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2020

# GLOBAL GUIDE TO COMPETITION LITIGATION





# Global Guide to Competition Litigation

2020



## 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. Contact details for our lawyers in each country can be found in the relevant chapter and at the end of this guide.



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## Jurisdiction guides quick reference table

	ARGENTINA	AUSTRALIA	AUSTRIA	BELGIUM	BRAZIL	CANADA	CHILE	CHINA	CZECH REPUBLIC	EGYPT
<b>COST OF BRINGING/DEFENDING AN ACTION</b>	LOW	HIGH	MID	MEDIUM	VARIABLE	VARIABLE	VARIABLE	MID	LOW	LOW
<b>ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?</b>	NO	YES	YES	YES	YES	YES	NO	YES	YES	YES
<b>APPLICABLE LIMITATION PERIOD</b>	INVESTIGATION: 5 years TORT: 3 years CONTRACT: 5 years	Six years from date cause of action accrued, although section 87 damages which are discretionary are not time limited	5 years from knowledge (capped at 10 years from date damage occurred) Limitation periods only start running once the infringement has been terminated This new provision applies to all claims that have not yet been time-barred on 26 December 2016, provided that the old rules (3 years from knowledge) (capped at 30 years from date of damage) are not more favorable to claimants	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 from the discovery of offensive conduct or disposition of any criminal proceedings Limitation for common law claims varies	Four years counting from when the definitive infraction sentence is enforced.	3 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 if the damage was caused willfully) in case of unfair competition 5 years from knowledge in case of restrictions of competition	3 years from date of knowledge (capped at 15 years from occurrence of damage) Extended where criminal law limitation period has not expired
<b>DISCLOSURE</b>	VERY LIMITED	YES	LIMITED (no pre-action disclosure; no disclosure of settlement submissions/leniency statements)	LIMITED	LIMITED	YES – WIDE	LIMITED	LIMITED	VERY LIMITED	LIMITED

	ARGENTINA	AUSTRALIA	AUSTRIA	BELGIUM	BRAZIL	CANADA	CHILE	CHINA	CZECH REPUBLIC	EGYPT
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 civil and collective 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	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	YES	LIMITED	YES (opt-in group actions only)
AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS	3 years	4+ years, variable	The average duration for civil court proceedings in general is 13 months (regional courts) Due to the complexity of facts and law, actions for damages in competition cases will most likely have a higher average	2-3 years	2-4 years	2-5 years; varies according to province	To date, this is undetermined.	6 months-3 years	2-3 years	1 - 2 years
HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?	YES (one abuse of dominance case)	YES	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	YES	NO (all claims settled to date or otherwise pending determination)	YES

	ARGENTINA	AUSTRALIA	AUSTRIA	BELGIUM	BRAZIL	CANADA	CHILE	CHINA	CZECH REPUBLIC	EGYPT
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. All damages caused during the period over which the infraction has extended.	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	YES	YES	YES	Yes under the general rules of the Civil Code, but this has not yet been tested.	YES	YES	YES
IS THE PASSING-ON DEFENSE AVAILABLE?	YES	UNCERTAIN	YES	YES	NOT DETERMINED	NO	Not contemplated in Chilean competition law, and has not yet been tested.	UNTESTED	YES	YES

	ENGLAND AND WALES	FRANCE	GERMANY	HONG KONG	HUNGARY	INDIA	ITALY	JAPAN	MEXICO
<b>COST OF BRINGING/DEFENDING AN ACTION</b>	HIGH	MID	MID	HIGH	LOW	MODERATELY HIGH	MID	MID	LOW
<b>ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?</b>	YES	YES	YES	NO	YES	NO	YES	YES	NO
<b>APPLICABLE LIMITATION PERIOD</b>	6 years	5 years from knowledge/manifestation of damage	5 years from end of year in which cause was discovered and infringement ended (recovery capped at 10 years from date of damage and end of infringement)	Actions brought by Hong Kong Competition Commission (HKCC): 5 years from end of infringement, or date the HKCC became aware of it. Follow on damages actions: 3 years from final determination of infringement (including appeals)	5 years from end of the infringement	A reasonable period, likely 3 years from the date of final order	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)
<b>DISCLOSURE</b>	YES - WIDE	LIMITED	LIMITED	Broad duty of disclosure on the HKCC in infringement proceedings brought by HKCC; other types of proceedings remain untested	LIMITED	LIMITED	LIMITED	VERY LIMITED	VERY LIMITED
<b>ARE CLASS ACTIONS AVAILABLE?</b>	YES	YES – LIMITED	NO	NO	NO	YES	YES (enacted January 2010)	OPT IN, introduced on 1 October 2016 (but limited to consumer complaints and still unclear whether to be used for recovering damages from competition violations)	YES

	ENGLAND AND WALES	FRANCE	GERMANY	HONG KONG	HUNGARY	INDIA	ITALY	JAPAN	MEXICO
ARE GROUP OR REPRESENTATIVE ACTIONS AVAILABLE?	YES	LIMITED	YES	YES	LIMITED	YES	YES	LIMITED	YES
AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS	1-4 years	1-2 years	2-4 years	2-3 years	2-5 years	2-3 years	2-4 years	2-4 years	9 months-2 years
HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?	YES	YES	YES	NO	YES	YES	YES	YES	YES
HAS THERE EVER BEEN A DAMAGES AWARD?	YES	YES	YES	NO	YES (plus several other actions are pending)	NO	YES	YES	NO
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)	Untested	Compensatory (including loss of profit and interest) 10% overcharge assumed for hard-core cartels	Compensatory to the extent of loss or damage shown to have been suffered	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	NOT PROHIBITED, BUT UNTESTED	YES (excluding immunity recipient, only liable toward its own suppliers and purchasers)	NO	YES	YES	YES
IS THE PASSING-ON DEFENSE AVAILABLE?	YES	YES	YES	UNTESTED	YES	YES, IN THEORY	YES	YES	YES, IN THEORY

	THE NETHERLANDS	PERU	PHILIPPINES	POLAND	RUSSIA	SINGAPORE	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED STATES
<b>COST OF BRINGING/DEFENDING AN ACTION</b>	MID	LOW	MID	LOW	LOW	UNDETERMINED	LOW	LOW	MID	LOW	HIGH
<b>ARE STAND-ALONE DAMAGES ACTIONS POSSIBLE?</b>	YES	YES	UNDETERMINED (but, in theory, no)	YES	YES	NO	YES	YES	YES	NO	YES
<b>APPLICABLE LIMITATION PERIOD</b>	5 years from knowledge (capped at 20 years)	Administrative sanctioning procedure: 5 years Damages action: 2 years from the final decision of the competition authority	5 years from the time the cause of action accrues	3 or 5 years (capped at 10 years from date of event causing damage)	3 years from knowledge (1 year if claim is that underlying contract is void)	2 years (for Follow-on, Rights of Private Action)	5 years	5 years from when infringement ceased	3 years 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)
<b>DISCLOSURE</b>	YES	VERY LIMITED (only the parties of the proceeding can access the file)	UNTESTED (but, in theory, yes)	YES	VERY LIMITED	UNDETERMINED (in theory, wide)	LIMITED	YES	LIMITED (but parties to administrative proceedings may obtain file of competition authority)	LIMITED	YES – WIDE
<b>ARE CLASS ACTIONS AVAILABLE?</b>	YES	NO	YES	YES	YES	NO	NO	YES	NO	NO	YES
<b>ARE GROUP OR REPRESENTATIVE ACTIONS AVAILABLE?</b>	YES	YES	YES	YES	LIMITED	YES	LIMITED	YES	NO (but bundling of claims is possible)	IN PRACTICE (bundling of claims is possible)	YES
<b>AVERAGE LENGTH OF FIRST INSTANCE PROCEEDINGS</b>	2 -3 years	Administrative sanctioning procedure: from 1 to 2 years Damages action: 6 years	2-4 years	2-3 years	3-6 months	UNDETERMINED	1-1.5 years	3-4 years	2 years	1-3 years	3-5 years
<b>HAVE ANY DAMAGES ACTIONS BEEN BROUGHT?</b>	YES	No published decisions yet.	NO	N/A	YES	NO	YES	YES	YES	Yes, but no published decisions yet	YES



	THE NETHERLANDS	PERU	PHILIPPINES	POLAND	RUSSIA	SINGAPORE	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED STATES
HAS THERE EVER BEEN A DAMAGES AWARD?	YES	No published decisions yet.	NO	N/A	YES	NO	YES	YES	YES	Yes, but publicity is limited	YES
MEASURE OF DAMAGES AVAILABLE	Compensatory (including loss of profit and interest)	Compensatory (including loss of profit and interests)	UNTESTED (but, in theory, should cover compensatory and punitive)	Compensatory (including loss of profit and interest)	Undetermined	NO	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 damages for the difference between a competitive price and the price charged due to the violation Damages are automatically trebled, and a successful plaintiff can recover its reasonable attorneys' fees and costs
RIGHT TO SEEK CONTRIBUTION	YES	YES	UNTESTED (but, in theory, yes)	YES	YES	UNDETERMINED (in theory, possible)	LIKELY	YES	YES	YES	NO
IS THE PASSING-ON DEFENSE AVAILABLE?	YES	NO	UNTESTED (but, in theory, yes)	YES	UNDETERMINED	UNDETERMINED (in theory, possible)	YES	YES	LIKELY (but difficult to rely on)	YES, IN THEORY	Not available under federal claims, but it is available under some state law claims

# EU Antitrust Damages Directive (2014/104/EU)

## Introduction

Published in the Official Journal on 5 December 2014, the 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.<sup>1</sup> Member States had until 27 December 2016 to transpose the Directive into national law. Despite the time that has passed since the deadline for implementation, the full impact of the Directive is yet to be seen as litigants and national courts grapple with its influence. This is particularly so given the often long tail of cartel enforcement, as several important provisions only apply to conduct arising after the implementation date.

To date, the Directive has not led to the emergence of a litigation culture akin to that in the US. However, we have seen an increase in the overall volume of claims, a trend we expect to continue.

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 and the proposed directive on consumer representative actions.

## Directive objectives

The Directive’s primary objective is to ensure that anyone who has suffered harm caused by an infringement of competition law (either under 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.<sup>2</sup> This covers actual loss, loss of profit and interest, but not overcompensation. Therefore, punitive and multiple damages are not recoverable.<sup>3</sup> 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 in a competition authority case file.

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<sup>1</sup> Article 1.

<sup>2</sup> Article 3.

<sup>3</sup> Ibid.

## Disclosure of evidence (Articles 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 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.<sup>4</sup>

- *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.<sup>5</sup>

- *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.<sup>6</sup>

- *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.<sup>7</sup>

- *Opportunity to be heard*

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

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<sup>4</sup> Article 5(1).

<sup>5</sup> Article 5(2).

<sup>6</sup> Article 5(3).

<sup>7</sup> Article 5(6).

<sup>8</sup> Article 5(7).

## 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 that have not been withdrawn.<sup>9</sup> 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.<sup>10</sup>
- *White list documents*, which may be disclosed at any time: evidence on the competition 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).<sup>11</sup>

## 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.<sup>12</sup>

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.<sup>13</sup>

## Effect of national decisions (Article 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 (Article 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.

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<sup>9</sup> Article 6(6).

<sup>10</sup> Article 6(5).

<sup>11</sup> Article 7(1) and 7(2).

<sup>12</sup> Article 8(1).

<sup>13</sup> Article 8(2).

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 (Article 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)*<sup>14</sup> are liable to their own direct and indirect purchasers only, provided that: (i) their market share remained below 5% at any time during 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 recipients*<sup>15</sup> 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 (Articles 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.<sup>16</sup> The Directive also provides that national courts shall have the power to estimate pass-on. In December 2019, the Commission published guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07).

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<sup>14</sup> Articles 11(2)–(3).

<sup>15</sup> Article 11(4).

<sup>16</sup> Article 12.

The Directive confirms the availability of the “passing-on” defense, and that both direct and indirect purchasers are entitled to sue.<sup>17</sup> 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 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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

## Quantification of harm (Article 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 practically 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 (Articles 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.

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<sup>17</sup> Article 13.

<sup>18</sup> Article 13.

<sup>19</sup> Article 14.

<sup>20</sup> Article 15.

## 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 has led to a narrowing of the range of procedural approaches available at the national level and removes some of the uncertainty that might previously have discouraged some potential claimants from taking action.

## The recommendation on collective redress and proposed directive

### Background

Published in the Official Journal on 26 July 2013, the Commission's Recommendation on common principles of injunctive and compensatory collective redress mechanisms (the "**Recommendation**") nudges 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 26 July 2015, although the Recommendation is not binding and thus Member States are not obliged to follow it. The Commission reported on the implementation of the Recommendation in January 2018, concluding that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU.

In light of the continued issues with the effectiveness of consumer rights enforcement across the EU, a proposed directive on representative actions for the protection of the collective interests of consumers (the "**Proposed Directive**") was at an advanced stage at the time of writing. The Proposed Directive is part of the EU's "New Deal for Consumers" and will, if passed, introduce a form of "class action" style representative actions for consumers.

## 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.

## Proposed directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

The Proposed Directive promises to introduce “class action” style litigation for consumers across the EU. It was the subject of a focused review and re-write by European Council officials in late 2019. The European Council adopted a revised approach on 27 November 2019 that attempts to reconcile the conflicting views between Member States (as well as entities representing consumer and business interests) on how such reforms should best be approached and the risks that they engender.



The revised text presents substantial changes to the first draft proposed by the Commission back in April 2018 and will no doubt provoke much debate on how it might be implemented at Member State level if adopted in this form. The next step is for the Proposed Directive to be approved at Commission and European Parliament level.

The key elements of the Proposed Directive include:

- the ability for qualified non-profit entities designated by Member States (so-called 'qualified entities') to launch representative actions on behalf of consumers;
- detailed requirements of what constitutes a "qualified entity" to ensure that a representative has the appropriate level of skill, knowledge and independence and that consumer protection, rather than litigation funding, is the focus of the claim;
- an ability for the qualified entities to prohibit an infringement and to seek redress, such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid;
- a rebuttable presumption of liability in litigation before the courts of all Member States where liability has already been determined by a court in another Member State in respect of that matter; and
- increased collaboration and consistency of outcomes between Member States with regards to consumer protection.

Whether or not the Proposed Directive, combined with the increasing prevalence of litigation funding and moves by some Member States to introduce class action mechanisms already, will translate to US volumes of class action activity and recovery is yet to be seen. However, the landscape of litigation and civil recovery no doubt will change in future. Effective management of this litigation risk will require a strategic approach coordinated across jurisdictions that accounts for the possibility of claims being made while regulatory investigations remain ongoing.

# Argentina

Esteban Rópolo

## A. Availability of civil claims

### 1. Scope for civil claims in Argentina

Follow-on claims are available in Argentina.

Article 62 of Competition Defense Law No. 27,442 (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. Based on the wording of Article 63 of the Law, stand-alone damages actions would not be available. Presidential Decree 480/2018 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 USD 3 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.

According to the Law, the National Competition Authority (the "**Agency**") is 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.

The Law was passed and the Agency has not been created yet. As such, the Competition Defense Commission and the Secretary of Internal Commerce continue as the agencies in charge of transitorily applying the Law until the appointment of the Agency. Hence, when we refer below to the Agency, it must be understood that it includes both the Competition Defense Commission and the Secretary of Internal Commerce.

Based on Article 63 of the Law, an administrative finding of infringement by the Agency is a pre-condition to a civil action. The courts will only determine the existence and amount of damages under an abbreviated procedure.

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. These delays will significantly affect the development and award of the damages claims.

## 2. Applicable limitation periods

The statute of limitation for 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.

Regarding damages actions, the Law establishes a period of either: (i) three years from the date on which the infringement was committed or ceased or the claimant could have become aware of the infringement, whichever event occurs later; or (ii) two years from the date of the final decision from the Agency.

## 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.

A 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,<sup>1</sup> 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.<sup>2</sup>

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 charges<sup>3</sup> and the defective provision of public services,<sup>4</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> Section 43 of the Argentine Federal Constitution.

<sup>3</sup> *Camara Nacional de Apelaciones en lo Comercial, Sala C, Unión de Usuarios y Consumidores c/ Banco de la Provincia de Buenos Aires s/ Sumarísimo*, 5 October 2005 (LL 1.11.05, F° 109.591; JA 14.12.05; ED 30/31.1.06, F. 53816).

<sup>4</sup> *Camara de Apelaciones en lo Civil y Comercial Federal, Sala I, Defensoría del Pueblo de la Ciudad de Buenos Aires c/ Edesur S.A.*, 16 March 2000, JA 2000-II-235.

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*,<sup>5</sup> and the subsequent opinion rendered by the Supreme Court in *Halabi*,<sup>6</sup> establish that standing to file “collectively suffered” claims will exist when: (i) there is a group of people that share 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.

The Consumers Protection Law (the “CPL”) determines 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.<sup>7</sup>

## 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, so far 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 (however, the court may shift this burden of proof if it considers that one of the parties is in better position to provide it). 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.

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<sup>5</sup> 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 October 2006.

<sup>6</sup> Corte Suprema de Justicia de la Nación, *Halabi, Ernesto c/ P.E.N. s/ amparo ley 16.986*, 24 February 2009., Section 54 of the CPL.

<sup>7</sup> Section 54 of the CPL.

## 6. Joint and several liability of cartel participants

Pursuant to Section 1751 of the Civil and Commercial 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 they do not do so, it is not clear if under the Civil and Commercial Code a cartel member who is sued for all damages caused by the whole cartel would be able to claim a contribution from their co-cartelists if they are not joined to the claim proceedings.

## 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 they do 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 regarding 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

The judge may impose a civil fine in favor of the claimant. The amount of such fine shall be determined by the court based on the facts of the case. Since the Law was passed in 2018, this provision has never been applied.

## 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 irreparable 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 USD 3 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 include the following:

- (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 and Lynsey Edgar

## 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).<sup>1</sup> 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, anti-competitive concerted practices 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 they: (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.<sup>2</sup> 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 that have engaged in infringing conduct in Australia or, where the conduct takes place overseas, that are carrying on business in Australia.<sup>3</sup>

### 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. It is not settled as to whether the cause of action will accrue when loss or damage is suffered, or when it is discovered.<sup>4</sup>

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<sup>1</sup> CCA, sections 80, 82 and 87.

<sup>2</sup> CCA, section 75B.

<sup>3</sup> CCA, section 5.

<sup>4</sup> *Wardley Australia Ltd v Western Australia* [1992] 175 CLR 514; *Energex Ltd v Alstom Australia Ltd* [2004] FCA 575.



Compensation can also be sought by a private litigant under section 87(1) of the CCA,<sup>5</sup> 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.<sup>6</sup>

### 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.<sup>7</sup>

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 common characteristics of the group of persons. 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.

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<sup>5</sup> 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.

<sup>6</sup> Judiciary Act 1903 (Cth), section 35A.

<sup>7</sup> FCA, section 33C.

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 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 limited number of cartel class actions brought in Australia. To date, all of these proceedings have been settled before any final hearing on liability or damages. Any settlement of a class action must be approved by the Court.

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.

To bring such proceedings, those persons must consent in writing to the ACCC bringing proceedings on their behalf. To date, the ACCC has not brought (and is unlikely to bring) any proceedings under this section for breaches of the prohibitions on anti-competitive conduct.

## **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.<sup>8</sup>

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. The section, as of late 2017, applies in relation to findings of fact, and admissions of fact.

### **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, the question remains open 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, that matter settled prior to trial. Therefore, the question of contribution and apportionment between respondents has not yet been fully considered by the court.

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<sup>8</sup> Evidence Act 1995 (Cth), section 140.

## 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.<sup>9</sup> The court will not grant leave unless discovery is proportionate and necessary for the determination of the issues in the proceedings<sup>10</sup> (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 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 ACCC 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 to witness statements and documents relied on by the ACCC in penalty proceedings it has brought in respect of the same cartel conduct.<sup>11</sup>

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:

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<sup>9</sup> Federal Court Rules 2011 (Cth) ("FCR"), rule 20.12

<sup>10</sup> Federal Court of Australia, Central Practice Note: National Court Framework and Case Management (CPN-1), 20 December 2019, Part 10.

<sup>11</sup> See for instance *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCACF 32.

- (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 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.<sup>12</sup>

## 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, most private competition law enforcement matters to date 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 been settled prior to the 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 AUD 1 million or substantially more.<sup>13</sup>

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 to 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 to 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.<sup>14</sup> 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 permitted 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*<sup>15</sup> 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

<sup>12</sup> FCR, rule 7.23

<sup>13</sup> In two recent cases, the applicant’s solicitors received payments of AUD 25 million and AUD 13 million, respectively, in legal fees as part of the settlement of the proceedings.

<sup>14</sup> FCR, rule 25.14.

<sup>15</sup> *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd* [2006] 229 CLR 386.

funder.<sup>16</sup> 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 with class members pursuant to which they receive a certain percentage of the damages awarded (or to which each class member is entitled) in return for funding the cost of the proceedings (and bearing the liability for any adverse costs, including court-ordered payments for security for costs).

A funder is only entitled to this “commission” from each class member who signs a funding agreement with the funder. In order to secure funding from each class member, litigation funders historically undertook a “book-build” process to identify class members and execute funding agreements with as many class members possible. That process was costly and time-consuming.

From 2015, Australian courts demonstrated a willingness to make “common fund orders.” Common fund orders provided that a litigation funder could extract a percentage of any settlement or judgment sum in its entirety, irrespective of whether or not it signed funding agreements with each class member entitled to share in any settlement or judgment sum. Courts also demonstrated a willingness to make those orders at an early juncture in the proceeding, providing the litigation funder with some commercial security at the outset of receiving a commission in return for its bearing the risks of the litigation and funding the litigation (and removing the need for the funder to engage in the “book-build” process). Typically, such orders also reserved the Court’s ability to modify the commission rate at a later juncture.

In late 2019, the High Court of Australia delivered a judgment in which it decided that Australian courts do not have power to make common fund orders at an early or intermediate juncture of proceedings, because the exercise of the Court’s powers to make an order for the commercial viability of commencing a proceeding from the funder’s perspective is not an exercise of power contemplated by the relevant legislation.

The High Court left open the question of whether a Court could make a common fund order at a later stage in a proceeding - for example, when approving a settlement application. Since the delivery of the High Court’s decision, the Federal Court has approved a settlement application containing a provision for the funder to receive a commission from all class members. The Court’s amended practice guidance also leaves open the possibility of the making of a common fund order at the time a settlement application is approved.

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 in 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 presently permitted to enter into contingency arrangements with clients pursuant to which they are entitled to a percentage of the damages awarded. However, a bill due to be considered by the Victorian Parliament in May 2020, will, if passed, permit contingency arrangements between clients and lawyers in Victoria, pursuant to which lawyers are entitled to calculate costs as a percentage of any award or settlement. 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

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<sup>16</sup> *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd* [2006] 229 CLR 386.

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.<sup>17</sup>

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

### 12. Availability of damages and quantification

The Federal Court can make an award of damages to compensate an applicant for loss or damage suffered by the 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 should not theoretically be able to recover any loss or damage that they passed on to a downstream purchaser – however it is not clear from the cases whether the pass-on defence is available.<sup>18</sup> 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 rendered.<sup>19</sup> The rate of interest usually applied is the cash rate published by the Reserve Bank of Australia plus 4%.<sup>20</sup>

### 13. Punitive and exemplary damages

In Australia, punitive and exemplary damages are not available for breaches of the CCA. This is because sections 82 and 87 of the CCA are compensatory in nature.<sup>21</sup>

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

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<sup>17</sup> FCA, section 53A.

<sup>18</sup> *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166.

<sup>19</sup> FCA, section 51A.

<sup>20</sup> Federal Court of Australia, Interest on Judgments Practice Note (GPN-INT), 18 September 2017.

<sup>21</sup> *Musca v Astle Corp Pty Ltd* [1988] 80 ALR 251, 262.

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 Anita Lukaschek

## 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 sections 33a et seq. 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.

Sections 33a et seq. of the Cartel Act have been adopted in implementation of Directive 2014/104/EU. The application of this new legal framework may — by virtue of a number of transitional provisions — still not be relevant in many instances: §§ 37a to 37g of the Cartel Act only apply to damages that occurred after 27 December 2016. §§ 37j to 37m of the Cartel Act apply to proceedings that have been initiated after that date. On the specific transitional provision as to limitation, see A.2 below.

Therefore, the previous legal framework will still be relevant in competition litigation in many cases. For the sake of clarity, the following focuses on the legal framework as introduced in implementation of Directive 2014/104/EU, if not stated otherwise.

### 2. Applicable limitation periods

According to section 37h of the Cartel Act, the limitation period for damages resulting from competition law infringements is five years from the moment a potential claimant has knowledge of the damage and the identity of the infringing party and of the fact that the behavior constitutes an infringement of competition law. The absolute limitation period for damages claims is 10 years. Limitation periods shall only begin to run when the infringement is terminated.

This provision is applicable to all claims that have not yet been time-barred on 26 December 2016, provided that the application of the old law is not more favorable to the claimant. This means that the previous legal framework may still be relevant in some instances: first, predecessor provision section 37a of the Cartel Act (in the version of the amendment in 2013), or secondly, limitation periods under general civil law (section 1489 ABGB). Accordingly, there are three different legal settings that may be relevant depending on the specifics of a case.

Section 37h para 2 of the Cartel Act sets forth that the running of the limitation period shall be suspended: (i) while a corresponding public enforcement procedure at the EU or national level (i.e., Austria or in another EU Member State) is pending; (ii) while there are ongoing investigations of a competition authority (European Commission or another national competition authority); and (iii) for the duration of a dispute resolution process. If the period is suspended because of the circumstances as described under (i) and (ii), the suspension ends one year after the infringement decision has become final or after the proceedings or investigations are otherwise terminated. Finally, if dispute resolution fails, the action needs to be brought “within a reasonable period” in order to prevent limitation.



Against the background of joint and several liability restrictions vis-à-vis the immunity recipient (see B.6 below), the limitation period of an injured party who is not a direct or indirect purchaser of an immunity recipient is suspended for the duration of damage proceedings brought by that injured party against other undertakings that were involved in the same infringement of competition law. Suspension ends one year after unsuccessful enforcement of a court decision against any of the other infringers (section 37h para 3 of the Cartel Act).

### 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 determine which court has jurisdiction. A district court (*Bezirksgericht*) is competent to hear claims of an amount up to EUR 15,000. Claims exceeding EUR 15,000 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.<sup>1</sup> 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.<sup>2</sup> 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 if it raises legal issues of fundamental importance. Appeals against second instance judgments are not allowed when the amount in dispute is EUR 5,000 or less, regardless of whether such judgments raise an issue of legal importance. Further, if the value in dispute does not exceed EUR 30,000, 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 only 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.

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<sup>1</sup> 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.

<sup>2</sup> Exempted are appeals in cases where the value of the claim does not exceed EUR 2,700. Appeals in such cases are restricted to grounds of nullity and questions of law (section 501 ZPO).

#### 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 strictly speaking, there are a few ways in which claimants may group their claims and achieve efficiencies.

Firstly, 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/her claim or negotiate a settlement.

Secondly, 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., *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.

Thirdly, 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 cartel damages 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 have been 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 37i para 2 of the Cartel Act, findings of a competition law infringement by the Cartel Court, the European Commission, any other competition authority in a Member State, or by a review court (deciding on an appeal against a competition authority's decision) have a binding effect for follow-on claims.

Secondly, according to section 37c para 2 of the Cartel Act, it is presumed that cartel infringements cause harm. The infringer has the right to rebut this presumption. This presumption of harm has been included in implementation of Article 17 of Directive 2014/104/EU. It does not extend to the concrete amount of harm, which still needs to be established by the claimant. However, civil courts may 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 (with reasonable efforts). Similarly, the court may also estimate the damage, if the value of individual claims does not exceed EUR 1,000, and the facts giving rise to the claim cannot be established without disproportionate difficulty (section 273 para 2 ZPO).

Thirdly, case law states that, in the case of infringements of so-called "protective laws" (*Schutzgesetze*), 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.

Fourthly, with regard to fault, the burden of proof is usually reversed since, pursuant to pertinent case law, competition rules are considered to be "protective laws." 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/she 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.

Fifthly, and importantly, 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 lower standard of proof if a typical link between a proven fact and another (not yet proven) fact is established based on common experience.

## 6. Joint and several liability of cartel participants

Pursuant to section 37e para 1 of the Cartel Act, undertakings that infringed competition law through joint behavior are jointly and severally liable for the whole damage caused by the infringement of competition law. It shall be noted that joint and several liability as a general concept has already been recognized before the insertion of this new provision into the Cartel Act on the basis of general civil law (section 1302 ABGB). This is important since section 37e of the Cartel Act only applies in relation to damages that occurred after 27 December 2016.

However, in implementation of Directive 2014/102/EU, section 37e para 2 of the Cartel Act introduced some derogations from joint and several liability: first, the infringer is liable only to its own direct and indirect purchasers where (i) the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC which employs less than 250 persons and which has an annual turnover not exceeding EUR 50 million, or an annual balance sheet total not exceeding EUR 43 million, (ii) whose market share in the relevant market was below 5% at any time during the infringement of competition law, and (iii) where the application of the rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value. This does not apply where the infringer has led the infringement of competition law, has coerced other undertakings to participate therein or has been previously found to have infringed competition law.

Secondly, joint and several liability of immunity recipients is limited to direct or indirect purchasers. Immunity recipients are defined as any (legal or natural) person who voluntarily revealed his/her knowledge of a secret cartel to a competition authority and who has thereupon been granted immunity of fines by way of a decision or termination of the proceeding. Beyond that, the immunity recipient's joint and several liability extends to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law (section 37e para 3 of the Cartel Act).

Section 37e para 4 of the Cartel Act addresses the issue of recovery of contributions made by one infringer from other (joint and several liable) participants in the infringement. In line with Directive 2014/104/EU, it is

established as a general principle that recovery is determined in light of the relative responsibility for the harm caused by the infringement of competition law. The relative responsibility of a given infringer depends on the circumstances of the particular case, such as turnover, market share or role in the cartel. The contribution amount of an infringer that has been granted immunity for fines under a leniency program shall not exceed the amount of harm it caused to its own direct or indirect purchasers.

In the context of joint liability, the Supreme Court 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. However, 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. 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).

Even evidence improperly obtained by the parties is in principle admissible. 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.

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.

One 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.

Moreover, section 37k para 5 of the Cartel Act prevents the use of “grey-listed” or “black-listed” information for evidence (as defined below). If evidence is obtained by a person solely through access to the file of a competition authority, it may be used only by this person (or by a person that succeeded to that person’s right) in an action for damages resulting from competition law infringement (section 37k para 6 of the Cartel Act).

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 except for the reason described in point (ii) above (section 380 ZPO).

Sections 37j and 37k of the Cartel Act allow for the disclosure of documents in proceedings relating to actions for damages resulting from infringements of competition law.

Firstly, national courts shall — upon the reasoned request of a claimant — order the defendant or a third party to disclose relevant evidence that lies in their control (section 37j para 2 of the Cartel Act). In this context, there is no failure to state a claim if only the claimant presents a reasoned justification containing

reasonably available facts and evidence sufficient to support the plausibility of its claim for damages (section 37j para 1 of the Cartel Act).

Before ordering disclosure, the defendant or third party shall be heard. The court may only order the disclosure of confidential information where proportionate. In determining whether disclosure is proportionate, courts shall consider the legitimate interests of all parties and third parties concerned. In particular, they shall consider: (i) the extent to which the claim or defense is supported by available facts and evidence justifying the request to disclose evidence; (ii) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; and (iii) whether the evidence for which disclosure is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that qualifies for protection (section 37j para 5 of the Cartel Act).

Courts shall employ effective measures to protect confidential information. In doing so, they may in particular (i) order that sensitive passages are redacted in documents before disclosure; (ii) conduct hearings on camera; (iii) restrict the number of persons — besides parties and their representatives — allowed to access the evidence without unduly restricting parties' rights; or (iv) instruct experts to produce summaries of the information in a non-confidential form (section 37j para 6 of the Cartel Act).

If information is protected by virtue of professional secrecy or a right to refuse evidence according to section 157 para 1 item 2 to 5 of the Austrian Criminal Procedure Code (*Strafprozeßordnung*), the party that has been ordered to disclose information may request that this information is disclosed only to the court. Subsequently, it is up to the court to decide whether this information is disclosed to the party that has requested its disclosure (section 37j para 7 of the Cartel Act).

Secondly, section 37k of the Cartel Act enables the disclosure of evidence included in the file of a competition authority; courts may request the disclosure of such evidence only if that evidence cannot reasonably be obtained from the parties to the proceedings or from a third party.

When deciding on such a request, in addition to the proportionality considerations described above, the court (competition authority) may also consider (i) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, and (ii) whether restrictions to disclosure are necessary to safeguard the effectiveness of the public enforcement of competition law.

Moreover, disclosure with regard to the following categories of evidence may be ordered only after a competition authority has closed its proceedings: (i) information that was prepared specifically for the proceedings of a competition authority; (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn (section 37k, para 3 of the Cartel Act; "grey list").

Importantly, leniency statements and settlement submissions are excluded from any kind of disclosure (section 37k para 4 of the Cartel Act; "black list"). This does not include information that exists regardless of the competition proceedings, even if this information is part of the competition authority's file.

The Cartel Act's rules on disclosure apply to competition litigation only. They apply alongside the respective rules of general civil procedure law (sections 303 et seq. ZPO). Accordingly, 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 the content of such

documents to allow for the 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 an adverse inference of an unjustified refusal to produce documents. Furthermore, 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.”

## 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 preliminary proceedings 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 obligations 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

The duration of proceedings related to civil claims based on violations of competition law may be considerably longer than for “ordinary” civil proceedings where the average duration ranges from six months (district courts) to 13 months (regional courts). There are numerous claims that have been submitted to the Austrian civil courts since 2010 which are still pending. However, this should also be seen in light of the fact that competition litigation was new in Austria at the time when most of these proceedings were initiated. Since then, many open legal questions have been clarified, be it by case law or by legislation (most importantly, the legal framework introduced in implementation of Directive 2014/104/EU), or by initiating preliminary ruling procedures before the European Court of Justice (ECJ).<sup>3</sup> This will most likely “accelerate” competition litigation in the future.

## 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 proceedings 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, but actual costs may be significantly higher.

## 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 at an early stage of development. Thus, many of the procedural specifics

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<sup>3</sup> ECJ 5 June 2014, Case 55/12, *Kone AG and others*; in 2018, the Austrian Supreme Court again referred a question on the compatibility of general Austrian tort law principles with EU law to the ECJ that was late last year (ECJ 12 December 2019, Case 435/18, *Otis Gesellschaft and others*).

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 pending at the regional court level and the court has not yet decided on 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

According to section 37d para 1 of the Cartel Act, the damaged party is entitled to obtain full compensation, including loss of profits (e.g., lost business opportunities).

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 eventually leave it to a court-appointed economic expert to choose the best calculation method for the specific case. In a 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 used. On the possibility to estimate the amount of harm where it is practically impossible or excessively difficult to precisely quantify the harm, see above (point 5).

### 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

The Cartel Court may order interim measures if there is prima facie evidence on the requirements of a final injunction (cease-and-desist order).

Cease-and-desist orders may be adopted by the Cartel Court (upon request) to bring a (continuing) infringement of competition law effectively to an end (section 26 of the Cartel Act). The Cartel Court may even decide on remedies if these are necessary to reinstall a lawful situation (e.g., infringement through omission).

## D. Emerging trends

The rules (sections 37a et seq. of the Cartel Act) that have been adopted to implement Directive 2014/104/EU certainly created a new (even) more attractive legal framework for private competition litigation in Austria. National implementation of Directive 2014/104/EU rarely goes beyond the requirements of the Directive. In particular, no collective redress mechanisms have been introduced. However, the Austrian legislator chose to extend the scope of the new provisions not only to (as required) damages following infringements of EU competition law but also to purely national infringements.

Currently, there is still a considerable number of proceedings pending before the Austrian civil courts that were initiated under the prior legal framework. Some of these proceedings have been pending for approximately ten years. So far, no landmark decision awarding or declining to award damages has been

rendered. However, some proceedings are currently approaching an important stage in terms of quantification of damage by the court-appointed economic expert. Important legal questions have been qualified. The Austrian Supreme Court has again referred a question on the compatibility of general Austrian tort law principles with EU law to the ECJ that issued a judgement late last year.<sup>4</sup> There is remarkable experience and case law in Austria as regards competition litigation. This — alongside the new legal framework — will most likely foster competition litigation in Austria in the future.

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<sup>4</sup> ECJ 12 December 2019, Case C-435/18, *Otis Gesellschaft and others*.



# Belgium

Kurt Haegeman and Geert Bovy

## 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 2019.

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.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("EU Antitrust Damages Directive") has been implemented in Belgium by the Belgian Act of 6 June 2017, which inserts a Title 3 "Actions for damages for infringements of competition law" in Book XVII of the Belgian Economic Law Code. The act entered into force on 22 June 2017. It applies to all new and pending proceedings before the Belgian courts, but not to pending proceedings that had been initiated prior to 26 December 2014. 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

Under general Belgian law, 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.

However, an action for damages relating to competition law infringements cannot be time barred before the administrative procedure has been closed definitively, i.e., when a decision establishing a competition law infringement obtains the force of *res judicata* (Constitutional Court, Case No. 38/2016, 10 March 2016).

The Belgian Act on actions for damages for infringements of competition law confirms the application of the limitation periods under general Belgian law and clarifies that a limitation period applies as of the day on which the continuing or repeated infringement of competition law has ceased and the potential claimants know (or can reasonably be expected to know):

- (a) the behavior and the fact that the behavior constitutes an infringement of competition law;
- (b) the fact that the infringement of competition law caused harm to it; and
- (c) the identity of the infringer.

However, a limitation period is interrupted (i.e., shall commence anew) when an investigation is carried out by a competition authority (which may be a national competition authority, the European Commission, or both). Such interruption will end the day after a final infringement decision has been reached. A “final infringement decision” is a decision establishing a competition law infringement which can no longer be appealed by virtue of common legal remedies.

### 3. Appeals

In general, 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. However, decisions of the court of first instance or the commercial court in cases where the claim is less than or equal to EUR 2,500 cannot be appealed.

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).

In principle, judgments are enforceable, also in the case of appeal. However, a court can, upon the request of a party, decide that an appeal suspends the execution of the judgment.

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

The Belgian Act on collective redress procedures (“Act”), which entered into force on 1 September 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 1 September 2014.

After a claim for collective redress has been found admissible, the court could apply two possible systems. 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, in the end it is the court that has the 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. If 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 in 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.

The Belgian Act on collective redress procedures was amended by the Belgian Act of 30 March 2018 to include small and medium-sized enterprises (SMEs) (as defined in Commission Recommendation 2003/361/EC) in the scope of the Act. A group of SMEs that have individually suffered damage as a result of a common damage cause can now also institute a collective redress procedure through a group representative.

The Belgian Act on actions for damages for infringements of competition law also applies to the abovementioned collective redress procedure with the exception of the possibility of the passing-on defense for the defendant in an action for damages.

## 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. However, the Belgian Act on actions for damages for infringements of competition law introduced a rebuttable presumption that cartels cause harm, thus easing the causation proof.

Belgian courts cannot take decisions running counter to a final infringement decision of the European Commission and/or of the Belgian Competition Authority (or the Brussels Court of Appeal). Infringements of competition law found by a final decision are deemed to be irrefutably established for the purposes of an action for damages. Final decisions of a national competition authority in another European Member State can be presented before a Belgian national court as prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

Decisions of the Belgian 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 in the same way but for the fault of the defendant.

There is no “rule of thumb” for establishing damages in difficult cases. Very few damages 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. The Belgian Act on actions for damages for infringements of competition law provides that the Belgian Competition Authority may, upon the request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

## 6. Joint and several liability of cartel participants

Under general Belgian law, there was no specific rule on joint and several liability for damages in respect of private competition litigation. Courts could, however, hold infringers jointly and severally liable (“*in solidum liability*”) on the basis of general tort law.

The Belgian Act on actions for damages for infringements of competition law now provides for joint and several liability of cartel participants for loss suffered when they are responsible for the same harm. 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.

However, the Act provides for an exception to this joint and several liability of cartel participants for small and medium sized enterprises (SMEs) (as defined in Commission Recommendation 2003/361/EC).

If an SME’s market share in the relevant market were below 5% at any time during the infringement of competition law, and 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, it is only jointly and severally liable:

- (i) to its own direct or indirect purchasers or providers; and
- (ii) to other injured parties, but only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

The abovementioned exception for SME’s does not apply where:

- (a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or
- (b) the SME has previously been found to have infringed competition law.

The Act also provides for an exception to the joint and several liability for immunity recipients. An immunity recipient is only jointly and severally liable:

- (i) to its direct or indirect purchasers or providers; and
- (ii) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

The amount of contribution of an immunity recipient shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers. To the extent that the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in light of its relative responsibility for that harm.

## 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 on 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.

On the basis of the Belgian Act on actions for damages for infringements of competition law, a court can impose penalties, ranging from EUR 1,000 to EUR 10 million, on parties, third parties and their legal representatives in the following circumstances:

- their failure or refusal to comply with a disclosure order;
- their destruction of relevant evidence;
- their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; and
- their breach of the limits on the use of evidence.

As in most civil law countries, documentary evidence is the most important type of evidence in bringing a claim. Generally, in civil cases in Belgium, written evidence is required for parties to prove the existence of a legal transaction between them relating to a value greater than EUR 375, and oral evidence may not be admitted to contradict or amplify the written evidence.<sup>1</sup> There are exceptions to this rule, for example 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/she 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. The Belgian Act on actions for damages for infringements of competition law clarifies that a court can only request the disclosure of evidence from the Belgian Competition Authority included in its file where no party or third party is reasonably able to provide that evidence. Such request for disclosure is furthermore without prejudice to the

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<sup>1</sup> As of 1 November 2020, Book VIII of the new Belgian civil code will enter into force. The threshold of EUR 375 for the proof of legal transactions will be raised to a sum or value equal or greater than EUR 3,500.

rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

## 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 two and three years to reach a final judgment at first instance in Belgium, depending on the complexity of the case. An appeal will take another 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/eight 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 1 January 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 EUR 90 for small claims to up to EUR 36,000 for claims above EUR 1 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 the damages 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 Arbitration and Mediation), 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.

As from 12 July 2018, a Belgian court, when of the opinion that a dispute can be resolved by mediation, may order at the request of a party or on its own motion the start of mediation. Such order must be made at the introductory hearing or, at the latest, at a hearing scheduled within one month of the submission of the first written submissions. If both parties do not agree with the order, no mediation will take place. In any event, even if the mediation was ordered by the court, each party remains free to terminate the mediation when it wants to.

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.

### Promotion of consensual dispute resolution under the Belgian Act on actions for damages for infringements of competition law

The Belgian Act on actions for damages for infringements of competition law provides that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process, excluding arbitration, with regard to those parties involved or represented in the consensual dispute resolution.

The Act also ensures that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers unless the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party. This last derogation can, however, be expressly excluded under the terms of the consensual settlement. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from 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 by the infringement of competition law, a national court shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

## 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.

The Belgian Act on actions for damages for infringements of competition law expressly includes the option for a defendant to invoke as a defense against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

Where the claimant is an indirect purchaser, the claimant shall be deemed to have proven that a passing-on to him/her occurred where he/she has shown that:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

The above shall not apply where the defendant can demonstrate credibly, to the satisfaction of the court, that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

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. This seems, however, to be a concern for the European legislator. Article 20 of the



EU Antitrust Damages Directive includes the point that the European Commission shall review the directive, *inter alia*, with regard to the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law.

Similarly, the Belgian Act on actions for damages for infringements of competition law provides that the Belgian Competition Authority may consider compensation, paid as a result of a consensual settlement and prior to its decision to impose a fine, to be a mitigating factor.

#### 14. Punitive and exemplary damages

Punitive and/or exemplary damages are not available in Belgium.

Courts can impose penalty payments 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.

Based on the Belgian Act on actions for damages for infringements of competition law, courts can also impose penalties, ranging from EUR 1,000 to EUR 10 million, on parties, third parties and their legal representatives in the following circumstances:

- their failure or refusal to comply with a disclosure order;
- their destruction of relevant evidence;
- their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; and
- their breach of the limits on the use of evidence.

This is payable to the Belgian State.

In addition, in the case of bid-rigging for public contracts, Article 314 of the Belgian Penal Code provides for the possibility of imposing fines ranging from EUR 800 to EUR 24,000 and a prison sentence from 15 days up to three years.

#### 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 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 date on which the facts on which the claim is based ceased to be applicable.

Finally, interim measures may also be obtained from the Belgian Competition Authority. Articles IV.72 and 73 of the Belgian Competition Act provide that the Competition Council may impose interim measures upon the reasoned request of a plaintiff, the Prosecutor General, the Minister of Economy or the Minister competent for the sector concerned by the alleged competition law infringement. The Competition Council, after having given the possibility to the defendant to submit a written response to the request for interim measures, is obliged to organize an oral hearing at the latest one month (which can be extended by 2 weeks) after the receipt of the request for interim measures. The Competition Council is required to take a reasoned decision within one month of the oral hearing. In absence of a decision within this period, the request for interim measures is deemed to be rejected.

## 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 that allegedly infringe competition law.

## D. Emerging trends

Although to date only a few damages 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 EUR 120 million settlement by Proximus of a damages claim brought by its competitors Mobistar and Base, an increasing number of companies are exploring the possibilities of bringing damages 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.

By Act of 4 April 2019 on the abuse of economic dependence, the Belgian legislator has introduced the concept of abuse of economic dependence in Article IV.2.1 of the Belgian Competition Act 2013. Just as for other competition law infringements, civil courts have the possibility to impose interim measures, injunctions and award damages for infringement of the prohibition of abuse of economic dependence. The exact conditions on what constitutes an abuse of economic dependence are not yet clear, but it might be expected that companies will institute more proceedings on this basis as the conditions to establish economic dependence are lower than for an abuse of dominance. It should be noted that the legal status of the prohibition of abuse of economic dependence is subject to debate given that the Belgian Competition Act of 2 May 2019, which entirely replaced the Belgian Competition Act 2013, does not contain an Article IV.2.1 prohibiting the abuse of economic dependence.

## Brazil

Paulo Casagrande and Bruno Burini\*

### 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 rules 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 authority 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 (“**Brazilian Public Class Action Law**”). The same type of lawsuit can be brought by the public defender's office, the Federal Union, states, municipalities, agencies/authorities, public companies, foundations, semi-public corporations or duly organized associations, on behalf of their members. It can also be filed as ordinary collective lawsuits by entities that represent private companies or individuals' collective interests, with damage claims.

The basis and requirements for such actions are explained further in section 4 below.

#### 2. Applicable limitation periods

The statute of limitations for private civil or ordinary collective actions 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 on which the cause of action is discovered, but some precedents accept other triggering facts (i.e., the end of a known antitrust infringement or the decision of the Brazilian Competition Authority (“**CADE**”) on the administrative procedure). There is as yet no settled case law in relation to competition law-based actions.

For public class actions seeking damages resulting from a breach of competition rules, 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 allegations 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 that 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 federal legislation (as is the case with competition rules), 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 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, free competition, or the touristic, aesthetic, historical or landscape heritage. Recently, the legal service of CADE claimed it could also file class actions, but it has not filed any so far.

If the public prosecutor or any of the 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 damage brings its own separate claim for compensation, these actions can be consolidated and addressed as part of the same proceedings.

The amount of 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 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 on 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/her own understanding of the facts and law, and is not bound by any decision of CADE.

However, a decision by 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 on by any CADE decision (except for any confidential documents) as a basis for bringing a civil claim. However, to reach a conclusion for a violation of competition laws, CADE does not need to assess the actual damages caused by the conduct in question.

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 the alleged 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

In principle, there is joint and several liability of cartel participants, based on a general rule from the Brazilian Civil Code. However, this is not yet settled by the courts, as there are precedents both accepting and rejecting this kind of liability.

## 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. The Superior Court of Justice decided that 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. In 2018, after this decision, CADE issued a specific resolution dealing with access to its case records.

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 396-404 of the Brazilian Civil Procedure Code. The right to obtain documents is limited, in light of restrictions on access to classified documents according to the Data Protection Law, Law on Access to Public Information and CADE Internal Rules.

## 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 current legal rule in Brazil that prevents competition claims from being arbitrated or settled privately through mediation or direct negotiation by the parties. In this sense, both CADE and society are increasingly concerned about the acceptance of alternative ways to settle controversies, including the adoption of arbitration in the context of cases of abuse of dominance.

#### Arbitration

The 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 findings — or can determine that damages be quantified in separate subsequent proceedings. If addressed in separate proceedings, 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 successful claims can exist in the 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 yet 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 an infringement 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 and reliable/stable decisions as yet on issues such as the calculation of damages or the evidentiary value of a CADE decision.

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# Canada

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## 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 Act<sup>1</sup> (“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), double ticketing (section 54) 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 (“Tribunal”), such as an order to cease certain anti-competitive conduct.<sup>2</sup>

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.<sup>3</sup> 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 common law causes of action 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 actions to avail themselves of a wider range of remedies.<sup>4</sup> Similar tactics have been used in Quebec, relying on the civil liability regime under Chapter III of the Civil Code of Quebec.

While Canadian courts are not bound by foreign findings of competition law infringement, such findings may carry persuasive weight and may increase the chances of succeeding in a private enforcement action 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

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<sup>1</sup> RSC, 1985, c C-34.

<sup>2</sup> 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.

<sup>3</sup> See, e.g., *Havana House Cigar & Tobacco Merchants Ltd v Naeini* (1997), 137 FTR 255.

<sup>4</sup> 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.



and the jurisdiction of the court. In Quebec, the courts have traditionally adopted a narrower approach, refusing to find 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.<sup>5</sup>

The language used to describe the limitation period under the Act is somewhat ambiguous and has resulted in debates as to the precise time at which the offensive conduct can be said to have occurred.<sup>6</sup> However, the Court of Appeal for Ontario provided guidance on the application of the “discoverability principle”<sup>7</sup> to section 36 claims in a proposed class action alleging price-fixing.<sup>8</sup> In *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, the plaintiff asserted a civil conspiracy claim and a claim under section 36 of the Act which was predicated on a breach of the section 45 conspiracy provision of the Act.<sup>9</sup> The Court ruled that, in the case of an action based on conduct that is contrary to any provision of Part VI of the Act (e.g., conspiracy, bid-rigging, etc.), the discoverability principle is applicable in determining the limitation period that is two years from the day on which the conduct was engaged in.<sup>10</sup> The Court stated, “a statutory limitation period will generally be subject to the discoverability principle when the running of the limitation period is linked either to the plaintiff’s knowledge about an event or to an event related to the plaintiff’s cause of action. The limitation period in s. 36(4)(a)(i) is triggered by an event related to the underlying cause of action – specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability.”<sup>11</sup>

In its recent 8:1 majority decision in *Godfrey v. Sony Corporation*, another price-fixing class action, the Supreme Court of Canada (“SCC”) resolved any debate and confirmed the applicability of the discoverability principle to the limitation period set out in s. 36(4)(a)(i). In its decision, the SCC noted the limitation period’s relation to the overall object of the *Competition Act*, which is “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy...and in order to provide consumers with competitive prices and product choices.”<sup>12</sup> The Court commented that anti-

<sup>5</sup> The Act, s 36(4).

<sup>6</sup> For example, see: *Laboratoires Servier, Adir, Oril Industries, Servier Canada Inc. v Apotex Inc.*, 2008 FC 825 aff’d 2009 FCA 222, leave to appeal ref’d [2009] SCCA No 403; *Garford Pty Ltd. v Dywidag Systems International, Canada, Ltd.*, 2010 FC 996 aff’d 2012 FCA 48 (“*Garford*”); *Crosslink v BASF Canada*, 2014 ONSC 1682 (SCJ) leave to appeal to Div. Ct. ref’d, 2014 ONSC 4529; *Sandhu v HSBC Finance Mortgages Inc.*, 2014 BCSC 2041 rev’d on other grounds 2016 BCCA 301; *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2016 ONCA 621 (“*Fanshawe*”); *Godfrey v Sony Corporation*, 2017 BCCA 302 aff’d by 2019 SCC 42 (“*Godfrey*”).

<sup>7</sup> The discoverability principle is a common law rule of interpretation providing that “a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.”: *Fanshawe, supra* at para 32 citing *Central Trust Co. v Rafuse*, [1986] 2 SCR 147 at p 224.

<sup>8</sup> *Fanshawe, supra*.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* at para 18.

<sup>11</sup> *Ibid.*

<sup>12</sup> The Act, s. 1.1 cited by *Godfrey, supra* at para 46.

competitive agreements are, by their nature, conduct that is contrary to Part IV of the Act (i.e., s. 36(1)(a)) and that they are “invariably conducted through secrecy and deception” and therefore unknown to claimants. The SCC’s view was that Parliament would have known this when enacting the limitation period and it would be an absurd result if the discoverability principle did not apply – as “to hold otherwise would create perverse incentives, encouraging continued concealment of anti-competitive behaviour until the two-year limitation period has elapsed”.<sup>13</sup> The SCC further commented that plaintiffs who bring section 36 claims are permitted to assert that the statutory limitation period was tolled pursuant to the equitable doctrine of “fraudulent concealment”, where “it would be, for any reason, unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action.”<sup>14</sup>

With respect to the alternative limitation period of two years from the date of the disposal of any criminal proceedings relating to the conduct at issue (s. 36(4)(a)(ii)), the court in *Fanshawe* held that, since this event is “arguably not connected to the plaintiff’s cause of action or knowledge,” it is “probably not subject to discoverability.” The court did not consider the existence of an alternative date for the commencement of a limitation period an issue, stating that “[t]here is no rule that suggests that both limitation periods in s. 36(4)(a) must operate in the same way.”<sup>15</sup> The SCC in *Godfrey* agreed, rejecting the argument that the alternative limitation period was enacted to revive a cause of action where the limitation period under s. 36(4)(a)(i) had expired. The SCC stated, “[w]hen s. 36(4)(a)(i) is contrasted with s. 36(4)(a)(ii), it is likely that Parliament intended that discoverability apply to the former limitation period and not the latter. Further, where criminal proceedings are *not* brought against a wrongdoer, the putative mitigating effect would be of no assistance to plaintiffs whose rights of action have expired by the operation of s. 36(4)(a)(i).”<sup>16</sup> 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 committed.

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.<sup>17</sup> 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.<sup>18</sup>

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<sup>13</sup> *Godfrey*, *supra* at paras 46 and 48.

<sup>14</sup> *Ibid.* at para 54 (see also the discussion at paras 51-55 generally). Fraudulent concealment is an equitable doctrine preventing limitation periods from being used in an unjust manner. It occurs where a defendant fraudulently conceals the existence of a cause of action and provides that the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud: *Godfrey*, *supra* at para 52 citing *Guerin v. The Queen*, [1984] 2 SCR 335 at p 390.

<sup>15</sup> *Fanshawe*, *supra* at para 47; *Godfrey*, *supra* at para 45.

<sup>16</sup> *Godfrey*, *supra* at para 45.

<sup>17</sup> *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2007 BCSC 640, varied on appeal, 2008 BCCA 278.

<sup>18</sup> *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 SCC on questions of law or mixed law and fact. The duration of the appeal process typically ranges from six 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,<sup>19</sup> through enabling provincial legislation. The enactment of class action legislation has drastically increased 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, 1992 ("CPA").<sup>20</sup> 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.<sup>21</sup>

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

- (i) the pleadings in the action disclose a reasonable cause of action;<sup>22</sup>
- (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;

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<sup>19</sup> However, courts in this province have the ability to certify class proceedings under existing procedural rules relating to representative proceedings. The Supreme Court of Prince Edward Island recently certified a class action in the case of *King & Dawson v. Government of PEI*, 2019 PESC 27, making the proceeding the first class action to go forward in that province. In certifying the proceeding, the judge borrowed heavily from the language of the *Class Proceedings Act* in Newfoundland and Labrador.

<sup>20</sup> SO 1992, c 6. In July 2019 the Law Commission of Ontario ("LCO") released the results of its comprehensive review of Ontario's class proceedings legislation which considered submissions, collective evidence and engaged in empirical analysis, the purpose of which was to ensure that the goals for which the legislation was designed are achieved, namely access to justice, behavioural modification and judicial economy. The LCO's report makes multiple recommendations for reform to the legislation across a broad range of issues, including the process for initiating a class action, certification, settlement approval and distribution, counsel fees and costs, among others. Whether or not the recommendations will result in actual legislative reform remains to be seen.

<sup>21</sup> Similar requirements exist in parallel provincial legislation across Canada.

<sup>22</sup> 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.

- (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.<sup>23</sup>

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 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 be ordered to pay some portion of the successful parties' legal 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.<sup>24</sup> 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, in the absence of any resolution, trial.

In the context of competition-based class actions, claimants, as with individual proceedings brought pursuant to the Act, will often plead related common law causes of action, such as negligent misrepresentation, along with alleged statutory breaches brought under section 36.<sup>25</sup>

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 ("**2013 trilogy**").<sup>26</sup> Prior to the 2013 trilogy, courts heavily debated whether a class proceeding is the appropriate forum in which to address some claims, especially those made by indirect purchasers in class actions dealing with price-fixing allegations. In such actions, the claimants usually claimed 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.

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<sup>23</sup> CPA, s 5(1).

<sup>24</sup> The provinces of New Brunswick and Newfoundland & Labrador are "opt in" jurisdictions.

<sup>25</sup> For example, in *Pro-Sys; Infineon Technologies AG, et al v Option Consommateurs, et al*, 2013 SCC 59 ("*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. In *Godfrey, supra* the SCC confirmed that section 36(1) of the *Competition Act* does not bar common law or equitable claims based on price-fixing conduct. It is permissible for plaintiffs in such cases to assert claims in tort, such as unlawful act conspiracy, and to pursue common law remedies based on the alleged price-fixing, in conjunction with statutory claims under section 36: *Godfrey, supra* at paras 79-89.

<sup>26</sup> *Option Consommateurs, supra*; *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.

A more recent source of contention in Canadian case law was whether “umbrella purchasers” have a cause of action.<sup>27</sup> Umbrella purchasers are those purchasers who bought a product from a non-conspirator that had the ability to, and did, raise the price of its products as a result of the conspiracy. While these umbrella purchasers have no direct or indirect commercial relationship with the conspirators, they may have suffered some harm as a result of the conspirators’ actions which allowed the non-conspirator to raise its price in the market. In the SCC’s decision in *Godfrey*, discussed above, the Court has confirmed that umbrella purchasers do have a cause of action under section 36 of the *Competition Act*. The Court held that interpreting the legislation to permit umbrella purchaser actions furthers the objectives of the *Competition Act*, including deterrence of anti-competitive behaviour and compensation for the victims of such behaviour. Deterrence is furthered because it increases the potential liability falling upon those who engage in anti-competitive behaviour by allowing a larger class of claimants.<sup>28</sup> On the facts of the case, the Court rejected the defendants’ arguments that allowing umbrella purchasers to bring a claim would expose them to indeterminate liability because (i) liability is limited by the class period and the specific products whose prices are alleged to have been fixed (on this point, the court noted that in order for cartel members to profit from conspiracy, the entire market price has to increase – the umbrella effect is therefore an intended consequence of the anti-competitive behaviour); and (ii) recovery is limited to only those purchasers who can show that they suffered a loss or damage as a result of a defendant’s conspiratorial conduct and umbrella purchasers will have to demonstrate that they suffered loss or damage.<sup>29</sup>

## 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 scrutinizing the evidence,<sup>30</sup> 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 criminal conduct.<sup>31</sup>

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 (“**Commissioner**”) and, through the Commissioner, the Competition Bureau (“**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

<sup>27</sup> *Shah v LG Chem*, 2015 ONSC 6148 (SCJ) var’d by 2017 ONSC 2586 (Div Ct) rev’d on the issue of umbrella purchasers by 2018 ONCA 819 (“*Shah*”); *Godfrey*, *supra*.

<sup>28</sup> *Godfrey*, *supra* at paras 65–66.

<sup>29</sup> The SCC left open the question of whether indeterminate liability might properly be considered *at all* in the context of a claim under s. 36(1)(a), but on the specific facts of *Godfrey* it was found that indeterminate liability would not arise for the reasons noted above; *Godfrey supra* at paras 69–78.

<sup>30</sup> *Janelle Pharmacy Ltd v Blue Cross of Atlantic Canada*, 2003 NSSC 179 at paras 95–99.

<sup>31</sup> *FH v McDougall*, 2008 SCC 53.

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.<sup>32</sup> 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.<sup>33</sup> 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. In addition, as noted, the SCC has recently affirmed the viability of causes of action alleged by umbrella purchasers for harm suffered as a result of market effects of the conspiracy, regardless of the lack of a direct or indirect commercial relationship with any of the conspirators.<sup>34</sup>

## 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 crossclaim, 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 relevant 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.

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, Subsection 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

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<sup>32</sup> *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, an SCC decision in which the passing-on defense was rejected in the context of a claim to recover the payment of an unlawful tax.

<sup>33</sup> 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.”

<sup>34</sup> *Godfrey, supra*.

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 the limited 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, in the absence of a criminal proceeding,<sup>35</sup> 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 section 29 contemplates such disclosure when necessary for the Bureau's administration or enforcement of the Act, the Bureau has also cited the same motive as a reason for resisting requests for information in some circumstances as a matter of general policy.<sup>36</sup> Legal and litigation privileges may also bar access to evidence gathered in the course of the criminal proceeding.<sup>37</sup>

An issue that remains open is whether claimants in a section 36 claim may make use of the earlier occurrence of discovery in proceedings taking place in jurisdictions outside of Canada. For example, Canadian claimants seek at times to rely on evidence that has already been disclosed in similar claims in the United States, and have had 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 time frame 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,<sup>38</sup> 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. Such an order compels a third party or third parties to preserve and provide evidence in its possession to a potential plaintiff.

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<sup>35</sup> 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.

<sup>36</sup> Competition Bureau Bulletin, Requests for information from private parties in proceedings under section 36 of the *Competition Act*, published 11 June 2018, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html>. In addition to opposing a subpoena for production of information if compliance "would potentially interfere with an ongoing examination, inquiry or enforcement proceeding," the Bureau more generally may do so where compliance would "otherwise adversely affect" its administration and enforcement of the Act, considering the importance of confidentiality for its ability to carry out that mandate (e.g., given its reliance on sources that voluntarily provide information, and on whistleblowers, immunity/leniency applicants and others who may be reluctant to cooperate, as well as a general concern with undermining enforcement and the purposes of the Act by potentially making commercially sensitive information more readily available amongst competitors).

<sup>37</sup> It is notable that in the relatively recent decision of the Federal Court of Appeal in *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 - a case in which the Commissioner of Competition brought proceedings against the Airport Authority for alleged abuse of dominant position - the Court rejected the argument that a class-wide public interest privilege exists to protect documents and information received from third parties during the course of an investigation. As such, claims for privilege on this basis will need to be made on a case-by-case or document-by-document basis. What impact, if any, this may have on the evidence available to private litigants when attempting to access the record of tribunal or court proceedings in follow-on section 36 claims remains to be seen.

<sup>38</sup> Arising from the English case of *Norwich Pharmacal Co v Comrs of Customs and Excise*, [1974] AC 133 (HL).



Two cases in Ontario, *GEA Group AG v Ventura Group Co*<sup>39</sup> and *York University v Bell Canada Enterprises and Rogers Communications Inc*,<sup>40</sup> have provided some clarity on the applicable test for ordering pre-action disclosure of evidence from non-parties. The person from whom discovery is sought can obtain reasonable compensation for the expenses arising out of compliance with the discovery order.<sup>41</sup>

## 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 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 three to five years (and sometimes longer, particularly if the parties decide to litigate beyond a successful certification motion) 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 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, among other things. By way of example, for a relatively complex competition litigation proceeding involving claimed damages exceeding CAD 50 million, it would not be unusual for a claimant to incur legal costs in the range of CAD 1 to 2 million, if the matter were to proceed all the way through trial. With the SCC's determination in *Godfrey* that umbrella purchasers can be included as plaintiffs in Canadian price-fixing class proceedings, costs in such proceedings are likely to increase. This is because classes in such proceedings will be larger and the complexity of assessing damages will increase driving up both litigation costs and potential exposure.

In jurisdictions with a "loser pays" rule, such as Ontario, 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 a successful claimant may be awarded an amount "not exceeding the full cost to him[/her] 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 class actions, is permissible, so long as the funding agreement is not champertous or illegal and is fair and reasonable such that it facilitates access to justice

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<sup>39</sup> 2009 ONCA 619.

<sup>40</sup> (2009) 311 DLR (4th) 755 (Ont SCJ).

<sup>41</sup> *Voltage Pictures, LLC v John Doe No. 1*, 2018 SCC 38 at paras 57 and 71. See also *Glaxo Wellcome plc v Minister of National Revenue*, [1998] 4 FC 439 (CA).



while protecting the interests of defendants.<sup>42</sup> Other potential alternative funding is by way of contingency fees and public funding (in rare cases where the claimants require financial support).

## 12. Alternative methods of dispute resolution

Private competition litigation is generally dealt with in court. However, alternative means of dispute resolution are available in Canada for civil claims in general including arbitration and mediation.<sup>43</sup>

## 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*,<sup>44</sup> the court awarded general damages of CAD 216,842 for conduct held to be contrary to the criminal misleading advertising provisions of the Act. In 2011, an Alberta court awarded CAD 5 million in general damages in *321665 Alberta Ltd v ExxonMobil Canada Ltd*<sup>45</sup> 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.<sup>46</sup>

### 14. Punitive and exemplary damages

Canadian courts have held that punitive damages are not available for claimants in a section 36 private action.<sup>47</sup> Nonetheless, punitive damages may be available for common law causes of action, 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.

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<sup>42</sup> *Houle v St Jude Medical Inc.*, 2017 ONSC 5129 at para 71, aff'd by 2018 ONSC 6352 (Div Ct). See also: *David v Loblaw*, 2018 ONSC 6469; *Marcil v Commission scolaire De La Jonquière*, 2018 QCCS 3836; *Marriott v. General Motors Company of Canada*, 2018 ONSC 2535.

<sup>43</sup> In some jurisdictions, mediation is a mandatory part of the dispute resolution process where the claim is commenced in court.

<sup>44</sup> 2008 NSSC 163, affirmed on appeal, 2009 NSCA 42.

<sup>45</sup> 2011 ABQB 292 ("*ExxonMobil*").

<sup>46</sup> *321665 Alberta Ltd v Husky Oil Operations Ltd*, 2013 ABCA 221.

<sup>47</sup> See, e.g., *Wong v Sony of Canada Ltd* (2001), 9 CPC (5th) 122 (Ont SCJ).

In general, however, punitive and exemplary damages are only awarded in Canada in rare circumstances. In *ExxonMobil*, the lower court ordered CAD 500,000 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> To obtain a final (permanent) injunction, the court will generally require that the court "fully evaluate" the parties' legal rights.<sup>51</sup>

## 16. Other types of relief

No other types of relief are available for a private claim under section 36.<sup>52</sup> 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, indirect and umbrella purchasers

The treatment of section 36 claims by indirect purchasers and umbrella purchasers in class actions has been an interesting point of contention and jurisprudential development. It is now clear that plaintiffs in Canadian price-fixing class actions can include direct, indirect and umbrella purchasers. This development is likely to result in larger Canadian classes which will lead to increased exposure and litigation costs for defendants.

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

<sup>48</sup> See, e.g., *Mead Johnson Canada v Ross Pediatrics* (1996), 7 CPR (3d) 417 (Ont Div Ct).

<sup>49</sup> See, e.g., *Price v Panasonic Canada Inc*, [2000] OJ No 3123 (Ont SCJ).

<sup>50</sup> See *1711811 Ontario Ltd v Buckley Insurance Brokers Ltd*, 2014 ONCA 125 at para 74, referring to *RJR- MacDonalld Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

<sup>51</sup> *Ibid* at para 79, citing *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396.

<sup>52</sup> In contrast, in cases brought by private parties before the Tribunal under section 103.1, behavioural 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, 20 October 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](http://www.ct-tc.gc.ca/CMFiles/CT-2011-008_Interim%20Supply%20Order%20on%20Consent_8_38_10-20-2011_3733.pdf).

decided on a case-by-case basis.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> As noted above, the SCC has recently confirmed the availability of a cause of action for umbrella purchasers with no direct or indirect commercial relationship with the alleged conspirators.

### 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, has facilitated a significant volume of both cartel prosecutions and 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.

The Bureau continues to be very active in its enforcement activity generally and in particular in the field of cartel investigations, which is one of the Bureau’s top priorities. The Bureau contributes significant resources to combating cartels and tackling bid-rigging activities. To that end, the Bureau maintains a criminal cartel whistleblowing initiative; has recently doubled its outreach efforts through bid-rigging awareness presentations; has re-vamped its immunity and leniency programs; actively collaborates with the Royal Canadian Mounted Police (RCMP) and Public Services Procurement Canada in running a Federal Contracting Fraud Tip Line; promotes the use of Certificates of Independent Bid Determination by all tendering authorities in Canada which require that bidders sign a written confirmation that their bid was developed independently from their competitors; and is leveraging new technology and developing a pilot program to test the use of algorithms that are able to sift through electronic bidding data for possible signs of collusion.

The legal framework in Canada to tackle bid-rigging is robust and potential penalties for individuals who are convicted are among the highest in the world. On conviction, a person could be sentenced to up to 14 years in jail and there are no limits on the criminal fines that courts can impose on companies or individuals. Fines for conspiracies to fix prices, allocate markets or restrict output can go up to C\$25 million and are also punishable by up to 14 years in prison. The record fine handed down for bid-rigging under the Act is C\$30 million. Over the last several years, over 30 individuals and over 40 companies have pleaded guilty to, or were found guilty of, cartel offences which resulted in more than C\$120 million in fines and sentences of house arrest for a number of individuals.

### Proactive Enforcement and Increased Private Litigation

In 2019, the Bureau appointed a new Commissioner of Competition who considers proactive enforcement a necessity and so increased enforcement activity may be expected – particularly in the digital, communications and infrastructure sectors. This, along with recent changes such as the availability of a cause

<sup>53</sup> *Pro-Sys* at paras 34–45.

<sup>54</sup> *Option Consommateurs* at paras 114–115.

<sup>55</sup> *Sun-Rype* at paras 1, 17–20.

of action for umbrella purchases, discussed above, is likely to result in increased competition class action activity.

Plaintiffs are also increasingly making use of Section 36 to pursue class actions for damages for breaches of rarely used provisions of the Act. For example, in the recently decided case of *Lin v. Airbnb, Inc.*,<sup>56</sup> the Federal Court certified a class proceeding alleging that Airbnb breached section 54 of the Act, a rarely used criminal offence known as “double ticketing”, which prohibits the supply of a product at a price that exceeds the lowest of two or more clearly expressed prices at the time the product is supplied. In certifying the action, the Court noted that the scope of section 54 of the Act and its application to the case were not free from doubt, but given the low bar to certification, the claim was allowed to proceed as a class proceeding to be determined on the merits.

### Increasing importance of corporate compliance programs

There has been an increase in the importance of corporate compliance programs in Canada as evidenced by the Bureau’s Corporate Compliance Programs Bulletin (“**Compliance Bulletin**”),<sup>57</sup> which places heightened emphasis on the importance of implementing credible and effective corporate compliance programs.

The Compliance 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 Compliance Bulletin) to be incorporated into a compliance program. While the Compliance 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 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 administrative monetary penalties, under the civil provisions), and the recovery of damages by private parties.<sup>58</sup> Notably, the Bureau has updated its Immunity and Leniency programs to include credit for sentencing for credible and effective corporate compliance programs that are consistent with the approach set out in the Compliance Bulletin: “Immunity and Leniency Programs under the Competition Act.”<sup>59</sup>

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<sup>56</sup> 2019 FC 1563.

<sup>57</sup> Published 3 June 2015, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>. The 2015 Compliance Bulletin updates and replaces an earlier version dated 27 September 2010.

<sup>58</sup> The Bulletin, section 2.1, “Why is Compliance Important?”

<sup>59</sup> Compliance Bulletin: “Immunity and Leniency Programs under the Competition Act” published 27 September 2018, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>.

# Chile

Juan Ignacio Donoso

## A. Availability of civil claims

### 1. Scope for civil claims in Chile

The Chilean compensation regime experienced major amendments in 2016, with the enactment of Law N° 20,945. This law introduced a new summary procedure before the Competition Tribunal, replacing the ordinary procedure before the civil courts. It also allows for the filing of class actions for the compensation of damages caused by an infringement of competition law. The new procedure should be faster; but to date only one case has been brought, which was settled.

Article 30 paragraph 1 of Decree Law N° 211 of 1973 ("**Chilean Competition Law**") establishes the basis for bringing a civil action to recover damages resulting from a breach of competition law, by providing that: "*Claim for damages resulting from a definite executed sentence issued by the Tribunal de Defensa de la Libre Competencia, will be submitted before said Tribunal and will undergo a procedure in accordance with the summary procedure, established in Book III of Title XI of the Civil Procedure Code.*"

Since the right to recover damages under the Chilean Competition Law arises from a final infringement decision issued by the *Tribunal de Defensa de la Libre Competencia* (the Tribunal for the Defense of Competition — "**TDLC**"), only follow-on actions are available under the Chilean Competition Law regime. However, enforcement cases can be brought before the TDLC by the *Fiscalía Nacional Económica* (the National Economic Prosecution Office — "**FNE**"), and also by private parties. Once the private party obtains a prior judgment from the TDLC that the defendant breached the competition law, it can sue for damages before the same court. Private parties cannot file for damages directly before the TDLC. They need to obtain an infringement judgment first. Therefore, it is quite common in Chile for private entities to file an infringement complaint in order to afterwards claim for damages if the infringement is established.

It may be possible for third parties to file directly for damages before a civil court under the general rules of the Chilean Civil Code for delict or quasi-delict. Recently, damages claims have been brought against parties that applied for leniency whilst the infringement proceedings are ongoing. The defendants in such claims have argued that stand-alone actions are not available under Chilean law, since having an infringement decision is a prerequisite to filing for damages. However, this matter has not yet been decided.

### 2. Applicable limitation periods

The statute of limitations to file infringement complaints is three years, counted from the date of performance of the anti-competitive conduct on which they are based. Actions to pursue hard-core cartels have a five-year limitation period, which does not begin to run while the effects attributable to the conduct of the action continue in the marketplace.

For damages actions, the limitation period is four years starting from the date of the final infringement judgment.

Said periods are interrupted by a complaint submitted by the FNE or a lawsuit filed by a private party, presented before the TDLC.

The statute of limitation for damages actions under the civil rules is four years counted from the perpetration of the act. Legal doctrine has considered that the four years are counted from the day the

wrongful or guilty act was committed and not from the day on which the damage occurred, if it and the act are not contemporary.

### 3. Appeals

The TDLC's final judgments, in actions either for infringement of competition law or for damages are only subject to appeal to the Supreme Court on issues of fact or law. Such appeals must be founded and filed within 10 business days of the date of the notification of the TDLC's decision.

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

Since 2016, and pursuant to the amendment introduced by Law N° 20,945, class actions can be brought for the compensation of damage caused by an infringement of competition law. Said actions can be brought before the TDLC when the individual or collective interests of the consumers are affected.

Collective actions can be filed on an opt-in or opt-out basis. They can be commenced by:

- (i) the Chilean Nationals Consumer Service;
- (ii) a consumers' association that was formed at least six months before the filing of the action, and that was duly authorized by its board of directors for the purposes of filing the complaint; or
- (iii) a group of at least 50 consumers, each duly individualized, that are affected in the same interest.

Once the proceedings have been initiated, any affected consumer can "opt in" to the claim when it is filed by a limited number of affected consumers, or "opt out" if it was filed on behalf of a class of unnamed consumers.

If the TDLC were to award damages, it must be the same for all of the consumers that belong to the same class or group of customers. For such purposes, during the proceedings, or even in its decision, the TDLC may order the formation of a class or group of customers according to its common characteristics.

## B. Conduct of proceedings and costs

### 5. Burden of proof

The burden of proof lies with the plaintiff. However, in the case of follow-on actions, Article 30 paragraph 2 of the Chilean Competition Law sets forth that the TDLC has to base its judgment on the facts established in the infringement judgment that precedes the request for damages. Therefore, the plaintiff can use the evidence submitted during the infringement procedure. This is in particular the case if the infringement procedure was initiated by a complaint of the FNE, since said authority tends to submit evidence related to the damages caused to consumers in order to obtain the imposition of higher fines (since one of the circumstances to be considered by the TDLC in order to establish the fine is the economic benefit obtained as a result of the violation).

The TDLC shall assess the proof in accordance with the rules of the sane critic, i.e., rules related to the proper understanding of the human being, such as logic and experience.

### 6. Joint and several liability of cartel participants

Chilean Competition Law does not contain any reference to the joint and several liability of cartel participants. Therefore, the general rules established in the Chilean Civil Code should apply.

Article 2317 of the Civil Code sets forth that each participant of a delict or quasi-delict is jointly and severally liable for the damages caused by said delict or quasi-delict. Although this article has not been tested in antitrust matters, there is no limitation or exemption against using it in a cartel case, and there is extensive case law about this article in connection with other civil and criminal delicts or quasi-delicts.

The existence of joint and several liability of cartel participants entails that the plaintiff will be able to bring an action for the compensation of the entire losses suffered as a consequence of the cartel against any or all of the cartel participants, at its own will, according to Article 1514 of the Civil Code.

If only some of the cartel participants are sued for damages and are ordered to pay for the damages caused by the collusion, Article 1522 of the Civil Code provides for the right of such participants to bring a suit for contribution against the participants who were not party to the damages suit. The right to contribution is limited in respect of each cartel participant to their actual share of the loss or damage caused by the infringement.

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

Any evidence and background that, in the TDLC's view, is apt to determine the pertinent acts will be admissible. Evidence submitted in competition claims typically includes documents, both physical and electronic, statements of witnesses of fact and expert witnesses, and questioning of the parties.

In the case of damages claims, the infringement file, if any, shall be used as evidence, since the Chilean Competition Law sets forth that the TDLC has to base its judgment on the facts established in the infringement judgment that precedes the claim for damages.

Upon request, the TDLC can mandate the disclosure of documents that are held by the parties or by third parties, inasmuch as they are directly related to the proceedings and are not secret or confidential. In this connection, the defendant can oppose the disclosure by arguing that the documents contain business secrets or by invoking legal privilege.

The request for disclosure requires a description of the document or group of documents disclosure of which is requested. This description can be broad, for example, agreements with distributors, payments or charges for certain items, communications with third parties, etc.

Witnesses that are subpoenaed by the TDLC are compelled to testify. However, such obligation does not apply to lawyers, medics and ecclesiastics in connection with information communicated confidentially by their clients in connection with a professional service. In addition, witnesses can refuse to testify if the answer exposes them to a risk of criminal investigation.

## **8. Pre-action disclosure**

Before the damages action is filed, the potential plaintiff can request from the future defendant the disclosure of public or private documents that, by their nature, may be relevant for the proceedings. The TDLC usually grants this type of request.

The request requires a description of the document or group of documents of which disclosure is requested, albeit this description can be broad.

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

Before Law N° 20,945, which amended the Chilean Competition Law, follow-on actions were filed before the civil judge and followed the ordinary procedure. The proceedings could take several years. The only two finished cases to date took an average of approximately 10 years. There are currently several cartel follow-on action claims submitted to the court of first instance, which were filed in 2015.

Law N° 20,945 of 2016 introduced a summary procedure before the TDLC, which also issues infringement decisions. Therefore, proceedings under the new regime should be faster, albeit there has not been a decision in this regard to date.

## 10. Average cost from issue of claim to judgment in Chile

Costs vary greatly depending on the complexities of a particular case.

In the case of a damages claim following an infringement judgment initiated by the FNE, the cost for the plaintiff can be rather low since, as mentioned, the plaintiff can use the investigative file and evidence submitted during the infringement procedure, particularly if economic reports estimating damages were submitted during such proceedings. However, even in this type of action, the plaintiffs tend to submit their own economic reports in order to support the existing evidence, or to estimate additional damages or quantify the damages even further.

The cost are usually higher for defendants, who typically submit economic evidence in order to rule out the existence of damages, or to undermine the quantification analysis performed by the plaintiff or submitted during the infringement proceedings.

There are no court fees to be paid by the plaintiff; however, the court will order the party that loses the case to pay both parties' legal costs, unless: (i) the losing party had plausible arguments to litigate; or (ii) the arguments of the losing party are not totally dismissed.

## 11. Third-party/alternative funding

There are no rules preventing third-party/alternative funding. The most common alternative funding is by way of contingency fees, which are regulated by the Chilean Bar Ethical Code. In addition, a 2018 amendment of the Chilean Consumer Protection Law allows for consumers' associations to apply for the use of public funds in order to submit judicial actions for the protection of consumer interests, including compensation of damages.

## 12. Alternative methods of dispute resolution

In principle, this type of claim may be subject to arbitration, albeit no party can be compelled to accept such alternative means of dispute of resolution.

## C. Relief

### 13. Availability of damages and quantification

Pursuant to Article 30 paragraph 3 of the Chilean Competition Law, which was introduced by Law N° 20,945 of 2016, compensation includes all damage caused during the period of the infringement.

The wording of this new paragraph indicates that the availability of damages is broad. However, damages in Chile are compensatory in nature, i.e., they aim to place the injured party in the same position it would have



been in had there been no infringement. Therefore, the indemnity has to be equal to the damage suffered by the injured party.

Although the scope of said paragraph has not yet been determined by specific competition case law, the compensation should include reparation for patrimonial damages suffered by the injured party, such as the actual loss suffered (*damnum emergens*) and the loss of profit (*lucrum cessans*), and reparation for extra-patrimonial damages (such as moral harm).

Nonetheless, according to the developments in civil case law, in order to be recoverable damages have to comply with certain requirements that can limit the claimed compensation:

- (a) The harm to be compensated must be certain. This means that a plaintiff would not be able to recover any loss or damage that they did not suffer. This requirement could enable a defendant to invoke the pass-on defense (which is not included in the Chilean Competition Law), since the overcharge that was passed on by the applicant to consumers could be considered as harm that was not suffered by the applicant.
- (b) The damages to be compensated must be direct, i.e., they have to be an immediate and necessary consequence of the facts that create such harm. This requirement excludes compensation for indirect damages and certain damages that are too remote from the infringement. However, it is not clear whether this requirement excludes claims brought by indirect purchasers, since there is currently no case law on the point.

#### 14. Punitive and exemplary damages

Punitive and exemplary damages are not available, since damages in Chile are compensatory in nature.

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

At any stage of the proceedings or before their commencement, and for the timeframe it deems convenient, the TDLC may order all precautionary measures necessary to mitigate or prevent any negative effects of the infringing conduct and to safeguard the common interest. These measures can be ordered at the request of the party or ex officio by the TDLC.

The ordered measures are essentially provisional and can be modified or removed without effect at any stage of the proceedings. If the measure was granted before the commencement of the proceedings, the lawsuit has to be filed within 20 business days or within a longer period determined by the TDLC. Otherwise, the measure will remain wholly without effect.

### D. Emerging trends

Civil actions for damages have increased considerably in the last three years. Consumer associations and/or the Chilean National Consumer Service have filed several follow-on cartel damage claims, such as in respect of the pharmaceutical cartel, the poultry cartel and the tissue paper cartel. All of these complaints were filed under the previous legal framework. The Chilean Competition Law amendment of 2016 facilitated the bringing of actions (including class actions) even further, so it is expected that actions for compensation will increase considerably in the future.

# China

Stephen Crosswell, Zhi Bao, Laura Liu and Wenting Ge

## 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);<sup>1</sup>
- (ii) abuse of a dominant position;<sup>2</sup> or
- (iii) entry into a concentration that results or could result in the elimination or restriction of competition in the market (i.e., mergers).<sup>3</sup>

On the surface, 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 8 May 2012 and effective from 1 June 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>1</sup> Anti-Monopoly Law Articles 13–14.

<sup>2</sup> Anti-Monopoly Law Article 17.

<sup>3</sup> Anti-Monopoly Law Article 20. Concentrations include various forms of acquisitions and other methods of obtaining control over another business operator.

<sup>4</sup> SPC Provisions Article 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.

<sup>5</sup> Anti-Monopoly Law Article 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,<sup>6</sup> the Price Law<sup>7</sup> and the Anti-Unfair Competition Law.<sup>8</sup>

### 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 1 May 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

From 1 October 2017, the general statute of limitations for civil cases in the PRC is three years (replacing the previous two-year limitation period) and also applies to AML and other competition-related litigation. The limitation period runs from the date on which the injured party knew or should have known of an infringement of its rights and interests.<sup>9</sup> However, if a claimant reports an infringement to a competition enforcement agency, the three-year limitation period is suspended in relation to claims that this claimant (and only this claimant) might have until such time as he/she knows or should know that the enforcement agency has either terminated the investigation or reached a decision as to whether an infringement has occurred.<sup>10</sup>

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.<sup>11</sup> A new limitation period shall be counted from the time such a letter is delivered to the other party.<sup>12</sup> Based on the Article 16 of the SPC Provisions and the current three-year limitation period, we understand that if the alleged monopolistic practice continued for more than three years by the time the plaintiff filed an action in court and the defendant raised the statute of limitation period in the defense, the damages are limited to three years from the date when the plaintiff filed an action.<sup>13</sup> In other words, for a continuous infringement (that does not stop following the filing), the plaintiff's damage claim based on the infringement of the three years prior to the filing date will not become time barred, even though the defendant raises the defense of statute of

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<sup>6</sup> Article 53, which imposes sanctions and liability for damages for bid-rigging.

<sup>7</sup> Article 41, which provides for civil liability for pricing violations.

<sup>8</sup> Article 20, which authorizes private enforcement against anti-competitive violations of the Anti-Unfair Competition Law.

<sup>9</sup> General Provisions of the Civil Code of the PRC ("Civil Code" which was revised on 15 March 2017 and will be effective from 1 October 2017), Article 188.

<sup>10</sup> SPC Provisions Article 16.

<sup>11</sup> Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the Statute of Limitations to Civil Case Trials Article 10.

<sup>12</sup> Civil Code Article 195.

<sup>13</sup> SPC Provisions Article 16.

limitation period. Also, if the defendant does not raise the defense of statute of limitation, the court would not consider this issue.

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 on which the infringing act occurred — regardless of whether the three-year period has begun to run or has been suspended due to lack of knowledge, an investigation or otherwise. However, in special circumstances, the People's Courts may consider extending the 20-year period.<sup>14</sup>

### 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.<sup>15</sup> Each major court has an existing intellectual property division that is tasked with hearing competition cases.<sup>16</sup> With approval from the Supreme People's Court, Primary People's Courts may also have jurisdiction as the court of first instance.<sup>17</sup> Higher People's Courts should exercise jurisdiction in cases with substantial influence on their respective jurisdictional regions.<sup>18</sup> Finally, in cases with substantial national influence, the Supreme People's Court may serve as the court of first instance.<sup>19</sup>

Regardless of the court of first instance, litigants have the right to one appeal.<sup>20</sup> The court of second instance then renders a final judgment.<sup>21</sup> On 1 January 2019, China launched an intellectual property tribunal at the Supreme People's Court (the "SPC IP Tribunal"). Since then, the SPC IP Tribunal would hear appeals against judgments and rulings by the intermediate-level courts in first-instance trials, leapfrogging the Higher People's Courts, which are typically the courts to which cases are appealed before going to the Supreme People's Court.<sup>22</sup> It should be noted that the "leapfrogging appeal" mechanism does not apply to cases that were decided by the Primary People's Courts in the first trials. In these cases, the Intermediate People's Court that is directly above the court of first instance would hear the appeal.<sup>23</sup> Though, generally, the court of second instance renders a final judgment, in some circumstances parties may obtain a rehearing under special proceedings.<sup>24</sup> 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.<sup>25</sup> 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, the upper-level court shall generally rehear the case itself. However, the upper-level court is allowed to designate the court granting the final judgment as the court charged to first rehear the case.<sup>26</sup>

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<sup>14</sup> Civil Code Article 188.

<sup>15</sup> SPC Provisions Article 3.

<sup>16</sup> Circular of the Supreme People's Court on Studying and Implementing Anti-Monopoly Law.

<sup>17</sup> SPC Provisions Article 3.

<sup>18</sup> Civil Procedure Law Article 19.

<sup>19</sup> Civil Procedure Law Article 20.

<sup>20</sup> Civil Procedure Law Article 164.

<sup>21</sup> Civil Procedure Law Article 175.

<sup>22</sup> Provisions on Several Issues Relating to the Intellectual Property Tribunal by the Supreme People's Court Article 2

<sup>23</sup> Civil Procedure Law Article 164

<sup>24</sup> Civil Procedure Law Article 198.

<sup>25</sup> Civil Procedure Law Articles 198-199.

<sup>26</sup> Supreme People's Court's Several Opinions on Accepting and Examining the Petitions for Retrial of Civil Cases Articles 27-28.

#### 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.<sup>27</sup> 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.<sup>28</sup> A judgment of the court with respect to registered claimants applies to all future registrants.<sup>29</sup> 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 lawsuits. 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 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.<sup>30</sup> In such cases, the Guiding Opinions impose requirements on lawyers to report the case to the ACLA.<sup>31</sup> The ACLA may convene meetings to discuss the lawyers’ handling of the class action cases<sup>32</sup> 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 supporting the lawyers.<sup>33</sup>

In addition, public interest litigation is also available under Chinese law, e.g., where conduct pollutes the environment or infringes the lawful rights and interests of a vast number of consumers. An authority or relevant organization as prescribed by the Environment Protection Law and the Protection of the Rights and Interests of Consumers Law may institute an action in a people’s court on this basis.<sup>34</sup>

### 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 proof for its claims.<sup>35</sup>

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<sup>27</sup> Civil Procedure Law Articles 52, 54.

<sup>28</sup> Civil Procedure Law Articles 53–54.

<sup>29</sup> Civil Procedure Law Article 54.

<sup>30</sup> Guiding Opinions 1.1.

<sup>31</sup> Guiding Opinions 3.1.

<sup>32</sup> Guiding Opinions 4.2.

<sup>33</sup> Guiding Opinions 4.3, 4.7.

<sup>34</sup> Article 284 Supreme People’s Court Interpretation on Application of Civil Procedure Law (“**Interpretation of Application of Civil Procedure Law**”).

<sup>35</sup> Provisions of the Supreme People’s Court on Evidence in Civil Procedures (“**Evidence Provisions**”) Articles 4–7.

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.<sup>36</sup>
- (ii) In disputes relating to the abuse of a dominant position, the claimant bears the burden of showing that the defendant holds a dominant position.<sup>37</sup>
- (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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

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 and also do not have 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, the principle of "on the balance of probability" is customarily adopted in civil cases in the PRC.

PRC law does not state whether competition authority decisions constitute binding evidence in private actions. The competition authorities' decisions are not binding. However, the findings of effective court decisions can create a rebuttable presumption.<sup>41</sup> As to findings of effective decisions by competition authorities, their evidentiary value is higher than regular documentary evidence in general.<sup>42</sup>

## 6. Joint and several liability of cartel participants

The Civil Code allows claimants to seek joint and several liability.<sup>43</sup> The PRC Tort Law ("Tort Law") also sets out certain categories of joint and several liability for joint tortfeasors.<sup>44</sup> 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.

Article 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

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<sup>36</sup> SPC Provisions Article 7.

<sup>37</sup> SPC Provisions Article 8.

<sup>38</sup> SPC Provisions Article 9.

<sup>39</sup> SPC Provisions Article 10.

<sup>40</sup> SPC Provisions Article 8.

<sup>41</sup> Evidence Provisions, Article 9; Interpretation on Application of Civil Procedure Law, Article 93.

<sup>42</sup> Evidence Provision, Article 77.

<sup>43</sup> Civil Code Article 178.

<sup>44</sup> Tort Law Articles 8-11.

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. As such, in private antitrust claims, if two or more defendants jointly commit a tort or contractual violation that causes harm to another person, they should be jointly and severally liable.

## 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.<sup>45</sup>

Generally, a party must provide evidence to support each of its claims, although, 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.<sup>46</sup> Consistent with inquisitorial court systems, the court also has the power to initiate its own investigation.<sup>47</sup> This procedure for receiving court assistance in obtaining evidence does not create a US-style discovery system. According to the Evidence Provisions,<sup>48</sup> a party may apply for the court to investigate and collect evidence if such evidence: (i) is kept by relevant governmental agencies and is only obtainable by a court; (ii) concerns state secrets, trade secrets or privacy; or (iii) cannot be obtained by that party or its counsel due to objective circumstances. 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.”<sup>49</sup>

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 the production of evidence uncovered in enforcement authority investigations. Generally, when courts initiate their own investigation, they will communicate with government authorities that may possess relevant information. The court does not, however, have the power to compel government authorities to produce evidence for parties to a civil litigation.

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.<sup>50</sup> In this manner, it may be possible for parties to competition litigation to obtain access to information concerning

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<sup>45</sup> Civil Procedure Law Article 63.

<sup>46</sup> Civil Procedure Law Article 64.

<sup>47</sup> Civil Procedure Law Article 67.

<sup>48</sup> Evidence Provision, Article 17.

<sup>49</sup> Evidence Provisions Article 18.

<sup>50</sup> Disclosure Regulations Article 33.

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.<sup>51</sup>

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 this kind of sensitive information is admissible, the court may take, or the parties may apply for, protective measures such as a private trial, restriction of or prohibition against copying, counsel-only disclosure or the signing by the parties of a confidentiality agreement.<sup>52</sup>

Finally, China does not recognize attorney-client privilege. Lawyers must keep confidential all information that the client does not wish the lawyer to divulge.<sup>53</sup> 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.<sup>54</sup> Further, the duty of confidentiality does not create a legal privilege between the 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 that extends to lawyers and other professionals.<sup>55</sup> 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 on or, if the parties fail to reach an agreement, at a time determined by the court. The court presides over the exchange of evidence and keeps a record of objections to any exchanged evidence in anticipation of trial.<sup>56</sup>

## 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.<sup>57</sup>

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. For a complicated case, it can take two to three years to have 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 cases. However, straightforward competition cases might take less than the average time. The table below illustrates the length of time the courts of first instance and the appellate courts took to render judgments in various recent and significant competition cases:

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<sup>51</sup> Disclosure Regulations Article 14.

<sup>52</sup> SPC Provisions Article 11.

<sup>53</sup> PRC Lawyers Law Article 38.

<sup>54</sup> PRC Lawyers Law Article 38.

<sup>55</sup> Civil Procedure Law Article 72.

<sup>56</sup> Evidence Provisions Article 38.

<sup>57</sup> When the plaintiff files a claim, the court will have seven days either to accept the case or to inform the plaintiff that the filing is incomplete. If the filing is deemed incomplete, the plaintiff would need to amend the claim and refile.



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 appellate court
<i>Rainbow v. Johnson &amp; Johnson</i> (2013)	18 months	14 months
<i>Qihoo 360 v. Tencent</i> (2014)	16 months	16 months
<i>Huawei v. InterDigital</i> (2013)	14 months	5 months
<i>Beijing Emiage Tech. Co. v. Qihoo 360</i> (2015)	6 months	4 months
Huawei v Samsung	19.5 months	N/A

## 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).<sup>58</sup> Case acceptance fees are calculated as a percentage of the amount of the claim.<sup>59</sup> Additionally, parties applying for interim measures, such as the preservation of property, must typically provide security in exchange for approval of their application.<sup>60</sup> That said, it can be anticipated that the cost of anti-monopoly proceedings in the PRC would be less than the cost of similar proceedings taking place 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.<sup>61</sup>

## 12. Alternative methods of dispute resolution

Chinese law provides several methods of alternative dispute resolution, including mediation and arbitration. However, the Supreme People's Court has ruled that anti-monopoly disputes are not within the scope of arbitrable disputes as defined in the Arbitration Law because the AML falls within the sphere of public law.<sup>62</sup> Thus, the parties cannot rely on the arbitration clause in their contracts to exclude the court's jurisdiction to adjudicate the anti-monopoly related disputes.

<sup>58</sup> Measures on the Payment of Litigation Costs ("Payment Measures") Article 6.

<sup>59</sup> Payment Measures Article 13.

<sup>60</sup> Civil Procedure Law Article 100.

<sup>61</sup> Measures for the Administration of Lawyers' Fees Article 13.

<sup>62</sup> See SPC's judgement in *Shell (China) Limited v Hohhot Huili Material Co., Ltd.* on August 21, 2019

## C. Relief

### 13. 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.”<sup>63</sup> The SPC Provisions specifically set forth that claimants may receive compensation for losses from the infringer.<sup>64</sup> The relevant law does not, however, provide guidance on the calculation of those losses. Judgments may include the reasonable expenses of a claimant in investigating and asserting its claim<sup>65</sup> and also require that the losing party bear the winner’s litigation costs.<sup>66</sup> 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.<sup>67</sup>

### 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.”<sup>68</sup>

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, it also theoretically applies to competition civil actions. However, the standard of proof for seeking an “advance enforcement” in a competition case would be high. Courts are unlikely to grant such a relief unless the facts of the case are very clear and that the rights and obligations 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.<sup>69</sup> The Civil Code lists other possible methods of bearing civil liability that could apply to anti-monopoly cases.<sup>70</sup> These other methods of bearing civil liability include cessation of injury, removal of hindrance, elimination of

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<sup>63</sup> Anti-Monopoly Law Article 50.

<sup>64</sup> SPC Provisions Article 14.

<sup>65</sup> SPC Provisions Article 14.

<sup>66</sup> Civil Procedure Law Article 152.

<sup>67</sup> Payment Measures Articles 6 and 29.

<sup>68</sup> SPC Provisions Article 14.

<sup>69</sup> SPC Provisions Article 14.

<sup>70</sup> Civil Code Article 179.

danger, restoration to the original state, elimination of effects and restitution of reputation and offer of apology.<sup>71</sup>

## 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 a dominant position, though there have also been a number of claims alleging vertical and horizontal anti-competitive agreements. Patent license disputes (e.g., standard essential patents (“SEPs”) combined with antitrust related disputes are more and more common in recent years,

Private actions have involved those between large companies as well as actions initiated by 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 (RPM) 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).<sup>72</sup> The plaintiff only claimed token damages of around RMB 10 (approximately USD 1.60). 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 18 June 2015, the Beijing Higher People’s Court, in its final ruling, affirmed that the Beijing Intellectual Property Court (“Beijing IP Court”) has jurisdiction over this case.<sup>73</sup> The case was first tried by the Beijing IP Court, which ruled against Tian Junwei as he did not meet his burden of proof that a vertical monopoly agreement existed between Carrefour and Abbott. Tian then appealed the case to the Beijing High Court. The Beijing High Court affirmed the Beijing IP Court’s decision, and the Beijing High Court’s decision is the final decision of the case.

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.

The Beijing IP Court states that as the sales agreement between Carrefour and Abbott was reached within the period where NDRC found evidence of Abbott using RPM, Carrefour and Abbott have the burden of proof that the sales agreement between them did not involve RPM. However, in this case, the court considered that the defendants had met their burden when they presented that the sales agreement only involved a recommended price not RPM. Another interesting point in this case is that the court admitted

<sup>71</sup> Civil Code Article 179.

<sup>72</sup> In August 2013, the NDRC fined six domestic and international baby formula companies a total of RMB 668 million for unlawful RPM. The companies sanctioned included Abbott, Biostime, Dumex, FrieslandCampina, Fonterra and Mead Johnson. All the companies took corrective measures during and after the investigation, including price cuts.

<sup>73</sup> 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 jurisdiction over the first instance antitrust cases in the city where it is located.

that Tian could claim his losses from Abbott although he did not purchase the goods directly from Abbott. However, Tian's burden of proof is not reduced, i.e., he still needs to prove the connection between this loss and Abbott's behavior.

#### *Sichuan Yibin Bricks Industry Association Cartel*

In July 2013, the Sichuan Administration for Industry and Commerce fined Yibin Bricks Industry Association (the "**Association**"), and other members of the Association, CNY 1.56 million (\$256,000) for monopolistic behavior. The Association had entered into contracts with up to 50 Association members which required the members to limit, and in some cases suspend, their production of bricks, for which they would be compensated for by the Association. Furthermore, the members would be penalized under the contracts if they went over their stipulated output restrictions. Nonetheless, the Association then failed to pay the promised compensation and various members filed complaints to anti-trust regulators.

In 2016, it is understood that five companies, all party to the original cartel as members of the Association, filed private actions for compensation from the same four defendants who they alleged were the organisers of the brick-cartel. As a result of the defendants' actions, the plaintiffs alleged that they suffered large economic losses.

However, in 2017, these complaints were dismissed by Chengdu Intermediate People's Court on the basis that it was not possible to prove the exact parties that were liable for the cartel conduct as all contracts were signed by the Association. This decision was upheld on appeal to the Sichuan Provincial High People's Court in 2018.

#### **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 16 October 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 position. A 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.

#### *Patent Wars/SEPs*

The Chinese courts have become an important venue for disputes between owners of telecommunications standards essential patents and handset and equipment manufacturers.

### *Huawei v. InterDigital*

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 28 October 2013, the Guangdong Higher People’s Court upheld the decision of the Shenzhen Intermediate People’s Court by ruling that InterDigital had violated the AML by licensing standard essential patents to Huawei at unfairly high royalty rates. InterDigital was ordered to cease the alleged excessive pricing and improper bundling of patents, and pay Huawei approximately RMB 20 million in damages.

This was the first competition case involving a patent licenses 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.

However, this was not the end of Huawei and InterDigital’s conflict. In December 2018, the Chinese Supreme People’s Court (“SPC”) granted InterDigital permission for a retrial of the October 2013 decision and suspended the enforcement of the Guangdong Higher People’s Court decision. Two days after the SPC decided to retry the case, InterDigital and Huawei reached a settlement. The SPC later issued a civil mediation paper, which marks the official conclusion of this case since 2011.

However, in January 2019, Huawei filed a new civil complaint against InterDigital in the Shenzhen Intermediate People’s Court. Huawei alleges that InterDigital has failed in its obligation to license its patents on FRAND terms following a patent license agreement’s expiry on 31 December 2018.

### *Arima v. InterDigital*

Arima (a Taiwanese mobile phone manufacture) filed a lawsuit against InterDigital to the Jiangsu Higher People’s Court on 22 September 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 RMB 120 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 of an undisclosed amount to Arima.

### *ZTE v. InterDigital*

On the other hand, the *ZTE v. InterDigital* case is still pending. ZTE filed this lawsuit against InterDigital with two complaints at the 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 RMB 20 million, which was later increased to RMB 99.8 million

(approximately USD 14.4 million). It is reported that InterDigital has challenged the jurisdiction of the Shenzhen Intermediate People's Court and also filed a petition for retrial with the Supreme People's Court regarding the jurisdictional challenges.

#### *Samsung v Huawei*

In January 2018, the Shenzhen Intellectual Property Court issued a judgment stating that two of Huawei's 4G wireless SEPs had been infringed by Samsung, and that Samsung had failed in its obligation to negotiate royalty rates on FRAND terms. As relief, the court put in place two injunctions (relating to each SEP) which required Samsung to cease the infringing activities. This, in turn, would require Samsung to remove certain products from its shelves. The injunction however was suspended to allow time for the companies to continue patent negotiations in the hope of finding an alternative, less drastic, solution.

Although the verdict has not been made public yet, this case is being watched closely by the legal community, particularly in relation to the principles it outlined regarding FRAND principles and the definition of a "willing licensee" in the context of royalty rates. It is reported that the Court found that, although Huawei was not entirely innocent, the delay in negotiations was mainly due to Samsung's lack of cooperation. Samsung had showed itself to be an unwilling licensee.

Additionally, in relation to royalty rates, the Court took into account each party's relative strength and competitiveness in relation to the relevant patents. The Court then reached the conclusion that Huawei's offered royalty rate was reasonable when taking into account the reasonable profits in the smartphone industry. On the other hand, the royalty rate offered by Samsung was disproportionately high. As a result, the Court held that Samsung had breached FRAND principles unilaterally.

#### **Private actions against state-owned enterprises and governmental agencies**

There has been a gradual increase in private competition enforcement actions against SOEs and governmental agencies in recent years.

#### *YANG Zhiyong v. China Telecom*

In January 2014, the Shanghai First Intermediate Court accepted a complaint filed by a consumer (Mr. Yang Zhiyong) against the state-owned China Telecom company alleging abuse of a dominant market position in the prices it charged for broadband internet and fixed-line telephone services. The Shanghai First Intermediate Court dismissed Yang's claims and ruled in favor of China Telecom in March 2015. In its judgment, the court emphasized the plaintiff's burden of proof in antitrust cases, i.e., the plaintiff needs to prove the defendant's dominance, abuse of its dominance, and the connection between his/her loss and the abuse, although such burdens are difficult for individual plaintiffs to meet. Yang then appealed the case to the Shanghai High Court. In December 2015, the Shanghai High Court affirmed the Shanghai First Intermediate Court's decision and dismissed all of Yang's claims.

#### *Yunnan Yingding v. Sinopec*

In early 2014, Yunnan Yingding Bio-energy Co., Ltd. ("**Yunnan Yingding**") brought a lawsuit against China Petroleum & Chemical Cooperation ("**Sinopec**") and its Yunnan branch for violating the AML by "refusing to deal" with Yunnan Yingding without justifiable reasons in the Kunming Intermediate People's Court. The plaintiff alleged that, after years of R&D, it is able to process swill-cooked dirty oil into useable biodiesel, but the defendant, which has absolute market dominance in the sales market, refused to purchase it, causing difficulties in selling the product.

The court accepted the case, ruled that the defendant had violated the AML by refusing to deal without justifiable reasons and ordered Sinopec to include the biodiesel products of the plaintiff in its sales channel,

on the basis that (i) Sinopec's Yunnan branch controls over 50% of the processed oil market in the Yunnan province and can therefore be deemed to have a dominant market position, and (ii) the relevant law requires Sinopec to purchase and sell biodiesel. However, the court rejected the plaintiff's claim for damages, saying that there was no evidence to support the plaintiff's claim of economic losses.

Both parties appealed the case to the Yunnan High Court. In April 2015, the Yunnan High Court heard the case and made the decision to revoke the earlier first instance ruling by the Kunming Intermediate Court and remanded the case back to the Kunming Intermediate Court for a trial. This ruling was made based on two factors: (i) the basic facts identified by the first instance trial were unclear, and (ii) there was a breach of legal procedure.

In October 2016, the Kunming Intermediate People's Court heard the case, but this time, the court denied all the claims of Yingding. The court still confirmed the dominant position enjoyed by the defendants but considered that there were no incidences of "abuse." Yingding re-appealed the case to the Yunnan High Court.

In 2017, the Yunnan High Court heard the appeal, affirmed the Kunming Intermediate Court's case and ruled in favor of Sinopec, i.e., there was no abuse of dominance as the defendants have justifiable reasons to make the commercial and rational decision to not deal with the plaintiff.

Nonetheless, Yunnan Yingding applied to the SPC to request a "re-examination" of the case in September 2017. The case is still awaiting ruling from the SPC. The decision is eagerly awaited and closely monitored by China's legal and energy communities, as it is the first antitrust dispute in the country's oil sector that has lasted for over three years. This case will also shed some light on the factors that can be seen as justifiable reasons for "refusal to deal."

#### *Sware v. Guangdong Provincial Education Department*

In May 2014, the Guangzhou Intermediate People's Court accepted a complaint filed by a Chinese software company (Sware) alleging that 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 provider for the government-organized event. Although the court ruled in favor of Sware, it did not grant its claims for damages. In relation to the abusive conduct, the court only confirmed its unlawfulness, but did not make any orders for it as the relevant event ended at that time. The case lasted 11 months.

The defendant has appealed to the Guangdong Higher People's Court; in 2017, the Guangdong High Court upheld the Shenzhen court of first instance's decision and ruled in favor of Sware.

This is the first case brought based on the "abuse of administrative power" under the AML. 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 of whether or not a government authority has abused its administrative power. 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 the failure to identify a credible competition law theory of harm, and the lack of credible evidence to properly define the relevant market and demonstrate the defendant's anti-competitive behavior or abuse of dominance. There are still some uncertainties and hurdles for claimants in bringing private competition enforcement cases in China. However, recent court decisions, particularly the decisions of the Supreme People's Court, have provided a useful illustration of the courts' approach to private enforcement. It is expected that the number of private enforcement actions will continue to increase in the future and will 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

There are two types of private enforcement action for competition law infringements depending on the subject matter of the relevant conduct. In the case of **unfair competition**, an action may be brought against an undertaking before the Czech civil courts under sections 2988 and 2990 of Act No. 89/2012 Coll., the Civil Code ("**Czech Civil Code**"). In the case of **restrictions of competition** (i.e., cartels and abuse of dominant position), an action may be brought against an undertaking before the Czech civil courts under Act No. 262/2017 Coll., on damages in the field of competition ("**Competition Damages Act**"). 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

As regards unfair competition, 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 if the damage was caused willfully) after the infringement occurred (regardless of whether it has been discovered or whether an investigating competition authority has made a finding in respect of the matter). As 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 the 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.

As regards restrictions of competition, the limitation period is governed by the Competition Damages Act and lasts five years from the date on which the claimant learned or could have learned of the existence of the damage suffered, the responsible person and the respective restriction of competition. In any case, the limitation period starts no sooner than from the date of final termination of infringing conduct. The limitation period is stayed during an ongoing investigation or proceedings conducted by the competition authority regarding the restrictions. Moreover, the limitation period is stayed, among other things, for one year from the date when: a) a final decision issued by the competition authority or by the court that such restriction of competition has occurred entered into legal force; or b) respective investigations or proceedings have come to an end in a different manner.

### 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).

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.

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 the 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 where 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 that were previously unknown) arise that, if known at the time the judgment was rendered, could have led to a different judgment.

Finally, a complaint to the Czech Constitutional Court is a remedy of last resort, which will be available to claimants only where 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.

### 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; or
- (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.

Currently, there are ongoing discussions about the adoption of new legislation that would allow for class actions. However, it is not yet clear whether such legislation will be adopted.

## 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.

Regarding the damage incurred, in the case of unfair competition, the claimant must prove that the infringement caused him/her to suffer damage. On the contrary, the position of the claimant is better in the case of cartels since the Competition Damages Act includes in its section 3 a rebuttable presumption that restrictions of competition in the form of cartels cause damage; thus, the burden of proof is shifted to the defendant.

Czech courts may also take into account 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 of the cartel agreement at once.

The court is not entitled to apportion liability between defendants and it must declare the parties to be jointly and severally liable. The Competition Damages Act introduces two specific categories of infringers whose liability is limited by the law: a) leniency receipts; and b) small or medium-sized enterprises (“**SME Infringer**”). In general, leniency receipts shall only compensate their direct or indirect buyers or suppliers. Other persons may claim damages against leniency receipts only when their receivables are unenforceable against other infringers and the limitation period for their claims has not yet lapsed. Similarly, the SME Infringer is obliged to compensate only its direct or indirect buyers or suppliers. This limitation applies provided that: a) its market share is lower than 5%; and b) the joint and several liability would give rise to an irreversible threat to its economic viability and the loss of the full value of its assets. The SME Infringer shall pay damages to other persons only if: a) its receivables against other infringers have not become time-barred; and b) the SME Infringer led the restriction of competition or forced other subjects to participate; c) has demonstrably restricted competition previously; or d) such claims are unenforceable against other infringers.

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 the 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 that 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.). In addition, 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 the subject of the disclosure either by another party to the proceedings or by a third party. Courts are generally reluctant to order the 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 CZK 50,000 (approximately EUR 2,000) on the relevant party (and continued or repeated failure to disclose can result in the imposition of additional fines up to approximately EUR 2,000 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.

The Competition Damages Act provides for a similar measure that can be adopted before the compensation proceedings. This measure is aimed at the disclosure of evidentiary means and is subject to a security in the amount of CZK 100,000 (approximately EUR 4,000).

## 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 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 up to another one to 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 CZK 40 million (approximately EUR 1.6 million). If the amount claimed exceeds CZK 40 million, the court fee amounts to CZK 2 million (approximately EUR 80,000) plus 1% of the amount exceeding CZK 40 million. The maximum court fee is capped at CZK 4.1 million (approximately EUR 164,000).

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, contingency fees for legal representation are permitted in limited circumstances. Recently, start-up firms focusing on alternative funding have started to appear on the Czech legal market.

## 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 that 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 the 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 the court uses 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.

Under the Competition Damages Act, losses should be recovered in full, including the depreciation of money. However, the damages compensation should not lead to overcompensation. The court may not mitigate the amount of damages even if there are reasons for special consideration. If the actual loss and loss of profit cannot be exactly determined, the court shall stipulate damages on the basis of just consideration.

#### 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, the claimant must 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 canceled 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 a returnable security to a court, namely CZK 50,000 (approximately EUR 2,000) to cover any loss caused by the injunction. Taking into account the circumstances of the case, the court may also increase the amount of the returnable security. The statutory reasons for increasing the security include: (i) the returnable security is clearly insufficient to cover the potential loss caused by the injunction; and (ii) the application for interim injunction is repeated (i.e., the participants are the same and the application seeks essentially the same or similar interim injunction based on analogous reasoning). The court might cancel the interim injunction in any case if reasons for its continuance are not given or circumstances otherwise change.

Furthermore, the Competition Damages Act provides for a specific interim measure aimed at the disclosure of evidentiary means that is subject to a security in the amount of CZK 100,000 (approximately EUR 4,000). If the court imposes such measure on the obliged party, the obliged party must disclose evidentiary means under sanction amounting up to CZK 10 million or 1% of its net annual turnover.

## 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.

New legislation that would allow for class actions is currently being discussed by the lawmakers.

# 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 broad. 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 (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.<sup>1</sup>

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 (ECA),<sup>2</sup> there is a clear limitation on bringing civil actions before criminal courts. Nonetheless, if the criminal action is moved before the Economic Criminal Court, injured parties would be still entitled to intervene in the criminal proceedings and seek damages before the criminal court. In practice, this happens frequently in competition law cases.

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.<sup>3</sup> 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 a plaintiff chooses 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 that are of an economic nature, including the ECL.<sup>4</sup>

### 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 a continuous nature (e.g.,

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<sup>1</sup> See, e.g., Court of Cassation decision number 1680, Judicial Year 2 of the Criminal Circuit on 16 May 1932.

<sup>2</sup> Article 21 of Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices as amended by Law No. 56 of 2014.

<sup>3</sup> Article 20/3 of the ECL.

<sup>4</sup> Law No. 120 of 2008 on the establishment of Economic Courts.



exclusivity of a dominant firm or a cartel agreement), the limitation period does not start until the last day on which the crime was committed (or continued to last).

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

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.<sup>5</sup>

### 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 if the value of the claim is less than EGP 5 million (USD\$ 350 thousand). 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. However, if the value of the claim is more than this amount, the claim will be brought directly before the Economic Court of Appeal. Furthermore, in all cases, the plaintiff may finally appeal to the Court of Cassation on points of law only.

As for a civil claim that 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, a plaintiff 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 in/opt into the case.<sup>6</sup>

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.<sup>7</sup> However, when it comes to associations (e.g., consumer protection associations (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.<sup>8</sup> 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.<sup>9</sup> Furthermore, in order to add more weight to their central role, the ECL stipulated that the board of the ECA would include their

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<sup>5</sup> Court of Cassation decision number 2659, Judicial Year 61 of the Civil Circuit on 21 January 1996.

<sup>6</sup> Article 251 of Law 50 of 1950.

<sup>7</sup> Sorour Fathy, *Al-Waseet fi Al-Ijra'at Al-Jina'eya (The Medium on Criminal Procedures)*, Part 1, 326–9, Cairo Uni. Press, 1979.

<sup>8</sup> 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 by the government as the final version and to be sent to the *Shura* Council and later to parliament.

<sup>9</sup> Memorandum Accompanying Draft Law on the Protection of Competition and the Prohibition of Monopolistic Practices.

representative.<sup>10</sup> 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.

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,<sup>11</sup> although neither this law nor its executive regulations elaborate on this right. It is debatable 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.<sup>12</sup> 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 the entire burden of proving 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 in any way binding on courts in general and civil courts in particular.<sup>13</sup> 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 decisions) are not binding on courts and that judges can freely disregard their opinions and rely in their judgments on other evidence that may be provided.<sup>14</sup> In this respect, there is no requirement placed on the court to respond to or give reasons as to why it did not rely on an expert report.<sup>15</sup> 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.

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<sup>10</sup> Article 12(5) of Law 3 of 2005.

<sup>11</sup> The wording of "the consumer" refers to all consumers as explained by the president of the parliament. Parliamentary Records, 67th Session, p. 35, 9 May 2006.

<sup>12</sup> 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.

<sup>13</sup> 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 in any way binding on the court.

<sup>14</sup> Court of Cassation decision number 1363, Judicial Year 62 of the Civil Circuit on 26 December 2013.

<sup>15</sup> Court of Cassation decision number 2898, Judicial Year 84 of the Criminal Circuit on 26 November 2014.

For example, in the *Float 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.<sup>16</sup> This has also been the trend in other damages actions brought by claimants after the ECA issued its infringement decision.

## 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 the case of abusing dominance.

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.<sup>17</sup> It should be noted that this condition may be satisfied even if the plaintiff was not a direct customer.<sup>18</sup> 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/her).

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 arising from, said cartel. Indeed, all existing follow-on actions related to cartel decisions have been brought against the specific cartel member from whom the claimant purchased its products only. In this respect, courts usually require the existence of contracts or purchase orders or the like in order to prove the existence of a direct contact with the company. Therefore, it would be more challenging to argue that other cartel members of the same cartel have also contributed by their fault in the overall harm sustained by the claimant.

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, although there is a slim possibility that they could recover from the cartelists.

## 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

<sup>16</sup> See, generally, the expert opinion submitted in case number 5 of the 2013 Economic Civil Court of Appeals – Mansoura (unpublished).

<sup>17</sup> Al-Gharib Mohamed, *Al-Ihtekar Wa Al-Monafasah Gheir Al-Mashrou'a* (Monopoly and Unfair Competition), p. 301, Dar Al-Nahda Al-Arabeya, 2004.

<sup>18</sup> 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.

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 to its slightest details. Thus the problem of proof can be a serious obstacle to effective private enforcement."<sup>19</sup>

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.<sup>20</sup> According to the law, a litigant may request the disclosure of a document that 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; or
- (iii) if the litigant depended on the document at any stage of the litigation.

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.

In practice, when a civil action is referred to an expert, the expert requests a number of documents from the parties. Parties appearing before the expert may also request him/her to request further documents from the claimant in order to enable the expert to undertake the mission assigned to him/her by the judge. These hurdles are mitigated in practice by the assigned expert's power to request documents from the parties.

## 8. Pre-action disclosure

Parties are not required by law to disclose any information before an action is triggered by a claimant. However, claimants are entitled to request disclosure from preparation judges to allow the claimants to obtain documents from third parties (e.g., the ECA).

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

A claim in civil courts may take one to two 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 on 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

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<sup>19</sup> Komninos Assimakis P., *EC Private Antitrust Enforcement: Decentralized Application of EC Competition Law by National Courts*, at pp. 225-6, Hart Publishing, 2008.

<sup>20</sup> Law No. 25 of 1968 on the Proof of Commercial and Civil Provisions.

the civil court.<sup>21</sup> In this respect, the burden will be reduced to proving 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 substantial part of the cost of any civil or criminal case. Other legal fees, depending on the court, are generally not substantial. Depending on the case, the other legal fees may range from USD\$ 2,000 - 5,000.

## 11. Third-party funding/alternative funding

There are no general 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 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 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 matter. In any event, which position the arbitration tribunals will adopt remains to be seen.

## 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.<sup>22</sup> However, whenever relevant — and upon the request of the plaintiff — the court may, in its decision, issue orders to stop certain types of conduct and put an end to the fault.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> For example, the role of the defendant in the infringement as a ringleader in a cartel, or his/her recidivism, is not considered in quantifying the amount of damages. Moreover, direct damage is the only

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<sup>21</sup> Salama, *supra*, at 351.

<sup>22</sup> 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.

<sup>23</sup> 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 injunctive relief whenever necessary. Article 171(2) of Law No. 131 of 1948.

<sup>24</sup> Court of Cassation decision number 11, Judicial Year 17 of the Civil Circuit on 1 January 1948.

<sup>25</sup> Al-Sanhouri, *supra*, at 819-21.

kind of loss taken into consideration.<sup>26</sup> 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 *Float Glass* case, even though the plaintiff quantified its damages to be an amount of approximately GBP 10 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.<sup>27</sup>

In another case, related to a price fixing cartel, the expert and the court awarded damages to the plaintiff based on the cartel overcharge and also based on what the plaintiff would have normally purchased but could not do so during the period of the cartel.

#### 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 the 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 affecting it.<sup>28</sup> 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 in 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.<sup>29</sup> Furthermore, it is important to note that the ECA or court has exclusive competence in evaluating these conditions and in deciding whether it is satisfied with the urgency and imminency of the matter.<sup>30</sup>

To date, a number of interim measures have been issued by the ECA in a number of competition inspections. For example, the ECA issued an injunction against a dominant company to resume supplying spare parts to independent car repairers. In another case, the ECA also issued an injunction against a dominant federation that refused to supply broadcasting rights to the entity responsible for terrestrial broadcasting in Egypt.

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<sup>26</sup> Al-Jammal Mustafa, Al-Nazareya Al-A'mmah Lil-Iltezamaat (The General Theory of Obligations), p. 402 – Al-Dar Al-Jame'eya, 1987.

<sup>27</sup> See, generally, the expert opinion submitted in case number 5 of 2013 Economic Civil Court of Appeals – Mansoura (unpublished).

<sup>28</sup> Court of Cassation decision number 48, Judicial Year 19 of the Civil Circuit, 23 November 1950.

<sup>29</sup> Court of Cassation decision number 243, Judicial Year 20 of the Civil Circuit, 20 December 1951.

<sup>30</sup> Court of Cassation decision number 151, Judicial Year 19 of the Civil Circuit 22 March 1951; Court of Cassation decision number 358, Judicial Year 20 of the Civil Circuit, 12 June 1952.

## 16. Other types of relief

Article 345 of the Egyptian Penal Code prohibits any action that 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 for the enforcement of the Egyptian competition regime, as its complementary role has been repeatedly reassured during parliamentary discussions.<sup>31</sup> 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 on a previous violation finding by the ECA. However, more recently, parties started successfully challenging non-compete clauses before the Economic Civil Court of Appeal in stand-alone actions. Furthermore, in the Egyptian market, the main concern facing potential claimants is not primarily that of costs but of the possible disciplinary retaliation of cartel members or the person abusing its dominant position.

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<sup>31</sup> The Parliamentary Records, 27th Session, p. 63, 12 February 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 is an active jurisdiction for litigation of competition claims - covering claims for compensatory damages as well as injunctive relief to stop alleged anti-competitive activity whether price fixing, bid-rigging, abuse of dominance or securing access to essential facilities.

The most significant uncertainty for the future of competition litigation in England and Wales arises from the UK's withdrawal from the EU on 31 January 2020. The transition period until 31 December 2020 means that the ability to pursue claims grounded in EU law will remain largely unchanged until then and, indeed, we are seeing an uptick in filings apparently intended to take advantage of that fact. It is likely that the EU law will have a lasting influence in the UK after withdrawal, with UK competition policy adopting similar lines and UK courts having regard to EU decisions even if not binding upon them. However, at the time of writing, the status of EU law and European Commission ("**Commission**") decisions after 2021 is far from clear.

#### 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**");<sup>1</sup>
- (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 ("**1998 Act**"), which are referred to as the "Chapter I" and "Chapter II" prohibitions, respectively.

As noted above, while the UK left the EU on 31 January 2020, Articles 101 and 102 will continue to apply, and Commission decisions will remain binding, until 31 December 2020.

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.<sup>2</sup>

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.

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<sup>1</sup> 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).

<sup>2</sup> Following a short-lived period of popularity, the economic torts have been used less frequently for competition claims in the past couple of years. This followed some unfavourable judgments in respect of such claims. For example, for the economic tort of unlawful means to count as 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 Commission in *Air Freight* was not sufficient to establish the requisite intention and nor could it be inferred from the cartellists' intention to benefit their own businesses (*Air Canada & Ors v. Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024).



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 Commission<sup>3</sup> or the UK's national competition authority, the Competition and Markets Authority (CMA).

### Claims in the High Court and the Competition Appeal Tribunal ("CAT")

Civil claims may be brought in the High Court or the CAT. These two forums are at the same level within the English court 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 issues relating to the jurisdiction of the CAT. However, reforms made in 2015 have sought to eliminate these issues, align many of the rules that 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 it may be more appropriate for some cases to be heard in the Commercial Court.<sup>4</sup>

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.<sup>5</sup> A CAT panel is made up of: (i) the CAT's president or a chairman; and (ii) two "ordinary members." A chairman of the CAT must be legally qualified and have the appropriate experience and knowledge; they include judges who also sit in the High Court of England and Wales.<sup>6</sup> The CAT's ordinary members need not be legally qualified, but they must have the 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 provide the statutory mechanism for bringing civil claims for breaches of competition law in the CAT. Broadly speaking, claimants have the same rights of action in the CAT as in the High Court, save that declarations are not available in the CAT. While the CAT retains its own procedural rules, the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648/2015) ("**CAT Rules**"), many of those rules mirror the Civil Procedure Rules (CPR), which govern claims in the High Court.

Opt-out collective actions for competition claims have been available in the CAT since October 2015.<sup>7</sup> Collective proceedings and settlements are not available in the High Court.<sup>8</sup> Competition claims may be transferred to or from the CAT and the High Court.<sup>9</sup>

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<sup>3</sup> Paragraph 35, Schedule 8A, 1998 Act (as amended) specifically provides that a finding by a Member State competition authority is prima facie evidence of an infringement.

<sup>4</sup> Paragraph 2.1(b) of the CPR Competition Law Practice Direction.

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> Opt-out and opt-in claims brought by any class representative deemed suitable have been available using this revised procedure since October 2015. A form of opt-in collective action brought by an approved representative body was available prior to this date but had only been pursued (unsuccessfully) on one occasion in *Replica Kit* (2007).

<sup>8</sup> 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 (GLOs).

<sup>9</sup> 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*

## Jurisdiction of the English courts

The English courts remain generous in their approach to accepting jurisdiction over competition cases under the Brussels Regulation.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

## 2. Applicable limitation periods

Following reforms to the CAT jurisdiction and the implementation of the EU Antitrust Damages Directive<sup>14</sup> (the “**Damages Directive**”) into UK law on 8 March 2017, the applicable limitation rules depend on when the relevant claim arose. In summary, the limitation periods are as follows:

- *In the case of claims in the High Court or CAT relating to loss or damage resulting from infringements of competition law that took place on or after 9 March 2017:* six years from the later of (i) the day the anti-competitive behavior ceased and (ii) the claimant’s “day of knowledge.” The day of knowledge is the day a claimant can reasonably be expected to know of the infringer’s behavior, that the behavior constitutes an infringement of competition law, that the claimant has suffered loss or damage arising from the infringement, and the identity of the infringer.<sup>15</sup>
- *In the case of claims in the High Court arising before 9 March 2017, or claims in the CAT arising between 1 October 2015 and 9 March 2017:* six years from the date on which the cause of action accrued, subject to special provisions where 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).<sup>16</sup> A cause of action in tort typically accrues when the damage is suffered.

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*Supermarkets Ltd v. MasterCard Incorporated & Others*; conversely, transfer was refused in a case regarding patent infringement proceedings — *Unwired Planet v. Huawei and Samsung* [2016] EWHC 958 (Pat).

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

<sup>11</sup> 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.

<sup>12</sup> *Emerson Electric Co and others v. Morgan Crucible Company PLC* [2012] EWCA Civ 1559.

<sup>13</sup> 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.

<sup>14</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

<sup>15</sup> Paragraph 19 of Schedule 8A to the 1998 Act.

<sup>16</sup> Sections 2, 9 and 32, Limitation Act 1980; section 47E 1998 Act.

- *In the case of claims in the CAT arising before 1 October 2015*: two years from: (i) the date the cause of action accrued; or (ii) the date the relevant infringement decision became final (i.e., after the expiry of the appeal period, or the conclusion of any appeal process).<sup>17</sup>

Specific limitation provisions apply to collective proceedings in the CAT. In particular, the limitation period for a section 47A claim is suspended from the date collective proceedings are commenced and only resumes upon the occurrence of certain events, such as if the collective claim is withdrawn.<sup>18</sup>

Limitation periods are also suspended: (a) until one year after a competition authority's infringement decision has become final or after the investigation is otherwise terminated; and (b) during consensual dispute resolution.<sup>19</sup>

### 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.<sup>20</sup>

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 sums (other than a decision on costs or expenses);
  - (b) the grant of an injunction; and
  - (c) an infringement finding in a stand-alone claim;
- (ii) from a decision as to the amount of an award of damages or other sums (other than the amount of costs or expenses).<sup>21</sup>

This includes appeals on points of law arising from a decision to refuse to certify a collective claim.<sup>22</sup>

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.

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.

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<sup>17</sup> Rule 119, CAT Rules.

<sup>18</sup> Para. 23 of Schedule 8A to the 1998 Act.

<sup>19</sup> Paras. 21-22, Schedule 8A to the 1998 Act.

<sup>20</sup> CPR 52.3(6).

<sup>21</sup> Sections 49(1A)-(1C), 1998 Act.

<sup>22</sup> There was some doubt as to whether such a right of appeal existed. However, the Court of Appeal confirmed certification decisions in collective proceedings could be appealed in *Walter Hugh Merricks CBE v. Mastercard Incorporated and Others* [2018] EWCA Civ 2527

#### 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. Opt-out and opt-in collective proceedings for competition claims are the closest the English courts get 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. In addition to the CAT's collective actions regime, there are a number of group or multiparty 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.<sup>23</sup>
- (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.<sup>24</sup>

The CAT will also determine whether the action should proceed on an opt-in or opt-out basis.<sup>25</sup>

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.<sup>26</sup> The CAT may not award 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.<sup>27</sup>

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 limited circumstances.<sup>28</sup> Damages-based agreements for the payment of legal fees are not enforceable in opt-out collective proceedings (see section 10 below).<sup>29</sup>

At the time of writing, ten applications to commence collective proceedings had been brought in the CAT and eight are pending determination.<sup>30</sup> No claims have yet been certified and those pending have been

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<sup>23</sup> Rules 78(1)-(3) of the CAT Rules.

<sup>24</sup> Rules 79(1)-(2) of the CAT Rules.

<sup>25</sup> Rule 79(3) of the CAT Rules.

<sup>26</sup> Section 47B(12) of the 1998 Act.

<sup>27</sup> Sections 47C(1)-(2) of the 1998 Act.

<sup>28</sup> Rule 98 of the CAT Rules.

<sup>29</sup> 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.

<sup>30</sup> Replica Kit (Case 1078/7/9/07 *The Consumers Association v JJB Sports PLC*, brought prior to reform of the regime when the rules permitted opt in claims by a representative body only); Mobility Scooters (Case 1257 - *Dorothy Gibson v. Pride*

paused pending the Supreme Court's judgment on the legal test to be applied in determining whether claims raise the same, similar or related issues suitable to be brought in collective proceedings (raised in *Merricks v MasterCard* and expected to be decided in late 2020). In *Merricks*, the CAT refused to certify the £14 billion opt-out, consumer collective action in respect of interchange fees for payment cards.<sup>31</sup> The Court of Appeal allowed an appeal against the CAT's decision on the basis that there were errors in the CAT's approach which justified the case being remitted for reconsideration.<sup>32</sup> MasterCard then appealed to the Supreme Court in a case which will have major implications for the future of the UK's collective action regime.

### High Court proceedings

There are no true 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.<sup>33</sup> 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.<sup>34</sup> An attempt to broaden the approach to create, in essence, an opt-out representative action failed in *Emerald Supplies Ltd v. British Airways plc*.<sup>35</sup> 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.<sup>36</sup> This test is wider than the requirement that the persons have the "same interest," as is required for representative proceedings (see above). There have been over 100 GLOs since the mechanism was introduced in 2000, although they are rarely used for competition claims.

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*Mobility Products Limited*); Interchange fees (Case 1266 *Walter Hugh Merricks CBE v. Mastercard Incorporated and Others*); Rail Tickets (Case 1305/7/7/19 *Justin Gutmann v London & South Eastern Railway Limited*; Case 1304/7/7/19 *Justin Gutmann v First MTR South Western Trains Limited and Another*); Trucks (Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and Others*; 1282/7/7/18; Case 1282/7/7/18 *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others*); FX (Case 1329/7/7/19 *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others*; Case 1336/7/7/19 *Mr Phillip Evans v Barclays Bank PLC and Others*); Ro-Ro (case registration not published at time of writing, *Mr Mark McLaren v MOL, "K" Line, NYK, WWL/EUKOR and CSAV*).

<sup>31</sup> [2017] CAT 16

<sup>32</sup> [2019] EWCA Civ 674

<sup>33</sup> CPR 19.6.

<sup>34</sup> Recent indications are that this mechanism may be due a revival, following a favourable judgment in *Lloyd v Google LLC* [2019] EWCA Civ 1599. However, this case concerned a data protection law breach in which uniform damages were sought for each class member. It is therefore unlikely to have major implications for competition claims, absent a radical rethinking of the approach to such claims.

<sup>35</sup> [2009] EWHC 741 (Ch); decision upheld on appeal [2010] EWCA Civ 1284.

<sup>36</sup> CPR 19.10–19.15.

## 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/she has suffered loss as a result of that infringement. The standard of proof is the “balance of probabilities.”<sup>37</sup>

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 Commission, the CMA and the CAT are binding in follow-on proceedings in the High Court and the CAT.<sup>38</sup> Following the implementation of the Damages Directive, decisions of other national competition authorities constitute prima facie evidence of an infringement in proceedings, which start after 9 March 2017, although they are not binding.<sup>39</sup>

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, they would not have suffered the loss identified and that they are therefore entitled to be restored to the financial position that they would have been in if the infringement had not occurred.

The implementation of the Damages Directive has caused further changes to English law in relation to the burden of proof, namely:

- (i) making clear that the burden of proving that overcharge was passed on and that the extent of this lies with the defendant seeking to rely on pass-on as a defense.<sup>40</sup> 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 that apply to indirect purchasers;<sup>41</sup> and
- (ii) introducing a rebuttable presumption that cartel infringements cause harm.<sup>42</sup>

### 6. Joint and several liability of cartel participants

Liability for infringements of competition law involving multiple parties ordinarily will 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

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<sup>37</sup> 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.”

<sup>38</sup> 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 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).

<sup>39</sup> Section 35(1) of Schedule 8A of the Competition Act 1998.

<sup>40</sup> Paragraph 11(2) of Schedule 8A of the 1998 Act.

<sup>41</sup> Paragraph 9 of Schedule 8A of the 1998 Act.

<sup>42</sup> Paragraph 13 of Schedule 8A of the 1998 Act.

anti-competitive conduct, even if there was no direct or indirect relationship between the claimant and that defendant.

The implementation of the Damages Directive has also introduced 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);<sup>43</sup> and
- (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.<sup>44</sup>

The Civil Liability (Contribution) Act 1978 (“**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).<sup>45</sup> 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.

Following the implementation of the Damages Directive, the amount that one liable party can recover from other liable parties in respect of loss or damage is determined based on their “relative responsibility for the whole of the loss or damage caused by the infringement.”<sup>46</sup>

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.<sup>47</sup> This issue is improved following the implementation of the Damages Directive, as the settling party’s contribution in any contribution proceedings must take into account the settlement and any claim must be reduced by the settling party’s share of any loss or damage.<sup>48</sup> However, this only applies for claims where the infringement and harm

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<sup>43</sup> Paragraph 12 of Schedule 8A of the 1998 Act.

<sup>44</sup> Paragraphs 15 and 16(2) of Schedule 8A of the 1998 Act.

<sup>45</sup> 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 Commission’s decision.

<sup>46</sup> Paragraph 38(2) of Schedule 8A of the 1998 Act.

<sup>47</sup> 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. This was upheld by the Court of Appeal in *WH Newson v. IMI plc* [2016] EWCA Civ 773, which found that a contribution claim made by IMI against Delta following a bona fide settlement by IMI did not require an investigation into IMI’s liability.

<sup>48</sup> Paragraphs 38-41 of Schedule 8A of the 1998 Act.



occurred after 9 March 2017 and, therefore, it is likely to be some time before settling infringers benefit from additional certainty.

## 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.

The implementation of the Damages Directive has effected certain changes to disclosure rules in competition litigation. The disclosure provisions from the Damages Directive are implemented in the UK through: (i) Schedule 8A of the Competition Act 1998; (ii) amendments to court rules, namely CPR Practice Direction 31C — Disclosure and Inspection in relation to Competition Claims; and (iii) CAT Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 2015. The UK's implementation of the disclosure provisions from the Damages Directive applies to proceedings that commence after 9 March 2017, irrespective of when the harm or infringement took place.

For cases commencing on or after 9 March 2017, cartel leniency statements (whether or not withdrawn) and settlement submissions that have not been withdrawn cannot be the subject of a disclosure order and are not admissible in evidence in competition proceedings.<sup>49</sup> Further, the investigation materials of any Member State competition authority are not admissible in evidence in competition proceedings before the competition authority has closed the related investigation.<sup>50</sup> These restrictions do not apply if the party to the proceedings obtained the submission or statement lawfully, and otherwise than from the competition authority's file.

### Disclosure in the High Court

Disclosure in the High Court is governed by CPR 31 and CPR Practice Direction 31C. "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.<sup>51</sup> Instead of standard disclosure, the parties may be ordered to disclose only those documents on which they rely and specific categories of documents. For example, a defendant could be ordered to disclose the pre-existing documents it provided to the Commission as part of an investigation, documents relating to pricing of the cartelized 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.

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<sup>49</sup> Paragraphs 28 and 32 of Schedule 8A of the 1998 Act. The English courts have carefully balanced the relevant considerations in determining whether leniency material should be the subject of a disclosure order in accordance with Case C-360/09 *Pfleiderer* for cases commenced prior to 9 March 2017 — see: *Silent Night v. Recticel* (ruling of Rose J of 4 October 2017 — not reported at the time of writing), where disclosure of leniency material was refused.

<sup>50</sup> Paragraphs 30 and 33 of Schedule 8A of the 1998 Act.

<sup>51</sup> Note that privilege extends to in-house lawyers in the UK.



As well as disclosure between the parties, it is also possible to seek pre-action disclosure<sup>52</sup> (see below) and disclosure from non-parties to the proceedings.<sup>53</sup>

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).<sup>54</sup>

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 and the CAT Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 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 disclosure and non-party disclosure are also available in the CAT.<sup>55</sup> 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 taken a quite generous approach to date in ordering the disclosure of information relating to competition law damages claims. Indeed, disclosure of the confidential version of the Commission’s decision, or parts of that decision, has been ordered in a number of cases.<sup>56</sup> Members of the judiciary have also expressed frustration at the time taken by the Commission to publish non-confidential versions of decisions, describing the delay as “astonishing and unsatisfactory.”<sup>57</sup> Despite the more restrictive approach introduced by the Damages Directive, the English courts 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 Commission to provide information or give its opinion on questions regarding the application of the EU competition rules.<sup>58</sup> The English High Court has

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<sup>52</sup> CPR 31.16.

<sup>53</sup> CPR 31.17.

<sup>54</sup> CPR 31.22.

<sup>55</sup> Rules 62–63 of the CAT Rules.

<sup>56</sup> 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).

<sup>57</sup> 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).

<sup>58</sup> 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*

made such requests in several cases.<sup>59</sup> However, for cases commencing on or after 9 March 2017, the High Court or the CAT cannot make a disclosure order addressed to a competition authority in respect of documents on its file unless no one else is reasonably able to provide that information.<sup>60</sup> Further, both the Commission and the national competition authority can submit observations to the English courts as *amicus curiae*.<sup>61</sup>

The CMA has a right to be notified of competition claims in the High Court and the CAT.<sup>62</sup> 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.<sup>63</sup>

Parties may also seek access to documents on the Commission's case file directly in accordance with the Transparency Regulation.<sup>64</sup> However, the ability to do so is significantly restricted. This is because competition investigations are generally presumed to be subject to a wide exception that entitles the 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.<sup>65</sup>

## 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.<sup>66</sup> An application for pre-action disclosure in relation to competition law claims has been rejected in circumstances where the court considered the claim too speculative and the scale of disclosure was too large and unfocused.<sup>67</sup>

This is not to say that pre-action disclosure will never be granted. However, such an application will need to be carefully considered and focused. 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 Sudan SA v Edmonds*,<sup>68</sup> in which a targeted request for specific documents that could be readily disclosed at little cost or inconvenience was allowed.

More recently, the High Court granted a potential claimant's application for disclosure against a third party in relation to a possible competition claim. The court required the third party to disclose documents relating to a potential breach of competition law that would have an impact on the applicant. The judge stated that

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*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).*

<sup>59</sup> *Wm. Morrison Supermarkets plc & Others v. MasterCard Incorporated & Others* (opinion of 5 May 2014); *Secretary of State for Health & Others v. Servier Laboratories Ltd & Others* (opinion of 22 December 2014); *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated & Others* (opinion of 29 October 2015).

<sup>60</sup> Paragraph 30 of Schedule 8A of the 1998 Act.

<sup>61</sup> Article 15(3) of Regulation 1/2003. The 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).

<sup>62</sup> 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.

<sup>63</sup> Paragraph 3 of the CPR Competition Law Practice Direction and rules 50(2) and 74 of the CAT Rules.

<sup>64</sup> 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.

<sup>65</sup> 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*.

<sup>66</sup> CPR 31.16 and rule 62 of the CAT Rules.

<sup>67</sup> *Hutchison 3G UK Ltd v. Vodafone Ltd, O2 Ltd, Orange Personal Communications Services Ltd, T-Mobile UK Ltd* [2008] EWHC 50.

<sup>68</sup> [2007] EWCA Civ 50.

without the order, "it is difficult to see how the claimant could make any progress in a claim which, as I have already found, is arguable."<sup>69</sup>

## 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 to three 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 an 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.<sup>70</sup> 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 that have reached final judgment make it difficult to make a generalized statement. Rule 58 of the CAT Rules sets out the procedure for fast-track proceedings, whereby the main hearing will take place within six months and a cost cap will apply. The fast track mechanism in the CAT continues to be a popular procedure, particularly for small businesses.

The CAT may take into account a number of factors when determining whether the fast-track procedure is appropriate, including: whether one of the parties is an SME; whether the time estimate for the main hearing is three days or less;<sup>71</sup> the complexity and the novelty of the issues involved; the number of witnesses involved; and the scale and nature of the documentary evidence involved. In *Socrates Trading Limited v. The Law Society of England and Wales*,<sup>72</sup> the training provider Socrates was successful in its abuse of dominance claim against the Law Society via the fast-track procedure. The trial was successfully completed in four days and involved oral experts being concurrently heard in a 'hot tub' arrangement. The proceedings were also cost-capped, under CAT Rule 58(2)(b).

While no collective actions in the CAT have yet proceeded to trial, we anticipate that they will take considerably longer than individual claims to do so.

Appeals to the Court of Appeal will generally add a further 18 months, with a similar period for a further appeal to the Supreme Court.

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<sup>69</sup> *Zantra Limited v. BASF plc* [2016] EWHC 3578 (Ch).

<sup>70</sup> In *Streetmap.EU Limited v. Google Inc* [2016] EWHC 253 (Ch), Streetmap claimed that Google had abused its dominant position in relation to search engines and online maps. The allegations of abuse were tried as a preliminary issue on the assumption that Google was dominant. Roth J noted that this "appeared a sensible course, since if the abuse allegations failed, that would be an end of the matter; whereas if they succeeded, the question of dominance could be determined at a subsequent trial."

<sup>71</sup> In *Breasley Pillows Limited and Others v. Vita Cellular Foams (UK) Limited and Others* [2016] CAT 8, Roth J stated that the fast-track procedure would not, for example, be appropriate for a trial of six weeks grouping together 10 claimants who were victims of a cartel: "[a]lthough three days is not an absolute limit, it should be stated emphatically that a case of such longer duration is not the kind of case that is suitable for the FTP."

<sup>72</sup> [2017] CAT 10.

## 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 GBP 1 million per party and often several multiples of that amount in cartel claims following on from Commission decisions. Disclosure, forensic accounting and economic analysis can considerably increase legal fees.

The courts have a general discretion as to the award of costs between parties, taking account of any offers to settle that are made<sup>73</sup> 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. In *Streetmap.EU Limited v. Google Inc.*<sup>74</sup> the High Court ordered Streetmap to make an interim costs payment of GBP 1 million to Google from the GBP 3.57 million recoverable.

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.<sup>75</sup> 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.<sup>76</sup>

Damages-based agreements (DBAs) are permissible in competition claims, save for opt-out collective proceedings in the CAT.<sup>77</sup> 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 that apply to DBAs, including a cap on the contingency fee of 50% of the damages recovered.<sup>78</sup>

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 1 April 2013.<sup>79</sup> Similarly, any after-the-event insurance premium owed by a winning party is no longer recoverable from the losing party.<sup>80</sup>

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<sup>73</sup> 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).

<sup>74</sup> [2016] EWHC 253 (Ch).

<sup>75</sup> Costs budgeting was adopted by the CAT for the first time in *Agents' Mutual Ltd v. Gascoigne Halman*, where the claimant and defendant budgeted approximately GBP 1.8 million and GBP 2.8 million respectively (although the defendant's estimate was not approved, and the CAT only permitted a more limited budget).

<sup>76</sup> Rule 58(2)(b) of the CAT Rules.

<sup>77</sup> Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LAPSO 2012"); section 47C(8) of the 1998 Act.

<sup>78</sup> 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.

<sup>79</sup> Section 44 of LAPSO 2012. Success fees are recoverable for CFAs entered into before 1 April 2013. LAPSO 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).

<sup>80</sup> Section 46 of LAPSO 2012.

## 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. Third-party funding arrangements were defended by the CAT in the application for a collective proceedings order in *Walter Hugh Merricks CBE v. MasterCard Incorporated and Others*.<sup>81</sup> Practically, collective actions are unlikely to be feasible without third party funding due to the scale of costs and ability of an individual class representative or class members to be able to fund the claim themselves.

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.<sup>82</sup> 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 most recently in January 2018. This code of conduct includes a guiding principle that funders may not seek to have the litigant's advisers 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 GBP 5 million in capital.

## 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.<sup>83</sup> The Damages Directive also encourages consensual dispute resolution.<sup>84</sup>

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.<sup>85</sup> 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

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<sup>81</sup> [2017] CAT 16.

<sup>82</sup> See, for example, sections 44-45 of LAPSO.

<sup>83</sup> *ET Plus SA v. Welter* [2006] LWR 251. See also *Microsoft Mobile OY (Ltd) v. Sony Europe Limited and Others* [2017] EWHC 374 (Ch).

<sup>84</sup> See for example recitals 5 and 48.

<sup>85</sup> Sections 49A-49B of the 1998 Act; rules 94-97 of the CAT Rules.

of the settlement and the estimated number of persons likely to be entitled to a share.<sup>86</sup> At the time of writing, this procedure had never been used and 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.<sup>87</sup> 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,<sup>88</sup> in respect of any infringement of competition law that has caused the claimant loss. English law therefore accords with the Damages Directive, and there was no need to transpose the provision setting out a right to full compensation.

Damages are calculated on the basis of a counterfactual or “but for” test. In *Arkin v Borchard Lines*,<sup>89</sup> 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.<sup>90</sup>

The “passing-on defense” is recognized in English law; that is, where the claimant is said to have passed on any cartel overcharge to its customers, then the claimant’s claim will be reduced by the equivalent amount. While this had been widely assumed to be the case for some time, it was confirmed by the CAT in *Sainsbury’s Supermarkets v. MasterCard*. However, the application of the principle in that case was controversial and the

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<sup>86</sup> Rules 94(9) and 97(7) of the CAT Rules.

<sup>87</sup> 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).

<sup>88</sup> Compound interest was awarded for the first time in a competition damages claim in the matter of *Sainsbury’s Supermarkets Ltd v. MasterCard Incorporated & Others* [2016] CAT 11.

<sup>89</sup> [2005] 3 All ER 613.

<sup>90</sup> *Courage v Crehan* [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; *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ 1086; *Healthcare at Home v Genzyme* [2006] CAT 29; 2 *Travel Group plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19; *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6; *Sainsbury’s Supermarkets v MasterCard* [2016] CAT 1; Case HC-2015-000268 *Britned v Abb* [2018] EWHC 2616 (Ch); Case Nos 03/2016/4759, A3/2017/0889, A3/2017/0888, A3/2017/0890 and A3/2017/3495 *Sainsburys v Mastercard* and *Sainsburys v Visa* [2018] EWCA 1536 (Civ).

judgment remains subject to appeal (expected to be addressed by the Supreme Court during 2020 in Case UKSC 2018/0156).

While the concept of passing on did not need to be transposed into English law, there is a new provision that makes clear that the burden of proving that an overcharge or underpayment was passed on by a claimant rests with the defendant.<sup>91</sup> Significantly, the defendant must also prove the extent to which the claimant did so.<sup>92</sup> At the time of writing, there are no UK cases that have considered the application of this provision and it is unlikely that a matter will arise for at least some time as the amendments apply only to infringements entirely arising on or after 9 March 2017.<sup>93</sup>

The ordinary English law limitations to damages may also apply to competition law claims. This is demonstrated by a 2015 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*.<sup>94</sup>

The Court of Appeal recently issued a landmark judgment in *Britned v ABB*<sup>95</sup>, the English court's first follow-on cartel damages award. In this case, the claimant was awarded GBP 7.5 million as a result of "baked-in" inefficiencies caused by the cartel, following an extremely detailed analysis of factual and expert evidence. The Court of Appeal highlighted the claimant's burden to prove losses, rejecting a lower court's award of damages for so-called "cartel savings" on the basis that this did not represent a loss to BritNed, and therefore could not be considered compensatory in nature. This case is likely to have a significant impact on future cases, emphasizing the meticulous way in which claimants will need to approach their quantum analysis and the importance of economic expert evidence in these cases.

#### 14. Punitive and exemplary damages

For competition infringements that occurred before 9 March 2017, an award of exemplary damages is a theoretical possibility but such awards are highly exceptional.<sup>96</sup> For infringements commencing after this date, however, the 2017 amendments make it clear that exemplary damages are not available in competition proceedings.<sup>97</sup>

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

An injunction is an order from 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 either the High Court or, as a result of recent changes, 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.

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<sup>91</sup> Paragraph 11(2), Schedule 8A, Competition Act 1998 (as amended).

<sup>92</sup> Paragraph 11(2)(b), Schedule 8A, Competition Act 1998 (as amended).

<sup>93</sup> Paragraph 42(1), Schedule 8A, Competition Act 1998 (as amended).

<sup>94</sup> *Tesco Stores Ltd and others v MasterCard Incorporated* [2015] EWHC 1145.

<sup>95</sup> *BritNed Development Limited v ABB AB and ABB Limited* [2019] EWCA Civ 1840.

<sup>96</sup> *2 Travel Group PLC (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19. This was an abuse of dominance case with usual facts and a very modest damages award of just GBP 60.

<sup>97</sup> Paragraph 36, Schedule 8A, 1998 Act.



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:<sup>98</sup>

- (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; and
- (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.

A number of cases highlight the importance of complying with these basic requirements (see *Dahabshiil Transfer Services Limited v Barclays Bank plc*,<sup>99</sup> *Chemistree Homecare Limited v Abbvie Limited*<sup>100</sup> and *Packet Media Ltd v Telefonica UK Limited*<sup>101</sup>).<sup>102</sup> 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, 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

The UK — along with the Netherlands, Germany, Austria and Italy — continues to be a focus for litigation of competition claims in the EU. The introduction of collective proceedings and settlements combined with the expansion of the CAT's jurisdiction increased the UK's attractiveness to claimants. These built on the 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 — that drew litigants to the UK.

The implications of "Brexit" on civil litigation generally and competition litigation specifically are not yet known. The UK electorate voted in a referendum to leave the EU on 23 June 2016 and the UK officially left the EU on 31 January 2020. The Withdrawal Agreement provides for a transition period until the end of 2020 during which EU law continues to apply. In addition, during the transitional period, Commission decisions adopted will be binding on and in the UK. It could be some time before the end of binding decisions under EU law as there are the existing stock of decisions, decisions adopted during the transition period and decisions adopted pursuant to investigations opened during the transition period. It will also be interesting

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<sup>98</sup> *American Cyanamid Co v. Ethicon Limited* [1975] 2 WLR 316.

<sup>99</sup> [2013] EWHC 3379 (Ch).

<sup>100</sup> [2013] EWHC 264 (Ch), upheld on appeal [2013] EWCA Civ 1338.

<sup>101</sup> [2015] EWHC 2235 (Ch).

<sup>102</sup> For earlier examples, see *Adidas v. ITF* [2006] EWHC 1318 (Ch) and *AAH Pharmaceutical Ltd v. Pfizer Ltd* [2007] EWHC 565 (Ch).



to see how courts and Member States will view proceedings brought in the UK, as the UK will be a third country from 1 January 2021.

That being said, we expect that the UK will elect to remain aligned with the EU on matters of civil justice, including jurisdiction and enforcement of judgments. We may even see development of parallel or sequenced litigation as claimants seek to recover before UK courts in addition to filing before EU Member States.

We also expect to see a continuing proactive approach to case management and alignment of claims pursued in relation to similar facts. This follows a series of conflicting judgments arising in relation to litigation on alleged unlawful multilateral interchange fees that prompted a number of appeals. The English courts and the CAT have since been inundated with further numerous claims in relation to interchange fees (almost 90 such claims on some estimates) and, separately, damage claimed in relation to a trucks cartel. A number of these claims were commenced in the High Court but subsequently transferred to the CAT to allow for a coordinated approach to case management.

The collective actions regime is now expanding rapidly as claims with causes of action arising in or after October 2013 are now increasing in volume. A flurry in filings is expected in the run up to the withdrawal from the EU in December 2020 in order to take advantage of the regime and the potential high damages recovery available to classes represented through this mechanism. The CAT is showing a willingness to deal with novel matters of case management decisively and to tackle issues affecting one or more claims grounded on similar facts by way of preliminary issue in order to align approaches across all matters.

# 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.

Ordinance No. 2017-303 (the “**Ordinance**”) and Decree No. 2017-305 (the “**Decree**”) of 9 March 2017 implemented EU Directive 2014/104 of 26 November 2014 on antitrust damages actions. These new provisions are applicable to claims in which the infringement occurred after the Ordinance came into force, ie, 11 March 2017. However, procedural rules on disclosure and access to evidence are applicable to actions brought before the Court since 26 December 2014.

The new French law on damages actions for infringement of European and/or French competition law applies to cartels and abuse of a dominant position (Articles 101 and 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) and Articles L 420-1 and L 420-2 para.1 of the French Commercial Code), and also to abuse of economic dependency (Article L 420-2 para. 2 of the French Commercial Code), allocation of exclusive import rights in certain overseas territories (Article L. 420-2-1 of the French Commercial Code) and abusively low prices (Article L. 420-5 of the French Commercial Code). In France, Article L 481-1 of the French Commercial Code is thus not limited to cartels and abuse of a dominant position.

The Ordinance also provides for a new definition of the person liable for the damages action (Article L 481-1 of the French Commercial Code). It is any legal or natural person forming an undertaking or organization. This is wider than under ordinary tort law and could be interpreted in the same way as undertakings before the competition authorities.

Parties to a contract may bring a nullity action based on the illegality of contractual provisions (Article 1162 of the French Civil code) 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: (i) request that the relevant clause or, if not severable, the entire contract be declared null and void; and (ii) claim for damages.

A complaint may also be filed with the French Competition Authority (*Autorité de la Concurrence*) requesting that it investigate and sanction 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).

Actions for damages for infringement of competition law (EU law or domestic) are generally based in tort (Article 1240 of the French Civil Code and Article 481-1 of the French Commercial Code). Such actions may be brought before the Commercial Court (*Tribunal de Commerce*) if they are 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, Paris and Rennes have exclusive jurisdiction (Decree No. 2009-1384 dated 11 November 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 481-1 of the French Commercial Code. They would then have to demonstrate both causation of harm and loss actually suffered.

## 2. Applicable limitation periods

The French legislation on limitation was amended in 2008 (Law No. 2008-561 dated 17 June 2008). The rules on limitation differ depending upon the legal basis of the action brought.

The limitation period for bringing an action based on Article L 481-1 of the French Commercial Code is five years from the date on which the practice has ceased and the claimant “has known or ought to have known” the following three facts pursuant to Article L 482-1 of the French Commercial Code:

- the existence of the behavior or acts and the fact that these are an infringement of competition law;
- the fact that the infringement of competition law caused harm to the claimant; and
- the identity of at least one of the infringing parties.

By way of derogation, when an infringer has obtained immunity from the French Competition Authority, the limitation period begins to run only where the victim could not receive compensation from the other infringers.

The limitation period is interrupted (i.e., it begins to run again entirely) by “any act relating to the investigation, the finding and the sanction of infringements” by the French Competition Authority, any other EU national competition authority or the European Commission.

The limitation period for bringing a criminal action is three years from the date that the breach is committed. Consumer 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 specializing 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 of 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 relating to competition and consumer law infringements has been adopted by the so-called "*loi Hamon*" of 17 March 2014 and is set forth under Article L. 623-1 et seq. of the French Consumer Code. Class actions are possible for repairing 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 consumer associations.

In order to be authorized, a consumer 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 activity.

Approval is granted for a period of five years and may be renewed subject to the same conditions. To date, 15 authorized consumer 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.

There are two main phases to French consumer class actions. First, the court must establish the liability of the defendant, 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 have two to six months to join the group and receive compensation.

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 the same amount of damage.

Aside from this type of class action for competition law infringements, the traditional representative action ("**action of joint representation**"), provided by Articles L. 622-1 to L. 622-4 of the French Consumer Code, still exists. This action is only open to registered consumer 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 consumer association must first obtain a written proxy from at least two of the consumers affected by the infringement. The consumer 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 less interest in light of the 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 order to facilitate victims' access to compensation, Article 481-2 of the French Commercial Code provides for an irrebuttable presumption of harm where the French Competition Authority has established the

practice's existence and the entities' liability for the practice, as of the day where such decision can no longer be overruled through ordinary appeal, excluding proceedings before the *Cour de Cassation* for the part relating to that decision. Article L 481-2 applies to sanction decisions of the French Competition Authority but does not apply to interim measures or commitment decisions. The latter decisions can serve as *prima facie* evidence.

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. 623-24 of the Consumer Code provides that infringements of competition law are irrefutably established on the basis of a final decision of national or European competition authorities or courts (including competition authorities and courts of all EU Member States). However, the authorized consumer 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.

However, the Ordinance and Decree include provisions on damages/presumption of loss. The presumption of loss is rebuttable and is provided in cases of "anti-competitive agreement amongst competitors" (Article L 481-7 of the French Commercial Code). In such cases, the defendant must prove that the claimant has not suffered any damage from the alleged infringement.

Regarding the passing-on defense, the indirect or direct supplier/purchaser of goods or services is deemed not to have passed-on the overcharge/price reduction suffered as a result of the infringement of competition law. The defendant must therefore prove that the claimant has passed-on the overcharge/price reduction. Both the indirect or direct supplier/purchaser may claim that they suffered the application or the passing-on of an overcharge/price reduction provided that they provide evidence of such application or passing-on. However, the indirect purchaser/supplier of goods or services benefits from a presumption that the passing-on of overcharge/price reduction occurred if it is proven that: (i) there has been an infringement of competition law; (ii) this infringement resulted in an overcharge/price reduction; and (iii) the indirect purchaser/supplier bought/sold the goods or services concerned in the infringement.

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 submissions from all parties.

It can be difficult for private parties to gather evidence to prove that anti-competitive practices have taken place without a 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

Regarding liability of cartel participants, Article L 481-9 of the French Commercial Code provides for joint and several liability for the harm caused by the infringement.

However, two derogations are provided to that joint and several liability. First, the immunity recipient would only be liable to its direct or indirect customers. Secondly, it is only liable to the other victims where such victims could not be fully compensated by other infringers (Article L 481-11 and L 481-12 of the French Commercial Code).

Article L 481-10 of the French Commercial Code also excludes joint and several liability for small and medium sized enterprises ("**SMEs**"), subject to certain conditions. This exception does not apply to SMEs that initiated the infringement or coerced other undertakings to participate in the infringement for example.

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 (i.e., having regard to the gravity of the defendants' respective fault and their causal role in the occurrence of the damage) 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

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 (Article L. 483-1 of the French Commercial Code and Articles 138 to 142 of the French Code of Civil Procedure).

Articles L 483-1 et seq. of the French Commercial Code set out the principles applicable to the disclosure of documents. The new approach is based on categories of documents:

- (i) Some documents can, under no circumstances, be disclosed by a judge (written statements or the transcript of oral statements made by leniency applicants and undertakings involved in a settlement procedure before the competition authorities and the French Minister of Economy, as well as partial transcripts of such documents).
- (ii) The grey list sets out documents which can be provided after the end of the investigation by the competition authorities (material prepared, drafted or created by the parties or the authority during the investigations, as well as written submissions or transcripts of oral statements of settlement submissions that have been withdrawn). A document which has not been prepared, drafted or created for the specific investigation does not benefit from such prohibition.
- (iii) The remaining documents can be disclosed. The court can order disclosure by the competition Authority, the Ministry of Economy, the European Commission or other national authorities, but the judge may exclude the disclosure in cases where one of the parties or a third party is reasonably in a position to provide that document.

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 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 aim at preventing corporate leniency statements and settlement submissions 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: *"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 request the court to order the defendant to disclose 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 EUR 100,000 and EUR 200,000.

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

Third-party funding is possible under French law and is slowly developing. A few organisations have set up in France which offer funding solutions for cartel victims. No legal framework for third-party funding however exists in France.

There is also a mechanism governed by rules contained in the French Civil Code which 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 due to the constraints imposed by said regime.

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 consumer association can ask the court to request the losing party to pay part of their legal 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 (eg, 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, 19 May 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 1231-2 to 1231-4 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.

Pursuant to article L 481-3 of the French Commercial Code, compensation in antitrust matters includes the loss resulting from the overcharge or from a lower price paid by the infringer and the loss resulting from the decrease in sales volume linked to a partial or total passing-on of the overcharge. The compensation also includes non-pecuniary harm and the loss of opportunity.

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 a 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.

In this respect, the Paris Court of Appeal has published on its website fact sheets on the assessment and compensation of damage caused by an anti-competitive practices.

The amount of damages awarded varies greatly. Examples of recent cases are as follows:

- (i) A major telecoms company was ordered to pay a competitor EUR 2,600,000 for the damage suffered as a result of anticompetitive practices (Court of Appeal of Paris, 10 May 2017).
- (ii) The French national railway company (SNCF) was ordered to pay a travel agency EUR 8,900,000 (Court of Appeal of Paris, 14 December 2016) for the damage suffered as a result of anticompetitive practices.
- (iii) A telecoms company was awarded EUR 179,640,000 for the damage suffered as a result of the abuse of a dominant position (Commercial Court of Paris, 18 December 2017 and Court of Appeal of Paris, 10 October 2018). This amount was increased by compensatory interest at the rate of 10.4%, bringing the total amount to EUR 346,858,000.

## 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 the civil courts (Articles 834 and 835 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 834 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 835 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 when 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 imminent damage or to abate a manifestly illegal nuisance.

It should be noted that the powers to grant relief under these provisions are very broad and the court may, if the conditions set forth by the law are fulfilled, order any conservative 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

In France, before the adoption of the EU Damages Directive, civil claims for damages resulting from an infringement of competition law were rare. Commentators had suggested that the reason for the low number of civil claims might be that the judicial proceedings were too long and that the amount of damages awarded was generally too low. Another reason might be that end-consumers, taken individually, generally suffered very small losses and, therefore, have had little incentive to act alone.

The class action procedure, introduced by the law of 17 March 2014 "*loi Hamon*" and which came into force on 1 October 2014, was designed to remedy some of these obstacles. However, to date, very few actions have been introduced before the French courts (one of the reasons put forward by the consumer associations is the length and expense of the proceedings).

In parallel, the number of follow-on actions and stand-alone actions by companies seems to be on the rise due to the increasing awareness of the possibility for aggrieved companies to obtain damages. The adoption of the EU Damages Directive has certainly contributed to such awareness.

## Germany

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### A. Availability of civil claims

#### 1. Scope for civil claims in Germany

Both 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 an infringement of Articles 101/102 TFEU may bring an action for damages against any or all of the infringing parties. The legal basis for damages claims is section 33a (1) GWB. Furthermore, any such market participant may claim for termination of the infringement and for injunctive relief. The legal basis for these claims is section 33 (1) GWB.

A finding of infringement by a competition authority is not a precondition for civil claims (for damages or otherwise). However, any civil action will be more challenging if the infringement has not yet been established by a competition authority or court, as the aggrieved party will have to prove that there has been an infringement. In practice, stand-alone cases are rare.

#### 2. Applicable limitation periods

The limitation period for bringing a cartel claim based on sections 33 (1) and 33a (1) GWB is five years (cf. section 33h (1) GWB).

The limitation period commences at the end of the year in which:

- the claim arose;
- the claimant obtained knowledge (or would have obtained such knowledge if he/she had not shown gross negligence) of (i) the circumstances giving rise to the claim, (ii) the fact that these circumstances amount to an infringement, and (iii) the identity of the infringer; and
- the infringement has ended.

The announcement of a cartel investigation by the competition authority may be sufficient to establish that the potential claimant knew or ought to have known of the infringement (but not necessarily of the identity of all infringers, whose involvement in the cartel may be published later). In Germany, the first public document of a cartel investigation is often the press release of the competition authority announcing the fine. This press release then serves as the triggering event for the limitation period.

However, according to section 33h (6) GWB, the limitation period is suspended during investigations of the European Commission or a national competition authority of a Member State. This suspension ends one year after the investigation ends. The purpose of this rule is to ensure that any affected person may benefit from the binding effect that a decision by these competition authorities has on the civil courts, as well as to give the affected person enough time to assemble all of the necessary information for a claim.

The maximum limitation period — irrespective of any knowledge of the claimant — is 10 years after the claim arose and the cartel infringement has ended (section 33h (3) GWB).

The limitation period of five years applies to claims that (i) arose after 26 December 2016 or (ii) were not time-barred by 9 June 2017 (section 186 (3) GWB). All other (i.e., older) claims are subject to the standard limitation period of three years (section 195 German Civil Code (*Bürgerliches Gesetzbuch*, "BGB")).

### 3. Appeals

An action can be initiated before a regional court (*Landgericht*). The regional court's judgment can be appealed at a court of appeals (*Oberlandesgericht*) and finally at the Federal Court of Justice (*Bundesgerichtshof*).

### 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 at the same court may be joined by the court, provided that the proceedings are already pending (section 147 ZPO). In addition, multiple claimants can pursue their claims jointly if the claims are based on the same factual and legal grounds (sections 59 and 60 ZPO).

In addition, claims can be "bundled" by assigning them to a single claimant, for example to a corporation whose business purpose is to pursue cartel damages claims. There are several pending actions before German courts brought by such corporations, such as Cartel Damage Claims SA ("CDC"). This "bundling" is subject to legal limitations whose exact demarcations are still being developed by case law. In particular (as the Regional Court of Düsseldorf held in December 2013), the assignee/claimant must have access to sufficient funds to cover the defendants' legal fees if the claim fails — either by having funds of its own, or by an obligation of the assignors to provide further such funds. Otherwise, the assignment of claims may be against public policy and, therefore, void (section 138 BGB).

Sections 33 (1), 33 (4) 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*).

Finally, the new sample proceeding for declaratory relief (sections 606 et seq. ZPO) allows claimants to opt in to a sample case in order to obtain a binding decision as to the grounds of their claim (but not as to quantum). While this proceeding has the potential for considerable impact for other types of disputes, it will probably not gain significant practical relevance for cartel damage claims. As decisions by the European Commission or a national competition authority can bindingly establish the existence of an infringement (see B.1. below), there is little need for a sample proceeding, which can (only) establish the grounds of the claim for damages.

## B. Conduct of proceedings and costs

### 5. Burden of proof

As a general rule, the claimant has to prove the infringement of competition law, the damage suffered and the causal link between the two.

Where a final decision by the European Commission or by a national competition authority in any Member State 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 33b GWB). This rule is much broader 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 33b GWB.

In addition, the burden of proof on the claimant is eased to some degree by the rebuttable presumption that a cartel has caused damage (section 33a (2) GWB – which, however, does not apply to infringements before the introduction of this provision). Thus, the claimant has to prove that he/she was affected by the cartel, but not necessarily that he/she incurred damage or that this damage was caused by the cartel. However, there is no rebuttable presumption as to the amount of damage incurred. While it is possible to have the court estimate this amount (section 287 ZPO), claimants, in practice, have to substantiate and at least approximate the amount claimed. In that context, claimants have to provide the necessary evidence (which may include expert reports).

## 6. Joint and several liability of cartel participants

Cartel members/parties to an anti-competitive agreement or arrangement are jointly and severally liable for all damage caused by the infringement (section 33d (1) GWB). Hence, an aggrieved party may, at its discretion, demand full or partial compensation from any of the infringers. The aggrieved party may sue any member of the cartel separately, or sue all or some of them jointly (sections 59 and 60 ZPO).

Two groups of defendants are privileged: leniency applicants and small and medium-sized enterprises (as defined by the European Commission in its recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124/36). A leniency applicant is liable for the direct and indirect damages of its own customers and suppliers; apart from that, the leniency applicant is liable to other aggrieved parties only if none of the other defendants can cover the damages (section 33e GWB).

A small or medium-sized enterprise is similarly privileged if (i) other enterprises participated in the infringement, (ii) its market share was below 5% throughout the cartel period, (iii) the “normal” joint and several liability would irrevocably endanger the company’s economic viability and would deprive its assets of all their value, and (iv) the small and/or medium-sized company was not the “ring leader”, did not force others to participate in the cartel, and is not a recidivist (section 33d GWB).

A court that holds several cartel participants liable can declare them to be jointly liable; the court does not need to apportion the damages to each individual defendant. Similarly, the claimant can demand the entire sum from any of the defendants. It is then up to the defendants to apportion the damages among each other. This is not done on a pro rata basis, but is based on the question of how much each participant contributed to the damage.

Defendants can issue third-party notices to other cartel members on the basis of their joint and several liability. The recipients of such notices are free to join the lawsuit or to decline. However, even if these other cartel members decline, any findings by the court against the defendant will be binding against these other cartel members in later recourse proceedings — to the extent that these other cartel members could have defended against these findings, had they joined the lawsuit.

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

Five different types of evidence may be used, either in combination or separately, to prove the factual basis relevant to deciding the case: (i) expert statements (section 402 et seq. ZPO); (ii) visual inspection (section 371 et seq. ZPO); (iii) examination 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 claimant must make the respective evidence available to the court (e.g., by providing the contact details of a witness or by presenting the documentary evidence).

“Ordinary” civil procedure law only provides limited options for a claimant to obtain documents that are in a defendant’s possession. The claimant’s position is vastly improved in cartel damage proceedings, where additional options are now available. We explain these additional options in the next section because they are closely related to the new rules on pre-trial disclosure.

Under “ordinary” civil procedure law, the claimant may ask the court, by way of reasoned submissions, to order the defendant (or a third party) to present a specific document to the court (sections 422, 428 and 142 ZPO). In contrast to procedural discovery in, for example, the US or England and Wales, this option does not allow for the “discovery” of facts that are not already known to the claimant, and thus need to be investigated. Rather, 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 for the court’s ultimate decision. While claimants will sometimes be able to provide such explanations, e.g., if the claimants have specific knowledge because they were granted access to the files of the competition authority, in most cases they will not. In addition, third parties are not obliged to disclose documents if they can refuse to give evidence (cf. section 142 (2) ZPO).

While this whole procedure is more restrictive than, e.g., an Anglo-Saxon disclosure or discovery, there is one important exception: the German ZPO has no general concept of legal privilege. Hence, a party may potentially be ordered to disclose correspondence with its attorney, subject to the aforementioned conditions. This is still an open issue in German law, and several scholars and at least one court have argued that such correspondence is indeed protected. Nevertheless, until the issue has been settled, parties to a German competition litigation should not expect their attorney correspondence to be protected to the same degree as it would be, e.g., in the United Kingdom.

Attorneys themselves do not need to provide documents, and may also refuse to appear as a witness. However, if the claimant already has the document, he/she may still use it in court unless he/she has obtained it by illegitimate means.

## 8. Pre-action disclosure

In cartel damages cases, aggrieved parties have three recently introduced paths available to obtain evidence or information prior to or during the trial.

The first path is a claim for disclosure of evidence and information based on section 33g (1) and (10) GWB. This claim can be made before filing an action for damages and before commencing settlement negotiations, and it can be addressed to anyone in possession of evidence. To justify the claim, the aggrieved party has to (i) credibly show that it may have a damages claim based on section 33a (1) GWB, and (ii) describe the evidence as precisely as possible based on the facts that are available to it with reasonable effort.

In cases where the claim for disclosure is pursued in court together with a claim for damages, the court can rule on the disclosure claim in an interim judgment, which can be challenged independently.

The addressee of the claim may refuse disclosure to the extent that disclosure would be disproportionate. Statements of parties that are part of the leniency program, settlement submissions and documents covered by the obligation of professional secrecy will not be disclosed. According to section 33g (8) GWB, the addressee can demand to be reimbursed for the expenses of the disclosure.

The second path is a request for access to the files of the competition authority where a lawsuit is already pending (section 89c GWB). The claimant must credibly show that he/she may have a damages claim based on section 33a (1) GWB, and that the information or evidence in question cannot be obtained from another party or any third parties without disproportionate effort.

The third path is to demand access by interim measure to any binding decision by the competition authorities that establishes an infringement (section 89b (5) GWB). Accordingly, this is an option for the preparation of follow-on claims. The addressee is any cartel participant whose participation has been established. The claimant must again credibly show that he/she may have a damages claim, but the claimant is not required to credibly show that other specific conditions usually necessary for interim relief — in particular the concern that a change of the status quo might frustrate the realization of the claimant's rights — are met. However, according to recent case law, section 89b (5) GWB does not do away with those other conditions for interim relief. If, e.g., a request under section 89b (5) GWB is found to lack urgency because it was not filed shortly after the publication of the non-confidential version of the decision of the EU Commission, it will still be inadmissible.

In addition to these three new paths, there are some "old" options for pre-trial disclosure that still remain as an alternative. Until 2017, German law did not provide for any pre-trial or procedural discovery. However, potential claimants could and still can obtain evidence in one or more of the following ways:

- (i) After an EU investigation has been 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 30 May 2001 regarding public access to European Parliament, Council and Commission documents – "**Transparency Regulation**").
- (ii) If the German Federal Cartel Office (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, a civil court dealing with a pending damages 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 at the 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 rather qualify as "discovery," which is generally 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 two and four years in the first instance. The period may be longer if complex substantive issues need to be examined and if many documents have to be obtained using the options for pre-trial disclosure.

An appeal will generally take another one to two years. A further appeal to the Federal Court of Justice, if admitted, will add another two or three years. Currently, cartel damages claims involve a high risk (compared to other fields of law) of going all the way to the Federal Court of Justice, as they involve many legal issues that are not yet settled. A very rough estimate for the average length of proceedings might be five to nine years, from the first instance up to the Federal Court of Justice.

## 10. Average cost from issue of claim to judgment in Germany

The costs for a damages claim will depend on the value and the complexity of the case, and on 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 that such costs are based on the statutory fee schedule. The remaining costs have to be borne by each party itself and can be quite substantial, especially in complex cases.

## 11. Third-party/alternative funding

The ZPO does not prohibit the funding of litigation by third parties. Alternatively, as noted above, aggrieved parties may assign their claims to professional service providers, who then pursue said claims (with the caveat of sufficient funding) – although the exact conditions under which such assignments are valid are still being determined by case law. Finally, aggrieved parties may even agree that their claims are pursued in court by a representative if, among other things, the representative has its own legitimate interest in pursuing the claim.

## 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.

Parties should be aware that arbitral awards on cartel damage issues will be somewhat more susceptible to being set aside than “ordinary” awards, as the German and European competition rules are considered part of German public policy.

Mediation is also an option in Germany at any point, as is settlement through other means.

## C. Relief

### 13. Availability of damages and quantification

Any cartel member, whether acting 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, damages claims are restricted to the compensation of actual loss, i.e., the aggrieved party has to be put into the (hypothetical) situation that it would be in if the infringement of competition law had not happened (known as “compensation by restoration of the previous situation”). This includes the compensation for lost profits (section 252 BGB).

Damages are calculated according to the “difference hypothesis” (*Differenzhypothese*), which is similar to the “but for” rule in other jurisdictions. 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”). Usually, this means that the (actual) cartel price is compared to 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 the case of lawful behavior of the cartel member, i.e., with competitive selling prices in place.

Determining the competitive selling price can be very difficult. Section 287 ZPO can be of help insofar as it allows the judge to estimate the amount of damages at its discretion and conviction, based on its evaluation of all circumstances. German courts frequently apply this provision in private competition litigation, and award an estimated amount of damages to the claimant. The Federal Court of Justice approves of this practice, as long as sufficient facts have been established that form a reliable basis for the estimate.

The defendant may invoke the passing-on defense, which is stated in the second sentence of section 33c (1) GWB: The damage is considered compensated to the extent that the claimant has passed on the cartel price to his/her customers. Compensation for lost profits (section 252 BGB) is not affected by the passing-on defense.

This defense is in line with the legal concept of “set-off of benefits” (*Vorteilsausgleichung*) — a general rule that roughly states that a claimant will not be compensated insofar as the infringement has indirectly worked to his/her benefit. The Federal Court of Justice discussed this rule at length in its seminal “ORWI” decision of June 2011, which also influenced the new section 33c (1) GWB. For this rule to apply, the defendant must prove that the claimant actually had passed on a cartel price to his/her customers due to the individual market conditions. The defendant must also prove that the passing-on did not work to the claimant’s detriment (e.g., because it led to a decrease in demand). Furthermore, the Federal Court of Justice held that, although the defendant will often not have access to the information necessary to prove these points, courts should be reticent when considering lowering the burden of substantiation for the defendant.

In addition, when dealing with the legal concept of “set-off of benefits,” courts commonly consider the following: (i) the set-off must not interfere with the purpose of awarding damages; (ii) it must not unacceptably burden the affected market participant; and (iii) it must not lead to the unjustified relief of the originator of loss.

As the passing-on essentially pushes the cartel damage down the supply chain, section 33c (2) GWB states that an indirect buyer — who bought the affected goods or services from a direct buyer (*mittelbarer Abnehmer*) — is presumed to have incurred the loss if he/she can prove that (i) the defendant violated competition law, (ii) said violation has led to cartel prices for the direct buyer, and (iii) he/she (the indirect buyer) has in fact purchased the affected goods or services.

Finally, section 33a (4) GWB entitles an aggrieved party to claim interest from the cartel infringer, starting at the occurrence of the damage. The default rate of interest per year is 5 percentage points 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

In addition to the injunctive relief for disclosure of information (see above), two types of interim measures may be relevant in private competition litigation. The court may grant an interim injunction to: (i) maintain the status quo (e.g., to cease further infringements); 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 to remove its assets. As a rule, it is next to impossible to obtain payment through an interim injunction.

### 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. Ever since 2005, the GWB has provided several incentives for claimants, including, for example, the rules that: (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 Eighth Amendment of the GWB, which came into force on 30 June 2013, extended the options for 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 damages claims is on the rise. German courts have repeatedly demonstrated their willingness to follow the legislator's intention to strengthen the position of aggrieved parties, and have issued several judgments in favor of claimants, mostly based on an assessment of damages pursuant to section 287 ZPO.

In June 2011, the Federal Court of Justice issued its first main decision on the calculation of damages in private competition litigation, which fleshed out the legal concept of "set-off of benefits" in the context of cartel damage claims. This decision is rightfully considered a landmark case, which provides important guidance for future competition litigation in Germany, especially concerning the passing-on defense. Also considering the decisions on access to files and records (including leniency applications) of public authorities, it is safe to say that the legal framework for competition litigation in Germany is increasingly taking shape.

With the Ninth Amendment of the GWB, the German legislator, in accordance with European law, has further strengthened claimants' position in private competition litigation as claims for pre-trial discoveries were introduced, presumptions in claimants' favor were implemented and the limitation period was extended.

Over the years, some German regional courts have gained particular experience with handling competition cases, such as Düsseldorf, Hannover and Mannheim. Parties who can choose their forum increasingly prefer to have their cases heard at these courts.

## Hong Kong

Stephen Crosswell, Tom Jenkins, Yvette Yu and Donald Pan

### 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 cross-sector competition regime came into force on 14 December 2015. The Hong Kong Competition Ordinance ("CO") prohibits agreements, arrangements or concerted practice that have the object or effect of harming competition ("**First Conduct Rule**"), and abuses of substantial market power ("**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.<sup>1</sup>

Two enforcement authorities were created under the CO: the Hong Kong Competition Commission ("**HKCC**") and the Hong Kong Competition Tribunal ("**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.

##### (a) *Stand-alone actions*

Under the CO, there are no stand-alone rights of action.<sup>2</sup> This was expressly confirmed by the Court of First Instance in *Loyal Profit*.<sup>3</sup> A defendant in a civil action may invoke competition law as a defense to a claim, e.g., for breach of contract. In May 2018, the Court of First Instance referred an allegation raised by Meyer Aluminium Limited that two of its suppliers of industrial diesel, Shell and Taching, had engaged price fixing in breach of the First Conduct Rule to the Competition Tribunal. Shell and Taching had both separately sued Meyer for breach of contract, with Meyer raising a competition law defense in both cases. On 12 September 2018, the Competition Tribunal decided that both cases should be listed and heard together.<sup>4</sup> This case is currently in the pre-trial phase.

##### (b) *Follow-on actions*

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.<sup>5</sup> 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).

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<sup>1</sup> CO, section 8 and section 23.

<sup>2</sup> CO, section 108.

<sup>3</sup> *Loyal Profit International Development Ltd v. Travel Industry Council of Hong Kong* [2016] HCMP 256/2016.

<sup>4</sup> *Taching Petroleum Co Ltd v. Meyer Aluminium Ltd* [2018] HKCT 4

<sup>5</sup> CO, section 110.

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 Competition 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 Competition 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.<sup>6</sup>

A right of follow-on action is not available for a 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 after the day on which the contravention ceased or the HKCC became aware of the contravention, whichever is later. For a 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 later.<sup>7</sup>

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.<sup>8</sup> 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 or not 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.<sup>9</sup> 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 on both 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 consisting of three judges.

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<sup>6</sup> CO, section 110(3).

<sup>7</sup> CO, section 94.

<sup>8</sup> CO, section 111.

<sup>9</sup> CO, section 134.

Typically, when hearing an appeal, the Court of Final Appeal is composed of a bench of five: 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 their 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:<sup>10</sup>

- (i) the proceedings concern common questions of law or fact;
- (ii) the relief sought is in respect of, or arises out of, the same act or a series of acts;
- (iii) the relief is 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 sees 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.<sup>11</sup>

In addition, the Competition Tribunal may, on the application of a person, permit the person or another person to join in the proceedings, in addition to, or in substitution of, any party to the proceedings.<sup>12</sup>

## 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. Both first instance judgments in the first two enforcement cases, which were handed down on 17 May 2019, address the burden of proof.

The Tribunal has found that to the extent that the HKCC brings an action alleging contravention of the Competition Ordinance, and seeks a pecuniary penalty, it will need to prove its case to the criminal standard, i.e., beyond reasonable doubt.<sup>13</sup> Where a respondent asserts that a particular agreement, although *prima facie* anticompetitive, should benefit from an efficiency exemption, the Tribunal has found that the respondent

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<sup>10</sup> Competition Tribunal Rules, Rule 9.

<sup>11</sup> Competition Tribunal Rules, Rule 9.

<sup>12</sup> Competition Tribunal Rules, Rule 22.

<sup>13</sup> *Competition Commission v. Nutanix Hong Kong Limited & Others* [2019] HKCT 2 (Part C).

bears the burden of establishing that the relevant criteria are met to a civil standard (i.e., balance of probabilities).<sup>14</sup>

The Tribunal has yet to consider the applicable standard of proof: (i) in enforcement cases, where the HKCC does not seek a pecuniary penalty; or (ii) in follow-on actions brought subsequently by private claimants.

In the case of follow-on actions, the civil standard is likely to apply, though it remains untested.

The CO provides no evidential presumptions in relation to damages 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 if and how 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.<sup>15</sup> Therefore, in such proceedings, 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.

In cases where a pecuniary penalty is sought, the Competition Tribunal is bound by the existing rules of evidence. Neither of the two judgments in the first two enforcement cases squarely addresses the rules of evidence that should be applied in a case where penalties are sought, for example as to whether the criminal rules of evidence (including as to hearsay) apply.

### Privilege

The generally applicable rules governing privilege in Hong Kong apply in competition cases.<sup>16</sup>

#### 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

Privilege against self-incrimination may be claimed. In the context of the HKCC's investigative powers however, the privilege against self-incrimination is abrogated by the CO to the extent that a person or company is not excused from giving any explanation or further particulars about a document, or from

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<sup>14</sup> *Competition Commission v. W. Hing Construction Co Ltd And Others* [2019] HKCT 3 (paras 156-204).

<sup>15</sup> CO, section 147.

<sup>16</sup> CO, section 58.

answering any question from the HKCC, on the grounds that to do so might expose that person or company to proceedings in which the HKCC seeks a pecuniary or financial penalty or criminal proceedings.<sup>17</sup>

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. The relevant provision in the CO has been narrowly interpreted by the Competition Tribunal to mean that any incriminating statement made by an employee in his/her personal capacity, while inadmissible against the employee, can nonetheless be used against his/her employer in proceedings where a pecuniary penalty is sought.<sup>18</sup>

### 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 by a HKCC member or employee is a criminal offense under the CO, punishable by a maximum fine of HKD 1 million and up to six months' imprisonment.<sup>19</sup>

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.<sup>20</sup> The process for making confidentiality claims is set out in Practice Direction 2 to the Competition Tribunal Rules.<sup>21</sup> 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 sees 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.

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<sup>17</sup> CO, section 45.

<sup>18</sup> *Competition Commission v. Nutanix Hong Kong Limited & Ors* [2017] 5 HKLRD 712.

<sup>19</sup> CO, section 125.

<sup>20</sup> Competition Tribunal Rules, Rule 37.

<sup>21</sup> <http://legalref.judiciary.gov.hk/doc/npd/eng/CTPD2.htm>.

## 8. Discovery and inspection of documents

There is no automatic right to discovery in proceedings before the Competition Tribunal, including in follow-on actions.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> The Competition Tribunal may decide on such applications with or without a hearing. Where the CO and the Competition Tribunal Rules make no provisions, the Rules of the High Court apply.

The Competition Tribunal has held that the HKCC has a broad duty of disclosure in proceedings brought by the HKCC for a determination of infringement and pecuniary penalties under the CO.<sup>25</sup> This means that the HKCC is required to disclose all relevant used and unused materials to the respondents.

## 9. Average length of time from issue of claim to judgment in Hong Kong

The CO only came into force on 14 December 2015. To date, there are six cases currently in the Competition Tribunal:

- (i) *Competition Commission v. Nutanix Hong Kong Limited & Ors* (CTEA 1/2017) - suspected bid rigging in the supply of a hyperconverged infrastructure system. This case was heard in June and July 2018, with closing submissions in September 2018. The judgment was handed down on 17 May 2019, where three of the four respondents were found to have infringed the CO. The decision is on appeal.
- (ii) *Competition Commission v. W Hing Construction Company Limited & Ors* (CTEA 2/2017) - suspected market sharing and price fixing in the provision of decoration works involving three blocks at a public housing estate in the Kwun Tong district. This case was heard in November and December of 2018. The judgment was handed down on 17 May 2019, where all ten respondents were found to have infringed the CO. One of the respondents has lodged an appeal. A hearing on penalties took place on 14 January 2020, with no decision on penalties as at the date of writing.
- (iii) *Competition Commission v. Kam Kwong Engineering Company Limited, Goldfield N&W Construction Company Limited, Pacific View Engineering Limited, Chan Kam Shui and Lam Po Wong* (CTEA 1/2018) - suspected price fixing and market sharing concerning the renovation of flats in a subsidized housing estate in Kowloon, Hong Kong. This is the first time the HKCC has brought an enforcement action against individuals who were involved in the alleged conduct.
- (iv) *Taching Petroleum Company Limited v. Meyer Aluminium Limited* (CTA1/2018)<sup>26</sup> - this was the first case referred to the Competition Tribunal by the Hong Kong High Court in May 2018. Meyer Aluminium raised a competition defense in response to a non-payment of dues claim made by Taching Petroleum Company Limited, alleging that Taching had colluded in a price-fixing arrangement with Shell Hong Kong Limited.

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<sup>22</sup> *Competition Commission v. Nutanix Hong Kong Ltd* [2018] HKEC 2133.

<sup>23</sup> Competition Tribunal Rules, Rule 24.

<sup>24</sup> Competition Tribunal Rules, Rule 24.

<sup>25</sup> *Competition Commission v. Nutanix Hong Kong Limited & Ors* [2017] 3 HKLRD 584, following *Securities and Futures Commission v. Wong Yuen Yee* [2017] 1 HKLRD 788.

<sup>26</sup> Combined pre-trial proceedings with *Shell Hong Kong Limited v. Meyer Aluminium Limited* (CTA2/2018).



- (v) *Competition Commission v. Fungs E & M Engineering Company Limited, Yee Hing Metal Shop, Cheung Min trading as Accord Construction & Decoration Co, Hing Shing Construction Company, Luen Hop Decoration Engineering Company Limited, Dao Kee Construction Company Limited, Wong Wai Chuen, Wong Fu San and Cheung Yun Kam* (CTEA 1/2019) - suspected cartel conduct concerning the renovation of flats in a subsidized housing estate in Kowloon, Hong Kong.
- (vi) *Competition Commission v. Quantr Limited and Cheung Man Kit* (CTEA 1/2020) - suspected price fixing concerning a bidding exercise organised by Ocean Park for the procurement of IT services. This is the first time the HKCC has made use of its powers under section 67(2) of the CO to issue an infringement notice, a remedial power the HKCC may use in the alternative to taking proceedings in the Competition Tribunal.

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. By way of example, the proceedings in CTEA 1/2017 were commenced in March 2017 with the filing of an Originating Notice of Application and the trial started in June 2018. The trial took 13 days. The proceedings in CTEA 2/2017 were commenced in August 2017, with a trial starting in November 2018 and lasting 17 days.

## 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 similar jurisdictions, such as London.

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 usually ordered to pay the costs of the successful party. "Costs" include the fees and expenses a party is obliged to pay his/her own lawyers and experts. The amount allowed is usually assessed on a "party-party basis," i.e., 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 of 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 claim;
- (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.<sup>27</sup> 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 gives 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.<sup>28</sup> 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.

### 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.<sup>29</sup>

Persons 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, considering: (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. In recent prosecutions, the HKCC has sought pecuniary penalties as well as director disqualification orders against individual employees in CTEA 1/2018, CTEA 1/2019 and CTEA 1/2020.

Individuals who fail to comply with a requirement or prohibition imposed by the HKCC may be subject to a fine of up to HKD 200,000 and imprisonment for up to one year. Individuals who obstruct an investigation may be subject to a fine of up to HKD 1 million and imprisonment for up to two years.

In addition, the CO gives the Competition Tribunal the power to institute a wide range of other orders for contravening the CO. This includes<sup>30</sup> 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

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<sup>27</sup> CO, Schedule 3, section 1(k).

<sup>28</sup> CO, section 95.

<sup>29</sup> CO, sections 101-103.

<sup>30</sup> CO, schedule 3.

specified goods, facilities or services; an order prohibiting or requiring the disposition of any specified property; an order prohibiting a person from exercising voting rights; or an order requiring any person to make a payment to the government or to any other specified person if the Tribunal considers it appropriate.

## D. Emerging trends

Since the appointment of Brent Snyder (a former US Department of Justice official) as its CEO in 2017, HKCC officials have consistently stressed the importance of installing deterrence against anti-competitive conduct at the individual level. Since 2018, the HKCC has actively targeted individuals. In the most recent three prosecutions<sup>31</sup>, the HKCC has sought pecuniary penalties as well as director disqualification orders against individual employees. Notably in CTEA 1/2019, the HKCC sought to disqualify a director who was not involved in the alleged contravention, but who allegedly took no steps to prevent it from taking place. We expect that the HKCC will continue to prosecute individuals wherever possible in the foreseeable future.

In CTEA 1/2020, the HKCC issued an infringement notice offering not to bring court proceedings against a party on the condition that the party makes a commitment to comply with the requirements of the notice. This is the first time the HKCC has made use of an infringement notice remedy. In contrast, the HKCC decided to bring court proceedings against another party in this case after it rejected the offer of an infringement notice.

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<sup>31</sup> *Competition Commission v. Kam Kwong Engineering Company Limited and others* (CTEA 1/2018); *Competition Commission v. Fungs E & M Engineering Company Limited and others* (CTEA 1/2019); and *Competition Commission v. Quantr Limited and Cheung Man Kit* (CTEA 1/2020).

# Hungary

Zoltán Barakonyi, András Horváth and Marton Horanyi

## 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 Act LVII of 1996 on the prohibition of unfair market practices and the restriction of competition (“HCA”)<sup>1</sup> Private enforcement actions can be brought pursuant to Act V of 2013 on the Civil Code (CC)<sup>2</sup> and Act CXXX of 2016 on the Civil Procedure Code (CPC) and the special rules contained in the HCA.

Private enforcement actions must be brought in the civil courts. Actions for damages on the basis of a breach of competition law are heard by the regional court.

A prior finding of an infringement is not a precondition to bringing a claim for damages. However, section 88/B of 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.

The Hungarian rules reflect the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

### 2. Applicable limitation periods

According to section 6:22 of the CC, the limitation period for damages claims is five years.

Section 88/T of the HCA sets forth that the limitation period starts after the infringement of competition law has ceased, and the claimant becomes (or, with reasonable care, could have become) aware of the infringement, the harm caused and the identity of the infringer. If the Competition Office, the European Commission or the national competition authority of any other EU Member State (“NCA”) opens a proceeding related to the infringement, the limitation period will be suspended until one year after the final and binding decision of the competition authority. If the parties engage in alternative dispute resolution (ADR) regarding the damages claim, the limitation period will be suspended until the end of the ADR process in respect to the undertakings involved.

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<sup>1</sup> Chapter IV contains the prohibition of agreements restricting competition equivalent to Article 101 TFEU, while Chapter V contains the prohibition of abuse of a dominant position equivalent to Article 102 TFEU.

<sup>2</sup> The CPC will enter into force on 1 January 2018 and will replace Act III of 1952 on the Civil Procedure Code. The rules of the CPC are applicable to cases commenced after its entry into force.

### 3. Appeals

According to section 88/A (3) of the HCA, the regional courts have exclusive competence for claims of damages caused by a competition law infringement.

Decisions of regional courts in Hungary are subject to appeal on the basis of fact and of law. 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 regional court 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 court of appeal. Otherwise, the regional court of appeal may reach a decision on the merits of the case.

The legal remedy available against final and binding judgments of the regional courts of appeal is extraordinary judicial review. This is only available for errors of law. Extraordinary judicial review cases are heard exclusively by the Curia (the Supreme Court of Hungary). A retrial is also possible in limited cases.

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

Class actions are not available in Hungary. However, some types of collective action are available, which may result in an award of damages caused by a competition law infringement.

According to the CPC, two or more claimants may commence a joint action if:

- (i) the subject matter of the claim is a joint right or joint obligation that can only be judged in one procedure (section 36 of the CPC); or
- (ii) the judgment would affect the joint claimants irrespective of whether they participate in the litigation, the claims are based on the same legal relationship, or the claims have similar legal and factual bases and the same court has jurisdiction over all of the defendants (section 37 of the CPC).

According to section 583 of the CPC, opt-in collective action is available in Hungary if at least 10 claimants have claims with similar legal and factual bases against the same defendant and the court allows the collective action. However, opt-in collective actions are only available in the case of employment disputes, claims based on damages caused by environmental pollution and claims based on consumer contracts. Thus, opt-in collective actions are likely to be possible only in very few cases of damages caused by a competition law infringement (e.g., abuse of dominance of an undertaking having a consumer contract portfolio).

Representative actions are available in Hungary. The HCA sets forth the substantive rules of the representative action of the Competition Office, while the CPC sets forth the procedural rules.

According to section 85/A of the HCA, where an infringement falling within the competence of the Competition Office caused harm to a large number of consumers, the Competition Office 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 (i.e., follow-on action). The court suspends litigation at the request of the Competition Office. The objective deadline for the claim is three years following the infringement, but the deadline only commences after the infringement has ceased and the duration of the investigation shall also 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"). The court can decide either to require the defendant to pay damages to all harmed consumers, if the amount of damages can be clearly determined, or to establish unlawfulness

regarding all harmed consumers, in which case the consumers are only required to prove causation and loss in their own actions. If the court requires the defendant to pay damages, and the defendant fails to comply voluntarily, each consumer may enforce the judgment against the defendant. The court can empower the Competition Office to publish the judgment in a national daily newspaper or otherwise.

According to section 571 of the CPC, representative actions are available to all entities authorized by an act of parliament to bring actions for the protection of public interest. Currently, the only authorization with respect to damages caused by a competition law infringement is the authorization of the Competition Office by the HCA mentioned above. However, it is not excluded that further authorizations will be provided by acts of parliament (e.g., for associations). According to the CPC, the individuals concerned are not considered to be parties to the litigation (they may not intervene either). The statement of claim must specify the individuals concerned and how individuals concerned can prove their status. If the represented group is not homogenous or a way of proving the individuals states cannot be determined (i.e., the "class" cannot be certified), the court dismisses the representative action. The judgment adopted in the case of a representative action must also determine which individuals are covered and how individuals concerned can prove that they are covered. Subsequent individual claims cannot be enforced if the defendant has informed the individual about the judgment adopted regarding the representative action within 30 days after publication and the individual has not reserved the right to enforce claims separately within 60 days after the defendant's notice. The public interest litigation interrupts the limitation period. If the action is dismissed, the limitation period is considered to be suspended for the duration of public interest litigation with respect to individual claimants.

To date, no damages in relation to an infringement of competition law have been awarded based on representative action.

Finally, it is also possible under Hungarian law 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**

Claimants seeking damages are required to prove, under the general rules of Hungarian civil law, the existence of an infringement, causation and 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.

According to section 88/B (9) of the HCA, the claimant bears the burden of proof regarding the facts supporting the claim that the defendant infringed the prohibition of agreements restricting competition or the prohibition of abuse of a dominant position. The defendant bears the burden of proof regarding the facts supporting the claim that the agreement falls under the de minimis exception (section 13 of the HCA), under block exemption (government regulation issued on the basis of section 16 of the HCA) or under individual exemption (section 17 of the HCA). The court can decide that, due to cumulative effects of similar agreements on the same relevant market, the de minimis exception or the block exemption is not applicable.

According to section 88/R of the HCA, where a prior decision of the Competition Office or the European Commission has already established an infringement of competition law and the decision was not challenged in judicial review, or was confirmed in judicial review, the court hearing the follow-on action is bound by the part of the decision establishing the infringement. Where a prior decision of an NCA has already established an infringement of competition law and the decision was not challenged in judicial review, or was confirmed in judicial review, the court hearing the follow-on action must regard the competition law infringement

established in the decision as a fact. Thus, in a follow-on action for damages, the claimant is only required to prove causation and loss.

## 6. Joint and several liability of cartel participants

According to section 6:524 of the CC, in the case of a collective infringement, the damaging parties bear joint and several liability. As cartels are collective infringements, members of the cartel are jointly and severally liable for damages caused. This means that a claimant may file an action against any and all members of the cartel for all damages caused by the infringement. Typically, claimants would file a single action against all members of the cartel. 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 defendant 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 in the infringement. If even this cannot be established, liability is shared equally among the defendants. There is no precedent in Hungary as to how the issue of contribution might be approached in the context of an antitrust damages case.

As set forth in the HCA, two exceptions apply to joint and several liability in the case of an infringement of competition law: small and medium-sized enterprises and leniency applicants are only liable toward their own direct and indirect purchasers and suppliers. According to section 88/H of the HCA, the exception regarding SMEs is only applicable if (i) the SME's market share was below 5% during the infringement, (ii) joint and several liability would jeopardize the SME's economic viability, and (iii) the SME was neither a cartel leader nor a recidivist. According to section 88/I of the HCA, the exception regarding leniency applicants is only applicable if the leniency applicant receives full immunity from either the European Commission, the Competition Office or an NCA. Neither exception applies, if full compensation cannot be achieved without joint and several liability.

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

According to section 263 of the CPC, the court is not bound by formal rules of proof, it can freely use the statements of the parties and all other evidence that is capable of proving the facts. The CPC mentions the following types of evidence: witness testimony, expert opinion, documentary evidence and inspection. However, any other evidence can be accepted that is capable of proving significant facts, unless it is contrary to public order.

With respect to documentary evidence, a limited disclosure regime applies to damages actions in the case of competition law infringements. According to section 88/J of the HCA, either party may request the court to order the other party to produce specific documents, evidence or data, or categories thereof, if it is not available to the requesting party, but it can prove significant facts or circumstances. The court has to assess the proportionality of the request, including the evidence already available to the requesting party and the volume and scope of the requested evidence. Confidential information may also be made available, even without the consent of the party. However, in this case, access is limited: no copies or notes can be made and the evidence can only be used in the antitrust damages litigation. Documents falling under legal privilege, leniency statements and settlement submissions as well as all information on the basis of which inferences can be drawn about the content of the leniency statement or the settlement submission are exempt from disclosure.

According to section 88/O of the HCA, the parties may also request the court to order the Competition Office, the European Commission or an NCA to produce evidence, which the requesting party cannot expect to obtain from any other source.

Section 88/Q of the HCA sets out clear sanctions in case a party violates the above-mentioned special evidence rules. The court may impose a fine of up to HUF 50 million (approximately EUR 160,000) in the case of a failure to comply with the rules of disclosure. In addition, the court is also entitled to consider the fact, which is allegedly supported by the requested evidence, as true.

The CPC eases rules of proof further. According to section 265 of the CPC, the court is entitled to consider the alleged fact as true if (i) the necessary evidence is being held by the other party, and the requesting party made the necessary efforts to obtain such evidence, (ii) the requesting party cannot prove the alleged facts, but the other party can be expected to rebut the alleged facts, or (iii) the other party hindered proof. There is no precedent in Hungary as to how the disclosure rules of the HCA and the rules of proof of the CPC are applied in conjunction.

## 8. Pre-action disclosure

There is no pre-action disclosure provided for in the HCA for damages caused by a competition law infringement.

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

On average, it takes two to five years to obtain judgment in first instance proceedings in damages claims based on competition law infringements. The duration of the proceedings varies due to the complexity of the case.

The CPC introduced new procedural rules that are expected to accelerate civil lawsuits in Hungary, and this may affect damages claims based on competition law infringements too.

## 10. Average cost from issue of claim to judgment in Hungary

The duty charged to commence civil proceedings is 6% of the value of the claim, subject to a statutory maximum of HUF 1.5 million (approximately EUR 4,800).

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, Hungarian courts, in light of recent court practice, tend to award higher lawyers' fees in relation to actions between business entities.

## 11. Alternative methods of dispute resolution

According to section 78 (10) of the HCA, the Competition Office, when determining the amount of the fine, may impose a lower fine on the infringing undertaking if it paid compensation of damages on the basis of an agreement achieved as a result of ADR (i.e., out-of-court settlement) before the Competition Office's decision.

In addition, as set out in section 88/F of the HCA, if the injured party reaches an out-of-court settlement with an infringing undertaking, the injured party can only enforce the remaining claims against other infringing undertakings not being a party to the out-of-court settlement. At the same time, the infringing



undertakings not being a party to the out-of-court settlement have no contribution right to recover any compensation from the infringing undertaking concluding the out-of-court settlement. The part of the claim against the infringing undertaking concluding the out-of-court settlement shall be deducted from the total amount of the compensation claim (i.e., it is not the amount paid based on the out-of-court settlement that shall be deducted).

Furthermore, as set out in section 88/C (5) of the HCA, in case an ADR process is ongoing, the court suspends its proceedings at the joint request of the parties until the conclusion of the ADR process, but not longer than two years.

## C. Relief

### 12. Availability of damages and quantification

In civil proceedings based on an infringement 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 infringement had not been committed (i.e., *restitutio in integrum*).

Claimants may seek to recover full damages, including interest. According to section 6:522 of the CC, all pecuniary damage (actual damage, loss of profit and costs incurred in connection with reducing or diminishing the damage caused) suffered by the claimant is recoverable. Any fines imposed by the competition authorities are generally not taken into account when calculating the level of damages. However, the financial gains of the injured party from the competition law infringement must be deducted from the damages claim (see below the special rules of the HCA on the "passing-on defense").

Private enforcement of domestic or EU competition law is not yet an established practice in Hungary. The appropriate method of quantifying damages is, therefore, uncertain. In the only case where damages have been awarded, the court decided to award general lump sum damages, stating that, notwithstanding the evidence available on the amount of damages, the exact amount of damages could not be determined.<sup>3</sup> This was based on the rule set out in section 6:531 of the CC, according to which, if the exact amount of damages cannot be calculated, the court shall award damages that are capable of compensating the injured party. As set forth in section 279 (3) of the CPC, the court shall do this by taking into consideration all circumstances of the case.

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, a rebuttable presumption applies. According to section 88/G (6) of the HCA, in cases involving hard-core cartels, the infringement will be assumed to result in an overcharge of 10%. As a result, it is likely that, in practice, a claimant will only need to prove causation. It will then be up to the defendants to prove that either the amount of the damage was less than 10% or the claimant did not suffer any damage at all (e.g., by invoking the passing-on defense).

The Hungarian courts would consider the question of passing-on when assessing whether there is causation and/or damage. As set out in section 88/G (3) of the HCA, the court must presume that passing-on occurred if the indirect purchaser proves the infringement, the overcharge and that it purchased the products

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<sup>3</sup> Judgment of the Győr Regional Court of Appeal dated 3 July 2014 in case Pf.V.20.047/2014.

affected by the infringement. 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.<sup>4</sup>

According to section 88/S of the HCA, the court can request the Competition Office to communicate its position regarding the occurrence of damages, the amount of damages and causation. The Competition Office is not obligated to comply with the request and the court is not bound by the Competition Office's position. Since its introduction (2017), there have been only two cases, where the court requested such a position from the Competition Office, however, no final and binding judgment has been published in these cases.

### 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

Interim injunctions are available in Hungarian civil proceedings. According to section 103 of the CPC, claimants can obtain an interim injunction if: (i) it is necessary to maintain the status quo, which could not be restored later; (ii) it is necessary to prevent hindrance to the claimant's exercise of rights; (iii) it is necessary to prevent the occurrence of imminent harm to the claimant; or (iv) it is justified by other special circumstances. 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 the case of damages caused by a competition law infringement.

Hungarian courts have the power to grant final remedies to protect the claimant against imminent loss. According to section 6:523 of the CC, in the case of imminent danger of damage, courts may: (i) issue a cease-and-desist order; (ii) order the defendant to take any action necessary to prevent damages; and (iii) require the defendant to provide security.

### 15. What other types of relief might be available to claimants in Hungary?

Claimants may bring claims for outcomes other than the award 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; and/or
- (iii) provide security for any future damage.

Additionally, according to section 6:72 of the CC, if a dominant undertaking refuses to conclude an agreement and thereby commits an abuse, the other party may request the courts to create the agreement.

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 agreement effective and either amend the agreement to eliminate the cause of invalidity, or consider the cause of invalidity as a breach of contract.

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<sup>4</sup> Judgment of the Metropolitan Regional Court of Appeal dated 18 April 2013 in case 14.Gf.40.057/2013.

## D. Emerging trends

In Hungary, there has been a steady number of damages cases: since 2006, the Competition Office was notified by the courts about 47 court proceedings (most cases were commenced in 2012 and 2013).

To date, there has been only one case where damages have been awarded: the court awarded HUF 3 million (approximately EUR 9,600) to a taxi driver barred from the local taxi stations by the rules of a local industry association.<sup>5</sup> The case before the Competition Office was closed without the finding of an infringement due to the commitment of the industry association to amend its rules.<sup>6</sup>

Furthermore, there are several other high profile cases pending final determination.

A pending case even reached the Court of Justice of the European Union (CJEU). A freight company claimed damages based on the European Commission's decision in the trucks cartel<sup>7</sup> and the regional court of appeal adjudicating the case requested a preliminary ruling. The subject of the request was the interpretation of the definition of "*the place where the harmful event occurred*" set out in Article 7(2) of the Recast Brussels I Regulation.<sup>8</sup> The question was if damages claims can be brought in Hungary based on this rule, if the defendant is not domiciled in Hungary, none of the cartel meetings took place in Hungary and the European Commission established the infringement for the entire EEA. It must be noted that the claimant domiciled in Hungary did not outright purchase the affected products, but leased them first in the framework of financial leasing. Also, the claimant was not in a contractual relationship with the defendant: on the one hand, the claimant did not lease a truck manufactured by the defendant; on the other hand, the claimant did not lease the trucks from the other cartelists, but from their Hungarian dealers. The CJEU in its judgment<sup>9</sup> confirmed that claims can be brought in affected markets, i.e., where the prices distorted by the cartel were applied and that claims can be directed against cartelists, who were not in a contractual relationship with the claimant. No final and binding judgment has been published in the underlying case.

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<sup>5</sup> See fn. 3 above.

<sup>6</sup> Decision of the Competition Office dated 6 September 2007 in case Vj-44/2007.

<sup>7</sup> Commission Decision of 19 July 2016 (Case AT.39824 – Trucks).

<sup>8</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>9</sup> Case C-451/18 – Tibor Trans, judgment of 29 July 2019, ECLI:EU:C:2019:635.

# India

Naval Satarawala Chopra and Rohan Arora, Shardul Amarchand Mangaldas & Co.

## A. Availability of civil claims

### 1. Scope of civil claims in India

Under section 53N of the Competition Act, 2002 ("**Act**"), the National Company Law Appellate Tribunal ("**NCLAT**") may award compensation to the Central Government, a State Government, a local authority, any enterprise or any person for any loss or damage shown to have been suffered as a result of an enterprise committing any contravention of the provisions of Chapter II of the Act prohibiting anti-competitive agreements and abuses of a dominant position as well as regulating mergers and acquisitions.

Such compensation claims may be made on the basis of findings by the Competition Commission of India ("**CCI**") or an order of the NCLAT in an appeal against such findings. Compensation claims may also be made where an enterprise has contravened other specified orders of the CCI or the NCLAT.

There is no provision under the Act for stand-alone private actions for damages. Civil claims in India relating to competition law are limited only to follow-on actions for compensation. The Act states that an application for compensation may be made only after the CCI or the NCLAT on appeal "has determined in a proceeding before it that violation of the provisions of the Act has taken place," or if the other provisions on contravention of CCI/NCLAT orders are attracted.

The provisions of the Act relating to anti-competitive agreements came into force only in 2009, and to merger control only in 2011. There are as yet no final orders by the NCLAT on any claim for compensation. A small number of claims have been made. However, the Supreme Court of India ("**Supreme Court**") has held that compensation applications can be heard by the NCLAT only after substantive appeals have been decided, which has delayed the actual hearing of claims.

### 2. Applicable limitation periods

There is no limitation period expressly set out in the Act for filing a compensation application. The general period of limitation of three years for monetary claims from the time when a violation of an Act is found provides some guidance as to what would be considered reasonable. Although there has been no finding in relation to the limitation period for compensation claims, NCLAT's predecessor, the Competition Appellate Tribunal ("**COMPAT**"),<sup>1</sup> recognized this three-year period in relation to making complaints to the CCI alleging a violation of the provisions of the Act.<sup>2</sup> This, however, is currently under review by the NCLAT and orders are expected shortly.<sup>3</sup>

### 3. Appeals

Under section 53T of the Act, appeals against any decision or order of the NCLAT (including decisions regarding compensation) are heard by the Supreme Court.

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<sup>1</sup> Under the Finance Act, 2017, the COMPAT was dissolved and the NCLAT assumed the powers of the COMPAT.

<sup>2</sup> *Nitin Radheshyam Agarwal v. Competition Commission of India*, Appeal No.108 of 2015.

<sup>3</sup> *Food Corporation of India v. Excel Crop Care Ltd.*, Compensation Application (AT) No.1 of 2019

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

Section 53N(4) 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 NCLAT, make an application to NCLAT for and on behalf of, or for the benefit of, the persons interested. In such cases, the relevant provisions of the Code of Civil Procedure 1908 shall apply.

### B. Conduct of proceedings and costs

#### 5. Burden of proof

The burden of proof lies on the claimant to show loss or damage suffered as a result of a violation of the relevant provisions of the Act.

The standard of proof for demonstrating such loss or damage is likely to be the civil standard of “on the balance of probabilities.”<sup>4</sup> In establishing a violation of the Competition Act itself, especially in cartel cases where the reliance upon circumstantial evidence is substantial, the CCI has recognized that there is rarely any direct evidence explicitly demonstrating anti-competitive conduct. Accordingly, the existence of anti-competitive conduct must be inferred from a number of co-incidences and indicia which, when taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an anti-competitive agreement, i.e. the CCI has to assess the evidence on the basis of benchmark of preponderance of probabilities.<sup>5</sup> It is likely that the NCLAT will apply the same standard in assessing the loss or damage suffered as a result of the anti-competitive conduct.

#### 6. Joint and several liability of cartel participants

The Act does not provide for joint and several liability of cartel participants.

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

Any person filing an application before the NCLAT to adjudicate on a claim under section 53N will have to produce evidence (documentary and otherwise) in support of the claim for compensation in order to prove 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 NCLAT.

There is no specific bar against investigation evidence, such as that collected by the Director General of Investigation (CCI). However, it should be noted that the enquiry of the NCLAT is limited to determining the eligibility and amount of compensation due to a claimant and not examining afresh the findings regarding a contravention of the Act.

If a particular document is not available with the claimant but is in the possession of the defendant or any third party, an application can be made to the NCLAT to seek an order for the disclosure of such document. The NCLAT has the same powers as a civil court under the Code of Civil Procedure 1908 in a range of matters, including requiring the discovery and production of documents.

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<sup>4</sup> To prove a fact by balance of probabilities is to prove one’s version better, even slightly, than the version of the other party. All the court needs to be convinced of is that though both the versions of fact are possible, one version is more likely than the other to be true.

<sup>5</sup> *Builders Association of India v. Cement Manufacturers’ Association and Ors.* Case No. 29 of 2010

However, no one can be compelled to disclose confidential communications between a legal professional and a client under section 129 of the Indian Evidence Act, 1872 ("**Evidence Act**"). Further, no lawyer can be compelled to disclose any communications made to him/her in the course of his/her engagement as a lawyer, or the legal advice given by him/her to a client; such communications and advice are legally privileged under section 126 of the Evidence Act.

## 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 time frame within which the NCLAT shall adjudicate and pass an order/decision in respect of a claim for compensation.

As seen above, the NCLAT has not adjudicated on any claim for compensation. Although a claim for compensation may be made once the CCI has made a finding of breach, all appeals, including any to the Supreme Court, must be decided before any claim can be heard by the NCLAT. The appellate process may take years. Once any appeals have been adjudicated, and a finding of contravention of the relevant provisions of the Act has finally been established, it may be assumed that the compensation application would be dealt with relatively quickly, as the contravention has already been established and all that remains to be addressed is the determination of the amount of compensation to be awarded to the claimant.

## 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 NCLAT are difficult to estimate, especially with varying solicitor charges and senior counsel charging anything from INR 100,000 to INR 2.2 million (USD 1,445 to USD 32,000) per hearing.

The Competition Appellate Tribunal (Form and Fee for filing an Appeal and Fee for filing Compensation Application) Rules 2009 prescribe the fees for filing applications under section 53N as INR 1,000 (approximately USD 14) for claims of less than INR 100,000 (approximately USD 1,400). For claims over INR 100,000, there are additional increments of INR 1,000 for every additional INR 100,000 of compensation claimed, subject to a maximum of INR 300,000 (approximately USD 4,300).

## 11. Third-party/alternative funding

The Act does not provide for third-party funding. However, the Supreme Court has held that third parties (non-lawyers) can fund litigation and be repaid after the outcome of the litigation.<sup>6</sup>

## 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, instead of making an application under section 53N, to explore alternative methods of claim resolution. Neither the CCI nor the NCLAT have any statutory powers to direct parties to use alternative methods of dispute resolution.

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<sup>6</sup> *Bar Council of India v. A.K. Balaji* (2018) 5 SCC 79.

## C. Relief

### 13. Availability of damages and quantification

"Compensation" is, under section 53N(3) of the Act, seen as the amount determined by the NCLAT 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. The NCLAT may obtain the recommendation of the CCI before passing an order of compensation.

General principles governing the law of damages will recognize circumstances that have reduced or negated the claimant's loss. Given the lack of jurisprudence, it is not known whether the NCLAT or the Supreme Court will accept a passing-on defence under Indian competition law.

### 14. Punitive and exemplary damages

The Act does not provide for 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 an act in contravention of Chapter II 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 act until the conclusion of such inquiry or until the issuance of further orders, without giving notice to such party, where it deems it necessary. Orders under section 33 may be appealed to the NCLAT.

In the *SAIL* case,<sup>7</sup> the Supreme Court of India set out the following conditions that need to be satisfied prior to interim relief being granted 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.
- (iii) From the record before the CCI, there is every likelihood that the applicant would suffer irreparable and irretrievable damage, 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 conduct permanently to discontinue and never repeat any infringing act ("cease-and-desist" order).

The NCLAT, after giving the parties the opportunity to be heard, can pass orders on receipt of an appeal as it sees fit, confirming, modifying or setting aside the order appealed against. This can include orders in respect of injunctions.

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<sup>7</sup> *Competition Commission of India v. Steel Authority of India Ltd.* (2010) 10 SCC 744.

## 16. Other types of relief

While the Act provides for various types of relief that can be granted by the CCI for contravening the provisions of Chapter II, it does not provide for any relief other than compensation in actions for private damages under section 53N of the Act.

### D. Emerging trends

Given the novelty of the compensation regime in India, there are no trends that currently emerge. We expect developments once matters are finally decided by the Supreme Court. Issues of maintainability are still under review and there is likely to be some clarity on these this year.



## Italy

Andrea Cicala 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.

Legislative Decree No. 3/2017 implemented the EU’s antitrust damages directive (Directive 2014/104/EU). The procedural provisions included in the decree (such as those concerning the courts’ order for disclosure — see below) apply to all actions for damages that were initiated after 26 December 2014, while the other provisions concerning the substance — for example, those concerning the statute of limitation period — apply only to the facts (i.e., misconduct) which occurred after the entry into force of the Decree.

For the purpose of an action for damages, an infringement of competition law ascertained by a decision of the Italian Competition Authority not subject to further appeal (Article 7 of Legislative Decree No. 3/2017) as well as a decision of the European Commission (Article 16 of Regulation 1/2003) constitutes evidence in court of the nature and of the personal, temporal and territorial extension of the infringement.

However, the burden of proving the damage suffered and the causal link between this and the unlawful conduct still lies with the claimant, cartel violations excepted. In fact, in the event of a cartel offense, the existence of damage to the direct buyer, generally in the form of overpricing of the goods subject to supplier collusion, is presumed. It is, therefore, up to the defendant to prove otherwise to escape liability.

The courts will also take into account findings of other national competition authorities when deciding a private competition enforcement case but are not bound to follow such decisions.

#### 2. Applicable limitation periods

Civil claims are generally based on tort. Tortious claims must be brought within five years of the relevant infringement occurring.

Limitation does not begin to run before the violation has ceased and the claimant has knowledge of: (i) the conduct and its unlawfulness; (ii) the fact that the conduct caused damages; and (iii) the identity of the infringer(s). Where the Italian and/or EU competition authority has started an investigation, the limitation period is in any case suspended until one year after the decision has become final.

The 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 conduct and its unlawfulness, the identity of the infringer and the 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.<sup>8</sup>

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

Based on Italian Decree No. 3/2017, claims for damages that are caused by the infringement of competition law must be filed exclusively before the Courts of Milan, Rome or Naples, where Specialized Sections for business litigation have been set up.

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 1 January 2010 (Article 49 of Law No. 99 of 23 July 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/her trade, business or profession) in relation to infringements committed from 15 August 2009 onward. The mechanism is "opt-in" so other consumers may elect to join a class action and thus 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 damages that are "homogeneous" throughout the group (the original text of the statute required actions brought in a group to be "identical," a more difficult standard to meet). Consumers who have bought goods relating to the same cartel (regardless of whether from the same cartel member) should be permitted to bring their claims as a class under these provisions.

On April 3, 2019 the Italian Parliament approved Law no. 31 of April 12, 2019 which was published in the Italian Official Gazette on April 18, 2019. The reform will constitute an entire new section of the Italian Code of Civil Procedure (ICCP), namely Articles 840*bis* ff. The new provisions should become effective in October 2020 and apply exclusively to unlawful conduct carried out after April 19, 2020. For all conduct occurred before that moment, the regime in Article 140*bis* of the Consumer Code shall continue to apply.

In line with the suggestions of the EU Commission, the law enacted by the Italian Parliament is aimed at increasing the application of the class action regime, which has been very limited so far.

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<sup>8</sup> In that respect, see Judgment No. 27527 of 10 December 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. (*The limitation period of antitrust damage claims in the light of the principles of legal certainty, equivalence and effectiveness in The private enforcement of competition laws*).

## B. Conduct of proceedings and costs

### 5. Burden of proof

In principle, claimants must prove the infringement or unlawful conduct, the amount of damages actually suffered and that the damages suffered were caused by that infringement or unlawful conduct. However, further to Decree 3/2017, some presumptions have been introduced to facilitate the plaintiffs.

Pursuant to Article 7(1) of Legislative Decree 3/2017, decisions adopted by the Italian competition authority, when no longer subject to appeal, constitute legal evidence for courts as to the nature and the scope of the infringement, while the burden of proving the damage suffered and the causal link with the unlawful conduct still lies with the claimant, with the exception described below in relation to cartel violation.

In fact, in the event of a cartel infringement, the existence of damage to the direct buyer, generally in the form of overpricing of the goods subject to supplier collusion, is presumed. It is, therefore, the responsibility of the defendant to prove otherwise.

The final decisions by the competition authority of other European Union Member States will be accepted as privileged evidence that an infringement has occurred<sup>9</sup> 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 damages. However, in practice, the courts may sometimes accept that the causal nexus is adequately proved based on common business experience and so 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 damages 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.

According to Article 12 of Legislative Decree 3/2017, if the complaint comes from an indirect buyer, confirmation that illegal conduct has taken place and that the direct buyer has been overcharged leads to a presumption that the damages are passed onto the indirect buyer. This is, however, relatively speaking, a presumption, the defendant being allowed to prove that there was no effective passing-on of the damage to the indirect buyer.

### 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 between defendants according to its assessment of their fault for the damage caused.

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<sup>9</sup> See the order of the Supreme Court No. 5327 of 4 March 2013, according to which, as the decision amounts to privileged evidence in favor of the damaged parties, the company responsible for the infringement is not allowed to ask the court for 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 in the administrative proceedings which gave rise to the decision.

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 in order to claim or to seek contribution from them.

Under certain conditions, the application of the abovementioned principles can be limited to the companies which applied for leniency programs and small companies (Article 9 of the decree). In particular, the immunity recipient is only liable to its direct or indirect purchasers or providers (except when the other injured parties may prove that they are unable to obtain full compensation from the other infringers, e.g., because all of them went bankrupt).

## 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 file 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 appoint its own expert in order to advise it on economic/accounting issues (the costs of said expert are to be paid, along with all other costs, by the losing party).

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, courts 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.

Legislative Decree 3/2017 enables courts to issue disclosure orders which may refer to "categories of evidence" and also involve the evidence gathered by the Italian competition authority and the European Commission during their proceedings. In particular, the decree differentiates between three categories of evidence: (i) evidence that can never be disclosed (e.g., leniency applications); (ii) evidence disclosable only after the conclusion of the competition authority or European Commission proceedings (e.g., written or oral information provided during the proceedings); and (iii) evidence disclosable before the conclusion of the Italian competition authority or European Commission proceedings (e.g., evidence which is not related to the first two categories). The abovementioned rules aim to overcome the usual information asymmetry in competition law infringements, where evidence is available to the party who is in breach of the law. If the defendant refuses to comply with the disclosure order, the court may impose administrative pecuniary sanctions and may presume the relevant issues at stake to be proven.

## 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. The 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 in 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 of the cost of defending a relatively straightforward claim to first instance judgment would be approximately EUR 100,000.

Courts 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 courts 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. Courts 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, courts 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/her 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 has not been developed, but we expect that such injunctions will rarely be granted.

### D. Emerging trends

The implementation in Italy of the 2014/104/EU Directive made by Legislative Decree No. 3/2017 is expected to substantially facilitate private enforcement cases, especially for follow-on actions.

The companies will be more exposed to claims for antitrust damages and will face claimants with a strengthened litigation position.

Consequently, the new legislation is likely to incentivize claimants to bring damages actions against antitrust infringements in Italy. The new scenario also needs to be read in the context of the Court of Cassation's Judgment No. 11564/2015, which significantly reduced the burden of proof on claimants to bring stand-alone actions for antitrust damages (i.e., actions brought in the absence of any decision by the antitrust authority). On that occasion, the Court held that local courts must order full disclosure by the defendant in case of evidence incompletely submitted by a plaintiff where there is a "plausible" indication of an antitrust infringement.

# Japan

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 14 April 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 (ie, 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 1 April 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 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 28 April 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 the system 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 share 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, has been implemented since 1 October 2016. Under the new system, only a "Certified Qualified Consumer Organization" (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.

It should be noted, however, that it is still unclear whether it will be possible to use 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) the 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 that is used by a public servant for an organizational purpose); or

- (v) documents concerning a suit pertaining to a criminal case or 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 15 May 1997*, 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. The average amounts of 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 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 either of 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 fines 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

## A. Availability of civil claims

### 1. Scope for civil claims in Mexico

Solely 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 specializing 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 on 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.

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 specializing in competition, broadcasting and telecommunications on a matter of law (e.g., violation of any fundamental constitutional rights of the parties).

Judgments of the 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 the 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 into 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 consisting of 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 a conflict of interests or a 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.

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.<sup>1</sup> 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

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<sup>1</sup> Cofece forms this opinion using all the information contained in the administrative file, which includes market information for the parties involved provided by the claimant or by the investigated undertakings.

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 between defendants may be possible.

## 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. In addition, once the administrative procedure has been 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 the production of such information prior to initiating an investigation formally.

Those legal privileged documents would not be accessible to claimant. The determination of the privileged nature of documents is made by Cofece under special rules issued by this authority.

## 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 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 damages 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 it 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.

Determining 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 in 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

In principle, punitive or exemplary damages are not available under Mexican law. There have been a couple of legal precedents — one of them stemming from a case solved by the Mexican Supreme Court of Justice — that seem to open the door for an indemnification similar to punitive damages in cases of personal injury.

At this point, it is difficult to predict whether these criteria would be expanded to breach of contract or other cases like breach of competition 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 infringement<sup>2</sup> 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.

#### 16. Other types of relief

Other types of relief are not available under Mexican law.

### D. Emerging trends

Civil damages claims following antitrust proceedings are now a reality in Mexico. The Mexican Public Health System (IMSS) has filed two claims against laboratories sanctioned for cartel conduct in the markets of human insulin and serums sold to IMSS. We anticipate an increase in damages claims in the near future.

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<sup>2</sup> 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.

# The Netherlands

Frank Kroes, Christiaan van der Meer and Sjef Janssen

## A. Availability of civil claims

### 1. Scope for civil claims in the Netherlands

Civil claims can be brought against any natural or legal person based on the infringement of Articles 101/102 TFEU and Articles 6 and 24 of the Dutch Competition Act. A civil claim is based on the Articles 6:162 (tort) and 6:193k - 193t of the Dutch Civil Code. 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. Claims may also be brought on a stand-alone basis. In practice, however, damages claims are usually brought only as follow-on litigation (that is: they are based on an authority's finding of infringement).

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. As such, it is not clear if they would be upheld or if an employee complicit in cartel activity would be prohibited from recovering from his employer.

New legislation implementing the EU Damages Directive came into force on 10 February 2017. The procedural provisions – inter alia on discovery – apply to proceedings commenced after 26 December 2014. In accordance with the Directive, the substantive provisions do not apply retroactively. This means that the new provisions with respect to liability and damages do not apply where the damage was suffered before 10 February 2017. Dutch courts have however taken the new provisions into consideration in cases based on the 'old' legislative basis. In *Tennet/ABB* the Supreme Court ruled that the new provisions should be taken into consideration based on the EU principles of equivalence and effectiveness.

### 2. Applicable limitation periods

The old rules with respect to the statute of limitations still apply where the limitation period has commenced prior to 10 February 2017. The old 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 becomes aware of the damage and the person liable for it (whichever is later). This does not need to be a certainty. Determinative is whether the claimant is in a position to bring a claim. This is strictly subjective, although the court will, of course, look at outwardly observable facts to determine whether such knowledge existed. The defendant will need to demonstrate facts that support that the claimant had actual knowledge of the damage and the person responsible or liable for them. This is the so-called "short" limitation period. The "short" limitation period is interrupted – after which a new limitation period of five years commences – by *inter alia* the start of proceedings or by written demand or notification that the damaged party preserves its rights with respect to the damages claim. There is also a "long" limitation period, which is 20 years from the date on which the damage was inflicted.

Under the new legislation, so where the limitation period has commenced after 10 February 2017, the "short" limitation period remains five years, but some other changes apply that may impact limitation issues. First, the "short" limitation period only commences once the infringement itself is finished, subject, second, to the further condition that the claimant was aware or should reasonably have been aware of the infringement, the damage and the person liable. The "long" period of 20 years still also applies, but does not commence

before the infringement is finished. The new legislation further introduced two new grounds for an extension of the limitation period. The first is an act of a Competition Authority with respect to an investigation or any other proceedings regarding an infringement of competition law. The duration of this extension is the time needed to issue a final infringement decision or another fashion to end the proceedings, plus one year. The other is an extrajudicial dispute resolution process. The grounds for this extension end when the mediation (or other means of extrajudicial dispute resolution) finishes, which is the case of one of the parties advises the other of the termination of the process or when nothing happens in it for six months or more.

As far as the old limitation rules are concerned (which are likely to apply for many years to come, if one looks at the time periods to which current infringement decisions have regard), awareness remains very much a subjective issue. In 2007, a court in Rotterdam found that on the date that the claimant filed a certain complaint with the competition authorities, he 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. The Arnhem-Leeuwarden Court of Appeals ruled in 2014 that a press release by the EC at the start of the investigation is insufficient for the limitation period to commence. In a more recent case (in 2017) a court in Amsterdam found that – in absence of the Decision itself – the press release at the date of the Decision or at least a summary of the Decision, may contain sufficient information for the limitation period to commence. In 2018 the Court of Rotterdam held, in a judgment relating to the bitumen cartel, that awareness of the involvement of another cartel member active on the same market as the claimant's direct seller, is insufficient for the limitation period to commence when the claimant is unaware of the involvement of its direct seller.

Claims for annulment of a contract based on competition law are subject to a limitation period of three years from the date on which this remedy became available to the claimant. This must arguably be understood to mean that the claimant is actually aware of the infringement of competition law.

### 3. Appeals

Decisions of a lower court are subject to appeal to one of the courts of appeal. This is an appeal *de novo*. This means that the appellant may appeal both on issues of fact and on issues of law. However, the appeal will, bar a few minor exceptions, be limited to the grounds of appeal that the appellant raises. If a Dutch court of appeal finds merit in one or more of the grounds of appeal of the appellant, it must re-decide the case in its entirety so as to form its own view on the outcome.

Decisions of the Court of Appeal may be appealed 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

New legislation that introduces a class action type of litigation for damages in the Netherlands came into force on 1 January 2020. The new class action legislation has both an opt-in as an opt-out regime. The collective action will apply to all persons belonging to a class who have their residency in the Netherlands, except where they decide to opt-out. On the other hand, non-Dutch residents belonging to such a class are allowed to opt-in and subsequently have their interests thereby represented in the collective action. The new class action legislation will not apply to proceedings that have been initiated prior to the introduction of the legislation and, if brought to Court on or after 1 January 2020, will only apply to cases based on

circumstances' that occurred from 15 November 2016 onwards. In practice the new class actions legislation will therefore presumably start to take precedence over the current regime within the next couple of years.

An alternative form of class action also already existed 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 the claims in that action are sufficiently protective of the interests of the "class"; 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. This so-called collective action is an opt-out system.

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, for example, claim compensation for the cost of an economic report establishing the amount of damages that results from anti-competitive behaviour.

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, especially where the claims are manifold and small. For these reasons, consumer claims for competition law infringements are few and far between. Most cases are, to date, based on an assignment model. This means that claims are assigned usually to a special purpose vehicle that brings the claims. Under the new class action legislation a claim for monetary damages may be brought in a collective action and this legislation is therefore expected to alter the class actions landscape in the Netherlands massively.

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, on a strictly voluntary basis, 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, among other things, 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

Under the old rules that apply to claims regarding damages incurred before 10 February 2017, the claimant bears the burden of proof in: (i) determining whether there has been an infringement; (ii) that the

infringement resulted in unlawful behaviour against the claimant; and (iii) 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 that the infringing behaviour was in fact unlawful to – e.g. had an effect on – the claimant, together with the causation and the loss.

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 an “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.

In a recent (February 2019) judgement by the Court of Appeal in Arnhem-Leeuwarden held that the requirements with regard to the obligation to furnish the facts also apply to a (professional) claimant who has purchased damages claims from customers of a cartel infringement and has bundled all those claims. Such a claimant must still demonstrate for each original customer that it had contracted with the cartel participants (during the cartel) and that those contracts have in fact been affected by the cartel. The Court of Amsterdam has recently (15 May 2019) stipulated that a litigation vehicle does in that regard not hold a special position from the perspective of Dutch procedural law, thereby also distinguishing the bundling of claims in an assignment model, which is common practice, from the collective action. The common practice of bundling individual claims may presumably change following the introduction of the ‘class action’ legislation.

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.

The new legislation introduces a rebuttable presumption that cartel infringements cause harm. The burden of proof is thereby shifted from the claimant to the defendant. The defendants must therefore demonstrate that the infringement has not caused any harm to the claimants. The Court of Amsterdam recently held that this does however not affect the claimants’ obligation to furnish the facts in relation to their claims. Claimants must still sufficiently substantiate each individual claim to ‘trigger’ the rebuttable presumption.

Actions can be brought in the Netherlands based on a finding of infringement by other national competition authorities. Decisions by other Member States’ competition authorities are to be treated as *prima facie* evidence. 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. Decisions by the ACM and the European Commission, that are no longer open to appeal, constitute irrefutable evidence of an infringement of competition law.

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.

## 6. Joint and several liability of cartel participants

Undertakings that have infringed competition law may be held jointly and severally liable for the damage resulting from that infringement. The extent of the joint and several liability of small and medium-sized

enterprises and immunity recipients may be limited to the damages incurred by the direct and indirect customers of those infringers.

Where infringers are jointly and severally liable for damages and one defendant pays more to the claimant than the part of the debt that is attributable to him, such defendant may seek contribution from the other infringers for the part of the original claim that concerned 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.

In cases where one of the infringers settles with the claimant, the original claim against the non-settling infringers is under the new legislation reduced by the settling party's share by operation of law (*ipso jure*). This was different under the pre-existing law, where this effect could be achieved only where provided for in the agreement between the settling parties.

## 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.

Under the new legislation for private damages actions, leniency documents may not be disclosed.

## 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 the production of 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 in the early stages of drafting that, if adopted, will broaden the scope of pre-action disclosure.

Under the new legislation for private damages actions, documents that contain statements with respect to reaching a potential settlement with the competition authority may not be disclosed, just as leniency documents cannot be discovered.

### 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. Cases for follow-on damages tend to take longer. 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 EUR 500,000 and EUR 1,000,000.

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, but in follow-on cases the recovery rate is likely to be substantially lower.

### 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. These rules do however not apply to third party funders.

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.

In the recently updated Claimcode 2019 – which is a soft law code of conduct for foundations and associations that pursue collective actions (or so called ‘interest groups’) – new conditions regarding third party funding are introduced. Even though this is a soft law instrument, the courts take the Claimcode into account when reviewing the legal position of the interest groups. These groups may now also ask for a reasonable surcharge to cover e.g. future collective actions and costs for the use of funds. It is up to the courts to review whether the surcharge is reasonable. Essential is that the funding conditions that apply to the relationship of an interest group and a third party funder may not conflict with the collective interest of the persons the interest group aims to protect.

### 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*.

In addition, next to the regular court proceedings the Netherlands has recently launched the Netherlands Commercial Court (the NCC). Parties may voluntarily opt to litigate before the NCC and such proceedings may be conducted in English. An additional benefit of proceedings before the NCC is that one of the aims is to reduce the lengths of proceedings where possible.

## 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* and the EU Damages Directive. 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.

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. Alternatively, if claimed, the court may set the damages at the amount of profit that the defendant gained from the infringement. Pursuant to Dutch law, the claimant must be fully compensated for its damages, but may not receive more than its actual damages.

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. The courts have the authority to estimate the damages if they cannot be assessed in a more precise way.

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 has been implemented into Dutch statutory law with the implementation of the EU Damages Directive. The defense was already accepted by the Supreme Court in *ABB/Tennet*, which decision will remain relevant for pre-Directive cases.

### 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. Now that new legislation regarding class actions came into force, we expect to see a further and significant rise in cartel follow-on actions before the Dutch courts.

There are currently a number of follow-on actions pending before the Dutch courts, including actions in relation to the airfreight cartel, the sodium chlorate cartel, the elevator cartel, the CRT cartel and the trucks 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 infringement decisions by the European Commission and/or national competition authorities.

The introduction of the Netherlands Commercial Court (the NCC), in early 2019, may also lead to more cases. The NCC allows for dispute resolution in English and may potentially reduce the length of the proceedings. We note that parties must agree to bring the case before the NCC, however once established that a Dutch court has jurisdiction a referral to the NCC may prove beneficial to all parties concerned.

# Philippines

Michael Macapagal and Camille Bianca Gatmaitan-Santos

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

### 1. Scope for private enforcement actions in the Philippines

In the Philippines, private enforcement actions are available under section 45 of the Philippine Competition Act (PCA). Section 45 allows any person who suffers direct injury by reason of any violation of the PCA to file a separate and independent civil action for damages — but after the Philippine Competition Commission (PCC) has completed its preliminary inquiry on the violation.

A preliminary inquiry can result in: (i) a resolution of closure, if the PCC finds that the PCA has not been violated; (ii) a resolution of closure without prejudice, if the PCC finds that the facts or information are insufficient to proceed, but without prejudice to another preliminary inquiry; or (iii) a resolution to proceed, if the PCC finds reasonable ground to conduct a full administrative investigation.<sup>1</sup> It has yet to be tested whether the section 45 civil action can be pursued in situation (ii).

Civil actions under section 45 are brought before the Regional Trial Courts<sup>2</sup> of the Philippines, under the Philippines' general procedural law (known as the Rules of Court).

### 2. Applicable limitation periods

The statute of limitations for section 45 civil actions is five years. The five-year period runs from the time the cause of action accrues.<sup>3</sup>

A cause of action accrues when an infringer's act or omission violates the right(s) of the claimant.

### 3. Appeals

The Rules of Court provide for appeal on grounds of fact, mixed law and fact, and law, from all final decisions of the Regional Trial Courts. If the appeal raises questions of fact or mixed law/fact, the appeal is taken to the Court of Appeals. The decision of the Court of Appeals may be appealed to the Supreme Court.

If the appeal is based solely on questions of law, the appeal is taken directly to the Supreme Court.

The Supreme Court's review, whether in appeals directly from the Regional Trial Court (on pure questions of law) or from the Court of Appeals (acting in its appellate jurisdiction), is discretionary. The appeal will proceed only if justified by special and important reasons, such as when the lower court has (i) decided a question of substance not decided before; (ii) decided a question of substance in a way not in accord with law or authority; or (iii) departed from the usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for the Supreme Court's exercise of its power of supervision.<sup>4</sup>

The duration of the appeal process varies depending on the nature of the appeal and the courts involved, but is typically 2-3 years.

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<sup>1</sup> PCA, section 31; PCC Rules of Procedure, Rule II, section 2.6.

<sup>2</sup> PCA, section 44.

<sup>3</sup> PCA, section 46.

<sup>4</sup> Rules of Court, Rule 45, section 6.

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

The Rules of Court allow class actions when the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties.<sup>5</sup> In a class action, a number of persons with common or general interest, which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned, may sue or defend for the benefit of all.<sup>6</sup>

To date, there have been no class actions filed in the Philippines involving violations of the PCA.

### B. Conduct of proceedings and costs

#### 5. Burden of proof

The burden of proof for section 45 civil actions is the civil burden — the claimant bears the burden of proving his/her case by a preponderance of evidence. Section 45 of the PCA implies that a claimant must show that there was an infringement of the applicable provisions of the PCA, and that he/she suffered actual loss as a result of the infringement.

In determining where the preponderance or superior weight of evidence on the issues involved lies, the court may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility as far as the same may legitimately appear in the trial. The court may also consider the number of witnesses, though the preponderance is not necessarily with the greater number.<sup>7</sup>

#### 6. Joint and several liability of cartel participants

There is no explicit provision in the PCA providing for joint and several liability among cartel participants.

However, depending on the circumstances, cartel participants may arguably be treated as joint tortfeasors. Under the Philippine Civil Code, the liability of joint tortfeasors is joint and several.<sup>8</sup> It is yet to be seen whether a Philippine court will treat, as tortious, causes of action arising from violations of the PCA.

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

Discovery is available in Regional Trial Court proceedings.<sup>9</sup> Discovery extends to material and relevant matters that are not privileged. This includes information on the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of relevant facts.

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<sup>5</sup> Rules of Court, Rule 3, section 12.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, Rule 133, section 1.

<sup>8</sup> Civil Code, Article 2194.

<sup>9</sup> Rules of Court, Rules 23 and 25-29.

Parties can also seek information and documents from third parties by requesting the court to issue subpoenas. A subpoena can be quashed if it is unreasonable or oppressive, or if the relevance of the documents is not shown. Privilege may be raised as justification to excuse compliance with a subpoena.

The PCA and the PCC Rules of Procedure provide for confidentiality of “business information” received during investigations before the PCC.<sup>10</sup> However, the PCC may disclose this confidential information “when disclosure is required by a valid order of a court of competent jurisdiction.” Thus, a Regional Trial Court hearing a section 45 civil action can, theoretically, require the disclosure of confidential business information.

## 8. Pre-action disclosure

Before an action is filed, depositions are available to a person who desires to perpetuate his/her own or another’s testimony.<sup>11</sup> It must be shown that the petitioner expects to be a party to an action, but is unable to bring it or cause it to be brought. The petitioner should describe the proposed testimony and his/her reasons for seeking to perpetuate it.

A court will grant the perpetuation of testimony if it may prevent a failure or delay of justice.

## 9. Average length of time from issue of claim to judgment in the Philippines

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, as well as interlocutory issues. Since competition law proceedings, by nature, tend to be complex, it will probably take a significant period of time to obtain a final judgment.

## 10. Average cost from issue of claim to judgment in the Philippines

Costs also vary greatly depending on the nature of the claim and the complexities of a particular case. Other facts that affect costs are: (i) the extent of discovery; (ii) the evidence required (including expert evidence); and (iii) the extent of interlocutory disputes.

That said, the cost of legal proceedings in the Philippines will probably range lower than the cost of similar proceedings in more mature competition law jurisdictions.

## 11. Third-party/alternative funding

There is no specific Philippine law that allows or disallows third-party/alternative funding for competition litigation in the Philippines.

Note that Philippine rules on legal ethics prohibit “champertous” agreements between lawyers and clients,<sup>12</sup> where the lawyer contracts with his client for part of the matter in litigation in exchange for conducting the case wholly at the lawyer’s expense. This is designed to prevent the lawyer from acquiring an “additional stake in the outcome of the action which might lead him to consider his own recovery rather than that of his client or to accept a settlement which might take care of his interest in the verdict to the sacrifice of that of his client in violation of his duty of undivided fidelity to his client’s cause.”<sup>13</sup> This should be distinguished from a contingent fee arrangement, where the client still pays for litigation expenses.

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<sup>10</sup> PCA, section 34; PCC Rules of Procedure, Rule XI.

<sup>11</sup> Rules of Court, Rule 24.

<sup>12</sup> *Nocom v. Camerino, et.al.*, G.R. No. 182984, 10 February 2009.

<sup>13</sup> *The Conjugal Partnership of the Spouses Vicente Cadavedo, et.al. v. Victorino Lacaya*, G.R. No. 173188, 15 January 2014.

## 12. Alternative methods of dispute resolution

Philippine law provides for several modes of alternative dispute resolution, including voluntary *ad hoc* or institutional mediation, and arbitration. Competition disputes can be the subject of mediation or arbitration (if the parties agree).<sup>14</sup>

A mandatory mediation procedure, consisting of mediation and judicial dispute resolution, is incorporated into civil actions in the Regional Trial Courts.<sup>15</sup>

## C. Relief

### 13. Availability of damages and quantification

The PCA does not set out specific guidelines on the quantification of damages. Thus, following the Philippine Civil Code:

- Compensatory damages are recoverable, and awarded based on “pecuniary loss suffered [as] duly proved;” they cover the value of the loss suffered, as well as lost profits.<sup>16</sup> Assuming that the claim can be framed and will be treated as a tort action, the infringer will be liable for all damages that are the “natural and probable consequences” of the act or omission complained of.
- Punitive damages should also be recoverable, as they are imposed “by way of correction for the public good.”<sup>17</sup>

In addition to damages, the claimant may recover attorneys’ fees and legal costs, though awards of these items are generally minimal.

### 14. Punitive and exemplary damages

See item 13.

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

Pursuant to the Rules of Court,<sup>18</sup> a court hearing a section 45 civil action may issue interim and final injunctive relief. For interim relief, the following essential requisites must be present:

- (a) the right of the complainant is clear and unmistakable;
- (b) the infringement of right sought to be protected is material and substantial; and
- (c) there is an urgent and paramount necessity for the injunction to prevent serious damage.<sup>19</sup>

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<sup>14</sup> Republic Act No. 9285, section 6.

<sup>15</sup> Administrative Matter No. 11-1-6-SC-PHILJA.

<sup>16</sup> Civil Code, Article 2199.

<sup>17</sup> Civil Code, Article 2229.

<sup>18</sup> Rules of Court, Rule 58.

<sup>19</sup> *Pedro Lukang v. Pagbilao Development Corporation*, G.R. No. 195374, 10 March 2014.

## 16. Other types of relief

Pursuant to the Rules of Court, a court hearing a section 45 civil action can theoretically issue other interim relief, such as (i) preliminary attachment and (ii) receivership, if warranted.<sup>20</sup>

With the adoption of the foregoing rules, the PCC has further ramped up its enforcement for violations of the PCA. Practitioners are thus looking forward to more administrative inquiries / enforcement actions by the PCC relating to anti-competitive agreem

## D. Emerging trends

Competition law enforcement, particularly private enforcement actions, is an emerging field of law in the Philippines. Practitioners certainly look forward to the first section 45 civil action, as it will clarify several outstanding procedural and substantive issues, among others as to the nature of the action (i.e., can it be based on tort?); the powers of the court vis-à-vis the PCC, particularly on the scope of disclosure; applicable defenses (such as passing-on); and available remedies and recoverable damages.

On 18 January 2019, the PCC's Rules of the Leniency Program (the "**Leniency Rules**") took effect. The Leniency Rules offer persons and entities that are former or current participants in cartels (i.e., horizontal arrangements involving price-fixing, bid-rigging, output restriction and market sharing) immunity from suit or reduction of administrative fines, in exchange for voluntary disclosure of information regarding the cartels. The Leniency Rules implement a "first to file" program, which may allow only one beneficiary of immunity from suit and one beneficiary of reduction of fines for each reported violation.

The Philippine Supreme Court also recently issued the "Rules on Administrative Search and Inspection under the Philippine Competition Act" (the "**Dawn Raid Rules**"), which took effect on 16 November 2019. The Dawn Raid Rules govern the procedure for the application, issuance, and enforcement of, inspection orders for administrative investigations of violations of the PCA. Under the Dawn Raid Rules, the PCC may apply to a court for an inspection order authorizing the search and inspection of business premises, land, and vehicles and to examine, copy, photograph, record, or print information relevant to an investigation (i.e., dawn raid). Refusal to comply with an inspection order may be considered contempt of court, which may result in the imposition of fines and the imprisonment of the responsible officer of the entity subject to the search.

With the adoption of the foregoing rules, the PCC has further ramped up its enforcement for violations of the PCA. Practitioners are thus looking forward to more administrative inquiries / enforcement actions by the PCC relating to anti-competitive agreements and abuse of dominance.

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<sup>20</sup> Rules of Court, Rules 57 and 59.

## Peru

Crosbby Buleje and Teresa Tovar

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

#### 1. Scope for private enforcement actions in Peru

In Peru, the antitrust regulation is established in the Law for the Repression of Anticompetitive Conduct ("**Law**"), approved by Legislative Decree 1034.

According to the Law, the competent authority to solve antitrust cases is the *Instituto de Defensa de la Competencia y de la Propiedad Intelectual* — INDECOPI. In the first instance, the office in charge is the Commission for the Defense of Free Competition ("**Commission**") and in the second instance, it is the Competition Tribunal.

Once INDECOPI has determined that an infringement was committed, private enforcement actions before the judiciary are available to any person who has suffered damages as a result of the anticompetitive conduct, even if he/she was not a party of the procedure before INDECOPI, and as long as he/she can prove a causal relationship regarding the conduct.

#### 2. Applicable limitation periods

According to Article 42 of the Law, administrative infringements prescribe five years after the last act of execution of the infringing conduct.

Regarding the statute of limitations for bringing an action for compensation for tort liability, the Peruvian Civil Code establishes a two-year limitation period.

#### 3. Appeals

In the proceedings before INDECOPI, the final decision of the Commission may be appealed to the tribunal by (i) the prosecuted, (ii) the complainant, and (iii) third parties with legitimate interest. The deadline to appeal is 15 working days.

In the second instance, the tribunal cannot impose more serious sanctions than those imposed in the first instance.

In proceedings before the judiciary, the courts of peace or civil courts are competent to hear actions for compensation in the first instance. Their decisions may be appealed to the hierarchical superior.

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

Peruvian law does not contain any specific provisions regarding class actions. However, Article 49 of the Law establishes that group or representative actions are available.

By virtue of this article, the Commission can file a claim for damages, in defense of the diffuse interests and the collective interests of consumers. In addition, the consumers affected or consumer protection entities can also file a claim for damages.

## B. Conduct of procedure and costs

### 5. Burden of proof

According to Article 162 of the Law of General Administrative Procedure, the burden of proof is governed by the principle of ex officio impulse.

In the proceedings before INDECOPI, the complainants have to provide signs of alleged infringement (i.e., documents, reports, expert opinions, testimonies, depositions, etc.). Nevertheless, INDECOPI may conduct inspections, request information, carry out dawn raids, etc., to gather more evidence regarding the Law infringement.

In proceedings before the judiciary, the burden of proof in private claims for damages arising out of anticompetitive conduct lies on the person who alleges damages.

Regulatory findings are not binding on a civil court considering a related private claim, but the court should consider the analysis of the resolution issued by INDECOPI as evidence that the alleged violation actually occurred.

### 6. Joint and several liability of cartel participants

In the proceedings before INDECOPI, each cartel participant is responsible for the infringement and sanction imposed.

In proceedings before the judiciary, even though there are no precedents, civil rules apply. According to the Peruvian Civil Code, if several parties are liable for damages, they will be jointly and severally liable. Therefore, as the cartel participants caused the damages arising from the cartel, they will be jointly and severally liable. However, whoever pays the full compensation may bring an action for recourse against the others and the judge may establish a proportion according to the degree of participation of each company. When it is not possible to establish the degree of responsibility of each one, the distribution will be made in equal parts.

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

In the proceedings before INDECOPI, the authority and the parties may submit as evidence: (i) documents, (ii) statements, (iii) testimonies, (iv) inspections, (v) expert opinions, (vi) emails, (vii) calls registry, and (viii) any other relevant information. On the basis of this evidence, INDECOPI must determine whether anticompetitive conduct was committed. In proceedings before the judiciary, the parties may submit the same evidence. The judge is not required to gather more evidence. In addition, even though the judge has access to the file of the administrative proceeding, this information is not binding to determine liability.

Regarding legal privilege, the Criminal Code establishes that any violation of a professional secret without the consent of the interested party is subject to prison for up to two years and 60-120 days' fine in an administrative procedure. There is no specific regulation on the access to communications between attorneys and clients. Nevertheless, based on the right to the secrecy of telecommunications, for any third party to access communications between a lawyer and his/her client, a court order is required.

In addition, the Commission may declare the confidentiality of certain information gathered by the authority or provided by a party, provided it is a business or commercial secret, information that affects personal or family privacy or information that can harm its owner if it is disclosed. The confidentiality declaration can be requested by a party to the proceedings or a third party with a legitimate interest.



The confidentiality request shall be granted, provided that:

- (a) such information is of reserved or private knowledge in relation to a specific matter;
- (b) those having access to the information have the conscious will and interest to keep it reserved, adopting the necessary measures to maintain it confidential; and
- (c) the information has an actual or potential commercial value.

The information declared confidential can only be accessed by the authority or its owner.

In the civil proceedings, the plaintiff can submit all the documentation and information that supports the alleged damage caused by the anticompetitive conduct, such as the investigation evidence or other additional information. Moreover, during the civil proceedings, the information pertaining to the company denounced can be declared confidential as an exception. The general rule is that the information is public.

## 8. Pre-action disclosure

Pre-action disclosure is not regulated under Peruvian law.

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

An administrative proceeding may take up to two years from the time a complaint is filed until the tribunal issues a final decision in the second instance.

Regarding the civil proceedings, there are no precedents of judicial decisions on antitrust cases. Nevertheless, taking into consideration liability cases in general, the civil proceedings may take up to five years from the final decision of the tribunal of INDECOPI.

## 10. Average cost from issue of claim to judgment in Peru

The administrative proceedings, by means of which a violation of the Law is denounced, has a rate corresponding to a Tax Unit. In that sense, if a consumer wanted to report anticompetitive conduct, he/she would have to pay approximately USD 1,260.

In the civil proceedings, the fees to be paid are relatively lower. However, apart from the economic costs, the costs of a legal defense and the time it will take until a final decision is obtained must be considered.

## 11. Third-party/alternative funding

There are no rules limiting third-party or alternative funding. This practice is not common.

## 12. Alternative methods of dispute resolution

In some cases, such as an alleged abuse of a dominant position or vertical collusion case, the complainant may withdraw the complaint (for instance, based on a private agreement). However, INDECOPI can decide to continue with the case if the conduct could affect the public interest.

Once INDECOPI has determined the existence of anticompetitive conduct, in the civil proceedings, the parties (the infringing companies and the plaintiff) could reach an out-of-court settlement on the damages.

## C. Relief

### 13. Availability of damages and quantification

Once INDECOPI has determined the existence of anticompetitive conduct, any person who has suffered damage as a result of such conduct can bring a civil action. According to Article 1985 of the Peruvian Civil Code, compensation for tort liability includes loss of profit, personal injury and moral damages. In addition, the amount of compensation must include legal interest from the date on which the damage occurred.

### 14. Punitive and exemplary damages

Punitive or exemplary damages are not available under Peruvian law. In the case of compensatory damages, please see point 13.

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

Regarding the administrative sanctioning proceedings, prior to the initiation of the proceedings or at any stage thereof, the Commission may issue an interim measure to ensure compliance with any corrective measures that issued in a final decision. These measures must be adjusted to the intensity, proportionality and needs to avoid the damages.

According to Article 24 of the Law, for an interim measure to be granted, the claimant must submit evidence of the following:

- (a) the payment of the fee administrative proceeding fee (USD 600 approximately);
- (b) the verisimilitude of the claim;
- (c) the danger in the delay of the final decision; and
- (d) that the requested precautionary measure is possible.

In the civil proceedings, Article 608 of the Civil Procedural Code provides that the judge, at the request of a party, may issue an interim measure prior to or within the commencement of the process.

### 16. Other types of relief

There are no other types of relief available to claimants.

## D. Emerging trends

No action for damages resulting from an infringement of the Law has yet been publicly reported. However, some consumer protection entities have publicly declared that they will file lawsuits against certain companies which INDECOPI declared guilty for carrying out price cartels.

## Poland

Michał Derdak, Sebastian Pabian 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 a 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).

Currently, under the Polish law, civil claims founded on a competition law infringement may be brought under two regimes depending on when the infringement took place. In cases where the infringement took place before 27 June 2017, the general damages provisions of the Polish Civil Code, Civil Procedures Code or Act on Assertion of Claims in Group Actions 2009 apply.

Where the infringement took place after 27 June 2017, the Act of 21 April 2017 on actions for damages for infringements of competition law ("**Act on actions for damages for infringement of competition law**") applies. This act transposes Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 ("**Damages Directive**") into Polish law.

It should be noted, however, that even in matters where the infringement took place before 27 June 2017, the new procedural rules of the Act on actions for damages for infringements of competition law will apply, which introduce a number of facilitations for claimants in proceedings.

On the other hand, all damages proceedings initiated in court before 27 June 2017 are handled under the old rules.

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

Depending on when the infringement took place, different limitation periods will apply.

In cases where the infringement took place before 27 June 2017 and where the statute of limitations has not lapsed by the time the new rules have entered into force, the applicable limitation period for issuing a claim for damages is three years from the date on which the potential claimant has learned or should have learned with due care about the harm and liable infringer.<sup>1</sup> Following changes to the Polish Civil Code in 2018, the limitation period lapse shifts to the last day of the calendar year in which the limitation period would lapse. The three-year limitation period 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 but the behavior complained of came to an end 10 years or more before discovery.

The rules on limitation do not take account of circumstances in which the potential claimant does not become aware of the event causing damage within 10 years (for example, in the case of a long- running

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<sup>1</sup> If the three-year limitation period begins to run before the date of entry into force of the new law, that period will begin to run on the date the new law entered into force.

secret cartel). There is no period of limitation specifically tailored for civil claims arising out of competition infringement. Likewise, there is yet to be 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. It is therefore likely that a strict approach on limitation will also be applied in damages cases resulting from cartels, to the extent that 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 longstop 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.

In cases where the infringement took place after 27 June 2017, the new rules apply. The applicable limitation period for issuing a claim for damages in accordance with the Act on actions for damages for infringement of competition law is five years from the date on which the potential claimant learned or with due care should have learned about the harm and liable infringer. Once again, following changes to the Polish Civil Code enacted in 2018, the limitation period lapse shifts to the last day of the calendar year in which the limitation period would lapse.

The limitation period does not commence until the infringement has ended. The limitation period may be suspended, e.g., upon the launch of a proceeding by the Polish competition authority (antitrust or investigation proceeding) or European Commission. In practice, therefore, the limitation period may last longer than five years. Additionally, proceedings suspend the limitation period not just until the final and binding end of the proceedings, but for one year afterwards. The five-year period of limitation cannot apply for more than 10 years after the date of termination of the infringement.

### 3. Appeals

A ruling by a Polish court of first instance on a private damages action may be appealed before an appellate 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.

In cases where the infringement took place after 27 June 2017, the Polish Regional Court is considered a court of first instance for claims regarding a competition law infringement.

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

The Act on Assertion of Claims in Group Actions 2009 provides for the 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. Polish law provides for an opt-in model of group action only. We are not aware of any competition damages claims brought in reliance on these provisions.

Claims are brought by a single person or the local consumer ombudsman acting as a representative for the group. The ombudsman is a public position. It is not obliged to agree to act in every case and it acts in the interests of individual consumers only. If a group of claimants cannot agree on the quantum of damages to claim, 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 group action in a manner that is the most convenient for the particular matter and other

interested persons may 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). If it is impossible to prove the exact amount of the damages or it is extremely difficult, the court may award an appropriate amount at its own discretion, having considered all the circumstances of the case.

## B. Conduct of proceedings and costs

### 5. Burden of proof

Under the general rule, 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.

However, the Act on actions for damages for infringement of competition law introduces several instruments that are meant to make it easier for claimants to claim damages based on competition law, including a number of rebuttable presumptions in favor of claimants.

First of all, under the Act on actions for damages for infringement of competition law, it is presumed that an infringement of competition law causes damage. Further, the new law introduces a presumption of culpability of an infringer.

The scope of the presumptions under the Act on actions for damages for infringement of competition law is also broader than the presumptions raised in the Damages Directive, as it covers not only cartels (horizontal agreements) but also vertical restraints and abuse of a dominant position.

In addition, the Act on actions for damages for infringement of competition law stipulates that final decisions of the Polish competition authority and final judgments of the courts are binding for courts in antitrust damages cases. The decisions of other competition authorities are considered as *prima facie* evidence.

### 6. Joint and several liability of cartel participants

With regard to infringements that took place before 27 June 2017, the general rules apply. According to the Polish Civil Code, the general rule is that if more than one person is deemed liable for an unlawful activity, those persons will be held jointly and severally liable for the resulting loss. Joint defendants share liability in full. This means that each defendant is wholly liable for the resulting damages. A court will not apportion liability between defendants on judgment as the court simply declares joint and several liability, rather than apportioning responsibility for damages between defendants. The main benefit to a defendant in joining other parties as defendants is that they may question the way that the proceedings are conducted by the first sued defendant in order to shift a greater portion of liability to that defendant.

With regard to infringements that took place after 27 June 2017, new rules of the Act on actions for damages for infringement of competition law apply. The Act on actions for damages for infringement of competition law, following the Damages Directive, introduces a limitation of the joint and several liability of small and medium-sized enterprises and immunity recipients (under the Leniency Program).

As regards small or medium-sized enterprises, where the infringer is a small or medium-sized enterprise, the infringer is liable only to its own direct and indirect purchasers where:

- (a) its market share in the relevant market was below 5% at any time during the infringement of competition law; 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.

However, the exemptions provided above do not apply where:

- (a) the small or medium-sized enterprise has led the infringement of competition law or has coerced another undertaking to participate therein; or
- (b) the small or medium-sized enterprise has previously been found to have infringed competition law.

As regards the immunity recipients, an immunity recipient is jointly and severally liable:

- (a) to its direct or indirect purchasers or providers; and
- (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

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

Neither the Act on claims for compensation for damage caused by infringement of competition law nor the Code of Civil Procedure contain an exhaustive list of evidence (Article 309 of the Code of Civil Procedure). Consequently, it is acceptable to use any source of information about facts essential for the case, if only it is not contrary to the provisions of law.

Under the provisions of the Code of Civil Procedure, the means of evidence (the so-called “named means of evidence”) are, inter alia, public and private documents, company books. Means of evidence not explicitly mentioned in the Code of Civil Procedure include, among others: computer print-outs, print-outs of electronic correspondence, electronic evidence (e-mails, files, records of accounting systems, etc.)

Before the Act on actions for damages for infringement of competition law entered into force, there was no standard disclosure obligation in Poland. After the implementation of the Damages Directive, the new rules regarding disclosure of evidence apply to infringements that took place both before and after 27 June 2017.

The court, upon the written request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages, may order the defendant, a third party or the competition authority to disclose relevant evidence which lies in their control. The defendant who has committed itself that the evidence will be used only for the purposes of the ongoing proceeding can also file such request.

If the evidence is in the file of the competition authority, the court may order the competition authority to disclose such evidence, only if obtaining the evidence from the defendant or third party is impossible or excessively difficult.

A request for the disclosure of evidence may be lodged with the lawsuit or during the proceedings. However, there are time limits for lodging the request. A request for the disclosure of evidence, like other requests for evidence, is subject to the general rule of the concentration of evidence, according to which the court shall dismiss late evidence unless the party is able to establish that it was not possible to submit it earlier or that the need for submitting specific evidence arose later.

The court shall assess whether the disclosure of the evidence is proportionate. In assessing proportionality, the court takes into account the legitimate interests of the parties and of the third party who, according to the request, is in possession of the evidence. The court examines, inter alia, the extent to which evidence relates to information that constitutes a business secret or other secrets subject to legal protection under separate provisions, in particular those relating to third parties, and the means available to protect such information.

The Act on actions for damages for infringement of competition law introduces several limitations for such disclosure of a permanent or temporary character.

First of all, disclosure of the following evidence may take place only after a competition authority, by adopting a decision or otherwise, has disclosed in its proceedings:

- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- (c) settlement submissions that have been withdrawn.

Further, it is not possible to order, at any time, disclosure of the following evidence:

- (a) leniency statements; and
- (b) settlement submissions.

It should be noted, however, that the protection from disclosure of leniency application does not apply to vertical agreements (under Polish law, it is also possible to apply for leniency with regard to any anticompetitive agreement, including verticals).

## 8. Scope of pre-action disclosure

Pre-action disclosure is not available under Polish law.

## 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 two to three years to reach a judgment at first instance. Similar to 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 a given case. Depending on the complexity of the case and the court assigned to hear it, the process of a competition claim may take approximately two to four 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, in principle 5% of the value of the claim, ranging from PLN 1,000 (approximately EUR 250) to PLN 200,000 (approximately EUR 50,000), 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. The legal fees, which are recoverable under the Polish civil proceedings, are capped (max. PLN 86,400, i.e., approximately EUR 20,000).

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 the 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. In general, 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

Generally, 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.

With regard to infringements that took place before 27 June 2017, the general rules will apply, which indicate that whoever is at fault for causing damage to another person shall be obliged to redress it.

Under the general rules, the “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 on 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 the suit.

With regards to infringements that took place after 27 June 2017, based on the Act on actions for damages for infringement of competition law, damages may be claimed by anyone who suffered loss, irrespective of



whether they are direct or indirect purchasers from an infringer. The new law emphasizes that damages may also be claimed by indirect injured parties, which is to some extent a new concept under Polish law.

The new law introduces the presumption that if an infringement of law resulted in a so-called "excessive burden" for the direct purchaser and an indirect purchaser bought such products or services (or derivatives of products or services), there is a presumption that such an excessive burden was transferred onto the indirect purchaser. This presumption is limited so that only an indirect purchaser can rely on it. This means that the defendant will still need to prove that the burden was passed on by the direct buyer.

#### 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 a 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.

# Russia

Anton Subbot and Nadia Goreslavskaya

## A. Availability of civil claims

### 1. Scope for civil claims in Russia

Russian competition law expressly provides for a right of companies and individuals harmed by anti-competitive conduct to claim damages (including lost profits) and seek other redress as may be appropriate. In order to claim damages before a Russian court, either anti-competitive conduct or its harmful effects should occur in Russia. Such a claim may be brought in the absence of a prior regulatory finding of the corresponding infringement.

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 or sellers; (iv) reduction of output or termination of manufacturing of particular products; and (e) refusal to enter into contracts with selected buyers. Since January 2016, a cartel is possible not only among sellers but also buyers. Also *per se* prohibited are concerted actions between competitors, which actually lead the described consequences. 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 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). Other concerted actions between competitors are prohibited if they actually lead to a restriction of competition.

Coordination of the activities of other economic entities (that are not members of the same group of companies (undertaking) as the coordinating entity) is prohibited if it actually leads to the same consequences described in the context of cartel-like agreements.

Unfair trade practices are generally prohibited if they: (1) aim to obtain a business advantage, (2) are contrary to the legislation of the Russian Federation, usage of trade or the requirements of good faith and fair dealing, and (3) actually cause or may potentially cause pecuniary or reputational damage to competitors. There is a number of more specific prohibitions against unfair trade practices, for example, dissemination of false, inaccurate or misleading information as to competing products, misleading information as to one's own products, incorrect comparison with a comparison or competing products, unlawful receipt, use or disclosure of commercial secrets or other proprietary information, etc.

## 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 about (1) a violation of their rights and (2) the identity of the proper respondent. There are no special rules for determining whether a person should have learned of its 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 Supreme Court, which has discretion as to whether to consider the appeal on the merits. The standard for reversal at this stage is a material error in substantive or procedural law, which has had crucial influence on the outcome of the judicial process.

If the Supreme Court declines to accept the appeal, this decision may be challenged before the Chairman of the Judicial Chamber on Economic Disputes or to the Presidium of the Supreme Court. If the Supreme Court considers the appeal on the merits, the resulting judgment may be also appealed to the Presidium of the Supreme Court, and with respect to such appeals the Supreme Court has discretionary jurisdiction. The formal criteria for reversal at this stage are that previous judgments 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

Since October 2019 the amendments to the Arbitrazh Procedure Code which introduce the concept of class actions before courts of general jurisdiction came into force.

Under the new procedure, individuals with a similar claim will be able to unite together or with organizations into a group of at least 5, select a representative from the group and file a lawsuit against a respondent. Individuals will be able to defend their collective interests through class action in almost any category of civil law, including antimonopoly law. Information about the filing of a class action must be published in the media so that other people can join the claim by opting in, if they believe their rights and legitimate interests were also violated.

Group actions related to antimonopoly issues fall under the jurisdiction of *arbitrazh* (economic) courts.

## 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.

Competition law claims are based on 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 that causation between the tortious conduct and claimed damages is not established.

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 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 ordered to produce must provide a reasonable excuse for not producing the evidence, 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 not disclose evidence obtained during competition proceedings voluntarily to an entity that was not a party to the proceedings, 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 further six 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 usual practice). The statutory period for the Court of Appeals to consider and determine an appeal is two months (this term can be extended by further 4 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 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 RUB 200,000 (approximately EUR 2,870 at the time of writing).

The average cost of legal and expert fees is difficult to 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, but 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 received an express statutory right to claim damages, including lost profits, or seek other redress against the infringing party.

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 had the violation not occurred. Although opinions of the economic experts technically are not required, without such an opinion, both proving damages and defending against such claims will be very difficult.

### 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 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 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 USD 11.5 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 for the amount of approximately USD 3.2 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 subsequently reflected in the AEB Code of Conduct for manufacturers of automobile manufacturers. There is a similar Code for the pharmaceuticals industry also developed by the AEB. Both Codes were agreed with FAS.

The State Duma has recently adopted in the third and final reading a law on an antimonopoly compliance system. In case of entry into force, the law is expected to become an effective tool for preventing antimonopoly violations. The document amends the Law on Protection of Competition by introducing the definition of antimonopoly compliance and key elements of an effective compliance system. The system is to be introduced on a voluntary basis and can be submitted to FAS for assessment. FAS is to examine such procedures and within 30 days provide opinions if they comply with the requirements set by the antimonopoly law.

# Singapore

Harikumar Pillay, Poh Lip Hang, Christine Xu and Jordan Tong

## A. Availability of civil claims

### 1. Scope for civil claims in Singapore

While stand-alone actions are not available, follow-on actions are allowed under Singapore law.

#### Stand-alone Actions

Section 86(2)(a) of the Competition Act (Chapter 50B) ("**Competition Act**") precludes independent stand-alone actions and there is no common law basis for bringing a stand-alone action.

#### Follow-on Actions

Any person who suffers loss or damage as a result of an infringement shall have a right of action for civil relief against the infringing party. The private action can only be brought after the Competition and Consumer Commission of Singapore ("**CCCS**") has determined that an undertaking has infringed an operative provision of the Competition Act. The operative provisions are:

- (a) section 34, which prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within Singapore;
- (b) section 47, which prohibits an abuse of dominance in any market in Singapore; and
- (c) section 54, which prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

The CCCS infringement decision which the follow-up actions rely upon must be the final infringement decision, i.e. not be subject to any right of further appeal from the CCCS, the Competition Appeals Board ("**CAB**"), the High Court and the Court of Appeal, collectively, the "**Final Determination**"

There is no common law basis for bringing a follow-on action as well.

### 2. Applicable limitation periods

The right of private action under section 86 of the Competition Act must be exercised within 2 years from the date that the Final Determination was made.

### 3. Appeals

#### Appeal against Decision of the Magistrate's Court or the District Court

Parties may commence an appeal in the High Court against a decision of the Magistrate's Court or the District Court, on grounds of errors of law or fact, subject to the following requirements under section 21 of the Supreme Court of Judicature Act:

- (a) the amount in dispute or value of the subject-matter at the hearing before that District Court or Magistrate's Court (excluding interest and costs) exceeds \$60,000 or any such amount as may be specified by an order made by the President in the *Gazette*; or

- (b) the District Court or Magistrate's Court or the High Court has granted leave.

#### Appeal against Decision of the High Court

Parties may commence an appeal in the Court of Appeal against a decision of the High Court, on grounds of errors of law or fact, subject to the following requirements under section 34 of the Supreme Court of Judicature Act:

- (a) the amount in dispute or the value of the subject-matter at the hearing before the High Court (excluding interests and costs) exceeds \$250,000 or such other amount as may be specified by an order made by the President in the *Gazette*;
- (b) the amount in dispute or the value of the subject-matter at the hearing before the High Court (excluding interests and costs) does not exceed \$250,000 or such other amount as may be specified by an order made by the President in the *Gazette*, but leave is granted by the High Court or Court of Appeal; or
- (c) the decision falls within a case specified in paragraph 1 of the Fifth Schedule of the Supreme Court of Judicature Act and leave is granted by the High Court or Court of Appeal.

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

Singapore does not have class-action litigation and the only form of representative group litigation provided under Singapore law is the representative action governed by Order 15, Rule 12 of the Rules of Court. Representative action is a legal action where one or more members of a class of people bring a claim on behalf of themselves and other members of the class, sharing a common interest in that claim. Any judgment or order given is binding and all claimants of the representative action.

In order to bring a representative action, a few requirements must be satisfied:

- (a) claimant that wishes to be part of a representative action must consent to its participation;
- (b) claimant must demonstrate that it has the "same interest" in the proceedings; and
- (c) court must be persuaded that the case should proceed as a representative action.

Each claimant is required to establish individually that it suffered loss or damage directly as a result of the infringement.

Given that the competition law private action regime remains untested, the viability of pursuing a private action under representative group litigation remains uncertain.

## B. Conduct of proceedings and costs

### 5. Burden of proof

#### Burden of Proof

As a general rule, the burden of proof to prove the existence of facts falls on whoever desires any court to give judgment, as to any legal right or liability, dependent on the existence of the facts. Accordingly, if a plaintiff seeks to claim compensation against an undertaking which has caused direct loss to the plaintiff as a result of the undertaking's infringement of section 34, 47 or 54 of the Competition Act, the burden of proof to prove the existence of the direct loss falls on the plaintiff.



## Standard of Proof

For a civil private action, the standard of proof is proof based on the balance of probabilities.

## Rebuttable Presumptions

There is no presumption of loss resulting from competition infringements arising from legislation. The position is untested in practice given that there are no private actions to date.

## 6. Joint and several liability of cartel participants

Given that the competition law private action regime remains untested, it is unclear as to whether the liability of cartel participants will be joint and several in private actions. Assuming that the liability of cartel participants is joint and several, it is likely that a defendant will be able to recover contributions from other infringing cartel participants, if the defendant was found liable for the loss.

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

In determining a claim of antitrust follow-on actions, the court shall accept as final and conclusive any Final Determination of CCCS, CAB or the High Court and the Court of Appeal, which establishes that the prohibition in question has been infringed.

Discovery of documents is a procedure where each party in a dispute discloses all the relevant and necessary evidence, with the exception of privileged documents (see below), before any hearing of the matter, to allow parties to evaluate the strength and weakness of their respective cases. This procedure is governed by Order 24 of the Rules of Court, and applies to civil proceedings, including competition law private actions, on a continuing basis.

The documents to disclose are as follows:

- (a) relevant documents, which are documents that are directly relevant for trial that a party rely or will rely on, including documents that:
  - (i) adversely affect one's own case;
  - (ii) adversely affect another party's case; or
  - (iii) support another party's case;
- (b) necessary documents, which are documents that are necessary either for disposing fairly of the matter or for saving cost.

Further, after the commencement of proceedings, parties to the dispute may apply for discovery against third parties, such as the CCCS (pursuant to Order 24, Rule 6(2) of the Rules of Court). However, given that the competition law private action regime remains untested, it is unclear as to whether the courts in Singapore will order the CCCS to disclose confidential documents and materials relating to its earlier infringement decision and its leniency programme.

## Privilege

Pursuant to sections 128, 128A and 131 of the Evidence Act and common law, documents may be protected from the discovery process by legal advice privilege and litigation privilege:

- (a) legal advice privilege protects confidential communications between clients and their lawyers that are made for the purpose of seeking or giving any legal advice or related legal assistance; and
- (b) litigation privilege protects confidential communications between clients and their lawyers, as well as between clients or their lawyers and third parties, where such communications came into existence due to actual, pending or contemplated litigation.

### 8. Pre-action disclosure

In relation to any civil cases, including competition law private actions, where a potential plaintiff lacks sufficient facts to commence proceedings, the potential plaintiff may apply for an order for the (pre-action) discovery of documents, to determine if it has a viable cause of action, pursuant to Order 24, Rule 6(1) of the Rules of Court. However, such an application may not be used as a fishing expedition and if the potential plaintiff has sufficient evidence to mount a claim, it is not entitled to pre-action discovery.

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

Given that the competition law private action regime remains untested, we are unable to determine the average length of time from issue of claim to judgment.

### 10. Average cost from issue of claim to judgment in Singapore

Given that the competition law private action regime remains untested, we are unable to determine the average cost from issue of claim to judgment.

### 11. Third-party funding/alternative funding

Third-party funding for competition law private actions is currently unavailable in Singapore. In Singapore, it is only available in relation to international arbitration.

### 12. Alternative methods of dispute resolution

Given that there has been no competition law private actions in Singapore, it remains to be seen whether alternative dispute resolution mechanisms will be appropriate.

## C. Relief

### 13. Availability of damages and quantification

Pursuant to section 86(8)(b) of the Competition Act, the court may grant to the plaintiff in an action relief by way of damages. Generally, damages for civil claims are meant to compensate the plaintiff for any loss suffered from the infringement and this is no different for competition law private actions. As there have been no private actions brought in Singapore in respect of competition law thus far, it remains to be seen how the courts would quantify the damages for such infringements.

### 14. Punitive and exemplary damages

The court may grant the plaintiff injunctive or declaratory relief, damages (including exemplary damages) and such other relief as the court thinks fit.

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

### Interim Injunctions

While the Singapore courts are not restricted from granting interim injunctions in the hearing of competition law private actions, it is unlikely that the courts will grant interim injunctions in such hearings. Given that follow-on actions may only be brought after a Final Determination, where the CCCS and the CAB would most likely have directed the infringing party to mitigate or end the infringement, it is less likely that the Singapore courts will grant an interim injunction, on a balance of convenience.

### Final Injunctions

Pursuant to section 86(8)(a) of the Competition Act, the court may grant to the plaintiff in an action relief by way of injunctions (i.e. final injunctions) or declarations.

## D. Emerging trends

As of now, the competition law private action regime in Singapore remains untested. There are some emerging competition litigation in the Asia Pacific Region, e.g. China, Hong Kong SAR. It remains to be seen whether Singapore may have its first follow-on action in the future.

# Spain

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## A. Availability of civil claims

### 1. Scope for civil claims in Spain

Stand-alone and follow-on actions are available in Spain.

On 27 May 2017, Royal Decree-Law 9/2017 was published in Spain's official Gazette, approving the text transposing Directive 2014/104/EU on claims arising from infringements of competition law (the "**Damages Directive**"). The Royal Decree-Law modifies the Spanish Competition Act ("**SCA**") by adding a new Title VI on compensation for the harm caused by anti-competitive practices, and the Spanish Civil Procedural Code ("**CPC**") by adding a new article related to new means of access to evidence in proceedings claiming compensation for damages arising from infringements of competition law. The mentioned regulation clarified the scope for civil claims in Spain in relation to compensation for damages, homogenizing the Spanish regulation with the rest of the European Union. The new regulation entered into force on 27 May 2017 and does not apply retroactively. The fact that the new regulation only entered into force on 27 May 2017 does not mean that prior to that date claims for damages for breach of competition law were not possible. They were still possible based on the provisions of the Spanish Civil Code but the new framework establishes clearer rules.

Claims may be filed to request compensation for losses and damages suffered as a result of a competition infringement (Articles 101 and 102 of the TFEU and Articles 1 and 2 of the SCA), 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. For instance, during 2019 and the beginning of 2020, a good number of Court decisions granting damages caused by the trucks cartel fined by the European Commission in July 2016 or by the envelopes cartel fined by the CNMC in March 2013 have been issued.

Under the new provisions of the SCA, infringers of competition law will be liable for the damages caused. The new provisions (specifically Article 72 of the SCA) determine a general principle of full compensation for the damages suffered, in such a way that the injured party is entitled to receive compensation from the infringer that includes actual damages (*damnum emergens*), loss of profit (*lucrum cessans*) and the payment of interest. Punitive damages are expressly excluded. Remedies sought may 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 they were in prior to entering the contract (i.e., restoring the goods and amounts exchanged under the contract), subject to certain limits.

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.

The regime of claims arising from infringements of competition law coexists with claims for damages under the Spanish Unfair Competition Act, subject to different limitation periods and requirements.

### 2. Applicable limitation periods

A new five-year limitation period has been established for claiming damages suffered as a result of competition infringements (Article 74 (1) of the SCA), significantly extending the one-year period for actions for damages in tort established in Article 1968 of the Spanish Civil Code. The provision indicates that the

limitation period will start to run from when the infringement ceased and the claimant knows or could reasonably have known: (i) of the behavior and the fact that it constitutes an infringement of competition law; (ii) the harm caused by the infringement of competition law; and (iii) the identity of the offender.

Pursuant to Article 74 (3) of the SCA, the limitation period will be interrupted if a competition authority starts an investigation or sanctioning proceeding in relation to the infringement. This interruption will end a year after the decision rendered by the competition authority becomes final or after the procedure is terminated. Similarly, in accordance with Article 74 (4) of the SCA, the period may also be interrupted if the parties engage in consensual dispute resolution. Lastly, according to the general legislation of the Civil Code, calculation of the limitation period will also be interrupted as a result of an out-of-court claim initiated based on the damage caused to the parties that are immersed or represented.

### 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. However, the appellant has to prove that the legal issues are sufficiently relevant for the Supreme Court to pick up the case. Otherwise, the Supreme Court will reject the appeal.

### 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 CPC, which refers to the protection of the interest of consumers.

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 (that have as their aim the defense of consumers) to bring claims for the protection of the group's collective interest 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 CPC 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 that organization to be recognized as a "formal association" (Articles 11.3 and 11.1 of the CPC).

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 the individual to appear in the proceedings and to formally become a claimant. The defendant only needs to pay damages to identifiable individuals.

Class actions are only available to protect 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, such as 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 because of the same infringement but who did not participate in the action.

To date, there is reportedly 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 market,<sup>1</sup> which, according to AUSBANC, caused damages of EUR 458 million to Spanish consumers. However, the Spanish courts dismissed this claim on procedural grounds because 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.

## B. Conduct of proceedings and costs

### 5. Burden of proof

In stand-alone cases, the claimant bears the burden of proof of the 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. The burden of proof that an agreement merits exemption under Article 101(3) TFEU or Article 1 (3) of the Spanish Competition Act rests on the alleged infringer. In follow-on actions, pursuant to Article 71(2) SCA, infringement decisions of the Spanish competition authorities or the European Commission are binding on Spanish courts. However, this binding effect will only be in relation to the existence of the infringement and the identity of the offenders. In contrast, decisions rendered by other competition authorities of other Member States will only benefit from an *iuris tantum* or rebuttable presumption, ex Article 75 (2) SCA.

The claimant needs to prove causation and loss. Royal Decree-Law 9/2017 has simplified the evidential requirements, although it retains the traditional criteria stating that the claimant needs to evidence: (i) that it has suffered a specific harm; (ii) that such harm is a consequence of unlawful behavior; and (iii) quantification of the harm caused.

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 losses are the direct consequence of the infringement. Despite this, based on the implementation of the Damages Directive, there is a rebuttable presumption of damages for cartel infringements. If the defendant alleges that there are possible causes of the claimant's loss other than its own conduct, the defendant will have the burden of proof with respect to those other causes and their effect on the claimant.

Rebuttable presumptions as evidence can play an important role, depending on 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.

### 6. Joint and several liability of cartel participants

Royal Decree-Law 9/2017 has introduced the general rule of joint liability between members of a cartel for the damages caused as a result of anti-competitive behavior. This new provision does not apply retroactively. However, based on the Spanish Civil Code, the joint liability of persons having caused damage can also be established. In fact, there have been several cases where the judge has declared the joint liability

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<sup>1</sup> See judgment by the EU Court of Justice (Case C-295/12 P) of 10 July 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.

of the members of a cartel by simply applying the provision of the Spanish Civil Code and not the new regulations implementing the Damages Directive.

Under the provisions of the SCA, there are some exemptions to the rule of the joint and several liability that arise from the Damages Directive. There is an exception for small and medium-sized enterprises, which will only be found liable to their own direct or indirect purchasers if the following requirements are met: (i) their market share in the respective market was below 5% through the whole period in which the infringement was committed; and (ii) if applying joint and several liability would be detrimental to their economic viability and cause a loss in their assets' value. Despite this, the rule will not apply if the entity was the one ordering the infringement or coercing companies to participate therein, or if they have already been found guilty for an infringement of competition law in the past. The same exception applies to entities that have benefitted from full immunity from fines as a result of leniency programs in cartel cases (they will only be held liable when the injured parties cannot obtain full compensation from the other undertakings involved in the infringement).

To our knowledge, to date no Spanish competition case has been decided where liability has been apportioned between defendants.

The right of recourse is established in Article 73 (5) of the SCA, which states that an infringer that has paid the indemnification may bring an action against the rest of the infringers to claim compensation. The amount will be determined in relation to the liability of the entity for the loss caused.

As regards the liability of parent companies and subsidiaries, in cases where the affected party entered into an agreement with a subsidiary whose parent company was party to an anticompetitive agreement, the Spanish courts have held that the affected party must claim damages arising from the infringement under competition law against the parent company and not against the subsidiary. In fact, Article 71.2 (b) of the SCA introduced a new rule not envisaged in the Damages Directive. This article establishes a quasi-objective joint and several liability of the parent companies for the damages caused by an infringement of Articles 101 and 102 of the TFEU and Articles 1 and 2 of the SCA committed by their subsidiaries.

There has also been controversy as to when a subsidiary can be held liable for the conduct of its parent company. This issue has been debated and discussed in the different Spanish proceedings in connection with the trucks cartel. The courts have given different points of view. In light of this controversy, in December 2019, the Regional Court of Barcelona issued a request for a preliminary ruling before the Court of Justice of the European Union ("ECJ") regarding subsidiaries' liability for competition law infringements committed by their parent companies. Under the request for a preliminary ruling (Case C-882/19), the Regional Court of Barcelona has addressed the following questions to the ECJ: (i) whether or not the single economic entity doctrine provides grounds for an extension of liability from the parent company to the subsidiary; (ii) whether the concept of single economic entity can be extended solely on the basis of control, or also on the basis of other criteria, such as the possibility that the subsidiary may have benefitted from the infringing acts; (iii) what are the requirements to extend liability; and (iv) whether the previous questions are asserted in a positive way, would provisions of national law which only allow the extension of liability in an ascendant way (i.e. subsidiary to parent) be compatible with EU Law.<sup>2</sup> The ECJ has not yet issued its ruling.

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<sup>2</sup> Case C-882/19 Request for a preliminary ruling from the Regional Court of Barcelona (SPAIN) lodged on 3 December 2019, *Sumal, S.L. v Mercedes Benz Trucks España, S.L.*: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62019CN0882>.

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

In contrast with common law systems, there is no discovery in Spanish law and the parties are under no obligation to disclose their private documentation.

However, with the implementation of the Damages Directive, Spanish Procedural Regulations have been modified to regulate access to the sources of evidence, but this is only applicable to the procedures of claims for damages derived from anti-competitive behaviors.

This mechanism of access to the sources of evidence has a procedural structure similar to an interim measure. It enables the claimant to request the judge to order the counterparty or third parties to provide access to some sources of evidence necessary to substantiate the claim. Nevertheless, the measures need to fulfill the principles of proportionality, necessity and suitability. Hence, unlike the discovery established in common law systems, this regime does not allow indiscriminate access to all evidence related to the competition law infringement. The judge will only allow the disclosure of specified information.

Indiscriminate searches of information, such as fishing expeditions, are prohibited. Similarly, the legislator has expressly excluded the possibility for the judge to order access to requests for leniency and firm settlement proposals in cartel cases. Furthermore, the judge will only allow the disclosure of specified items of evidence or of categories of evidence when circumscribed as narrowly and precisely as possible, after considering the legitimate interests of all parties and third parties concerned, ex Article 283 bis CPC.

Specific rules have been included in the CPC regarding the disclosure of evidence contained in the competition authority's file. Pursuant to Article 283 bis (j), strict confidentiality requirements have been laid down together with restrictions as to the information that may be requested. For instance, the disclosure of information prepared by the parties or by the competition authorities in ongoing proceedings may only be ordered by the court after the competition authority has closed the proceedings. All other information gathered in a competition authority's file may be disclosed at any time.

## 8. Pre-action disclosure

Due to the implementation of Royal Decree-Law 9/2017, pre-action disclosure has been introduced into Spanish legislation, limiting its application to claims regarding damages for infringements of competition law. Thus, the disclosure of documents may be requested during the proceedings or prior to the commencement of the proceedings, although, in the latter case, the claim must be brought within 20 days after the disclosure took place. Moreover, the court can rule that evidence obtained through procedural abuse of the applicant may not be used in future proceedings.

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

A claim in the commercial courts typically takes from 9 months 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 fact or law) will take about the same length of time.

Finally, appeals to the Supreme Court are usually lengthier and can add another two to four 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. In addition, the appellant has to prove that the legal issues are sufficiently relevant for the Supreme Court to pick up the case. Otherwise, the Supreme Court will reject the appeal.



## 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. Generally, a range of between EUR 25,000 and EUR 90,000 would not be unusual for first instance damage cases under competition law. In the 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 to the facts or the application of the relevant law. 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.

## 12. Alternative methods of dispute resolution

Alternative means of dispute resolution are available. In this sense, although arbitration tribunals could not decide on whether certain actions infringe competition law, claims for damages based on judicial declarations of infringements of competition law can be submitted to and resolved through arbitration.

Both the Arbitral Court of Madrid ("*Corte de Arbitraje de Madrid*") and the Barcelona Arbitration Tribunal ("*Tribunal Arbitral de Barcelona*") are well-established arbitration organizations in Spain.

## 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 Royal Decree-Law 9/2017.

Spanish law 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, plus interests. Royal Decree-Law 9/2017 allows the court — in this type of litigation — to make an estimation of the damages when the amount is difficult or even impossible to determine based on the evidence available and provided by the parties. 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, defendants can be released from compensating the victims of the cartel if they were able to prove that the victims passed on the economic harm to their clients, which is inclusive of overcharge (price increase) and loss of profits (consequential loss of sales). In other words, 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 either reduce the amount of the compensation accordingly or reject the claim for damages due to lack of evidence of the losses suffered. Otherwise, such a situation could give rise to undue enrichment. The "passing-on" defense has been explicitly recognized by the Spanish Supreme Court. The burden of proof of the damages that the claimant would have "passed on" remains on the defendant.

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.

Cartels are presumed to cause harm, unless the defendant proves otherwise. Damages are mainly calculated by aggregating the economic harm suffered by the claimant and the economic loss of profit. They are usually proven, through either expert reports or the documentation that the claimant submits in the proceedings.

According to the Spanish Supreme Court, the expert reports must formulate a reasonable hypothesis concerning the harm suffered by the claimant, based on the available data. In this sense, in its most recent judgments, the Supreme Court granted all the damages claimed by the claimants (and supported by the claimants' expert reports) because the defendant's expert report only refuted the claimants' arguments but did not propose a different and equally reasonable calculation of the damages. Furthermore, in those cases where the economic reports presented by the claimants did not properly prove the damages suffered, the Court, based on the powers granted to it under Article 76(2) of the SCA (implementing Article 17(1) of the Damages Directive), has estimated the amount of the damages suffered. In the claims arising from the trucks cartel, the Courts of appeal have been awarding compensation that ranges from 5% to 15% of the price of the vehicle. In claims arising from the envelopes cartel, the Courts of appeal have been granting compensation that amounted to 20% of the price of the envelopes.<sup>3</sup>

In essence, the Spanish courts are still figuring out how to interpret the relevant law. It is therefore expected that the Spanish commercial courts will focus on the methodology and credibility of the relevant experts in future cartel damage rulings. Thus, it is essential to engage a forensic firm that is highly experienced and specialized in this kind of claim.

The court can request the Spanish Competition Authority to intervene as *amicus curiae* to assist the court to calculate damages.

#### 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 a full trial 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 that: (i) there is a *prima facie* "appearance of good right" (*fumus boni iuris*); and (ii) there is a risk that the final decision cannot be enforced without an interim remedy (*periculum in mora*). Additionally, it may be rational in some cases to stop the infringement, thereby preventing further harm from being suffered.

The claimant is obliged to submit security in order to compensate the defendant for any damage 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 be entitled to claim further damages in specific follow-on proceedings.

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<sup>3</sup> Judgments n° 64/2020 January 13; n° 58/2020 January 13; n° 60/2020 January 13; n° 65/2020 January 13; n° 46/2020 January 10; n° 45/2020 January 10; n° 51/2020 January 10, of the Regional Court of Barcelona n° 15.

## D. Emerging trends

Claims for damages suffered due to antitrust violations are becoming more common in Spain. Currently, the most known civil damages claims in Spain are those arising from the trucks cartel (fined by the European Commission) and the envelopes cartel (fined by the CNMC).

The implementation of the Damages Directive in Spain in 2017 will continue to make these types of claims more common, particularly as it extended the limitation period from 1 year to 5 years.

# Sweden

Erik Brändt Öfverholm, Jonas Benedictsson, Magnus Stalmarker, Philip Thorell and Antonia Malmgren

## 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 Swedish Competition Act (*Sw. Konkurrenslagen (2008:579)*) or EU competition rules. No prior finding of an infringement by a competition authority is required to bring such an action.

For the purposes of the Swedish Competition Act, an undertaking is defined as a natural or legal person who conducts operations of a financial or commercial nature (and excludes business carried out in the course of exercising public authority).

It is not possible to seek damages from individuals who are mere employees of the defendant corporation. However, the Swedish 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 their duties.

Civil claims for the infringement of Swedish competition law can be brought under the Swedish Competition Damages Act (*Sw. Konkurrensskadelagen (2016:964)*), which came into force on 27 December 2016, implementing Directive 2014/104/EU of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("**Damages Directive**"). The Swedish Competition Damages Act is formally applicable in relation to damages claims based on infringements within all of the EU, but the question of which court has competence over a damages claim with international nexus is primarily regulated by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Chapter 3, Section 25 of the Swedish Competition Act refers to the Swedish Competition Damages Act in relation to provisions on damages. According to Chapter 5, Section 1 of the Swedish Competition Damages Act, the Patent and Market Court (*Sw. Patent- och marknadsdomstolen*) is the competent court for examining cases relating to damages due to infringements of competition law.<sup>1</sup>

In March 2019, the Patent and Market Court delivered its first judgment where the matter of jurisdiction regarding damages due to infringements of competition law was at hand (Case No. PMT 10900-18). In December 2014, several companies within the Bong Group were held liable for infringing Article 101 TFEU by participating in a cartel (Case AT.39780 — Envelopes). As a result, one of the plaintiffs (consisting of several companies within the Office Depot Group) filed a claim relating to damages suffered due to the infringement. The Bong companies argued that the Swedish Patent and Market Court should reject their proposed liability to indemnify, while the Office Depot companies insisted that the case would be ruled inadmissible due to the Swedish court lacking jurisdiction. Indeed, the Swedish Patent and Market Court found it did not have the authority to judge the Office Depot companies' claims in regard to not having their residence in Sweden. However, given the fact that the Bong companies' defense met the demands for a declaratory judgment, the court further held that the Bong companies should be held accountable for the

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<sup>1</sup> On 1 September 2016, the Patent and Market Courts Act (*Sw. Lag (2016:188) om patent- och marknadsdomstolar*) came into force, whereby the Patent and Market Court replaced the District Court of Stockholm as the sole competent court for examining cases relating to damages due to infringements of competition law.

damage suffered by all respondent Office Depot companies other than the Swedish branch. The judgment was appealed by the Bong companies and is currently under review by the Patent and Market Court of Appeal.

## 2. Applicable limitation periods

The limitation period for bringing a claim for damages based on competition law infringement runs for five years from the date on which the infringement ceased and the injured party became aware of the infringement or reasonably can be assumed to have become aware: (i) of the conduct and that it constituted an infringement; (ii) of the fact that the infringement caused the claimant harm; and (iii) of the identity of the infringing party (Chapter 2, Section 6 of the Swedish Competition Damages Act). The limitation period according to the former rules was 10 years from when the damage was caused and, in that respect, was longer. However, the new limitation period of five years starts running at a later point in time in accordance with the above. The limitation period of five years starts to run, at the earliest, when the infringement ceases, which constitutes a prolongation of the starting point of the limitation period compared to former rules. The starting point according to the new rules also takes into account the injured party's knowledge of the infringement, which was not the case according to the former rules. According to Chapter 2, Section 7 of the Swedish Competition Damages Act, the limitation period will be suspended if the Swedish Competition Authority decides to take action in relation to the relevant infringement, and a new limitation period will start running when a final infringement decision is delivered or when the procedure of the Swedish Competition Authority is otherwise closed.

## 3. Appeals

The Patent and Market Court is the competent court to examine cases that have been brought forward based on the Swedish Competition Damages Act (Chapter 5, Section 1 of the Swedish Competition Damages Act). Its judgments may be appealed, with leave, to the Patent and Market Court of Appeal (*Sw. Patent- och marknadsöverdomstolen*) on points of fact and/or law. Judgments from the Patent and Market Court of Appeal are, as a rule, final. However, if special circumstances are at hand and leave to appeal is granted, judgments may be appealed to the Supreme Court (*Sw. Högsta domstolen*).

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

Under the Swedish Group Proceedings Act (*Sw. Lagen (2002:599) om grupprättegång*), which entered into force on 1 January 2003, class actions may be brought in competition litigation cases. Private individuals or legal persons (group civil claim), organizations (organization group action) or authorities (public group action) may institute a group action.

A group civil claim can be brought by any person who belongs to the group that such person wishes to represent (a so-called opt-in claim). Specially designated government authorities can bring a public group action.

An organization action can be brought by non-profit organizations devoted to safeguarding consumer or employee interests if the action concerns goods or services supplied to consumers (i.e., the buyer of the end product).

Group action suits are intended to complement conventional legal proceedings. Therefore, a group action may only be heard by the court if special pre-conditions for proceedings are satisfied:

- (i) The issues addressed in the case must be the same or similar with regard to the claims of all of the members of the group.

- (ii) The case must not be evidently unmanageable because 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.
- (v) The person bringing the action on behalf of the group must be an appropriate representative with the financial resources to bring an action; moreover, the representative must not have interests of their own in a case that clashes with the interests of other members of the group.

If not all of these special preconditions are satisfied, the court will dismiss the group action.

## B. Conduct of proceedings and costs

### 5. Burden of proof

According to Chapter 2, Section 1 of the Swedish Competition Damages Act, damages may be claimed 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. The national courts may estimate the loss to a reasonable amount.

Relevant facts must be “proven” or “shown” (*Sw. “visat” or “styrkt”*). The standard of proof is lower than the requirement that facts be proved “beyond a reasonable doubt” as applied in criminal cases, but it requires more than merely showing that the damage is likely to be the result of an infringement (i.e., it does not involve a simple “balance of probabilities”).

An important provision is Chapter 5, Section 9 of the Swedish Competition Damages Act, which implements Article 9.1 of the Damages Directive, stating that final decisions by the Swedish Competition Authority or by a Swedish court establishing an infringement have positive legal force in relation to a following civil damages claim. This also applies to decisions by the European Commission, as they are binding on national courts. Infringement decisions delivered in other EU Member States, however, only serve as probative evidence. It should be noted that the legal force only applies to decisions establishing the existence of an infringement and not the contrary. The provision means that an injured party that brings a claim after a final infringement decision has been delivered is relieved from having to prove the existence of an infringement. However, the injured party can only rely on this evidentiary alleviation in relation to the scope of the infringement decision (e.g., time frame/duration of the established infringement), i.e., for any damages claims based on conduct outside the scope of the decision, the injured party must prove the existence of an infringement. The provision means increased possibilities for so-called follow-on claims.

Another important provision is Chapter 3, Section 4 of the Swedish Competition Damages Act, which provides a rebuttable presumption of harm in the case of cartel infringements, i.e., the infringing parties have the burden of proof in this regard. The presumption only concerns the existence of harm, i.e., a causal relationship between the infringing conduct and the loss incurred. The burden of proof in relation to the extent of the harm/size of the loss still lies on the claimant. As mentioned above, the national courts can assist by estimating the loss to a reasonable amount.

If a claimant brings a civil claim against a defendant claiming that an agreement is unenforceable due to certain provisions that are in breach of the competition rules, the burden of proof is on the claimant, which may be discharged by proving the facts as above. In principle, a defendant might also argue that any damage that the claimant might have suffered (e.g., in the form of higher prices) has been passed on by the claimant and, therefore, 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.

In the case of harm being passed on to indirect buyers (in the form of higher prices) or suppliers (in the form of lower prices), i.e., companies/persons in the distribution chain that are operating further away from the infringing conduct, Chapter 3, Sections 5-6 of the Swedish Competition Damages Act provides rules on presumption for the passing-on (*Sw. övervältra*) of such harm. A claimant who is an indirect buyer/supplier only needs to prove that an infringement exists and that it has led to higher or lower prices in relation to the direct buyer/supplier (which has been trading with the claimant) of the defendant to activate a rebuttable presumption of passing-on of such prices (i.e., harm) onto the claimant. These provisions on evidentiary alleviation are motivated by the difficulties for indirect buyers/suppliers to prove harm and the extent of damages.

## 6. Joint and several liability of cartel participants

When two or more undertakings are liable for the same harm caused by an infringement of competition law, they are jointly and severally liable for any damage resulting from that infringement (Chapter 2, Section 2 of the Swedish Competition Damages Act).

Small and medium sized enterprises 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 (Chapter 2, Section 3 of the Swedish Competition Damages Act). However, in the event such company caused the infringement by inducing others to participate, had a leading role in the infringement, had previously been found guilty of an infringement or if the injured party is unable to receive full compensation from any other infringing party, the limitations may not apply. Chapter 2, Sections 4-5 of the Swedish Competition Damages Act provides some limitations for companies that have been granted leniency or have settled with an injured party.

A party that has paid compensation to an injured party has a right of recourse against other liable parties by way of a 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 exemptions to this general rule; in particular, it is not necessary to disclose legally privileged documents that include 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 that 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 that 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 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 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 the business activities, business secrets, innovations and research and development of an undertaking will 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 was disclosed. Further, during an investigation, documents and information in the Swedish Competition Authority's file are confidential if it is of significant importance to the investigation that the information is not disclosed, but may be obtained on completion of the investigation subject to the rules of 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 addition, Chapter 5, Section 4 of the Swedish Competition Damages Act further restricts a claimant's access to evidence by limiting the possibility of the disclosure of documents and information kept by the Swedish Competition Authority if an order for disclosure may, without difficulty, be directed toward someone else or if a decision of disclosure can be assumed to seriously obstruct the work of the Swedish Competition Authority. Chapter 5, Section 5 of the Swedish Competition Damages Act excludes certain documents kept by the Swedish Competition Authority from disclosure if they relate to the leniency program or an ongoing matter/investigation, etc. Chapter 5, Section 8 of the Swedish Competition Damages Act provides that documents covered by Chapter 5, Section 5 of the Swedish Competition Damages Act may not be used as evidence in a damages case until the Swedish Competition Authority has closed the relevant matter/investigation.

In practice, this means that a claimant may find it difficult to secure access to certain documents and information obtained or kept by the Swedish Competition Authority.

## 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 to final instance; complex cases could take three to four years in the lower courts alone and one to two years if appealed.

## 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 of 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 cases relating to competition damages. 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.

If the parties consent, the courts may order a mediation session with a mediator appointed by the court to encourage the parties to reach a settlement. Mediation is not a prerequisite to the issue of a claim in court.

## C. Relief

### 13. Availability of damages and quantification

Damages are calculated to reflect the actual damage sustained (plus interest), meaning that damages awarded are normally limited to the amount needed to restore the claimant to the position the claimant would have been in had the defendant not committed the infringement (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, in their discretion, may 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 that is considered obviously irrelevant. An expert may be appointed to assess any type of issue, including, of course, the amount of damages.

### 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

In certain circumstances, the Swedish Competition Authority may issue an interim injunction pending a final judgment on whether an infringement has occurred. Further, the Patent and Market Court 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/the Patent and Market Court rarely issues interim injunctions.

As for the standard of proof required for interim measures, the law states 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 anti-competitive can be deemed invalid by the court and thus unenforceable. Mandatory provisions often replace the invalid section so that the agreement remains valid but has different legal consequences. However, if the anti-competitive sections form an essential part of the agreement, the entire agreement may be rendered void.

## D. Emerging trends

The Swedish Competition Authority has expressed the view that the aim of the Swedish Competition Damages Act, which came into force on 27 December 2016, implementing the Damages Directive, is to increase the possibility of receiving compensation in the form of damages for parties (companies as well as consumers) that have been harmed by competition law infringements, such as cartels. By increasing and facilitating the possibility of successfully making a claim for damages, the aim is also to further deter companies from engaging in infringing conduct.

As a result of the Swedish Competition Damages Act, civil damages claims are expected to increase in the future. However, it is too early to properly assess or predict the effects of the Swedish Competition Damages Act, and to what extent it will increase the frequency of damages claims (e.g., follow-on claims), and if the new rules will lead to more claimants being successful in court. Until the case law has matured, it is difficult to make statements of certainty regarding future developments.

However, there have been a number of actions for damages based on infringements of competition law in Sweden. One older 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 (*Sw. Hovrätten*) concluded that Swedavia had abused its dominant position and ordered Swedavia to repay SEK 400 million to Scandinavian Airlines Systems, which had been previously paid by Scandinavian Airlines Systems under a contract for construction works relating to a new terminal.

A more recent example is a judgment rendered by the District Court of Stockholm (*Sw. Stockholms tingsrätt*) where Euroclear (formerly VPC), Sweden's central securities depository, was found to have abused its dominant position on the market with regard to address information by refusing to supply such information 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 findings of the District Court of Stockholm, although it reduced the damages awarded.

Furthermore, the District Court of Stockholm delivered two judgments during the spring of 2016 as a result of a follow-on claim for damages connected to a judgment of the Market Court (*Sw. Marknadsdomstolen*) that established that TeliaSonera had abused its dominant position by engaging in so-called margin squeeze. The District Court of Stockholm awarded SEK 65 million in damages to Yarp (Case No. T 15382-06) and SEK 240 million in damages to Tele2 (Case No. T 10956-05). In June 2017, the Court of Appeal overturned the

judgment of the District Court of Stockholm in the proceedings concerning Yarps and dismissed Yarps' claim for damages, stating that Yarps had been unable to prove that TeliaSonera had infringed the competition rules by way of margin squeeze (Case No. T 2673-16).<sup>2</sup> The same was true concerning the judgment appealed by Tele2, but in that case the Court of Appeal overturned Tele2's claim for litigation costs due to Tele2 being unable to prove alleged damage as a result of the admitted margin squeeze (Case No. T 5365-16).

The most recent judgment was released on 22 November 2019 from the Svea Court of Appeal (*Sw. Svea Hovrätt*) regarding Net at Once Sweden's claim for damages suffered due to Gothnet's alleged abuse of dominant position in connection with a public procurement (Case No. PMT 2216-18). The same matter was examined in February 2018 by the District Court of Stockholm, which ruled in favor of Gothnet (Case No. PMT 16599-15) but Net at Once Sweden later made an appeal thereof. As the action for damages was brought up already in 2015, the Svea Court of Appeal held that the material regulations in the Swedish Competition Damages Act should not be adhered to and instead the previously applicable regulations of damage claims in the Swedish Competition Act should apply.

Even though the Svea Court of Appeal made a different conclusion of the relevant market than that of the District Court of Stockholm, the final judgment was the same. Following an overall consideration of the facts and evidence brought by Net at Once Sweden, the Svea Court of Appeal held that there were not enough grounds for the court to rule Gothnet as having such a position on the market that it could act independently in relation to competitors and customers on the relevant market. The Svea Court of Appeal further held that the mere finding of Gothnet not having a dominant position on the relevant market was reason enough to reject Net at Once Sweden's appeal. By this, the Svea Court of Appeal ruled that the previous judgment made by the District Court of Stockholm should still apply, thereby rejecting Net at Once Sweden's claim for damages. The ruling is final, meaning it may not be further appealed in higher instance.

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<sup>2</sup> The government bill submitted regarding the Patent and Market Courts Act (Prop. 2015/16:57) stated that those cases where a main hearing was initiated before 1 September 2016 would continually be dealt with according to preceding regulation, i.e., by the District Court of Stockholm.

# Switzerland

Valentina Hirsiger, Philippe Monnier and Philippe Reich

## 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 the result of an unlawful agreement (Article 5 Cartel Act) or unlawful practices of a dominant enterprise (Article 7 Cartel Act).

According to prevailing opinion, end consumers (often referred to as indirect purchasers) do not have legal standing to sue in respect of infringements of Swiss competition law as they do not themselves participate in the market offering goods or services and are therefore presumed not to be hindered by such infringements. This approach has attracted considerable criticism and the Swiss government has proposed changing the Cartel Act to give consumers standing to bring such claims. However, this proposal formed part of a wider project containing a number of controversial changes to substantive law provisions of the Cartel Act and was rejected in September 2014. Consequently, it is unlikely that consumer claims will become more important in the near future.

Private antitrust actions may only be brought against undertakings. According to the Swiss Cartel Act, undertakings are defined as suppliers and purchasers of goods and services active in commerce.

Swiss courts and arbitral tribunals have also occasionally had to deal with private antitrust claims based on alleged infringements of EU competition law or foreign competition laws. In this situation, both Swiss courts and arbitral tribunals are, in principle, expected to determine the applicability of relevant foreign provisions and the consequences of the alleged infringement on the private claims before them (*iura novit curia*). 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. Tort claims become time-barred after three years from the date on which the claimant is deemed to have sufficient knowledge of the cause of action and resulting losses to bring a lawsuit to court. For this purpose, the claimant has to have actual knowledge of the basis of the claim and the entity against which he/she has a claim. However, the claimant does not need to be in a position to indicate the exact amount of losses suffered for the limitation period to be triggered. Claims will become time-barred in any case regardless of the claimant's state of knowledge after 10 years from the occurrence or end of the tortious conduct (Article 60 of the Code of Obligations).<sup>3</sup> For the purposes of this rule, competition law infringements occurring continuously over a protracted period of time will generally be viewed as a single tort, with the consequence that the 10-year statute of limitations only starts once the infringement has come to an end. Contractual claims generally become time-barred after 10 years, subject to some exceptions.

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<sup>3</sup> The absolute statute of limitation for claims resulting from personal injury or death amounts to 20 years; however, this exception will hardly become relevant in the context of competition litigation.

The claimant can take measures to interrupt the statute of limitations, e.g. by filing a debt enforcement request or initiating litigation.

The statute of limitations is not suspended or extended while an investigation into an alleged infringement by the Competition Commission or foreign cartel authorities is carried out. Consequently, private claims can become time-barred before completion of the administrative investigation(s) unless the claimant can show that he/she took the necessary measures to interrupt the statute of limitations or that he/she did not have sufficient knowledge of the unlawful restraint to initiate court proceedings before the investigation was concluded. In early 2012, the Swiss government proposed modifying this rule, suggesting that the statute of limitations should be suspended during any investigation by the Competition Commission. However, this proposal was rejected in parliament in September 2014 together with other controversial proposals for a broader reform of substantive law provisions of the Cartel Act.

The parties to an anticompetitive agreement can invoke illegality as a defense without being subject to the statute of limitations.

### 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. However, it is possible to group individual claims arising from the same factual circumstances by 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. This means that each individual claim will depend on separate factual circumstances or legal arguments, which would have to be established separately before the court. We are not aware of this method having been used in practice in Switzerland to bring a claim for damages resulting from infringements of competition law.

In summer 2013, the Swiss government presented a report on the possible introduction of a 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.

In March 2018, the Swiss government proposed certain amendments to the Swiss Civil Procedure Code and submitted a preliminary draft for public consultation. The proposed amendments are designed in particular to facilitate collective redress. The consultation process ended on 11 June 2018 and the Federal Council is now preparing a final draft for parliament. Since the preliminary draft received mixed reactions, it is unclear which changes will prevail.

## B. Conduct of proceedings and costs

### 5. Burden of proof

The claimant is required to prove the infringement of competition law, the defendant's fault, the damage suffered and causation, i.e., that the damages incurred were a result of the infringement. 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 according to Article 5 paragraphs 3 and 4), the claimant only has to establish the existence and type of agreement in question. The most recent judgments of the Federal Supreme Court no longer require the Swiss Competition Commission to take an effects-based approach for hard-core restrictions (see Chapter D below). According to the Federal Supreme Court, even undertakings with low market shares can be sanctioned if they have participated in a hard-core restriction. Furthermore, while courts are not formally bound by the findings of the Competition Commission on whether or not there has been an infringement, it is unlikely in practice 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 knowledge or causation, or possibly even the illegality of the alleged infringement if the conduct is illegal under both Swiss and European law.

If there is no pre-existing decision on whether or not competition law is breached, Swiss courts must obtain a legal opinion from the Competition Commission prior to deciding on any civil claims. These legal opinions are not formally binding on 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 civil proceedings.

To obtain damages, the claimant must, in principle, satisfy the “but for” test to show that the losses incurred were caused by an unlawful competition law infringement. Exceptionally, 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, the 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, particularly in view of the fact that attempts to rely on geographic comparisons have been rejected in other areas of law, such as unfair competition and intellectual property law.

Certain hard-core horizontal and vertical agreements are deemed to eliminate effective competition. The Federal Supreme Court ruled in its most recent judgments that the Competition Commission is no longer required to take an effects-based approach for such restrictions. This leads to a lower burden of proof for the claimant.

## **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 Article 50 of the Code of Obligations, or if they contribute to the creation of the same damage through separate competition law infringements as provided for in Article 51 of the Swiss Code of Obligations. In both cases, each defendant is, in principle, liable for 100% of the damage, while the liability on an individual level is only determined later in separate proceedings for contribution between defendants. In view of such a claim for contribution, the first defendant may seek to join others to a pending claim to avoid re-litigation of issues applicable to 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 Swiss Civil Procedure Code, documents, witness testimony, expert testimony and the testimony of parties can be submitted as evidence.

There is no general duty of disclosure 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. Trade secrets are protected under Swiss civil procedural law, as well as in proceedings before the Swiss Competition Commission. Thus, parties may request the non-disclosure of documents containing such trade secrets.

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 issued in the context of such professional activity. This is a comprehensive legal privilege that applies irrespective of where the documents in question are located and when they were created, as long as the documents were issued in connection with a mandate. 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 parties to the investigation. Access to statements made and documents submitted by leniency applicants will generally be denied as these documents are subject to secrecy. However, the Federal Administrative Court found in recent decisions that access may only be granted under the Federal Act on Data Protection if the decision made by the Swiss Competition Commission has become legally binding.<sup>4</sup> Potential claimants may apply for access to the files and records of the European Commission and, if produced, use these in Swiss courts if the case has been the subject of an EU investigation.

## 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 information.

Notwithstanding the above, there is a special procedure for the preliminary collection and securing of evidence if the applicant demonstrates an interest worthy of protection, or if the evidence-gathering process would be substantially more difficult or not possible at a later stage (Article 158 of the Swiss Civil Procedure Code).

## 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 substantially longer. If appealed to the Federal Supreme Court, a case may well take up to four or five years.

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<sup>4</sup> In its decisions, the Federal Administrative Court stated that legally binding decisions would have such an impact civil courts could hardly deviate from when examining claims for damages. For this reason, the authorities could not use the decisions having not yet come into legal force to examine possible damages. The Federal Administrative Court states that, indeed, there was a right to inspect files. This, however, also has to be evaluated under the Data Protection Act, which sets clear limits to the disclosure of data.

## 10. Average cost from issue of claim to judgment in Switzerland

There is no average cost for bringing proceedings in respect of a competition law infringement in Switzerland. The costs will depend on the value and complexity of the case and whether it is subject to appeal.

The costs of 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 under dispute but may increase or decrease depending on the complexity of the individual case. Due to this approach and the costs of litigation, even a party that wins on all points will generally only be reimbursed for part of the expenses incurred in a complex competition law case.

Swiss courts typically require the claimant to make a payment toward the costs of proceedings in advance. The amount is fixed based on a provisional assessment of the value under dispute and of the complexity of the case. This can be a cash payment to the court or a bank guarantee.

## 11. Are alternative methods of dispute resolution available for private competition infringement actions?

Pursuant to the Swiss Civil Procedure Code, the court may at any time during the civil proceeding attempt to achieve a settlement between the parties. The court may schedule a special hearing or submit a written settlement proposal to the parties. The settlement can cover all claims or only a part of the claims. The parties may also at any time try to negotiate an extrajudicial settlement without the court's involvement.

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 currently not aware of instances where such assignment has been used for 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 laws. 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 suffer 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 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, even if foreign antitrust law has to be applied. 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 restitution claim is targeted at unlawful profits. 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 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/she is likely to suffer irreparable harm should it continue. Unlike in ordinary proceedings, the courts are not required to obtain a prior legal opinion from the Competition Commission in such cases. However, Swiss courts have so far been rather reluctant to grant preliminary injunctions in antitrust procedures.

### D. Emerging trends

Private competition claims have attracted quite some interest from legal commentators in Switzerland in recent years, but their practical importance remains limited. This is mainly because the losses suffered as a result of competition law infringements are often relatively small and consumers do not, according to the prevailing view, have the necessary standing to sue. 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, it is unclear whether the Swiss legislator will attempt to facilitate private competition claims again in the near future. However, competition law infringements are 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.

In recent years, Swiss case law has experienced uncertainty as to whether hard-core horizontal and vertical agreements should be per se qualified as substantial. The Federal Supreme Court, e.g. in its decision of 18 May 2018, has meanwhile repeatedly confirmed that agreements falling under Article 5 paragraph 3 and 4 of the Cartel Act (hard-core horizontal and vertical agreements) are significant by nature. Thus, no effect of such agreements needed to be demonstrated. For example, BMW retailers in the European Economic Area (EEA) agreed on a prohibition of the sales of cars outside of the EEA and therefore excluding the Swiss market from their sales region. Despite evidence from BMW that 1,774 parallel imports had taken place, the Federal Supreme Court confirmed that BMW's contracts had led to market foreclosure and are therefore to

be seen as significant by nature. On 12 June 2017, the Competition Commission published explanatory guidelines on the Vertical Notice aiming to summarize the very recent case law. The amended Vertical Notice also sets forth in section 12(1) that agreements falling under Article 5 paragraph 4 of the Cartel Act (hard-core vertical agreements) are in principle significant according to the same. This development is relevant for private antitrust litigation, as it lowers the burden of proof for the claimant in cases of such hard-core restrictions. While helping potential victims of hard-core restrictions, these recent developments may have far-reaching adverse effects for undertakings. There is currently a parliamentary motion pending that aims to reverse the effects of the Federal Supreme Court's recent case law on this matter. The motion's object is to ensure that unlawful restraints of competition are determined according to both qualitative and quantitative criteria. The Federal Council has recommended to reject the motion. The Council of States has referred the motion to the competent commission for preliminary consultation.

Other Supreme Court decisions have recently sparked controversy. For example, in a landmark decision dated 21 April 2017 in re *Gaba*, the Swiss Federal Supreme Court adopted a broad interpretation of the geographical scope of Swiss competition law and the effects doctrine enshrined in Article 2 paragraph 2 of the Swiss Cartel Act. The Court ruled that the mere potential for events abroad to have an effect in Switzerland is sufficient to trigger the applicability of the Swiss Cartel Act, regardless of the intensity of such potential effect. As a consequence, general export bans imposed on retailers anywhere in the world, regardless whether export to Switzerland has been explicitly prohibited or whether the ban was in fact implemented, fall within the territorial scope of the Swiss Cartel Act.

Another important development is an initiative launched in 2017 that aims at the prohibition of price differentiation (the Fair Prices Initiative). This initiative proposes to introduce an obligation for entities based outside of Switzerland to sell products and services to Switzerland-based customers at the same prices as they sell such products and services to local (non-Swiss) customers. The initiative also proposes to introduce the concept of relative market power into Swiss law. The concept of relative market power would strengthen civil competition litigation because the claimant would no longer need to prove that the defendant has a dominant market position. Instead, a position of relative market power would suffice. The Federal Council has drafted an indirect counter-proposal to the Fair Prices Initiative, which also provides for the introduction of a provision on relative market power, but limits it to preventing misconduct by companies in cross-border competition. This would exclude civil competition litigation in domestic cases. The Federal Council's official statement on the Fair Prices Initiative and the Federal Council's indirect counter-proposal was published on 29 May 2019 but has not yet been discussed in parliament.

Finally, the Federal Administrative Court issued two decisions concerning the right of third parties to access the files of proceedings after completion of an investigation (RPW 2018/1 p. 178, BVGE A-6315/2014 and RPW 2018/1 p. 194, BVGE 2016/22). In both cases, the Federal Administrative Court upheld the decision of the Competition Commission, which had granted access to the files to the extent that they related to tenders affected by unlawful competition agreements in which the applicant was the competent purchasing body (public entity) and insofar as this did not reveal information disclosed by the leniency applicant. For civil competition litigation, such access to the files can be of great importance, since this information can be used to substantiate possible civil claims.

## Turkey

Zumrut Esin, Hakan Ozgokcen and Koray Sogut

### A. Availability of private enforcement regarding competition law infringements and jurisdiction

#### 1. Scope for civil claims in Turkey

Article 37 of International Private and Procedural Code No. 5718 states that claims regarding a violation of competition law are subject to the law of the country where the market directly affected by the violation is located. Therefore, all infringements directly affecting the Turkish market are subject to Turkish law; even if infringements originate in a third country, claims can be brought against undertakings from other jurisdictions under Turkish law and in Turkish courts, provided the infringement has effects in Turkey.

The Act on the Protection of Competition No. 4054 ("**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/customers and competing undertakings can claim damages for the losses they suffered.

In essence, private claims regarding competition law infringements are subject to the provisions set out in the Code of Obligations Law No. 6098 ("**Code of Obligations**") and to the provisions regulating claims regarding tortious acts. The procedural rules set out in the Civil Procedure Law No. 6100 apply to the private enforcement of competition law. Several provisions of the Competition Act itself specifically set out terms and conditions applicable for the private enforcement of competition law infringements. These provisions are explained in the following sections.

Finally, in its previous cases, the Court of Cassation required claimants to file a complaint with the Turkish Competition Board ("**Board**") prior to filing a civil lawsuit for the damages. Based on recent precedent, a final decision of the Board is no longer regarded as a requirement to initiate an action before the courts but rather is a "preliminary issue" for the civil lawsuit. Accordingly, while the claimant can initiate an action in the absence of a final Board decision, such an action will be stayed pending the resolution/finalization of the Board's enforcement decision.

#### 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. The claimant must bring an action within two years of having become aware of the tortious act, and in any case within 10 years of the tortious act's occurrence.

That said this is a rather controversial topic since the Code of Obligations provides that if the tortious act constitutes a crime for which the penal codes prescribe a longer limitation period, that longer period also applies to the civil tort claim. In recent rulings, the Court of Cassation applied this provision to competition

law violations based on the ground that competition law violations constitute misdemeanours falling within the general ambit of Misdemeanours Law No 5326. As such, the general statute of limitations for competition law offenses of eight years was applied as the statute of limitations period.

### 3. Appeals

First instance civil court decisions can be appealed to the regional court of appeals and then the court of cassation under the same provisions applicable for any other civil lawsuit filed for a tortious act.

First instance court decisions can be appealed on all grounds, including errors of facts, law or procedures. The first instance court's lack of jurisdiction and the existence of a different court's judgment on the same dispute are examples of appeals on procedural law grounds. Appeals due to substantive law issues include the incorrect application of the law and mistakes made in the legal determination of the case's facts (e.g., erroneously determining a lawful action as unlawful and, as a result, accepting a tort claim). The regional court of appeals examines the facts of the dispute and conducts a legal inspection on the appealed decision, and may pass a new decision. The regional court of appeals' decisions can be appealed to the court of cassation.

The court of cassation is empowered to conduct a judicial inspection on the regional court of appeals' decisions if it finds that the regional court of appeals incorrectly evaluated the facts in light of the evidence, or incorrectly evaluated the evidence itself. The court of cassation reviews whether the regional court of appeals correctly applied the law to the facts. The court of cassation is empowered to approve or overturn the regional court of appeals' decisions. The appeal procedure can be relatively long in Turkey, lasting two to three years depending on the specific characteristics of the case.

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

In general, Turkish law has no provision 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 ("**Turkish Civil Procedure Law**") 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 to protect 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 the Turkish Civil Procedure Law, it is possible to voluntarily bundle individual claims by way of assignment if such claims depend on common factual circumstances. In these cases, the claims of the different claimants will continue to exist as individual claims. In the event these individual claims are bundled, the 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

A damages claim such as a tort claim arising from competition law violations is subject to the same rules as those governing civil tort claims. 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 is an unlawful action by the defendant, damage, causation between the unlawful action and the damage, and negligence by the defendant while acting unlawfully.

When establishing whether there is an unlawful action and negligence by the defendant while acting unlawfully, claimants rely on the decisions of the Board. Civil courts are not bound by the decisions of the Board and they can make their own assessment. The Board decisions, however, have an influence on civil courts and it is likely that civil courts will rely on the findings of the Board while evaluating the case.

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 that 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 that there is an agreement restricting competition or a distortion of competition in the market, such as evidence of partitioned markets, sustained market price stability or price increase within close intervals by undertakings operating in the market.

Generally, claimants 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 jointly caused a particular damage will be jointly liable to claimants for that damage. Therefore, for example, one cartel member can be sued for the damages caused by all of the cartel participants. The cartel member can then seek a contribution toward 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 with all types of evidence. In accordance with the Turkish Civil Procedure Law, the court may hold the holders of certain types of evidentiary documents responsible, and ask them to submit the documents pertaining to the case.

There are no specific laws in Turkey regarding legal privilege. However, documents exchanged between attorneys and clients, which are related to their professional relationship, would generally benefit from legal privilege.

## 8. Pre-action disclosure

Unlike Anglo-Saxon legal systems, Turkish law has no fully fledged pre-action disclosure system. Some of the Turkish Civil Procedure Law provisions grant certain pre-action disclosure and discovery opportunities within the scope of perpetuation of evidence. These provisions aim to facilitate the collection and preservation of evidence prior to the commencement of the action. For this purpose, the courts may decide to obtain evidence from parties who allegedly violated the law, to acquire expert opinions, and to hear witnesses. The courts can rule for these actions only if evidence is in imminent danger of being destroyed or it would not be submitted to the courts unless these actions are taken in the pre-action stage.

Other than the above, if the case is not pending in 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 enforcement proceedings regarding competition law infringements in Turkish law are qualified 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, the expert economic analysis that may be required for relatively complex cases and potential further difficulties in proving the actual damage the claimant suffered, these lawsuits may take longer to be finalized than other tort lawsuits.

Another factor that prolongs the time for judgments is, as explained above, the requirement to file a complaint with the Board before filing a civil lawsuit, and to wait for the Board's decision.

## 10. Average cost from issue of claim to judgment in Turkey

In essence, private enforcement proceedings regarding competition law infringements in Turkish law are qualified 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. The Union of Turkish Bar Association sets an annual cap on attorney fees, and the defeated parties are not responsible for covering any attorney fees above the cap.

According to the latest World Bank research, on average, court costs, attorney fees and enforcement costs make up around 25-30% of the claims; court costs and attorney fees make up around 18% of the claims.

## 11. Third-party funding/alternative funding

Under the Turkish Civil Procedure Law, only those whose interests are violated can file an action to claim a remedy for the violated interest. In limited circumstances specifically provided by the law, third parties may be allowed to file an action regarding the 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. In the past, disputes arising from legal areas such as intellectual property and competition were not considered eligible for arbitration. Lately, however, there is an inclination to accept that disputes relating to private enforcement of competition law could be eligible. The fact that private competition litigation is 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 enforcements 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 were not infringed. In quantifying the damage, all profits that the claimants expected to gain should be calculated by considering the preceding years' balance sheets. Accordingly, it is generally considered that the type of damage suffered because of competition law infringements should be defined as loss of profit.

Despite the above, the Competition Act provides no method for the quantification of damages. It is expected that these methods will develop through case law, particularly given the limited number of cases and that "damage" can be interpreted differently within the scope of each case. The methods for the quantification of damages 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 incurred damages because of an agreement, a decision of undertakings or gross negligence of an undertaking, upon the request of the claimant, the court can award three times the loss incurred by the claimant as compensation.

### 15. Availability of interim or final injunctions regarding an alleged competition law infringement

The Turkish Civil Procedure Law 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 the acquisition of a right, which is the subject matter of the dispute, becomes difficult or impossible and/or there is a risk that substantial damages may occur unless an interim injunction is granted. The courts can grant any type of injunction to remove risks or prevent damages. As the Board's decision is deemed to be a preliminary issue (or prerequisite in certain past decisions), it is highly unlikely that the courts will decide on an interim injunction in the absence of a Board decision.

The claimant asking the court for an interim injunction must provide 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 that the courts would consider any Board decision an official document. Considering that a Board decision is considered as a preliminary issue (or a prerequisite in certain past decisions) for any civil law claim under Turkish case law, courts cannot require claimants to provide security in cases of competition litigation.

## D. Emerging trends

For the time being, there are only a few publicly available case decisions on competition litigation. There is, however, an increasing amount of interest in competition litigation, as evidenced by several academic and professional articles recently published on this topic. Moreover, the Turkish Competition Authority's banking cartel decision of 2013, where it found that 12 prominent banks had colluded to fix interest rates in the loans market and fined them accordingly, has made its way through the judicial review process and largely been confirmed by the courts. This has in turn raised awareness of competition litigation issues, especially in the eyes of consumers. Since then, several books and booklets have been published specifically addressing consumers and explaining to them how they can best claim damages from their banks. We are also witnessing that the number of competition litigation cases has been increasing exponentially in the past few years, due to courts' confirmation of the banking cartel decision. As more and more cases will be completed and decisions will be published in the future, this trend of ever-growing litigation will ultimately bring with it more practical clarity on legal issues in competition litigation cases. That being said, there are also potentially negative developments. For example, in terms of the Board's 12 banks decision mentioned above, the Council of State firstly upheld the Board's decision. Afterwards, the Council of State reassessed its decision pursuant to a request of revision of decision, ruling that the Board misapplied the "single continuous infringement" concept to the case at hand and that the administrative courts should reassess the case. The fact that the Council of State took a contrary approach to the Board's decision at such a late stage of judicial review and ended up negating the legal basis of an existing damages award may potentially have a chilling effect on future damages claims. This will also likely strengthen the current position of the Court of Cassation to wait for the finalization of the underlying decision before letting claims go through.



## United States

Mark Hamer and Catherine Stillman

### A. Availability of civil claims

#### 1. Scope for civil claims in the United States

For longer than in any other jurisdiction, United States law has permitted private parties injured by anti-competitive conduct to bring private damages actions. If successful, a private plaintiff can recover three times its actual damages plus its reasonable attorneys' fees and costs. Private parties can also sue for injunctive relief. The action may be tried by a jury.

There is no requirement that a finding of infringement be issued by a regulatory authority prior to the private damages 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 USD 75,000. Many private antitrust cases are brought as class actions. Diversity jurisdiction in these cases is defined by the Class Action Fairness Act ("CAFA") and counsel should be consulted with regards to 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. Generally, private damages 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.

The question of whether US competition laws apply to conduct outside of the US has increasingly become a key issue in private antitrust litigation in the US. This is governed by the Foreign Trade Antitrust Improvements Act ("FTAIA") and case law interpreting the FTAIA, which require that foreign anti-competitive conduct have a direct, substantial and reasonably foreseeable effect on US commerce before the conduct is deemed actionable. The US Supreme Court addressed this statute 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 scope of the FTAIA or whether it is jurisdictional or comprises an element of a plaintiff's claim (though more recent cases are taking the latter approach). US courts also vary on the standard for the directness of US injury resulting from foreign conduct and on whether a foreign injury resulted from a US injury. Counsel advice should be sought in applying the FTAIA.

The FTAIA does not apply to import commerce, i.e., products purchased by a US entity for importation into the US from a foreign defendant. It applies to conduct outside the US, e.g., the fixing of a worldwide price if that conduct has a direct, substantial and reasonably foreseeable effect on US commerce, and there is a causal link between the foreign price paid by a foreign claimant and the injury to US purchasers. It is this

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 a substantive element of an antitrust action is an important one, although seemingly arcane, as the distinction alters the burden of proof and its associated costs and litigation strategy. If the FTAIA is interpreted as a question of subject matter jurisdiction, then the claimant would bear the burden of proof to establish jurisdiction in its opposition to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). Conversely, if the FTAIA is interpreted to establish a substantive element of an antitrust claim, then the burden is shifted to the defendant to show that the claimant cannot prevail on any claims falling within the scope of the FTAIA under Federal Rule of Civil Procedure 12(b)(6). Further, for the purposes of deciding a 12(b)(6) motion, the facts alleged in the complaint are presumed to be true. Thus in practical terms, where the FTAIA is interpreted to establish an element of an antitrust claim, FTAIA issues are decided only after documents have been produced, deposition testimony has been provided and litigation expenses have been incurred. The trend in the past 10 years has been to interpret the FTAIA as an element of an antitrust claim.

### 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, or defendants agree to accept service in exchange for an extension of the time to respond.

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(c)(3)) (“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 a 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 generally available in antitrust cases 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).<sup>1</sup> Service may be effected on:

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<sup>1</sup> Ibid.

- (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) in cases where there is no internationally agreed means, or an international agreement allows, but does not specify, other means, by a method that is reasonably calculated to give notice according to the following:
  - (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
    - (1) unless prohibited by the foreign country's law, by:
    - (2) delivering a copy of the summons and the complaint to the individual personally; or
    - (3) 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. This rule derives from the US Supreme Court's decision in *Illinois Brick Co. v Illinois*, 431 US 720 (1977). In *Illinois Brick*, the Court ruled that pass-on is allowed as a defense in an action for violation of the Sherman Act. In other words, a defendant may not argue that a plaintiff passed on an overcharge to its customer and, therefore, was not damaged. The US Supreme Court observed that attempting to determine how much of an overcharge was passed on to the plaintiff's customer is famously difficult and can also be affected by other market forces not related to a defendant's antitrust violation.

After the Supreme Court adopted the rule that only direct purchasers could sue for damages under the US antitrust laws, many states amended their own antitrust laws to allow indirect purchasers to sue for violation of that state's antitrust law. Today, more than 30 states and the District of Columbia recognize 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.

A recent U.S. Supreme Court decision, *Apple Inc. v. Pepper*, 587 U.S. \_\_ (May 13, 2019) creates the possibility that, with respect to platforms that make a market for both sellers and buyers, there could be two sets of direct purchasers: (i) those who pay a fee to place a product or service for sale on the platform and (ii) those who make purchases via the platform and thus pay a price that allegedly includes part or all of the purportedly offending fee. Both groups may be deemed direct purchasers. This decision undercuts one of the rationales for *Illinois Brick*: the court's desire to avoid complex economic analysis assessing the ripple effects of conduct through multiple levels of commerce. Already, in addition to the purchasers of apps from the Apple app store, a second class action has been commenced by the creators of the apps. Both putative classes complain of the same commission paid to the app store and both classes assert that they are direct purchasers.

## 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 the 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 apply.

## 3. Appeals

The rules regarding appeals are the same for private damages actions as they are 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 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

Antitrust damages actions often proceed as class actions. 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 or challenging jurisdiction.

While class certification issues are sometimes bifurcated from the merits phase of a case, under recent case law and practice, class and merits discovery are likely to proceed at the same time.

Usually, the key issues on a class certification motion are whether there is a class-wide methodology for proving injury, whether issues common to the alleged class predominate over individual issues specific to various class members, 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) there are so many members of the proposed class, including their counsel, 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 a class cannot be certified.

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 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 that applicable to most civil claims – the plaintiff must prove the elements of its claim by a preponderance of the evidence.

A plaintiff must prove not only conduct violating the antitrust laws, but also that such conduct was the proximate cause of its injury, and prove the amount of its damages with 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. A plea of *nolo contendere* in an antitrust case is not entitled to *prima facie* effect in subsequent antitrust actions if the plea was entered into before any testimony had been taken.

## 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 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 the 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 plaintiff's agreement 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. Judgment-sharing agreements are difficult to negotiate and are not often entered into.

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

Although the 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 excessively

broad and unduly burdensome discovery, the scope of discovery in a private damages action remains extremely broad. Under revised Rule 26(b)(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 in 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 damages 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 plaintiff in an antitrust private damages action might demand that a defendant produce any written statements provided to the foreign antitrust authorities. There is no general rule protecting foreign regulatory material from discovery and it has been ordered to be disclosed in some cases.<sup>2</sup> However, discovery has also been refused in a number of cases on grounds including comity and the doctrine of foreign investigatory privilege, particularly when the foreign authority makes its views known to the US court.<sup>3</sup> 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.

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<sup>2</sup> See, for example, *In re Vitamins Antitrust Litigation*, Misc. No. 99-197, MDL No. 1285 (D.D.C. 20 May 2002).

<sup>3</sup> See, for example, *In re Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 2008 US Dist. LEXIS 107882 (E.D.N.Y. 2008), *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 17 June 2002); *In re Rubber Chemicals Antitrust Litigation* 486 F. Supp. 2d 1078 (N.D. Cal 2007).



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.<sup>4</sup> 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 23 May 2012 as to the importance of protecting leniency documents from disclosure. 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 in maintaining confidentiality in the documents subject to request. In most recent cases, letters from the foreign antitrust authority to the court were needed in order to prevent discovery of the foreign investigation materials and leniency applications. In the *Cathode Ray Tube (CRT)* litigation, the Northern District of California denied two separate motions that sought to compel confidential European Commission decisions from defendants. The court reasoned that disclosure was inappropriate given the interests of comity, the importance of international cooperation in leniency programs, and official correspondence from the European Commission's Directorate General for Competition that assured eventual availability of public, redacted versions.<sup>5</sup> Notably, the *CRT* court maintained a distinction between requiring the disclosure of the EC decision by defendants, and requesting that the EC provide the Decision directly.<sup>6</sup>

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 deposition of the claimant's expert 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 may 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 order to obtain single damages awards in civil claims (de-trebling) and the elimination of joint and several liability – cooperate with plaintiffs' 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 plaintiffs in any follow-on private civil antitrust actions. Cooperation

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<sup>4</sup> Assertions of confidentiality by the foreign regulatory authority were also considered relevant in *In re Payment Card Interchange Fee*, 2010 US Dist. LEXIS 89275 (E.D.N.Y. 2010), and *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal 2007).

<sup>5</sup> See Order Denying Motion to Compel, *In re Cathode Ray Tube (CRT) Litig.*, 4:07-cv-05944-JST, Dkt. 2463 (N.D. Cal. March 26, 2014); Order Denying Direct Action Plaintiffs' Renewed Motion to Compel Production of the European Commission Decision; *id.* at Dkt. 3133 (N.D. Cal. Nov. 20, 2014). See also Transcript of Proceedings, *In Re Capacitors Antitrust Litigation*, 3:17-cv-03472-JD, Dkt. 221, pg. 10-15, 22 (N.D. Cal. May 9, 2018) (court declined to order disclosure of EC leniency interviewees).

<sup>6</sup> Order Denying Direct Action Plaintiffs' Renewed Motion to Compel Production of the European Commission Decision; *id.* at Dkt. 3133, p. 8 (N.D. Cal. Nov. 20, 2014). See also *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 751, n. 180 (Del. Ch. 2014) (EC made available a partially redacted version of a Decision in response to a request from the Delaware Chancery Court).



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 plaintiffs 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 a 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 within two years through either summary judgment or trial. If there is an appeal, it could take an additional 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 its attorney’s fees and costs if the plaintiff prevails. A victorious defendant, however, has no right to recover its attorneys’ fees and costs.

## 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 plaintiff 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, often for a fee of one-quarter to 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 plaintiff can establish antitrust injury – injury to competition in a relevant market – and that in fact such injury to competition caused injury to the plaintiff, then the plaintiff may recover its damages caused by the violation. The plaintiff 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 at issue on which he/she 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 a 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.

## D. Emerging trends

The U.S. system for private antitrust damage litigation is well established and we expect its basic procedures to remain in place. Some areas, however, are likely to develop or clarify in the coming years. For example, courts will have to determine how to treat multi-sided e-commerce platforms where there may be two or more sets of allegedly direct purchasers complaining of the same conduct. Economic damages may have to be evaluated so as to prevent prohibitive multiple recoveries by different groups. We may also see further development in class certification rulings where there is evidence that some members of a putative class were not injured in fact. If there are class members with no injury, at what point will the standards of commonality and predominance be met? And in the area of foreign to foreign commerce, courts in the U.S. differ both on the standard for showing an impact on U.S. commerce and the standard for showing whether that U.S. impact caused the foreign injury.

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