the amount of loss incurred. So, if passed on, no loss will in fact be recoverable by the claimant.

To recover damages for actual loss, the claimant must demonstrate that its property or right to property has been diminished (i.e., that it incurred costs which would not otherwise have been incurred in its regular course of business). While no award of damages has yet been made, in theory loss would likely be assessed by reference to any overcharge imposed unlawfully on cartelized goods that the claimant would not have paid but for the operation of the cartel.

To recover damages for loss of profit, the claimant must demonstrate that, in the absence of the infringement, a profit (or a greater profit) would have been made. The aggrieved party may claim profit usually achieved in ordinary course of business rather than showing profits actually lost. The claimant may ask the Czech court to assess the loss on the basis of an estimate if losses are difficult to prove on the facts. The court may also appoint an expert to advise on the calculation of damages if it considers it appropriate to do so. Although parties may propose specific experts or raise objections against those proposed by the other party, the court is not required to have regard to proposals of parties, provided that the expert is unbiased and impartial. The parties to the proceedings are also free to submit expert reports on quantification, subject to the court's discretion to require that these reports are reviewed by a court-appointed expert.

Czech courts may not reduce an award of damages in order to take into account the amount of any fine imposed by the competition authority. Further, the court will not accept any argument to mitigate the amount of damages imposed.

14. Punitive or exemplary damages

Punitive or exemplary damages are not available under Czech law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

The court may issue an interim injunction on an *ex parte* basis either before or after proceedings are initiated. The party requesting the interim injunction must prove that the situation of the participants urgently requires preliminary intervention (whether by ordering a party to act or to desist from acting in a particular way) or that enforcement of a judgment could be threatened if the order is not granted. The circumstances supporting the order of interim injunction must be demonstrated to a reasonable level of probability and, in addition, claimant must also show that its case is arguable. The court relies on the written submissions and documents provided by the proposing party and determines without a hearing whether the order should be granted. The other party may file an appeal against the decision on an interim injunction. Such appeal does not have a suspensory effect on the order, so the appellant must succeed in order to discharge the order.

However, in principle, the court is unlikely to grant an interim injunction if the result requested by the claimant is essentially that sought in the final judgment.

Interim measures remain in force until they expire or are cancelled by the court. Interim injunctions expire if:

- (i) the applicant fails to file a petition (i.e., initiate the proceedings) within the time period specified by the court or statute;
- (ii) the applicant's petition has been refused by the court;
- (iii) the applicant's petition has been accepted (i.e., the court has ruled in favor of the applicant) and 15 days have lapsed since the decision became enforceable; or
- (iv) the period for which the interim injunction was issued has lapsed.

Before or on the day of filing an application for interim injunction, the applicant must pay to a court a returnable security, namely CZK50,000 (approximately EUR1,800) to cover any loss caused by the injunction. The court might cancel the interim injunction in any case if reasons for its continuance are not given or circumstances otherwise change.



D. Emerging trends

The question of how best to encourage private parties to pursue damages actions against competition law infringers is the subject of academic debate in the Czech Republic. As a result of the EU Antitrust Damages Directive it is expected that many perceived barriers to litigation will be addressed.

Only a few claims for damages have been initiated in the Czech Republic to date, however, no damages have yet been awarded by a Czech court in relation to a competition law claim. Claims have either been dismissed, are still under way, or have been settled on confidential terms.

Egypt

Mohamed Elfar

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in Egypt

Legally, the scope of private enforcement in Egypt is very wide. According to the established principles of civil law, any person has the right to seek damages for any harm sustained. In other words, any person who committed a fault is liable to compensate it (Article 163 of the Egyptian Civil Code).

In this respect, civil claims may be brought either as stand-alone or follow-on actions. In addition, civil claims may be brought before the criminal court as a direct action (due to the criminal nature of the Egyptian Competition Law (the “ECL”)) or brought before a civil court. According to the established case law of the Egyptian Court of Cassation, parties injured as a result of a criminal act can choose between either following the criminal court route or bringing an action before the civil court to seek damages.¹⁶²

However, due to the fact that criminal cases arising from the ECL cannot be initiated without the submission of a prior request from the Chairperson of the Egyptian Competition Authority (the “ECA”),¹⁶³ there is a clear limitation on bringing civil actions before criminal courts.

That said, it is widely accepted that a civil claim may still be brought before a civil court for faults arising from an infringement related to the ECL. This is because the ECL states that its decisions are without prejudice to the liability arising from those infringements.¹⁶⁴ Accordingly, proving the crime is not a precondition to bringing a civil claim. Therefore, as stated, it is generally accepted that civil claims can be brought before the civil courts for infringements arising from the ECL.

In this respect, if plaintiffs choose the civil route, they will have standing before the Egyptian Economic Civil Court. This is a specialized court in civil disputes arising from economic laws and has exclusive jurisdiction to review all disputes arising from a specified set of laws listed therein which have an economic nature, including the ECL.¹⁶⁵

2. Applicable limitation periods

If a plaintiff chooses to bring a stand-alone civil damages action, the applicable limitation period shall be three years from the date the plaintiff became aware of the infringement or 15 years from the date the infringement was committed (Article 172/1 of the Egyptian Civil Code). However, as noted, infringements of the ECL are also of a criminal nature. Therefore, the limitation period of the civil claim before civil courts will not start until the limitation period of the criminal case is met. Generally, the limitation period of criminal cases is three years from the date of committing the crime. If the crime is of continuous nature (e.g., exclusivity of a dominant firm or a cartel agreement), the limitation period does not start until the last day upon which the crime was committed.

As for the limitation period for follow-on actions, it is related to the limitation period of enforceability of final judgments issued by the criminal court. For example, if the ECA initiates a criminal action for a certain anti-competitive conduct, the injured parties may have the right to intervene in the case.

¹⁶² See, e.g., Court of Cassation decision number 1680, Judicial Year 2 of the Criminal Circuit on May 16, 1932.

¹⁶³ Article 21 of the Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices as amended by the Law No. 56 of 2014.

¹⁶⁴ Article 20/3 of the ECL.

¹⁶⁵ Law No. 120 of 2008 on the establishment of Economic Courts.



However, if the ECA does not initiate an action and instead waits for a final judgment, the limitation period will be three years from the date of issuance of this final judgment.¹⁶⁶

3. Appeals

In relation to stand-alone actions before the civil court, an appeal on a point of fact or law can be made by a plaintiff to the Economic Civil Court of Appeal. In this respect, the Economic Court has full power to review any points underpinning the appeal and has the choice to alter the first instance decision in whole or in part. Furthermore, the plaintiff may finally appeal to the Court of Cassation on points of law only.

As for a civil claim which is brought in relation to a criminal action, if the defendants are acquitted, the plaintiffs will not have the right to appeal the decision before the Economic Criminal Court of Appeal, unless an appeal was submitted by the Public Prosecutor's Office.

4. Availability of class actions for infringement of competition law and/or damages available in Egypt

Under Egyptian law, there is no concept of class/group actions. Under a common classic form of action, which is the main form of damages action in Egypt, plaintiffs may choose to file cases individually or collectively by assigning a certain lawyer to handle the case on their behalf. In these two possibilities, other consumers may have a vested interest and decide to intervene/opt in to the case.¹⁶⁷

Under the Egyptian regime, another possible method of representation is that of unions. In this respect, unions are entitled to bring actions on behalf of their members, whenever their interests are endangered or harmed.¹⁶⁸ However, when it comes to associations (e.g., consumer protection associations (the "CPAs")), the matter is not sufficiently clear. Article 19 of the draft ECL presented by the government for parliamentary discussions gave a clear right to CPAs to bring actions before competent courts.¹⁶⁹ This meant that, according to this draft, CPAs had the right to bring stand-alone direct actions before criminal courts or civil actions before civil courts. However, this part of the Article was repealed just before it was submitted to the *Shura* Council and later to parliament. Nonetheless, the explanatory memorandum accompanying the submitted draft law reassured the complementary role of CPAs in the enforcement of the competition law.¹⁷⁰ Furthermore, in order to add more weight to their central role, the ECL stipulated that the board of the ECA would include their representative.¹⁷¹ These indications mean that CPAs were intended and are expected to play an active role in the competition enforcement regime.

Although the wording giving the clear right to CPAs to act was repealed, it is still widely accepted that CPAs are entitled to claim damages on behalf of their members, based on the general rules of litigation. This is because CPAs were established for a specific purpose: consumers' protection. Hence, CPAs have the right to defend the interests of their members whenever they are endangered or threatened.

¹⁶⁶ Court of Cassation decision number 2659, Judicial Year 61 of the Civil Circuit on January 21, 1996.

¹⁶⁷ Article 251 of the Law 50 of 1950.

¹⁶⁸ Sorour Fathy, *Al-Waseet fi Al-Ijra'at Al-Jina'eya* (The Medium on Criminal Procedures), Part 1, 326–9, Cairo Uni. Press, 1979.

¹⁶⁹ Article 19 of the draft law on "The Regulation of Competition and Prohibition of Monopolization," prepared by the Ministry of Supply and Internal Trade in November 1998. This draft was the one chosen to be adopted finally by the government and to be sent to the *Shura* Council and later to parliament.

¹⁷⁰ Memorandum Accompanying Draft Law on the Protection of Competition and the Prohibition of Monopolistic Practices.

¹⁷¹ Article 12(5) of the Law 3 of 2005.

Furthermore, according to Article 23(a) of the Law on Consumer Protection, CPAs are granted the right to bring legal actions on behalf of consumers (or intervene in ongoing cases), as long as their interests are affected,¹⁷² although neither this law nor its executive regulations elaborate on this right that was granted. It is arguable whether it is possible for associations to bring civil actions on behalf of an unidentified number of consumers (non-members) or to represent their members or other identified victims if they have sustained damages. However, it may be contended that the intention of the drafters, i.e., government and parliament, was to introduce a new form of action, namely that of an opt-out “class action” that would nevertheless be restricted to CPAs and not to individual consumers.

Nevertheless, in practice, this Article is merely used within the existing traditional limits of action. CPAs do bring actions on behalf of consumers who submit complaints to it, if they (CPAs) have sufficient resources.¹⁷³ Therefore, it is confined within the traditional boundaries of actions and, to date, there is no evidence that there was any attempt to extend its usage as an opt-out mechanism.

B. Conduct of proceedings and costs

5. Burden of proof

In a civil stand-alone action, the claimant will bear all the burden to prove the existence of fault, harm and causal link.

In this regard, it is of relevance to highlight the binding nature of the ECA’s decisions. However, nothing indicates that these decisions are of any binding nature to courts in general and civil courts in particular.¹⁷⁴ Furthermore, there is a consensus, which is clear from the numerous judgments of the Court of Cassation, that expert opinions (i.e., the ECA’s decision) are not binding to courts and that judges can freely disregard their opinions and rely in their judgments on other evidence that may be provided.¹⁷⁵ In this respect, there is not any requirement on the court to respond to or give reasons why it did not rely on any expert report.¹⁷⁶ Accordingly, a claimant in a stand-alone action will have to prove the presence of a fault from the outset and should not rely solely in any way on the ECA’s decision, other than its indicative/persuasive value.

For example, in the *Flat Glass* case, the ECA decided that the defendant was abusing its dominant position and a criminal case was initiated. Shortly afterwards, the criminal case was settled. However, when an injured party brought a damages claim relying on this report, the court refused to rely solely on the previous finding of the ECA. Instead, the court appointed an expert from the ECA’s economists to determine whether there was fault or not and subsequently if there was sufficient fault to quantify the damages.¹⁷⁷

6. Joint and several liability of cartel participants

According to the Egyptian Civil Code, “[e]very fault which causes harm to another imposes liability for damages upon the person who committed it.” This means that a dominant person will be liable for damages in case of committing any abuse of dominance.

¹⁷² The wording of “the consumer” refers to all consumers as explained by the President of the Parliament. Parliamentary Records, 67th Session, p. 35, May 9, 2006.

¹⁷³ If there is insufficient funding available to bring the action on behalf of the consumer, the CPA refers the complaint to the Consumer Protection Authority. In all cases, consumers do not pay any fees or expenses.

¹⁷⁴ In the *Steel Rebar* case, the ECA’s report ruled that although the investigated company enjoyed a dominant position, this dominance was not abused. However, the Court of Cassation – Criminal Circuit upheld the decision of the Economic Criminal Court of Appeal and confirmed its finding that the dominant person had abused its dominance. This clearly indicates that the ECA report was not of any binding nature to the court.

¹⁷⁵ Court of Cassation decision number 1363, Judicial Year 62 of the Civil Circuit on December 26, 2013.

¹⁷⁶ Court of Cassation decision number 2898, Judicial Year 84 of the Criminal Circuit on November 26, 2014.

¹⁷⁷ See, generally, Expert’s Opinion submitted in case number 5 of 2013 Economic Civil Court of Appeals – Mansoura (unpublished).



However, for cartel cases, it can be argued that cartel members can be jointly liable for the harm committed to the claimant. The plaintiff must show that the harm caused was a direct consequence of the violation of the ECL by the defendants.¹⁷⁸ It should be noted that this condition may be satisfied even if the plaintiff was not a direct customer.¹⁷⁹ For example, if there was a price-fixing cartel at the production level, a final customer who bought the overcharged products from a wholesaler or a retailer has the right to seek damages from all those who were involved in the cartel. This is on the condition that the final customer proves the presence of a cartel (if there was not a prior judgment) and that the overcharge is due to the identified cartel (and not as a result of overpricing by any distributors that was passed on to him).

In practice, it is more likely that a plaintiff would bring an action mainly against the specific cartel member from whom a purchase, for example, was made. This is because in doing so it will be much easier for the claimant to prove the direct and actual relation to, and damage sustained arising from, the said cartel.

Furthermore, the Egyptian legal system is still not fully acquainted with the concept of umbrella damages. Therefore, it is less likely that someone who bought something from a non-cartel member would be able to seek damages from that non-cartel member. It may have the chance, although very slim, to obtain damages from the cartelists themselves.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

In Egypt, courts rely mainly on evidence provided by the parties. Hence, it is usually burdensome for plaintiffs to prove the presence of a fault and to seek information kept by third parties. The following extract, which is of particular relevance to the situation in Egypt, reflects on some of these difficulties:

“... [c]ompetition law disputes are characterised by wide information inequalities and symmetries between litigants. Usually most of the inculpatory information will be in the hands of the defendant while the plaintiff will be merely relying on indications. These problems are particularly grave for stand-alone actions. Indeed, many actions fail because the plaintiff cannot have access to information held by the defendant or sometimes by third parties, and because he essentially has the inevitable task of proving a competition law infringement in the slightest detail. Thus the problem of proof can be a serious obstacle to effective private enforcement.”¹⁸⁰

To address this problem (according to the general rules), the Egyptian legal regime sets rules by which litigants may request an order from the court to oblige the other party, or even a third party, to disclose certain specific documents or information the other party or third party may hold.¹⁸¹ According to the law, a litigant may request the disclosure of a document the other litigant is thought to possess in one of the following cases:

- (i) if the law permits requesting the other litigant to present the document;
- (ii) if the document is common between the plaintiff and the defendant; and
- (iii) if the litigant depended on the document on any stage of the litigation.

¹⁷⁸ Al-Gharib Mohamed, Al-Ihtekar Wa Al-Monafasah Gheir Al-Mashrou’a (Monopoly and the Unfair Competition), p. 301, Dar Al-Nahda Al-Arabeya, 2004.

¹⁷⁹ Salama Ma’moun, Al-Ijra’at Al-Jana’eya fi Al-Tashree’a Al-Misry (Criminal Procedures in the Egyptian Legislation), pp. 234-8, Vol. 1, Dar El-Nahda Al-Arabeya, 2003–2004.

¹⁸⁰ Komninos Assimakis P., EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, at pp. 225-6, Hart Publishing, 2008.

¹⁸¹ Law No. 25 of 1968 on the Proof of Commercial and Civil Provisions.

In the first scenario, the law allows for the requesting of documents. For example, Article 28 of the Commercial Law gives the right to the court, on its own initiative or upon the request of one of the parties, to order the other litigant to present certain documents that such litigant may possess. Interestingly, the party requesting the document is not allowed to view it. This right to view the document is limited to the court and to any independent experts whom the court may choose to appoint. This condition maintains and respects the confidentiality of commercially sensitive documents and information.

As a result, plaintiffs in a stand-alone case may request the court to order the defendant to present any kind of document, in order to prove the presence of an anti-competitive practice, without prejudicing its confidentiality. This means that defendants would be less suspicious about the exposure of their commercially sensitive information.

8. Pre-action disclosure

Parties are not required by law to disclose any information before an action is triggered by a claimant.

9. Average length of time from issue of claim to judgment in Egypt

A claim in civil courts may take from two to three years depending on the complexity of the case and whether it is a stand-alone or a follow-on action. Actions that follow a judgment from a criminal court are much easier and would take less time than stand-alone actions or even actions that simply follow a decision of the ECA. This is because a criminal judgment is binding to the civil court, which means that the finding of an infringement by the criminal court will be of great help to the claimant in possible subsequent cases before the civil court.¹⁸² In this respect, the burden will be reduced to prove the presence of harm and the causal link only as the finding of fault will become almost undisputed by virtue of the criminal court judgment.

10. Average cost from issue of claim to judgment in Egypt

Lawyers' fees are usually the main substantial part of the cost of any civil or criminal case. However, other legal fees, depending on the court, are generally not substantial.

11. Third party funding/alternative funding

There are no main restrictions that can limit any source of funding. However, it is uncommon for third parties to fund litigation in Egypt.

12. Alternative methods of dispute resolution

To date, no ECL-related cases in Egypt have been resolved through arbitration. However, arbitration in Egypt has dealt with non-compete clauses as a form of unfair competition under the Egyptian Commercial Law and not the ECL.

A main obstacle to the development of arbitration under the ECL is the question on the arbitrability of matters related to the ECL in the first place. According to the Egyptian arbitration procedures, criminal law matters are not arbitrable. Therefore, it remains unclear whether damages claims that may be brought to arbitration would be accepted or if the tribunal would dismiss the case and refuse to commence proceedings due to the criminal nature of the ECL. Nonetheless, there is another sound argument that states that arbitration in civil disputes related to the ECL is still possible, as it is in many cases a contractual matter that is unrelated to any criminal aspect. In any event, it remains to be seen which position the arbitration tribunals would adopt.

¹⁸² Salama, *supra*, at 351.



C. Relief

13. Availability of damages and quantification

According to Article 171 of the Egyptian Civil Law, damages are more likely to be granted in monetary form.¹⁸³ However, whenever relevant – and upon the request of the plaintiff – the court may, in its decision, issue orders to stop certain conduct and put an end to the fault.¹⁸⁴ Furthermore, the Court of Cassation has stated that its priority is to grant permanent injunctions whenever possible, so that the fault that was committed by the defendant ceases.¹⁸⁵ This will enable plaintiffs to not only compensate for their loss but also prevent defendants from engaging in certain anti-competitive conduct.

Articles 170, 221 and 222 of the Egyptian Civil Law stipulate that the aggravating and mitigating circumstances taken into consideration by a judge are those related to the plaintiff (victim) and not the defendant.¹⁸⁶ For example, the role of the defendant in the infringement as a ringleader in a cartel, or his recidivism, is not considered in quantifying the amount of damages. Moreover, direct damage is the only kind of loss taken into consideration.¹⁸⁷ However, it should be noted that there is not a fixed maximum amount of damages, which gives the judge room to assess the harm sufficiently.

Furthermore, in the *Flat Glass* case, even though the plaintiff quantified its damages to be an amount of approximately GBP10 million, the court referred the case to an expert from the ECA to determine the amount of damages. In the expert's report, the only factor that was taken into consideration in the calculation of direct damages was the exact amount of damages and loss of profit in abstract, without considering any aggravating or mitigating factors.¹⁸⁸

14. Punitive and exemplary damages

Under the Egyptian legal regime, the general rule is that damages are solely of a compensatory nature. Therefore, there is no possibility of granting punitive damages due to the corrective justice philosophy behind the whole regime.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

In Egypt, both the ECA and courts have the right to issue interim measures due to the specific nature of the ECL inspection and, given that it may be a lengthy process, the imminent and irreparable damage that may arise therefrom.

The first condition for adopting interim measures/injunctions in Egypt is that the ECA or courts have to define the circumstances where urgency is required, i.e., where there is imminent irreparable damage to the protected right that cannot be preserved under regular forms of litigation, even if exceptionally shortened. As for the other condition, the ECA/court is expected to consider whether the claim at hand would affect the right contested or whether it can deliver an interim measure without

¹⁸³ Al-Sanhouri Abdelrazak, *Al-Waseet Fi Sharh Al-Qanoun Al-Madani* (The Medium in Explaining the Civil Code), Sources of Obligations, at 815-8, Manshourat Al-Halabi Al-Hokoukeyah, 2000.

¹⁸⁴ See Article 66(2) of Law No. 17 of 1999. In this Article, it is clearly stated that it is up to the court to grant an injunctive relief whenever necessary. Article 171(2) of Law No. 131 of 1948.

¹⁸⁵ Court of Cassation decision number 11, Judicial Year 17 of the Civil Circuit on January 1, 1948.

¹⁸⁶ Al-Sanhouri, *supra*, at 819-21.

¹⁸⁷ Al-Jammal Mustafa, *Al-Nazareya Al-A'mmah Lil-Iltezamaat* (The General Theory of Obligations), p. 402 – *Al-Dar Al-Jame'eya*, 1987.

¹⁸⁸ See, generally, Expert's Opinion submitted in the case number 5 of 2013 Economic Civil Court of Appeals – Mansoura (unpublished).

affecting it.¹⁸⁹ If the former were to arise, the ECA or court would be going beyond its scope of jurisdiction by rendering rulings and not just interim measures.

Moreover, the ruling on the interim measure case does not affect the main claim in any way, as its purpose is limited to the interim aspect and does not extend beyond that point.¹⁹⁰ Furthermore, it is important to note that the ECA/court has exclusive competence in evaluating these conditions and in deciding whether it is satisfied or not with the urgency and immanency of the matter.¹⁹¹

To date, no interim measures have been issued from the ECA or any court in relation to ECL disputes. However, the ECA has attempted on occasion, and is willing whenever suitable, to issue interim measures.

16. Other types of relief

Article 345 of the Egyptian Penal Code prohibits any action which aims to increase or decrease prices, and it lists a number of such prohibited practices, as well as finally stipulating “or any other deceiving method.” This Article is of specific relevance to the enforcement of the Egyptian competition regime, as its complementary role has been repeatedly reassured during parliamentary discussions.¹⁹²

Therefore, although stand-alone actions before the criminal court are currently unacceptable under the ECL, building stand-alone actions before criminal courts may still be possible by relying on other laws.

From a practical perspective, the plaintiff, together with the Prosecutor’s Office, will work on proving the same violation of the law. This is due to the fact that, for the plaintiff to satisfy the first requirement (i.e., the occurrence of a fault), the plaintiff has to prove the presence of an infringement of the law, despite this also being a duty of the Prosecutor’s Office. Therefore the plaintiff and the Prosecutor’s Office would be working in parallel in an attempt to reach the same goal initially. Yet, if they were able to prove the presence of a violation, the plaintiff would have to prove the rest of the requirements (i.e., damage and causal link), as such claimant would be seeking compensatory damages for private interest. However, since the adoption of the ECL, no direct actions have been brought under Article 345 to date, but it remains a possible route for action.

D. Emerging trends

Private enforcement of the ECL is still an emerging field of law. The very few civil cases that have been brought to date were mainly based upon a previous violation finding by the ECA. Furthermore, in the Egyptian market, the main concern facing potential claimants is not primarily that of costs but of the time duration of the proceedings and the possible disciplinary retaliation of cartel members or the person abusing its dominant position. Until these challenges are effectively addressed, the development of private competition litigation in Egypt is likely to be limited.

¹⁸⁹ Court of Cassation decision number 48, Judicial Year 19 of the Civil Circuit, November 23, 1950.

¹⁹⁰ Court of Cassation decision number 243, Judicial Year 20 of the Civil Circuit, December 20, 1951.

¹⁹¹ Court of Cassation decision number 151, Judicial Year 19 of the Civil Circuit March 22, 1951; Court of Cassation decision number 358, Judicial Year 20 of the Civil Circuit, on June 12, 1952.

¹⁹² The Parliamentary Records, 27th Session, p. 63, February 12, 2005.



England and Wales

Keith Jones, Francesca Richmond and Jennifer Reeves

A. Availability of civil claims

1. Scope for civil claims in England and Wales

Introduction

England and Wales continues to see increasing competition litigation activity, both in relation to follow-on and stand-alone claims for damages and for injunctive relief. This trend is set to continue, particularly given the major reforms introduced by the Consumer Rights Act 2015 (the “2015 Act”) in October 2015. These reforms expanded the jurisdiction of the UK’s specialist competition court, the Competition Appeal Tribunal (the “CAT”), introduced a fast track procedure for competition claims and, most controversially, created an opt-out collective action mechanism in the CAT.

On 23 June 2016, the UK electorate voted in a referendum to leave the EU. While the vote is not binding, we expect the UK Government to initiate the exit mechanism and for the process to take at least two years. Until then, EU law continues to apply in the UK unchanged and the growth in competition claims is likely to continue. We may even see an uptick in the number of claims as claimants seek to take advantage of the UK courts while they can. If and when the UK leaves the EU, the position is more uncertain. We do not yet know what form of relationship the UK will establish with the EU. However, in the long term, we anticipate that there will be considerable change in the jurisdictional rules which have enabled EU claims to be brought in the UK courts.

This Chapter considers the EU Antitrust Damages Directive (the “Damages Directive”)¹⁹³ and the changes it will require to UK law. Despite the vote to leave the EU, the UK remains an EU Member State for now and therefore continues to be required to implement the Directive by December 27, 2016. That said, there is uncertainty as to whether this will happen.

Basis for competition claims

Competition law claims in England and Wales include claims resulting from a breach of:

- (i) Article 101 or 102 of the Treaty on the Functioning of the European Union (“TFEU”);¹⁹⁴
- (ii) Articles 53 and 54 of the Agreement on the European Economic Area; and
- (iii) the domestic equivalent of Articles 101 and 102 in the Competition Act 1998 (the “1998 Act”), which are referred to as the “Chapter I” and “Chapter II” prohibitions respectively.

The principal cause of action in competition claims is breach of statutory duty, although claimants may also plead economic torts, such as conspiracy to use unlawful means.¹⁹⁵

¹⁹³ Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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.

¹⁹⁴ Rights and obligations provided by the TFEU are directly enforceable in the English courts (Section 2(1), European Communities Act 1972). Further, Articles 101 and 102 TFEU have been held to be directly effective in all Member States (*Garden Cottage Foods v Milk Marketing Board* [1984] AC 130 and *Courage v Crehan* [2001] ECR I-6297).

¹⁹⁵ Claimants increasingly use the economic torts to seek damages for conduct which is in breach of foreign competition laws, but not EU or English competition law (as in the claims arising from the air freight cartel). To make out the economic tort of unlawful means conspiracy, the defendant must have intended to injure the claimant. While it is accepted that cartel conduct can constitute a conspiracy to use unlawful means, the Court of Appeal has held that an infringement decision of the European Commission in *Air Freight* was not sufficient to

Defendants may rely on a breach of competition law as a defense to a claim in certain circumstances. For example, in a claim for breach of contract, the defendant may argue that the contract is unenforceable as it infringes competition law and, therefore, the claim cannot succeed.

Competition law claims can be brought on a stand-alone or follow-on basis. Stand-alone claims are where the claimant alleges an infringement of competition law independently of any competition authority investigation or decision. Follow-on claims rely on a prior infringement decision to establish liability, such as a finding of the European Commission or the UK's national competition authority, the Competition and Markets Authority (the "CMA").

Claims in the High Court and the CAT

Civil claims may be brought in the High Court or the CAT. These two forums are at the same level within the English courts system, but they have different powers and their own procedural rules. To date, the High Court has been the most popular forum for competition claims due to problems with the CAT's jurisdiction. However, reforms made in 2015 have sought to eliminate these issues, align many of the rules which apply in the High Court and the CAT, and establish the CAT as the primary forum for competition claims in the UK.

Claims filed in the High Court will usually be assigned to the Chancery Division, although some cases may be suitable to be heard in the Commercial Court.¹⁹⁶

Cases in the High Court are determined by a single judge. By contrast, cases in the CAT are typically determined by a panel of three.¹⁹⁷ A CAT panel is made up of: (i) the CAT's President or a Chairman; and (ii) two "ordinary members." Chairmen of the CAT must be legally qualified and have appropriate experience and knowledge; they include judges who also sit in the High Court of England and Wales.¹⁹⁸ The CAT's ordinary members need not be legally qualified, but they must have appropriate experience and expertise in areas such as business, economics or accountancy.

Claims filed in the CAT are governed by Sections 47A-49B of the 1998 Act, which provides the statutory mechanism for bringing civil claims for breaches of competition law in the CAT. Until recently, this provision permitted only follow-on claims for damages to be filed in the CAT. In October 2015, however, the 2015 Act amended the 1998 Act to allow the CAT to hear stand-alone claims, including claims for injunctions. More broadly, the 2015 Act aligned many of the rules which apply in the CAT with those applicable in the High Court. While the CAT retains its own procedural rules, the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648/2015) (the "CAT Rules"), many of those rules mirror the Civil Procedure Rules ("CPR"), which govern claims in the High Court.

The 2015 Act also introduced an opt-out collective redress mechanism for competition claims for the first time. Although parallels have been drawn between the new collective action mechanism and US-style class actions, there are numerous restrictions on such actions in the UK and considerable discretion is left with the CAT to decide whether to permit such claims. Collective proceedings and

establish the requisite intention and nor could it be inferred from the cartelists intention to benefit their own businesses (*Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024). Therefore, it is questionable how popular the economic torts will be in future claims, particularly follow-on claims.

¹⁹⁶ Paragraph 2.1(b) of the CPR Competition Law Practice Direction.

¹⁹⁷ A single judge may hear a claim where the case is allocated to the "fast track procedure." Section 14(1A) of the Enterprise Act 2002. The fast track procedure is governed by rule 58 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648/2015).

¹⁹⁸ Suitably qualified judges sitting in the Court of Session in Scotland or the High Court of Northern Ireland may also be deployed as Chairman of the CAT (Section 12(2) of the Enterprise Act 2002).



settlements may only be brought in the CAT.¹⁹⁹ Competition claims may be transferred to or from the CAT and the High Court.²⁰⁰

Jurisdiction of the English courts

The English courts remain generous in their approach to accepting jurisdiction over competition cases under the Brussels Regulation.²⁰¹ In several cases, claimants have filed claims in the High Court against UK-domiciled subsidiaries of cartelists in circumstances where none of the addressees of the infringement decision were domiciled in the UK.²⁰² The use of “anchor defendants” in this way was rejected by the CAT, which held that there must be a UK-based addressee of the infringement decision to give the CAT jurisdiction under the old Section 47A of the 1998 Act.²⁰³ However, the divergence between the High Court and the CAT on the question of jurisdiction may fall away under the new regime introduced by the 2015 Act.²⁰⁴

2. Applicable limitation periods

The limitation period for bringing a claim for damages resulting from an infringement of competition law is six years from the date upon which the cause of action accrued.²⁰⁵ A cause of action in tort typically accrues when the damage is suffered.

Where a fact relevant to the claimant’s right of action has been deliberately concealed (or commissioned in circumstances where the breach was unlikely to be discovered for some time), as with a price-fixing cartel, the limitation period does not begin to run until the claimant discovers the concealment or could, with reasonable diligence, have discovered it.²⁰⁶ For this exception to the ordinary limitation rules to apply, the facts which have been concealed must be those which are essential for the claimant to establish a *prima facie* case.²⁰⁷ The Court of Appeal has recently held that this applies to competition claims and that there is no special rule to delay the running of the limitation period in such claims.²⁰⁸ Therefore, the claimant need not have all details and facts relating to the infringement in order to commence proceedings and time may start to run before the announcement of an infringement decision.

¹⁹⁹ Note, however, that there are additional mechanisms for group claims in the High Court. These include joint proceedings, same interest representative actions and Group Litigation Orders (“GLO”).

²⁰⁰ Section 16, Enterprise Act 2002. Claims transferred from the CAT to the High Court include *Teva UK Limited & Others v Reckitt Benckiser Group plc & Others*; the first case to transfer from the High Court to the CAT was *Sainsbury’s Supermarkets Ltd v MasterCard Incorporated & Others*, which was transferred in December 2015 and was due to be heard at the time of writing in early 2016.

²⁰¹ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments (recast), which applies to proceedings instituted on or after January 10, 2015. If and when the UK leaves the EU, the Brussels Regulation will cease to apply and the tactics to obtaining UK jurisdiction are likely to change.

²⁰² See *Roche Products Limited and others v Provimi Limited* [2003] EWHC 961 (Comm); *Cooper Tire & Rubber Company Europe Limited and others v Dow Deutschland Inc and others* [2010] EWCA Civ 864; and *KME Yorkshire Limited and others v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190.

²⁰³ *Emerson Electric Co and others v Morgan Crucible Company PLC* [2012] EWCA Civ 1559.

²⁰⁴ Note, further, that the Court of Justice held in C-352/13 – *CDC Hydrogen Peroxide v Evonik Degussa GmbH* (EU:C:2015:335) that claimants can rely on an anchor defendant to claim jurisdiction even where that anchor defendant withdraws from the proceedings. The Court of Justice also held that Article 7(2) of the Brussels Regulation enables claimants to bring claims in the courts of the place where the cartel/agreement was concluded or harm is suffered; harm will generally be deemed to be suffered in the place of the victim’s registered office.

²⁰⁵ Sections 2 and 9, Limitation Act 1980.

²⁰⁶ Section 32, Limitation Act 1980.

²⁰⁷ *Johnson v Chief Constable of Surrey* (CA, unreported, November 23, 1992).

²⁰⁸ *Arcadia and others v Visa Inc and others* [2014] EWHC 3561 (Comm), [2015] EWCA Civ 883.

Before the 2015 Act came into force, special limitation provisions applied to follow-on claims in the CAT. While the limitation rules have now been aligned in the High Court and the CAT,²⁰⁹ the transitional provision in the CAT Rules means that the old CAT rules²¹⁰ continue to apply to claims arising before October 1, 2015.²¹¹ In essence, the old CAT limitation period required claims to be brought within two years of: (i) the date the cause of action accrued; or (ii) the relevant infringement decision becoming final (i.e., after the expiry of the appeal period, or the conclusion of any appeal process).

Specific limitation provisions apply to collective proceedings in the in the CAT. Section 47E(4) of the 1998 Act provides that the limitation period for a Section 47A claim is suspended from the date collective proceedings are commenced. Section 47E(5) sets out when the suspended limitation period will resume, such as if the collective claim is withdrawn.

The Damages Directive makes specific provision regarding limitation periods for competition claims. Article 10 of the Damages Directive provides that the limitation period must be at least five years and shall not begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know:

- (i) of the behavior and the fact that it constitutes an infringement of competition law;
- (ii) of the fact that the infringement of competition law caused harm to him; and iii) the identity of the infringer.

While the Damages Directive is unlikely to bring about a significant change in the English law of limitation so far as it relates to cartel claims, the requirement that the limitation period does not start to run until the infringement has ceased could considerably extend the period for other types of competition infringements, particularly abuse of dominance.

Article 10 of the Damages Directive also requires that the limitation period be suspended where a competition authority takes action to investigate the conduct until at the earliest one year after the infringement decision has become final or after the investigation is otherwise terminated. If the Directive is implemented, English law will need to be amended to reflect this provision.

3. Appeals

Appeals from the High Court and the CAT are made to the Court of Appeal. In both cases, permission to appeal is required from the Court of Appeal or the relevant court of lower instance. Permission to appeal may be given only where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.²¹²

In the CAT, Section 49 of the 1998 Act provides for appeals in proceedings under Section 47A or in collective proceedings:

- (i) on a point of law arising from a decision as to:
 - (a) the award of damages or other sum (other than a decision on costs or expenses);
 - (b) the grant of an injunction;
 - (c) an infringement finding in a stand-alone claim; and

²⁰⁹ Section 47E, 1998 Act. Note that the limitation period for Scottish proceedings is five years (Section 47E(2)(b)).

²¹⁰ Competition Appeal Tribunal Rules 2003 (S.I. No. 2003/1372); see rule 31(1)-(3).

²¹¹ Rule 119, CAT Rules.

²¹² CPR 52.3(6).



- (ii) from a decision as to the amount of an award of damages or other sum (other than the amount of costs or expenses).²¹³

Appeals from the CAT lie to the Court of Appeal, provided that the permission of the CAT or the Court of Appeal has been obtained. Appeals can be made by a party to the proceedings or a person who has sufficient interest in the matter. Notably, there is no statutory provision for appeals against a decision on an application to certify collective proceedings (see below).²¹⁴

A further appeal from the Court of Appeal on points of law of general public importance lies to the Supreme Court (formerly the House of Lords), provided that permission to appeal is granted by either the Court of Appeal or the Supreme Court.

4. Availability of class actions for infringement of competition law and/or damages available in England and Wales

A form of class action is available in the CAT only. The 2015 Act amended the 1998 Act to give the CAT the power to determine certain competition claims by way of opt-out and opt-in collective proceedings. This is the closest the English courts have to a class action mechanism. The relevant statutory provisions are set out in Section 47B-E of the 1998 Act, and the procedural rules are provided by the CAT Rules. The provisions came into force on October 1, 2015 and one claim had been filed at the time of writing.²¹⁵ In addition to the CAT's collective actions regime, there are a number of group or multi-party litigation mechanisms available in the High Court.

Collective proceedings in the CAT

Collective proceedings are proceedings brought on behalf of a defined class of persons by a representative. Such proceedings can be "opt-in" (where each class member actively signs up to participate in the proceedings) or "opt-out" (where, in broad terms, each person within the class is automatically included in the proceedings unless they actively choose not to be). The opt-out provisions apply to UK-domiciled claimants only, but non-UK-domiciled claimants may opt in to the collective proceedings.

The bringing of collective proceedings must be approved by the CAT. This approval involves two aspects:

- (i) Authorization of the class representative: the class representative need not be a member of the class and is not required to have a personal claim against the proposed defendant. However, the Tribunal must consider that it is "just and reasonable" for that person to act as the class representative in the proceedings.²¹⁶
- (ii) Certification of the claims as eligible for inclusion in collective proceedings: to be eligible, the claims must: be brought on behalf of an identifiable class of persons; raise "common issues"; and be "suitable" to be brought in collective proceedings.²¹⁷

The CAT will also determine whether the action should proceed on an opt-in or opt-out basis.²¹⁸

Where the CAT gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, unless otherwise specified.²¹⁹ The CAT may not award

²¹³ Sections 49(1A)-(1C), 1998 Act

²¹⁴ While it is unclear how such appeals will be approached by the courts, it is possible that challenges to CAT certification decisions will be limited to judicial review proceedings.

²¹⁵ Case 1257 - *Dorothy Gibson v Pride Mobility Products Limited*

²¹⁶ Rules 78(1)-(3) of the CAT Rules.

²¹⁷ Rules 79(1)-(2) of the CAT Rules.

²¹⁸ Rule 79(3) of the CAT Rules.

²¹⁹ Section 47B(12) of the 1998 Act.

exemplary damages in collective proceedings, although it can make an aggregate damages award where it is not required to assess the amount recoverable by each represented person.²²⁰

The CAT may award costs to or against the class representative but not to or against a represented person (unless that person is the class representative), except in certain limited circumstances.²²¹ Damages-based agreements for the payment of legal fees are not enforceable in opt-out collective proceedings (see section 10 below).²²²

At the time of writing, one application to commence collective proceedings had been brought in the CAT but had not yet been determined.²²³

High Court proceedings

There are no opt-out mechanisms for group claims in the High Court.

Representative proceedings, where more than one person has the “same interest” in a claim, may be brought in the High Court.²²⁴ Interested persons must opt in to the action in order to participate. This type of proceeding is relatively uncommon because the “same interest” test that each claimant must meet in order to join the proceedings is difficult to satisfy. An attempt to broaden the approach so as to create, in essence, an opt-out representative action failed in *Emerald Supplies Ltd v British Airways plc*²²⁵. This was because the criteria for identifying who might qualify for inclusion in the class depended on the outcome of the action itself and, further, because not all members of the class had the same interest in the outcome of the claim (as some were direct customers and some indirect, who would have had different interests in, for example, questions of passing-on).

Group litigation orders (“GLOs”) are also available and can be made where one or more claims raise “common or related issues” of fact or law.²²⁶ This test is wider than the requirement that the persons have the “same interest,” as is required for representative proceedings (see above). GLOs are rarely used in practice.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant bears the burden of proof to establish that there has been an infringement and that he has suffered loss as a result of that infringement. The standard of proof is the “balance of probabilities.”²²⁷

In “follow-on” cases, the decision of the competition authority or the CAT establishes the infringement, leaving the claimant to prove only that the infringement caused it loss. Infringement decisions of the European Commission, the CMA and the CAT are binding in follow-on proceedings

²²⁰ Sections 47C(1)-(2) of the 1998 Act.

²²¹ Rule 98 of the CAT Rules.

²²² Section 47C(8) of the 1998 Act. Damages-based agreements are agreements between the client and their representative that the representative’s fee is contingent on the success of the case and is determined as a percentage of the damages received by the client.

²²³ Case 1257 - *Dorothy Gibson v Pride Mobility Products Limited*

²²⁴ CPR 19.6.

²²⁵ [2009] EWHC 741 (Ch); decision upheld on appeal [2010] EWCA Civ 1284.

²²⁶ CPR 19.10–19.15.

²²⁷ Note that, in the context of public enforcement, this standard of proof is to be applied bearing in mind that infringements of competition law are quasi-criminal matters attracting severe financial penalties (*Napp Pharmaceuticals v DGFT* [2002] CAT 1 and *Attheraces v BHB* [2005] EWHC 3015 (Ch)). Therefore, evidence of the infringement must be “commensurately cogent and convincing.”



in the High Court and the CAT.²²⁸ Decisions of other national competition authorities are not binding, but will be treated as admissible evidence.²²⁹

In “stand-alone” cases, the claimant is required to establish that there has been an infringement as well as causation and loss. However, the burden of proof in establishing that an agreement merits exemption under Article 101(3) TFEU or Section 3 of the 1998 Act lies with the defendant, which must also prove its case on the balance of probabilities.

To establish a causal link between the infringement and any loss suffered, the claimant must demonstrate that “but for” the defendant’s actions he would not have suffered the loss identified and that he is therefore entitled to be restored to the financial position that he would have been in if the infringement had not occurred. Although not yet the subject of any judicial authority in the English courts, the judgment of the Court of Justice in *Manfredi*²³⁰ that “any individual” could make such a claim where a “causal relationship” exists between the harm suffered and the prohibited agreement is assumed to mean that indirect purchasers are able to bring claims.

If implemented, the Damages Directive is likely to require changes to the English law in relation to burden of proof, namely:

- (i) to make clear that the burden of proving that overcharge was passed on lies with the defendant seeking to rely on pass-on as a defense (Article 13) and, where the existence of the claim depends on overcharge having been passed on, the claimant bears the burden of proving the existence and scope of such passing-on, subject to certain presumptions which apply to indirect purchasers (Article 14); and
- (ii) to introduce a rebuttable presumption that cartel infringements cause harm (Article 17).

6. Joint and several liability of cartel participants

Liability for infringements of competition law involving multiple parties will ordinarily be joint and several. This means that a claimant may bring an action for damages resulting from a breach of competition law, such as a cartel, against any cartel member for the entirety of the loss suffered by the claimant as a result of the anti-competitive conduct, even if there was no direct or indirect relationship between the claimant and that defendant.

If implemented, the Damages Directive will introduce two derogations to the principle of joint and several liability:

- (i) small or medium sized enterprises (“SMEs”) are only liable to their direct and indirect purchasers where (a) their market share in the relevant market was below 5% at any time during the infringement and (b) the application of the normal rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value (save where the SME was the leader or coercer, or has previously been found to have infringed competition law) (Articles 11(2)–(3)); and

²²⁸ European Commission infringement decisions are binding on national courts (Article 16(1) of Regulation 1/2003); findings of fact made by the CMA in the course of an investigation are binding once the time for appealing the findings has expired, or the findings have been upheld on appeal, unless the High Court or CAT otherwise directs (Section 58(1) of the 1998 Act); infringement decisions of the European Commission, the CMA and the CAT are binding in the High Court or the CAT once they have become final (Section 58A of the 1998 Act).

²²⁹ *Ferrexpo v Gilson Investments* [2012] EWHC 721. Note also that Article 9 of the Damages Directive provides that a decision of a national competition authority will constitute at least *prima facie* evidence of an infringement when relied on before a court of another Member State.

²³⁰ Judgment of the Court (Third Chamber) of July 13, 2006. *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*.

- (ii) infringers will not be permitted to obtain contributions from infringers that have obtained immunity from fines in return for voluntary cooperation with a competition authority; infringers with such immunity will typically be required to compensate their own (direct and indirect) customers only (Articles 11(4)–(5)).

The Civil Liability (Contribution) Act 1978 (the “1978 Act”) provides that any person liable for damage suffered by another may recover a contribution from any third party who is also liable in respect of the same damage. To claim such contribution, defendants can join other potentially liable parties to the action against them and/or pursue third parties in separate proceedings (including after judgment has been given).²³¹ Actions to recover contribution in reliance on the 1978 Act must be brought within two years of the date upon which the right to claim contribution accrued.

It is for the court to assess how liability should be apportioned between persons responsible for the same damage. The court will make such an award as is considered “just and equitable having regard to the extent of that person’s responsibility for the damage in question,” in accordance with Section 2(1) of the 1978 Act. However, it is far from clear how the English courts will approach this exercise in practice. For example, liability could be apportioned equally as between the defendants or based on: (i) each defendant’s culpability for the cartel; (ii) the amount of sales each defendant made to the claimant; or (iii) the defendants’ market shares.

The joint and several nature of the liability complicates settlement discussions in cartel claims because it remains open to other defendants to sue the settling defendant on the theory that the settling defendant has not settled a sufficiently large portion of the joint liability.²³² There are mechanisms designed to reduce the risk of such contribution claims being successful in effectively re-opening the settlement reached but they have not yet been tested before the English courts.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Evidence in competition claims typically includes statements of witnesses of fact and expert witnesses, as well as disclosure. Witnesses of fact and expert witnesses may be required to give oral evidence and may be cross-examined. Compared to the courts of many civil law countries, the disclosure regime in England and Wales is extensive.

Disclosure in the High Court

Disclosure in the High Court is governed by CPR 31. “Standard disclosure” is where parties disclose all documents within their control and upon which they rely, that adversely affect their own or the other party’s case or that support the other party’s case. Disclosure is given by exchanging lists of documents. The parties are then entitled to inspect and take copies of the documents disclosed by list, save where those documents are privileged.²³³ Instead of standard disclosure, the parties may be ordered to disclose only those documents on which they rely and specific categories of document. For example, a defendant could be ordered to disclose the pre-existing documents it provided to the European Commission as part of an investigation, documents relating to pricing of the cartelized

²³¹ By way of example, in the *Emerald Supplies* case, British Airways was sued as the sole defendant in the High Court for damages allegedly suffered in relation to a cartel in which British Airways and a number of other airlines were alleged to have been party (*Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch)). British Airways sought to join 32 other airlines to this action, although it later discontinued its attempts to join the airlines that were not ultimately addressees of the European Commission’s decision.

²³² See also, *IMI v Delta* [2015] EWHC 1676 (Ch), which considered whether a defense could be raised to a contribution claim where the claimant had a defense available to it in the main claim. The Court held that the defense could not be raised in the contribution proceedings as the court must proceed on the basis that the claimant had proved all elements of its pleaded case in the main proceedings.

²³³ Note that privilege extends to in-house lawyers in the UK.



product or communications between certain relevant persons. A more focused issues-based approach is increasingly preferred by the courts over wide-ranging and costly standard disclosure.

As well as disclosure between the parties, it is also possible to seek pre-action disclosure²³⁴ (see below) and disclosure from non-parties to the proceedings.²³⁵ Where a party seeks disclosure from the European Commission or a national competition authority, Articles 6-7 of the Damages Directive will be relevant.²³⁶

Given the confidential nature of many documents which will be required to be disclosed, a “confidentiality ring” will typically be put in place. Confidentiality rings usually allow only legal advisers full access to confidential documents and restrict how those documents can be used and shared. In any event, disclosed documents can only be used for the purpose of the proceedings (subject to certain exceptions, such as where the document has been referred to in open court).²³⁷

Third parties to an action can obtain, without the need for permission or prior notification to the parties, any statement of case, including the particulars of claim, defense, reply and any further information filed with the civil courts. A party to an action, or any person identified in a statement of case, may apply for an order preventing or restricting disclosure of that statement of case.

Disclosure in the CAT

Disclosure in the CAT is governed by rules 60–65 of the CAT Rules, which came into force on October 1, 2015. The CAT Rules have adopted a similar approach to disclosure as that which applies in the High Court, although the CAT has an especially broad discretion.

Pre-action and non-party disclosure are also available in the CAT.²³⁸ Confidentiality rings are routinely used in the CAT. Third party access to court documents is more restricted in the CAT than in the High Court.

English Courts’ approach to disclosure

The English courts have proved quite aggressive in ordering the disclosure of information in relation to competition law damages claims. Indeed, disclosure of the confidential version of the European Commission’s decision, or parts of that decision, have been ordered in a number of cases.²³⁹ Members of the judiciary have also expressed frustration at the time taken by the European Commission to publish non-confidential versions of decisions, describing delay as “astonishing and unsatisfactory.”²⁴⁰

If implemented, the approach of the English courts to disclosure of leniency material and other documents will be guided by the provisions of Damages Directive, which prohibits the disclosure of corporate leniency statements and settlement submissions.²⁴¹ Until then, disclosure of leniency

²³⁴ CPR 31.16.

²³⁵ CPR 31.17.

²³⁶ Where disclosure is sought from the European Commission, the Transparency Regulation (Regulation (EC) No. 1049/2001) should also be considered.

²³⁷ CPR 31.22.

²³⁸ Rules 62–63 of the CAT Rules.

²³⁹ See: *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch), *National Grid Electricity Transmission plc v ABB Ltd* [2011] EWHC 1717 (Ch), *WM Morrison Supermarkets plc v MasterCard Inc & Others* [2013] EWHC 3271 (Comm) (para. 20), *DB Schenker Rail (UK) v Hoffman & Co Elektrokohle AG* [2014] CAT 2, *Secretary of State for Health and others v Servier Laboratories and others* [2015] EWHC 647 (Ch).

²⁴⁰ See Mr. Justice Roth in respect of the Air Cargo cartel (<http://globalcompetitionreview.com/news/article/35737/cat-president-slams-dg-comps-failure-publish>) and *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch).

²⁴¹ Article 6 of the Damages Directive.

material continues to be governed by the Court of Justice’s judgments in *Pfleiderer*²⁴² and *Donau Chemie*,²⁴³ which require the court to balance the need for disclosure and the need to protect the leniency regime. In conducting this balancing exercise, the English court ordered that certain leniency materials be disclosed in *National Grid*.²⁴⁴ Despite the more restrictive approach which may be introduced by the Damages Directive, we expect the English courts to continue to take a robust view on the scope of material that should be made available to claimants and on the time at which that material should be disclosed.

Requesting information from a competition authority

As in all Member States, the national court may ask the European Commission to provide information or give its opinion on questions regarding the application of the EU competition rules.²⁴⁵ The English High Court has made such requests in several cases.²⁴⁶ Further, both the European Commission and the national competition authority can submit observations to the English courts as *amicus curiae*.²⁴⁷

The CMA has a right to be notified of competition claims in the High Court and the CAT.²⁴⁸ It also has the right to submit written observations on issues relating to the application of Article 101 or 102 TFEU or Chapter I or II of the 1998 Act, and to apply for permission to submit oral observations.²⁴⁹

Parties may also seek access to documents on the European Commission’s case file directly in accordance with the Transparency Regulation.²⁵⁰ However, the ability to do so is significantly restricted. This is because competition investigations are generally presumed to be subject to a wide exception which entitles the European Commission to refuse to provide documents if doing so would undermine the protection of commercial interests of a natural or legal person, court proceedings and legal advice, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.²⁵¹

8. Pre-action disclosure

Pre-action disclosure may be ordered against a prospective defendant where necessary to fairly dispose of the anticipated proceedings, assist the disputes to be resolved without proceedings or save costs – although the courts will not tolerate a fishing expedition on the part of the claimant.²⁵² An application for pre-action disclosure in relation to competition law claims has been rejected in

²⁴² Case 360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

²⁴³ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* (ECLI:EU:C:2013:366).

²⁴⁴ *National Grid Electricity Transmission v ABB & Others* [2012] EWHC 869 (Ch).

²⁴⁵ Article 15(1) of Regulation 1/2003. See also *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101 and 102 TFEU]*, as amended by *Communication from the Commission – Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles [101 and 102] (2015 Amendment)*.

²⁴⁶ *Wm. Morrison Supermarkets plc & Others v MasterCard Incorporated & Others* (opinion of May 5, 2014); *Secretary of State for Health & Others v Servier Laboratories Ltd & Others* (opinion of December 22, 2014); *Sainsbury’s Supermarkets Ltd v MasterCard Incorporated & Others* (opinion of October 29, 2015).

²⁴⁷ Article 15(3) of Regulation 1/2003. The European Commission submitted written observations to the English courts in *National Grid Electricity Transmission plc v ABB Ltd and others* (2011) and *Morgan Advanced Materials v Deutsche Bahn* (2014).

²⁴⁸ Paragraph 3 of the CPR Competition Law Practice Direction and rules 33(7), 35(6), 36(4), 74 and 76(6) of the CAT Rules.

²⁴⁹ Paragraph 3 of the CPR Competition Law Practice Direction and rules 50(2) and 74 of the CAT Rules.

²⁵⁰ Regulation (EC) 1049/2001 of the European Parliament and of the Council of May 2001 regarding public access to European Parliament, Council and Commission documents.

²⁵¹ Article 4(2) Transparency Regulation. See: Case T-437/08 *CDC Hydrogene Peroxide v European Commission* [2011] ECR II-8251, Case C-365/12 *Commission v EnBW* and Case T-380/08 *Netherlands v Commission*.

²⁵² CPR 31.16 and rule 62 of the CAT Rules.



circumstances where the Court considered the claim to be too speculative and the scale of disclosure was too large and unfocused.²⁵³

This is not to say that pre-action disclosure will never be granted. However, such an application will need to be carefully considered. Pre-action disclosure may, in some circumstances, be ordered against persons who are not prospective defendants, as illustrated by the judgment of the Court of Appeal in *Total E&P Soudan SA v Edmonds*,²⁵⁴ in which a targeted request for specific documents that could be readily disclosed at little cost or inconvenience was allowed.

9. Average length of time from issue of claim to judgment in England and Wales

At the outset, it should be noted that a significant proportion of competition claims settle and that only a small number have reached trial. That said, a claim in the civil courts typically takes around two years to reach trial, depending on the complexity of the case, the volume of evidence and the interlocutory applications brought by the defendant(s) (such as challenges to jurisdiction or stay applications pending the outcome of appeal of an infringement decision). Our experience is that private actions have, so far, taken longer to resolve than is typical for other civil claims due to the relative novelty and difficulty of the issues raised in private actions brought to date (in terms of jurisdiction, economic analysis, etc.). Cartel claims tend to take longer than abuse of dominance claims.

Cases can be expedited in the civil courts and it may be possible to apply for a speedy trial. A party may also seek to bring the case to an early conclusion through: (i) an application to strike out the claim; or (ii) an application for summary judgment where the claimant or defendant has no real prospect of success, although such applications are rarely successful.

Claims before the CAT may be slightly quicker than before the civil courts, although the small number of cases which have reached final judgment make it difficult to make a generalized statement. A fast track procedure has recently been introduced in the CAT whereby the main hearing will take place within six months and a cost cap will apply.²⁵⁵ This procedure is designed for SMEs seeking injunctive relief where the time estimate for the main hearing is three days or less.²⁵⁶ While no collective actions in the CAT have yet proceeded beyond the filing of the initial application, we estimate that they will take considerably longer than individual claims to reach trial.

Appeals to the Court of Appeal will generally add a further year; with a similar period for a further appeal to the Supreme Court.

10. Average cost from issue of claim to judgment in England and Wales

The potential costs of litigating a claim for breach of competition law are difficult to quantify as they will depend on a range of factors (type of claim, number of parties, volume of documents, procedural issues, etc.). Both claimants and defendants must consider that this type of claim has the potential to become very complex and drawn out over a long period of time, causing costs to spiral. It is not unusual for claimant and defendant costs to exceed GBP1 million per party and sometimes to be several multiples of that amount in cartel claims following on from European Commission decisions. Disclosure, forensic accounting and economic analysis can considerably increase legal fees.

²⁵³ *Hutchison 3G UK Ltd v Vodafone Ltd, 02 Ltd, Orange Personal Communications Services Ltd, T-Mobile UK Ltd* [2008] EWHC 50.

²⁵⁴ [2007] EWCA Civ 50.

²⁵⁵ Rule 58 of the CAT Rules.

²⁵⁶ The first application for fast track designation was made in Case 1243/5/7/15 – *NCRQ Ltd v Institution for Occupational Safety and Health*, although the proceedings settled before the application had been determined.

The courts have a general discretion as to the award of costs between parties, taking account of any offers to settle that are made²⁵⁷ and the parties' general conduct in the matter. In most cases, the losing party will be ordered to pay the successful party's costs and the parties' will then attempt to agree the actual amount to be paid. Where the parties cannot reach an agreement, the court will assess what costs can be recovered. In practice, the successful party generally only recovers between 70% and 80% of its actual costs.

The courts have the power to manage costs, which may include requiring costs budgets to be exchanged between the parties and a cap on recoverable costs. Where a claim is subject to the fast track procedure in the CAT (see section 9 above), the amount of recoverable costs must be capped at a level determined by the CAT.²⁵⁸

Damages-based agreements ("DBAs") are permissible in competition claims, save for opt-out collective proceedings in the CAT.²⁵⁹ DBAs are a form of contingency fee arrangement whereby lawyers' fees are contingent on the claimant winning the case and are determined as a percentage of the damages awarded. There are various restrictions which apply to DBAs, including a cap on the contingency fee of 50% of the damages recovered.²⁶⁰

Conditional fee arrangements ("CFAs") provide that lawyers' fees are only paid in certain circumstances, typically where the client wins the case. Such agreements are permissible in competition claims, although success fees are not recoverable from the opponent for CFAs entered on or after April 1, 2013.²⁶¹ Similarly, any after-the-event insurance premium owed by a winning party is no longer recoverable from the losing party.²⁶²

11. Third party funding/alternative funding

Historically, the availability of third party funding has been extremely limited in England and Wales. More recently, however, the litigation funding industry has grown considerably and there are now a number of third party and alternative funding options available in competition cases in England and Wales.

While the English rules against champerty and maintenance continue to prevent the improper support of litigation, the common law rules have been significantly scaled back by statute.²⁶³ Therefore, a third party funding arrangement is likely to be enforceable provided the funder has no right to control the proceedings or otherwise gains an interest in the action itself (rather than the proceeds).

The Association of Litigation Funders ("ALF") published a Code of Conduct in November 2011, which was updated in January 2014. This Code of Conduct includes, for example a guiding principle that funders may not seek to get the litigant's advisers to cede control of the conduct of the dispute to the funder. More recently, the ALF has controversially introduced a new requirement for its members to hold at least GBP2 million in capital to fund cases.

²⁵⁷ The costs implications of certain offers to settle are governed by CPR Part 36 in the civil courts ("Part 36 Offers") and rules 45-49 of the CAT Rules in the CAT ("Rule 45 Offers"). The cost shifting consequences of a Rule 45 Offer in the CAT do not apply to collective proceedings (rule 74(c) of the CAT Rules).

²⁵⁸ Rule 58(2)(b) of the CAT Rules.

²⁵⁹ Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012"); Section 47C(8) of the 1998 Act.

²⁶⁰ Regulation 4(2)(b) and (3) of the Damages-based Agreements Regulations 2010 (SI 2010/1206). Note that a 25% cap applies in personal injury cases.

²⁶¹ Section 44 of LASPO 2012. Success fees are recoverable for CFAs entered into before April 1, 2013.

LASPO also provides certain exceptions to the non-recoverability rule, none of which are likely to be relevant to competition claims (in any event, the relevant statutory provisions were not in force at the time of writing).

²⁶² Section 46 of LASPO 2012.

²⁶³ See, for example, Sections 44-45 of LASPO.



12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available in England and Wales. Mediation is commonly employed to resolve disputes and court rules require parties to consider the use of mediation or other alternative dispute resolution. In addition, the High Court has held that competition law can be arbitrated if the claims alleging competition law infringement fall within the ambit of a contractual arbitration clause.²⁶⁴

Most claims for damages resulting from an alleged breach of competition law are resolved by settlement before they reach trial. The details of such settlements are not generally publicly reported, but some have been achieved as a result of an alternative means of dispute resolution. Where the parties reach a settlement after proceedings have been issued, they are required to notify the court. In most instances, the parties will agree to have the settlement agreement embodied in a consent order or judgment.

Collective settlements in the CAT

The 2015 Act introduced a new collective settlement mechanism which applies in the CAT only.²⁶⁵ This enables opt-out collective proceedings to be settled, or for collective claims to be settled before litigation is commenced, pursuant to a specific procedure. In both instances, the CAT must authorize the settlement reached between the approved class representative, on behalf of the class, and the defendant(s) with the effect that the terms of the settlement bind the entire class. The CAT will only approve a proposed collective settlement if it is satisfied that its terms are “just and reasonable.” The CAT Rules set out the factors the CAT may consider when determining whether a proposed settlement is just and reasonable, such as the amount of the settlement and the estimated number of persons likely to be entitled to a share.²⁶⁶ As the collective settlement procedure is new, however, it remains to be seen how the CAT will approach applications for collective settlement approval orders.

Voluntary redress schemes

The 2015 Act also introduced a new power for the CMA and other concurrent regulators to approve voluntary redress schemes from applicants who have infringed Article 101 or 102 TFEU or the Chapter I or II prohibitions.²⁶⁷ Such schemes provide a way of offering compensation for competition infringements outside of the courts. In certain circumstances, an approved voluntary redress scheme may lead to the reduction of any penalty imposed by the CMA (or concurrent regulator) in respect of the infringement. However, the process for obtaining approval is complex and has not yet been tested.

C. Relief

13. Availability of damages and quantification

The basic rule is that damages are available and awarded in order to restore the claimant to the position it would have been in had the breach causing it loss not occurred. Thus, claimants may seek compensatory damages including interest in respect of any infringement of competition law that has caused the claimant loss. English law therefore accords with the Damages Directive, which requires Member States to ensure there is a right to full compensation for any harm caused by a competition law infringement, including actual loss, loss of profit, and interest (Article 3).

²⁶⁴ *ET Plus SA v Welter* [2006] LWR 251.

²⁶⁵ Sections 49A-49B of the 1998 Act; rules 94-97 of the CAT Rules.

²⁶⁶ Rules 94(9) and 97(7) of the CAT Rules.

²⁶⁷ Section 49C-49E of the 1998 Act. The redress scheme procedure is set out in the Competition Act 1998 (Redress Scheme) Regulations 2015, and elaborated on in the CMA’s *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA 40).

Damages are calculated on the basis of a counterfactual or “but for” test. In *Arkin v Borchard Lines*,²⁶⁸ the judge stated that an assessment of damages would involve starting with the relevant market as it existed at the time of the alleged infringement and then asking what loss, if any, the infringement had as a matter of common sense directly caused. For this purpose, it would be necessary to reconstruct the market conditions most likely to exist if no infringement had occurred (the counterfactual). By way of example, in the case of price-fixing, a customer might be awarded the difference between the price it actually paid for the goods and the price it would have paid in a competitive market. This but for or counterfactual approach has been followed subsequently (see *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors*,²⁶⁹ *Crehan*,²⁷⁰ *Healthcare at Home v Genzyme*,²⁷¹ *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Limited*²⁷² and *Albion Water Limited v Dŵr Cymru Cyfyngedig*²⁷³).

It remains unclear how the counterfactual approach should be applied in different circumstances however. For example, the Court of Appeal found in *Crehan* (a price-fixing case) that, instead of attempting to calculate the profits that the claimant might have made had he not been subject to an anti-competitive agreement, an appropriate measure of damages might instead be the value of the going concern that the claimant would have had but for the agreement as well as his actual losses. (This award was overturned by the House of Lords (now the Supreme Court) on a separate issue of EU law.) More recently, in *Albion Water* the CAT considered the appropriate methodology for calculating the counterfactual price in an abuse of dominance case. It held that there would typically be a range of lawful access prices a defendant could have offered and that the counterfactual access price should be the figure in the middle of that range (i.e., the CAT calculated damages on the basis of a *reasonable* access price, rather than the highest possible access price the defendant could lawfully have charged).

At the time of writing, there is no binding authority directly establishing that the concept of “passing-on” should be considered relevant to quantifying damages in England and Wales (i.e., where the claimant is said to have passed on any loss of profit caused by cartel prices by inflating his own prices to the ultimate consumer). However, various English cases suggest this concept should be applied. In any event, the UK will be required to formally implement laws recognizing passing-on by December 27, 2016 under the Damages Directive.²⁷⁴ To aid indirect purchasers, the Damages Directive also requires recognition of a rebuttable presumption that indirect purchasers have suffered some level of overcharge harm as a result of an infringement.

At the EU level, the European Commission adopted a communication on quantifying harm in antitrust damages actions and an accompanying Practical Guide in June 2013. The Damages Directive also states that the European Commission will issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser (Article 16).

The ordinary English law limitations to damages may also apply to competition law claims. This is demonstrated by a recent case in which the Court held that a claim may be barred by a dishonest act on the claimant’s part, applying the principle of *ex turpi causa*.²⁷⁵

²⁶⁸ [2005] 3 All ER 613.

²⁶⁹ [2008] EWCA Civ 1086.

²⁷⁰ [2004] EWCA Civ 637. In this case, the House of Lords overturned the damages award on the basis that there was no breach, but did not comment on the approach to quantification taken by the Court of Appeal.

²⁷¹ [2006] CAT 29.

²⁷² [2012] CAT 19.

²⁷³ [2013] CAT 6.

²⁷⁴ Note that the UK referendum on EU membership means that it is uncertain whether the UK will implement the Damages Directive, although - until it leaves the EU - it is formally required to do so.

²⁷⁵ *Tesco Stores Ltd and others v MasterCard Incorporated* [2015] EWHC 1145.



14. Punitive and exemplary damages

An award of exemplary damages is currently a theoretical possibility in a competition damages claim in England and Wales, with one such award having been made in an abuse of dominance case (*2 Travel*²⁷⁶). Such awards are highly exceptional and *2 Travel* was a case with unusual facts, notably because the national competition authority issued an infringement decision but did not impose any fines. Further, the amount awarded was modest (just GBP60,000) and is consistent with the typically modest size of exemplary damages awards in other English law contexts.

Punitive and exemplary damages will be prohibited if the UK implements the Damages Directive because this Directive limits damages to compensatory awards only (Article 3(3)).

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

An injunction is an order of the court that requires a party to do a specific act or refrain from doing a specific act. It may be interim (granted pending full trial of the issues) or final (granted after the conclusion of proceedings). In competition claims, injunctions are used to prevent the continuation of an (alleged) infringement, typically an abuse of dominance such as a refusal to supply.

Interim and final injunctions may be sought from the High Court or, as a result of recent changes, from the CAT. If necessary, these bodies may grant an interim injunction on fewer than 24 hours' notice and in some cases without notifying the opposing party.

Before granting an interim injunction, the court will generally require the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

The grant of an injunction is at the discretion of the court. In determining whether to exercise this discretion, the court will consider the following:²⁷⁷

- (i) Whether there is a serious question to be tried. The claimant does not need to show a prima facie case and there is no in-depth analysis of the merits, although the claim must not be frivolous or vexatious.
- (ii) Whether damages would be an adequate remedy. If damages are an adequate remedy the application for an injunction will be refused.
- (iii) The balance of convenience of each of the parties should the order be granted. The court will consider the respective inconvenience or loss to each party if the order is granted or refused.

Recent cases highlight the importance of complying with these basic requirements (see *Dahabshiil Transfer Services Limited v Barclays Bank plc*,²⁷⁸ *Chemistree Homecare Limited v Abbvie Limited*²⁷⁹ and *Packet Media Ltd v Telefonica UK Limited*²⁸⁰).²⁸¹ In *Chemistree*, the claimant alleged that the defendant's decision to withdraw the supply of a particular drug to the claimant was an abuse of the defendant's dominant position, seeking an interim injunction to continue the supply. This was refused in the High Court on the basis that the claimant had not given sufficient evidence that the defendant had a dominant position in the market concerned or, even if it had, that the defendant had abused any such position or that the claimant would suffer loss as a result. This was upheld on appeal. In contrast,

²⁷⁶ *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

²⁷⁷ *American Cyanamid Co v Ethicon Limited* [1975] 2 WLR 316.

²⁷⁸ [2013] EWHC 3379 (Ch).

²⁷⁹ [2013] EWHC 264 (Ch), upheld on appeal [2013] EWCA Civ 1338.

²⁸⁰ [2015] EWHC 2235 (Ch).

²⁸¹ For earlier examples, see *Adidas v ITF* [2006] EWHC 1318 (Ch) and *AAH Pharmaceutical Ltd v Pfizer Ltd* [2007] EWHC 565 (Ch).

in *Dahabshiil*, the High Court granted an injunction on the basis that the claimant had demonstrated there was a serious question as to whether the defendant had a dominant position and had abused that dominance in particular markets.

The CAT will grant injunctions using the same criteria, subject to rules 67-70 of the CAT Rules. Injunctions issued by the CAT are enforceable as if they had been issued by the High Court.

D. Emerging trends

2015 saw the most significant reform to competition claims in England in a decade. The introduction of collective proceedings and settlements, as well as the expansion of the CAT's jurisdiction, places the UK at the forefront of competition litigation in Europe. These reforms, combined with existing features of the English legal system – such as the broad scope for disclosure, experienced and efficient commercial courts and, to date, relatively generous approach on jurisdiction – mean the English courts are likely to remain a forum of choice for claimants seeking redress for competition law wrongs. Indeed, we have already seen a number of law firms and litigation funders establishing practices in England and Wales so as to bring claims in this area.

The vote of the UK electorate to leave the EU on 23 June 2016 is unlikely to have any effects on the growth of competition claims in the UK in at least the short to medium term. Even if the UK does initiate the exit process, it is likely to remain an EU Member State for at least two years and, after then, any withdrawal is highly unlikely to disapply EU law retrospectively. There may also be an uptick in claims over the next few years as claimants seek to take advantage of the UK courts while they can.

The implementation of the Damages Directive in late 2016 will bring considerable change to the competition damages landscape across the EU.²⁸² As noted, there is some uncertainty as to whether the Damages Directive will be implemented in the UK in light of the recent referendum on EU membership, although the UK is - formally - required to do so while it remains a Member State. In any event, the amendments to the UK's private actions regime are likely to be less significant than in other Member States because of the relatively established right to competition damages, the availability of broad disclosure, joint and several liability, and suchlike.

²⁸² For further detail on the Damages Directive, see the relevant chapter of this guide.



France

Alex Dowding and Léna Sersiron

A. Availability of civil claims

1. Scope for civil claims in France

Stand-alone and follow-on actions are available in France.

In principle, civil claims for damages caused by infringements of competition law may be brought in France by and against companies and individuals. In practice, such actions are most often initiated against companies.

The scope to bring civil claims in France is very wide. The basis for this kind of action may be contract, tort or criminal law. In addition to EU law, there are several provisions under French law dealing with infringement of competition law. Articles L. 420-1 and L. 420-2 of the French Commercial Code reflect Articles 101 and 102 TFEU. Article L. 420-6 of the French Commercial Code deals with the situation where an individual plays a personal and decisive role in the setting up or implementation of competition law infringement and provides criminal penalties for such conduct.

Parties to a contract may bring an action for damages based on breach of contract if, for example, one of the clauses of the contract violates competition law (whether EU or domestic law). If upheld, the claimant is entitled to request that the relevant clause or, if not severable, the entire contract, be declared null and void.

A complaint may also be filed with the French Competition Authority (*Autorité de la Concurrence*) requesting that it investigates and sanctions an infringement of competition law. If the authority decides to accept the complaint, it will then carry out an investigation to determine whether an infringement has occurred and impose penalties if appropriate. Investigations often take several years and it is unusual for potential claimants to initiate a civil claim while investigations are ongoing (if possible), except to avoid the claim being time-barred. In such cases, the action is generally stayed until the competition authority issues a decision. Such protective actions will however no longer be required after the implementation into French law of the EU Antitrust Damages Directive which provides that claimants will have one year after an infringement decision has become final to initiate a damages action.

Actions for damages for infringement of competition law (EU law or domestic law) are generally based in tort (Article 1382 of the French Civil Code). Such actions may be brought before the Commercial Court (*Tribunal de Commerce*) if it is between companies or commercial entities, or otherwise before the Civil Court (*Tribunal de Grande Instance*) if the Commercial Court does not have jurisdiction to hear the claim. For competition matters, the Civil Courts and Commercial Courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy and Rennes have exclusive jurisdiction (Decree No. 2009-1384 dated November 11, 2009). Consumer class actions can be brought before the regional courts of the place of the defendant.

Actions based on criminal law must be brought before the Criminal Court (*Tribunal Correctionnel*). Victims may, if they are party to criminal proceedings (*parties civiles*) request, before the Criminal Court, damages on the basis of Article 1382 of the French Civil Code. They would then have to demonstrate both causation of harm and loss actually suffered.

2. Applicable limitation periods

The French legislation on statutes of limitations was amended in 2008 (Law No. 2008-561 dated June 17, 2008). The rules on limitation differ depending upon the legal basis of the action brought.

The general limitation for bringing an action (whether civil or commercial) for damages is five years from the date on which the claimant discovers the existence of the cause of action or should reasonably have discovered it. In practice, claimants may argue that they discovered the cause of action only upon publication of the decision delivered by the French Competition Authority confirming that a company has engaged in anti-competitive practices. The EU directive on follow-on damages, to be implemented by December 27, 2016, provides that claimants will have one year from the issuance of a final infringement decision to initiate a damages action.

The French Competition Authority will not investigate allegations relating to facts dating back more than five years if no previous or ongoing attempt has been made to investigate, establish or punish the relevant entities or individuals (Article L. 462-7 of the French Commercial Code). If the breach is characterized as a continuing offense, the limitation period will begin to run from the date upon which the infringement ceases. An action by the French Competition Authority is in any case barred 10 years after the date on which the breach of competition law ceased if no decision has been issued.

The limitation for bringing a criminal action is three years from the date that the breach is committed. Consumers' class actions can be brought up to five years from the date of issuance of a final decision of a national or European authority or court establishing an infringement of competition rules. The limitation period for individual damages actions is suspended by the launch of a class action. The period resumes for at least six months from the date on which a final class action decision establishing liability for damages has been issued.

3. Appeals

Parties may appeal on a point of fact or law against a judgment delivered by lower courts on the merits (i.e., by a civil court, commercial court and/or criminal court) before the Court of Appeal within one month from notification of the judgment. The Paris Court of Appeal has exclusive jurisdiction to hear appeals on competition law matters when the judgment is delivered by a lower court specialized in competition law matters. The Paris Court of Appeal also has exclusive jurisdiction to rule on decisions delivered by the French Competition Authority (Article D. 311-9 of the French Code of Judicial Organization).

A further appeal from the Court of Appeal on points of law may be brought to the Supreme Court (*Cour de cassation*) and may be filed with the court within two months from notification of the appeal judgment.

Appeals against judgments delivered by an administrative court (*Tribunal Administratif*) may be brought to the Administrative Court of Appeal (*Cour Administrative d'Appel*). A further appeal from the Administrative Court of Appeal may be brought to the Council of State (*Conseil d'Etat*).

4. Availability of class actions for infringement of competition law and/or damages in France

A specific class action procedure related to competition and consumer law infringements has been adopted by the so-called "*loi Hamon*" of March 17, 2014 and is set forth under Article L. 423-1 et seq. of the French Commercial Code. Class actions are possible to repair the individual harm caused by the infringement of competition law provisions to consumers placed in an identical or similar situation. Class actions can only be initiated by authorized consumers' associations.

In order to be authorized, a consumers' association must:

- (i) have been in existence for a period of at least one year;
- (ii) demonstrate that the organization carries out effective public activity in defense of the interests of consumers;



- (iii) if purported to be a national organization, have a membership of at least 10,000 members; and
- (iv) be independent from any form of professional activities.

Approval is granted for a period of five years and may be renewed subject to the same conditions. To date, 15 authorized consumers' associations have been registered.

Authorized associations may only represent consumers, defined by the French Consumer Code as individuals acting for purposes that are primarily outside their trade, business, craft or profession.

The procedure of this new class action is twofold. First, the court must establish the liability of the professional, identify the group of consumers concerned and set the amount to be paid as compensation for each consumer. Once such a ruling has been issued, the consumers concerned then have two to six months to join the group and be compensated.

A simplified procedure allows for direct and individual compensation when the number and identity of consumers harmed is known and when these consumers have suffered a damage of the same amount.

Aside from this new type of class action for competition law infringements, the traditional representative action ("action of joint representation"), provided by Articles L. 422-1 to L. 422-3 of the French Consumer Code, still exists. This action is only open to registered consumers' associations and may be brought before any French court, including criminal courts, to represent either an individual interest or a number of interests where the individuals involved have sustained damage as the result of the same infringement. In order to initiate an action of joint representation, the consumers' association must first obtain a written proxy from at least two of the consumers affected by the infringement. The consumers' association cannot publicly call for proxies or otherwise seek these out – it must wait for complaints to be made to the association directly. The action of joint representation has rarely been used because of the very strict requirements applying to those who have standing to bring such claims and to the initiation of any action. This procedure is of a lesser interest in light of the new class action procedure introduced by the "*loi Hamon*."

B. Conduct of proceedings and costs

5. Burden of proof

The claimant normally bears the burden of proof in establishing whether there has been an infringement of competition law and in evidencing causation and loss. In practice, if a final prior decision of the French Competition Authority or the European Commission has already established that the defendant has infringed competition law, the claimant may only need to prove causation and loss. The EU directive on follow-on damages provides that a final infringement decision of a national competition authority or of a court of appeal constitutes irrebuttable evidence of infringement of competition law. Findings of infringement issued by other national competition authorities are not binding upon French courts but may be taken into account as evidence of an infringement. In any event, the quantification of the damage suffered and the causal link between the infringement and damage must still be demonstrated to the court by the claimant.

As far as consumer class actions are concerned, Article L. 423-17 of the Consumer Code provides that infringements to competition law are irrefutably established on the basis of a final decision of national or European authorities or courts (including competition authorities and courts of all Member States of the European Union). However, the authorized consumers' association or the claimant still needs to provide evidence of damage and a link between the infringement and the damage.

There is no strict burden of proof defined by French law; courts enjoy wide discretionary powers to appraise the evidence brought before them and decide whether it is sufficiently convincing.

The courts may seek advice from the French Competition Authority as to whether an infringement has occurred and the proceedings initiated before the court will be stayed until the competition authority issues its opinion. The French Competition Authority may choose to conduct an investigation before taking a view and will only issue an opinion after hearing submission from all parties.

It can be difficult for private parties to gather evidence to prove that anti-competitive practices have taken place without a pre-existing decision identifying an infringement. As a result, in practice most civil actions are based upon a decision of a competition authority (i.e., follow-on actions), which obviates the need for the court to seek advice from the French Competition Authority on this issue.

6. Joint and several liability of cartel participants

Liability will ordinarily be joint and several for infringements of competition law involving several defendants. This means that a claimant may potentially bring an action for damages against any one party for the entire loss caused by all infringers. In cases where only one cartel member is sued, it can seek to join others to the action and/or initiate a claim against them at a later stage for a contribution to any damages paid out. To date, French claimants (as purchasers of cartelized products) have tended to claim damages from their own supplier(s), rather than involve all cartel members in the claim or seek to recover all damages suffered from one cartel member only.

If an award of damages is made against a group of defendants on the basis that their liability is joint and several, it is for the court to assess how liability should be apportioned between the defendants. French courts generally either apportion damages between co-defendants by reference to the harm caused by each or, if such apportionment is not possible, by dividing damages between them equally.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Under French law, parties have a duty to disclose all documents on which they rely. However, claimants do not have to disclose documents that would adversely affect their case or support the other party's case.

In the course of proceedings, a party may request the court to order the other party to disclose documents relevant to the case that are not already within the control of the requesting party (Articles 138 to 142 of the French Code of Civil Procedure). Such requests should normally expressly identify the documents requested – “fishing expeditions” are not permitted under French law.

The court may decide on its own initiative that documents should be produced by a party (Articles 143, 144 and 146 et seq. of the French Code of Civil Procedure). The court may also request, at its own initiative or upon request from any of the parties, the assistance of an expert to clarify factual elements of the case (Articles 232 et seq. of the French Code of Civil Procedure).

The main exception to disclosure ordered under these provisions is that confidential and privileged documents cannot be disclosed. Confidentiality and legal privilege must, however, be justified and the court may consider that the documents should nonetheless be disclosed. If the court requires the disclosure of a confidential document, it may decide that this document will not be divulged to the opposing party or that the document will be examined only by an appointed expert. These measures are rarely taken in practice since they raise due process issues.

If the success of an action for damages resulting from a competition law breach depends on factual elements that need to be recorded, the claimant may request, on a summary or without notice basis, that a bailiff be appointed to record these facts. This request would be filed on the basis of Article 145 of the French Code of Civil Procedure (see below) and the report of the bailiff may be produced before the court in any subsequent action based upon those facts.



Investigation evidence is ordinarily confidential and therefore cannot be disclosed in judicial proceedings. According to Article L. 462-3 of the Commercial Code, the French Competition Authority will not disclose documents created or submitted in the context of a leniency application.

The French Competition Authority may also be reluctant to provide documents submitted in the context of settlement or commitment procedures. However, courts have in the past already ordered the French Competition Authority to disclose a non-confidential version of statements or documents relating to such settlement or commitment procedures. The Commission has adopted amendments to a number of key procedural rules in order to bring them into line with the EU Damages Directive. The amendments focus on the use of evidence included in the Commission's case file, and in particular aim to protect leniency corporate statements and settlement submissions from being used in damages action in national courts.

Judgments and decisions are public so third parties have access to the full content of each judgment/decision. The courts and the French Competition Authority may also order the publication of the judgment in newspapers or magazines

8. Pre-action disclosure

Pre-action disclosure is not generally available under French law. However, parties may apply for an order prior to initiating proceedings requiring the potential defendant to produce documents or information that could be relevant to an action.

These requests are based on Article 145 of the French Code of Civil Procedure, which provides that *“If there is a legitimate reason to preserve or establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.”* The court will not issue such an order if it considers that the evidence sought is unlikely to be relevant to the anticipated action or if the evidence sought is not sufficiently defined. As noted above, courts want to avoid “fishing expeditions” on the part of the potential claimant. However, it is not difficult to obtain this measure if the required conditions are met.

The claimant may also potentially request the court to order that the defendant discloses documents relevant to the action pursuant to Articles 138 to 142 of the French Code of Civil Procedure.

9. Average length of time from issue of claim to judgment in France

The average length of time for this type of proceeding will vary according to the complexity of the case and the measures ordered by the judge (production of documents, appointment of an expert, consultation with the French Competition Authority, etc.). The proceedings will also take longer if the defendant brings interlocutory applications, for instance, to challenge the jurisdiction of the court.

Taking these elements into account, a claim in the Commercial, Civil or Criminal courts typically takes between one and two years from the issuance of the claim to the delivery of the judgment, and sometimes longer.

Appeals before the Court of Appeal will generally add at least 18 months to the proceedings.

10. Average cost from issue of claim to judgment in France

It is very difficult to quantify the potential costs of defending a claim for infringement of competition law since, for the same reasons as set out above, costs will depend on a range of factors. It is all the more difficult since civil claims resulting from an infringement of competition law are rare in France. The range of average costs of first instance proceedings is probably between EUR100,000 and EUR200,000.

It should be noted that, under French law, courts ordinarily order that the losing party should bear the costs of the proceedings (translation fees, witnesses, experts, etc.). Recoverable costs are listed in Article 695 of the French Code of Civil Procedure and do not include lawyers' fees. Courts may order the losing party to bear lawyers' fees as part of the legal costs recoverable under Article 700 of the French Code of Civil Procedure. The court, however, has discretionary powers to set the amount of legal costs to be paid by the losing party and the sums ordered are rarely the full amount of lawyers' fees charged.

11. Third party/alternative funding of litigation

Except in limited cases relating to insolvency proceedings, alternative forms of funding are not permitted in France.

There is, however, a mechanism governed by rules contained in the French Civil Code which would make it permissible, under certain circumstances, for a company to purchase claims from victims and then pursue them in its own right. To our knowledge, no one has yet pursued this course of action in a competition context.

Contingency fees are allowed under French law but lawyers cannot agree "no win, no fee" deals. Lawyers could agree with their client that the fees will be composed of both a fixed amount (paid regardless of the result) and a contingency fee. The fee will not be reduced in the event of losing but will increase in the event that the claim succeeds.

In the case of a class action, the authorized association, as opposed to the consumers, bears the costs associated with representation and the proceedings in general. If the action is successful, the authorized consumers' association can ask the court to request the losing party to pay part of their judicial expenses.

12. Alternative methods of dispute resolution

Parties who do not wish to bring their case before a court may resort to arbitration or mediation to resolve disputes involving competition law issues.

The opportunity of mediation is also open for authorized associations in the context of a class action, at all stages of the proceedings. The negotiated agreement must be confirmed by a judge, who must ascertain that the agreement has been reached in the interests of consumers and will be enforceable.

With respect to arbitration, the Paris Court of Appeal confirmed in 1993 that, although arbitrators lack the power to impose fines for infringements of competition law, they could decide upon the consequences of such infringements (e.g., liability to pay damages and the amount to be paid by way of compensation) (*Société Labinal v Sociétés Mors et Westland Aerospace*, Paris Court of Appeal, May 19, 1993).

C. Relief

13. Availability of damages and quantification

Under French law, damages are exclusively compensatory: their purpose is to restore the victim to the position that it would have been in had the breach never been committed.

As a general rule, damages will be awarded only if the harm sustained is direct, personal, certain and foreseeable (Articles 1149 to 1151 of the French Civil Code). The claimant must show that there is a causal link between the infringement and the damages suffered. This means that the passing-on defense is in principle available in cartel cases and the defendant may argue that no damages should be recovered by buyers that have themselves resold the cartelized goods to final purchasers and passed on the unlawful overcharge to final customers.



Consequential damages are available if certain and foreseeable. French courts will therefore award damages for loss of chance and loss of earnings if appropriate. Compensation for loss of chance is calculated by reference to the probability of the missed opportunity occurring (and so will never be 100%).

The court may request the assistance of an expert to assess the amount of damages to be awarded to the parties if it considers it necessary. The parties can also submit their own expert reports.

The amount of damages awarded varies greatly. Examples of recent cases are as follows:

- (i) A travel agency was awarded EUR20,000 for the damages suffered from the loss of customers caused by a cartel (Court of Appeal of Paris, December 14, 2011).
- (ii) A major internet search provider was ordered to pay the company directory cartographers EUR500,000 (Commercial Court of Paris, January 31, 2012).
- (iii) A lysine producer was ordered to pay EUR1,612,347 to several poultry producers (Court of Appeal of Paris, February 27, 2014).

14. Punitive and exemplary damages

Punitive damages that exist, for instance, in the US are not available under French law. This is because, as stated above, the purpose of damages under French law is to compensate the victim for the harm sustained rather than to reform or deter the defendant and others from engaging in infringing conduct.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

A party may apply for an interim order to stop an alleged violation of competition law pending a substantive action on the merits. Such an injunction may be requested before civil courts (Articles 808 and 809 of the French Code of Civil Procedure) or the commercial courts (Articles 872 and 873 of the French Code of Civil Procedure).

Pursuant to Article 808 of the French Code of Civil Procedure (or Article 872 of the French Code of Civil Procedure), French courts will grant interim measures if:

- (i) there is urgency; and
- (ii) the party applying for interim measures proves either of the following:
 - (a) the measure cannot seriously be challenged by the other party; and
 - (b) the measure is justified by the existence of the dispute.

In addition, pursuant to Article 809 of the French Code of Civil Procedure (or Article 873), summary proceedings may be introduced in order to require cessation of an obviously unlawful act. Indeed, the president of the court may, even where confronted with a serious challenge, order in a summary procedure such protective measure or measures to restore the parties to their previous state as required, to avoid an imminent damage or to abate a manifestly illegal nuisance.

It should be noted that the powers to grant relief under these provisions are very wide and the court may, if the conditions set forth by the law are fulfilled, order any conservatory measure as well as any measure of restoration.

Final injunctions are also available when an action is brought on the merits. Injunctions, whether interim or final, are often backed up by a daily penalty (*astreinte*).

D. Emerging trends

Up until now, civil claims for damages resulting from an infringement of competition law have been rare in France.

Claims for damages resulting from a competition law infringement often settle before final judgment without the details of such settlements being publicly reported.

Commentators have suggested that the reason for the low number of civil claims brought in France to date may be that the judicial proceedings take too long and that the amount of damages awarded is generally too low. Another reason may be that end-consumers, taken individually, generally suffer very small losses and therefore have no incentive to act alone, so as to initiate costly legal actions. The class action procedure recently introduced by the “*loi Hamon*” and which came into force on October 1, 2014, has been designed to remedy some of these obstacles. However, a year after its entry into force, only six class actions have been introduced before the French courts (one of the reasons put forward by the consumer associations is the length of the proceedings).

In parallel, the number of follow-on actions by companies seems to be on the rise due to the increasing awareness of the possibility for aggrieved companies to obtain damages. The recent adoption of the EU Damages Directive has certainly contributed to such awareness.



Germany

Christian Horstkotte, Dr. Nicolas Kredel and Dr. Peter Stankewitsch

A. Availability of civil claims

1. Scope for civil claims in Germany

Stand-alone and follow-on claims are available in Germany.

Any market participant that may have been negatively affected by an infringement of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, “GWB”) and/or Articles 101/102 TFEU may bring an action for damages against the infringing corporations or individuals. This general rule has been confirmed by Section 33(3) GWB, which came into force on July 1, 2005 and applies for infringements that took place as from that date. However, German courts have based their judgments in private competition litigation cases on this general rule even where the infringements took place before July 1, 2005.

A finding of infringement by a competition authority is not a precondition to a civil damages action. In practice, some claimants have even tried to recover damages before the investigation of the Federal Cartel Office (*Bundeskartellamt*, the “FCO”) has been completed. However, in this case, the burden of proof is completely with the claimant (see below).

2. Applicable limitation periods

According to Sections 195 and 199 of the German Civil Code (*Bürgerliches Gesetzbuch*, “BGB”), the standard limitation period for bringing a claim is three years.

The limitation period commences at the end of the year in which the claimant obtained knowledge of the circumstances giving rise to the claim and of the identity of the infringer (or would have obtained such knowledge if the claimant had not shown gross negligence in failing to do so). Often, the announcement of a cartel investigation by the competent competition authority may be sufficient to establish that the potential claimant knew or ought to have known of the event causing damage (but not necessarily of the identity of the infringer, whose involvement in the cartel may only have been published later). In Germany, the press release of the competition authority announcing the fine is often the first public document of a cartel investigation and thus serves as the triggering event for the limitation period.

If a claimant files a claim within the above limitation period, his claims would, however, normally be limited to those damages that accrued within the preceding 10 years, which is the maximum limitation period for pecuniary damage claims (Section 199(3) BGB).

For cartel infringements that took place on or after July 1, 2005, Section 33(5) GWB establishes a special rule for private competition litigation claims. According to Section 33(5) GWB, the standard limitation period will be suspended for as long as investigations of the European Commission or a national competition authority of a Member State are ongoing. The purpose of this rule is to make sure that any affected person may benefit from the binding effect that a decision by these competition authorities has on the civil courts, given that there might be quite lengthy administrative proceedings leading to the imposition of fines. Limitation of a claim occurs at the earliest six months after investigations are formally completed. Courts also tend to apply this rule for cartel infringements that have occurred before July 1, 2005 if the competition authority’s investigation was completed on or after this date.

3. Appeals

An action will be initiated before a regional court (*Landgericht*), from where it can be appealed to the Court of Appeals (*Oberlandesgericht*) and finally to the German Supreme Court (*Bundesgerichtshof*). It should be noted that certain regional courts, such as Berlin, Düsseldorf and Mannheim, have greater experience of handling competition cases and are therefore preferable to courts located in other areas, provided that the respective courts all have jurisdiction to hear the case. There are also special rules providing for the exclusive competence of one regional court for cartel disputes in a certain region (Section 89 GWB).

4. Availability of class actions for infringement of competition law and/or damages in Germany

The German Code of Civil Procedure (*Zivilprozessordnung*, “ZPO”) does not provide for class action litigation. Individual proceedings may be consolidated, provided that the relevant proceedings are already pending before the same court and the court agrees to join the proceedings. Furthermore, claimants can argue that they are entitled jointly to pursue claims, provided that these are based on substantially the same factual and legal grounds (Sections 59 and 60 ZPO).

Despite the fact that class actions in private competition litigation are not known in Germany, there is the possibility of “bundling” damages claims together. However, this possibility has been severely restricted by a decision of the Regional Court of Düsseldorf in December 2013. In that case, the FCO uncovered a cartel in the cement sector relating to the setting of sales quotas as well as price-fixing going back to the early 1990s. A Belgian company named Cartel Damage Claims SA (“CDC”) was specifically incorporated to bundle various damages claims against the cement producers. CDC acquired the damages claims of many affected companies by way of purchase and assignment, and then filed a claim before the Regional Court in Düsseldorf. The first hearing on the case took place in December 2006 and the Regional Court established the admissibility of the claim by way of a partial decision. The defendants appealed this decision to the Higher Regional Court. In May 2008, the Higher Regional Court rejected the appeals and confirmed the admissibility of the claim. A request for a legal review of the appeals decision was rejected by the German Supreme Court in April 2009, who confirmed the admissibility of the claim as well. The proceedings continued before the Regional Court of Düsseldorf in the first instance, which ended with a decision on December 17, 2013. The claim was rejected as the regional court came to the conclusion that CDC was not the owner of the damage claims. According to the regional court, this resulted, inter alia, from the invalidity of the assignments by the damaged companies to CDC due to a violation of *bonos mores*. The court reasoned that the primary aim of the assignments was to deprive the defendants of the possibility to claim their legal costs in case of a loss of CDC. In comparison to the damaged companies, CDC was only a special purpose vehicle without assets. The assignors had no obligation to provide CDC with further capital injections. Therefore, the regional court qualified the assignments as abusive and *contra bonos mores* because their purpose was to shift the risk of having to bear the costs of the proceedings unilaterally to the defendants. This decision was confirmed by the Higher Regional Court in 2015 and the judgment is final. This judgment does not exclude the bundling of claims by assignment in general. However, there are no clear lines as to the funding required for a company to enforce claims in court. There are several ongoing actions brought into court by CDC or similar companies.

Apart from the bundling of claims, Sections 33(2) No. 1 and 34a GWB allow consumer associations and other professional associations to request cease-and-desist orders and to request that the infringer has to transfer any financial gains it obtained from the infringement to the federal budget (*Vorteilsabschöpfung*). This possibility was extended with the last amendment to the GWB with effect from June 30, 2013.



B. Conduct of proceedings and costs

5. Burden of proof

In general, the claimant has to prove the infringement of competition law, the individual damages suffered, and the causal link between the two.

Where a final decision of a national competition authority in any Member State or a final decision of the European Commission has identified an infringement, German courts are bound by such finding so that no further proof is necessary regarding the existence of an infringement (Section 33(4) GWB). This rule is much wider than in other jurisdictions, in not being limited to the decisions of the German authority/European Commission. It also applies to infringements that took place prior to the coming into force of Section 33(4) GWB (i.e., prior to July 1, 2005), but only if a final decision of the competent competition authority has been rendered after July 1, 2005.

6. Joint and several liability of cartel participants

Cartel members/parties to an anti-competitive agreement or arrangement are jointly liable for all damages caused by an infringement of Section 1 GWB or Article 101 or 102 TFEU (Section 830(1) BGB). Hence, according to Section 421 BGB, each claimant (“obligee”) may at his discretion demand full or part performance from each of the potential defendants (“obligors”). This rule was confirmed explicitly by the German Supreme Court in June 2011.

In terms of civil proceedings, each claimant may sue any member of the cartel separately or sue all or some of them at once (Section 59 and 60 ZPO). If more than one cartel member is sued, the court generally does not need to apportion the damages awarded to each individual defendant. This is due to the fact that each defendant will be liable for the full damages granted anyway (Section 421 BGB). It is up to the defendants to apportion the damages granted to the claimants among themselves.

The ZPO does not allow a defendant who is exposed to joint and several liability to directly sue other members of the cartel and thus force them to become co-defendants. However, according to Sections 72 et seq. ZPO, a defendant can issue a third party notice to any other person who might be held liable by way of recourse (e.g., on the basis of joint and several liability of joint tortfeasors). As a result of such third party notice, the third party is free to join the lawsuit in support of any party and any findings of the court against the defendant will be binding against the third party in case of later recourse proceedings initiated by the defendant, provided that the third party could have joined the lawsuit and could have argued against such findings in the main lawsuit.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

The ZPO provides for five different types of evidence that may be used, either in combination or separately, in order to prove the factual basis relevant for deciding the case. These are as follows: (i) statement of an expert (Section 402 et seq. ZPO); (ii) legal inspection (Section 371 et seq. ZPO); (iii) hearing of the parties (Section 445 et seq. ZPO); (iv) documentary evidence (Section 415 et seq. ZPO); and (v) hearing of witnesses (Section 373 et seq. ZPO).

The burden of proof also requires the claimant to make the respective evidence available to the court (e.g., by providing the contact details of a witness or by presenting the documentary evidence); procedural discovery (as per the US or English model of litigation for instance) does not exist.

As regards documentary evidence, the claimant may ask the court, by way of reasoned submissions, to oblige the defendant (or a third party who has a certain document to hand) to present it to the court. This is possible if the document is necessary for deciding the case (Sections 422, 428, 142 ZPO). In contrast to procedural discovery in, for example, the US or England and Wales, this does not provide for “discovery” of facts that are not already known to the claimant and thus need to be investigated.

Rather, it is limited to simply overcoming the mere fact that a particular document relevant to the case is not in the possession of the claimant. Thus, the claimant has to give a detailed explanation as to: (a) the evidence that is contained in the document; (b) the facts that will be proven by that document; (c) the place where the document is located and the responsible person; and (d) the document's relevance to the ultimate decision. Hence, in most cases this procedural option will not be relevant since the claimants are not in a position to provide the detailed information required for a reasoned submission. However, in cases where the claimants have been granted access to the files of a responsible competition authority, the position may be different. In any event, it can be expected that the number of documents affected by this procedural possibility is limited.

In terms of legal privilege, it should be noted that the defendant has to provide the document requested by the court even if the relevant documents are part of his correspondence with his external attorney. This is because there is no general concept of legal privilege in the ZPO in Germany. In addition, third parties are also generally obliged to provide documents upon the request of the court unless they can claim a right to refuse to give evidence (cf. Section 142(2) ZPO). Attorneys do not need to provide documents and may also refuse to appear as a witness. The position may be similar with respect to officials of the competition authorities, at least as regards those facts that do not fall under the claimant's right of access to the file and records (see below). However, the situation will be different should the claimant have the attorney's document already; if so, the claimant is allowed to present it to the court unless it has been obtained through illegitimate means.

8. Pre-action disclosure

German law does not provide for pre-trial or procedural discovery (this is one of the reasons why there is no underlying concept of legal privilege). However, potential claimants may be able to gather evidence to substantiate their damages claims in one or more of the following ways:

- (i) After an EU investigation is concluded, potential claimants may apply for access to the file of the European Commission (cf. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents – the “Transparency Regulation”).
- (ii) If the FCO has been involved in an investigation, potential claimants may apply for access to the files and records after conclusion of the investigation (under Section 406e of the German Code of Criminal Procedure, which is applicable to cartel investigations). In deciding whether access has to be granted and, if so, to what extent, the FCO has to consider the conflicting interests of the parties. The decision of the FCO may be appealed. Taking into account the reasoning of the European Court of Justice in the *Pfleiderer* case, the Local Court of Bonn, which is competent to rule on an appeal against a decision of the German FCO, decided in January 2012 that a potential claimant has the right to obtain access to the file and records as well as to the seized documents, but that leniency applications, internal notes of the investigating authority or business secrets need not be disclosed. A similar decision was made by the Higher Regional Court of Düsseldorf in August 2012.
- (iii) The Regional Court of Hamm had to decide in a special case in November 2013. In this case, the civil court with a pending damage claim requested access to the files of the public prosecutor (including the leniency applications). The access was granted under the following conditions:
 - (a) Criminal proceedings had been initiated against the cartel members.
 - (b) The court itself (eventually on request of the claimant) has to seek access to the files of the public prosecutor by specifying the facts that should be proven by the documents and the nature of the documents. It is not sufficient to request the court to



access the file as a whole, as this would be rather qualified as “discovery” which is not permitted under German procedural rules.

Once the civil court has received the requested files, it has to decide on a case-by-case basis whether it can use them as a basis for its decision and make them available to the claimant. This assessment has to take into account the constitutional right of the claimant for effective legal protection and the aim to reduce cartel infringements, but also the constitutional right of the defendant regarding its business secrets. The seniority of the concerned data can especially play a decisive role. Therefore, the court has to apply the considerations stated in the *Pfleiderer* case.

- (iv) Potential claimants might attempt to use information that they received in discovery proceedings before foreign courts in a competition litigation action in Germany. It is unclear whether the German courts are allowed to accept such documents as evidence in German competition litigation.

9. Average length of time from issue of claim to judgment in Germany

Depending on the complexity of the case, a claim for damages will take between one and four years in the first instance. The period may be longer if complex substantive issues need to be examined.

An appeal will generally take another one to two years. A further appeal to the German Supreme Court, if admitted, will add another two or three years. For the time being, the risk of proceedings going before all three courts is high as many legal and procedural questions in the field of private competition litigation are not yet decided. In view of the limited case law on private competition litigation proceedings in Germany to date, a very rough estimate for the average length of proceedings might be four to nine years from the first instance up to the Supreme Court.

10. Average cost from issue of claim to judgment in Germany

The costs likely to be incurred in pursuing or defending a claim for damages will depend on the value and the complexity of the case and the number of instances in which it will be tried. The costs (legal and court fees) generally have to be borne by the losing party but, as regards legal fees, only to the extent such costs are based on the statutory fee schedule. The remaining costs have to be borne by each party itself.

11. Third party/alternative funding of litigation

The ZPO does not prohibit the funding of litigation by third parties. Moreover, it may even be possible to file a representative action if: (i) the rights owner and the defendant agree; and (ii) the representative has a valuable interest in claiming a right. Also, as noted above, it appears possible to sell and assign rights to third parties merely for the purposes of pursuing a combination of claims. However, it has not yet been settled how a sufficient financing for pursuing a combination of assigned claims can be secured in the interest of defendants.

12. Alternative methods of dispute resolution

If the private competition litigation arises from prior contractual relations and if the parties had already entered into an arbitration agreement that extends to such a dispute, arbitration proceedings are possible. Arbitration proceedings could also take place if the parties concluded an arbitration agreement after a dispute had arisen, but this rarely ever happens. However, the parties have to be aware that an arbitral award might later be put under the strict scrutiny of a German state court as the German and European competition rules are considered part of the German public policy that must be observed, even in arbitration. Mediation is also an option in Germany at any point, as is settlement through any other means.

C. Relief

13. Availability of damages and quantification

Affected market participants have the right to sue for damages. Each cartel member, whether such cartel member has acted deliberately or negligently, is obliged to compensate any loss that an affected person suffered as a result of the infringement (Section 421 BGB).

According to Section 249 et seq. BGB, damage claims are restricted to the compensation of actual loss, i.e., the claimant has to be put into the (hypothetical) situation the claimant would be in if the infringement of competition law had not happened (known as “compensation by restoration of the previous situation”). Thus, in private competition law proceedings, claimants can only claim compensatory damage. This includes the compensation for lost profits (Section 252 BGB).

As regards the determination of damages, it should be noted that damages to be compensated by a cartel member/infringer are to be calculated according to the “difference criterion” (*Differenzhypothese*), which is similar to the “but for” rule in other jurisdictions. In line with this principle, the financial situation of the claimant after the infringement has to be compared with the financial situation the claimant would have been in if the infringement had not happened (the “counterfactual”). Thus, for example, the cartel price has to be compared with the competitive selling price, i.e., the price that would have been achieved under competitive conditions. As a first indication of the loss suffered, the court may compare the turnover actually realized by the cartel member against the hypothetical turnover that would have been generated in case of lawful behavior of the cartel member, i.e., pursuant to competitive selling prices.

As determining the competitive selling price may be very difficult, Section 287 ZPO provides a mechanism by which the judge can estimate the amount of damages based on the merits of the case. German courts have regularly applied this provision in private competition litigation and awarded an estimated amount of damages to the claimant. The German Supreme Court generally approved this practice, as long as sufficient facts have been established that form a reliable basis for such an estimate.

Another aspect that could make it easier for the claimant to pursue damages claims before the German courts is Section 33(3) GWB. According to this provision, even if a claimant was able to pass on the cartel prices to his customers by adding its own margin to the cartel price, the claimant is still considered to have suffered damages.

However, this rule does not exclude the so-called “passing-on defense” in practice. When it comes to the actual calculation of the damages suffered, the court may still apply the so-called “set-off of benefits” rule, a legal concept that may result in a similar outcome as the passing-on defense. Similar to the passing-on defense, the burden of proof for the conditions under which the set-off of benefits applies lies with the defendant and not the claimant. Nevertheless, compared to the passing-on defense, the criteria are much stricter and thus, are less likely to be proven. According to the common practice of the courts, the applicability of this rule requires the following (apart from the causal link that is also required by the passing-on defense): (i) its application does not interfere with the purpose of awarding damages; (ii) it does not unacceptably burden the affected market participant; and (iii) it does not lead to an unjustified relief of the originator of loss. The German Supreme Court confirmed in a judgment of June 2011 that, while “set-off benefits” are a valid defense, the defendant will have to show in detail that the claimant actually had passed on a cartel price to his customers due to the individual market conditions. The fact that the defendant typically does not have access to information about the market conditions between the claimant and his customers only reduces the burden of proof for the defendant in limited cases, provided that the passing-on of the cartel price has been shown to be sufficiently likely.



At least for infringements that took place on or after July 1, 2005, Section 33(3) GWB entitles an affected person to claim interest from the defendant starting at the occurrence of the damage. The default rate of interest per year is 5% above the basic rate of interest (Section 288(1) BGB). The basic rate of interest is periodically adjusted by reference to the rate of interest for the most recent main refinancing operation of the European Central Bank (Section 247(1) BGB).

14. Punitive and exemplary damages

German law does not allow for punitive or exemplary damages.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Generally, two types of interim measures might be relevant in private competition litigation. The court may grant an interim injunction to: (i) maintain the status quo (e.g., to cease further damages); or (ii) freeze assets of the defendant to ensure the enforcement of a potential judgment ordering payment of damages. While interim injunctions can be obtained in both cases in *ex parte* proceedings (on the basis of affidavits evidencing a valid substantive claim as well as the urgency of the matter), freezing injunctions are only rendered in practice if it can be proven that the other side is just about to leave the country or remove its assets. As a rule, interim injunctions will not be granted with respect to the payment itself.

D. Emerging trends

In Germany, as throughout Europe, the enforcement of civil damages claims for breach of competition law is being strengthened in many ways. The German legislator facilitated the enforcement of private damages claims with the reform of the GWB by the 7th Amendment, which applies to infringements that took place on or after July 1, 2005. Since then, and as described above, the GWB provides several incentives for claimants, for example: (i) final decisions of cartel authorities throughout the EU have a binding effect before the German civil courts; (ii) interest has to be paid from the date of occurrence of the damage; and (iii) the limitation period stops running as long as investigations proceed.

The 8th Amendment of the GWB, which came into force on June 30, 2013, i.e., extended the possibilities of consumer associations and other professional associations to request cease-and-desist orders and to request that the infringer has to transfer any financial gains it obtained from the infringement to the federal budget (*Vorteilsabschöpfung*).

Additionally, public awareness of cartels and potential damage claims has been raised. German courts have repeatedly demonstrated their willingness to follow the legislator's intention to strengthen the claimant's position and have rendered several damage awards in favor of claimants, mostly based on an assessment of damages pursuant to Section 287 ZPO.

In June 2011, the German Supreme Court issued its first main decision on the calculation of damages in private competition litigation, which confirmed the right of indirect purchasers to claim damages against any member of a cartel and recognized the defense of "set-off benefits," for which the defendant generally has the burden of proof. This decision is a landmark case that set the rules of private competition litigation in Germany for the future. Together with the decisions on access to files and records (including leniency applications) of public authorities on cartel members, the legal framework for such cases in Germany is gaining more and more shape.

Hong Kong

David Fleming and Stephen Crosswell

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in Hong Kong

Private enforcement under the Hong Kong Competition Ordinance

Hong Kong's new cross-sector competition regime came into force on December 14, 2015. The Hong Kong Competition Ordinance ("CO") prohibits agreements, arrangements or concerted practice that has the object or effect of harming competition (the "First Conduct Rule"), and abuses of substantial market power (the "Second Conduct Rule"). The Merger Rule, which prohibits mergers that substantially lessen competition, currently only applies to mergers involving telecommunication carrier license holders. The First and Second Conduct Rules apply to conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong, even where the conduct takes place outside of Hong Kong and/or involves non-Hong Kong companies.²⁸³

Two enforcement authorities were created under the CO: the Hong Kong Competition Commission ("HKCC") and the Hong Kong Competition Tribunal (the "Competition Tribunal"). The HKCC has been established to investigate and bring proceedings in relation to alleged violations of the CO. The Competition Tribunal is a specialist division within the Hong Kong High Court, with primary responsibility to hear competition cases and issue decisions on violations, penalties and other methods of relief.

Under the CO, there are no stand-alone rights of action. However, persons who have suffered loss or damage as a result of an act that has been determined to be in contravention of the CO may bring follow-on actions in the Competition Tribunal to claim damages and other relief.²⁸⁴ The Court of First Instance does not generally have jurisdiction to hear competition law claims (unless, for example, a claim is transferred from the Competition Tribunal).

A contravention of the First and Second Conduct Rules (which can give rise to a follow-on action for damages) is deemed to have arisen in the following circumstances:

- (i) following a determination by the Competition Tribunal;
- (ii) following a determination by the Court of First Instance, in any proceedings transferred to it by the Tribunal in consideration of the interests of justice;
- (iii) following a determination by the Court of Appeal, on an appeal from a decision of the Tribunal or the Court of First Instance, or the Court of Final Appeal, on an appeal from the Court of Appeal; or
- (iv) as a result of an admission in a commitment that has been accepted by the HKCC.²⁸⁵

A right of follow-on actions is not available for contravention of the Merger Rule.

2. Applicable limitation periods

An application for pecuniary penalties or other orders by the HKCC to the Competition Tribunal, in relation to a contravention of the First or Second Conduct Rule, must be brought within five years

²⁸³ CO, Section 8 and Section 23.

²⁸⁴ CO, Section 110.

²⁸⁵ CO, section 110(3)



after the day on which the contravention ceased or the HKCC became aware of the contravention, whichever is the later. For contravention of the Merger Rule, an application must be made within six months after the day on which the merger was completed or the HKCC became aware of the merger, whichever is the later.²⁸⁶

A follow-on action may not be brought during the period in which an appeal may be made (including the period before the appeal is determined if such an appeal is made) unless the Court of First Instance or the Tribunal, on the application of the plaintiff seeking to bring a follow-on action, permits it.

The statute of limitations for follow-on actions in Hong Kong is three years from the earliest date on which the action could have been commenced.²⁸⁷ The limitation period will start to run as long as a final determination has been made or the relevant period for making an appeal expires – regardless of whether the plaintiff actually knows of the breach.

3. Appeals

In Hong Kong, the Competition Tribunal is a superior court of record established in accordance with the CO, with the same powers as the Court of First Instance.²⁸⁸ As such, decisions of the Competition Tribunal can be appealed to the Court of Appeal. Court of Appeal decisions can be appealed to the Court of Final Appeal. In Hong Kong, the Court of Final Appeal is the highest appellate court, which has jurisdiction in respect of matters conferred on it by the Hong Kong Court of Final Appeal Ordinance (Cap.484) and by certain other ordinances. It hears appeals both on civil and criminal matters from the High Court (the Court of Appeal and the Court of First Instance).

The Court of Final Appeal will hear civil appeals at its discretion from any final judgments of the Court of Appeal if the matter involved in the appeal is of great general or public importance, or otherwise ought to be submitted to the Court of Final Appeal for decision. Leave applications in the Court of Final Appeal are heard by an appeal committee of the court, generally comprising three judges.

Typically, when hearing an appeal, the Court of Final Appeal is composed of a bench of five, comprising the Chief Justice or other presiding judge, three permanent Hong Kong judges and one non-permanent judge from Hong Kong or another common-law jurisdiction.

Generally, an appeal is not a re-hearing, and fresh evidence is rarely allowed. The appellate court will rarely interfere with a decision based on the exercise of the lower court's discretion or with a trial judge's view of the facts based on his perception of the witnesses, unless that exercise of discretion or perception was clearly wrong or involved an error of principle.

The Court will consider authority from other common-law jurisdictions, including England, as persuasive, although they are not binding. The court is developing its own jurisprudence having regard to legislative background and other circumstances affecting Hong Kong.

4. Availability of class actions in competition cases in Hong Kong

Class actions are not available in Hong Kong.

However, the Competition Tribunal may consolidate two or more proceedings or pending applications if:²⁸⁹

- (i) the proceedings concern common questions of law or fact;

²⁸⁶ CO, Section 94.

²⁸⁷ CO, Section 111.

²⁸⁸ CO, Section 134.

²⁸⁹ Competition Tribunal Rules, Rule 9.

- (ii) the reliefs sought are in respect of, or arise out of, the same act or a series of acts;
- (iii) the reliefs are sought against the same defendant or respondent; or iv) it is desirable to make a consolidation for other reasons.

The consolidation of proceedings or pending applications can be made on such terms as the Competition Tribunal thinks just. The Competition Tribunal may decide to determine the proceedings and applications at the same time, one after another and/or may stay one proceeding or application until after the determination of another.²⁹⁰

In addition, the Competition Tribunal may, on the application of a person, permit the person or another person to be joined in the proceedings, in addition to, or in substitution of, any party to the proceedings.²⁹¹

B. Conduct of proceedings and costs

5. Burden of proof

The general rule is that the party making the claim bears the evidential burden of proof.

The CO does not establish the standard of proof that should be applied in competition cases. There is likely to be a distinction between:

- (i) proceedings brought by the HKCC for a determination as to whether there has been an infringement of the CO (as well as potentially for pecuniary penalties and other remedies); and
- (ii) follow-on actions brought subsequently by private claimants.

In relation to proceedings brought by the HKCC for the determination of whether an infringement has occurred, there remains uncertainty as to whether the appropriate standard is civil (whereby the HKCC would need to prove its case on a balance of probabilities) or criminal (in which case, the HKCC would be required to meet the more onerous standard of proving its case beyond a reasonable doubt).

On January 29, 2016, the Court of First Instance handed down its judgment in *Television Broadcasts Limited v Communications Authority*.²⁹² The judge was the Honorable Godfrey Lam, who presides as President of the Competition Tribunal. This was an appeal by TVB against a finding of the Communications Authority that TVB had breached the competition-related provisions of the Broadcasting Ordinance. TVB claimed that, inter alia, the matter constituted a criminal complaint. The Court of First Instance disagreed, finding that the complaint was not of a criminal nature and therefore did not attract the more onerous rules of evidence applicable to criminal cases. However, the judge's reasoning appears to be driven in part by the fact that the regulations concerned a narrow class of persons (broadcasting licensees) and not the public at large.

It remains to be seen how the Competition Tribunal (and in all likelihood the Court of Appeal/Court of Final Appeal) will approach this question in the context of the CO.

Follow-on actions are likely to be governed by the civil standard (balance of probabilities), consistent with other civil litigation.

²⁹⁰ Competition Tribunal Rules, Rule 9.

²⁹¹ Competition Tribunal Rules, Rule 22.

²⁹² *Television Broadcasts Limited v Communications Authority (first respondent) and the Chief Executive in Council (second respondent)* HCAL 176/2013.



The CO provides no evidential presumptions in relation to damage claims. There is, for example, no presumption that cartels will cause harm to individual purchasers.

6. Joint and several liability of cartel participants

There is no legal basis to claim joint and several liability under the CO. However, the Competition Tribunal has the same powers as the Court of First Instance, including the power to impose liability on a joint and several basis where appropriate. It remains to be seen how and whether the Competition Tribunal will use this power in competition cases.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Rules of evidence

Save for instances where the HKCC has sought to impose a penalty against either an undertaking or an individual, the Competition Tribunal is not bound by the existing rules of evidence.²⁹³ Therefore, the Competition Tribunal may receive and consider any relevant evidence or information, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would otherwise be admissible in a court of law. In this regard, hearsay evidence may be admissible in front of the Competition Tribunal. The CO is silent as to the rules of evidence that apply where the HKCC has sought a penalty.

Privilege

The generally applicable rules governing privilege in Hong Kong apply in competition cases.²⁹⁴ Privileged communications are protected from disclosure.

In Hong Kong, communications in the context of providing legal advice or in anticipation of litigation are protected by privilege. This extends to legal advice provided by external lawyers and in-house lawyers, provided that they are acting in their capacity as legal advisers (and not providing commercial or other advice).

Self-incrimination

Under the CO, there is no protection against self-incrimination. If the HKCC exercises its powers to require a person or a company to produce any document or specified information, that person or company is not excused from supplying it on the basis that it might incriminate or expose that person or company to proceedings where a pecuniary penalty or financial penalty is sought.²⁹⁵

However, the HKCC cannot use any incriminating statement made by that person or company under compulsion against the person or company that made the statement in proceedings where it seeks a financial penalty before the Competition Tribunal.

Confidentiality

The HKCC is required to establish and maintain adequate procedural safeguards to prevent the unauthorized disclosure of confidential information. This is defined in the CO as including information that has been provided to or obtained by the HKCC in the course of, or in connection with, the performance of its functions, which relates to: (i) the private affairs of a natural person; (ii) the commercial activities of any person that are of a confidential nature; and/or (iii) the identity of any person who has given information to the HKCC. Unauthorized disclosure of confidential information

²⁹³ CO, section 147.

²⁹⁴ CO, section 58.

²⁹⁵ CO, section 45.

by a HKCC member or employee is a criminal offence under the CO, punishable by a maximum fine of HKD1 million and up to six months' imprisonment.²⁹⁶

In Tribunal proceedings, a party may apply to the Competition Tribunal for an order for confidential treatment in respect of the whole or part of a document filed or intended to be filed, served or otherwise disclosed in relation to any proceedings.²⁹⁷ The process for making confidentiality claims is set out in Practice Direction 2 to the Competition Tribunal Rules.²⁹⁸ Different procedures apply depending on whether parties agree on the request of confidentiality.

Parties are encouraged in Practice Direction 2 to agree among themselves on confidentiality issues. Where parties failed to reach an agreement, the requesting party must show the Competition Tribunal that the information has a genuine need to be protected and the persons or classes of persons against whom confidentiality is asserted are specific. Practice Direction 2 also makes it clear that confidentiality cannot be claimed for the entire or whole sections of a document if sufficient protection can be achieved through limited redactions.

The Competition Tribunal has the discretion to refuse or approve the application to the extent and on terms as it thinks fit. In deciding on such an application, the Competition Tribunal must have regard to all the circumstances of the case, the public interest, the legitimate business interests of the undertaking, the interests of the natural person and the interests of justice.

In addition to requesting the confidential treatment of documents, parties can also request the Competition Tribunal to hold hearings in private or exclude confidential information from its publicly available judgments and decisions.

8. Discovery and inspection of documents

There is no automatic right to discovery in proceedings before the Competition Tribunal, including in follow-on actions. A plaintiff may apply to the Competition Tribunal for an order for discovery and production of documents relating to the proceedings from a person (a party to the proceedings or a third party, including the HKCC) for inspection.²⁹⁹ In considering such applications, the Competition Tribunal will take into account all the circumstances of the case, including whether there is the need to secure the furtherance of the purposes of the CO as a whole, whether the information contained in the document sought to be discovered or produced is confidential, the balance between the interests of the parties and other persons and the necessity for the fair disposal of the proceedings.³⁰⁰ The Competition Tribunal may decide on such applications with or without a hearing. Where the CO and the Competition Tribunal Rules make no provision, the Rules of the High Court apply.

9. Average length of time from issue of claim to judgment in Hong Kong

The CO only came into force on December 14, 2015. To date, there have not been any cases brought before the Competition Tribunal (by HKCC or third parties). It remains to be seen how long cases will take to run. Generally, in Hong Kong, cases in the courts will take a number of years to get to trial. The length of a trial will depend on the complexity of the issues and the number of witnesses. Hearings may run for days, weeks or months, depending on these factors.

10. Average cost from issue of claim to judgment in Hong Kong

Hong Kong has a sophisticated common law legal system with robust court processes. The cost of running cases in Hong Kong is similar to that of other similar jurisdictions, such as London.

²⁹⁶ CO, section 125.

²⁹⁷ Competition Tribunal Rules, Rule 37.

²⁹⁸ <http://legalref.judiciary.gov.hk/doc/npd/eng/CTPD2.htm>

²⁹⁹ Competition Tribunal Rules, Rule 24.

³⁰⁰ Competition Tribunal Rules, Rule 24.



There is scope to recover some of these costs if successful in the proceedings. Pursuant to Section 144 of the CO, the Competition Tribunal has the same jurisdiction, powers and duties as the Court of First Instance in respect of its practice and procedure, including in respect of costs. Generally, the court in Hong Kong has discretion in ordering the reimbursement of costs and the amount of such costs. The unsuccessful party in proceedings is almost invariably ordered to pay the costs of the successful party. “Costs” include the fees and expenses a party is obliged to pay his own lawyers and experts. The amount allowed is usually assessed on a “party-party basis”, that is, all costs necessarily and properly incurred for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed. The successful party rarely obtains full reimbursement for all its costs – the proportion is generally about two-thirds of the actual costs paid.

11. Third party/alternative funding mechanisms

Third party funding is generally prohibited in Hong Kong (where strict prohibitions on champerty and maintenance remain in force), but several exceptions to the common law rules are recognized. These include:

- (i) where the person funding the claim has a legitimate common interest in the outcome of the claims;
- (ii) where the claim involves “access to justice” consideration;
- (iii) a miscellaneous category of practices accepted as lawful, such as the sale and assignment by a trustee in bankruptcy of an action commenced in the bankruptcy to a purchaser for value; and
- (iv) certain insolvency proceedings.

C. Relief

12. Availability of damages and quantification

Damages are available.³⁰¹ There is no case law yet setting out the Tribunal’s approach to quantification, but it is expected that the approach in other common law jurisdictions, such as the UK, will be influential.

Under the CO, there is no stand-alone right of action. A person who has suffered loss or damage caused by a contravention of the First or Second Conduct Rule can seek damages in follow-on actions.

13. Punitive and exemplary damages

Punitive or exemplary damages are not generally available in Hong Kong. However, it remains unclear whether the Competition Tribunal is allowed to order punitive damages in excess of the actual loss or damages suffered as a result of the contravention. The CO permits the Competition Tribunal wide-ranging powers to order additional relief, discussed in further detail below.

14. Availability of interim injunctions in respect of an alleged competition law infringement

The Competition Tribunal may make an interim order, if satisfied that a person is engaged in or is proposing to engage in conduct that contravenes the CO.³⁰² Such orders may be made as the result of an application, or of the Competition Tribunal’s own volition when considered appropriate. An interim order remains in force for a period of not more than 180 days, and may be extended for a further period of up to 180 days.

³⁰¹ CO, Schedule 3, section 1(k).

³⁰² CO, section 95.

15. Other types of relief

The Competition Tribunal has the power to impose pecuniary penalties of up to 10% of turnover obtained in Hong Kong for each financial year in which the infringement occurred, up to a maximum of three years. In addition, directors may also be disqualified for a period of up to five years if their conduct contributed to the company's infringement or if they had reasonable grounds to suspect the existence of infringement and took no steps to prevent it, or if they did not know but should have known of the company's infringement.³⁰³

Persons³⁰⁴ that have contravened or been involved in a contravention may be ordered to pay a pecuniary penalty of any amount the Competition Tribunal considers appropriate, having consideration to: (i) the nature and extent of the infringing conduct; (ii) the loss or damage caused by the conduct; (iii) the circumstances in which the conduct took place; and (iv) whether the person has previously been found to have contravened the CO.

Individuals who fail to comply with a requirement or prohibition imposed by the HKCC may be subject to a fine of up to HKD200,000 and imprisonment of up to one year. Individuals who obstruct an investigation may be subject to a fine of up to HKD1 million and imprisonment of up to two years.

In addition, the CO gives the Competition Tribunal the power to institute a wide range of other orders for contravention of the CO. This includes³⁰⁵ an order restraining or prohibiting a person from engaging in any conduct that constitutes a breach of the CO; an order prohibiting conditions to the supply of goods or services; an order to void an agreement or requiring the parties to an agreement to modify or terminate that agreement; an order requiring any person or class of person to be given access to or the right to use specified goods, facilities or services; an order prohibiting or requiring disposition of any specified property; an order prohibiting a person from exercising voting rights; or an order requiring any person to pay to the government or to any other specified person if the Tribunal considers appropriate.

³⁰³ CO, sections 101-103.

³⁰⁴ Person is not defined in the CO. It remains to be seen whether these provisions will be used to seek pecuniary relief against individuals.

³⁰⁵ CO, schedule 3.



Hungary

Zoltán Barakonyi and András Horváth

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in Hungary

Any natural or legal person that qualifies as an “undertaking” (i.e., an economic enterprise) can be sued in the Hungarian civil courts for damages resulting from an infringement of Articles 101 and 102 TFEU and/or Chapters IV and V of the Hungarian Competition Act (“HCA”). Private enforcement actions can be brought pursuant to the general rules of civil procedure and the special rules contained in the HCA.

Private enforcement actions must be brought in the civil courts. There are no specialist courts or sections of courts to hear actions for damages on the basis of a breach of competition law. Depending on the value of the claim, cases can be heard either by the local courts or the regional courts (such as the Budapest-Capital Regional Court).

A prior finding of an infringement is not a precondition to bringing a claim for damages. However, the HCA requires that the court notifies the Hungarian competition authority, the Competition Office, if competition laws are to be applied in pending civil litigation. If the Competition Office informs the court in response to such a notice that it has launched an investigation in that particular case, the court must suspend its procedure until a final and binding decision has been made by the Competition Office. The decisions of the Competition Office are binding on civil courts insofar as the decision establishes the infringement.

2. Applicable limitation periods

In respect of damages claims based on an infringement of competition law, the limitation period runs for five years from the date on which the damage was incurred.

If the claimant is somehow prevented from enforcing his rights (for example, where the event causing him damage is kept secret so that he is not aware of the damage suffered), the limitation period is automatically extended and expires one year after the obstacle to enforcement has been removed. So, the limitation period will be extended for a secret cartel until such time as the victims become aware of the damage caused (or reasonably should have done so, for example when the case becomes public or an infringement decision is published).

3. Appeals

Decisions of the local courts and the regional courts in Hungary are subject to appeal on the basis of fact and of law. Appeals against decisions of the local courts are heard by the regional courts, while appeals from the regional courts are heard by the Regional Courts of Appeal.

The Regional Courts of Appeal may refer a case back to the court of first instance if serious procedural errors are identified or if it considers that further evidence is required from the parties in order to address the case, the consideration of which would put a significant burden on the Regional Courts of Appeal. Otherwise, the Regional Courts of Appeal may reach a decision on the merits of the case.

The legal remedy available against final and binding judgments of the second instance courts is “extraordinary judicial review.” This is only available for appeals based on errors of law. Extraordinary judicial review cases are heard exclusively by the Curia (the supreme court of Hungary). Retrial is also possible in limited cases.

4. Availability of class actions for infringement of competition law and/or damages in Hungary

There are no class actions, as such, under Hungarian law. Certain types of collective action are available, some of which may result in an award of damages in competition law cases.

Firstly, two or more claimants may commence a joint action if:

- (i) the subject matter of the claim is a joint right or obligation that can only be judged in one procedure, or if the judgment would affect the joint claimants irrespective of whether one did not participate in the claim;
- (ii) the claimants' claims are based on the same legal relationship; or
- (iii) the claimants' claims have similar legal and factual bases and the same court has jurisdiction over all of the defendants.

Secondly, pursuant to Section 92 of the HCA, where an infringement falling within the competence of the Competition Office caused harm to a large number of consumers, it may bring a civil law claim against the undertaking on behalf of consumers. The condition of such claim is that an investigation has already been launched by the Competition Office regarding the infringement (the Competition Office may request the court to suspend litigation until the end of the investigation). The objective deadline for the claim is three years following the infringement. However, the duration of the investigation shall be disregarded. This action can be brought on behalf of an unidentified number of consumers, provided it is possible to establish their individual identities (i.e., they are a certifiable class). If the claim is successful, the court will require the defendant to comply with any order made, such as an award of damages, and will determine which consumers are entitled to enforce it. Such an action does not affect the right of consumers to commence proceedings against the defendant in their own right. To date, no such claims have been brought in relation to an infringement of competition law.

Finally, it is also possible for claimants to assign their damages claims to another entity, which will enforce them in its own name and can retain any damages recovered.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant bears the burden of proving the infringement and, if damages are claimed, that this infringement caused loss. There is no formalized test for the standard of proof as such – the party bearing the burden of proof must discharge its burden of proof in a way that enables the court to reach a firm conviction on the claim. In respect of cartel cases, the burden of proving that an agreement falls within Article 101(3) TFEU exemption or the Hungarian equivalent, Section 17 of the HCA, is on the defendant.

Claimants seeking damages are required to prove, under the general rules of private law, the existence of an infringement, causation and loss. The claimant has to prove that it suffered loss as a result of the defendant's conduct, i.e., that the loss would not have occurred in the absence of the infringement.

Where a prior decision of the Competition Office or the European Commission has already established an infringement of competition law, the court hearing the follow-on action(s) must accept the infringement as established. Thus, in a follow-on claim for damages, the claimant is only required to prove causation and loss.



6. Joint and several liability of cartel participants

Joint and several liability for competition law breaches exists as between those responsible for the breach. Thus, as cartels are collective infringements, members of the cartel are jointly and severally liable for damages caused. This means that a claimant may sue any and all members of the cartel for all damages caused by the infringement. Typically claimants would sue all members of the cartel in one lawsuit. If the claimant's action is successful, the court would fix the amount of damages and confirm the joint and several liability of the defendants. Claimants can then collect the full amount of damages from any and all defendants.

"Contribution" is available among defendants. Each is liable for damages according to the proportion of its fault. If this cannot be established, the liability of the defendants is according to their involvement. If even this cannot be established, liability is shared equally among the defendants. There is no precedent as yet in the Hungarian courts as to how the issue of contribution might be approached in the context of a competition damages case.

Notwithstanding the above, the court may depart from the general rule of joint and several liability and oblige each defendant to pay damages in proportion to its contribution to the loss if: (i) the claimant contributed to the loss; or (ii) this is otherwise justified by the special circumstances of the case.

Where only one or some potential defendants are sued, the named defendant or defendants may request that other parties are joined to the case. If those parties accept their joinder to the lawsuit, they (as intervening parties) may support the position of the defendant or defendants who were originally parties to the lawsuit. However, the assessment of the legal relationship between the defendant or defendants who were originally parties to the lawsuit and the newly joined interveners shall not be subject to this very lawsuit. The parties who were requested to join the case may deny the joinder without explanation. Another scenario is when the defendant or defendants raise(s) in the lawsuit that further parties should be involved in the case as defendants. However, it is in the sole discretion of the claimant(s) whether to extend the claim also to these parties.

Notwithstanding the above, the HCA contains an important concession to parties who are granted immunity from fines by the Competition Office. Although they remain jointly and severally liable to pay damages resulting from an infringement, they may refuse to pay damages provided that the claimants are able to collect those damages from any other party to the infringement. Additionally, the HCA provides that the courts must suspend proceedings initiated against a successful immunity applicant until the decision of the Competition Office is final against all cartel members (i.e., until any legal remedies relating to the decision are exhausted). These rules have not been invoked yet.

The wording of the HCA suggests that the above benefits of leniency are only available to parties who received immunity from the Competition Office. However, on the basis of Community law, parties receiving immunity from the European Commission may be able to claim the same benefits. In any case, the concession granted by the HCA from joint and several liability is only possible if the claim is decided under Hungarian civil law, as the suspension obligation only applies to Hungarian courts.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

There is no disclosure as such under Hungarian procedural law. However, a party may request that the court orders another party to produce any specific evidence it holds that is not already in the requesting party's possession.

Private claimants may also request the court to obtain documents from the Competition Office if these are not accessible otherwise. Pursuant to the Act on Civil Procedure, the Competition Office cannot refuse to transfer documents to the court and not even leniency applications or settlement submissions

are protected from transmission. Documents transmitted to the court are, however, not automatically disclosed to claimants. If a document contains business secrets, the court must seek permission from the holder of the secret before disclosing it. If the holder of the secret objects to the disclosure of its business secrets, the document (or the relevant part of the document) cannot be used as evidence. Although courts are generally free to determine under the applicable rules of the Civil Code whether a document contains business secrets, pursuant to a recent amendment to the HCA, courts have no discretion to assess the confidentiality of leniency applications and settlement submissions, which must be considered as business secrets due to a mandatory provision of the HCA. Such documents are therefore only disclosed to claimants with the permission of the party submitting it to the Competition Office.

As the first follow-on damages actions issued in Hungary are still pending final determination, and as no stand-alone actions have been brought to date, the above rules on disclosure have not yet been tested in the context of competition law litigation.

8. Pre-action disclosure

There is no pre-action disclosure under Hungarian procedural law.

9. Average length of time from issue of claim to judgment in Hungary

As the first follow-on damages actions brought in Hungary are still pending final determination, it is not possible to specify average duration to completion.

However, on average, it takes two to five years to obtain judgment at first instance on a general claim. The duration of the proceedings will depend on the complexity of the case. Competition cases can be expected to be similar.

A recent amendment to the Act on Civil Procedure obliges the courts to handle the case in an expedited manner if the value of the case exceeds HUF400 million (approx. EUR1.35 million). This amendment may speed up private enforcement litigations if the amount of the damage claim exceeds the abovementioned amount.

10. Average cost from issue of claim to judgment in Hungary

The fee charged to commence civil proceedings is 6% of the value of the claim, subject to a statutory maximum of HUF1.5 million (approx. EUR5,000).

The losing party will normally be required to pay the legal costs reasonably incurred by the successful party. Legal costs include costs reasonably incurred by the parties in connection with the dispute before proceedings were commenced or out of court, including costs relating to the production of evidence (e.g., experts' fees) and the cost of representation (e.g., lawyers' fees). Lawyers' fees are not automatically awarded in full as the court may award a reduced amount in accordance with the statutory fee schedule. However, the Hungarian courts, in light of recent court practice, tend to award higher lawyers' fees in relation to lawsuits between business entities.

11. Alternative methods of dispute resolution

There is no publicly available information concerning any arbitration procedure regarding private enforcement action in Hungary as yet. However, in theory, this route is available for competition law cases. Similarly, mediation may be involved at any stage through the agreement of all relevant parties.



C. Relief

12. Availability of damages and quantification

In civil proceedings based on a breach of Hungarian or EU competition law, damages may be awarded in accordance with the general rules of civil law. Damages are designed to restore the claimants to the position they would have been in if the breach had not been committed.

Claimants may seek to recover full damages, including interest. In principle, all pecuniary damage (actual damage, loss of profit and costs incurred in connection with reducing or diminishing the damage caused) and non-pecuniary damage suffered by the claimant are recoverable. Any fines imposed by the competition authorities are generally not taken into account when calculating the level of damages.

Private enforcement of domestic or EU competition law is not yet an established practice in Hungary and no award of damages has yet been made by the Hungarian courts. The appropriate method of quantifying damages is therefore uncertain. In general, damages are quantified by the court upon the motion of the claimant. Where quantification requires specialist economic expertise, the court may appoint experts to advise on the method of calculation and the exact amount of damages.

In order to reduce the burden associated with the quantification of damages, an amendment to the HCA introduced a rebuttable presumption that in cases involving hard-core cartels, the infringement will be assumed to result in an illegal price increase of 10%. As a result, it is likely that in practice a claimant will only need to prove causation and/or that the damage incurred exceeded the 10% level. It will then be up to the defendants to prove that either the amount of the damage was less than 10% or that the claimant did not suffer any damage at all (e.g., by invoking the passing-on defense).

The Hungarian courts would most likely consider the question of passing-on when assessing whether there is causation and/or damage. The passing-on defense should be successful, in particular, if the defendant is able to prove that the claimant's profit margins remained the same during the existence of the cartel, or that the claimant's profits remained stable or were growing as expected under normal circumstances.

13. Punitive and exemplary damages

Punitive or exemplary damages are not available in Hungary.

14. Availability of interim or final injunctions in respect of an alleged competition law infringement

Generally, two types of interim measures are available in Hungarian civil proceedings. The court may grant an interim injunction to maintain the status quo between the parties (e.g., to prevent further damage), or the court may freeze the assets of the defendant to safeguard the enforcement of a potential judgment.

Interim injunctions are available in courts pursuant to the provisions of the Hungarian Code of Civil Procedure. Claimants can obtain an interim injunction if: (i) it is necessary in order to prevent damage; (ii) it is necessary to end the infringing activity; or (iii) if the special circumstances of the claimant make it necessary and if the harm caused by the preliminary injunction does not exceed its benefits.

A decision on whether to order an interim injunction is at the sole discretion of the court. Interim injunctions have not yet been tested in private enforcement competition cases.

The Hungarian courts have the power to grant final remedies to protect the claimant against further loss. Courts may: (i) issue a cease-and-desist order to avoid further damage; (ii) order the defendant to

take any action necessary to prevent further damage; and (iii) require the defendant to provide security for any future damages. The new Civil Code also expressly provides that, in case a dominant company refuses to conclude an agreement and thereby commits an abuse, the other party may request the courts to create the agreement.

15. What other types of relief might be available to claimants in Hungary?

As noted above, claimants may bring claims for outcomes other than the reward of damages. They may also ask the court to:

- (i) issue a cease-and-desist order to avoid further damage;
- (ii) order the defendant to take any action necessary to prevent further damage;
- (iii) provide security for any future damages; and
- (iv) create an agreement in case of an abusive refusal to conclude a contract by a dominant company.

Moreover, as any agreement infringing competition law is null and void, claimants may also ask the courts to apply the legal consequences of an invalid contract and to restore the former status quo, or, if this is impossible, to declare the contract invalid until the final decision of the court.

D. Emerging trends

The first follow-on damages actions in Hungary are still pending final determination. The outcome of these cases will determine whether private damages claims may become common in the future. The Competition Office remains committed to facilitating private competition litigation. If necessary, it may initiate further legislative changes to ensure victims can effectively exercise their right to claim damages.



India

Luthra & Luthra Law Offices, India

A. Availability of civil claims

1. Scope of civil claims in India

The Central Government, State Government, Local Authority, or any enterprise or person (the “Claimant”) may make an application for compensation resulting from an infringement of Chapter II³⁰⁶ of the Competition Act, 2002 (the “Act”) or compensation for any loss suffered on account of contravention of any orders of the Competition Commission of India (“CCI”) or the Competition Appellate Tribunal (“COMPAT”).

Such claims are brought in reliance on Section 53N of the Act and are adjudicated by the COMPAT.³⁰⁷ The claims must be based upon a finding of infringement by the CCI or on an appeal finding issued by the COMPAT. Under Sections 42A³⁰⁸ and 53Q(2)³⁰⁹ of the Act, a claim for compensation can also be made before the COMPAT for any losses suffered due to the failure of an enterprise to comply with the orders of the CCI or the COMPAT. Furthermore, compensation claims are mandated to follow the procedural requirement stipulated in the Competition Appellate Tribunal (Procedure for Appeals & Applications) Regulations, 2010³¹⁰ and the Competition Appellate Tribunal (Form and Fee for filing an Appeal and Fee for filing Compensation Application) Rules, 2009.

The scope of the Act is limited to anti-competitive practices that have an effect in India. If a claimant seeks to recover damages for anti-competitive practices with an effect outside India, they must first obtain a judgment in the relevant jurisdiction as to the infringement and damage suffered and then can seek recognition and enforcement of that judgment before the Indian courts.

2. Applicable limitation periods

The Act itself does not, either by reference or incorporation, provide for any period of limitation for the purposes of filing an application before the COMPAT to adjudicate on a claim for compensation arising from findings of the CCI or from the orders of COMPAT, or under Sections 42A or 53Q(2) of the Act.

In cases where no period of limitation is prescribed, Indian Courts generally adhere to a principle known as the “doctrine of laches,” which provides that proceedings ought to have been initiated within a “reasonable period of time” and that a failure to do so results in serious prejudice and harm to

³⁰⁶ Chapter II of the Act contains the substantive provisions of law dealing with anti-competitive agreements, abuse of dominance and merger control (regulation of combinations).

³⁰⁷ The Act specifically excludes the jurisdiction of civil courts to deal with matters which the CCI or the COMPAT are empowered by or under the Act to determine.

³⁰⁸ Compensation in case of contravention of orders of Commission “42A. *Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under Sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.*”

³⁰⁹ Contravention of orders of Appellate Tribunal “53Q. (2) *Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.*”

³¹⁰ Read with Competition Appellate Tribunal (Procedure) Regulations, 2011.

the defendant and adversely impacts the ability of the defendant to defend itself. The Supreme Court of India, in *Corporation Bank & Anr. v Navin*,³¹¹ has held that:

“The transactions in question took place in the years 1979 and 1981. The difficulties in realization of the amounts due from the consignee also became clear at the time when the claim was made before the Corporation and the claim had been made as early as on December 19, 1982. The petition before the Commission was filed on September 25, 1992, which is clearly a decade after a claim had been made before the Corporation. A claim could not have been filed by the respondent at this instance of time. Indeed, at the relevant time, there was no period of limitation under the Consumer Protection Act to prefer a claim before the Commission but that does not mean that the claim could be made even after unreasonably long delay. The Commission has rejected this contention by a wholly wrong approach in taking into consideration that foreign exchange payable to Reserve Bank of India was still due and, therefore, the claim is alive. The claim of the respondent is from the bank. At any rate, as stated earlier, when the claim was made for indemnifying the losses suffered from the Corporation, the futility of waiting any longer for collecting such amounts from the foreign bank was clear to the parties. In those circumstances, **if the claim was to be made at all, it ought to have been made within a reasonable time thereafter.** What is reasonable time to lay a claim depends upon facts of each case. In the legislative wisdom, a three-year period has been prescribed as the reasonable time under the Limitation Act to lay a claim for money. **We think that period should be the appropriate standard adopted for computing reasonable time to raise a claim in a matter of this nature. For this reason, we also find the claim made by the respondent ought to have been rejected by the Commission.**” (emphasis added)

The aforementioned decision of the Supreme Court of India has been followed by the Monopolies and Restrictive Trade Practices Commission (“MRTPC”), the predecessor of the CCI, in *Director General (Investigation & Registration) v Sitapur Plywood Manufacturers Ltd. and Anr*³¹² (2001); *Triveni Borewells v Ingersoll Rand (India) Ltd.*³¹³ *Director General (Investigation and Registration) and Anr. v Thermax Private Limited*³¹⁴ and *M.S. Shoes East Limited v Indian Bank and Ors.*³¹⁵ These cases related to compensation claims and the MRTPC had held that applications were filed more than three years after the cause of action accrued (the reasonable period of limitation as considered by the Supreme Court in case of *Corporation Bank and Anr. v Navin*) and therefore rejected the claims for compensation.

3. Appeals

In terms of Section 53T³¹⁶ of the Act, appeals against any decision or order of the COMPAT lie before the Supreme Court of India. Such appeals, therefore, are to be filed within 60 days of the date of communication of the decision or order of the COMPAT. The Claimant may file an appeal before the Supreme Court of India within this time limit.

³¹¹ AIR 2000 SC 761.

³¹² MANU/MR/0100/2001.

³¹³ MANU/MR/0022/2002.

³¹⁴ I(2003)CPJ158(MRTP).

³¹⁵ I(2003)CPJ131(MRTP).

³¹⁶ Appeal to Supreme Court “53T. The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the Appellate Tribunal to them; Provided that the Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of 60 days.”



4. Availability of class actions for infringement of competition law and/or damages in India

Section 53N(4)³¹⁷ of the Act provides that, where any loss or damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the COMPAT, make an application to adjudicate on a claim for compensation, for and on behalf of, or for the benefit of, the persons so interested. In such cases, the provisions of rule 8 of Order 1 of the Code of Civil Procedure, 1908 shall apply.³¹⁸ If a person has opted out of the joint claim, such person will not be bound by the COMPAT's decision on the claim.

B. Conduct of proceedings and costs

5. Burden of proof

The Claimant will need to demonstrate the loss or damage suffered as a result of a contravention of the provisions of Chapter II of the Act or disobedience of an order/direction passed by the CCI and/or COMPAT. Therefore, a Claimant will have to discharge the burden of showing causation and the loss or damage suffered by it in order to recover compensation.

The Act is silent on the standard of proof required in these cases. However, for civil claims such as these, the standard applied should be “on the balance of probabilities.”

6. Joint and several liability of cartel participants

The Act does not recognize joint and several liability of cartel participants. Under the Act, a claim for compensation requires the applicant to demonstrate the loss or damage suffered by it on account of an enterprise contravening Chapter II.

Section 52N(3) is clear that the COMPAT may direct an enterprise to compensate the applicant for the loss or damage caused to the applicant as “a result of any contravention of the provisions of Chapter II having been committed by such enterprise” (emphasis added).

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Any person filing an application before the COMPAT to adjudicate on a claim under Section 53N will need to show the loss or damage suffered as a result of a contravention of the provisions of Chapter II or on account of any contravention of an order of the CCI or the COMPAT (as the case may be).

Consequently, a claimant must produce evidence in support of its claim for compensation including, relevant documents/witnesses, etc.

There is no duty of disclosure upon infringers but, in the event that a claimant intends to rely on a particular document that is in the possession of the defendant or any third party, it may apply to the COMPAT and seek an order for disclosure of such document. It may be noted that in terms of Section 53O(2), the COMPAT has, for the purposes of discharging its functions, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 for the following matters: (i) summoning and enforcing the attendance of any person and examining him on oath; (ii) requiring the

³¹⁷ Awarding compensation “53N. (4) Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub- section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.”

³¹⁸ One person may sue or defend on behalf of all in the same interest.

discovery and production of documents; (iii) receiving evidence on affidavit; and (iv) requisitioning any public record or document, or copy of such record or document, from any office.

8. Pre-action disclosure

The Act does not provide for any pre-action disclosure.

9. Average length of time from issue of claim to judgment in India

The Act does not provide a specific period of time within which the COMPAT shall adjudicate and pass an order/decision in respect of an application for adjudication of a claim for compensation.

At the time of writing, the COMPAT has not finally adjudicated upon any claim for compensation; therefore, it is difficult to predict the length of such proceedings. However, it is worth noting the following: (i) in the event that an entity has filed an appeal against a CCI decision holding it guilty of infringing a provision of the Act, the claim for compensation can only be filed against such entity after the COMPAT has decided the appeal (if a claim is filed after the CCI decision but before an appeal has been filed, then upon the filing of such appeal, the claim for compensation shall be kept in abeyance till the disposal of the appeal); and (ii) the speed of disposal depends largely upon the COMPAT and the parties.

10. Average cost from issue of claim to judgment in India

The legal costs involved in bringing or defending an action either before the CCI or COMPAT are difficult to estimate, especially with varying solicitor charges and senior counsels charging anything from INR100,000 to INR2.2 million per hearing.

The Competition Appellate Tribunal (form and fee for filing an appeal and fee for filing compensation applications) Rules 2009 prescribe the fees for filing applications under Section 53N as INR1,000 for claims of less than INR100,000. For claims over INR100,000, the fee is INR1,000 with additional increments of INR1,000 for every additional INR100,000 of compensation claimed or fraction thereof, subject to a maximum of INR300,000

11. Third party/alternative funding

The Act does not make any provision for third party funding.

12. Alternative methods of dispute resolution

While the Act does not prescribe any alternative dispute resolution mechanisms in respect of claims for compensation, it is theoretically possible for parties, during the pendency of an application under Section 53N, to explore alternative methods of claim resolution, including negotiations, mediation, conciliation or even arbitration. Neither the CCI nor the COMPAT have any statutory powers to direct parties to use alternative methods of dispute resolution. However, in a recent judgment of the Madras High Court,³¹⁹ it was held that the scheme of the Act allows parties to enter into a compromise or settlement, which shall be subject to scrutiny by the CCI who will examine whether public interest would continue to suffer and whether the object of inquiry would stand defeated by acceptance of a compromise.

C. Relief

13. Availability of damages and quantification

As discussed above, in terms of Section 53N of the Act, a claimant may make an application to the COMPAT to adjudicate on a claim for compensation. While the term “compensation” is not defined

³¹⁹ *The Tamil Nadu Film Exhibitors Association v CCI & Ors* [2015] CompLR 0420.



under the Act, it is linked, under Section 53N(3) of the Act, to the amount determined by the COMPAT as realizable from the enterprise for the loss or damage caused to the Claimant as a result of any contravention of the provisions of Chapter II of the Act. Since the key provisions of the Act only came into force in 2009, there are, as of yet, no decisions/orders by the COMPAT on any application for adjudication of a claim for compensation. Given the provisions of Section 53N(3) discussed above, it is likely that the term “compensation” will be interpreted in its most general sense as referring to anything given to make amends for loss caused.

As regards quantification, a claim for “compensation” for the purposes of an application under Section 53N(1) will have to be supported by documentary or oral evidence or both. Such evidence must demonstrate the loss or damage that such a party should have suffered as a result of any contravention of the provisions of Chapter II of the Act or of order of CCI or COMPAT, having been committed by an enterprise.

Claimants may include any “person” or “consumer,” both of which have been widely defined in the Act. A consumer includes a purchaser (direct or indirect) irrespective of whether the purchase is for personal use, commercial purpose or resale. Given the lack of jurisprudence, it is not known whether the COMPAT or the Supreme Court of India will accept the passing-on defense under Indian competition law. However, general principles governing the law of damages will recognize circumstances that have reduced or negated the Claimant’s loss.

14. Punitive and exemplary damages

There is no specific provision in the Act granting powers to the COMPAT to award punitive or exemplary damages.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Under Section 33 of the Act, where during the course of an inquiry the CCI is satisfied that any conduct in contravention of the Act has been committed and continues to be committed or that such act is about to be committed, the CCI may temporarily restrain any party from carrying on such acts until the conclusion of such inquiry or until the issuance of further orders, without giving notice to such party, where it deems necessary.

The Supreme Court of India, in *Competition Commission of India v Steel Authority of India Ltd.*, [2010 COMPLR 0061 (Supreme Court)], set out the following conditions that are required to be satisfied prior to grant of an interim relief under Section 33 of the Act:

- (i) the CCI must be satisfied (which requires a much higher degree of proof than the formation of a *prima facie* view under Section 26(1) of the Act) that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;
- (ii) it is necessary to issue the order of restraint; and
- (iii) from the record before the CCI, there is every likelihood that irreparable and irretrievable damage would be suffered by the applicant, or the continuation of the activity would have an adverse effect on competition in the market.

After the conclusion of an inquiry, the CCI may, in terms of Section 27(a) of the Act, pass an order directing an enterprise indulging in anti-competitive agreements to permanently discontinue and never repeat any infringing act (“cease-and-desist” order); and permanently restrain abusive behavior by dominant enterprises.

Similarly, the COMPAT has wide powers in respect of the parties before it. It can pass “any order as it deems fit”³²⁰ so long as such orders are within the law and its powers.

16. Other types of relief

In addition to passing “cease-and-desist” orders in respect of anti-competitive agreements, the CCI under Section 27 of the Act is also empowered to pass orders containing the following:

- (i) imposing a penalty of up to 10% of the average of the turnover for the last three preceding financial years upon each person/enterprise who is found to have infringed the provisions of the Act;
- (ii) imposing upon each participant in a cartel a penalty of up to three times its profit for each year of the continuance of such cartel or 10% of the turnover for each year of the continuance of such cartel, whichever is higher;
- (iii) directing modification of agreements that are found to be anti-competitive under Section 3 of the Act; and
- (iv) issuing such other orders/directions as the CCI may deem fit.

With respect to infringement(s) of the provisions of Section 4(1) of the Act that prohibit abuse of a dominant position, the CCI may restrain the enterprise from continuing with its abusive conduct and may impose a penalty of up to 10% of the average of the turnover for the last three preceding financial years on such enterprise. In addition, the CCI may direct the manner in which the infringing enterprise will modify its conduct and, under Section 28 of the Act, may pass orders directing the division of a dominant enterprise to ensure that such enterprise does not abuse its dominant position.

Under Section 48 of the Act, the CCI is empowered to proceed against and punish a person who, at the time a contravention was committed, was in charge of and responsible to the company (which is found to have infringed the provisions of the Act) for the business of the company. Although Section 48 empowers the CCI to *punish* such a person, the scope of such punishment has not been spelt out in the Act, but jurisprudence suggests that the same is limited to only monetary penalties.

D. Emerging trends

The first order of the CCI imposing a monetary penalty was issued in June 2011. Since then, there have been several orders of the CCI imposing monetary penalties. The notable ones include:

- (i) the INR2.58 billion penalty on three airline companies for anti-competitive practices in fixing fuel surcharges;
- (ii) the INR6.71 billion penalty on four public sector insurance companies for rigging a tender floated by a state government;
- (iii) the INR25 billion penalty on 14 OEMs/car manufacturers for abusing their dominant position and indulging in anti-competitive practices (*Spare Parts matter*);
- (iv) the INR63 billion penalty on 11 cement manufactures for price-fixing and limiting the supply and production of cement;
- (v) the INR6.3 billion penalty on DLF for abuse of dominant position;
- (vi) the INR555 million penalty on the National Stock Exchange for abuse of dominant position;
- (vii) the INR1.12 billion penalty on 46 manufacturers of LPG cylinders for bid rigging;

³²⁰ Section 53B(3) of the Act.



- (viii) the INR56.6 million penalty on Schott Glass India Pvt. Ltd. for abuse of dominance;
- (ix) the INR1.7 million penalty on the Karnataka Films Chamber of Commerce (KFCC) for cartel behavior;
- (x) the INR100,000 penalty on each of the 27 producers/distributors of Hindi Motion Picture Films for cartel-like behavior; and
- (xi) the INR53 million penalty on the Board of Control for Cricket in India for abusing its dominant position.

It may be noted that some of the abovementioned penalty orders of the CCI have been upheld/reduced/modified by the COMPAT while the others are in appeal before the COMPAT. To date, no applications under Section 53N of the Act have been adjudicated by COMPAT.

Italy

Andrea Cicala, Riccardo Pennisi and Gaetano Iorio Fiorelli

A. Availability of civil claims

1. Scope for civil claims in Italy

Stand-alone and follow-on claims are available in Italy.

Individuals and corporations may bring actions for damages arising from infringements of Italian or EU competition law by corporations and individuals (provided that the individual qualifies as a “personal undertaking” (*imprenditore individuale*) or a person trading as a business).

A claim for damages can be brought regardless of whether a finding of infringement has been made by the competition authorities. The courts will take into account findings of national competition authorities when deciding a private competition enforcement case but are not bound to follow such decisions. However, where an infringement of competition law has been identified by a decision of the European Commission, Italian courts will consider themselves bound by the findings made in that decision (Article 16 of Regulation 1/2003). An Italian court may therefore opt to stay proceedings brought in reliance on a European Commission decision where that decision is subject to appeal before the European courts so as not to reach a judgment that is irreconcilable with the outcome of that appeal or appeals.

2. Applicable limitation periods

Civil claims are generally based on tort. Tortious claims must be brought within five years of the relevant infringement occurring.

The Italian Supreme Court has ruled that limitation does not begin to run until the moment when the infringement becomes evident to the potential claimant (rather than from the date on which damage actually occurred).³²¹ On the basis of Articles 2935 and 2947 of the Italian Civil Code, a tortious action for damages arising from an infringement of competition law is therefore time-barred five years from the day on which the claimant acquires, or ought to have reasonably acquired, proper knowledge of the infringement and/or damage suffered. A party who asserts that the limitation period has expired must prove the moment at which the claimant obtained (or ought reasonably to have obtained) knowledge of the infringement and/or damage suffered. According to the general principles stated by the Italian Supreme Court, it might be presumed that, in practice, the injured party acquires (or could have acquired using ordinary diligence) knowledge once a finding of infringement has been issued by a competition authority.³²²

If the action is based on a breach of contract, the applicable limitation period is 10 years from the date of the breach.

3. Appeals

Following the recent entrance into force of Italian Decree No. 1/2012, civil claims for damages resulting from violations of Italian competition law (Article 33 of the Competition Act) or from violations of EU competition law must be filed before the Specialized Sections of the competent court or first instance tribunal having territorial jurisdiction.

³²¹ Judgment no. 2305 of February 2, 2007.

³²² In that respect, see Judgment no. 27527 of December 10, 2013; B. Nascimbene, F. Rossi Dal Pozzo, *La prescrizione delle azioni risarcitorie antitrust alla luce dei principi della certezza del diritto, di equivalenza ed effettività*, in *Il private enforcement delle norme sulla concorrenza*, Milan, Italy, 2009, page 123 ff.



Any appeal must be raised before the Specialized Sections of the competent Court of Appeal having territorial jurisdictions and may challenge either the law or the facts identified in the judgment of the first instance court.

Court of Appeal judgments may be challenged before the *Corte di Cassazione*, but only on points of law or where it is alleged that a breach of the rules concerning jurisdiction has occurred.

4. Availability of class actions for infringement of competition law and/or damages available in Italy

A class action law was enacted in Italy on January 1, 2010 (Art. 49 of Law no. 99 of July 23, 2009) and, in 2012, was amended so as to expand its scope.

Claims may be brought by consumers or the end-user (defined as any individual acting for purposes falling outside his trade, business or profession) in relation to infringements committed from August 15, 2009 onward. The mechanism is “opt-in” so other consumers may elect to join a class action and so consent expressly to their rights being determined as part of those proceedings. Consumers that do not decide to join the class are not bound by the outcome of the action.

As amended, the law allows any consumer or user group seeking damages or declaratory relief to initiate a class action in respect of infringements or damage that are “homogeneous” as between the group (the original text of the statute required actions brought in a calls to be “identical,” a more difficult standard to meet). Consumers who have bought goods related to the same cartel (regardless of whether from the same cartel member) ought to be permitted to bring their claims as a class under these provisions.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant must prove the infringement or unlawful conduct, the amount of damage actually suffered and that damage suffered was caused by that infringement or unlawful conduct. In order to establish causation, the claimant must show that “but for” the infringement, the damage suffered would not have occurred.

A decision by a national competition authority will be accepted as privileged evidence that an infringement has occurred³²³ and, as noted above, a decision by the European Commission will be considered binding proof of liability by Italian courts.

As a general rule, the claimant is required to prove that the unlawful conduct caused the actual damage. However, in practice, the courts may sometimes accept that the causal nexus is adequately proved based on common business experience and so the court might be prepared to assume that unlawful overcharges were imposed as a result of cartel activity. This presumptive approach is often taken in respect of claims where the nature of the breach is such that the causal nexus between breach and damage cannot be proved – or would be extremely difficult to prove – in a rigorous way. Competition claims are considered to fall into this category. For example, the Italian Supreme Court has indicated that, in cases where a decision of the Italian Competition Authority has identified a restrictive agreement contrary to competition law, the causal nexus between that agreement and resulting damages may be presumed. It is then open to the defendant to provide evidence to rebut this presumption.

³²³ See the order of the Supreme Court no. 5327 of March 4, 2013, according to which, as the decision amounts to a privileged evidence in favor of the damaged parties, the company responsible for the infringement is not allowed to ask the court a mere re-assessment of the same facts already analyzed by the Italian Competition Authority, provided, of course, that the party at hand actually participated to the administrative proceedings which gave rise to the decision.

6. Joint and several liability of cartel participants

Liability for breach of competition law is considered a joint and several liability under Italian law and Italian courts are able to apportion liability to pay damages as between defendants according to its assessment of their fault for the damage caused.

In theory, the claimant is entitled to recover all damages from one or some members of a cartel and so need not issue the claim against all of those deemed responsible for the infringement. Defendants are able to join others to a claim or to seek contribution from them.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Italian law does not provide for formal disclosure. The parties to an action must produce the documents upon which they rely and file these with the court but there is no obligation to disclose documents (and other information) that is adverse to the parties' respective positions.

The court may determine to appoint its own expert in order to advise it on economic/accounting issues (the costs of such expert to be paid, along with all other costs, by the losing party to the trial). However, the parties must apply to the court for permission to adduce further evidence such as, for example, witness testimonies and expert evidence.

In certain limited cases and under specific conditions, the court may order the parties, or even third parties, to disclose specific documents, either on the application of the parties or on its own initiative. Such orders may include legal advice given by in-house lawyers but not by external legal advisers. A party applying for such disclosure will need to: (i) describe the documents requested in as much detail as possible so as to show that the claimant is not "fishing"; and (ii) confirm that the documents requested are not in its possession or otherwise available to it.

8. Average length of time from issue of claim to judgment in Italy

The average length of time from the issue of a claim to first instance judgment is between two and four years. Actual duration may depend on many factors, including:

- (i) the number of defendants involved in the litigation (for claims relating to cartels, a large number of parties are normally joined into the litigation and this will lengthen proceedings); and
- (ii) the complexity of the evidential phase (which, for example, may require the appointment of an accounting expert to quantify the damages suffered by the claimant)

9. Average cost from issue of claim to judgment in Italy

Many factors come into play that affect the costs of litigating this type of claim, including: (i) the quantum claimed; (ii) the number of parties involved; (iii) the number of related civil claims to be dealt with and their locations; (iv) the kind of fact-finding evidence that the injured party may introduce and (v) the overall complexity of the case. A rough estimate to defend a relatively straightforward claim to first instance judgment would be approximately EUR100,000.

The court will also decide which of the parties shall bear the costs of the proceedings. Generally, in accordance with Article 91 of the Italian Procedural Civil Code, all or part of the costs incurred will be paid by the losing party.



10. Third party/alternative funding

As a general rule, any claim can be assigned to a third party but, to our knowledge, this has not yet occurred in Italy in relation to private competition enforcement. It is also permissible for lawyers to agree to act on a contingency fee basis.

11. Alternative methods of dispute resolution

Competition disputes can be submitted to arbitration under Italian law. Parties may alternatively volunteer to go through mediation with the aim of achieving settlement. Under Italian law, the parties are not generally obliged to opt for mediation, except for some specified matters that are not relevant in this context.

C. Relief

12. Availability of damages and quantification

Only compensatory, rather than punitive, damages may be awarded in respect of a competition law action brought in Italy. The defendant will be liable only in relation to those damages that can be proven as the immediate and direct consequence of its conduct.

The constituent elements of the damage are those provided by the Italian Civil Code (and include loss of profits).

To date, a limited number of private competition litigation cases have been dealt with by the ordinary courts in Italy. These cases indicate that a court will determine the difference between the situation that the injured party is in and the situation that it would have been in had an infringing action not occurred. The court will calculate this on a hypothetical basis by comparing profits realized by the injured party before and after the infringing action (provided the two reference periods offer the same comparable characteristics) or by comparing the profits realized after the infringing action and those realized by another similar but unaffected company.

Since proving the quantum of damage can be difficult and complex, parties often file *ex parte* technical reports on central issues concerning the economic analysis of the issue. As noted above, the court may also appoint a technical expert to assist it on economic issues, including the quantification of damages.

13. Punitive and exemplary damages

As noted above, neither punitive nor exemplary damages are available in Italy.

14. Availability of interim or final injunctions in respect of an alleged competition law infringement

In principle, it is possible to obtain an interim or final injunction in relation to a competition law infringement.

An infringement of competition law not only implies damage to the competitiveness of a market but may also cause specific prejudice to a single entity and/or consumer. Consumers can therefore seek protection of their interests by asking for an interim injunction aimed at obtaining an order for the immediate cessation of the unlawful conduct carried out by the author of the infringement. Such an interim order will be granted provided that the claimant can prove the existence of his rights (i.e., right to claim) and that irreparable prejudice is likely to be suffered if the unlawful conduct persists.

Case law on injunctions awarded on this basis in the context of competition law is not developed, but we expect that such injunctions will rarely be granted.

D. Emerging trends

The number of civil claims in Italy is likely to continue to grow. At present, however, the number of actions that have actually been brought is still relatively small.



Japan

Fumio Koma, Junya Ae and Hiroaki Nagahashi

A. Availability of civil claims

1. Scope of civil claims in Japan

Individuals and corporations can bring legal action to claim compensation for damages arising from violations of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947; “JAA”).

Such legal action may be based on general tort law principles, which are mainly governed by Article 709 of the Civil Code and Article 25 of the JAA. The scope of general tort law is so wide that no violation of the JAA is specifically excluded. By contrast, Article 25 of the JAA lists specific types of violations that are subject to liability, including typical violations such as monopolization, unreasonable restraint of trade and unfair trade practices.

Tort liability under Article 709 of the Civil Code requires the violation to have been negligent or intentional, whereas Article 25 of the JAA requires the prior issuance of a final and binding administrative order (i.e., a cease-and-desist order) by the Japan Fair Trade Commission (the “JFTC”) before a claim for damages may be brought. Violators of Article 25 of the JAA are liable even where a violation is neither negligent nor intentional. However, a claim based on Article 25 of the JAA can only be brought after an administrative order or a declaration of illegality has been issued by the JFTC regarding the violation which has become final and binding.

Another difference is jurisdiction. Jurisdiction for actions based on general tort law is determined by the general jurisdiction rules, under which actions can be brought in a district court with jurisdiction over the location of the defendant’s principal office or the place where the tort was committed. By contrast, the Tokyo High Court was given exclusive jurisdiction over actions based on Article 25 of the JAA as the court of first instance until 2013, when an amendment to the JAA gave the Tokyo District Court exclusive jurisdiction as the court of first instance. This amendment entered into force on April 1, 2015.

The most likely defendants in these actions are business operators who have violated the JAA. In addition, although rarely seen in practice, it is technically possible to bring civil actions based on general tort law against individuals involved in violations, such as directors or employees of violating business operators.

2. Applicable limitation periods

The limitation period for actions claiming compensation for damages under Article 25 of the JAA is three years. The limitation period commences on the date on which the administrative order or the declaration of illegality pertaining to the alleged violation becomes final and binding (Article 26 of the JAA).

The right to claim compensation for damages based on general tort law expires (i) when the claimant does not exercise the right within three years from the time that it becomes aware of both the occurrence of damages and of the identity of the person who caused the damages or (ii) when 20 years have elapsed from the time of the tortious act.

It should be noted that, under a court precedent (judgment of the Supreme Court rendered as of April 28, 2009, Case No. *Heisei (Gyo-Hi) 97*), the limitation period for claims based on general tort law may commence without regard to whether an administrative order or declaration of illegality pertaining to the alleged violation has become final and binding. Therefore, civil actions based on general tort law need to be filed within three years of the injured party learning of the occurrence of

the damages and the person who caused them, without regard to the status of any administrative procedure pertaining to the alleged violation.

3. Appeals

For claims based on both general tort law and Article 25 of JAA, appeals, first from a district court to a high court and then from the high court to the Supreme Court, are available.

When a party appeals a judgment rendered by a district court to the competent high court, such party may challenge its findings both on the facts and on issues of law. In contrast, in appeals from a high court to the Supreme Court, facts legitimately determined by the high court are binding on the Supreme Court (Article 321(1) of the Civil Procedure Code (the “CPC”)), and thus, review by the Supreme Court is limited to the application of the law and the legitimacy of the fact-finding process.

4. Availability of class actions for infringement of competition law and/or damages in Japan

Japanese law does not specifically provide an equivalent to the class actions permitted in the US.

Under Japanese law, the “Appointed Party” system prescribed by Article 30 of the CPC is most similar to a US class action. Pursuant to Article 30 of the CPC, a number of persons, who share common interests, may appoint from among themselves one or more persons to be the party/parties to a lawsuit (the “Appointed Party”), and the Appointed Party stands as the claimant or defendant on behalf of the appointing person(s). The judgment in such a lawsuit affects not only the Appointed Party but also the persons who appointed it. However, it does affect persons who shares common interests but did not appoint the party.

Furthermore, a new collective lawsuit system (a so-called Japanese class action), which applies only to specific types of consumer protection claims will be implemented in the very near future. The Japanese government passed a new law in December 2013 introducing the new system, under which only a “Certified Qualified Consumer Organization” (a “CQCO”) approved by the government may file a class action claim for monetary damages on behalf of consumers. The claims subject to the new system are defined as “Common Obligations,” which means obligations to make monetary payments owed by business operators to consumers under the Consumer Contract Act.

The “two-tier and opt-in” procedure is a unique feature of the new system. In a “first-tier” procedure, a CQCO will file a lawsuit requesting that the court confirm the existence of a Common Obligation among the claims if the CQCO finds that damages have been caused to a sufficiently large number of consumers. If the Common Obligation is not confirmed by the court, the procedure will end. If the Common Obligation is confirmed by the court or by an agreement by the parties during the first-tier procedure, a “second-tier” procedure will be initiated to determine the claims of consumers.

In the second-tier procedure, a CQCO will either: (i) notify consumers with potential claims found to be subject to the class action of the first-tier result; or (ii) provide public notice via the internet, newspapers, TV commercials, etc. Consumers with claims will then delegate the authority to recover their claims to the CQCO via the same procedure, and the CQCO will file said claims with the court. The court’s judgment in the second-tier procedure will be binding against all consumers who delegated the authority to seek recovery of their claims to the CQCO at the end of the second-tier procedure.

The new system will come into effect on October 1, 2016.

It should be noted, however, that it is still unclear whether it will be possible to utilize this new system to recover damages for competition violations. It is necessary to closely monitor the development of related guidelines and actual enforcement.



B. Conduct of proceedings and costs

5. Burden of proof

The claimant is required to prove (i) a violation of antitrust law, (ii) occurrence of damages, (iii) causality between the violation and the damages, and (iv) the amount of the damages.

Even where a final and binding administrative order or declaration of illegality has been issued by the JFTC pertaining to the violation alleged by the claimant in the civil lawsuit, Japanese courts are technically not bound by such orders or declarations and the claimant still assumes the burden of proof regarding requirements (i) through (iv) above. That said, in practice such an order or declaration can have a material impact on a civil lawsuit. Specifically, a violation of competition law may be strongly presumed to have occurred based on the existence of an administrative order or declaration by the JFTC. Therefore, for claimants, the submission of such an order or declaration is highly likely to be beneficial, if available.

6. Joint and several liability of cartel participants

Each member of a cartel is liable for all damages caused by the cartel. In other words, a claimant may sue one or more persons from among the participants to claim compensation for all of the damages suffered by the claimant.

The JAA has a leniency program that enables applicants under certain conditions to enjoy an exemption from an administrative penalty imposed by the JFTC. However, it does not directly apply to civil procedures. Therefore, application for the program does not exempt applicants from civil liability.

The apportionment of damages awarded to a claimant among cartel participants is based mainly on the fraction of the damages attributable to each participant. If one of the joint participants compensates the claimant in excess of the fraction for which it is liable, the participant can demand reimbursement from the other participants. Such a demand can be made not only by filing another legal action against the other participants, but also by a “Notice of Suit” under Article 53 of the CPC, which forces other members of a cartel to participate in a lawsuit between the members being sued and the claimant.

7. Documents and evidence that can be used by claimants (for example, evidence obtained via investigation) and legal privileges

Parties to a civil lawsuit do not have a general obligation to disclose documents, including evidence that would have an adverse impact on them.

However, upon the request of a party, the court may order the other party to submit documents to the court as evidence unless a requested document falls within any of the following classifications prescribed under Article 220 of the CPC:

- (i) documents stating matters subject to a right to remain silent in connection with possible criminal responsibility;
- (ii) documents concerning a secret that relates to a public servant’s duties;
- (iii) documents stating facts that lawyers, doctors, notaries, religious persons or other professionals learned in the course of their duties or other technical or professional secrets;
- (iv) documents prepared exclusively for use by the holder thereof (excluding a document held by the state or a local public entity which is used by a public servant for an organizational purpose); and

- (v) documents concerning a suit pertaining to a criminal case, a record of a juvenile case or documents seized in such cases.

Further, a party can request the court to order those in possession of documentary evidence to submit it to the court (Article 226 of the CPC). For example, a claimant can request the court to have the JFTC provide its records of a case.

The JFTC has publicized a *Notice on Provision of Documents for Civil Lawsuits Claiming Compensation for Damages Caused by Violations of the JAA, as of May 15, 1991*, which provides, among other things, its disclosure policy when requested to provide documents to a court under Article 226 of the CPC. In the notice, the JFTC emphasized that, depending on the circumstances, it will accede to such requests for evidentiary documents, including documents used in findings of fact by the JFTC in administrative orders or other materials relevant to its investigations to promote private enforcement of the JAA.

8. Pre-action disclosure

While it would not be directly classified as pre-action disclosure (wherein a potential party to a lawsuit can request disclosure of documents held by the counterparty before commencement of the lawsuit), potential claimants can collect information in the possession of potential opponents prior to filing a lawsuit through the “Preservation of Evidence” procedure under Article 234 of the CPC.

In this procedure, a court examines evidence upon petition by a potential party even before filing a lawsuit if the court finds such examination necessary because examination of the evidence would be difficult without prior examination (Article 234 of the CPC). The petitioner must make a *prima facie* case showing such necessity.

9. Average length of time from submission of claim to judgment in Japan

It is very difficult to assess the average length of proceedings in the absence of any authoritative records of the time required from the filing of a claim to the rendering of a judgment.

Based on publicly available records of court precedents, reaching a final judgment in the first instance typically takes two to four years. Appeals generally take a similar amount of time for each further instance.

10. Average cost from submission of claim to judgment in Japan

Costs consist mainly of court fees (i.e., fees to be paid to the court) and legal fees. Average amounts for such fees are not available.

Court fees include court costs, charges for service of legal documents by the court, and expenses necessary for the examination of evidence. Court costs are provided under the Act on Costs of Civil Procedure and are calculated based on the amount of a claim. A claimant or appellant must pay the court costs with a stamp on a complaint or a written appeal. However, the court fees, including the court costs, should basically be borne by the defeated party.

Legal fees should be borne by each party, in principle. In the case of a tort claim, a reasonable amount of legal fees is considered to be part of the damages caused by the tortious act and, thus, the court may order the defendant to pay an amount of money corresponding to this reasonable amount. However, the amount ordered by the court does not usually cover the entire amount of the legal fees.

11. Third party/alternative funding

Third party or alternative funding for litigation is not explicitly prohibited in Japan.



Contingency fees are allowed under Japanese law. “No win, no fee” arrangements are not explicitly prohibited but, to our knowledge, are rarely used in practice.

According to Article 466 of the Civil Act, any claim may be generally assigned except where its nature does not permit assignment. It should be noted, however, that assignment or entrustment of rights in order to have an assignee or trustee carry out a specific procedural act (i.e., bring and prosecute a claim) is prohibited under Article 10 of the Trust Act.

12. Alternative methods of dispute resolution

Arbitration is a typical type of alternative dispute resolution in Japan and is governed by the Japanese Arbitration Act. It can be commenced if the parties agree to use the process, although there is some debate as to whether disputes over competition law matters can be resolved through arbitration. The Arbitration Act does not explicitly exclude such disputes from its scope as defined in its Article 13(1), so arbitration may be worth considering as an option in competition law disputes.

Conciliation under the Act for Conciliation of Civil Affairs is another option that can be used to resolve competition law-related disputes.

C. Relief

13. Availability of damages and quantification

Under Japanese law, damages are compensatory because it is considered fair and sufficient to restore a victim to its original state before the violating act occurred.

Consequently, as a general rule, a claimant has to prove the difference between its actual state after being affected by the alleged violation and the state it would have been in if the violation did not occur. For example, where a claimant purchaser argues that it was forced to buy products for an increased price determined by a cartel, it has to show not only the actual price at which it purchased the products, but also the price that would have been offered under competitive conditions.

Further, while no current precedent exists to our knowledge, the passing-on defense is likely to be available in principle because the defendant may successfully claim that no damages should be claimed by buyers who themselves resold goods at a price which included overcharging by the cartel to final purchasers thereby passing on the price increase to the final customers.

The JAA does not provide specific rules to help claimants quantify the damages caused by violations of the JAA. Therefore, it is often extremely difficult to prove the price that would have been offered in the absence of a violation of the JAA. In such a case, a court may determine the damages suffered based on oral arguments and evidence submitted, exercising its discretion regarding the calculation of damages under Article 248 of the CPC.

The amount of compensation awarded in cases to date has varied, but in many of the cartel cases in which a claimant purchaser or party to a contract prevailed, courts awarded approximately 5% to 20% of the actual amount of the contract.

14. Punitive and exemplary damages

Japanese law does not allow punitive or exemplary damages.

15. Availability of interim or final injunctions in respect of alleged competition law infringement

Both interim and final injunctions are available for the private enforcement of the JAA against unfair trade practices under Article 19 of JAA, but not with respect to cartel cases.

The requirements for an injunction are prescribed by Article 24 of the JAA. According to this provision, a person is entitled to seek the suspension or prevention of typical violations of the JAA, such as the operation of a cartel, by a business operator under the following circumstances:

- (i) if the person's interests are infringed or are likely to be infringed by the business operator's violation of the JAA; or
- (ii) if the person is suffering or is likely to suffer extreme damages due to the violation.

D. Emerging trends

In Japan, the case law on civil claims for violations of the JAA is largely concerned with bid-rigging. Price-fixing and other types of cartels have not been main enforcement targets so far.

However, there has been a remarkable trend in the field of administrative enforcement of the JAA in cartel cases, wherein the amounts of the surcharges that the JFTC has ordered have been strikingly high. This trend in surcharge payment orders means damages suffered by injured parties from potential cartels would likely be extensive, which may motivate them accordingly to file civil lawsuits.

Therefore, it will be worth noting whether the number of civil lawsuits against cartels increases in the near future.



Mexico

Gerardo Calderon-Villegas and Juan Carlos Zamora-Müller

A. Availability of civil claims

1. Scope for civil claims in Mexico

Stand-alone and follow-on claims are available in Mexico.

Civil claims can be brought under the general provisions of the Federal Civil Code and the Federal Civil Proceedings Code, before federal courts specialized in competition, broadcasting and telecommunications matters against any “undertaking” (defined as a natural or legal person carrying on any economic activity) by a party who has suffered loss as a result of a monopolistic practice, the abuse of a dominant position, an illegal cartel or an unauthorized merger.

According to Article 134 of the Mexican Competition Law 2014, a prior finding of infringement by the Federal Economic Competition Commission (“Cofece”) is a precondition to bringing such an action. Findings issued by other national competition authorities cannot be relied upon in order to support any civil claim under this provision.

Any potential claimant should therefore file a complaint before Cofece and obtain a final administrative finding that an infringement has occurred (if no such finding has otherwise been made) before initiating a civil action intended to recover damages. Any indication of a potential violation of the Mexican Competition Law is sufficient to file a complaint and for Cofece to initiate an investigation. Cofece is also empowered to initiate an investigation of such infringements in its own right.

Depending on the complexity of the case, an administrative proceeding before Cofece might take between 18 months and four years. The investigation stage can take between six months and two years while the administrative procedure of formulating a decision can take between one and three years. Furthermore, a final ruling could be challenged by means of a constitutional trial (*amparo*) before the abovementioned specialized courts. In practice, this judicial stage might take up to 18 months to be resolved and, depending on the complexity of the case, sometimes even longer.

It is worth mentioning that any person can file a complaint about any monopolistic practices or illegal concentrations.

2. Applicable limitation periods

The general limitation period for bringing a civil action for damages is two years from the date that Cofece’s administrative ruling becomes final (once the *amparo* trial is resolved or if no *amparo* trial is filed, within the 15 working days after the final ruling is notified to the affected party). However, in the case of class actions (see section 4 below), the limitation period is three years and six months.

Additionally, since a final ruling declaring an infringement of competition law is a precondition to any civil action for damages being brought, it is important to mention that Cofece is not empowered to investigate activities that ceased more than 10 years before.

However, it should be noted that Cofece is able to make a finding regarding activities that began more than 10 years previously, where the activities complained of are continuing.

3. Appeals

Cofece decisions may be challenged only by way of a constitutional bi-instance trial (*amparo indirecto*) before federal courts specialized in competition, broadcasting and telecommunications on a matter of law (e.g., violation of any fundamental constitutional rights of the parties).

Judgments of specialized courts referred to above, which would rule on any action for damages at first instance, can be challenged before a single judge circuit tribunal. The resolution rendered in the appeal may in turn be challenged through a constitutional single instance trial (*amparo directo*) on grounds that fundamental rights of the parties have been breached.

The appeal might take between six months and one year and the further *amparo* appeal might take between six months and three years.

4. Availability of class actions for infringement of competition law and/or damages in Mexico

Class actions (collective actions) were introduced to Mexican law by amendments to the Federal Civil Proceedings Code (enacted in August 2011 and in force at the end of February 2012). This statute allows Cofece and/or any representative of a group comprising at least 30 members to file a collective action for damages in circumstances where a group of end consumers have been harmed by an anti-competitive practice. As with individual actions, a prior finding of infringement by Cofece is a precondition to bringing a collective action for damages.

In order to qualify as a group representative, the relevant individual/undertaking must have the characteristics of the affected class and meet the requirements of the Civil Proceedings Code (i.e., to act diligently, professionally and in good faith, without conflict of interests or history of having filed frivolous actions). The class representative need not advertise the action and consumers who do not seek to join the action are not bound by any final judgment.

It is worth noting that two or more undertakings are able to file a single complaint before Cofece to initiate the corresponding administrative investigation.

B. Conduct of proceedings and costs

5. Burden of proof

A private claimant seeking damages may rely on Cofece's finding of infringement to establish the defendant's liability, but must prove beyond reasonable doubt that a causal link exists between the infringement and the loss suffered, as well as the extent of the loss itself.

Any evidence relevant to proving loss (i.e., a detriment suffered by the claimant) is admissible, such as accounts showing a decrease in income. However, losses resulting from infringements of competition law are often very difficult to quantify. Specialized federal courts are entitled to ask Cofece for an opinion to estimate the loss caused by the infringement.³²⁴ However, the specialized federal courts are not obliged to ask for the estimate nor are they bound to accept it if provided by Cofece.

6. Joint and several liability of cartel participants

There is no specific law or rule on joint and several liability for damages in respect of private competition litigation in Mexico. When there are several persons deemed responsible for a breach of competition (e.g., in a cartel case), a claimant may sue one, several or all members at once. In such cases, applying tortious principles, the court is required to distribute liability to pay damages proportionally between the defendants according to the degree of responsibility the court considers that the defendants share in the infringement.

There is no rule allowing for the joinder of defendants to an action where only one cartel member is sued. However, in theory, a claim for contribution as between defendants may be possible.

³²⁴ Cofece makes this opinion using all the information contained in the administrative file, which includes market information for the involved parties provided by the claimant or by the investigated undertakings.



7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

US-style discovery is not available in Mexico. Each party must produce evidence in support of its case and is not obliged to share any information with its counterparties. It is possible to apply for an order from the court requiring a party to disclose specific information. However, such applications must be targeted and must specifically identify the information sought.

It is important to mention that, during the investigation stage of the proceedings, neither the claimant nor the defendant has access to the investigation file. However, the parties may obtain non-confidential copies of the investigation file after the investigation stage of the proceedings has been concluded. Also, once the administrative procedure is concluded, any person may obtain a non-confidential copy of the infringement decision from Cofece. Where civil proceedings have been initiated before specialized federal courts, courts may (and usually do) request the entire non-confidential administrative file from Cofece.

In proceedings before Cofece, in addition to the evidence filed by the claimant, Cofece may, during the investigation stage of the proceedings, request any information and documents it deems relevant to the investigation from the parties. Dawn raids may be conducted at the premises of the undertakings under investigation. Cofece may also order any third party to provide witness evidence in respect of its investigation. Cofece is not empowered to compel production of such information prior to initiating an investigation formally.

8. Pre-action disclosure

Pre-action disclosure is not available in Mexico. However, where a potential claimant can prove that there is a substantial risk that a person might abscond or a document might be destroyed or modified, and that evidence is essential to resolve the potential claim, the specialized federal court may order the person to give evidence or that the document be produced.

9. Average length of time from issue of claim to judgment in Mexico

A private enforcement claim might take between nine months and two years (or more) to be resolved at first instance. An appeal against the first instance decision and the *amparo* trial against the appellate court decision might take an additional nine months to three years.

The time frame for the proceedings suggested is only an estimate which is based on typical cases tried in the past. It is important to bear in mind that each case is different and its duration would depend on many factors, including the workload of the courts, the legal strategy followed and the procedural nuances of each case. In addition, it is worth mentioning that no action has been brought since the Mexican Competition Law 2014 came into force, given the specialized federal courts competence to resolve private damage actions resulting from competition violations.

10. Average cost from issue of claim to judgment in Mexico

There are no court fees to be paid for litigation in Mexico. Legal representation costs and professional fees vary widely depending on the complexity and the quantum of damages claimed in the case.

In ordinary civil and commercial cases, the courts may order that the losing party pay the winner's costs. The rules to determine the amount of legal fees payable by the losing party vary depending on the procedural rules applicable to each case (but is rarely the full amount actually incurred).

In class action cases, each party must bear its own legal costs regardless of the outcome. It is open to the class to determine how costs are split between them.

11. Third party/alternative funding

There is no rule preventing alternative funding of litigation in Mexico. In practice, it is common to provide for a contingency fee payable if the claim is successful and a regular fee payable regardless of the outcome so as to cover the basic costs of representation.

12. Alternative methods of dispute resolution

Arbitration is only possible in Mexico where the parties have entered into an arbitration agreement that includes resolution of the issues in dispute or if the parties conclude an arbitration agreement after the dispute has arisen. In both cases, the agreement must be in writing.

Determination of whether a competition infringement has occurred is considered a matter of public interest and so is the preserve of Cofece. Accordingly, an arbitration may only address the question of resulting damages if the award is to be enforceable in Mexico.

C. Relief

13. Availability of damages and quantification

Damages resulting from a breach of competition law may be awarded in accordance with the general rules of civil law. Under Article 2108 of the Federal Civil Code, these can be defined as any loss or detriment to the undertaking patrimony and may include loss of profits.

Under Mexican law, the defendant will be considered liable only in relation to those losses that are the immediate and direct consequence of its conduct. As such, while the “passing-on defense” has not yet been formally recognized in Mexico, in theory, it might be raised since the claimant can only be indemnified for the damage that it has actually suffered.

To date, there have been no final judgments awarding damages to a claimant in a private competition law case and so there is not yet an established practice in Mexico of quantifying damages in such cases. Generally, damages are quantified by federal courts upon the motion of the claimant. Additionally, the court may appoint experts to advise on the method of calculation and the exact amount of damages. While the parties do not have any input to this appointment, it is open to them to appoint their own experts during trial in order to comment on these issues.

14. Punitive and exemplary damages

Punitive or exemplary damages are not available under Mexican law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Under Article 135 of the Mexican Competition Law 2014, in cases where the harm to the competition process might be irreversible, Cofece is empowered to issue precautionary measures so as to order an undertaking potentially guilty of an infringement³²⁵ to cease the conduct that might be deemed anti-competitive until a final ruling has been passed. These precautionary measures do not prejudice the outcome of the final ruling.

Such measures are at the discretion of the Cofece and may not be formally requested by the affected party.

³²⁵ After the investigation stage of the proceedings, if there are enough elements to presume an infringement, Cofece issues a preliminary resolution of alleged responsibility (*dictamen de probable responsabilidad*) against the parties under investigation to initiate the administrative procedure.



16. Other types of relief

Other types of relief are not available under Mexican law.

D. Emerging trends

No civil damage claims have been publicly reported as issued in Mexico. The lack of claims is likely to be a result of a finding of infringement by Cofece being a precondition to filing a damages claim in Mexico. Notwithstanding this, given the recent strengthening of Cofece powers with the New Competition Law, such claims may become more common in the near future.

The Netherlands

Frank Kroes, Christiaan van der Meer and Sijf Janssen

A. Availability of civil claims

1. Scope for civil claims in the Netherlands

Civil claims can be brought against any “undertaking” (defined as a natural or legal person carrying on some commercial or economic activity) under Articles 101/102 TFEU and under Articles 6 and 24 of the Dutch Competition Act. Civil claims must be brought in the civil courts.

A regulatory finding of infringement is not a precondition to a civil action in the Netherlands.

It is also possible to bring an action for damages against a statutory director (based on tort) in cases where that director is “seriously to blame” for the anti-competitive behavior. An action can equally be brought against any other employee, but the employee will be able to recover from his employer any damages that he is forced to pay out, unless he acted with willful intent or gross negligence. To date, no such claims have been brought in the context of competition law and so it is not clear if they would be upheld and/or if an employee complicit in cartel activity would be prohibited from recovering from his employer.

2. Applicable limitation periods

The limitation period for bringing a damages claim based on competition law in the civil courts is five years from the day following that on which the claimant and the person liable for it (whichever is the later) becomes aware of the damage. The period is capped at 20 years from the date on which the damage was inflicted.

There is, to date, not much case law in the context of competition litigation as to when awareness might arise – it is very much a subjective question. In 2007, a court in Rotterdam found that on the date a certain complaint was filed with the competition authorities, the claimant was already aware of the damages caused by the infringement and of the person liable for it. However, this does not establish authority for attributing knowledge to a claimant as at the date some third party makes a complaint or the competition authorities instigate an investigation independently.

Claims for annulment of a contract based on competition law are subject to a limitation period of three years from the date on which the claimant became aware of the violation of competition law or should reasonably have become aware of the violation.

3. Appeals

Decisions of a lower court are subject to appeal to one of the courts of appeal. This is an appeal *de novo*. The appellant may appeal both on issues of fact and on issues of law. If a Dutch court of appeal finds merit in one or more of the grounds of appeal of the appellant, it must redetermine the case in its entirety so as to form its own view on the outcome.

A further appeal from the Court of Appeal lies to the Dutch Supreme Court. Appeals to the Supreme Court are limited to issues of law or complaints that the judgment of the Court of Appeal lacks proper reasoning.

4. Class actions for infringement of competition law and/or damages available in the Netherlands

A form of class action exists in the Netherlands. An association (*vereniging*) or foundation (*stichting*) may start a collective action provided that: (i) the action serves to represent the similar interests of others; and (ii) it represents those interests pursuant to its articles of association. Both requirements



are easy to satisfy. Articles of association of associations or foundations may in general be amended easily. As an alternative, an association or foundation may be established specifically to conduct the action. This happens frequently. Currently, there is a legislative proposal being considered by the Dutch Parliament that, if adopted, will introduce an additional requirement so that the court may refuse to admit an action if it considers that those whose interests the action should serve will not benefit from it.

A range of remedies may be requested in a collective action. This includes an injunctive relief and a declaration that the defendant acted wrongfully against the members of the group that the association or foundation represents. However, there is one important qualification to the remedies available: a claim for monetary damages may not be brought in a collective action. In *Vie d'Or*, the Supreme Court interpreted this exception so as to include a declaratory judgment establishing causation or guidelines for establishing the amount of damages. In the same case, the Supreme Court found that the exception does not stand in the way of a claim for compensation of the costs associated with establishing liability or damages. This means that in a private enforcement action, the association or foundation may claim compensation for the cost of an economic report establishing the amount of damages that results from anti-competitive behavior.

The result of the exception that prevents a claim for monetary damages is that a collective action may establish that an infringement has occurred and may identify those affected, but it may be necessary to follow that collective action with individual claims for damages suffered. Although those individual claims may be combined in one action, this is likely to be a burdensome and costly process for the claimant and for the defendants.

There is also a statutory mechanism by which multiple damages claims can be settled collectively. This mechanism circumvents a host of individual damages actions by securing settlement between the defendant and an association or a foundation that represents the interests of each of the individual claimants. The association or foundation must be representative of the individual claimants. If a settlement is reached, the parties may file an application with the Amsterdam Court of Appeal in order to have the settlement declared universally binding. If the court of appeal issues such a declaration, the settlement becomes binding upon all members of the group that are entitled to compensation under the settlement, unless group members elect to opt out within a specified period of time. In determining whether to approve any settlement deal, the court of appeal must assess whether the settlement is reasonable, taking into account the nature of the damage, the amount of damages and the ease and expediency of obtaining compensation. If group members opt out, these members are free to start or continue an individual action.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant bears the burden of proof in: (i) determining whether there has been an infringement; and (ii) demonstrating causation and loss. In cases where a prior decision of the Dutch Competition Authority, the ACM, or the European Commission has already established a competition law infringement, the court will accept that an infringement has occurred and will require the claimant to prove only the causation and the loss. Actions can be brought in the Netherlands based on a finding of infringement by other national competition authorities. However, it is a matter for the court to decide the evidential weight afforded to such findings and such findings will not necessarily be afforded the same significance as a finding by the ACM or the European Commission.

An appeal of a decision of the European Commission (or, as the case may be, the ACM) does not always stay national damages proceedings. Notwithstanding the undesirable possibility of a revoked competition decision on the one hand and the award of damages in a (national) judgment on the other, the alleged infringers still have to demonstrate that: (i) they have appealed the decision timely; (ii) there are reasonable doubts concerning the validity of the decision; and (iii) the defense in appeal will

affect the validity of the decision. Based on these points, the national court will decide whether or not to stay the proceedings until a decision on appeal is rendered. There is no defined standard of proof, but the claimant must show a causal link between the infringement and any loss suffered and the court must give “understandable” reasoning as to why it accepts that the causal link has been demonstrated. The court must be persuaded that “but for” the defendant’s actions, the claimant would not have suffered the loss identified and that the claimant is therefore entitled to be restored to the financial position that the claimant would have been in if the infringement had not occurred.

Note, the Dutch courts may reverse the burden of proving causation if the defendant infringed a rule that is aimed at preventing the damage that occurred. For example, a breach of traffic rules might be expected to result in an accident and so the court may consider it reasonable to reverse the burden of proof in those circumstances so that the defendant must prove his breach did not in fact cause any accident. It is not clear to what extent the rule permitting reversal of the burden of proof may be applied in competition cases.

The burden of proof in establishing that an agreement merits exemption under Article 101(3) TFEU or Article 6(3) of the Dutch Competition Act rests on the (alleged) infringer.

With regard to the passing-on defense, it remains unclear whether the claimant or the defendant will bear the burden of establishing that passing-on has occurred in any particular case. However, it is noted that the EU directive on quantifying damages stipulates that the burden of proof rests on the defendant.

6. Joint and several liability of cartel participants

Joint and several liability for infringers exists in certain limited circumstances, namely “alternative causation” or “group liability”. “Alternative causation” exists when it is unclear which act caused the damage, but may have been caused by either one of two or more separate acts. “Group liability” arises when the infringers acted as a group, which is likely the case if the infringers acted as a cartel for example.

Where infringers are jointly and severally liable for damage and one defendant pays more to the claimant than the part of the debt that is attributable to him, such defendant may seek to recover any overpayment from the other infringers to the extent that he can show such overpayment is attributable to them. In other words, internally, each cartel member should contribute to the extent that the claimant’s damage is attributable to it. In circumstances where only one or some cartelists are sued in any particular claim, it is open to those named as defendants to seek to join others to the claim on the basis of joint and several liability or to seek a contribution to any damages award or settlement after the fact. Note that, if a defendant opts not to join others to proceedings and instead seeks a contribution later, it is open to those from which he seeks a contribution to criticize the defense of the claim or terms of settlement in order to argue that any share should properly be reduced. As yet, there are no decided cases on contribution between cartelists or guidance on how a Dutch court might apportion liability in the context of competition infringements.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Parties are under an obligation to each other and to the court to state their case truthfully. This entails the disclosure of all documents in their control that are relevant to the case, regardless of whether these documents adversely affect their own or the other party’s case or which support the other party’s case. If the parties fail to do so, the court may draw the inferences it deems appropriate. The principal exception to disclosure is that privileged documents do not need to be disclosed.

There is no obligation upon the ACM to disclose investigation evidence to third parties in order to assist private enforcement action, although a court order may be obtained requiring such disclosure.



The ACM has stated that it would resist disclosing such material, particularly in the case of an infringing party who has been granted leniency in an investigation, in order to maintain the effectiveness of its investigations.

8. Pre-action disclosure

Pre-action disclosure is available via a number of routes. A prospective claimant may ask for a preliminary hearing of witnesses. This allows him to hear witness evidence from any person (not only those connected to the potential defendant) in court prior to starting proceedings. The process may be used simply to allow the claimant to assess whether the claimant has a case. A preliminary hearing of witnesses may only be refused in exceptional cases, for example when there is a clear case of misuse of the procedure.

In addition, the claimant may require any party to submit a copy of documents that are relevant to his case. This entitlement is, restricted in various ways. It can only relate to a well-defined category of documents as specified by the claimant. Further, the claimant must demonstrate a legitimate interest in production of the documents and such legitimate interest must be connected to a legal relationship (usually contract or tort) to which the claimant is a party. Documents that are subject to privilege cannot be procured in this fashion. Discovery of documents in this way is not permitted if the evidence can be obtained in a different fashion, for example by hearing witnesses. There is a legislative proposal currently pending before Parliament that, if adopted, will broaden the scope of pre-action disclosure.

9. Average length of time from issue of claim to judgment in the Netherlands

A claim in the civil courts typically takes between one to two years to reach a final judgment in the first instance, depending on the complexity of the case. An appeal will take about the same length of time. An appeal to the Supreme Court will add another year or two to the duration of the proceedings, such that a case may last three to six years.

10. Average cost from issue of claim to judgment in the Netherlands

The cost of litigation varies widely, depending on the complexity of the case. The potential range of costs for first instance proceedings is likely to be between EUR300,000 and EUR700,000

The Netherlands applies a mitigated “loser pays” rule. This means that the loser must reimburse the costs incurred by the winner but recovery is capped at a certain level depending on the number of briefs and hearings and the value of the case. In practice, this means that only part of the actual cost can be recovered by the winner – generally recovery is around 20% of costs actually incurred.

11. Third party/alternative funding

There is no rule preventing alternative funding of litigation other than the bar rules that forbid fee arrangements that are entirely contingent on the outcome of the case. There is no prospect that this prohibition will be removed. In fact, the current Minister of Justice intends to include it in an act of Parliament so as further solidify the prohibition’s status.

Associations or foundations often fund litigation raising monies from the beneficiaries from the action. Individuals pay a small contribution in order to finance a collective action in their interest.

12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available. Claims can be resolved by mediation or arbitration. The Netherlands has a well-established mediation institute, the *Nederlands Mediation Instituut*, and an equally well-established arbitration institute, the *Nederlands Arbitrage Instituut*.

C. Relief

13. Availability of damages and quantification

Claimants may seek compensatory damages, including loss of profit and interest, for breach of competition law in accordance with the judgments of the Court of Justice of the European Union in *Courage v Crehan* and *Manfredi*. Claimants may also claim statutory interest on damages awarded to them. Generally, the statutory interest will start to run from the date when the damages were suffered rather than from the judgment date.

To date, no final awards of damages have been made in the Netherlands. However, the ordinary rule is that damages awarded are designed to compensate the claimant so as to restore it to the position that it would have been in had the breach not been committed. In the alternative, if claimed, the court may set the damages at the amount of profit that the defendant gained from the infringement.

Quantification of loss in the competition context is easier said than done as damages actually suffered can be difficult to calculate. An assessment of damages may involve starting with the relevant market as it existed at the time of the alleged infringement. For this purpose, it will be necessary to reconstruct the most likely market conditions assuming no infringement of Article 101 or 102 TFEU or the Dutch equivalent. This may require economic expertise and the courts may appoint experts to advise them on the calculation of damages. Parties are able to nominate or comment upon the appointment of such experts and are expected to bear the costs of any appointment.

Ordinarily, fines imposed by the competition authorities are not taken into account by the court in determining damages to be awarded in civil claims. It remains to be seen whether fines might be subtracted from profit in cases where this is taken as the basis for setting damages. The passing-on defense is accepted in the Netherlands after the Court of Appeals considered such a defense is in line with the intentions of the EU legislator with respect of quantifying damages suffered as a result of competition infringement.

14. Punitive and exemplary damages

Punitive or exemplary damages are not generally available in the Netherlands.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Interim injunctions preventing the defendant from continuing to infringe competition rules pending full trial of the issues may be sought from the civil courts. The claimant must summarily demonstrate that an infringement has occurred. The court may refer the matter to ordinary proceedings if the matter is not suitable for a judgment on a summary basis. This might be the case, for example, if the taking of evidence is required in order to establish whether an infringement has occurred. The judges in summary proceedings have a wide margin of appreciation in this respect and, in practice, cases are not often referred for a full hearing.

In determining whether to grant an interim injunction or not, the court must weigh the interests of the claimant and the interests of the defendant, taking into account: (i) the likelihood that the claimant will have its case upheld in the proceedings on the merits; (ii) the damages likely to be suffered by the claimant if the injunction is not given; and (iii) the damages likely to be suffered by the defendant if the injunction is given. Further, the ability of a claimant or defendant to pay damages awarded on final judgment may also be taken into account— but the applicant will not be required to offer a cross undertaking to pay damages suffered if it does not succeed on the claim.



D. Emerging trends

The Netherlands is a jurisdiction that is favored by claimants bringing civil claims in the EU.

The reasons for this are that: (i) litigation is relatively cheap in the Netherlands; (ii) disclosure is available; and (iii) it is possible to bring collective actions and achieve settlement on a collective basis. There are currently a number of follow-on actions pending before the Dutch courts, inter alia, in relation to the paraffin waxes cartel, the airfreight cartel, the sodium chlorate cartel and the elevator cartel. Several defendants in these cases are not established in the Netherlands, however Dutch courts have accepted jurisdiction where one of the defendants (the so-called anchor defendant) is based in the Netherlands and the other claims are closely connected. This close connection requirement is not fulfilled when the Commission decision distinguishes several nationally operating cartels instead of one cartel that affects several Member States.

Many of these actions have been brought by “professional claimants,” such as Cartel Damage Claims and others, that have a business model based upon bundling up claims and seeking very high damages on the basis of decisions by the European Commission and/or national competition authorities that an infringement has occurred. However, to date, no final award of damages has yet been awarded in the Netherlands.

Poland

Katarzyna Manteuffel, Łukasz Hejmej and Mikołaj Piaskowski

A. Availability of civil claims

1. Scope for civil claims in Poland

A private civil action can be brought on either a stand-alone or follow-on basis in respect of any type of practice that might be deemed anti-competitive under Polish or EU competition law (including abuse of a dominant position and anti-competitive agreements).

Civil claims founded on a competition law infringement may be brought under the general damages provisions of the Polish Civil Code and the Civil Procedures Code or under the Act on Assertion of Claims in Group Actions 2010 (in Poland, there is no specific legislation on private competition litigation). The approach to the issue and conduct of proceedings is the same for both corporations and individuals, whether domestic or foreign. Claims may include damages suffered outside of Poland, provided that the Polish court has jurisdiction to hear the claim.

2. Applicable limitation periods

The applicable limitation period for issuing a claim for damages in accordance with the Polish Civil Code is three years from the date on which the potential claimant becomes aware of the following:

- (i) The occurrence of damage
- (ii) The identity of the person responsible for the damage

The three-year period of limitation cannot apply more than 10 years after the date on which the event causing damage occurred. Therefore, an action can no longer be brought even when the fact of infringement is actually discovered by the claimant if the behavior complained of came to an end 10 years or more since discovery.

The rules on limitation do not take account of circumstances in which the potential claimant does not become aware within 10 years of the event causing damage (for example, in the case of a long-running secret cartel). There is no period of limitation specifically tailored for civil claims arising out of competition infringement. Likewise, there is yet to be a case law on how the standard applicable limitation period might be interpreted in such circumstances. The Polish courts have interpreted the scope of limitation restrictively in other fields of law, such as in medical negligence, and it is likely that a strict approach on limitation will also be applied in damages cases resulting from cartels, to the extent that the EU competition law has not been infringed. As to how Polish law currently stands, it is not possible to sue participants in a cartel for damages resulting from their infringement if 10 years or more have passed since the cartel was active. Hypothetically, one might argue that a long-stop on limitation is not consistent with the *Manfredi* judgment, but we are not aware of any such argument being raised before the Polish courts to date and so it is unclear whether this argument would succeed to circumvent the rules on limitation or not.

Furthermore, when litigating a single continuous infringement that occurred over a period lasting more than 10 years, a claimant may try to recover all damage, but the defendant may raise the statute of limitations and thus, the claimant will only be able to recover damage suffered within the limitation period.

3. Appeals

A ruling by a Polish court of first instance on a private damages action may be appealed before an appeal court on grounds of either fact or law. In extraordinary cases, a claim might even be appealed



further on a point of law before the Polish Supreme Court (cassation) if: (i) an important legal issue is involved; (ii) there is a need to clarify the application of legal provisions that raise substantial doubts or where there is divergence in jurisprudence; (iii) there is an invalidity of proceedings; or (iv) the appeal is “obviously” justified.

4. Availability of class actions for infringement of competition law and/or damages in Poland

The Act on Assertion of Claims in Group Actions 2010 provides for a possibility for a group of 10 people or more, who have claims of the same type and whose claims are based on one or the same factual ground, to file a collective claim. The act uses a Polish word that may be understood to refer to either individuals or legal entities. We are not aware of any competition damage claims brought in reliance on these provisions.

Claims are brought by a single person or the local consumer ombudsman acting as representative for the group. The ombudsman is a public position. He is not obliged to agree to act in every case and he acts in the interests of individual consumers only. If a group of claimants cannot agree on the quantum of damages to be claimed, the group may restrict its claim to the establishment of the defendants’ liability and then bring individual actions in respect of damages owed to each of them. If the group action is certified, the court announces the class action in national press and other interested persons are permitted to opt in to the action. The announcement of court will indicate a deadline by which interested persons must opt in to the proceedings (from one to three months).

B. Conduct of proceedings and costs

5. Burden of proof

The claimant bears the burden of establishing that there has been an infringement of competition law. The claimant likewise bears the burden of demonstrating that “but for” that infringement, loss would not have been suffered. Every element of its claim, including all the circumstances justifying the claim and all of the facts to which the claimant attribute legal consequences (concrete loss and precise quantum), must be proven by the claimant. A decision issued by a competition authority may serve as strong evidence of infringement, but it is not yet accepted that a competition authority’s decision is a definitive proof of liability in Poland, despite past judgments of the Polish Supreme Court suggesting that a civil court may be bound by the decision of the competition authority. According to the current case law, the court assessing the case may make its own findings as to whether an infringement has occurred, regardless of whether a competition authority has already made a decision or finding in that case. In cases where a civil claim has been issued and a competition authority subsequently starts an investigation into the same matter, the court may stay proceedings pending determination of the investigation, but is not obliged to do so.

Even if a decision of a competition authority exists and is accepted by the court as evidence that the infringement occurred, the claimant will still be obliged to prove that damage has been suffered as a result of the infringement. The court determines whether the given circumstances have been proved to a satisfactory standard. In cases where the exact amount of damage cannot be proven or where providing the proof is excessively difficult, the court is able to award an amount that it considers “appropriate.”

6. Joint and several liability of cartel participants

According to the Polish Civil Code, the general rule is that if more than one person might be deemed liable for an unlawful activity, those persons will be held jointly and severally liable for the resulting loss.

Joint defendants are considered to share liability in full. This means that each defendant is deemed wholly liable for the resulting damage. A court will not apportion liability between defendants on

judgment as the court simply declares joint and several liability, rather than apportioning responsibility for damage between defendants. The main benefit to a defendant in joining other parties as defendants is that they will then be able to question the way that the proceedings are conducted by the first sued defendant in order to shift a greater portion of responsibility to the sued defendant.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

It is possible to apply to obtain non-confidential copy of infringement decisions from the Polish Competition Authority. The authority is obliged to disclose the so-called “public” information, but access to such information may be restricted if it contains business secrets.

There is no standard disclosure obligation in Poland. However, a claimant may ask the court to order defendants or other third parties to disclose specific documents and information necessary in order to support its claim. The claimant may also ask the court to require that these documents be treated as non-confidential (even in cases where documents are covered by legal privilege). On the other hand, from a practical point of view, it will be very difficult to identify documents that have to be disclosed because, in competition litigation, it is unlikely that the claimant will have knowledge of what documents exist as evidence of anti-competitive behavior.

8. Scope of pre-action disclosure

There is no scope to apply for pre-action disclosure under the Polish civil procedure.

9. Average length of time from issue of claim to judgment in Poland

Private enforcement is still emerging in Poland. Therefore, it is difficult to specify how long it might take to resolve a competition claim from issue to judgment at first instance, in comparison with other types of actions for damages.

Generally, complex damages actions take from three to five years to reach judgment at first instance. As it is with other jurisdictions, the estimated time for any given case will depend on its complexity. Evidential issues concerning proof and amount of damages, such as a rise in competition claims, are particularly difficult and will likely add to the complexity of any case. Depending on the complexity of the case and the court assigned to hear it, the process of a competition claim may take approximately one to three years before it can be resolved.

10. Average cost from issue of claim to judgment in Poland

The claimant must pay a court fee upon filing the statement of claim. For competition claims, 5% of the value of the claim, ranging from PLN30 (approximately EUR7) to PLN100,000 (approximately EUR25,000), is the likely fee.

The general rule on costs is that costs follow the event and the losing party pays the reasonable costs incurred by the winning party as well as its own costs. In determining what costs are reasonable, the Polish courts will objectively assess whether the costs incurred were necessary in conducting the case and the extent to which such costs can be justified.

Even in cases where costs incurred are considered justified, the court may nonetheless, in its discretion, order that only part of costs should be paid by the losing party or it may even choose not to order any payment of costs at all. According to legal rules of procedure, this happens in “particularly justified cases” and it is for the judge to decide if the rule may be applied based on the circumstances of the case (e.g., this may be because the claimant has caused some costs to be incurred by virtue of its negligent or unfair behavior).



11. Third party/alternative funding

There is no real precedent on the concept of third party funding in Poland. There are no rules prohibiting such funding, but only the parties to the proceedings may ask for an order for recovery of the costs that such parties have incurred. It is possible to transfer the rights to a claim from one person to another, without the defendant's consent. Therefore, it is theoretically possible for a third party to bundle claims in respect of damages claimed in competition litigation proceedings.

12. Alternative methods of dispute resolution

Parties can choose to submit claims to arbitration or mediation, provided that the parties have agreed to submit the disputed issue to arbitration or mediation.

To date, there are no public reports of arbitration or mediation proceedings occurring in respect of competition law disputes in Poland.

C. Relief

13. Availability of damages and quantification

The Polish Civil Code provides for compensation of two types of losses – *damnum emergens* (actual loss arising) and *lucrum cessans* (lost profits). An injured party has the right to sue for both, although a claim is restricted to monetary compensation when restitution is impossible, or could involve excessive difficulties or costs for the defendant.

The damages awarded are designed to restore the claimant to the position in which it would have been had the breach not been committed. Accordingly, damages cannot exceed the amount of loss actually incurred by the claimant.

A “passing-on” defense does not exist in the Polish legal system. However, it should be emphasized that the principle of *compensatio lucri cum damno* has a similar effect upon the amount of damages recoverable by an injured party. According to this principle, and as noted above, the damages awarded cannot exceed the amount of loss incurred so, if passed on, no recoverable loss can in fact be demonstrated by the claimant. Interest is available and is applied from the date of lodging suit.

14. Punitive and exemplary damages

Punitive or exemplary damages are not available under Polish law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

An interim injunction may be granted without notice in circumstances where a claim is established as having potential basis and it is likely that, in the absence of an interim injunction, it will be impossible or extremely difficult to enforce the judgment or achieve the objective of the proceedings.

Under Polish law, an interim injunction may be granted prior to proceedings being commenced. However, if an interim injunction is granted in such circumstances, a statement of claim must be issued within two weeks. On the issue of the claim, the circumstances justifying the motion must be substantiated and the court will decide whether the injunction may be justified on an ongoing basis.

16. Other types of relief

There are no other types of relief available to claimants.

D. Emerging trends

No actions for damages resulting from infringement of competition law have yet been publicly reported as issued in Poland. Without changes to the Polish Civil Code and the Civil Procedures Code (or the overarching European regime) to address some of the difficulties in bringing such actions, particularly in respect of burden of proof and causation, significant growth seems unlikely.

That may change after the implementation of the EU Damages Directive. However, at the time of writing, the form of implementation was not known.



Russia

Anton Subbot, Nadia Goreslavskaya and Kirill Svetlov

A. Availability of civil claims

1. Scope for civil claims in Russia

Anti-competitive conduct or its harmful effects need not occur in Russia in order to claim damages before a Russian court. Moreover, such a claim may be brought in the absence of a prior regulatory finding of the corresponding infringement.

Russian competition law was amended in 2012 so as to provide an express right for companies and individuals harmed by anti-competitive conduct to claim damages (including lost profits) and seek other redress as may be appropriate. Because these amendments represent a clarification of the existing law, such amendments do not affect the right to claim damages caused by the anti-competitive conduct that occurred before 2012.

Russian competition law prohibits certain actions of market-dominant companies, anti-competitive agreements and concerted practices, coordination and unfair trade practices. There is a distinction between *per se* and rule of reason violations. For example, the following actions by market-dominant companies are considered to be *per se* illegal: (i) establishing monopolistically high or low prices; (ii) withdrawal of goods from circulation if it leads to the increase of price for these goods; (iii) forcing contracting parties to accept unfair contractual terms; (iv) economically or technologically unjustified reduction of output; (v) economically or technologically unjustified refusal to enter or evasion from entry into contracts with selected buyers; (vi) economically, technologically or otherwise unjustified establishment of different prices for the same goods; (vii) price and non-price discrimination; (viii) creation of barriers to market entry and exit, etc.

Agreements between competitors that actually or potentially lead to the following consequences are viewed as a cartel and are *per se* prohibited: (i) price fixing; (ii) price maintenance at public auctions; (iii) market allocation based on territory, sales volume, assortment or composition of buyers; (iv) reduction of output; and (e) refusal to enter into contracts with selected buyers, with the most recent amendments, effective January 2016, being that a cartel is possible not only among sellers but also buyers. Other agreements are prohibited to the extent that these agreements actually or potentially lead to a restriction of competition. However, vertical agreements are *per se* illegal only if these agreements: (i) lead to the resale price maintenance except when they establish the maximum resale price; or (ii) provide for the duty of the buyer not to trade in competing goods (with certain exceptions).

Coordination of the activities of other economic entities (that are not members of the same group of companies as the coordinating entity) is prohibited if it leads to the same consequences described in the context of cartel-like agreements.

2. Applicable limitation periods

A claim for damages caused by a violation of the competition law will be characterized as a tort claim with a limitation period of three years from the time when the aggrieved person learned or should have learned that their rights had been violated.

There are no special rules for determining whether a person should have learned of the rights being violated and so this question will be resolved on a case-by-case basis.

3. Appeals

Private claims for damages resulting from competition law infringements are subject to the ordinary procedure followed by commercial courts. This procedure provides for a hearing before a court of the first instance and the judgment of that court may be appealed to the Court of Appeals on grounds of fact and/or law.

The judgment of the Court of Appeals may be further appealed to the Court of Cassation on grounds of law only. The Court of Cassation may also set aside the judgments of the lower courts if the factual conclusions drawn directly contradict the evidence in the case.

The judgment of the Court of Cassation may be further appealed to the Court of Supervision, which is the court of the last instance. While all other courts must consider appeals from the decisions of lower courts, the court of supervision has discretion as to whether to accept jurisdiction over any appeal. The formal criteria for accepting an appeal are that judgments of the lower courts violate:

- (i) The rights and freedoms guaranteed by the Constitution, as well as by the generally recognized principles of international law and international treaties of the Russian Federation;
- (ii) The rights and lawful interests of an undefined group of persons or other public interests;
- (iii) The uniformity in the interpretation and application of law by lower courts.

4. Availability of class actions for infringement of competition law and/or damages in Russia

Group actions for infringement of competition law are theoretically possible in Russia but have not been tested in practice as yet.

An important limitation on class action claims is that, in order to form a group to bring such claims, all claimants must be participants in the legal relationship out of which the dispute has arisen (i.e., parties to the same contract). The courts have yet to apply this provision in the competition context.

B. Conduct of proceedings and costs

5. Burden of proof

The burden of proof in private claims for damages resulting from competition law infringements is governed by the ordinary rules governing commercial claims, which means that the claimant is generally required to prove the circumstances on which it relies. Whether the claimant has met this burden is decided on the balance of probabilities.

Because competition law claims are based in tort (and arise from a breach of a statutory duty), if tortious conduct is proven, a legal entity is presumed to be liable unless it can demonstrate that it was unable to comply with the applicable requirements due to some force majeure circumstances (or the causal link between the tortious conduct and claimed damages is not established). It is still unclear whether the existence of a competition compliance program may be used to rebut this presumption.

Regulatory findings are not binding upon a court considering a related private claim, but the court will likely consider such findings as very persuasive evidence of the fact that the alleged infringement actually occurred.

6. Joint and several liability of cartel participants

Competition law claims are by nature tort claims and so, where more than one entity has participated in commissioning the tort, joint tortfeasors will be deemed jointly liable for the damages caused. A tortfeasor that has alone paid compensation to a claimant in respect of damages caused jointly with



others may claim contribution from the other tortfeasors in such proportion as those damages are attributable to the individual fault of each. If the individual fault of each joint tortfeasor cannot be determined, their shares in the overall amount of damages are deemed to be equal. If a joint tortfeasor is sued alone, it may request the court to join the others and if the court denies this request, it may initiate a contribution claim in a separate action.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

In Russia, the potential to obtain discovery in general is very limited. A party to court proceedings may request that the court order the other party to produce documents necessary to the case. However, to succeed on such a request, the documents requested must be identified fairly specifically otherwise the court will not grant production. Although the party that was ordered must provide a reasonable excuse for not producing the evidence that it was ordered to produce, the court is not formally required to draw an adverse inference from such a refusal.

The question of whether a claimant in court proceedings may obtain access to documents gathered by the competition authorities during a competition audit or competition proceedings has not yet been resolved. The competition authorities would probably not disclose evidence obtained during competition proceedings voluntarily to an entity that was not a party to this proceeding, particularly as the parties to the competition proceedings usually mark the evidence they submit as confidential. However, it may be possible to obtain such evidence by requesting the court to order the competition authorities to produce it even if the competition authority is not a party to the court proceedings.

8. Pre-action disclosure

There is no pre-action disclosure, i.e., the court proceedings must be initiated to apply for disclosure of any documents.

9. Average length of time from issue of claim to judgment in Russia

Court proceedings in Russia are very quick. The statutory period for the court of the first instance to resolve a case is three months and most first instance court judgments are issued within this time.

This period may be extended by a further three months for complex cases, which is likely to be the case for competition-related claims. The judgment of the first instance court becomes effective within one month of its issue unless the judgment is appealed to the Court of Appeals (which is a usual practice). The statutory period for the Court of Appeals to consider and determine an appeal is two months. The judgment of the Court of Appeals becomes effective immediately but may be appealed to the Court of Cassation within two months (which is also a usual practice). The time period for the Court of Cassation to consider and determine an appeal (and for that appeal to be challenged) is the same as in the Court of Appeals.

10. Average cost from issue of claim to judgment in Russia

The maximum fee charged to file commercial claims is fixed at RUB200,000 (approximately EUR2,500 at the time of writing).

The average cost of legal and expert fees is difficult to estimate but a range between EUR25,000 and EUR100,000 may be taken as a rough estimate. The winner may request the court to award legal fees but the courts are very conservative in determining what fees are reasonable.

11. Third party/alternative funding

There are no rules limiting third party or alternative funding and this practice is not wide-spread.

12. Alternative methods of dispute resolution

There is no direct prohibition against submitting private claims in relation to breaches of competition law to arbitration and mediation provided that the parties consent to it.

C. Relief

13. Availability of damages and quantification

As noted above, Russian competition law was amended in 2012 so that companies and individuals harmed by anti-competitive conduct now have an express statutory right to claim damages, including lost profits, or seek other redress against the infringing party.

The courts are yet to develop any particular approach to quantification of private damages based on competition claims. The ordinary rule is that the claimant should be compensated for the damages suffered as a result of the violation, which means that the courts should place the claimant in a position it would have been in but for the respondent's actions. Although opinions of the economic experts are not required, without such an opinion, proving damages will be difficult.

The passing-on defense is arguable in theory but it is not yet clear whether the claimant or the defendant should bear the burden of proving passing-on.

14. Punitive and exemplary damages

There are no punitive or exemplary damages available under Russian law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Injunctions in respect of an alleged competition law offense are governed by the ordinary rules of procedure, which means that injunctions are possible in principle but are very difficult to obtain in practice.

As an interim measure, an injunction may be granted: (i) in cases where not granting it would subsequently prevent or hinder execution of the judgment; or (ii) for the purposes of preventing substantial damage to the claimant. A permanent injunction is possible but the court would have to indicate in the judgment what actions must be performed as well as the time and place of their performance.

16. Other types of relief

Apart from damages, an aggrieved person may seek any type of relief that would reinstate its rights (e.g., invalidation of a contract, requiring the respondent to enter into a contract, etc.).

D. Emerging trends

There have been a limited number of private claims based on competition law offenses, covering both stand-alone and follow-on cases. However, the Government of Russia and FAS have sought to encourage civil claims for damages resulting from anti-competitive conduct. This includes the government's instruction to develop federal legislation on class actions and a broad discussion around FAS' latest proposals relating to multiple damages (e.g., 10% of the offender's annual revenue in the affected market). These are subject to a certain degree of criticism but the ongoing discussions in this area are likely to promote private competition claims.

Moreover, there have been certain interesting cases relating to claims based on decisions of FAS. For instance, a foreign manufacturer of pharmaceuticals was found guilty of abusing dominance by unjustifiably refusing to deal with a local distributor. Based on FAS' decision, the distributor sued for



damages and won. The damages awarded to the claimant amount to approximately USD11.5 million. In another case, a manufacturer of concrete was found guilty of an unjustified refusal to deal with a local reseller and, based on FAS' decision, the court then awarded loss of profit to the claimant in the amount of approximately USD3.2 million. Several other cases also involved follow-on claims, whereas successful stand-alone claims continue to be rare.

Competition principles can be used in addition to, or instead of, claiming for damages by terminated distributors seeking reinstatement, or by rejected potential distributors seeking a direct contract with a manufacturer. A number of successful claims in the automotive sector had a significant impact on the industry. Although these were not directly connected with a violation of competition law, FAS issued recommendations to automotive manufacturers covering, inter alia, suggested terms of dealer contracts as well as terms of terminating such contracts. The said provisions were then reflected in the AEB Code of Conduct for manufacturers of automobile manufacturers. There is a similar code in the works for the pharmaceuticals industry.

Private claims are expected to be made more often, and are also expected to obtain additional support and preservation through statutory provisions.

Spain

Carles Prat, Valeria Enrich, Alberto Escudero and Carmen Campo

A. Availability of civil claims

1. Scope for civil claims in Spain

Stand-alone and follow-on actions are available in Spain.

Civil claims can be brought in Spain under Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), and/or under Articles 1 and 2 of the Spanish Competition Act against any undertaking or person engaging in a commercial or economic activity.

Remedies sought include a declaration that a contract is invalid because it contravenes competition rules (Article 1303 of the Spanish Civil Code). If upheld, the parties must be restored to the position that they were in prior to entering into the contract (i.e., restoring the goods and amounts exchanged under the contract), subject to certain limits.

Claims may also be filed to request compensation for losses and damages suffered as a result of a competition infringement, whether such claims are filed on a stand-alone basis or follow a finding of infringement by the European Commission, the National Markets and Competition Commission (“CNMC”) or the Regional Competition Authorities.

No specific rules exist under Spanish law that specially provide for the ability to sue in Spain relying on a foreign national competition authority’s findings, but this should in principle be possible.

Civil claims must be brought in the Spanish commercial courts, which are specialized civil courts that have been entrusted with applying and interpreting EU and Spanish competition rules. Follow-on actions in which only damages are sought might also be brought in the Spanish civil courts.

2. Applicable limitation periods

As the Spanish Supreme Court has confirmed in recent judgments,³²⁶ damage claims based on the damages caused by the existence of a cartel are considered tort claims (as opposed to claims based on contractual liability). Therefore, the limitation period is generally one year from the day that the claimant becomes aware of the damages (i.e., the date when the claimant becomes aware of both the infringing act and the infringer) or from the day that the claim could have been exercised (Articles 1968 and 1969 of the Spanish Civil Code).³²⁷ In Catalonia, the limitation period could be up to three years.

Existing case law indicates that, if the damages are caused by a series of illegal acts rather than a single continuous infringement, then the one-year limitation period is triggered for each individual illegal act. Thus, there is a different time period for each infringement.

The limitation period for bringing a claim challenging the validity of a contract (e.g., because it violates competition law) is four years from the date upon which the contract was entered into (Article 1301 of the Spanish Civil Code). As noted above, in cases where a contract is held to be invalid, the parties (subject to certain limitations) must attempt to restore the goods and amounts exchanged under the contract such that the parties are in the same position as they were prior to entering into the contract (Article 1303 of the Spanish Civil Code).

³²⁶ Supreme Court judgments of November 7, 2013 and June 8, 2012.

³²⁷ Recently, the Supreme Court has recognized that the prescription starts when the claimant is aware of the extent of the losses suffered from the infringement (i.e., the date when the claimant has clear knowledge of the damage suffered). See judgment of the Supreme Court (Case 528/2013), of September 4, 2013.



3. Appeals

The appellant may appeal a first instance decision to the competent court of appeal on both issues of fact and issues of law.

A further appeal from the court of appeal can be made to the Spanish Supreme Court. Only decisions that must be challenged in order to “unify legal doctrine” (i.e., the challenge is brought on the basis that a given decision is contrary to the interpretation of the law established in preceding case law) or exceed a certain monetary threshold can be appealed to the Supreme Court.

4. Availability of class actions for infringement of competition law and/or damages in Spain

Spanish legislation does not contain any specific provision regarding the standing of classes, groups or representative bodies to bring actions challenging agreements or a claim for damages based on an infringement of EU or national law.

The provision most similar to a “class action” is Article 11 of the Spanish Civil Procedures Act, which refers to the protection of the interest of consumers.

In cases where potential victims can be easily identified, Article 11.2 allows those groups of consumers or end-users, consumer and user associations and other legally constituted entities (the purpose of which would be the defense of the consumers) to bring claims for the protection of the collective interest of the group before a court and to claim damages.

Where the affected parties are an unascertainable group of consumers or end-users, or a group whose members cannot be easily identified, Article 11 of the Spanish Civil Procedures Act is more restrictive. Only consumer associations (which, according to the law, represent general consumer interests) may claim on their behalf. Acting through an association requires it to be recognized as a “formal association” (Articles 11.3 and 11.1 of the Spanish Civil Procedures Act).

Where a judgment is made in respect of this type of “consumer action,” each individual consumer must then apply to the court separately: (i) to be recognized as a member of the class or group; and (ii) so that the court can quantify the damages caused to that individual. In these cases, Spanish law requires that the individual appears in the proceedings and formally becomes a claimant. The defendant needs only to pay damages to the identifiable individuals.

Class actions are only available for the protection of the rights of consumers and end-users who, for example, have suffered a loss arising from anti-competitive conduct. Other types of affected groups (not representing the interests of consumers/end-users – e.g., a group of companies affected by a cartel formed by its suppliers) that wish to bring a claim will have to do so either individually or collectively (under the same legal representation). In such cases, the judgment will only affect the claimants involved in bringing the proceedings. It will not bind other parties that might also have suffered losses or damages as a result of the same infringement but who did not participate in the action.

Reportedly, to date there is only one case in which a consumer association has claimed for damages. The claim was submitted by the AUSBANC association against Telefónica on the basis of Telefónica’s margin squeeze in the Spanish broadband market³²⁸ which, according to AUSBANC, would have caused damages of EUR458 million to Spanish consumers. However, the Spanish courts dismissed this claim on procedural grounds due to the fact that AUSBANC did not fulfill the formal conditions required to submit a claim on behalf of an unascertainable group of consumers. Therefore, the possibility of “class actions” remains mostly unexplored.

³²⁸ See judgment by the EU Court of Justice (Case C-295/12 P) of July 10, 2014, confirming in full a European Commission decision of 2007 that had fined Telefónica for a margin squeeze in the Spanish broadband market, in breach of EU antitrust rules.

After the very recent CNMC Decisions sanctioning motor vehicle manufacturers and numerous dealers for alleged exchange of information and cartel behavior, a Spanish Consumer Association (“OCU”) has decided to bring damages actions. For the moment, available information indicates that the OCU has made a call to consumers that may have been affected by these anti-competitive practices. The development of such damages claims remains to be seen.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant bears the burden of proof in establishing whether there has been an infringement. The required legal standard is to prove the existence of the facts constituting an infringement – there is no concept equivalent to the “balance of probabilities” or beyond reasonable doubt.

In cases where there is a prior final infringement decision of the CNMC, the Regional Competition Authorities or the European Commission, the court must accept that the infringement is established.³²⁹ In such cases, the claimant only needs to prove causation and loss. Decisions from other national competition authorities may be accepted as evidence of the existence of an infringement, but will not be sufficient in themselves to establish such infringements.

In any event, the claimant must show a direct causal link between the infringement and any loss suffered. To do this, the claimant must demonstrate that the damages are the direct consequence of the infringement. If the defendant alleges the existence of possible causes of the claimant’s loss other than its own conduct, then the defendant will have the burden of proof with respect to those other causes and their effect on the claimant.

Spanish procedural legislation establishes that the court will take into account the degree of access that each party has to relevant evidence (Article 217 of the Spanish Civil Procedures Act).

Rebuttable presumptions as evidence can play an important role depending upon the specific factual circumstances. In competition law rebuttable presumptions could, for instance, be admissible with regard to damages and loss suffered if there is a sufficient factual basis in the case at stake.

The burden of proof in establishing that an agreement merits exemption under Article 101(3) TFEU or Article 1.3 of the Spanish Competition Act rests on the alleged infringer.

6. Joint and several liability of cartel participants

For non-contractual liability (such as liability arising from cartel offenses), Spanish case law indicates that, where several parties have acted jointly and caused damages as a result, and the particular actions of each infringing party cannot be separated, liability for the damages caused will be joint and several. To our knowledge, to date no Spanish competition case has been decided where liability has been apportioned between defendants.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

In contrast with common law systems, in Spanish law there is no discovery and the parties are under no obligation to disclose their private documentation. Parties may use any documentation and

³²⁹ See judgment of the Supreme Court of November 7, 2013. Nevertheless, in a recent judgment by the Commercial Court n° 12 of Madrid (Case 00088/2014) of May 9, 2014, the judge considered that, although the facts of the case did not constitute a cartel (following the judgment of the Court of Appeal), those same facts could constitute other anti-competitive conduct such as boycott. The claimant had to prove that those facts amounted to boycott, that the claimant had suffered a loss and that the loss resulted from the anti-competitive conduct.



evidence they can obtain through their own resources. They may also request specific and identifiable documents in the possession of the other party to be brought into the proceedings.

There is no obligation upon the CNMC to disclose investigation evidence to third parties in order to assist in a private enforcement action, although a court order may be obtained requiring such disclosure.

Legally privileged documentation may not be used by the CNMC, unless the privilege is waived, and should also not be used by the parties. However, the latter circumstance is considered an ethical obligation, not a legal obligation.

8. Pre-action disclosure

The applicable Spanish legislation does not provide for pre-action disclosure (i.e., the request of documents from the opposing party before the commencement of the trial) as a general preliminary measure. However, in certain cases it may be possible to obtain particular documents and evidence prior to the commencement of the trial.

9. Average length of time from issue of claim to judgment in Spain

A claim in the commercial courts typically takes from a year to a year and a half to reach the final judgment in the first instance, mainly depending on the workload of the court handling the case. An appeal to the Court of Appeal (on matters of either fact or law) will take about the same length of time.

Finally, appeals to the Supreme Court are usually lengthier and can add another 2 to 4 years to the duration of the proceedings. An appeal to the Supreme Court on matters of fact is only possible if the appellant can prove that the interpretation by the lower court was arbitrary, contradictory and clearly inaccurate.

It should be noted that claims in excess of EUR600,000 may be appealed to the Supreme Court for reasons of incorrect interpretation or application of either procedural or other legal rules. In contrast, claims with a value of under EUR600,000 may only be appealed to the Supreme Court if there is contradictory case law in the resolution of similar cases.

10. Average cost from issue of claim to judgment in Spain

The cost of litigation varies widely, depending on the complexity of the case and, usually, on the amounts claimed. As a general indication, a range of between EUR25,000 and EUR90,000 would not be unusual for first instance damage cases under competition law. In case of a costs award, the court commonly follows the criteria of the local Bar Association.

In Spain, the court will always order the party who loses the case to pay the costs and expenses of the other party, unless the case raises serious doubts as regards the facts or the application of the relevant law. In cases where the claimant's petition and arguments are dismissed only in part, the court will not issue an order regarding costs, and each party will pay its own expenses.

11. Third party/alternative funding

There is no rule preventing alternative funding of litigation. We are not aware of any third party funding in Spanish law. Some insurance companies, however, provide legal defense insurance.

12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available. Claims may, in principle, be submitted to arbitration.

Both the Arbitral Court of Madrid and (“*Corte de Arbitraje de Madrid*”) and the Barcelona Arbitration Tribunal (“*Tribunal Arbitral de Barcelona*”) are well-established arbitration organizations.

No Spanish arbitration awards dealing with competition issues or granting damages for an infringement of competition law have been published to date. However, arbitration awards are essentially private and therefore not generally available to public.

C. Relief

13. Availability of damages and quantification

Claimants may seek full compensatory damages – including damages, loss of profit and interest – for breaches of competition law in accordance with the judgments of the Court of Justice of the European Union in *Courage v Crehan* and *Manfredi*.

There are no specific Spanish rules regarding liability for damages for breach of EU and national competition law. Thus, the general rules on damages based on liability in tort are applicable. The Spanish Civil Code differentiates between two types of damages: actual damages (*damnum emergens*) and damages in the form of lost profits (*lucrum cessans*). The court may award compensation for both types of damages suffered by the claimant, provided that the amount of each is duly evidenced during the proceedings. Additionally, moral damages or those affecting the claimant’s reputation may also be claimed.

Generally, only losses directly suffered by a claimant may be compensated. Therefore, if a claimant has “passed on” all or part of the inflated cost of the products to its clients and has thus minimized the losses incurred, the court should take this into account and either reduce the amount of the compensation accordingly or reject the claim for damages on the basis of lack of evidence of the losses suffered. Otherwise, such a situation could give rise to unjust enrichment. The “passing-on” defense has been explicitly recognized by the Spanish Supreme Court. The burden of proof of the damages that would have been “passed on” by the claimant remains on the defendant.

There is no presumption under Spanish legislation that higher prices have been “passed on” to the end- purchasers. Thus, any defendant raising this argument will have to prove it to the court in a sufficient manner.³³⁰

Given that damages are generally awarded to restore a claimant’s position, it is unlikely that fines imposed by competition authorities will be taken into account by the commercial courts when awarding damages (although this has not been addressed by the courts to date). This would require exceptional circumstances.

In any event, although the claimant is not obliged to do so, it is advisable to submit some expert economic evidence in order to prove the causation of the damages and the losses. In most cases, the defendant will submit its own expert report. The experts producing such reports may be obliged to attend the hearing to defend them.

Damages are mainly calculated by aggregating the economic damages suffered by the claimant and the economic loss of profit. Both must be proven, either through expert reports or the documentation that the claimant can provide to the proceedings. According to the Spanish Supreme Court, the expert reports must formulate a reasonable hypothesis concerning the damages suffered by the claimant founded on reliable data. In this sense, in its most recent judgments, the Supreme Court granted all the

³³⁰ The Supreme Court has clarified that, in order to prove the “passing-on” defense, is not enough for the defendant to prove that the claimant raised the prices to its clients. It is necessary that the defendant prove that, when raising the prices to final clients, the claimant managed to pass on all the damages suffered from the cartel. See judgment by the Supreme Court (Case 651/2013), of November 7, 2013, *Sugar Cartel*.



damages claimed by the claimants (and supported by the claimant's expert reports) because the defendant's expert report only refuted the claimant's arguments but did not propose a different and equally reasonable calculation of the damages.

Moral damages are unilaterally determined by the court, based on previous case law and the repercussion, if any, of the infringement in the market.

For example, in a case affecting the electricity market, where a utility company limited access to a database managed by electricity distributors to only one of the electricity marketers, the judge decided that this was an abuse of dominant position and awarded damages based on the customers that the marketer would have obtained if it had unrestricted access to the database and the benefit that it would have obtained by each additional client.

14. Punitive and exemplary damages

Punitive or exemplary damages are not available in Spain.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Interim injunctions preventing the defendant from continuing to infringe competition rules pending full trial of the issues may be sought from the commercial courts in interim injunction proceedings. There are no summary proceedings, only the possibility of an interim injunction.

To obtain an interim injunction, the applicant has to prove: (i) that there is a *prima facie* "appearance of good right" (*fumus boni iuris*); and (ii) that there is a risk that the final decision cannot be enforced without an interim remedy (*periculum in mora*). Additionally, in some cases it may be rational to stop the infringement, thereby preventing further damages from being suffered.

The claimant is obliged to submit bail in order to compensate the defendant for any damages that may be caused as a result of the injunction if the claim on the merits eventually fails. If the claimant loses the case overall, the defendant may indeed be entitled to claim further damages in specific follow-on proceedings.

D. Emerging trends

In the last several years, the Spanish courts have ruled on several private litigation cases. The majority of these cases related to commercial disputes in the petrol station sector where the parties had requested the nullification of contractual clauses in the agreements between the petrol suppliers and the petrol station. The basis for these requests was that the relevant contractual clauses were contrary to competition law or the parties used the argument of breach of competition law to defend themselves from an alleged contractual infringement. These claims have been accompanied by requests for compensation for the losses and damages suffered. In addition, recent judgments of the Supreme Court have clarified some procedural matters regarding damage claims and paved the way for additional claims as the damage claimed were fully granted by the Supreme Court.

We expect that more civil claims will occur in the near future. The new EU directive 2014/104/EU on Antitrust Damage Actions will contribute to this trend too.

Sweden

Leif Gustafsson, Jonas Benedictsson, Magnus Stalmarker and Amanda Erixon

A. Availability of civil claims

1. Scope for civil claims in Sweden

Civil claims can be brought under Swedish and EU competition rules by individuals or companies against any undertaking for damages resulting from that undertaking intentionally or negligently infringing any of the prohibitions contained in the Competition Act or EU competition rules. No prior finding of an infringement by a competition authority is required in order to bring such an action.

For the purposes of the Swedish Competition Act (*Sw. Konkurrenslagen (2008:579)*) an undertaking is defined as a natural or legal person who conducts operations of a financial or commercial nature (and excludes businesses carried out in the course of exercise of public authority).

It is not possible to seek damages from individuals who are mere employees of the defendant corporation. However, the Companies Act (*Sw. Aktiebolagslagen (2005:551)*) provides that a member of a board of directors or a managing director may be liable for damages caused to the company (or a shareholder) intentionally or negligently in the performances of his duties.

Civil claims for infringement of Swedish competition law can be brought provided that the rules of the Swedish Competition Act apply. According to the recitals of the Swedish Competition Act, its application outside of Sweden is based on the effects principle. Thus, where a restriction on competition has effects on trade within Sweden, the Swedish Competition Act is applicable. In accordance with Chapter 3 Section 25 and 26 of the Swedish Competition Act, the District Court of Stockholm shall always be competent to examine cases relating to damages, subject to the provisions of the Brussels Regulation and the Convention.

If the Brussels Regulation or Convention does not apply, the Swedish national rules on jurisdiction provide that the competent Swedish court to examine civil cases is the court of the district where the defendant is domiciled (Chapter 10, Section 1 of the Swedish Code of Judicial Procedure (*Sw. Rättegångsbalken (1942:740)*)). As regards claims for damages, both the court of the district where the infringing act took place and court of the district where the damage was incurred are also competent to hear the case (Chapter 10, Section 8 of the Swedish Code of Judicial Procedure). It is important to note that, if applying Swedish competition law, the courts only have the power to award damages suffered in Sweden. This is the case even in relation to findings of infringement by the European Commission, where harm may have been suffered in jurisdictions other than Sweden – the Swedish courts can only award damages for harm suffered in Sweden.

2. Applicable limitation periods

The limitation period for bringing a claim for damages based on competition law infringement runs for 10 years from the date when the damage was caused (Chapter 3, Section 25 of the Swedish Competition Act). Note that this limitation period is not dependent upon when the claimant became aware of the infringement or that it had suffered harm and so it is irrelevant for the purposes of limitation if the infringing activity was concealed.

3. Appeals

The District Court of Stockholm has sole jurisdiction, upon application of the Swedish Competition Authority, to order an undertaking to pay a special fine where the undertaking or a person acting on the undertaking's behalf intentionally or negligently violated the prohibition in Chapter 2, Section 1 or 7 or Article 101 or 102 of the Treaty on the Functioning of the European Union. Its judgments may be appealed, with leave, to the Courts of Appeal (*Sw. hovrätter*) on points of fact and/or law. Judgments



from the Court of Appeal may, if leave to appeal is granted, be appealed to the Supreme Court (*Sw. Högsta domstolen*).

As regards other matters, the district courts are competent to hear an action for damages according to the forum rules in Chapter 10 of the Code of Judicial Procedure and the District Court of Stockholm may also have jurisdiction to hear cases relating to damages pursuant to Chapter 3 Section 25 of the Swedish Competition Act. A claimant or defendant may appeal District Court (*Sw. tingsrätter*) judgments relating to private competition law matters to the Courts of Appeal (*Sw. hovrätter*) on points of fact and/or law. Leave to appeal such judgments is required.

4. Availability of class actions for infringement of competition law and/or damages in Sweden

Under the Swedish Group Proceedings Act, which entered into force on January 1, 2003, class actions may be brought in competition litigation cases. A group action may be instituted by private physical or legal persons (group civil claim), organizations (organization group action) or authorities (public group action).

A group civil claim can be brought by any person who belongs to the group that such person wishes to represent. A public group action can be brought by certain specially designated government authorities. The government has designated two such authorities for this purpose: the Consumer Ombudsman and the Swedish Environmental Protection Agency. The Swedish Competition Authority has no power to bring public group actions.

An organization action can be brought by non-profit organizations devoted to the safeguarding of consumer or employee interests if the action concerns goods or services supplied to consumers (i.e., the purchaser of the end product).

Group action suits are intended to complement conventional legal proceedings. A group action may therefore only be heard by the court if certain special pre-conditions for proceedings are satisfied:

- (i) The issues addressed in the case must be the same or similar as regards the claims of all of the members of the group;
- (ii) The case must not be evidently unmanageable on account of substantial differences in the legal basis of the claims of different members of the group;
- (iii) A group action must be more appropriate than other legal proceedings;
- (iv) The group must be appropriately defined, for example, in terms of its size and delimitation; and
- (v) The person bringing the action on behalf of the group must be an appropriate representative, which includes having the financial resources to bring an action. Moreover, the representative must not have interests of his own in the case that clash with the interests of other members of the group.

Unless all these special preconditions are satisfied, the court will dismiss the group action.

B. Conduct of proceedings and costs

5. Burden of proof

Private competition litigation damages claims are governed by general principles of Swedish tort law, under which the party claiming damages bears the burden of proof. Damages may only be claimed under Chapter 3, Section 25 of the Swedish Competition Act if the infringement was committed intentionally or negligently. Thus, the claimant must prove the existence of: (i) an intentional or

negligent infringement of the competition rules; (ii) loss; and (iii) a causal relationship between the infringing conduct and the loss incurred. The claimant must also provide a calculation of the amount of loss it is claiming.

Relevant facts must be “proven” or “shown” (*Sw.* “*visat*” or “*styrkt*”). The standard of proof is less than the requirement that facts be proved “beyond a reasonable doubt” as applied in criminal cases, but requires more than merely showing that the damage is more likely than not the result of infringement (i.e., it does not involve a simple “balance of probabilities”).

According to Swedish law, the claimant must prove (*Sw.* *styrka*) the facts in order to satisfy the standard of proof in civil proceedings, including competition litigation cases. The claimant must prove: (i) the infringement or the act that caused the damage; and (ii) the size of the damage, including that it is the direct effect of the act of the defendant. The claimant may rely on a regulatory decision (of either the European Commission or the Swedish Competition Authority to support a claim, but it is only likely to be considered relevant where the decision concerns the Swedish market) as proof of an infringement but must show that the infringement caused the claimant to suffer damage. The basic principle is that the extent of injury must be proven (as is the case for the infringement and the causal link). However, if proof regarding the extent of injury cannot be adduced (or can only be adduced with difficulty), the court may estimate the injury at a reasonable amount. This may also be done where the production of the relevant evidence can be expected to entail costs or inconveniences out of reasonable proportion to the extent of the injury and the amount of the claimed damages is minor. As far as we are aware, this approach has not yet been applied in a competition damages case.

If a claimant brings a civil claim against a defendant claiming that an agreement is unenforceable due to certain provisions which are in breach of the competition rules, the burden of proof is upon the claimant, which may be discharged by proving the facts as above. In principle, a defendant might also argue that any damage which the claimant might have suffered (e.g., in the form of higher prices) has been passed on by the claimant and, therefore, that it has not suffered any loss as a result of the infringement. Should the claimant establish in principle that it has suffered loss, the burden of proving passing-on might switch to the defendant.

6. Joint and several liability of cartel participants

When two or more undertakings are liable for the same injury caused by an infringement of competition law, they are, according to general principles of Swedish tort law, jointly and severally liable for any damage resulting from that infringement.

A party who has paid compensation to an injured party has a right of recourse against other liable parties by way of separate contribution claim.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Any person (including the parties to the claim) who holds a document which can be assumed to be of importance as evidence in proceedings (criminal or civil) may be ordered to disclose it by the court on the application of the other party. There are certain exemptions to this general rule; in particular, it is not necessary to disclose legally privileged documents, which includes correspondence between a client and its lawyer. It should be noted that advice provided by in-house lawyers is not deemed privileged in Sweden.

A court may grant an order for the disclosure of a document which is relevant to the proceedings as evidence (*Sw.* *editionsföreläggande*) on the application of a party to the proceedings or on its own initiative. A party who seeks an order for the disclosure of a document must identify the document and the relevant contents that would justify its disclosure. The court can then order the party to



disclose the document. However, the possibility of obtaining evidence from an infringing undertaking is often limited, as the courts tend to find that there are insufficient grounds to issue such an order.

Documents and information obtained by the Swedish Competition Authority in the course of an investigation or otherwise may be considered by the courts to be “public documents” to which all Swedish citizens have a right of access, according to the Swedish Constitution as set forth in the Freedom of Press Act (*Sw. Tryckfrihetsförordningen (1949:105)*). However, there are a number of exemptions to this general rule, which are set out in the Swedish Public Access to Information and Secrecy Act (*Sw. Offentlighets- och sekretesslagen (2009:400)*). For instance, information concerning business activities, business secrets, innovations and research and development of an undertaking shall be secret if the interests of the undertaking or its business parties may be harmed by disclosure. Information held on the Competition Authority’s case files regarding an undertaking’s business, inventions and research, etc. must be treated as confidential by the Competition Authority if the undertaking might be expected to suffer injury if that information were disclosed. Further, during an investigation, documents and information in the Swedish Competition Authority’s file are confidential if it is of significant importance for the investigation that the information is not disclosed but may be obtained on completion of the investigation subject to the rules on confidentiality. A statement from an individual is confidential and covered by secrecy if it can be assumed that the individual will be harmed if the statement is disclosed. In practice, this means that a claimant would find it difficult to secure access to certain documents and information obtained by the Swedish Competition Authority, particularly any information which may support an alleged infringement of the competition rules.

8. Pre-action disclosure

Pre-action disclosure is not available in Sweden.

9. Average length of time from issue of claim to judgment in Sweden

It is difficult to give an accurate estimate of the average duration of this type of case as there have been few private damages actions for competition law infringements in Sweden to date. As an approximate estimate, a private competition litigation action might take up to six years from first instance to the Supreme Court; complex cases could take three to four years in the lower courts alone and one to two years if appealed further to the Supreme Court.

10. Average cost from issue of claim to judgment in Sweden

Again, the limited number of relevant cases in Sweden to date makes it very difficult to give an accurate estimate of the average cost of this type of case. For a comparative indication, see the Quick Reference Guide.

In addition to its own legal fees, the losing party will be ordered by the court to pay the successful party’s legal costs. If a party is successful in part, the legal costs for the proceedings may be apportioned between the parties. If the parties are both equally successful/unsuccessful, the court may order each party to bear its own costs. The successful party may also be liable for the legal costs incurred as a result of any unnecessary action, negligently caused delays, or any other procedural negligence. The cost for a court case concerning damages for breach of competition law can be expected to vary widely, depending on the complexity of the case and the number of instances.

11. Third party/alternative funding

In principle, a claim can be transferred to a third party rather than being pursued by the party that suffered the loss. To date, this has not happened in Sweden. In part, this may be because only the parties in the court proceeding in question may be ordered by the court to reimburse the other party for its legal costs (meaning that, even if transferred to a third party, the original claimant might still be held liable for costs).

12. Alternative methods of dispute resolution

In general, arbitrators may rule on the civil law effects of competition law as between the parties, but a prerequisite is a binding arbitration agreement between the parties. A court will not consider dismissing a case on this basis unless a party formally objects to the jurisdiction of the court due to the existence of a binding arbitration agreement between the parties.

The district court may, if the parties consent, order a mediation session with a mediator appointed by the court so as to encourage the parties to reach a settlement. Mediation is not a prerequisite to the issue of a claim.

C. Relief

13. Availability of damages and quantification

Damages are calculated to reflect the actual damage sustained, so damages awarded normally are limited to the amount needed to restore the claimant to the position the claimant would have been in had the defendant not committed the breach (i.e., compensation for costs, the loss of income, reduced turnover, etc.).

For example, in the case of price-fixing, a customer may be awarded the difference between the price it paid for the goods and the price it would have paid in a competitive market. In the case of resale price maintenance, where a reseller is prevented from selling at a lower price, the reseller may be compensated for the loss of profits caused by a reduced turnover. In addition, in the case of market-sharing, resellers may have been prevented from choosing between competing suppliers to obtain the best price. Damages may be awarded to compensate the reseller for the price difference. If the exact amount of loss to the claimant is difficult to prove, the court may use an estimated reasonable amount instead.

Under Swedish procedural law, parties may rely on virtually all kinds of documents, statements by witnesses and experts and occurrences in attempting to prove their case. The courts may in their discretion freely evaluate the evidence presented by the parties. Consequently, all kinds of evidence (including expert evidence) are in principle admissible. However, the court will dismiss evidence which is considered to be obviously irrelevant. An expert may be appointed to assess any type of issue, including of course the amount of damages. As explained above, the passing-on defense is in principle available.

14. Punitive and exemplary damages

Punitive or exemplary damages are not available under Swedish law.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

The Swedish Competition Authority may, in certain circumstances, issue an interim injunction pending a final judgment on whether an infringement has occurred. Further, the Swedish Market Court (*Sw. Marknadsdomstolen*) may also issue an interim injunction following the commencement of legal proceedings in accordance with Chapter 3, Section 3 of the Swedish Competition Act.

According to the recitals of the Swedish Competition Act, an interim injunction should only be issued in exceptional cases, i.e., where the infringement may have serious consequences. Further, the effect of such an injunction on the respondent must also be taken into consideration. As a result, the Swedish Competition Authority/Market Court rarely issues interim injunctions.

As for the standard of proof required for interim measures, the law says that it is sufficient that “probable cause” (*Sw. sannolika skäl*) has been shown regarding the claim.



16. Other types of relief

A section of an agreement that is deemed to be anti-competitive can be deemed invalid by the court and thus unenforceable. The invalid section is often replaced by mandatory provisions so that the agreement remains valid but has different legal consequences. However, if the anti-competitive sections form the essential part of the agreement, the entire agreement may be rendered void.

D. Emerging trends

There have been a number of actions for damages based on infringements of competition law in Sweden. Such claims are expected to be more frequent in the future. One example is a case between Scandinavian Airlines Systems and Swedavia (formerly LFV), i.e., the operator of Arlanda Airport in Stockholm. In 2001, the Court of Appeal concluded that Swedavia had abused its dominant position and ordered Swedavia to repay SEK400 million to Scandinavian Airlines Systems, which previously had been paid by Scandinavian Airlines Systems under a contract for construction works relating to a new terminal.

Another example is a judgment rendered by the District Court of Stockholm where Euroclear (formerly VPC), Sweden's central securities depository, was found to have abused its dominant position on the market for address information by refusal to supply to shareholders in joint-stock companies. The claimants that used the requested information in their business activities were awarded damages. The case was appealed to the Court of Appeal which, in 2011, confirmed the District Court's findings, although reducing the damages awarded.

Directive 2014/104/EU of the European Parliament and the Council on damages actions under national law for breach of the competition rules (the "Directive") has led to the proposal for legislation to be drafted implementing the Directive in Sweden. The legislation will take over from the current rules and regulate in more detail the possibilities for damages actions. Such legislation is proposed to take effect on December 27, 2016.

As in the current legislation, it is a requirement that intent or negligence be established. If more than one company has committed the breach and caused damage, the liability will normally be joint and several.

The damage will cover both the actual damage incurred and interest-based compensation. Companies with a turnover of below EUR50 million or total assets of no more than EUR43 million per calendar year and with fewer than 250 employees will benefit from certain limitations in the right of claimants to seek damages, provided that their market share was below 5% at any time during the infringement or that the award of damages would result in their assets losing all value. However, in the event such company caused the infringement by inducing others to participate, the easements may not apply.

The time bar is set to five years from the date that the infringement ceased and the damaged party was made aware or should have been aware of the infringement, the damage and the identity of the infringing party. If the Competition Authority commences an investigation or the matter is brought to a dispute resolution process, the time will be suspended until the end of the dispute resolution or the investigation.

Concerning cartels, the presumption is suggested to be that the infringement is presumed unless otherwise shown. The infringing parties will thereby have the burden of proof.

Damage incurred at previous or later distribution levels will be seen as being over or under the price that is calculated by carrying over the prices. This means that if a company is selling at certain prices to a customer, the customer will have a right to compensation if it could be assumed that the original supplier has over inflated prices to the indirect customer, and such over inflation has then been carried forward to the ultimate customer.

In the case of damage at a previous level, damage may be awarded if the indirect supplier can show that underpricing has occurred and such sales have caused the claimant damage. Services are equal to goods with regard to compensation and sales.

Action shall be taken at the Patent and Market Court, which is to come into effect on September 1, 2016. This court reform will also embrace a new final court, the Patent and Market Supreme Court.

As proof of a claim may be in the possession of the Competition Authority, certain rules have been proposed to apply for the production of such evidence and its use in court.



Switzerland

Anne-Catherine Hahn

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in Switzerland

Private enforcement actions for damages resulting from infringements of Swiss competition law can be brought by individuals or companies. Claimants must show that they are or have been obstructed from entering or competing in a particular market due to an unlawful restraint of competition. This obstruction might be as a result of the operation of an unlawful agreement (Article 5 Cartel Act) or the unlawful practices of a dominant enterprise (Article 7 Cartel Act).

According to the prevailing opinion, ultimate consumers (often referred to as indirect purchasers) do not have standing to sue in respect of infringements of Swiss competition law as they do not themselves participate in the market to offer goods or services and are, therefore, presumed not to be hindered by such infringements. This approach has attracted considerable criticism and the Swiss government proposed to change the Cartel Act so as to expressly grant consumers standing to bring claims. However, as this proposal formed part of a broader project containing a number of controversial changes to substantive law provisions of the Cartel Act, it was ultimately rejected in September 2014. Consequently, it is unlikely that consumer claims will become more important in the foreseeable future.

Occasionally, Swiss courts and arbitral tribunals also have to deal with private law complaints based on alleged infringements of EU competition law or other foreign competition laws. In this situation, both Swiss courts and arbitral tribunals are in principle expected to determine the applicability of the relevant foreign provisions and the consequences of the alleged infringement on the private claims before them. Provided that the jurisdiction of a court in Switzerland has been established, such court is in principle competent to assess the case in its entirety and to award damages accordingly, even if some of the losses may have occurred abroad.

2. Applicable limitation periods

Private enforcement claims will normally qualify as tort claims but may also be raised in relation to breach of contract claims. Under the current law, tort claims become statute-barred within one year from the date on which the claimant is deemed to have sufficient knowledge of the cause of action and resulting losses in order to bring a lawsuit in court.³³¹ For this purpose, the claimant has to have actual knowledge of the basis of the claim and the entity against whom he may have a claim. However, the claimant need not be in a position to indicate the exact amount of losses suffered for the limitation period to be triggered. Claims will in any case become statute-barred, regardless of the claimant's state of knowledge within 10 years of the tortious conduct having come to an end (Art. 60 of the Code of Obligations). For the purposes of this rule, competition law infringements running continuously over a protracted period of time will generally be viewed as a single tort, with the consequence that the 10 year statute of limitation only begins to run once the infringement has come to an end.

Under the current law, the statute of limitation is not suspended or extended while an investigation by the Competition Commission or foreign cartel authorities into an alleged infringement is being carried out. Consequently, private claims can become statute-barred before the completion of the administrative investigation(s) unless the claimant can show that he did not have sufficient knowledge of the unlawful restraint to initiate court proceedings before the investigation was concluded. The

³³¹ A proposal was made in 2013 to extend the limitation period to three years, but this reform is not yet in force.

Swiss government, in early 2012, proposed to modify this position, suggesting that the statute of limitation should be suspended during any investigation by the Competition Commission. In September 2014, this proposal was, however, rejected in parliament, together with other controversial proposals for a broader reform of substantive law provisions of the Cartel Act.

Among cartel members, the illegality of agreements made in violation of competition law can always be invoked as a defense to an action for breach of that illegal contract without being limited by the expiry of a statute of limitation period.

3. Appeals

Private enforcement claims are, as a matter of Swiss federal law, heard by a single cantonal court, i.e., the higher cantonal court. The decisions of these courts can be appealed to the Swiss Federal Supreme Court, but such review is limited to the application of the law by the cantonal court and to any obvious mistakes in the determination of the relevant facts. Such an appeal can easily take up to two years.

4. Availability of class actions for infringement of competition law and/or damages in Switzerland

Swiss law does not provide for class action proceedings. It is, however, possible to bundle individual claims arising from the same factual circumstances by way of consolidation and joinder of parties.

It is also possible to assign individual claims to one person who can then file a single claim for damages. However, unlike a class action, the assigned claims continue to exist as individual claims, i.e., to the extent that they depend on different factual circumstances or legal arguments, these will have to be established separately before the court. We are not aware of this vehicle having been used in practice to bring a main claim for damages resulting from infringements of competition.

In summer 2013, the Swiss government presented a report on the possible introduction of collective redress mechanism to address perceived shortcomings in law enforcement in different areas. So far, it is unclear whether, and to what extent, specific mechanisms will ultimately be introduced into Swiss law as a result of this discussion.

B. Conduct of proceedings and costs

5. Burden of proof

The claimant is required to prove the infringement of competition law, the damage suffered and that, but for the infringement, the damage would not have been suffered by the claimant. To the extent that the unlawfulness of a restrictive agreement is presumed in the Cartel Act (for example, a price-fixing arrangement is presumed to be unlawful – Article 5 paragraphs 3 and 4), claimants need only establish the existence and type of agreement in question. Further, while courts are not formally bound by a finding of the Competition Commission that there has been an infringement, it is difficult to imagine that they would deviate from such a finding if a claim is based upon it. In cases of Europe-wide infringements, claimants may also be able to invoke decisions by the European Commission to establish issues of knowledge or causation, or, if the same conduct is illegal under both Swiss and European law, possibly even the illegality of the alleged infringement.

If there is no pre-existing finding of infringement, Swiss courts must obtain a legal opinion from the Competition Commission prior to determining if a competition law infringement has occurred. These legal opinions are not formally binding upon the Swiss courts. In addition, their practical value is limited as opinions are typically provided based on abstract legal questions submitted by the court, at a time when the relevant facts have not yet been fully established in the civil proceedings.



To obtain damages, claimants must in principle satisfy the “but for” test to show that the losses suffered by them were caused by an unlawful competition law infringement. It has, however, been argued by legal commentators that it should be sufficient to establish the causal nexus between the infringement and the resulting losses on the basis of a preponderance of evidence. Furthermore, damages can be awarded on the basis of an estimate by the Swiss courts if there are clear indications, though no strict proof, that losses have been suffered as a result of the infringement. In one case, losses were established based on a comparison between different geographic markets (Commercial Court of Aargau, RPW 2003, 451, 475). It is not clear whether this claimant-friendly approach will be followed by other Swiss courts, in particular because attempts to rely on geographic comparisons have been rejected in other areas of law, such as unfair competition and intellectual property law. Nevertheless, Swiss courts will probably take into consideration that strict proof of causation may be extremely difficult for a claimant to establish.

6. Joint and several liability of cartel participants

Cartel members can be jointly and severally liable for damages in circumstances where they act as joint tortfeasors in accordance with Art. 50 of the Code of Obligations, or if they contribute through separate competition law infringements to the creation of the same damage, as provided in Art. 51 of the Swiss Code of Obligations. In both cases, each of the defendants is in principle liable for 100% of the damage, while the individual liability of each is only determined afterwards in separate proceedings for contribution as between defendants. In view of such a claim for contribution, a first defendant may seek to join others to a pending claim to avoid having to re-litigate issues relevant for all of them, such as the existence of an unlawful infringement.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Under the Federal Civil Procedure Act, documents, witness testimony, expert testimony and the testimony of parties can be submitted as evidence. There is, however, no general duty of disclosure as between the parties, and applications for disclosure in Swiss civil proceedings are handled restrictively. Generally, disclosure will only be granted if the party applying for it can demonstrate that it requires a specific document in the other party’s possession.

Practicing lawyers registered in one of the cantonal registers are subject to a professional duty of secrecy and may refuse to testify as a witness in a case on which they are advising, or to produce privileged documents. This is a comprehensive legal privilege which applies irrespective of where the documents in question are located, and when they were created. However, no similar privilege exists to protect advice provided by in-house counsel under Swiss law. Documents prepared by or held in the possession of in-house counsel can therefore be used by the Swiss Competition Commission in administrative proceedings or requested by opposing parties in a private action.

Parties bringing follow-on damages actions may rely on factual findings of investigations by the Competition Commission. However, they will only have access to investigation documents if they were also involved in the investigation as parties. Access to statements made and documents submitted by leniency applicants will generally be denied, as these documents are subject to secrecy. To the extent that the case has been the subject of an EU investigation, potential claimants may apply for access to the files and records of the European Commission and, if produced, use these in the Swiss courts.

8. Pre-action disclosure

Switzerland does not provide for pre-action discovery of documents. Prior to the commencement of an action, a party can only obtain information from its opponent based on existing substantive information rights (for example, a contractual right to information or as a shareholder in a company). The Cartel Act does not grant any additional rights to access information.

9. Average length of time from issue of claim to judgment in Switzerland

The duration of proceedings depends on the procedural and substantive complexity of the case and on the workload of the court. It is unlikely that a first instance decision could be obtained in less than two years, but proceedings might also take much longer. If appealed to the Federal Supreme Court, a case may well take up to four or five years.

10. Average cost from issue of claim to judgment in Switzerland

There is no average cost for bringing proceedings in respect of a Swiss competition law infringement. The costs will depend on the value and the complexity of the case and whether it is subject to appeal.

The costs of the proceedings as well as legal fees are borne by the losing party, but only to the extent they are based on the statutory fee schedule. The amounts of legal costs and fees are determined on the basis of the value in dispute but may be increased or decreased depending on the complexity of the individual case. Due to this approach, and due to the costs of litigation, even a party that succeeds on all points will generally only be reimbursed for part of the expenses incurred to litigate a complex competition law case.

Swiss courts typically require the claimant to make a payment in advance towards the costs of the proceedings. The amount of this security is fixed based on a provisional assessment of the value in dispute and of the complexity of the case. The security can be provided by means of a cash payment to the court or by means of a bank guarantee.

11. Are alternative methods of dispute resolution available for private competition infringement actions?

Mediation and arbitration are available in Switzerland and many international contracts provide for arbitration in Switzerland. Competition law disputes can in principle be submitted to arbitration, and arbitral tribunals are required to apply Swiss or European competition law if these laws are relevant to the outcome of the case.

In the event that competition law is not, or not correctly, applied by an arbitral tribunal, it is extremely difficult to obtain an annulment of the resulting award as the incorrect application of European competition law does not found a challenge on public policy grounds in Switzerland.

12. Third party/alternative funding

Lawyers subject to Swiss bar rules are not allowed to work exclusively on the basis of contingency fees. However, contingency fees are admissible as part of a remuneration scheme, provided that the regular (mostly hourly) fee is at least sufficient to cover the basic costs of representation.

Additionally, it is possible to enter into an arrangement under which a third party finances the litigation in exchange for a percentage of any proceeds. It is also possible to assign claims to a third party in their entirety.

We are not aware of instances where such assignment has been used in the context of private enforcement actions.

C. Relief

13. Availability of damages and quantification

The amount of damages that claimants may recover is determined in accordance with the ordinary principles of Swiss contract and tort law. Claimants are only entitled to compensation for actual losses incurred.



The passing-on defense may be raised by defendants, arguing that an effective and complete transfer of cartel prices to subsequent purchasers extinguishes losses suffered by the direct purchaser. While the availability of the passing-on defense is widely advocated among legal commentators, it is difficult to reconcile with the – until now prevailing – view that consumers do not have the necessary standing in Switzerland to bring damages claims for competition law infringements. Applied strictly, this would mean that cartel prices effectively transferred to consumers could not lead to any damages claims because the direct purchaser does not have any losses, while consumers lack the necessary standing to sue for losses sustained by them. This outcome has attracted widespread criticism. However, as the government proposal to expressly grant consumers standing to sue was rejected in 2014, the situation is unlikely to change in the near future (see section 1 above).

14. Punitive and exemplary damages

Swiss law does not allow for an award of punitive or exemplary damages. However, parties affected by competition law infringements can demand restitution of the profits realized by the infringer under the Cartel Act. While damages claims purport to compensate the claimant for losses suffered due to a competition law infringement, the restitutionary remedy is targeted at the return of ill-gotten gains. As such, it may in particular come into play where the claimant's losses cannot be established with sufficient certainty.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

In principle, it is possible to obtain a preliminary injunction so as to prevent one party from continuing to engage in competition law infringements. For this purpose, the applicant must provide *prima facie* evidence of the infringement and, in addition, demonstrate that he is likely to suffer irreparable harm if it continues. Unlike in ordinary proceedings, the courts are not required to obtain a prior legal opinion from the Competition Commission in such cases.

D. Emerging trends

Private competition claims have attracted quite some interest from legal commentators in Switzerland, but their practical importance has remained limited. This is due mainly to the fact that the losses suffered as a result of competition law infringements are often relatively small, that consumers do, according to the prevailing view, not have the necessary standing to sue and that enforcement by the Competition Commission is perceived as a cheaper and more efficient way of sanctioning competition law infringements. Considering that proposals to facilitate private enforcement claims were rejected by the Swiss Parliament in 2014 because they formed part of a broader, controversial reform project, it is rather unlikely that the Swiss legislator will make another attempt to facilitate private competition claims in the near future.

Competition law infringements are, however, frequently raised as defenses in contractual disputes. There have also been cases in which Swiss parties have been affected by foreign proceedings, including by US class action settlements. These developments raise procedural issues, namely with regard to the recognition of foreign judgments and settlements in Switzerland, but questions of Swiss competition law generally only play a minor role in their resolution.

Turkey

Zumrut Esin and Hakki Can Yildiz

A. Availability of private enforcement regarding competition law infringements and jurisdiction

1. Scope for civil claims in Turkey

Under the International Private and Procedure Law No. 5718, claims regarding infringement of competition law are subject to the law of the state in which the market directly affected by the infringement is located. Therefore, all infringements directly affecting the Turkish market are subject to Turkish law; and even if infringements originate from a third country, claims can be brought against undertakings from other jurisdictions under Turkish law and in Turkish courts, provided the infringement directly affects Turkey.

The Act on the Protection of Competition No. 4054 (the “**Competition Act**”) states that anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to the Competition Act, or abuses its dominant position in a particular market for goods or services, must compensate for any damages suffered by other persons. Under the Competition Act, persons engaging in restrictive arrangements or committing abuses of a dominant position are those that qualify as “undertakings,” a term defined in the Competition Act as “natural and legal persons who produce, market and sell goods or services in a market, as well as specific units which have the ability to take independent decisions and which constitute an economic whole (i.e., association of undertakings).” Claimants can be anyone who suffers losses from the actions of undertakings infringing the Competition Act. Therefore, consumers and competing undertakings can claim damages for the losses they have suffered.

In essence, private claims regarding competition law infringements are subject to the provisions set out in the Code of Obligations No. 6098, and to the provisions regulating claims regarding tortious acts. Procedural rules set out in the Civil Procedure Law No. 6100 will apply to the private enforcement of competition law. There are also several provisions of the Competition Act itself that specifically set out terms and conditions applicable for private enforcement of competition law infringements. These provisions are explained under the questions below.

Finally, Court of Appeals precedents require claimants to file a complaint to the Competition Board before filing a civil lawsuit for the damages, and civil courts are also required to await the Competition Board’s decision regarding the competition law infringement before they can render their decision in the civil lawsuit.

2. Applicable limitation periods

The limitation periods for civil lawsuits filed for damages regarding competition law infringements are subject to the statute of limitations applicable to tort claims regulated under the Code of Obligations. Actions should be brought within two years of the claimant knowing of the tortious act, but must be brought within 10 years of the tortious act.

3. Appeals

First instance civil court decisions can be appealed to the Court of Appeals under the same provisions applicable for any other civil lawsuit filed for a tortious act.

First instance court decisions can be appealed on procedural law and substantive law grounds. Lack of jurisdiction of the first instance court and the existence of a judgment of a different court on the same dispute can be given as examples of appeals that can be made on procedural law grounds. The reasons



for appeal because of substantive law issues include, most importantly, incorrect application of the law and mistakes made in the legal determination of the facts of the case (e.g., erroneously determining a lawful action as unlawful and, as a result, accepting a tort claim). The Court of Appeals is also empowered to evaluate evidence and overturn the first instance court decision if it finds that the facts are incorrectly evaluated in light of the evidence, or that the evidence itself is incorrectly evaluated. The appeal procedure can be relatively long in Turkey, and it can take up to one to two years depending on the specific characteristics of the case.

Finally, regional courts of justice are expected to be established under the Civil Procedure Law No. 6100, which came into force on October 1, 2011. These regional courts of justice will serve as the first-tier appeal courts for first instance court judgments. Once these are established, the Court of Appeals will be the second-tier appeal court. Coinciding with these changes, appeal procedures and rules will be changed, and some of the duties and powers of the Court of Appeals will be assigned to the regional courts of justice.

4. Availability of class actions for infringement of competition law and/or damages available in Turkey

In general, there is no provision in Turkish law that regulates class actions. Some laws entitle certain groups of people to file lawsuits. The Law on the Protection of Consumers No. 4077 allows consumers' associations to file lawsuits for infringements regarding the consumer protection law. The Competition Act, however, has no provision that entitles a specific group of people (e.g., consumers' associations) to file civil lawsuits regarding competition law infringements.

The Civil Procedure Law No. 6100 introduced a new provision that, under certain circumstances and conditions, allows third party legal entities such as associations to file lawsuits, on behalf of themselves, but for protecting the interests of their members and associates. These lawsuits can be commenced only to remedy the illegality, which is the subject matter of the lawsuit, or to prevent the imminent violation of rights. Therefore, associations or other legal entities cannot file this type of lawsuit to claim compensation for damages suffered by their members or associates.

In Turkish civil procedure law, it is also possible to voluntarily bundle individual claims by way of assignment. In these cases, the claims of the different claimants will still continue to exist as individual claims if such claims depend on common factual circumstances. In the event these individual claims are bundled, such claims can be litigated together. The courts can also request the mandatory bundling of individual claims if a specific right arising from substantive law is exercised by more than one claimant.

B. Conduct of proceedings and costs

5. Burden of proof

This is a tort claim, which has the same rules governing civil tort litigations. There are, however, certain provisions in the Competition Act that provide exceptions to the general rules for civil litigation. In civil litigation, claimants bear the burden of proof for all relevant facts of the case and, in particular, claimants must prove that all mandatory elements of a tortious act existed in any given case. In proving the existence of these mandatory elements, claimants must establish that there exists an unlawful action by the defendant, damage, causation between the unlawful action and the damage, and a default by the defendant while acting unlawfully.

When establishing if there is an unlawful action by the defendant and a default by the defendant while acting unlawfully, claimants rely on the decisions of the Competition Board. A Competition Board decision is a prerequisite for filing an action in civil courts under the precedents of the Court of Appeals. Civil courts are not bound by the decisions of the Competition Board. These decisions, however, have influence on civil courts and it is likely that civil courts will rely on Competition Board

findings while evaluating their case. The legal status of Competition Board decisions is further strengthened in the draft Competition Act, which has been circulated to the public and is in the consultation phase. In the draft Competition Act, civil courts can refer to the Competition Board as an expert designated by the law if there is a legal action whereby an analysis should be carried out to identify whether the Competition Act was infringed.

Another mandatory element that claimants must prove in civil litigation is the causation between the tortious act and the damage suffered. Although this is also the case for the private enforcement of competition law, the Competition Act provides a legal presumption, which reverses the burden of proof in favor of claimants in certain events. Defendants will bear the burden of proof if the claimants submit evidence giving the impression there is an agreement restricting competition or a distortion of competition in the market, such as evidence demonstrating that markets are partitioned, a stability has been observed in market prices for a long period, or prices increase within close intervals by undertakings operating in the market.

In addition, claimants, as a general rule, must also prove they suffered damages because of the tortious act and the exact damage they suffered. If the claimant cannot establish the exact amount, courts can estimate the damage provided the claimant submits sufficient evidence for a reasonable estimation (see also section 13 regarding the quantification of damages).

6. Joint and several liability of cartel participants

Under the Competition Act, undertakings that have jointly caused a particular damage will be jointly liable to claimants for that damage. Therefore, for example, one cartel member can be sued for all damages caused by all the cartel participants. The cartel member can then seek a contribution towards the damages by way of recourse or settlement with the co-conspirators.

7. Documents and evidence claimants can use (for example, investigation evidence) and legal privilege

The Competition Act states specifically that claimants can prove the existence of agreements, decisions and practices restricting competition by all types of evidence. In accordance with the Civil Procedure Law No. 6100, holders of certain types of evidentiary documents may be held responsible by the court to submit the documents to the court to the extent these documents pertain to the case.

Regarding legal privilege, there are no specific laws in Turkey. However, it is accepted that the documents exchanged between attorneys and clients, which are related to their professional relationship, would benefit from legal privilege.

8. Pre-action disclosure

Unlike Anglo-Saxon legal systems, Turkish law has no fully fledged pre-action disclosure system. There are, however, some provisions of the Civil Procedure Law that provide for certain pre-action disclosure and discovery opportunities within the scope of perpetuation of evidence. These provisions aim to facilitate the collection and preservation of some evidence prior to the commencement of the action. For this purpose, the courts may decide to obtain evidence from parties who have allegedly violated the law, to have expert opinions, and to hear witnesses. These can be ruled by the courts only if evidence is in imminent danger of being destroyed or it would not be submitted to courts unless these actions are taken in the pre-action stage.

Other than the above, if the case is not pending in a court, a party can only obtain information based on specific information rights, such as those arising in connection with a contractual right or with its status as a shareholder of the infringing party.



9. Average length of time from issue of claim to judgment in Turkey

In essence, private enforcements regarding competition law infringements in Turkish law qualify as tort litigations and have the same procedural rules. In Turkey, civil lawsuits take around one to three years.

Due to the characteristics and complexities of competition litigation, however, and in particular the expert economic analysis that may be required for relatively complex cases, and the possibility of further difficulties that may arise in proving the actual damage the claimant suffered, these lawsuits may take longer to become finalized than other tort lawsuits would.

Another factor that prolongs the time for judgments is, as explained above, the requirement to file a complaint to the Competition Board before filing a civil lawsuit, and to wait for the Competition Board's decision.

10. Average cost from issue of claim to judgment in Turkey

In essence, private enforcements regarding competition law infringements in Turkish law qualify as tort litigations and have the same procedural rules. The defeated party must bear all costs arising from trial, including the court costs and attorney fees. It should be noted that there is a tariff setting a cap on the attorney fees, which is annually issued by the Union of Turkish Bar Associations, and the defeated parties are not responsible to cover any attorney fees above the tariff.

According to the latest World Bank research, court costs, attorney fees, enforcement costs, in average, make up around 25-30% of the claims; and court costs and attorney fees make up around 18% of the claims.

11. Third party funding/alternative funding

Under Turkish civil procedure law, only those people whose interests are violated can file an action to claim a remedy for the violated interest. Third parties may be allowed in a few circumstances that are specifically provided by the law, to file an action regarding violation of an interest belonging to a third party. Since it is not specifically provided in any law, violating interests arising from competition law does not entitle an unrelated party to file an action instead of the person whose interests are violated. However, claimants can receive funding from third parties if the third parties do not participate in the lawsuit as claimants (see also section 4 above).

12. Alternative methods of dispute resolution

Under Turkish law, arbitration can be used to resolve disputes if the subject matter of a dispute is eligible for arbitration, there is a legally valid arbitration agreement between the parties, and the legal relationship under which the dispute arises is determinable. The subject matter of the dispute's eligibility for arbitration is one of the most important conditions in determining whether competition law infringements can be subject to arbitration. Before, it was generally not accepted that disputes arising from legal areas such as intellectual property and competition could be eligible for arbitration. Lately, however, there is an inclination towards accepting that disputes relating to private enforcement of competition law would be eligible. Also, the fact that private competition litigation is, in general, based on the same rules governing tort litigation, and tort claims can be eligible for arbitration, further strengthens the argument that civil law consequences of competition disputes would be eligible for arbitration.

C. Relief

13. Availability of damages and quantification

Under the Competition Act, in private enforcement regarding competition law infringements, claimants can claim as damage the difference between the actual loss they incurred because of the infringement and the loss they would have incurred if competition law had not been infringed. In quantifying the damage, all profits the claimants expected to gain should also be calculated by considering the balance sheets of the preceding years. Accordingly, it is generally considered that the type of damage, which is suffered as a result of competition law infringements, should be defined as loss of profit.

Despite the above, the Competition Act provides no method for quantification of damages. It is expected these methods will develop through case law. Since there have been no published court decisions whereby damages suffered as a result of competition law infringement are quantified, it is not quite possible to envisage how the courts' approach will develop in this matter. The methods will be subject to the same rules applicable for civil tort litigations as explained above.

14. Punitive and exemplary damages

The Competition Act provides a treble damages remedy for claimants. If a person has incurred damages because of an agreement, a decision of undertakings or gross negligence of an undertaking, the court can, upon the request of the claimant, award three times the loss incurred by the claimant as compensation.

15. Availability of interim or final injunctions regarding an alleged competition law infringement

Civil procedure rules are governed by the Civil Procedure Law No. 6100, which provides for several interim remedies, including injunctions, perpetuation of evidence and charging orders, all of which may be granted by the courts depending on the facts of the case. The courts can grant interim injunctions if acquisition of a right, which is the subject matter of the dispute, becomes difficult or impossible and/or there is a risk that would result in substantial damages unless an interim injunction is granted. The courts can grant any type of injunction to remove the risks or prevent the damages.

The claimant asking the court for an interim injunction must provide a security for any possible damage that may be caused to the defendant because of the injunction. However, if the claim is made on the basis of an official document, courts cannot require the claimants to provide security. It is likely the courts would consider any Competition Board decision an official document. Also considering that a Competition Board decision is a prerequisite for any civil law claim under Turkish case law, in cases of competition litigation, courts cannot require claimants to provide security.

D. Emerging trends

There is a new draft law expected to repeal and replace the Competition Act currently in force. This draft law has been circulated to the public and the consultation process is continuing. Certain changes are proposed under this draft law regarding competition litigation which aim to facilitate competition litigation in Turkey.

For the time being, there are no published case decisions on competition litigation and it is an area yet to develop. However, there is an increasing amount of interest in competition litigation, supported by several academic and professional articles recently published on this topic.



United States

Darrell Prescott and Catherine Stillman

A. Availability of private enforcement in respect of competition law infringements and jurisdiction

1. Scope for private enforcement actions in the United States

For longer than any other jurisdiction, the United States has maintained that private parties injured by anti-competitive conduct may seek legal redress in court for violations of competition laws – referred to in the US as antitrust laws. Private parties can sue for injunctive relief or damages sustained as a result of an antitrust violation. The action may be tried to a jury and, if the plaintiff prevails, the damages are trebled as a matter of law. In addition, the plaintiff can recover its reasonable attorney's fees.

There is no requirement that a finding of infringement be issued by a regulatory authority prior to the private damage claim (although, as explained below, a final judgment in a government criminal or civil action or a conviction obtained on a guilty plea may be used as *prima facie* evidence of infringement in a subsequent private action).

Subject matter jurisdiction

Subject matter jurisdiction is satisfied in a US federal court by either: (i) federal question jurisdiction; or (ii) diversity jurisdiction. Federal question jurisdiction means that the cause of action is provided for under a US federal statute. Diversity jurisdiction means that the plaintiff and defendant have diverse citizenship (i.e., the plaintiff and the defendant are citizens of different US states) and the amount in controversy exceeds USD75,000. Many private antitrust cases are brought as class actions. Diversity jurisdiction in these cases is defined by the Class Action Fairness Act ("CAFA") and one should consult with counsel regarding CAFA's requirements immediately when such a case is brought.

When federal question jurisdiction is present, a claimant may also bring causes of action under state law if such causes of action arise out of the same nucleus of operative facts. This is called pendent jurisdiction. Thus, when diversity jurisdiction is present, a plaintiff may bring state law claims that could not be otherwise brought in federal court. Generally, private damage actions under federal law can only be brought by direct purchasers. However, more than 30 states have laws that permit indirect purchasers to sue; such state claims are typically joined in the federal action by pendent jurisdiction.

Sometimes referred to as an issue of subject matter jurisdiction, and sometimes not, the issue regarding whether US competition laws apply to conduct outside of the US is an increasingly key issue in private antitrust litigation in the US. For the most part, this is governed by the Foreign Trade Antitrust Improvements Act ("FTAIA"). The US Supreme Court addressed this issue in *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 542 US 155 (2004). The law on the FTAIA is currently in flux and federal judicial decisions are not consistent as to the FTAIA's scope, or whether it is jurisdictional or comprises an element of a plaintiff's claim (though more recent cases are taking the latter approach).

For many years, it has been clear that conduct outside the US to fix the price of goods sold in the US has been subject to the Sherman Act. This is called "import commerce." The FTAIA does not apply to import commerce. It applies to conduct outside the US, e.g., the fixing of a worldwide price, if that conduct has a substantial effect on US commerce, and there is a causal link between the foreign price and the injury to US purchasers. It is the causal link which has been the hardest element for claimants to satisfy, especially where the product is first purchased outside the US.

The issue of whether the FTAIA is a question of subject matter jurisdiction or simply a defense to an antitrust action – while seemingly arcane – is an important one because a claimant bears the burden of

establishing subject matter jurisdiction, while a defendant bears the burden of proving a defense, and often courts will not require a plaintiff to prove all of the elements of its claim until discovery from defendants has been had.

Personal jurisdiction

Section 12 of the Clayton Act provides:

“Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.” [15 U.S.C. § 22 (1997)]

The clause before the semi-colon is a venue provision (describing districts where an antitrust lawsuit against a corporate defendant may be heard). The clause following the semi-colon is a service of process provision (describing where a corporate defendant may be served with papers that bring it before a particular court). In addition, the second clause’s final phrase, “wherever it may be found,” allows worldwide service of process upon a corporate defendant if that corporate defendant is subject to Section 12’s language. Service of the initial summons and complaint on a company located in a country that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (“Hague Service Convention”), must usually be made pursuant to the Convention. Often, however, courts pressure defendants to waive use of the Hague Service Convention due to its inherent delay in US proceedings.

In addition, there is a separate venue statute that is broader for non-US defendants, permitting venue over such defendants in any district (see 28 U.S.C. § 1391(d)) (“alien venue statute”). If claimants can use the alien venue statute in combination with Section 12’s service of process provision, claimants can sue a non-US corporate defendant in federal court anywhere in the United States, subject to constitutional limitations, and serve that defendant anywhere in the world. However, if Section 12’s worldwide service provisions are limited to cases where venue exists under Section 12’s first clause, claimants will be far more limited in their choice of forum. The majority view in the US is that worldwide service, pursuant to the clause in Section 12, is available in antitrust cases generally against corporate defendants, and that a claimant can use it in conjunction with the alien venue statute.

Proper service of process

A defendant may properly be served with a claim wherever it may be found (including any place outside the US).³³² Service may be effected on:

- (i) individuals domiciled outside the US in accordance with Rule 4(f) of the Federal Rules of Civil Procedure; and
- (ii) corporate entities domiciled outside the US in accordance with Rule 4(h) of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure allow for service at any place not within any judicial district of the US, *provided* that the method of service falls within one of the categories specified:

- (i) any internationally agreed means of service that is reasonably calculated to give notice of service (such as those authorized by the Hague Service Convention);
- (ii) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

³³² Ibid.



- (a) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
- (b) as the foreign authority directs in response to a letter rogatory or letter of request; or
- (c) unless prohibited by the foreign country's law, by:
 - (1) delivering a copy of the summons and the complaint to the individual personally; or
 - (2) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (iii) by other means not prohibited by international agreement, as the court orders. [Fed. R. Civ. P. 4(f).]

Standing

A claimant must be able to establish that it is a proper party to bring a private damages claim. This is generally referred to as standing. In order to establish standing, the claimant must establish that it has been injured in fact and that its injury is not too remote.

The indirect purchaser rule

US federal law provides for a damages remedy in price-fixing actions only to direct purchasers, not indirect purchasers. The rationale for this rule, known as the "indirect purchaser rule" relates to the Supreme Court's decision that pass-on would not be allowed as a defense in an action for violation of the Sherman Act. In other words, a defendant may not argue that a claimant should not recover merely because the claimant passed on to its customer all or some of the illegal price increase that was caused by the defendant's conduct. In *Illinois Brick Co. v. Illinois*, 431 US 720 (1977), the US Supreme Court observed that attempting to determine how most of the overcharge was passed along to the claimant's customer is famously difficult and also can be affected by factors not relating to defendant's antitrust violation – in other words, other market forces. Thus, if a defendant cannot use pass-on as a defense, then only a direct purchaser may sue for damages – thereby also eliminating the danger of duplicative recovery from the defendant.

After the Supreme Court adopted the rule that only direct purchasers could sue for damages under the US antitrust laws, many states adopted their own law to allow indirect purchasers to sue for violation of that state's antitrust law. Today, more than 30 states and the District of Columbia have recognized an indirect purchaser cause of action either by statute or case law. The Supreme Court has held that these statutes and case decisions are not preempted by US federal antitrust law. In an indirect purchaser claim, the claimant does bear the burden of showing that the illegal overcharge was passed on to it and in what amount.

In light of the above, a defendant in the US is typically faced with not only a claim by direct purchasers under US federal antitrust law, but also claims from indirect purchasers under multiple state laws. All of these claims are typically consolidated into one proceeding under the doctrine of pendent jurisdiction, by removal from state courts pursuant to the Class Action Fairness Act, and/or by proceedings before the Judicial Panel on Multidistrict Litigation, at least for pre-trial purposes.

2. Applicable limitation periods

Limitation periods for private causes of action are governed by both federal and state antitrust laws. Under Section 4 of the Clayton Act, which authorizes private rights of action, the statute of limitation is four years from when the cause of action accrued. However, the running of that limitation period can be deferred or "tolled" based on different types of equitable or statutory tolling.

The most common type of equitable tolling is alleged fraudulent concealment, which provides that the limitation period will be stayed until the claimant discovers the violation, provided that the claimant can prove that: (i) the defendants took active steps to fraudulently conceal their illegal conduct; and (ii) the claimant exercised reasonable diligence in trying to discover the violation, given the circumstances. Under (ii), the claimant cannot turn a blind eye or otherwise ignore facts which would cause it to inquire further into defendants' conduct. Such facts are sometimes referred to as facts which put the claimant on "inquiry notice," meaning that the facts put the claimant on notice to inquire further.

Another type of equitable tolling is class action tolling, which provides that the limitations period as to any entity's or person's claim which falls within the putative class does not run during the pendency of a class action. However, if the entity or person opts out of the class action or if class certification is finally denied (after any appeals are exhausted), then the limitation period begins to run again.

Finally, there is statutory tolling, which provides that the limitation period applicable to a private civil competition action is tolled during the pendency of a criminal antitrust action, and for one year after that action concludes – either by a guilty plea or a final conviction (after all appeals are exhausted). The mere pendency of a criminal antitrust investigation is not enough to toll the limitation period. The investigation must end in a guilty plea, indictment or a conviction in order for the statutory tolling to attach.

3. Appeals

The rules regarding appeals are the same for private damage actions as for other private civil actions. As a general rule, a party cannot appeal a ruling unless there is a final judgment in the case. So, for example, while a claimant can appeal the dismissal with prejudice of a case, a defendant cannot appeal the denial of a motion to dismiss, until there is a final judgment in the case, usually at either the summary judgment stage or after trial. A ruling disposing of a case, consolidated with others in a multidistrict litigation, is considered a final judgment in the case and may be appealed.

There are a few exceptions to this general rule. First, under 28 U.S.C. Section 1292(b), a party may seek interlocutory appeal of an order if there is a controlling question of law, as to which there is a difference of opinion and a ruling on such issue would materially advance the litigation. Such a motion must be first made to the district court. If that court denies the motion, no interlocutory appeal is possible. If that court grants the motion, then the matter is submitted to the Court of Appeals, which can grant or deny leave to appeal.

Second, as mentioned below at section 4 on class actions, a party may seek to appeal, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, a denial or a grant of class certification. That petition is made directly to the Court of Appeals. If that court grants the petition, then the appeal proceeds like any other appeal.

4. Class actions for antitrust damages available in the US

The US has had class actions at the federal and state levels for many years. Federal class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. A claimant can move to certify a class at any time, although the most common practice and sequencing is for the class certification phase to follow any initial motions challenging the sufficiency of the complaint and challenging jurisdiction.

The class certification issues are sometimes bifurcated from the merits phase of a case. If class certification is bifurcated from the merits phase, then discovery relating to class certification (sometimes called "class discovery") proceeds before discovery on the merits. However, under recent case law, class and merits discovery are likely to proceed at the same time.



Usually, the key issue on a class certification motion is whether there is a class-wide methodology for proving injury and whether the type of injury claimed is consistent with the facts presented on the merits of the alleged violation. This is often addressed by expert opinions for each side.

In order to certify a class action under Rule 23, a claimant must establish five requirements: (i) the number of members of the proposed class are so numerous that it is not practical to join them all in the same action; (ii) the claims of the members of the proposed class present common questions of law and fact; (iii) the claims of the members of the proposed class are typical of each other; (iv) the representatives of the proposed class can and will adequately represent the interests of the members of the proposed class; and (v) common questions of law and fact with respect to the class members' claims predominate over any individual questions presented by those claims.

The chief battleground for class certification is often predominance. If common questions of law and fact do not predominate over individual questions, then the efficiency that a class action is supposed to achieve is not realized.

Under Rule 23(f), a grant or denial of class certification may be appealed directly to the Court of Appeals, without obtaining an order from the district court judge certifying its ruling as appropriate for an interlocutory appeal under 28 U.S.C. 1292(b). However, the Court of Appeals has discretion as to whether or not to accept an appeal under Rule 23(f). Finally, even if the Rule 23(f) appeal is accepted, it will not necessarily stay the case at the district court level, unless the defendants seek and are granted a stay by either the district court or the Court of Appeals.

B. Conduct of proceedings and costs

5. Burden of proof

The burden of proof applicable to private damages claims is the same as applicable to most civil claims – the claimant must prove the elements of its claim by a preponderance of the evidence.

A claimant must prove not only conduct violating the antitrust laws, but also that such conduct was the proximate cause of its injury. The claimant must also prove the amount of its damages to a reasonable certainty.

A prior guilty plea by a defendant in a related criminal proceeding can be used: (i) as collateral estoppel to prevent the defendant from denying the existence of the violation; and (ii) even if not collateral estoppel, as evidence that the trier of fact can consider in determining liability. A government judgment made by consent (as compared to a guilty plea) or on the basis of a *nolo contendere* plea (no contest, but no admission) may also be relied upon as *prima facie* evidence of liability, *provided* that some testimony was taken from the defendant before the judgment was entered.

6. Joint and several liability of cartel participants

Defendants in an action under US antitrust law alleging a violation of Section 1 of the Sherman Act face joint and several liability for each other's Section 1 violation. In other words, one defendant can be held liable for the entire scope of damages caused by all of the defendants if conspiracy or agreement is proven among them. However, notwithstanding that a Section 1 violation creates joint and several liability, defendants cannot seek to join others to claims brought against them or claim contribution from each other toward any damages awarded against them in respect of such violations. Contribution to or indemnification of loss has been held to violate public policy.

In addition, when one defendant settles, that does not reduce the overall damages in direct proportion to the settling defendant's sales or market share during the period of the alleged conspiracy. Instead, the set-off for a defendant's settlement occurs only after a judgment adverse to the remaining defendants is issued, and only in such amount as the settling defendant actually paid out. This means

that the set-off only occurs after the claimants' damages are trebled, as a claimant's damages are trebled automatically when the claimant obtains a judgment against the defendants.

This phenomenon – the effect or reduction of a defendant's settlement occurring only after trebling – has the practical effect of leaving the non-settling defendant or defendants liable for nearly all of the damages caused by all defendants' conduct. This can create significant pressure on a defendant to settle. It can also create a race among defendants to settle first. One way in which defendants try to combat this pressure is to enter into a judgment sharing agreement. Such agreements are legal and are usually confidential; however, negotiating such judgment sharing agreements can be challenging, depending on the companies involved. Attempts to discover whether defendants have executed a judgment sharing agreement have generally been rebuffed.

A judgment sharing agreement typically provides that, if a defendant settles, it must secure the agreement of the claimants to remove its sales from the case – thereby removing the joint and several liability attributable to the settling defendant's sales. If it cannot secure that agreement, then the settling defendant is liable, by the contractual agreement, to reimburse any defendants that are subject to a judgment for that portion of the judgment that is attributable to the settling defendant's sales (less the value of the settling defendant's settlement, which would be offset after trebling in any event). Obviously, a judgment sharing agreement, operating in this way, provides a significant disincentive for any defendant to settle separately from the group of all of the defendants.

7. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

The scope of discovery in a private damage action is extremely broad, although Federal Rule of Civil Procedure 26(b)(1), which defines the scope of discovery in civil actions, was amended in December 2015 to add proportionality considerations that are intended to limit overly broad and unduly burdensome discovery. Under revised Rule 26(d)(1), parties “may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” The practical effect of the newly added proportionality provisions has not yet been determined, but it is likely that even the amended scope of discovery would typically include documents and electronic records produced in a prior government investigation (unless a court orders otherwise as explained below) plus hundreds of thousands, perhaps millions, of emails and other electronic records, depending on the facts of the case.

As a general rule, in a private damages action, a claimant can discover relevant facts, and electronic records that exist independently of a government investigation. The mere fact that the government asked for the fact or document, or that the fact or document was disclosed to or produced to a government authority in response to a subpoena or any other request pursuant to a government investigation, does not prevent the claimant from discovering the fact or document. Nor does the scope of the government investigation limit what can be discovered in a private antitrust damage action.

The only limitations on a claimant in terms of discovery of or relating to the government investigation are: (i) when the claimant's discovery request is phrased in such a way that it would require that the defendant reveal what the government had asked for in its investigation; and (ii) when the claimant seeks the government's notes and other work product generated in its investigation.

In addition, a claimant in a private damages action might apply for a defendant to produce any written statement provided to the foreign regulatory authorities. There is no general rule protecting foreign



regulatory material from discoverability and it has been ordered to be disclosed in some cases.³³³ However, discovery has also been refused in a number of cases on grounds including comity and the doctrine of foreign investigatory privilege.³³⁴ Recently, for example, the US District Court for the Northern District of California, in determining whether Hitachi ought to be compelled to produce foreign investigation documents in the TFT-LCD (Flat Panel) Antitrust Litigation, explained that five factors should be considered when determining whether to order discovery of foreign regulatory documents:

- (i) the importance of the documents to the litigation;
- (ii) the specificity of the claimant's request;
- (iii) whether the documents originated in and are located in the US;
- (iv) whether the claimant has alternative means of obtaining the information contained in the documents; and
- (v) whether the interest of the US in enforcing its antitrust laws outweighs the interest of the foreign regulator in maintaining confidentiality of the documents.

In Hitachi's case, the European Commission wrote to the US District Court expressing concern that the documents produced or submitted in respect of a leniency application should be kept confidential; this concern was identified by the US District Court as a relevant factor in denying the motion to compel discovery in that case.³³⁵ The *TFT-LCD (Flat Panel)* judgment preceded the Court of Justice of the European Union's judgment in Case 360/09 *Pfleiderer* (which found that access to leniency documents might be granted by national courts in principle) and the joint statement of the heads of European Competition Authorities on May 23, 2012 as to the importance of protecting leniency documents from disclosure. As such, it is unclear whether US courts will be prepared to take into account these general statements as expressions of the interest of European regulators in maintaining confidentiality of investigation documents or if foreign regulatory authorities must continue to make submissions in each case as to the interest of maintaining confidentiality in the documents subject to request.

Expert discovery – the discovery of an expert's opinion and likely testimony – is a significant part of discovery in a private damages action. In some of the larger antitrust class actions, there may be multiple experts on each side – claimants and defendants – opining on issues relevant to class certification, the existence of the alleged conspiracy, the fact of injury, and the quantification of damages. Typically, a claimant will provide an opening expert report, the claimant's expert's deposition will be taken, the defendant will then provide its expert's report, and then its expert's deposition will be taken. Often, but not always, the claimant will be allowed to provide a rebuttal report by its expert, and if such a report is allowed, a second deposition of the claimant's expert will be allowed on the rebuttal report.

8. Pre-action disclosure

As a general rule, pre-action disclosure is not available for private actions under US or state antitrust law. One addendum to this general rule is that recipients of amnesty from criminal fines must also – in

³³³ See, for example, *In re Vitamins Antitrust Litigation*, Misc. No. 99-197, Docket No. 3079 (D.D.C. May 20, 2002).

³³⁴ See, for example, *In re Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.), TFT-LCD (Flat Panel) Antitrust Litigation, No. M: 07-1827 (N.D. Cal 2011); *In re Methionine Antitrust Litigation*, No. C-99-3491, MDL No. 1311 (N.D. Cal June 17, 2002); *In re Payment Card Interchange Fee* (E.D.N.Y. 2010); *In re Rubber Chemicals Antitrust Litigation* 486 F. Supp. 2d 1078 (N.D. Cal 2007).

³³⁵ Assertions of confidentiality by the foreign regulatory authority were also considered relevant in *In re Payment Card Interchange Fee* (E.D.N.Y. 2010), and *In re Rubber Chemicals Antitrust Litigation* 486 F. Supp. 2d 1078 (N.D. Cal 2007).

order to obtain single damage awards in civil claims (de-trebling) and the elimination of joint and several liability – cooperate with claimants’ counsel in private damages actions.

In 2004, the US Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”), which provides that an amnesty recipient is entitled to the elimination of joint and several liability and treble damages, so long as it cooperates with claimants in any follow-on private civil antitrust actions. Cooperation is defined as producing documents upon request, including those produced to the US Department of Justice, and making witnesses available for depositions in the US.

Based on ACPERA, it is possible that private claimants could approach an amnesty recipient (if they are able to determine which company it is) prior to filing a complaint and ask for the above cooperation.

9. Average length of time from issue of claim to judgment in the US

While a non-antitrust civil action in federal or state court might take as long as two years to litigate, antitrust civil actions in the US can take significantly longer, depending on the case and the number of parties involved.

For example, in an antitrust case involving two companies, the case might be concluded, through either summary judgment or trial, within two years. If there is an appeal, it could take an additional one year. However, typical antitrust class actions generally take longer – perhaps three years or more to reach their conclusion, with an additional year for an appeal.

Numerous class actions consolidated into one proceeding – referred to as a Multi-District Litigation (“MDL”) – may take four to six years because of the number of parties, the number of issues, and the need for different tracks for direct and indirect purchaser actions.

10. Average cost from issue of claim to judgment in the US

While it is difficult to predict the legal fees that will be incurred in a private damages action in the US, there are some observations and broad parameters to consider.

First, as a general rule, there is the distinction between single actions and class actions. Class actions are often more expensive because they involve an additional phase of briefing and discovery. Class actions may also involve an appeal in the middle of the case, for example, on class certification or on a potentially dispositive legal issue.

The countervailing consideration in comparing single actions to class actions is the fact that class actions involve multiple defendants that can share the work on various portions of the case common to all defendants if a joint defense agreement is entered into.

In addition, the above parameter does not include costs, which continue to increase significantly. Chief among these costs are: (i) outside electronic discovery vendor fees; and (ii) expert fees.

Finally, a plaintiff, whether an individual or an individual representing a class, may recover his or its attorney’s fees and costs if the plaintiff prevails.

11. Third party/alternative funding

In the US, it is possible for a private damages action to be brought by an attorney who agrees with its client to handle the case on a contingent fee basis. This means that, unless it prevails (by judgment or settlement), the claimant is not required to pay any legal fees or costs incurred in pursuing its case. Most antitrust class actions are handled on a contingent fee basis on the plaintiff side, usually for a fee of one-third of the recovery.



12. Alternative methods of dispute resolution

Alternative methods of dispute resolution – arbitration and mediation – are available in antitrust actions. The central question for arbitration is whether there is an arbitration clause between the parties and, if so, whether the claim falls within the scope of the arbitration clause.

In addition to binding arbitration, it is also possible that an arbitration clause might contain a class action waiver. Depending on the circumstances, such class action waivers may be enforceable.

C. Relief

13. Availability of damages and quantification

As a general rule, if a claimant can establish antitrust injury – injury to competition in a relevant market – and that in fact such injury to competition caused injury to the claimant, then the claimant may recover its damages caused by the violation. The claimant need not prove that the antitrust violation was the sole cause of its damages, but it must prove that the violation was a significant cause of its damages. Further, defendants cannot argue, in respect of direct purchasers, that damage has been passed on by way of higher prices charged to the end-consumer (meaning that the direct purchaser has suffered no loss). However, for those states that permit indirect purchaser actions, an indirect purchaser may recover if it can show the extent to which it has absorbed the loss suffered, rather than passing it on to its own customers.

The fact and quantification of damages are almost always proven by expert opinion and testimony. There are rules for the admissibility of expert opinion, with the seminal Supreme Court decision in *Daubert* explaining the approach to be taken to expert evidence under the Federal Rules of Evidence. Generally speaking, the trial judge must ensure that: (i) the expert is qualified in the field relevant to the matters in issue on which he has been asked to testify; (ii) the data used supports the conclusions drawn in the expert's opinion; (iii) the methodology applied is sufficiently reliable (or deemed scientifically valid); and (iv) the testimony assists those trying the case to understand the evidence and determine the issues. The *Daubert* principle has led to the exclusion of expert economic evidence submitted to demonstrate damage resulting from a competition infringement where the expert did not apply recognized methods of assessment, or failed to do so properly.

14. Treble and exemplary damages

Treble damages are automatic for any judgment under the US antitrust laws. They are also available under some state competition laws. Only a violation and some damages need be shown. There is no special or additional showing necessary in terms of egregious conduct.

15. Availability of interim or final injunctions in respect of an alleged competition law infringement

Injunctive relief seeking to prevent further antitrust violations is nearly always a component of a private damages action. In most class actions, it is not an important part of the case because the conduct complained of will usually have been stopped either when a government investigation is commenced or when the class action is first filed.

However, where the action attacks the legality of an ongoing business method, the request for injunctive relief might have greater force. The same is true in cases where injunctive relief is sought to prevent a company from continuing alleged sham patent or other litigation against a rival, in violation of US antitrust law, or where relief is sought to enjoin a merger.

Finally, injunctive relief is an important distinguishing factor in some class actions because predominance, while required for class actions seeking damages, is not required in class actions seeking injunctive relief.

Contributing Authors

Argentina

Esteban Rópolo
Phone: + 54 11 4310 2263
Email: esteban.ropolo@bakermckenzie.com

Australia

Georgina Foster
Phone: + 61 2 8922 5329
Email: georgina.foster@bakermckenzie.com

Austria

Andreas Traugott
Phone: + 43 1 24 250 443
Email: andreas.traugott@bakermckenzie.com

Thomas Obersteiner
Phone: + 43 1 24 250 254
Email: thomas.obersteiner@bakermckenzie.com

Belgium

Kurt Haegeman
Phone: + 32 2 639 36 65
Email: kurt.haegeman@bakermckenzie.com

Brazil

Francisco Todorov
Phone: + 55 61 2102 5014
Email: francisco.todorov@bakermckenzie.com

Bruno Burini
Phone: + 55 61 2102 5060
Email: bruno.burini@trenchrossi.com

Mauro Gonçalves
Phone: +55 (61) 2102-5011
Email: mauro.goncalves@bakermckenzie.com

Canada

Kenneth Jull
Phone: + 1 416 865 2309
Email: ken.jull@bakermckenzie.com

Matthew Latella
Phone: + 1 416 865 6985
Email: matthew.latella@bakermckenzie.com

Arlan Gates
Phone: + 1 416 865 6978
Email: arlan.gates@bakermckenzie.com

David Gadsden
Phone: + 1 416 865 6983
Email: david.gadsden@bakermckenzie.com

Eva Warden
Phone: + 1 416 865 2350
Email: eva.warden@bakermckenzie.com

China and Hong Kong

David Fleming
Phone: + 852 2846 1975
Email: djf@bakermckenzie.com

Stephen Crosswell
Phone: + 852 2846 2599
Email: stephen.crosswell@bakermckenzie.com

Zhi Bao
Phone: Tel: +86-10-6505-4627
Email: baozhi@fenxunlaw.com

Czech Republic

Martin Hrodek
Phone: + 420 236 045 001
Email: martin.hrodek@bakermckenzie.com

Martina Závodná
Phone: + 420 236 045 001
Email: martina.zavodna@bakermckenzie.com

Egypt

Mohamed Elfar
Phone: + 2 02 2461 9301
Email: mohamed.elfar@bakermckenzie.com

England and Wales

Keith Jones
Phone: + 44 20 7919 1573
Email: keith.jones@bakermckenzie.com

Francesca Richmond
Phone: + 44 20 7919 1621
Email: francesca.richmond@bakermckenzie.com

Jennifer Reeves
Phone: + 44 20 7919 1934
Email: jennifer.reeves@bakermckenzie.com

France

Alex Dowding
Phone: + 33 1 44 17 53 12
Email: alex.dowding@bakermckenzie.com



Léna Sersiron
Phone: + 33 1 44 17 75 49
Email: lena.sersiron@bakermckenzie.com

Germany

Christian Horstkotte
Phone: + 49 211 31 11 6 491
Email: christian.horstkotte@bakermckenzie.com

Dr. Nicolas Kredel
Phone: + 49 211 31 116 132
Email: nicolas.kredel@bakermckenzie.com

Dr. Peter Stankewitsch
Phone: + 49 69 29 90 8 141
Email: peter.stankewitsch@bakermckenzie.com

Hungary

Zoltán Barakonyi
Phone: + 36 1 302 3330 316
Email: zoltan.barakonyi@bakermckenzie.com

András Horváth
Phone: +36 1 302 3330
Email: andras.howarth@bakermckenzie.com

India

Luthra & Luthra Law Offices, India
www.luthra.com

Italy

Andrea Cicala
Phone: + 39 02 76231 378
Email: andrea.cicala@bakermckenzie.com

Riccardo Pennisi
Phone: + 39 02 76231 358
Email: riccardo.pennisi@bakermckenzie.com

Gaetano Iorio Fiorelli
Phone: + 39 02 76231 459
Email: gaetano.ioriofiorelli@bakermckenzie.com

Japan

Fumio Koma
Phone: + 81 3 6271 9447
Email: fumio.koma@bakermckenzie.com

Junya Ae
Phone: + 81 3 6271 9491
Email: junya.ae@bakermckenzie.com

Hiroaki Nagahashi
Phone: + 81 3 6271 9533
Email: hiroaki.nagahashi@bakermckenzie.com

Mexico

Gerardo Calderon-Villegas
Phone: + 52 55 5279 2900
Email: gerardo.calderon@bakermckenzie.com

Juan Carlos Zamora-Müller
Phone: + 52 55 5279 2945
Email: juancarlos.zamora-mueller@bakermckenzie.com

The Netherlands

Frank Kroes
Phone: + 31 20 551 7435
Email: frank.kroes@bakermckenzie.com

Christiaan van der Meer
Phone: + 31 20 551 7199
Email: christiaan.vandermeer@bakermckenzie.com

Sjef Janssen
Phone: + 31 20 551 7134
Email: sjef.janssen@bakermckenzie.com

Poland

Katarzyna Manteuffel
Phone: + 48 22 445 3154
Email: katarzyna.manteuffel@bakermckenzie.com

Lukasz Hejmej
Phone: +48 22 4453147
Email: lukasz.hejmej@bakermckenzie.com

Mikolaj Piaskowski
Phone: +48 22 4453140
Email: mikolaj.piaskowski@bakermckenzie.com

Russia

Anton Subbot
Phone: +7 (495) 787 2700
Email: anton.subbot@bakermckenzie.com

Nadia Goreslavskaya
Phone: + 7 495 787 2700
Email: nadia.goreslavskaya@bakermckenzie.com

Contributing Authors

Kirill Svetlov
Phone: +7 (495) 787-2700
Email: kirill.svetlov@bakermckenzie.com

Spain

Carles Prat
Phone: + 34 93 206 08 50
Email: carles.prat@bakermckenzie.com

Valeria Enrich
Phone: + 34 93 206 08 44
Email: valeria.enrich@bakermckenzie.com

Alberto Escudero
Phone: + 34 91 771 9797
Email: alberto.escudero@bakermckenzie.com

Carmen Campo
Phone: + 34 93 206 08 69
Email: carmen.campo@bakermckenzie.com

Sweden

Leif Gustafsson
Phone: + 46 8 566 177 34
Email: leif.gustafsson@bakermckenzie.com

Jonas Benedictsson
Phone: + 46 8 566 177 26
Email: jonas.benedictsson@bakermckenzie.com

Magnus Stalmarker
Phone: + 46 8 566 177 08
Email: magnus.stalmarker@bakermckenzie.com

Switzerland

Anne-Catherine Hahn
Phone: + 41 44 384 1442
Email: anne-catherine.hahn@bakermckenzie.com

Turkey

Zumrut Esin
Phone: + 90 212 376 64 00
Email: zumrut.esin@esin.av.tr

Koray Sögüt
Phone: + 90 212 376 64 22
Email: koray.sogut@esin.av.tr

Hakki Can Yildiz
Phone: + 90 212 376 64 54
Email: can.yildiz@esin.av.tr

United States

Darrell Prescott
Phone: + 1 212 626 4476
Email: darrell.prescott@bakermckenzie.com

Catherine Stillman
Phone: + 1 212 626 4218
Email: catherine.stillman@bakermckenzie.com



Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

www.bakermckenzie.com

©2017 Baker & McKenzie. All rights reserved. Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.